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Federal Criminal Appellate Practice in the Second Circuit

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Remarks
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I begin with some interesting statistical information just published by the Administrative Office of the United States Courts relating to criminal appeals in the Second Circuit. For the fiscal year ending in 1988, we terminated 529 criminal appeals, constituting about 18% of our total number of all cases terminated. In 1988, 291 cases were terminated on the merits. Of these, 234 were affirmed, 31 reversed and the remainder terminated by dismissal, remand or other non-merit disposition. The reversal rate for convictions in 1988 was 10.8%, up over 2-1/2% percentage points from the 8.1% reversal rate in 1987. This is not necessarily to be taken by the defense bar as a source of great encouragement. In any event, our median time for disposition, counting from the filing of the notice of appeal in a criminal case, is 6 months, the fastest in the nation. If you can't get a reversal, you can at least get a rapid decision.

The last item in your coursebook is my outline on Federal Criminal Appellate Practice in the Second Circuit. The outline covers the subject of appealability, beginning at page 227, mechanics of appeals, beginning at page 232, scope of review, beginning at page 239, appellate advocacy at 242 and decisionmaking at 247. I hope that the outline will be of use to you in prosecuting criminal appeals in the second circuit. As a

matter of my own self-interest, I ask that you give special attention to the section on appellate advocacy. My colleagues and I would very much appreciate a general improvement in the quality of briefing as well as oral argument. On the last page of the outline, page 251, I have listed some suggested references that may be helpful in preparing for the presentation of a criminal appeal.

Due to time constraints and the rule that a good appellate lawyer should limit argument to a few good points, I intend to cover only two topics -- one touched upon in my outline and one not covered in the materials at all. The first is the importance of making a proper record of evidentiary objections, and the second is the use of 28 U.S.C. § 2255, the principal vehicle for post-conviction relief following the completion of the appellate process. I hope to leave some time for questions and comments on anything you may care to discuss relating to appeals and post-conviction relief.

With respect to the admission of evidence, Rule 103(a)(1) of the Federal Rules of Evidence requires a timely objection or motion to strike with the specific ground for objection stated on the record, unless the specific ground is apparent from the context. Rule 103(a)(2) requires an offer of proof in the case of a ruling excluding evidence, unless the evidence to be offered is apparent from the context. Even if there is a proper

objection or offer of proof, however, there is no error unless substantial rights are affected. Of course, Rule 103(d) provides that an appellate court can take notice of plain errors that affect substantial rights but are not brought to the attention of the trial court. This is the evidentiary counterpart of the general rule that an error not objected to at trial will not be considered on appeal unless it can be classified as "plain error."

A recent case before a panel of my court involved an appellant who was convicted after a jury trial for possessing and distributing two vials of "crack." On appeal, she contended that the district court erred in allowing the government to cross examine her about her general familiarity with cocaine. In a summary order, the panel rejected the contention, citing the failure to object to the evidence, and holding that there was no plain error in light of the district court's broad discretion in evidentiary matters and the appellant's denial on direct examination that she was a dealer in cocaine. One can only speculate what the result would have been if the objection were properly made.

To summarize: Admission or exclusion of evidence is not error unless a party's substantial rights are affected and (1) a specific objection is made in cases of admission and (2) an offer of proof is made in cases of exclusion. Here are some actual

objections to the admission of evidence that are improper because they lack the necessary specificity:

> "He's getting close to that legal problem, your honor."
>
> "That's unfair, your honor!"
>
> "That's unfair, your honor and he knows it!"
>
> "I've been listening to Mr. McNamara for half an hour, your honor, and if he persists in testifying, I'll have no alternative but to mark him and offer him in evidence."
>
> "Incompetent, irrelevant and immaterial . . . and against the interests of justice . . . and just no good."
>
> "He's getting on dangerous ground, your honor."
>
> "Objection, your honor. Counsel knows that's totally improper."
>
> "Judge, could we get on with something that has to do with this case?"
>
> "Objection, your honor, that's highly unusual."

My favorite: "Objection, your honor, that evidence is very unfavorable to my client."

How about this actual question and objection?:

> Question. When he went, had you gone and had she, if she wanted to and were able, for the time being excluding all the restraints on her not to go also, would he have brought you meaning you and she with him to the station?
>
> Mr. Brooks. Objection. That question should be taken out and shot.

In some of those questions, of course, the specific ground for objection may have been apparent from the context. That certainly was true of the last objection. You can and should always avoid trouble by being specific. Sometimes, a very brief

objection will do it: objection -- irrelevant; objection -- privileged communication. More often, some brief explanation of the objection in plain language will comply with the Rule and preserve the objection. Here are some illustrations:

LEADING – Objection, your honor, counsel is putting words in the witness's mouth. This is leading.

HEARSAY – Objection, your honor, the jury cannot tell if someone who is not a witness was telling the truth. This is hearsay.

BEST EVIDENCE – Objection, your honor, it's not fair for the defendant to talk about what is in that letter and not let the jury see it. Not the best evidence.

Christopher J. Munch, Chief Deputy District Attorney in Denver, Colorado, is a lawyer who has developed a whole series of plain language objections. Here are some of his:

ARGUMENTATIVE – Objection. It's improper to ask a witness to agree with your little theory or argument. You're supposed to ask questions about the facts.

IRRELEVANT – Objection. That has nothing to do with the things this jury has to decide.

SPECULATIVE – Objection. He's asking the witness to guess. Witnesses are supposed to tell us what they know, not speculate.

HEARSAY – Objection. The witness should only be asked what he knows, not what somebody else told him.

BEYOND THE SCOPE – Objection. This is getting off the subject. It is beyond the scope of direct and violates Rule 611(b).

INSUFFICIENT FOUNDATION – Objection. Without more background there is no way to tell whether this is reliable enough to even be considered, much less believed.

NARRATIVE – Objection. He's asking the witness to give a speech instead of answering questions. The witness might accidentally say things that are improper and he shouldn't be put in that position.

Much time, of course, is wasted in making objections that take you nowhere, clutter up the record and serve no purpose. Here are some examples of those:

(a) "Self-serving" -- Hopefully, all evidence adduced by a party serves the interests of that party. By itself, the objection means nothing.

(b) "Calls for operation of witnesses mind's" -- It is our fervent desire that the mind of a witness become operational in response to any question. There are cases where the state of mind is the principal issue.

(c) "Non-responsive answer" -- A non-responsive answer is a problem only for the questioner and I conclude my discussion of evidentiary objections with some actual illustrations of non-responsive answers. Of course, the attorney asking the questions is responsible for these non-responsive answers. These questions illustrate that a well-prepared witness, like a well-prepared lawyer, is beautiful to behold but all too rare:

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"Anguished English"

by Richard Lederer

Richard Lederer was a speaker at the April "Super Seminar of Shorthand Reporters" in New York City, sponsored by The Association of Black Shorthand Reporters; The Association of Surrogate's and Supreme Court Reporters - City of New York; Civil, Criminal and Family Court Reporters' Chapter - Local 1070 — DC37; Federation of Shorthand Reporters; and the New York State Shorthand Reporters Association. A linguist and commentator on the spoken word, he writes a column for the "National Shorthand Reporters" magazine.

This is an excerpt from his book, "Anguished English, An Anthology of Accidental Assaults Upon Our Language," by Richard Lederer, Copyright© 1987 by Richard Lederer, published by Wyrick & Company, Charleston, S.C.

Court is now in session, and here are my favorite transquips, all recorded by America's keepers of the word. *[Note: Most of the "transquips" in this chapter of the book are copyrighted by the National Shorthand Reporters Association, and are reprinted with their permission.]:*

Q. Did you stay all night with this man in New York?
A. I refuse to answer that question.
Q. Did you stay all night with this man in Chicago?
A. I refuse to answer that question.
Q. Did you ever stay all night with this man in Miami?
A. No.

Q. James stood back and shot Tommy Lee?
A. Yes.
Q. And then Tommy Lee pulled out his gun and shot James in the fracas?
A. (After a hesitation) No sir, just above it.

Q. Doctor, did you say he was shot in the woods?
A. No, I said he was shot in the lumbar region.

Q. Now, Mrs. Johnson, how was your first marriage terminated?
A. By death.
Q. And by whose death was it terminated?

Q. What is your name?
A. Ernestine McDowell.
Q. And what is your marital status?
A. Fair.

Q. Are you married?
A. No, I'm divorced.
Q. What did your husband do before you divorced him?
A. A lot of things that I didn't know about.

Q. Do you know how far pregnant you are right now?
A. I will be three months November 8th.
Q. Apparently then, the date of conception was August 8th?
A. Yes.
Q. What were you and your husband doing at that time?

Q. Did he pick the dog up by the ears?
A. No.
Q. What was he doing with the dog's ears?
A. Picking them up in the air.
Q. Where was the dog at this time?
A. Attached to the ears.

Q. Were you acquainted with the decedent?
A. Yes, sir.
Q. Before or after he died?

Q. What happened then?
A. He told me, he says, "I have to kill you because you can identify me."
Q. Did he kill you?
A. No.

Q. Mr. Jones, is your appearance this morning pursuant to a deposition notice which I sent to your attorney?
A. No. This is how I dress when I go to work.

Q. Have you ever been arrested?
A. Yes.
Q. What for?
A. Aggravating a female.

Q. You say you're innocent, yet five people swore they saw you steal a watch.
A. Your Honor, I can produce 500 people who didn't see me steal it.

Q. When he went, had you gone and had she, if she wanted to and were able, for the time being excluding all the restraints on her not to go also, would he have brought you meaning you and she with him to the station?
A. MR. BROOKS. Objection. That question should be taken out and shot.

Q. At the time you first saw Dr. McCarty, had you ever seen him prior to that time?

Q. Did the lady standing in the driveway subsequently identify herself to you?
A. Yes, she did.
Q. Who did she say she was?
A. She said she was the owner of the dog's wife.

Q. Now I'm going to show you what has been marked as State's Exhibit No. 2 and ask if you recognize the picture.
A. John Fletcher.
Q. That's you?
A. Yes, sir.
Q. And you were present when that picture was taken, right?

The primary vehicle for post-conviction relief following the completion of the appellate process is a motion under 28 U.S.C. § 2255. The statute for the most part supplants the habeas corpus petition for federal prisoners by providing a commensurate remedy in the sentencing court. Indeed, the Supreme Court has indicated that 2255, if it reaches the claim of error, must be used in preference to habeas. This is not considered to constitute an unconstitutional suspension of the writ of habeas corpus.

Section 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

There are thus four grounds for relief:

1. That the sentence was imposed in violation of the Constitution or laws of the United States.

2. That the court was without jurisdiction to impose such sentence.

3. That the sentence was in excess of the maximum authorized by law.

4. That the sentence is otherwise subject to collateral attack.

Generally, the failure to raise a non-constitutional or non-jurisdictional claim on direct appeal precludes assertion of the claim in the collateral 2255 proceeding. However, there are exceptional circumstances where even a non-constitutional or non-jurisdictional error can result in a complete miscarriage of justice, justifying collateral relief. I'll give you an example of exceptional circumstances in a little while. With respect to claims of constitutional or jurisdictional error, however, the rule in the Second Circuit is that such claims may be raised in a 2255 proceeding, even if they were not raised on direct appeal. There is an exception to this rule in the Second Circuit, but we don't know what it is yet. If you will examine Brennan v. United States, 867 F.2d 111, 117 n.1 (2d Cir. 1989), you will see that we have not made up our collective minds as to whether the proper standard for the exception is the deliberate bypass test or the cause and prejudice test. That's a loose end that one of you will ask us to tie up in the near future. For purposes of our discussion, however, it suffices to say that constitutional and jurisdictional errors generally can be raised by way of 2255 even if not raised on the original direct appeal. Brennan did not involve such claims and went off on a failure to raise a statute of limitations objection at trial and a failure to challenge the characterization of the New York State Supreme Court as a RICO enterprise on appeal. As to the failure to object to the jury

instruction on statute of limitations grounds at trial, Brennan failed the cause and prejudice test applicable to trial error. As to the failure to raise the enterprise question on appeal, Brennan failed the exceptional circumstances test.

We found that the exceptional circumstances test was met in Ingber v. Enzor, 841 F.2d 450 (2d Cir. 1988), and I refer you to my opinion in that case for some detailed discussion of 2255. In Ingber, we found that 2255 properly was used to vacate a conviction for mail fraud in light of the Supreme Court's decision McNally v. United States. The McNally holding -- that the mail fraud statute was limited to the protection of property rights -- was decided after Ingber's conviction was affirmed. McNally overruled long-established Second Circuit precedent that deprivation of intangible rights not related to money or property was punishable under the mail fraud statute. Thus, those convicted under our erroneous view of the mail fraud statute, 18 U.S.C. § 1341, were convicted of conduct that was not a crime.

We held that the retroactive application of McNally was necessary in order to avoid an unfair result, despite the fact that Ingber had failed to present his challenge either on appeal or in a petition for writ of certiorari. The challenge of course was not a constitutional one, and the time to file for certiorari had expired well before our precedents were displaced by McNally. The exceptional circumstances excusing the requirement for

raising the claim on appeal obviously were the entrenched precedents in relation to the scope of the mail fraud statute. Appeal on the question of deprivation of intangible rights in a mail fraud scheme would have been futile at the time of Ingber's conviction. We said:

> Were we to penalize Ingber for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court. Such a rule would encourage appeal of even well-settled points of law.

Other circuits have followed us in using § 2255 to apply McNally retroactively.

The following circumstances have been held to justify challenges under § 2255 in this circuit:

A. Where the indictment on its face fails to state a federal offense.

B. Where a guilty plea was based on an insufficient factual foundation.

C. Where a guilty plea was induced by a prosecutor's false promise.

D. Where counsel was not admitted to any bar, although the disbarment of a defendant's counsel during a pretrial suppression hearing was held not to require the vacation of a sentence where the attorney ceased representation immediately upon learning of the disbarment.

E. A claim of perjured testimony.

F. The incompetency of the defendant at the time of court proceedings.

G. Where it was alleged that separate judgment of conviction arose out of a single criminal transaction, raising questions of double jeopardy.

H. Where a claim of spillover effects of a double-jeopardy-barred criminal charge was raised.

I. Where the constitutional authority of a de facto judge was challenged.

Where a motion addresses the execution of a sentence rather than the legality of the conviction or the propriety of the sentence imposed, relief is not available under § 2255. I recently served on a panel that heard an appeal from the denial of a 2255 motion made by a prisoner who sought correction of his sentence on the claim that he was in custody during the time spent in a hospital prior to sentencing. In a summary order, we held that review of the execution of appellant's sentence could be obtained not by a 2255 motion but through a writ of habeas corpus under 28 U.S.C. § 2241. Since the review by way of habeas corpus could be had only in the court having jurisdiction over appellant's custodian, we held that jurisdiction was lacking in the Eastern District, the place of conviction.

Rules and forms for proceeding under § 2255 have been adopted by the Supreme Court. They are found under the title, "Rules Governing Section 2255 Proceedings in the United States District Courts." The procedural rules should be examined carefully before making a 2255 motion. After the motion is filed, it is presented the judge who presided at the movant trial and imposed sentence. If the appropriate judge is unavailable, it is presented to another judge of the same district court. The judge may either order the summary dismissal of the motion or order the U.S. Attorney to answer. Discovery is permitted, and expanded record may be directed, and an evidentiary hearing may be held. If there is a hearing, counsel must be appointed under the provisions of the Criminal Justice Act to represent an indigent defendant. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice requires.

Section 2255 itself provides that the court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." Consideration of successive motions may be denied, however, "only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the

subsequent application."

Although § 2255 provides a means of remedy for a prisoner in custody under sentence, the custody requirement has been read liberally so that any conditions that significantly confine and restrain will suffice. Accordingly, custody has been found where the defendant was released on his own recognizance after conviction in state court; where the prisoner was discharged while his motion was awaiting appellate review; and where the movant was free on parole. The critical moment in determining custody is when the motion is filed. The fact that a successful collateral attack may not result in release from custody is no bar to considering the motion. As the rule provides, the movant also must be under sentence for the conviction under attack.

An order entered under § 2255 is appealable, and the time limits for civil appeals apply. Since the United States always is a party, notice of appeal must be filed within 60 days of the entry of the district court's judgment. The United States as well as the movant may appeal.

Section 2255 provides an important and flexible tool for achieving post-conviction, post-appeal relief. I commend it to your consideration.

I'm open for questions.

FEDERAL CRIMINAL APPELLATE PRACTICE

IN THE SECOND CIRCUIT

by

HON. ROGER J. MINER
United States Circuit Judge
Second Circuit Court of Appeals

May 12, 1989

FEDERAL CRIMINAL APPELLATE PRACTICE

IN THE SECOND CIRCUIT

APPEALABILITY

I. Final Judgment of Conviction Required

1. Except where a direct review may be had in the Supreme Court, appeals from all final decisions of the District Courts must be prosecuted in the Courts of Appeals. 28 U.S.C. § 1291.

2. The final decision in a criminal case is the final judgment of conviction, a document signed by the Judge and entered by the Clerk only after sentence is imposed. See Fed. R. Crim. P. 32(b)(1); Berman v. United States, 302 U.S. 211, 212-13 (1937).

3. Congress intended to avoid piecemeal disposition of criminal matters because "encouragement of delay is fatal to the vindication of the criminal law." Cobbledick v. United States, 309 U.S. 323, 325 (1940) (Frankfurter, J.). "The rule of finality has particular force in criminal prosecutions." United States v. MacDonald, 435 U.S. 850, 853-54 (1978).

4. Appeals from nonfinal decisions will be dismissed sua sponte for lack of jurisdiction in the Court of Appeals. In re United States, 565 F.2d 19 (2d Cir. 1977), cert. denied, 436 U.S. 962 (1978).

II. Exceptions to the Final Judgment Requirement

1. The collateral order doctrine has been developed to permit defendants to appeal interlocutory orders in certain limited circumstances: The order must conclusively determine a disputed question, resolve an issue completely separate from the merits of the action and effectively be unreviewable on appeal from a final judgment. Flanagan v. United States, 465 U.S. 259 (1984).

2. Appeals under the collateral order doctrine have been accepted for the purpose of reviewing the following:

(a) Denial of a motion to dismiss an indictment on grounds of double jeopardy. Abney v. United States, 431 U.S. 651, 662 (1977).

(b) Denial of a motion to dismiss under the speech and debate clause of the Constitution. Helstoski v. Meanor, 442 U.S. 500, 507-08 (1979).

(c) Commitment for hospitalization pursuant to 18 U.S.C. § 4241(d) because of mental incompetence to stand trial. United States v. Gold, 790 F.2d 235, 238-39 (2d Cir. 1986).

(d) Order denying dismissal of an indictment where a "colorable claim" of violation of a prior plea agreement is made. United States v. Abbamonte, 759 F.2d 1065, 1071 (2d Cir. 1985).

(e) Decisions relating to bail. Stack v. Boyle, 342 U.S. 1, 6 (1951). 18 U.S.C. § 3145 (Supp. II 1984) now provides for

the prompt determination of an appeal from a release or detention order.

(f) Pre-trial restraining orders under the forfeiture provisions of the RICO and CCE Acts. United States v. Gelb, 826 F.2d 1175 (2d Cir. 1987); United States v. Monsanto, 852 F.2d 1400 (2d Cir. 1988) (in banc).

3. Appeals under the collateral order doctrine have been rejected for the purpose of reviewing the following:

(a) Disqualification of defense counsel. Flanagan v. United States, 465 U.S. 259 (1984).

(b) Denial of motion to dismiss on grounds of prosecutorial vindictiveness. United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982).

(c) Denial of motion to dismiss on sixth amendment speedy trial grounds. United States v. MacDonald, 435 U.S. 850, 857 (1978).

(d) Continuances under the provisions of the Speedy Trial Act. United States v. Gurary, 793 F.2d 468 (2d Cir. 1986) (extensions of time granted both to return an indictment and to conduct a preliminary hearing).

(e) Collateral protective order prohibiting defendant from disclosing confidential documents made available to him by government. United States v. Caparros, 800 F.2d 23 (2d Cir. 1986).

(f) Denial of motion to dismiss indictment for alleged grand jury abuses. Midland Asphalt Corp. v. United States, No. 87-1905 (U.S. Mar. 28, 1989) (LEXIS, Genfed library, US file).

(g) Order denying preindictment motion for return of property under Fed. R. Crim. P. 41(e) if it is tied in any way to a criminal prosecution in esse against movant. Standard Drywall, Inc. v. United States, 668 F.2d 156 (2d Cir.), cert. denied, 456 U.S. 927 (1982) (grand jury investigation pending). Compare United States Postal Serv. v. C.E.C. Servs., No. 88-6196, slip. op. at 1767-68 (2d Cir. Mar. 6, 1989) (grand jury dismissed without returning indictment).

III. Appeals by the Government

1. While the double jeopardy clause prohibits the appeal of a judgment of acquittal, the government is provided a statutory right to appeal as to certain matters in criminal cases. 18 U.S.C. § 3731 allows appeals from:

(a) Order dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except where the double jeopardy clause bars further prosecution.

(b) Suppression or exclusion of evidence, where the defendant has not been put in jeopardy, before the verdict or finding, if the United States Attorney certifies that the appeal

is not taken for purpose of delay and that the evidence constitutes substantial proof of a material fact.

(c) Release of a person charged with or convicted of an offense, or denial of a motion for revocation or modification of conditions of release. See also 18 U.S.C. § 3145(b) (motion for revocation or amendment of detention order).

2. The government may appeal from the dismissal of a portion of a count of an indictment only if the portion arguably could have been set forth as a separate count. United States v. Tom, 787 F.2d 65, 77 (2d Cir. 1986).

3. A pre-trial ruling denying the government's motion to use certain evidence at trial is appealable by the government. United States v. Valencia, 826 F.2d 169, 172 (2d Cir. 1987).

4. Orders granting motions to suppress wiretap evidence or denying wiretap applications are appealable if the United States Attorney certifies that the appeal is not taken for purposes of delay. 18 U.S.C. § 2518(10)(b).

IV. Sentence

1. Under the new sentencing provisions, both the government and the defendant have the right to appeal to the Court of Appeals for review of a final sentence. 18 U.S.C. § 3742(a), (b).

2. An appeal of an otherwise final sentence imposed by a Magistrate may be taken to the District Court as though the

appeal were to a Court of Appeals from the District Court. 18 U.S.C. § 3742(f).

V. Appeal After Conditional Plea

1. A defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to review the adverse determination of any pre-trial motion on appeal from the judgment. The approval of the court and the consent of the government is required for a conditional plea. Fed. R. Crim. P. 11(a)(2).

2. A defendant who prevails on appeal must be permitted to withdraw the conditional plea. Id.

MECHANICS OF APPEAL

I. Pre-Appeal Proceedings in the District Court.

1. The District Court must advise a defendant found guilty after trial of the right to appeal and of the right to apply for leave to appeal in forma pauperis. Fed. R. Crim. P. 32(a)(2).

2. If the defendant so requests, the Clerk of the District Court must prepare and file a Notice of Appeal on behalf of the defendant. Id.

3. As to any defendant found guilty after trial, the District Judge must complete and transmit to the Clerk of the

District Court for transmittal to the Court of Appeals "Form A," required by the Revised Second Circuit Plan To Expedite The Processing Of Criminal Appeals (hereinafter "Plan"), containing, inter alia, the following information:

(a) Sentencing data;

(b) Whether any transcripts were ordered during trial;

(c) Whether defendant is eligible for appointment of counsel on appeal pursuant to the Criminal Justice Act; whether there is any reason that trial counsel should not be continued on appeal; and whether the minutes of trial should be transcribed at the expense of the government.

See Plan, sec. 1.

II. The Notice of Appeal and Related Matters.

1. The Notice of Appeal by a defendant is filed in the District Court within ten days after the entry of the judgment or order appealed from. If filed before such entry, but after announcement of a decision, sentence or order, the Notice of Appeal is treated as filed on the date of entry. Fed. R. App. P. 4(b).

2. An appeal from a judgment of conviction also may be taken within ten days after the entry of an order denying a timely motion in arrest of judgment or for a new trial; if the motion for new trial is made on the ground of newly discovered evidence, the extension of time to appeal is conditioned on the

making of the motion within ten days after the entry of judgment. Id.

3. A Notice of Appeal by the government is filed in the District Court within thirty days after the entry of the judgment or order appealed from; "entry" means entering in the criminal docket. Id.

4. The time for filing a Notice of Appeal may be extended for thirty days, with or without a motion, by the District Court "[u]pon a showing of excusable neglect . . . before or after the time has expired." Id.

5. The filing fee ($5) and the docketing fee ($100) are paid to the Clerk of the District Court. See 28 U.S.C. § 1917; Fed. R. App. P. 3(e); Reports of the Proceedings of the Judicial Conference of the United States (1987) (Judicial Conference Schedule of Fees for the United States Courts of Appeals eff. May 1, 1987); see also 28 U.S.C. § 1913.

6. The Clerk of the District Court serves notice of the filing by mailing copies of the Notice of Appeal to counsel of record for each party other than appellant. In a case of an appeal by a criminal defendant, the Clerk serves a copy of the Notice of Appeal, either personally or by mail, upon the defendant. Fed. R. App. P. 3(d).

7. The Clerk also has the duty to transmit copies of the Notice of Appeal and the docket entries to the Clerk of the Court of Appeals, who must promptly enter the appeal in the appropriate

records. Id.; Plan, sec. 2. The appeal then is entered upon the Court of Appeals docket. Fed. R. App. P. 12(a).

8. At the time of filing the Notice of Appeal, counsel for the appellant must furnish "Form B," required by the Plan, to the Clerk of the District Court. This form certifies that the transcript has been ordered and satisfactory arrangements have been made with the court reporter for payment of the cost of the transcript. Plan, sec. 3.

9. When a transcript has been ordered, the court reporter must notify the Clerk of the Court of Appeals "immediately" of the estimated length of the transcript and the estimated date of completion. Id., sec. 4.

10. The time for completion of the transcript "shall not exceed thirty days from the order date except under unusual circumstances which first must be approved by the Court of Appeals upon a showing of need." Id.

III. Proceedings in the Court of Appeals

1. As soon as possible after the Notice of Appeal is filed in a criminal case, a scheduling order is issued in the Court of Appeals providing:

(a) That the record on appeal be docketed within twenty days after filing of the Notice of Appeal;

(b) That the brief and appendix of appellant be filed not later than thirty days after the date on which the

transcription of the trial minutes is scheduled to be completed, unless a longer or shorter period is established for good cause shown.

(c) That the Appellee's Brief be filed not later than thirty days after the date on which Appellant's Brief and Appendix are scheduled to be filed, unless a longer or shorter period is fixed for good cause shown.

(d) That the argument will be heard during the week designated in the order.

Plan, sec. 5.

2. Although not referred to in the Plan, a Reply Brief may be filed and served by an appellant within fourteen days after service of the Brief of the Appellee. Except for good cause shown, a Reply Brief must be filed at least three days before argument. Fed. R. App. P. 31(a).

3. The Court of Appeals may enter any other orders deemed desirable for prompt disposition of appeals. These include orders: appointing counsel on appeal; setting date for filing transcriptions of trial minutes; requiring attorneys for co-appellants to share a copy of the transcript; and instructing the Clerk to permit counsel to remove and examine the record. Plan, sec. 6.

4. The record on appeal consists of the original papers and exhibits filed in the District Court, any transcript of

proceedings, and a certified copy of the docket entries prepared by the Clerk of the District Court. Fed. R. App. P. 10(a).

5. The record on appeal must be filed by the date fixed in the scheduling order. See supra III.1.(a). Motions to extend time to file the record ordinarily will not be granted. If the transcript is incomplete, the record should be filed and supplemented upon completion of the transcript. Plan, sec. 5(a).

6. Each appellant is required to take such action as may be necessary "to enable the clerk to assemble and transmit the record." Fed. R. App. P. 11(a).

7. Any differences of the parties with respect to whether the record discloses what occurred in the District Court must be settled by the District Court. Also, the Court of Appeals may direct that omissions or misstatements be corrected and may order a supplemental record to be certified and transmitted. Fed. R. App. P. 10(e).

8. Section 11 of the Second Circuit Rules Supplementing Federal Rules of Appellate Procedure (hereinafter "Supp. Rules") urges the parties to agree as to the exhibits necessary for the determination of the appeal. Failing that, each party may designate the exhibits considered necessary, and all non-designated exhibits remain with the District Court Clerk unless requested by the Court of Appeals. The Rule does not relieve the parties of their obligations with respect to preparation of the Appendix under Supp. Rule § 30.

IV. Motions

1. The time and manner of making motions are governed by Supp. Rule § 27. Notice of Motion Form T-1080 must be employed, and a copy of the lower court decision must accompany the affidavits, memoranda of law and exhibits. Supp. Rule § 27(a)(1)-(2).

2. Substantive motions normally are heard by the regular panels sitting on Tuesday of each week, and oral argument is permitted. A single judge may hear substantive motions when the court is in recess. Id. § 27(b), (f).

3. On a motion for release pending appeal:

(a) Appellant must demonstrate by clear and convincing evidence that he or she is not likely to flee or pose a danger to the safety of any other person or the community if released. 18 U.S.C. § 3143 (b)(1).

(b) Appellant also must demonstrate that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal, new trial or a sentence that does not involve imprisonment. Id. § 3143(b)(2). A "substantial" question is one that is "close" or could very well be decided the other way; it is more than non-frivolous. United States v. Randell, 761 F.2d 122, 125 (2d Cir.), cert. denied, 474 U.S. 1008 (1985).

(c) An application for release after conviction must be made in the District Court in the first instance. Fed. R. App. P. 9(b).

(d) No appeal lies from district court's presentence denial of bail pending appeal of sentence. United States v. Friedman, 813 F.2d 579 (2d Cir. 1987) (per curiam).

4. A sentence of imprisonment may be stayed if a defendant is released pending appeal. Sentences of fine or probation also may be stayed pending appeal. Fed. R. Crim. P. 38; Fed. R. App. P. 8(c).

5. Procedural Motions generally are determined by a single judge without oral argument. Supp. Rule § 27(f). Motions for leave to file oversized briefs, to postpone the date for filing briefs or to change the date of argument must be made not less than seven days before the brief is due or the argument is scheduled, in the absence of exceptional circumstances. "Motions to postpone the dates set for filing briefs or for argument are not viewed with favor and will be granted only under extraordinary circumstances." Plan, sec. 9.

SCOPE OF REVIEW

I. Errors of Fact

1. In challenging the sufficiency of the evidence supporting conviction, the defendant "bears a very heavy burden." United States v. Soto, 716 F.2d 989, 991 (2d Cir. 1983).

2. A guilty verdict must be sustained if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

3. In appeals by defendants, "[p]ieces of evidence must be viewed not in isolation but in conjunction, and the reviewing court must draw all favorable inferences and resolve all issues of credibility in favor of the prosecution." United States v. Khan, 787 F.2d 28, 34 (2d Cir. 1986).

4. The claim of insufficiency of evidence generally is preserved for appeal by a motion for a judgment of acquittal made at the close of all the evidence. See Fed. R. Crim. P. 29; United States v. Kaplan, 586 F.2d 980, 982 n.4 (2d Cir. 1978).

5. A District Court's finding of consent to search will not be set aside unless clearly erroneous. United States v. Arango-Correa, 851 F.2d 54, 57 (2d Cir. 1988).

6. Although the general rule is that a District Court's findings of fact may not be disturbed unless clearly erroneous, see United States v. Rios, 856 F.2d 493, 495 (2d Cir. 1988) (per curiam), the Court of Appeals must examine the entire record and make an independent determination of the issue of voluntariness

when the privilege against compelled self-incrimination is claimed. Beckwith v. United States, 425 U.S. 341, 348 (1976).

7. If a trial court's finding is sustained by the evidence as to a question of fourth amendment custody, "[t]he court of appeals [is] mistaken in substituting for that finding its view of the evidence." United States v. Mendenhall, 446 U.S. 544, 557 (1980) (plurality). But see United States v. Ceballos, 812 F.2d 42, 46-47 & n.1 (2d Cir. 1987).

II. Errors of Law

1. Admission or exclusion of evidence is not error unless a party's substantial rights are affected and (1) a specific objection is made in cases of admission or (2) an offer of proof is made in cases of exclusion. Fed. R. Evid. 103(a).

2. Giving or failing to give an instruction to a jury may not be assigned as error unless specific objection is made before the jury retires. Fed. R. Crim. P. 30.

3. "An appellate court can reverse the determination below for mere error in law, and does not apply the clearly erroneous standard in reviewing determinations of law." 2 Fed. Proc. L. Ed. § 3:652.

4. Errors not affecting substantial rights are to be disregarded. Fed. R. Crim. P. 52(a) (harmless error rule). An error not objected to at the trial level will not be considered on appeal unless it falls into the "plain error" category. See

United States v. Calfon, 607 F.2d 29, 30 (2d Cir. 1979) (per curiam), cert. denied, 444 U.S. 1085 (1980).

5. Plain errors or defects affecting substantial rights may be noticed on appeal although they were not called to the attention of the trial court. Fed. R. Crim. P. 52(b). Plain error must go to the very essence of the case. Calfon, 607 F.2d at 31.

6. Constitutional error can be regarded as harmless only where it can be said to be harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18, 24 (1970), although some constitutional errors involve rights so important as to require automatic reversal, see, e.g., Price v. Georgia, 398 U.S. 323, 331 (1970) (double jeopardy).

7. An abuse of discretion standard has been applied to review district court decisions relating to the following: severance, consolidation, continuance, change of venue, and motion to withdraw guilty plea. 9 Fed. Proc. L. Ed. § 22:1303 et seq.; see, e.g., United States v. Cicale, 691 F.2d 95, 106 (2d Cir. 1982) (continuance), cert. denied, 460 U.S. 1082 (1983).

APPELLATE ADVOCACY

I. The Brief

1. The Brief must contain, in the following order: (1) a table of contents, with page references, and a table of

cases (alphabetically arranged), statutes and other authorities, referring to the page where they are cited; (2) a statement of the issues presented; (3) a statement of the nature of the case, the course of proceedings and the disposition below, followed by a statement of facts with references to the record; (4) an argument containing contentions, reasons and citations to authorities and the record; (5) a conclusion stating the relief sought. Fed. R. App. P. 28(a)-(c). Appellant's Brief must include, as a preliminary statement, the name of the Judge who rendered the decision and a citation to the opinion, if reported. Supp. Rule § 28(2). The form of the Brief is prescribed by Fed. R. App. P. 32 and Supp. Rule § 32.

2. Except by permission of the Court, principal Briefs cannot exceed fifty pages and Reply Briefs cannot exceed twenty-five pages, exclusive of pages containing the tables and any addendum containing statutes, rules and regulations. Fed. R. App. P. 28(f), (g). Excessive footnoting should be avoided.

3. If pertinent authorities come to the attention of the party after the Brief is filed or after oral argument but before decision, that party should promptly advise the Court by letter, with a copy to opposing counsel, setting forth the citations. Fed. R. App. P. 28(j).

4. Parties should be referred to in the Brief by name or description rather than "appellant" or "appellee." Fed. R. App. P. 28(d).

5. Some deficiencies noted: excessive quotation of the record and authorities; inaccurate citations; typographical and grammatical errors; outdated authorities; disorganized arguments; failure to identify and distinguish adverse precedent; lack of clarity; prolix sentences; uninformative point headings; inadequate statement of the issues presented; incomplete factual presentation; statement of the facts through summary of witness' testimony rather than narrative; discussion of material outside the record; use of slang; inclusion of sarcasm, personal attacks and other irrelevant matters; excessive number of points; lack of reasoned argument; illogical and unsupportable conclusions; failure to meet adversary's arguments; failure to recognize that the purpose of the Brief is to persuade. See Supp. Rule § 28(1).

II. The Appendix

1. The appellant is responsible for preparing and filing the Appendix to the Briefs. It must contain: (1) the docket entries in the proceeding below; (2) relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; (4) other parts of the record to which the parties wish to direct the Court's attention. Generally, memoranda of law filed below should not be included. Fed. R. App. P. 30(a). The form of the Appendix is governed by Fed. R. App. P. 32.

2. The parties are encouraged to agree on the contents of the Appendix. If they cannot, the appellant must serve on the appellee a designation of the parts of the record to be included and a statement of the issues to be presented, within ten days after the filing of the record. The appellee then must designate the portions of the record it desires to include, within ten days thereafter, and the appellant must include the parts so designated. Fed. R. App. P. 30(b).

3. Unless the parties otherwise agree, the cost of producing the Appendix must be paid initially by appellant. If the appellant considers the items designated by appellee unnecessary, the appellee must be so advised and must then advance the costs of including those items. The cost of production is taxed as costs, except that the cost of producing unnecessary items may be imposed on the requesting party. Local rules may provide for sanctions to be imposed upon "attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix." Id. (Although the Second Circuit has not yet adopted such a rule, these sanctions have been imposed under the Court's inherent powers.)

4. An alternative method, allowing for deferred preparation of the Appendix, is provided, and the Appendix may be dispensed with altogether in appeals conducted under the Criminal Justice Act. Fed. R. App. P. 30(c); Supp. Rule § 30. When exhibits are

designated for inclusion, they may be bound in a separate volume, suitably indexed with a description of each exhibit. Fed. R. App. P. 30(e); Supp. Rule § 30.

5. Preparation of an appropriate Appendix is an important factor in successful appellate advocacy. Underinclusion is just as serious a deficiency as overinclusion. Frequently, Briefs refer to matters in the record that are not included in the Appendix. This creates an unfavorable impression on the Court.

III. Oral Argument

1. Although the Court is authorized to dispense with oral argument in certain cases, Supp. Rule § 34(g), the custom in the Second Circuit is to allow it whenever requested. Time requests are passed on by the presiding judge, and the time currently allowed to each side averages ten to fifteen minutes. Appellant may reserve time for rebuttal. Argument is heard by a panel of three judges. Once a case is set for oral argument, there may be no continuance, except by order of the Court on good cause shown. Fed. R. App. P. 34. Engagement of counsel (other than in the Supreme Court) is not good cause. Supp. Rule § 34.

2. Oral argument is a very important element of appellate advocacy and should not be waived. It presents an important opportunity to persuade the Court. The Second Circuit is a "hot bench" and the judges welcome the opportunity to clarify their thinking and that of their colleagues through the interchange

with counsel. A judge's tentative conclusions about a case have been "turned around" on many occasions by oral argument.

3. Some deficiencies noted: reading from a prepared text; quoting extensively from a case or from the record; deferring answers to questions; referring to the Brief rather than responding directly to the inquiry; lack of preparation; lack of familiarity with precedential cases decided since the filing of the Briefs; excessive discussion of the facts; lack of familiarity with relevant facts; unnecessary discussion of basic legal principles; unfamiliarity with cases cited; responding with a "guess"; lack of a structured argument; ineffective presentation of the issues; insufficient voice volume; distracting mannerisms; answering questions with questions; attempting to cover too many points; emotional arguments.

IV. Sanctions

1. The sanction of dismissal may be imposed for failure to comply with time limitations or any rule or order related to the appeal. Supp. Rule § 38; Plan, sec. 11.

DECISION MAKING

I. Initial decision making

1. The median time for processing criminal appeals in the Second Circuit is 6 months, the fastest in the nation. See Second Circuit Report 1988, at 7. A decision may come in the form of a written opinion or a summary order. Decisions may be announced from the bench, but such dispositions are rare, except in the case of argued motions. Summary orders are not formal opinions and are unreported. Since they are considered to serve "no jurisprudential purpose," they may not be cited or otherwise referred to in unrelated cases before the Second Circuit or any other court. Rules Relating to the Organization of the Court § 0.23.

2. Tentative votes are taken at conferences held immediately following oral argument or at the end of the week. Voting memoranda, giving reasons for the tentative votes, are exchanged in a number of cases. Writing assignments are made by the senior active judge, unless that judge dissents, in which case the assignment is made by the next senior active judge. Drafts of opinions and summary orders undergo extensive review by panel members, and positions frequently are re-aligned. Summary orders generally are not used in cases of reversal, and any panel member may object to decision by summary order.

3. Following receipt of the opinion or order, the Clerk enters judgment and, on the same date, mails copies of the opinion or orders to the parties. Fed. R. App. P. 36. The mandate issues twenty-one days thereafter, "unless the time is

shortened or enlarged by order." Fed. R. App. P. 41(a). See Plan, sec. 13.

II. Post-judgment decision making

1. The decision-making process may continue with a petition to the panel for rehearing, which must be filed within fourteen days after entry of judgment unless the time is shortened or enlarged by order. The petition must particularize the points of law or fact petitioner contends were overlooked or misapprehended in the opinion. Oral argument ordinarily is not permitted, and no answer to the petition will be received unless the court so requires. Fed. R. App. P. 40; see also Supp. Rule § 40.

2. The petition for rehearing may also contain a "suggestion" for rehearing in banc. The vote of a majority of the Circuit Judges in regular active service is necessary to secure in banc consideration. An appeal or other proceeding may be heard in banc initially, but in banc hearings generally are disfavored. They are limited to cases where consideration by the full Court is necessary to maintain uniformity of decisions and where questions of exceptional importance are involved. Fed. R. App. P. 35; Supp. Rule § 35.

3. Issuance of the mandate is stayed upon timely filing of a petition for rehearing. If the petition is denied, the mandate issues seven days thereafter. A further stay may be sought by motion on notice pending application for writ of certiorari to

the U.S. Supreme Court. Fed. R. App. P. 41; Supp. Rule § 41. The pendency of a suggestion for rehearing in banc does not automatically stay the mandate. Fed. R. App. P. 35(c).

SUGGESTED REFERENCES

Federal Rules of Appellate Procedure, 28 U.S.C.A. app. at 1-323 (West 1980 & Supp. 1988).

United States Court of Appeals for the Second Circuit Rules Supplementing Federal Rules of Appellate Procedure, 28 U.S.C.A. app. at 452-76 (West 1980 & Supp. 1988).

United States Court of Appeals for the Second Circuit Rules Relating to the Organization of the Court, 28 U.S.C.A. app. at 441-52 (West 1980 & Supp. 1988).

Revised Second Circuit Plan to Expedite the Processing of Criminal Appeals, 28 U.S.C.A. app. at 482-93 (West 1980 & Supp. 1988).

Comm. on Federal Courts of the Ass'n of the Bar of the City of New York, Appeals to the Second Circuit (6th ed. 1988).

Federal Criminal Code and Rules 295-338 (West 1988).

16 C.A. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure §§ 3945-3994 (1977 & Supp. 1988).

E. Re, Brief Writing and Oral Argument (6th ed. 1987).

M. Tigar, Federal Appeals: Jurisdiction and Practice (1987 & Supp. 1988).

2 Federal Procedure, Lawyers Edition §§ 3:300 - 3:787 (1981 & Supp. 1988); 9 id. §§ 22:1186 - 22:1358 (1982 & Supp. 1988).

Feinberg, Unique Customs and Practices of the Second Circuit, 14 Hofstra L. Rev. 297 (1986).

Miner, The Don'ts of Oral Argument, Litigation, Summer 1988, at 3.

Newman, In Banc Practice in the Second Circuit: The Virtues of Restraint, 50 Brooklyn L. Rev. 365 (1984).

Wasby, The Functions and Importance of Appellate Oral Argument: Some Views of Lawyers and Federal Judges, 65 Judicature 340 (1982).

POSTCONVICTION REMEDIES

1. Conviction defined

A criminal conviction occurs at the entering of the judgment of conviction, a document setting forth the plea, the verdict or findings and the adjudication and sentence. See Fed. R. Crim. P. 32(b)(1).

2. Postconviction relief may be sought through:

(a) certain mechanisms available preconviction as well as postconviction:

- Fed. R. Crim. P. 33 (new trial in interests of justice, e.g., newly discovered evidence; available on motion of defendant only and subject to brief time limit);
- Fed. R. Crim. P. 34 (arrest of judgment, e.g., if indictment or information does not charge an offense, or if no jurisdiction over offense charged; on motion of defendant only and also subject to short time limit);
- Fed R. Crim. P. 36 (clerical mistakes in judgments, orders or other parts of record; motion may be brought at any time);

(b) motion for correction of sentence for changed circumstances, brought by government to reflect a defendant's subsequent substantial assistance in investigation or prosecution of another. Fed R. Crim. P. 35(b). Subject to one-year time limit. Id.;

(c) a timely appeal:

- 28 U.S.C. § 3731 regulates appeals by government of a criminal decision, judgment or order, the appeal of which must not violate double jeopardy;
- 28 U.S.C. § 3742 provides that appeal of sentence may be taken by defendant or government to court of appeals from the district court, or to district court from a magistrate;

(d) petition for coram nobis (seeking relief from factual error) under the "All Writs" statute, 28 U.S.C. §1651(a), available before or after petitioner is in federal custody, see Thomas v. United States, 271 F.2d 500 (D.C. Cir. 1959) (before); Chin v. United States, 622 F.2d 1090 (2d Cir. 1980) (after), cert. denied, 450 U.S. 923 (1981), or while petitioner is serving a sentence for a subsequent state conviction, United States v. Morgan, 346 U.S. 502 (1954);

(e) an application for habeas corpus, see 28 U.S.C. § 2241-2242, by one in custody pursuant to the judgment of a state court, id. § 2254, or otherwise in custody; or

(f) a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255.

3. Habeas corpus and section 2255 compared:

(a) Similarities:

- Section 2255 affords federal prisoners a remedy identical in scope to federal habeas corpus.

Davis v. United States, 417 U.S. 333, 343 (1974).

- Habeas corpus literally means "you have the body," and the writs are used to gain release from unlawful custody.
- Proceeding by writ of habeas corpus or by motion pursuant to section 2255 is not attack on the conviction but on the validity of the detention and is, therefore, a collateral proceeding rather than an appeal. Smith v. Bennett, 365 U.S. 708, 711 (1961); United States v. Dukes, 727 F.2d 34, 41 (2d Cir. 1984).
- Unlike direct review, a collateral attack may be made at any time, Dukes, 727 F.2d at 41, subject to the "deliberate delay" doctrine, see Brennan v. United States, 867 F.2d 111, 117 (2d Cir. 1989).

(b) Differences:

- Section 2255 was enacted "to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another more convenient forum." United States v. Hayman, 342 U.S. 206, 219 (1952).
- Whereas an application for habeas corpus is directed to the Supreme Court, any justice thereof, a district court, or any circuit judge, within their respective jurisdictions, 28 U.S.C. §§ 2241-2242, and jurisdiction in the first

instance normally lies in the district court where the prisoner is in custody, see generally 16 Federal Procedure §§ 41:53-41:65, at 350-56 (L. Ed. 1983) (hereafter Fed. Proc.), a motion under section 2255 is directed to the court that imposed the sentence sought to be vacated, set aside, or corrected, 28 U.S.C. § 2255. (An application under section 2255 usually should be made to the sentencing judge, but where that "might unnecessarily complicate and delay adjudication of a petitioner's substantial mainstream claims," it may be made to another judge in the same court. Papadakis v. Warden of MCC, 822 F.2d 240, 245 (2d Cir. 1987).)

- Section 2255 provides the exclusive remedy for a federal prisoner to attack a sentence, Dukes, 727 F.2d at 40 n.4, except that "where the Section 2255 procedure is shown to be 'inadequate or ineffective,' the Section provides that habeas corpus shall remain open to afford the necessary hearing," Hayman, 342 U.S. at 223 (quoting § 2255). The circumstances under which section 2255 could be inadequate, however, are virtually nonexistent. See C. Wright, 3 Federal Practice & Procedure § 591, at 426-28 (2d ed. 1982) (hereafter Fed. Pract.).

- There are circumstances outside of the scope of section 2255 where a writ for habeas corpus may be used, such as where the sentence itself is not at issue (e.g., where the challenge is to revocation of parole, or to the manner in which the sentence is being executed, or where one is confined without judgment or held beyond the expiration of sentence) or where one is committed for mental incompetency. See 3 id. § 591, at 425-26.
- The privilege of the writ of habeas corpus is explicitly provided for in the Constitution. See U.S. Const. art. 1, § 9, cl. 2.
- In contrast with section 2255, section 2254 of 28 U.S.C. regulates any habeas action brought in federal court by a prisoner in custody pursuant to a state court judgment. See 28 U.S.C. § 2254.
- For any habeas proceeding in federal court, whether or not brought under section 2254, jurisdictional power is conferred by section 2241. See 16 Fed. Proc. § 41:40, at 345.

4. Scope of section 2255 collateral proceedings

(a) Four grounds for relief:

- "that the sentence was imposed in violation of the Constitution or laws of the United States";
- "that the court was without jurisdiction to impose such sentence";

- "that the sentence was in excess of the maximum authorized by law"; and
- that the sentence "is otherwise subject to collateral attack." Hill v. United States, 368 U.S. 424, 426-27 (1962).

(b) Like habeas corpus, section 2255 requires "exceptional circumstances" -- i.e., an error that is either "jurisdictional," "constitutional," fundamentally defective in that it "inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure." Hill, 368 U.S. at 428.

5. Sufficient grounds for section 2255

(a) Where indictment on its face fails to state a federal offense. Hayle v. United States, 815 F.2d 879, 881-82 (2d Cir. 1987).

(b) Where guilty plea was based on insufficient factual basis, see Montgomery v. United States, 853 F.2d 83, 85-86 (2d Cir. 1988), or was induced by prosecutor's false promise, see United States v. Paglia, 190 F.2d 445, 448 (2d Cir. 1951).

(c) Right to counsel, e.g., where chosen counsel was not admitted to any bar, Solina v. United States, 709 F.2d 160 (2d Cir. 1983); cf. Waterhouse v. Rodriquez, 848 F.2d 375 (2d Cir. 1988) (disbarment of defendant's counsel during pretrial suppression hearing did not

require vacation of sentence where attorney ceased representation immediately upon learning of disbarment).

(d) Claim of perjured testimony. United States v. Barillas, 291 F.2d 743, 744-45 (2d Cir. 1961).

(e) Competency of defendant at time of court proceedings. See Saddler v. United States, 531 F.2d 83 (2d Cir. 1976) (per curiam).

(f) See also § 7(a) infra (constitutional claims).

6. Insufficient grounds for section 2255

(a) Where guilty plea was induced by statutory provision subsequently invalidated. United States v. Bass, 477 F.2d 723 (2d Cir. 1973).

(b) Attorney performance not falling below a standard of reasonably effective assistance. See Strickland v. Washington, 466 U.S. 668 (1984).

(c) Request for sentence credit. See United States v. Martinez, 837 F.2d 861, 865-66 (9th Cir. 1988) ("Courts have original jurisdiction only over the imposition of [federal] sentence, not over its computation.").

7. Constitutional claim

(a) Found to be constitutional:

- where alleged that separate judgments of conviction arose out of single criminal transaction, raising questions of double jeopardy. Grimes v. United States, 607 F.2d 6, 9-11 (2d Cir.

1979).

- claim of spillover effects of double-jeopardy-barred criminal charge. Pacelli v. United States, 588 F.2d 360, 363-64 (2d Cir. 1978), cert. denied, 441 U.S. 908 (1979).
- constitutional authority of de facto judge. United States v. Allocco, 305 F.2d 704, 706-07 (2d Cir. 1962).
- composition of grand jury; however, where objection is untimely, claim will be procedurally barred unless cause is shown and prejudice would result from denying claim. Davis v. United States, 411 U.S. 233 (1973).

(b) Found to be nonconstitutional (see § 11 infra):

- statute of limitations affirmative defense. Brennan, 867 F.2d at 117 n.1.
- interpretation of term in statute. Id. ("enterprise" in RICO statute).
- credibility of witnesses. Norris v. United States, 687 F.2d 899, 900 (7th Cir. 1982).

8. Exceptional circumstances found where:

(a) Subsequent change in law resulting in petitioner's "conviction and punishment [having been imposed] for an act that the law does not make criminal." Davis v. United States, 417 U.S. 333, 346 (1974). This rule applies even where petitioner failed to raise the issue

in the direct appeal, perhaps not having thought of the argument that was not yet law, or having decided not to challenge well-settled precedent. See Ingber v. Enzor, 841 F.2d 450, 454 (2d Cir. 1988).

9. Custody and sentence requirement

(a) Section 2255 provides a means of remedy for "a prisoner in custody under sentence." This custody requirement has been read liberally, 3 Fed. Pract. § 596, at 468, so that any conditions that significantly confine and restrain will suffice, Jones v. Cunningham, 371 U.S. 236, 243 (1963).

(b) Custody found where:

- defendant released on his own recognizance after conviction in state court. Hensley v. Municipal Court, 411 U.S. 234 (1973) (habeas corpus action);
- prisoner discharged while petition awaiting appellate review. Carafas v. LaVallee, 391 U.S. 234 (1968) (habeas corpus action);
- petitioner free on parole. Argro v. United States, 505 F.2d 1374, 1375 n.1 (2d Cir. 1974).

(c) The critical moment in determining custody is when the section 2255 motion is filed. 3 Fed. Pract. § 596, at 470.

(d) Fact that successful collateral attack may not result in release from custody is no bar to considering section 2255 motion. Peyton v. Rowe, 391 U.S. 54

(1968) (challenge to sentence due to take effect at termination of current sentence); Walker v. Wainwright, 390 U.S. 335 (1968) (separate sentence due to take effect at termination of challenged sentence); Grimes, 607 F.2d at 8-9 (challenge to one basis of single general sentence).

(e) As the rule states, the petitioner also must be under sentence for the conviction attacked. Id. at 7.

10. Hearing

(a) Section 2255 and Rule 4(b) governing the section, see § 13 infra, provides that if the motion, file and records of the case conclusively show that the prisoner is entitled to no relief, a hearing is unnecessary. See Garcia Montalvo v. United States, 862 F.2d 425, 426-27 (2d Cir. 1988) (per curiam); Williams v. United States, 503 F.2d 995, 998 (2d Cir. 1974). The determination lies within the discretion of the district court, Williams, 503 F.2d at 998, notwithstanding the government's consent to a hearing, id.

(b) Nevertheless, a pro se complaint must be liberally construed. See Elliott v. Bronson, No. 88-2242, slip. op. at 2561 (2d Cir. Apr. 5, 1989) (per curiam).

(c) Petitioner need not be produced at every section 2255 hearing. Hayman, 342 U.S. at 222. However, where "there are substantial issues of facts as to events in which the prisoner participated, the trial court should

require his production for a hearing." Id.; see also Paglia, 190 F.2d at 448.

11. Procedural defaults

(a) Petitioner may be barred from raising a claim under section 2255 because of a failure to assert the claim at trial or on direct appeal.

- The nature of the claim may be determinative -- whether it is: (a) constitutional or jurisdictional; or (b) nonconstitutional and nonjurisdictional. See, e.g., Brennan, 867 F.2d at 117 & n.1.
- Depending on the nature of the claim and the procedural default, two tests have been used to determine whether the claim may be heard by way of section 2255: (a) "deliberate bypass" -- i.e., whether the failure to raise the issue in earlier proceedings was a deliberate strategic decision, see United States v. West, 494 F.2d 1314 (2d Cir.), cert. denied, 419 U.S. 899 (1974); and (b) cause and prejudice -- i.e., whether petitioner can show good cause for the procedural default and prejudice resulting from not being allowed to raise the issue by section 2255, see United States v. Frady, 456 U.S. 152 (1982).
- The deliberate bypass test is the narrower exception and its application will bar fewer

section 2255 claims than will application of the cause and prejudice test. See Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977).

(b) Test for constitutional or jurisdictional claims:

- There is an open question in the Second Circuit whether the "deliberate bypass" test remains the proper standard for foreclosing constitutional and jurisdictional issues not raised on direct appeal, or whether the "good cause and prejudice" test applies. See Brennan, 867 F.2d at 117 n.1.

(c) Test for nonconstitutional and nonjurisdictional claims.

- A failure to object at trial forecloses review, subject to petitioner's satisfying the cause and prejudice test. Id. at 119 (statute of limitations affirmative defense not raised at trial).
- As a general rule, the failure to raise a nonconstitutional or nonjurisdictional claim on direct review precludes assertion of the claim in a collateral proceeding. Id. at 117, 120.
- In "exceptional circumstances," however, even a nonconstitutional or nonjurisdictional error can result in a "complete miscarriage of justice," justifying collateral relief. Id. at 117, 121; see Ingber, 841 F.2d at 454.

(d) The failure of counsel to take an appeal when requested

to do so may itself be ground for section 2255 review. See Rodriquez v. United States, 395 U.S. 327 (1969).

(e) Effect of plea:

- After judgment on plea of guilty, defendant may not raise under section 2255 nonjurisdictional challenges. Hayle, 815 F.2d at 881. Any jurisdictional defect must be apparent from the face of the indictment. Id. at 881-82.

12. Time for 2255 motion

(a) The "motion for . . . relief may be made at any time." 28 U.S.C. § 2255.

(b) There must be a sentence imposed on the complained-of conviction in order to confer jurisdiction for collateral attack. Grimes, 607 F.2d at 7.

(c) Neither laches, Pacelli, 588 at 360, nor any statute of limitations applies to the making of a section 2255 motion. 3 Fed. Pract. § 597, at 480.

(d) Nevertheless, delays can be taken into account by the court ruling on section 2255 motion. Pacelli, 588 F.2d at 365.

(e) Rule 9(a) of the Section 2255 Rules provides that the motion may be dismissed if delay caused the government to be prejudiced in its ability to respond, unless the movant shows that the motion "is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances

prejudicial to the government occurred." Section 2255 Rule 9(a). "It is the government's ability to respond to the motion, not its ability to retry the defendant successfully, that is relevant." 3 Fed. Pract. § 597, at 482.

(f) Delay may be disregarded, however, where (1) there is a change in law or new evidence, and (2) the interests of justice would be served and the petitioner makes a proper showing why a particular ground for relief was not asserted. Advisory Committee Note to Rule 9(a) of the Habeas Corpus Rules (incorporated by reference in Note to Rule 9(a) of the Section 2255 Rules -- see § 13 infra).

(g) A new rule of criminal procedure formulated after conviction is final generally is not to be applied retroactively, except where the new rule either "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'" or "requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" Teague v. Lane, 109 S. Ct. 1060, 1073 (1989) (citations omitted).

13. Procedure

Rules and Forms have been adopted by the Supreme Court to govern proceedings under section 2255. See Rules Governing Proceedings in the United States District Courts Under

Section 2255 of Title 28, United States Code ("Section 2255 Rules").

14. Mislabeling: labels not decisive

(a) Mislabeled as petition for habeas corpus, treated as 2255 motion. Dukes, 727 F.2d at 40 n.4.

(b) Mislabeled as petition for coram nobis, treated as 2255 motion. United States v. Little, 608 F.2d 296, 299 (8th 1979), cert. denied, 444 U.S. 1089 (1980).

(c) Mislabeled as petition under 2255, treated as coram nobis petition. United States v. Loschiavo, 531 F.2d 659, 662 (2d Cir. 1976).

15. Appellate Review of 2255 motions

(a) Section 2255 itself provides that an order under section 2255 is appealable.

(b) Time limits for civil appeals apply. Section 2255 Rule 11; United States v. Hayman, 342 U.S. 205, 209 n.4 (1952); see also Fed. R. App. P. 4(a).

(c) Because the United States is a party to all section 2255 proceedings, notice of appeal must be filed within 60 days of entry of the district court's order. Fed. R. App. 4(a). The United States also may appeal. See Andrews v. United States, 373 U.S. 334, 337-38 (1963); Bonfiglio v. Hodden, 770 F.2d 301 (2d Cir. 1985). However, section 2255 cannot be "staged" in form to circumvent a prohibition on government appellate rights. United States v. Hundley, 858 F.2d 58 (2d Cir.

1988).

16. Successive Motions

(a) Although res judicata does not apply to motions under section 2255, Sanders v. United States, 373 U.S. 1, 12-15 (1963), the court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner," 28 U.S.C. § 2255.

(b) Consideration of the motion may be denied on these grounds "only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." Sanders, 373 U.S. at 15; see also Section 2255 Rule 9(b) (effective 1977).

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