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Procedure: Failure to Exhaust Appellate Remedies as a Bar to Relief

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PROCEDURE — FAILURE TO EXHAUST APPELLATE
REMEDIES AS A BAR TO RELIEF

Is relief by motion to vacate on the ground of improper admission into evidence of a coerced confession available to one who has, by excusable neglect, failed to exhaust his appellate remedies? In a recent case, *Hodges v. United States*,¹ a divided court answered the question in the negative.

At a trial before a federal district court the accused's objections to the admissibility of an alleged coerced confession were overruled and he was convicted of robbery. He failed to appeal within the period prescribed by law, but three months later he entered a motion to vacate the sentence in accord with the provisions of 28 U. S. C. § 2255.² Unsuccessful in the trial court, he appealed to the United States Circuit Court of Appeals for the District of Columbia Circuit where relief under the motion was denied on the ground that he had neither exhausted his appellate remedies nor justified his failure to do so. At a rehearing before the circuit court the accused explained his failure to appeal the conviction by showing that he had not been advised that he must appeal within ten days and that he had been taken away after sentencing without opportunity to consult his attorney. The court, assuming *arguendo* that the confession was coerced and that failure to appeal was the result of excusable neglect, departed from its earlier ruling and denied relief, holding that in the absence of a "real miscarriage of justice,"³ relief by collateral attack to correct errors in the admission of evidence is not available where there has been a failure to exhaust appellate remedies.

¹282 F. 2d 858 (D.C. Cir. 1960); *petition for cert. filed* 29 U.S.L. Week 2073; *cert. granted* 29 U.S.L. Week 324, U.S., 5 L. Ed. 690 (1961) (No. 389 Misc., 1960 Term; renumbered No. 748).

²For an excellent discussion of the history, provisions and purpose of this statute, see *U.S. v. Hayman*, 342 U.S. 205 (1952). Chief Justice Vinson on page 216 of that decision, in discussing the scope of 28 U.S.C. #2255, quoted a statement from the Judicial Conference Committee on Habeas Corpus: "This section applies only to Federal sentences. It creates a statutory remedy consisting of a motion before the court where the movant has been convicted. The remedy is in the nature of, but much broader than, *coram nobis*. The motion remedy broadly covers all situations where the sentence is 'open to collateral attack.' As a remedy, it is intended to be as broad as habeas corpus."

³*U.S. v. Hodges*, 282 F. 2d 858, 860 (D.C. Cir. 1960).

The reasoning of the majority in the principal case is that collateral attack must be prevented from becoming a substitute for the more orderly appellate procedures and that to allow collateral attack in cases where there has been a failure to exhaust appellate remedies would necessitate the relitigation of cases at a time when witnesses may have died and memories faded. Relative to this argument, the majority relied heavily on the case, *Sunal v. Large*,⁴ where the Supreme Court of the United States refused to allow habeas corpus to correct a sentence based upon the improper interpretation of procedural aspects of a criminal statute, because the accused had not exhausted his appellate remedies. However, in that case the court, while holding that as a general rule the exhaustion of appellate remedies is a prerequisite to the availability of relief by collateral attack, qualified the rule by adding the words, "at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court."⁵ The court did not apply an "in the absence of a real miscarriage of justice" principle such as that employed by the majority in *Hodges v. United States*. While the qualification stated in *Sunal v. Large* may well deal with miscarriages of justice, it seems primarily to distinguish between errors in denial of constitutional rights and errors not affecting such rights. It should be noted that the reason why the accused did not appeal in *Sunal v. Large* was that an appeal seemed useless, since in the year preceding, an appeal had been taken and lost on the same issue in another case.⁶ Three Supreme

⁴332 U.S. 174 (1947).

⁵*Id.*, at 182. On page 178 the court pointed out that in the past it had not rigidly adhered to the requirement that appellate remedies must be first exhausted before collateral attack is available. The court said: "Habeas corpus has at times been entertained either without consideration of the adequacy of relief by the appellate route or where an appeal would have afforded an adequate remedy. Illustrative are those instances where the conviction was under a federal statute alleged to be unconstitutional, where there was a conviction by a federal court whose jurisdiction over the person or the offense was challenged, where the trial or sentence by a federal court violated specific constitutional guaranties." On pages 178 and 179 the court cited cases in support of the above.

⁶*U.S. v. Rinko*, 147 F. 2d 1 (7th Cir., 1945); *cert. denied*, 325 U.S. 851 (1945). Shortly after the statutory period for appealing the conviction in question in *Sunal v. Large*, *supra*, elapsed the point at issue in that case was decided in favor of the accused in *Estep v. U.S.* and *Smith v. U.S.*, 327 U.S. 114 (1946).

Court Justices dissented from the majority holding denying relief in *Sunal v. Large*,⁷ on the ground that the qualification added to the general rule laid down was too narrow and that it should be extended to include the "excusable failure to appeal" situation presented in that case.

Recent decisions have held that the admission into evidence of coerced confessions is violative of the due process requirements of the Fifth and Fourteenth Amendments.⁸ Collateral attack has been permitted to remedy convictions supported by such confessions.⁹ Thus it would seem that *Hodges v. United States* would be within the qualification added to the general rule by the court in *Sunal v. Large*.

In *United States v. Robinson*,¹⁰ the Supreme Court refused to permit an appeal after the statutory time for such relief had elapsed, even though the failure to enter a timely appeal was due to "excusable neglect." The majority in *Hodges v. United States*, relying on this case, argued that as excusable neglect does not extend the time to take a direct appeal, a fortiori, it cannot expand the relief available under the motion to vacate into that available on direct appeal. However the pertinency of that argument to the problem in the principal case seems dubious in the light of the language used in *United States v. Robinson*, for in a footnote to its opinion the Supreme Court stated:

The allowance of an appeal months or years after the expiration of the prescribed time seems unnecessary to the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights. Examples are . . . the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside, or correct the sentence under 28 U. S. C. § 2255.¹¹

⁷Justices Frankfurter, Rutledge, and Murphy; Justice Burton concurred in the result.

⁸*Leyra v. Denno*, 347 U.S. 556 (1954); *Payne v. State of Arkansas*, 356 U.S. 560 (1958); *Spano v. People of State of New York*, 360 U.S. 315 (1959).

⁹*Leyra v. Denno*, 347 U.S. 556 (1954). See, also, *Kent v. U.S.*, 272 F. 2d 795, 798 (1st Cir. 1960); *Overman v. U.S.*, 281 F. 2d 497, 498 (6th Cir. 1960).

¹⁰361 U.S. 220 (1960).

¹¹*Id.*, at 230.

Thus it could be argued, as the minority in the principal case did, that the Supreme Court would envision reliance upon collateral attack by motion to vacate to avoid injustice in such situations as that presented in the instant case. The majority in the principal case argued that the footnote to *United States v. Robinson* is not applicable because there has been no denial of basic rights "within the principles announced in *Sunal v. Large*." However, as has been pointed out, the distinction applied there was one of constitutional rights and lack of jurisdiction, and not one of "basic rights."

The minority opinion in the principal case holds that failure to exhaust appellate remedies, if due to excusable neglect, should not bar relief by collateral attack under a motion to vacate. A recent case, *Larson v. United States*,¹² supported this position by indicating that had the accused not deliberately refrained from appealing, collateral attack by motion to vacate would have been available. That case involved serious errors in impaneling the jury, and the reason no appeal was taken was that the accused feared the possibility of a death sentence if a new trial were ordered.

The problem presented in the principal case is significant in that it involves a conflict between the need for preserving orderly appellate procedures as the primary means of correcting errors in the trial courts, and the desire to render substantial justice to those charged with violating the law. To relax the requirement that there must be an exhaustion of appellate remedies before collateral attack is available would perhaps lead to abuses and overburden the courts. Yet rigid adherence to the requirements seems to work injustice in some, even if not many, cases. Although the Supreme Court has not ruled directly on the question presented in the principal case, it would seem that the language of the court in *Sunal v. Large* and *United States v. Robinson* would indicate that it would look favorably upon the minority position in *Hodges v. United States*.

J. E. D.

¹²275 F. 2d 673 (5th Cir. 1960).