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Habeas Corpus - Procedural Prerequisites - Motion Denied for Failure to Appeal Convicion Despite Failure Being Excusable

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HABEAS CORPUS — PROCEDURAL PREREQUISITES — MOTION DENIED FOR FAILURE TO APPEAL CONVICTION DESPITE FAILURE BEING EXCUSABLE — Plaintiff was convicted of robbery in a federal district court and, although represented by counsel, failed to appeal within the statutory ten-day period. Three months later he filed a motion in the same court under section 2255 of the judicial code[1] to vacate the sentence on the ground that the conviction, because it was based on a coerced confession, was unconstitutionally obtained without due process of law.[2] The motion was denied[3] and the denial affirmed,[4] in the absence of any attempt to excuse the failure to appeal. On reargument, plaintiff attempted to excuse his failure to appeal by alleging that neither the court nor his counsel advised him of his right to an appeal or that such appeal had to be taken within ten days.[5] On re-

1 28 U.S.C. § 2255 (1958). This section provides that a prisoner in custody under sentence of a federal court may move the court which imposed the sentence to vacate, set aside or correct the sentence and that the motion shall be granted "if the court finds . . . that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack. . . ." For most purposes § 2255 replaces habeas corpus which will not be entertained if the prisoner is authorized to apply for relief pursuant to this section unless the remedy by motion appears to be inadequate. Moreover, cases dealing with habeas corpus proceedings constitute authority to govern questions concerning the availability of a motion under § 2255, so far as here relevant. United States v. Hayman, 342 U.S. 205, 219 (1952); United States v. Edwards, 152 F. Supp. 179 (D.D.C. 1957); see also Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 175 (1949). See generally United States v. Morgan, 346 U.S. 502 (1954); Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U.L. REV. 26 (1945); Peters, *Collateral Attack by Habeas Corpus Upon Federal Judgments in Criminal Cases*, 23 WASH. L. REV. 87 (1948); Rogge & Gordon, *Habeas Corpus, Civil Rights and the Federal System*, 20 U. CHI. L. REV. 509 (1953); Comment, 61 HARV. L. REV. 657 (1948).

2 "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

3 United States v. Hodges, 156 F. Supp. 313 (D.D.C. 1957).

4 This original opinion, which appears as an appendix to the principal case, held that even if there had been a coerced confession which would constitute a denial of due process, failure to appeal precluded relief under § 2255 "in the complete absence of any attempt to excuse the failure to appeal. . . ." Principal case at 866.

5 Plaintiff supported this allegation with two affidavits to the effect that he had been taken to jail immediately after sentence and was thus prevented from conferring with counsel in regard to an appeal. Principal case at 862.

argument before the court en banc, *held,* affirmed, three judges dissenting. Even if the failure to appeal was excusable, such failure precludes relief by motion under section 2255 since collateral attack may not be used as a substitute for an appeal. *Hodges v. United States,* 282 F.2d 858 (D.C. Cir. 1960).

Section 2255 codifies the general rule that federal convictions are subject to collateral attack when based on an alleged[6] violation of defendant's constitutional rights.[7] The majority opinion in the principal case, however, states it to be "the general rule that the admission of a confession at a plenary trial is not subject to attack under section 2255 on the ground that the confession was coerced."[8] No authority is cited in support of this purported "general rule" and none has been found. On the contrary, the federal appellate courts have uniformly condemned the use of coerced confessions although the rationale behind their condemnation has varied depending upon whether the conviction under attack was obtained in a federal or state court and upon whether the review was direct or collateral. The courts have, of jurisdictional necessity, decided both direct and collateral reviews of state convictions on constitutional grounds, and it is now well settled that the use by a state of a coerced confession violates the due process clause of the fourteenth amendment.[9] Since appellate review of federal convictions need not rest on constitutional grounds, most reversals in federal cases have been based on either the rule of evidence which excludes coerced confessions as untrustworthy[10] or the federal rule of evidence, established in *McNabb v. United States,*[11] which excludes confessions obtained during an illegal detention before arraignment. The fifth amendment privilege against self-incrimination has also been cited in dictum in conjunction with the untrustworthy evidence rule as a makeweight ground for reversal on appeal of a few federal convictions involving coerced confessions.[12] To date the Supreme Court has not been presented with a collateral attack of a federal conviction based upon a coerced confession which would, as do all state conviction cases, require constitutional grounds to support a reversal.

[6] In reaching its decision the court assumed, as it must, that the allegations were true. See, *e.g.,* United States v. Rosenberg, 200 F.2d 666, 668 (2d Cir. 1952); United States v. Sturm, 180 F.2d 413, 414 (7th Cir. 1950).

[7] *E.g.,* Johnson v. Zerbst, 304 U.S. 458 (1938) (right to counsel); Counselman v. Hitchcock, 142 U.S. 547 (1892) (self incrimination); *In re* Nielsen, 131 U.S. 176 (1889) (double jeopardy); Callan v. Wilson, 127 U.S. 540 (1888) (right to jury trial); *Ex parte* Bain, 121 U.S. 1 (1887) (requirement of indictment).

[8] Principal case at 860.

[9] *E.g.,* Spano v. New York, 360 U.S. 315 (1959); Leyra v. Denno, 347 U.S. 556 (1954); Watts v. Indiana, 338 U.S. 49 (1949); Malinski v. New York, 324 U.S. 401 (1945); Brown v. Mississippi, 297 U.S. 278 (1936).

[10] Ziang Sung Wan v. United States, 266 U.S. 1 (1924). See generally 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).

[11] 318 U.S. 332 (1943). The *McNabb* rule is based, not on constitutional grounds, but rather on the Court's supervisory control over the federal judicial system. See generally Comment, 43 VA. L. REV. 915 (1957).

[12] *E.g.,* Bram v. United States, 168 U.S. 532, 542 (1897); Purpura v. United States, 262 Fed. 473, 475 (4th Cir. 1919).

The requisite constitutional basis should readily be found, however, either by reading the due process clause of the fifth amendment as coextensive with that of the fourteenth and then relying on the state conviction cases, or by squarely holding that the use of a coerced confession violates the self-incrimination clause of the fifth amendment.[13] It would appear, therefore, that the majority's position is in error and that the general rule permitting collateral attack of a conviction based on a denial of defendant's constitutional rights should be applicable in the principal case.

This general rule, however, is qualified by the requirement that the taking of an appeal is a condition precedent to seeking collateral relief on any grounds.[14] The crucial issue in the principal case is whether an exception to this requirement may be made when the failure to appeal is excusable. The majority opinion answered in the negative. A significant number of federal habeas corpus cases have, however, overlooked or expressly excused the failure to appeal and permitted collateral attack notwithstanding such failure.[15] Three of these cases, in which federal convictions involving alleged denials of constitutional rights were not appealed, are pertinent and illustrative. *Bowen v. Johnston*[16] raised the important and theretofore unsettled question whether the state or federal government had criminal jurisdiction over national parks. The Supreme Court expressly held that because of these "exceptional circumstances" the failure to appeal would be excused. *Johnson v. Zerbst*[17] held that a hearing must be granted

[13] If this hypothesis is rejected the availability in federal courts of relief by collateral attack for a prisoner convicted by a coerced confession would depend on whether he had been convicted in a state or federal court; this would place the higher federal courts in the anomalous position of being able to correct state convictions but not those of their own lower courts.

[14] Sunal v. Large, 32 U.S. 174 (1947); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942) (dictum); Glasgow v. Moyer, 225 U.S. 420 (1912); Harlan v. McGourin, 218 U.S. 442 (1910). This failure-to-appeal rule was judicially created and is not part of the statutory language of § 2255. The common expression of the rule is that "habeas corpus proceedings may not be used as a substitute for appeal."

[15] The following cases expressly excused the failure to appeal from state convictions and permitted collateral attack: Smith v. O'Grady, 312 U.S. 329 (1941) (plea of guilty and no counsel); Craynor v. Gonzales, 226 F.2d 83 (9th Cir. 1955) (although no state appeal perfected, state court had allowed petition for habeas corpus); Downer v. Dunaway, 53 F.2d 586 (5th Cir. 1931) (alleged mob domination of trial and impossibility of filing for appeal until after date set for execution); Yohyowan v. Luce, 291 Fed. 425 (E.D. Wash. 1923) (state trial court had no jurisdiction over petitioner, an Indian, and petitioner had no money for an appeal). In the following cases federal convictions were under collateral attack and hearings were granted in spite of the fact that no appeal had been taken: Waley v. Johnston, 316 U.S. 101 (1942) (facts concerning alleged coerced plea of guilty were dehors the record and therefore could not have been corrected on appeal); Bowen v. Johnston, 306 U.S. 19 (1939) (federal trial court allegedly without jurisdiction); Johnson v. Zerbst, 304 U.S. 458 (1938) (alleged unconstitutional denial of counsel); Council v. Clemmer, 165 F.2d 249 (D.C. Cir. 1947) (same); Reid v. Sanford, 42 F. Supp. 300 (N.D. Ga. 1941) (same). The significance of these cases lies not in whether petitioner was successful in the collateral attack of his conviction, but in the fact that despite there being no appeal, a collateral attack was permitted. The principal case and the present analysis involve only the question of whether a hearing will be allowed.

[16] 306 U.S. 19 (1939).

[17] 304 U.S. 458 (1938).

where petitioner alleged that he had been deprived of his constitutional right to counsel since the absence of counsel was sufficient to excuse the failure to appeal.[18] Perhaps the most significant case is *Council v. Clemmer*.[19] There petitioner had counsel during his trial but argued that his failure to appeal was excusable because he had relied upon his attorney's assurance that an appeal would be prosecuted and that he did not learn of the attorney's failure to appeal until after the time limit had elapsed.[20] The above cases show that under certain circumstances the failure to appeal may be excused and a collateral attack permitted. The holding in the principal case that even an "excusable" failure to appeal bars a motion under section 2255 is, therefore, demonstrably in error.[21]

The questions remain, however, what will be sufficient to excuse the failure to appeal and whether the facts in the principal case bring it within the excusable category. As the above three cases suggest, the failure-to-appeal rule appears to be only one of several factors which courts have considered in deciding whether to permit collateral attack when there has been no appeal. Each case involved, as a second factor, either an important unsettled question of law which the court felt should be decided or an alleged denial of a basic constitutional right: in *Bowen*, an important question of federal-state criminal jurisdiction; in *Zerbst*, an alleged violation of the sixth amendment right to counsel; in *Council*, an argument that denial of counsel at the arraignment violated the sixth amendment. Another factor is the balance which must be struck between the quest for justice on the one side and finality of judicial proceedings and the economizing of the courts' time on the other.[22] The *Zerbst* and *Council* cases

[18] In discussing petitioner's failure to appeal, Mr. Justice Black said, "Urging that — after conviction — he was unable to obtain a lawyer; was ignorant of the proceedings to obtain new trial or appeal and the time limits governing both; and that he did not possess the requisite skill or knowledge properly to conduct an appeal, he says that it was — as a practical matter — impossible for him to obtain relief by appeal. If these contentions be true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's right by *habeas corpus*." *Id.* at 467.

[19] 165 F.2d 249 (D.C. Cir. 1947).

[20] In granting the hearing the Court of Appeals for the District of Columbia Circuit, the same court which in the present case holds that even an excusable failure to appeal bars collateral relief, said, "The time for appeal is relatively brief, and *we have accepted appellant's explanation of his failure to appeal from the judgment of the trial court in order that the more substantial contentions raised herein may be given proper attention.*" *Id.* at 251. (Emphasis added.)

[21] The majority opinion places heavy reliance on United States v. Robinson, 361 U.S. 220 (1960), which held that since the filing of a notice of appeal within ten days is a jurisdictional requirement the period for taking an appeal may not be enlarged although the failure to appeal was excusable. The dissenting opinion, principal case at 862-63, seems to be correct in insisting that this direct appeal case is not authority for denying a collateral attack hearing. On the contrary, the very purpose of habeas corpus is to terminate wrongful detention resulting from errors which were not or could not be corrected on appeal. See Waley v. Johnston, 316 U.S. 101 (1942).

[22] These institutional expediencies seem to have greatly influenced the court in the principal case. Principal case at 860.

demonstrate that whether the petitioner had any real, practical opportunity to take an appeal is the final, potent factor in such a decision. The court in the principal case was in error when it treated the failure-to-appeal rule as an invariable bar to collateral attack rather than as a surmountable hurdle. And, if the proper test of balancing all the relevant considerations is applied, the court appears also to have reached the wrong result. Facts were alleged which, if true, indicated not only the denial of a basic constitutional right and the presence of an important question of law, but also indicated the absence of any real opportunity to appeal. Under such circumstances the remaining considerations of economy of judicial time and the finality of legal proceedings must surely bow to the very real possibility of an unconstitutional deprivation of human liberty.

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