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Failure to File Timely Notice of Appeal in Criminal Cases: Excusable Neglect

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Failure To File Timely Notice of Appeal in Criminal Cases: Excusable Neglect

Although an appeal from a criminal conviction is of comparatively recent origin,[1] it is presently accepted "as a matter of right" in our criminal procedure.[2] This contemporary insistence on the convicted party's right to an appeal is an expression of society's reluctance to allow the liberty or the life of the accused to be determined in a single, fallible proceeding. We are hesitant to impose the severe punishment of imprisonment or death until we are reasonably certain that the conviction is not erroneous. Somewhat inconsistent with this desire for certainty is the practical and equally important interest in securing a termination of the litigation.[3] We must obtain a finis to the case, and the ultimate conclusion should be achieved within the shortest time possible. Lengthy delays, which hamper an adequate review, also erode the efficacy and the desired goals of our criminal administration.[4] Because of the need for a rapid and final resolution of the case, a limitation on the time within which an appeal may be taken must be imposed.

Legislatures and courts attempt to balance these dual interests in securing both justice to the defendant and a quick termination of the case by providing an adequate time period within which the defendant must note his appeal. The imposition of a generous time limitation within which an appeal may be taken protects the defendant's right to appeal while furthering a prompt disposition of the controversy.

However, new problems are raised when the defendant, through no fault of his own, fails to note his appeal within the time allotted. When this happens, should the somewhat arbitrary time limitation be rigidly enforced? Would not a rigorous application of the time limitation, oblivious of the reason for the defendant's delay, overemphasize the need for finality of judgment and thus conflict with our notions of fundamental justice? It is the purpose of this note to examine how the interest in securing a rapid termination of the case can best be achieved in a manner consonant with our desire to see that fairness has been accorded to the defendant who, through no fault of his own, has failed to file a timely appeal.

I. Federal Aspects of the Problem

The taking of criminal appeals in federal courts is governed by rule 37(a)(2) of the Federal Rules of Criminal Procedure, which provides:

> An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial

1 The Court in Carroll v. United States, 354 U.S. 394, 400 (1957), in discussing the history of criminal appeals, noted that such appeals were not fully available until 1891.

2 Coppedge v. United States, 369 U.S. 438, 441 (1962).

3 See generally Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963).

4 Huff v. United States, 192 F.2d 911, 913-14 (5th Cir. 1951), *cert. denied*, 342 U.S. 946 (1952).

> or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.[5]

An analysis of the cases dealing with rule 37, discloses that the federal courts have attempted to give the rule a broad interpretation, and yet have recognized that the ten-day limitation is mandatory and an untimely appeal cannot be heard.[6]

Certain recent cases indicate that the courts have interpreted the rule liberally. For example, the rule explicitly states that when the defendant is not represented by counsel, the court shall advise him of his right to appeal within the ten-day period. The obvious *raison d'être* of this provision has also served as a basis for holding that when the defendant has a court-appointed attorney who does not continue to serve in that capacity for the ten-day period of appeal, the time for appeal does not commence until the defendant is actually apprised of his right to appeal.[7] Also, the rule's requirement that an appeal must be taken within ten days of the entry of an order denying a motion for a new trial or in arrest of judgment is affected by rule 49(c),[8] which compels the clerk to notify the prisoner of the entry of the order.[9] The time for taking the appeal originates, then, on the day that the defendant receives the notice, rather than the date of the entry of the denial, as rule 37(a)(2) seems to require.[10]

Moreover, the courts have assiduously protected the uninformed defendant who failed to observe the punctilios for filing the notice of appeal which are established by rule 37(a)(1).[11] A letter which intimates a desire to appeal will suffice even though "it does not comply with all the technical niceties ordinarily governing a notice of appeal."[12] Even a filing of a petition for leave

5 FED. R. CRIM. P. 37(a)(2).

6 For a more comprehensive treatment of timely appeals under the Federal Rules see Note, *Timely Appeals and Federal Criminal Procedure,* 49 VA. L. REV. 971 (1963).

7 Boruff v. United States, 310 F.2d 918 (5th Cir. 1962).

8 Rosenbloom v. United States, 355 U.S. 80 (1957) (per curiam).

9 FED. R. CRIM. P. 49(c) provides: "Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing."

10 Ching v. United States, 338 F.2d 333 (10th Cir. 1964) (per curiam); Blunt v. United States, 244 F.2d 355 (D.C. Cir. 1957). However, the negligence of the clerk is inconsequential if the defendant had actual notice of the entry. Gonzalez v. United States, 233 F.2d 825 (1st Cir. 1956). More important, the clerk is not required to mail notice of the entry of judgment. Wilkinson v. United States, 278 F.2d 604 (10th Cir.) (per curiam) *cert. denied,* 363 U.S. 829 (1960); Hyche v. United States, 278 F.2d 915 (5th Cir.) (per curiam), *cert. denied,* 364 U.S. 881 (1960).

11 FED. R. CRIM. P. 37(a)(1) provides in part:

> An appeal . . . is taken by filing with the clerk of the district court a notice of appeal in duplicate. . . . The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order.

12 United States v. Duncan, 310 F.2d 367, 368 (7th Cir. 1962).

to proceed *in forma pauperis* is sufficient to constitute the taking of an appeal.[13] Obviously, the defendant will not lose his right to appeal merely because his notice is mailed to the district judge rather than the clerk, as the rule requires.[14]

The recent Supreme Court holding in *Fallen v. United States*[15] probably best exemplifies the liberal manner in which, in some instances, the courts have treated the rule. In *Fallen,* the indigent defendant's letter, which was written while he was incarcerated in a federal penitentiary, did not reach the clerk until fourteen days after his sentencing. Although the envelope was not postmarked, the letter was dated by the defendant as having been written on the eighth day after sentencing and the government was unable to provide any evidence that he had not in fact entrusted the letter to the prison authorities on that day. In the ordinary course of mail delivery, a letter written eight days after sentencing would have reached the clerk within the prescribed ten days. In view of this situation, the Court reversed the court of appeals' dismissal[16] and held that rule 37 did not bar the appeal, since the defendant "did all he could under the circumstances . . ."[17] to file his notice within the time prescribed. *Fallen* serves as a prime example of a court's effort to do justice and avoid forfeiture of a substantial right on technical procedural grounds.[18]

However, there is another face to the manner in which the courts have applied rule 37. Although the rule has generally been liberally construed as is evident in the above-discussed case, the courts have not trifled with the ten-day requirement and have consistently held that the timely filing of the notice is essential to the appellate court's jurisdiction. Ordinarily, a court cannot enlarge the prescribed ten-day limitation even upon a showing that the failure to file the timely appeal was excusable. The foremost case which illustrates the rigorous application of rule 37 is *United States v. Robinson.*[19] In *Robinson,* the defendant and his attorney each thought that the other was going to file the required notice of appeal. In addition, the attorney, who had never before taken a criminal appeal, erroneously believed that the time for taking the appeal was thirty days.[20]

13 Tillman v. United States, 268 F.2d 422 (5th Cir. 1959). Rule 4(d) of the Proposed Uniform Rules of Appellate Procedure stipulates that a motion for leave to appeal in forma pauperis shall be treated as a notice of appeal. 34 F.R.D. 263 (1964). However, a mere oral statement made at the time of the sentencing which intimates that the defendant desires to appeal will not satisfy the rule. Peoples v. United States, 337 F.2d 91 (10th Cir. 1964); United States v. Isabella, 251 F.2d 223 (2d Cir. 1958).

14 Halfen v. United States, 324 F.2d 52 (10th Cir. 1963); United States v. Quartello, 16 F.R.D. 421 (S.D.N.Y. 1954).

15 378 U.S. 139 (1964), *reversing* 306 F.2d 697 (5th Cir. 1962).

16 *Id.* at 144.

17 *Ibid.*

18 *Fallen* was presaged by several other liberal cases: see, *e.g.,* Reynolds v. United States, 288 F.2d 78 (5th Cir. 1961), where the notice of appeal was considered in the constructive custody of the clerk since it was mailed in time to be delivered to the clerk's office on Saturday, a day on which the office was closed; Williams v. United States, 188 F.2d 41 (D.C. Cir. 1951); Wallace v. United States, 174 F.2d 112 (8th Cir.), *cert. denied,* 337 U.S. 947 (1949).

Four members of the Court concurred in *Fallen,* but on the grounds that the rule is satisfied and the notice is filed when an incarcerated defendant delivers his letter to the prison authorities. This "constructive filing" would seem to be the reasonable approach, and it has been adopted in California. People v. Daily, 175 Cal.App.2d 101, 345 P.2d 558 (Dist. Ct. App. 1959).

19 361 U.S. 220 (1960).

20 *Id.* at 221, n.1. The attorney failed to distinguish between the rules governing appeals in civil cases and the rules of criminal procedure. FED. R. CIV. P. 73(a) provides that an appeal may be taken within thirty days of the entry of judgment.

Hence the appeal was not filed until eleven days after the expiration of the time prescribed by rule 37. The Court rejected the argument that the time for taking an appeal could be enlarged if the untimely filing was caused by excusable neglect and concluded that "the taking of an appeal within the prescribed time is mandatory and jurisdictional."[21]

Manifestly, a requirement which is considered by the Supreme Court as mandatory and essential to the appellate court's jurisdiction is, notwithstanding the holding in *Fallen,* a relatively impliable one. Hence, the concept that the timely filing of a notice of appeal is "jurisdictional" may prevent a court from granting relief to an unwary defendant even if it believed that, in the interest of fairness, it should do so. Thus, the stringent requirement enunciated by *Robinson* has sometimes resulted in the loss of the unfortunate defendant's right to appeal because of the negligence of others. While a defendant cannot lose his right to appeal because state officials have either actually suppressed his appeal papers[22] or were negligent in not forwarding them,[23] he can lose his right because of the negligence of his attorney in not filing the papers within the prescribed time.[24] Thus, an untimely appeal will be dismissed where the defendant has two attorneys, each of whom fails to file the timely notice thinking the other would fulfill the obligation.[25] Similarly, relief has been denied where the defendant's court-appointed attorney failed to advise his client that the appeal must be taken within ten days.[26] Hence, the existing law presents the somewhat anomalous situation in which a defendant who is unaided by counsel and who relies on the prison authorities may be in a better position than the defendant who justifiably reposes his trust in his attorney to file the appeal.[27]

A good example of possible injustice through rigorous application of rule 37 is found in the recent Supreme Court case, *Berman v. United States.*[28] In *Berman,* the defendant's attorney was taken ill and thus did not file the notice of appeal until the Monday succeeding the Saturday on which the ten-day limitation had expired.[29] The Court affirmed the court of appeals' dismissal of the untimely appeal in a *per curiam* opinion which merely cited *Robinson.* In a scathing dissent, in which three other members of the Court concurred, Mr. Justice Black vigorously objected to the majority's inflexible interpretation of the rule.[30] He intimated that he considered his brethren's opinion nothing

21 *Id.* at 229.

22 Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); Cochran v. Kansas, 316 U.S. 255 (1942).

23 Fallen v. United States, 378 U.S. 139 (1964).

24 Dodd v. United States, 321 F.2d 240 (9th Cir. 1963) (dictum); United States v. Isabella, 251 F.2d 223 (2d Cir. 1958) (court indicated that it might be disposed to grant relief if the rules had an appropriate provision); Dennis v. United States, 177 F.2d 195 (4th Cir. 1949); United States v. Peabody, 173 F. Supp. 413 (W.D. Wash. 1958).

25 O'Neal v. United States, 264 F.2d 809 (5th Cir. 1959).

26 United States v. Parker, 208 F. Supp. 920 (D. Mass. 1962).

27 This possibility was mentioned by Mr. Justice Black in his dissenting opinion in Berman v. United States, 378 U.S. 530, 537 (1964).

28 378 U.S. 530 (1964).

29 The clerk's office was closed on Saturday and Sunday. The defendant's attorney filed an affidavit stating that he was not aware that the federal courts did not follow the New York practice of extending the time for appeal until the Monday succeeding the Saturday on which the normal time limitation expired. *Id.* at 535.

30 Black's vitriolic dissent is worth noting:

> Throughout history men have had to suffer from legal systems which worshipped

more than a concrete expression of the mistaken ". . . notion that courts exist to fashion and preserve rules inviolate instead of to apply those rules to do justice to litigants."[31]

Black's incisive dissent highlights the fact that there are instances in which an untimely appeal should be considered excusable, and that an opportunity for relief should be granted rather than leaving the unwary defendant without a remedy. This suggests that a revision of the rule might be in order if the primary purpose of procedural rules — to secure an orderly disposition of the proceeding in accordance with our sense of fair play[32] — is to best be realized. Evidently the Advisory Committee on Appellate Rules has recognized this possibility. In the Committee's Proposed Federal Rules of Appellate Procedure, rule 4(d) provides: "Upon a showing of excusable neglect the district court may extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the original time prescribed. . . ."[33] Obviously, the proposed rule will, in many instances, provide a remedy to the deserving defendant who has a meritorious defense; on the other hand, the excusable neglect provision has disadvantages. Before considering the wisdom of such a rule, it may prove profitable to scrutinize the manner in which the states have approached the problem and also to examine the collateral relief that may be available to a defendant who has failed to file a timely notice of appeal because of "excusable neglect."

II. State Treatment of the Timely Appeal Problem

While a majority of states allow a longer time within which an appeal may be taken than the ten days prescribed by the federal rules,[34] the states differ in other respects in their treatment of a defendant who, through no fault of his own, has failed to file a timely appeal. For the purposes of this brief sur-

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rigid formalities at the expense of justice. . . . [A]ny civilized system of judicial administration should have enough looseness in the joints to avert gross denials of a litigant's rights growing out of his lawyer's mistake or even negligence. . . . The Criminal Rules were framed with the declared purpose of ensuring that justice not be thwarted by those with too little imagination to see that procedural rules are not ends in themselves, but simply means to an end: the achievement of equal justice for all. *Id.* at 537-38.

31 *Id.* at 539.

32 FED. R. CRIM. P. 2 maintains: "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

33 Proposed Uniform Rules of Federal Appellate Procedure, 34 F.R.D. 263 (1964).

34 See: ALA. CODE tit. 15 § 368 (1958) (six months); ARIZ. R. CRIM. P. 348 (sixty days); ARK. STAT. ANN. § 43-2701 (repl. vol. 1964) (sixty days); COL. SUP. CT. R. 18 (six months); FLA. STAT. ANN. § 924.09 (1941) (ninety days); IDAHO CODE ANN. § 19-2805 (1947) (thirty days); IOWA CODE ANN. § 793.2 (1946) (sixty days); MICH. GEN. CT. R. 803 (twenty days); MINN. STAT. ANN. § 632.01 (1945) (six months); MONT. REV. CODES ANN. § 94-8105 (1947) (six months); NEV. REV. STAT. § 177.100 (Supp. 1963) (three months); N.M. SUP. CT. R. 5, §§ 1 and 3 (three months); N.Y. CODE CRIM. PROC. § 521 (thirty days); N.D. CENT. CODE ANN. § 29-28-08 (1960) (three months); OHIO REV. CODE ANN. § 2953-05 (Page Supp. 1964) (thirty days); OKLA. STAT. ANN. tit. 22 § 1054 (Supp. 1964) (three months); ORE. REV. STAT. §§ 53.020 and 157.030 (Supp. 1963) (thirty days); S.D. CODE § 34.4104 (Supp. 1960) (six months); TEX. CODE CRIM. PROC. ANN. Art. 827 (1950) (within term of court); UTAH CODE ANN. § 77-39-5 (1953) (two months); W.VA. CODE ANN. § 5790 (1961) (eight months); WIS. STAT. ANN. § 958.13 (1958) (one year); WYO. COMP. STAT. ANN. § 7-292 (1957) (one year).

vey, and at the risk of overgeneralization, it is best to classify the various state statutes and rules into three main types: those in which there is no provision for excusing an untimely appeal; those statutes or rules which allow the court a large amount of discretion to hear a belated appeal; and those which allow an untimely appeal, but only under the circumstances specified in the rule or statute.

A. States in which there is no provision for excusing a belated appeal

A defendant who has failed to file a timely appeal because of excusable neglect faces an immense obstacle where there is no state statute or rule which provides for an extension of the time in which an appeal may be taken. Since the right to appeal is a statutory right, the defendant is obliged to fulfill the requirements imposed by the statute if he is to secure an appeal. Consequently, there are innumerable cases in which an untimely appeal has been dismissed with the mere statement that the period for taking an appeal is mandatory and the court simply has no jurisdiction to hear a delayed appeal.[35] In short, the time limitation "is binding upon the courts no matter how meritorious the excuse for failure to appeal in due time."[36]

Opposed to this characteristically inflexible approach is *State v. Frodsham*.[37] In this Montana case, the defendant, who had been convicted of kidnapping, had failed to note a timely appeal because of the negligence of his court-appointed attorney. Although the court was fully cognizant of the "multitude of decisions of this court and other courts, state and federal, which hold that appeals not taken within the statutory time should be dismissed, regardless of the excuse for the delay,"[38] it discussed the merits of the appeal.[39] The court reasoned that elementary justice would not tolerate the deprivation of the defendant's right to appeal, a loss caused by the inadvertence of an attorney whom the indigent defendant had to accept. While the court's approach is atypical, it certainly appears to be preferable, at least in the circumstances that existed, to the usual undeviating insistence on the prescribed time limitation.

B. States which provide a means by which belated appeal may be taken

Several states have promulgated statutes or rules which grant their courts some discretion to hear a belated appeal.[40] For example, a Michigan court rule provides as follows: "The Supreme Court may, in its discretion, grant leave to appeal, upon a showing, supported by affidavit, that there is merit in the claim

35 *E.g.*, State v. Leopard, 191 Kan. 581, 382 P.2d 330 (1963); State v. Morrissey, 259 Minn. 563, 108 N.W.2d 10 (1961); Commonwealth v. McKnight, 204 Pa.Super. 313, 204 A.2d 281 (1964).

36 Berkson v. Schneiderman, 280 App.Div. 142, 112 N.Y.S. 2d 88, 89 (Sup. Ct. 1952).

37 362 P.2d 413 (Mont. 1961).

38 *Id.* at 419.

39 However, Frodsham's contentions were subsequently found to be without merit.

40 *E.g.*, ARIZ. SUP. CT. R. 16(a); ARK. STAT. ANN. § 43-2701 (repl. vol. 1964); CAL. R. OF CT. 31(a); IND. ANN. STAT. § 9-3305 (repl. vol. 1956); MICH. GEN. CT. R. 803.3; MO. SUP. CT. R. 28.07; N.H. REV. STAT. ANN. § 508.7 (1955); OHIO REV. CODE ANN. § 2953.05 (Page Supp. 1964); OKLA. STAT. ANN. tit. 22 § 1054 (Supp. 1964).

of appeal and that the delay was not due to appellant's culpable negligence."[41] Another approach is exemplified by an Ohio statute which provides that after the usual thirty-day time limitation for the taking of appeals has expired, an ". . . appeal may be taken only by leave of the court to which the appeal is taken."[42] Statutes and rules of this variety may eliminate the unfairness which can result if the usual statutory time limitation for the taking of an appeal is rigorously applied, regardless of the defendant's excuse. The courts in a state which has such a provision obviously enjoy a large amount of discretion. However, the cases indicate that these various courts are not in agreement as to why and when the discretion should be exercised in favor of the defendant. For instance, in Indiana, a court may sustain a motion for a belated appeal if the defendant can show sufficient cause to excuse the delay in noting the appeal.[43] However, the negligence of an attorney in not ascertaining the time for an appeal has been considered an insufficient cause for excusing the delay.[44] Similarly, a delay caused by a misunderstanding between the defendant's two counsel has not been regarded as an adequate cause for allowing the belated appeal.[45] On the other hand, the Arizona Supreme Court has found that the negligence of the defendant's attorney is an appropriate reason for granting an appeal which was not noted within the prescribed period.[46] Moreover, unlike Indiana, the California Supreme Court has liberally construed its rule which confers on the appellate courts power to grant relief from late filing.[47] The defendant is given the benefit of any doubt that might exist as to the reason for the failure to appeal and the court has stated that it will grant relief from the late filing of the notice simply "as a matter of policy."[48] Hence, a delayed appeal will be granted if the delay resulted from the failure, apparently without excuse, of the appellant's attorney.[49]

It is difficult to appraise the success or advisability of these statutes or rules which provide for belated appeals. However, the California cases would seem to indicate that the desired goal of preventing the forfeiture of substantial rights on technical grounds can be achieved without unduly sacrificing the equally desirable goals of a prompt disposition of the case and judicial economy.

41 MICH. GEN. CT. R. 803.3.
42 OHIO REV. CODE ANN. § 2953.05 (Page Supp. 1964).
43 State *ex rel.* Casey v. Murray, 231 Ind. 74, 106 N.E.2d 911 (1952).
44 Barker v. State, 242 Ind. 5, 175 N.E.2d 353 (1961).
45 Harrell v. State, 239 Ind. 336, 157 N.E.2d 581 (1959).
46 State v. Schroeder, 95 Ariz. 255, 389 P.2d 255 (1964).
47 CAL. R. OF CT. 31(a) provides:

> Whenever a notice of appeal is received by the clerk of the superior court after the expiration of the period prescribed for filing such notice, the clerk shall mark it "Received (date) but not filed" and advise the party seeking to file the notice that it was received but not filed because the period for filing notice of appeal had elapsed and that he may petition the reviewing court for relief by verified statement or declaration under penalty or perjury, setting forth the date of the order or judgment from which the party seeks to appeal, the steps which the party took to file his notice of appeal on time, and any other information which has, or which the party believes has, a bearing upon the circumstances which caused the notice of appeal to arrive late.

48 People v. Tucker, 40 Cal. Rptr. 609, 612, 395 P.2d 449, 452 (1964).
49 People v. Diehl, 41 Cal. Rptr. 281, 396 P.2d 697 (1964); People v. Flanagan, 41 Cal. Rptr. 85, 396 P.2d 389 (1964); People v. Casillas, 38 Cal. Rptr. 721, 392 P.2d 521 (1964).

C. States which provide for a belated appeal in specified circumstances

A possible middle ground between the practice of dismissing all untimely appeals, regardless of the reason for the delay, and the rules or statutes which give the courts a large amount of discretion, is to allow the filing of an untimely appeal only when the circumstances specified in the enabling statute exist. The state of New York, where an appeal ordinarily must be taken within thirty days, has such a rule;[50] if the defendant's attorney dies or is suspended within the thirty-day period, an appeal may be taken within sixty days of the date on which the misfortune occurred. Also, if the attorney becomes physically incapacitated, the court may, in its discretion, honor the application for a late appeal.

A rule or statute which specifically limits the circumstances in which a court may hear an untimely appeal has obvious disadvantages as well as advantages. While such a rule diminishes the possibility of frequent fabrications of fictitious claims, it also increases the possibility that a defendant who has a meritorious claim will be left without a remedy after his, or his attorney's, procedural default which is not within the excuses specified in the statute. It is submitted that it is unwise to attempt to categorize all the reasons which are sufficient cause for allowing a belated appeal. The flexibility which may be required to do justice in a particular situation is best provided by allowing the court itself to determine whether the circumstances are such that the delay should be considered excusable.

III. Collateral Review

A. Postconviction remedies for state prisoners

Invariably, a timely appeal which provides an orderly and prompt disposition of the controversy, is the correct mode of review. It is an oft-repeated statement that a writ of habeas corpus cannot supplant an appeal;[51] collateral remedies are reserved for the exceptional cases. However, in certain instances, a defendant who has failed to file a timely appeal and who has a claim of constitutional proportions may secure relief through the postconviction remedies provided by the state. For example, a defendant may secure a writ of habeas corpus[52] or coram nobis[53] when his appeal papers have been unconstitutionally suppressed by prison authorities. The maxim that habeas corpus is not a sub-

50 N.Y. CODE CRIM. PROC. § 521-a (1958), provides:

> If an attorney dies, is removed or suspended within the time fixed by law to take an appeal . . ., such notice may be served within sixty days from the date of death, removal or suspension. If any attorney becomes mentally or physically incapacitated within the time fixed by law to take an appeal, without having served a notice of appeal, the court whose determination is sought to be reviewed, upon application made within sixty days from the date of the commencement of each incapacity may, in its discretion, and upon such terms as it may direct, permit such notice to be served.

51 Hill v. United States, 368 U.S. 424 (1962); Sunal v. Large, 332 U.S. 174 (1947); State *ex rel.* Risatti v. Eaton, 161 So.2d 549 (Fla. Dist. Ct. App. 1964); Commonwealth *ex rel.* Davis v. Russell, 415 Pa. 119, 202 A.2d 306 (1964).

52 Beard v. Warden, 211 Md. 658, 128 A.2d 426 (1957).

53 People v. Hairston, 10 N.Y.2d 92, 217 N.Y.S.2d 77, 176 N.E.2d 90 (1961). In People v. Hill, 8 N.Y.2d 935, 204 N.Y.S.2d 172, 168 N.E.2d 841 (1960) the court utilized coram nobis to provide relief for a defendant who was insane during the time required for taking the appeal.

stitute for appeal is obviously not applicable in these situations where the cause of the failure to appeal is a constitutional infirmity.[54] Also, a few courts have gone so far as to provide collateral relief where the defendant has been deprived of his right to an appeal because of the failure of his attorney to note his appeal.[55] For example, in *Ex parte Caldwell,*[56] the defendant had failed to file a timely appeal because of the mistake of his inexperienced attorney. His appeal was therefore dismissed as untimely; yet the Texas court granted his petition for a writ of habeas corpus.

However, a defendant who has failed to file a timely appeal ordinarily will not be able to secure relief through his state's postconviction procedure. The convicted defendant is confronted with the principle that habeas corpus is not a substitute for a timely appeal, and he must show that his claim is one which the postconviction procedure will recognize. Hence, his ability to utilize the collateral approach will depend upon the literal scope of the state's remedy and whether the court is at all reluctant to liberally construe or expand the remedy. It is beyond the purpose of this note to review the breadth of the various states' postconviction remedies. Suffice to say that the diverse state procedures have been condemned as being too limited in scope, excessive in number, or too conservatively construed by the state courts.[57] In short, the state postconviction remedies have generally been criticized as inadequate to provide relief in all the circumstances in which fundamental justice demands relief. For example, a typical state postconviction remedy may still be restricted to instances where the convicting court lacked jurisdiction over the defendant or over the crime charged or imposed an excessive sentence.[58] Obviously, a remedy of such a limited scope cannot satisfy the expanding requirements of fairness imposed by the fourteenth amendment and therefore affords no aid to the defendant who has failed to file a timely notice of appeal although he may have a claim of constitutional proportions.

The failure of the states to develop postconviction remedies adequate to protect a prisoner's constitutional rights has necessitated, or at least stimulated, frequent resort to federal habeas corpus proceedings. The federal writ of habeas corpus, or as it is frequently termed, "the Great Writ,"[59] permits a federal court to order discharge of any prisoner who is detained by a state in violation of the federal Constitution or laws.[60] Either as a principle of comity or judicial economy,

54 The Supreme Court has held that suppression of appeal papers by prison authorities is unconstitutional. Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); Cochran v. Kansas, 316 U.S. 255 (1942). Habeas corpus has also been provided when the prison official had merely neglected to mail the appeal papers. State *ex rel.* Ervin v. Smith, 160 So.2d 518 (Fla. 1964); Burke v. State, 160 So.2d 523 (Fla. Dist. Ct. App. 1964).

55 State v. Shoemaker, 225 Md. 639, 171 A.2d 468 (1961).

56 383 S.W.2d 587 (Tex. Crim. App. 1964).

57 See, *e.g.*, Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners,* 108 U. PA. L. REV. 461 (1960); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism,* 7 UTAH L. REV. 423 (1961).

58 *E.g.*, COL. REV. STAT. ANN. § 65-1-3 (1963). See Scott, *Post-Conviction Remedies in Colorado Criminal Cases,* 31 ROCKY MT. L. REV. 249 (1959).

59 Fay v. Noia, 372 U.S. 391 *passim* (1963).

60 The statutory provisions on habeas corpus for state prisoners appear in 28 U.S.C. §§ 2241-2254. § 2241(c) provides: "The writ of habeas corpus shall not extend to a prisoner unless — . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . ."

various limitations have been imposed on the availability of the writ to a state prisoner, but it is now clear that the writ may be available to such prisoner who has a claim of constitutional magnitude, even though he *failed to appeal* his state conviction. The Supreme Court's decision in *Fay v. Noia,*[61] establishes this proposition. In *Fay,* the state prisoner was convicted of murder on evidence consisting of coerced confessions. After consultation with his counsel Noia decided not to appeal, mainly because of his apprehension that a death sentence would be imposed on retrial. Years later, Noia attempted to secure his release by means of his state's postconviction remedies but relief was denied because of his failure to appeal.[62] Noia then petitioned for a writ of federal habeas corpus.[63] The significant holding of the Supreme Court is contained in its statement that ". . . jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceeding. . . ."[64] The Court adhered to the classic definition of waiver — an intentional relinquishment or abandonment of a known right or privilege[65] — and concluded that Noia had not waived his constitutional claim by his failure to appeal in the state courts. The federal courts may refuse a petition for the writ when the state prisoner deliberately bypasses the orderly state procedure but, in the words of the Court, a deliberate bypassing is effected only by the "considered choice of the petitioner."[66]

This brief recital of *Fay v. Noia* is sufficient to expose its implications as to the subject here under discussion. A defendant who had failed to file a timely appeal because of excusable neglect certainly could not be said to have made a "considered choice." Hence, the federal courts must entertain his petition. In short, a federal forum is available to every state prisoner who alleges that he has suffered an unconstitutional state conviction even though he had inadvertently failed to file a timely notice of appeal in the state court.

B. Collateral relief for federal prisoners under 28 USC 2255

The *Fay v. Noia* decision on availability of federal habeas corpus is not confined to state prisoners; its implications also extend to the availability of the writ, or its statutory counterpart, 28 U.S.C. § 2255, to federal prisoners. Section 2255, for all practical purposes, has replaced and is the equivalent of the writ of habeas corpus for federal prisoners.[67] Section 2255 provides a collateral remedy

61 372 U.S. 391 (1963). This case involves immense implications in state-federal relations and thus has been a fertile source for law review commentaries. See, *e.g.,* Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle,* 39 N.Y.U. L. REV. 78 (1964); Symposium, *Habeas Corpus — Proposals for Reform,* 9 UTAH L. REV. 18 (1964); 12 KAN. L. REV. 557 (1964); 9 VILL. L. REV. 168 (1963).

62 Noia first sought to utilize the states' remedy of coram nobis. Coram nobis was denied in 3 N.Y.2d 596, 148 N.E.2d 139, 170 N.Y.S.2d 799, *cert. denied,* 357 U.S. 905 (1958).

63 Federal habeas corpus was denied in 183 F.Supp. 222 (S.D.N.Y. 1960), *rev'd,* 300 F.2d 345 (2d Cir. 1962), *aff'd,* 372 U.S. 391 (1963).

64 Fay v. Noia, 372 U.S. 391, 438 (1963).

65 *Id.* at 439. This definition was first enunciated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

66 *Id.* at 439.

67 Under § 2255, a federal court cannot entertain a habeas corpus petition of a federal prisoner unless the motion procedure of § 2255 is inadequate to test the validity of the petitioner's confinement.

for a prisoner who is sentenced by a federal court in violation of the Constitution or laws of the United States[68] just as the federal writ of habeas corpus provides a similar remedy to a state prisoner who is unconstitutionally confined in a state prison. Since *Fay* decided that a state prisoner is not deprived of the collateral remedy of federal habeas corpus when he has suffered an "abortive state proceeding,"[69] the question arises whether a federal prisoner, who has endured a similar procedural default in a federal court, should not be able to secure similar relief under § 2255. Admittedly, the underlying considerations in *Fay v. Noia* vary somewhat from the issues involved in the problem of whether collateral relief should be available to a federal prisoner who had failed to file a timely notice of appeal. A prominent consideration in *Fay,* which is not present in the case of a federal prisoner, was the desirability of providing a federal forum for the federal question. On the other hand, a case involving a federal rather than a state prisoner does not present the grave peril of "disrupting the delicate balance of federalism so foremost in the minds of the Founding Fathers and so uniquely important in the field of law enforcement."[70] However, the same ultimate question is present in each case: whether a person who has failed to assert his constitutional claim on appeal because of his procedural default should be precluded from collateral relief. In *Fay,* the Court asserted that a state prisoner's procedural default would not preclude his resort to federal habeas corpus unless the failure to appeal was the "considered choice" of the defendant; this same controlling standard would seem to be equally applicable to the federal prisoner. Thus, it would be logically inconsistent to deny a federal prisoner collateral relief when he has inadvertently failed to note his appeal within the prescribed time if a similar forfeiture doctrine does not burden the state prisoner.

There is some authority for the contention that one who has a constitutional claim may secure a § 2255 hearing, notwithstanding his excusable failure to note a timely appeal.[71] Indeed, in *United States v. Robinson,*[72] the case most

68 28 U.S.C. § 2255. The section provides in part:

> 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.

The dominant purpose of § 2255 was to relieve the district court where federal penitentiaries are located from the burden of all the habeas corpus petitions filed by the prisoners. For an excellent review of the purposes and effectiveness of § 2255 see Smith, *Title 28, Section 2255 of the United States Code — Motion to Vacate, Set Aside or Correct Sentence: Effective or Ineffective Aid to a Federal Prisoner?* 40 NOTRE DAME LAWYER 171 (1965). See also Note, *Procedural Substitute for Habeas Corpus: A Critical Analysis and Comparison,* 34 ST. JOHN'S L. REV. 81 (1959); Note, *Section 2255 of the Judicial Code: The Threatened Demise of Habeas Corpus,* 59 YALE L.J. 1183 (1950).

69 This descriptive term has been applied to state cases dismissed because of such procedural defaults as failure to file timely notice of appeal. The term was evidently originated by Professor Reitz. See Reitz, *Federal Habeas Corpus: Impact on an Abortive State Proceeding,* 74 HARV. L. REV. 1315 (1961).

70 Fay v. Noia, 372 U.S. 391, 445 (1963) dissenting opinion.

71 It should be emphasized that Hodges v. United States, 368 U.S. 139 (1961) is not, as some have believed, accurate authority for the contention that § 2255 is an inappropriate remedy for a defendant who excusably failed to file his appeal within the ten-day limitation. In *Hodges* the Court did not actually reach the question whether collateral relief could be secured when the federal prisoner has a claim of constitutional dimension and failed to timely

frequently cited for the proposition that excusable neglect will not justify a belated appeal, the Court expressly noted that a § 2255 hearing may be available to rectify a denial of a basic constitutional right.[73] Also, shortly after *Fay* the Ninth Circuit[74] examined that decision's implications as to the availability of a § 2255 hearing for a federal prisoner, who alleged that perjured testimony was used against him and also that he lost his right to appeal only because his counsel failed to follow his instructions. Evidently, the Court thought that collateral relief could be available since it remanded the case to the district court to determine whether the defendant had in fact intentionally relinquished his right to appeal, and if he had suffered any prejudice in not securing a review. Subsequently, Mr. Justice Black persuasively contended in his dissenting opinion in *Berman* that the petitioner, who had alleged a constitutional infirmity in his conviction, could assert his rights in a § 2255 hearing. The Justice cogently reasoned that if Noia could secure relief despite his failure to appeal it would be "unthinkable that the same rule should not be applied in federal courts so as to grant relief to a defendant who has been denied a federally guaranteed right because of his failure to comply . . ." with the ten-day rule.[75]

Therefore, it appears that a defendant who has a claim that is cognizable in a § 2255 hearing may secure relief under that section even though he had failed to appeal because of excusable neglect. Manifestly, if the defendant, who has inadvertently failed to appeal is to secure collateral relief under § 2255 he must have a *constitutional* claim which is within the scope of, or is cognizable in, such a proceeding. As mentioned above, the scope of collateral review under § 2255 is comparable to the scope of habeas corpus:[76] both remedies are designed to provide relief from deprivations of a constitutional right. If the defendant does not have a claim of constitutional magnitude he will probably not be able to secure collateral relief; the remedy was not intended, nor is it allowed, to serve as an appeal.[77] However the Court has never attempted to enumerate the instances in which § 2255 relief may be granted. Therefore, the question arises whether an attorney's willful or negligent failure to note a timely appeal could be such a denial of effective assistance of counsel as to be, in itself, a constitutional infirmity and therefore cognizable in a § 2255 hearing. At first glance, the question appears frivolous. The right to appeal is not essential to due process[78] and, while incompetence of counsel may, in rare instances, be

note his appeal. The defendant asserted that his confession was secured because of an illegal detention and that he should have been accorded a § 2255 hearing regardless of his failure to appeal. The Court dismissed the writ as improvidently granted, evidently because the records of the case showed that there was not an unlawful detention and not because of the defendant's failure to appeal. See 60 MICH. L. REV. 1168 (1962).

72 361 U.S. 220 (1960).

73 *Id.* at 230, n. 14. See Hixon v. United States, 268 F.2d 667 (10th Cir. 1959).

74 Dodd v. United States, 321 F.2d 240 (9th Cir. 1963).

75 Berman v. United States, 378 U.S. 530, 532 (1964) (dissenting opinion).

76 United States v. Hayman, 342 U.S. 205 (1952); United States v. Meyers, 84 F.Supp. 766 (D.D.C. 1949), *aff'd,* 181 F.2d 802 (D.C. Cir.), *cert. denied,* 339 U.S. 982 (1950).

77 Hodges v. United States, 368 U.S. 139, 141 (1961) (dissenting opinion); Sunal v. Large, 332 U.S. 174 (1947).

78 Ohio *ex rel.* Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 80 (1930). Despite the fact that appeal has not been given the dignity of a due process-protected right, it has, as was noted at the outset, been given an increasingly important position in the administration of criminal justice. See Coppedge v. United States, 369 U.S. 438 (1962).

grounds for reversal,[79] the requirements of the sixth amendment would have to be extensively expanded if the mere failure to take a timely appeal could be considered a deprivation of the defendant's constitutional rights and thus cognizable in a § 2255 hearing. Nevertheless, several recent cases have encountered the question of whether the attorney's failure to file a timely appeal is, in itself, a sufficient reason for allowing a § 2255 proceeding. In none of these cases did the court discuss the availability of a § 2255 hearing in terms of whether the deprivation of the defendant's right to an appeal presented a constitutional infirmity, and would thus be within the traditional scope of the remedy. Rather, the courts have apparently accepted the idea that the remedy provides some flexibility and can be molded to rectify serious wrongs whether or not the error has heretofore been considered of constitutional proportions. Several courts have absolutely rejected the argument that a § 2255 hearing is available upon a mere showing of neglect of counsel[80] or on the sole ground that the attorney, contrary to the defendant's instructions, had failed to note an appeal.[81] A few courts have intimated that the failure of the defendant's attorney might be a sufficient denial of effective assistance and cognizable in a § 2255 hearing, but only if there was plain reversible error in the trial.[82] Finally, the First and Seventh Circuits have provided relief to an unwary defendant where there were indications that his attorney had actually deceived him into believing that an appeal had been noted.[83] The First Circuit's opinion in *Desmond v. United States*[84] is worthy of a brief analysis. The court recognized that § 2255 was not intended to serve as a substitute for an appeal; yet it also realized that the remedy is a flexible one, capable of rectifying a denial of basic rights. It persuasively reasoned that because of the undeniable importance of the right of appeal, and the implications of *Fay*, a defendant who had lost his appeal because of the deception of his counsel was entitled to a § 2255 hearing.[85]

It is not the purpose of this note to attempt to assay the wisdom of expanding the traditional scope of the collateral remedy so as to include the deprivation of the right to appeal which results when an unscrupulous or negligent attorney fails to file a timely appeal. However, these cases illustrate the increasing importance the courts have attached to the right to appeal, and their reluctance to withhold all remedies from one who has, through no fault of his

79 Wilson v. State, 222 Ind. 63, 51 N.E.2d 848 (1943). But the incompetency of counsel will rarely be considered a violation of due process. See Tompsett v. Ohio, 146 F.2d 95 (6th Cir.), *cert. denied*, 324 U.S. 869 (1944).

80 Dennis v. United States, 177 F.2d 195 (4th Cir. 1949); United States v. Peabody, 173 F. Supp. 413 (W.D. Wash. 1958).

81 Wilson v. United States, 338 F.2d 54 (9th Cir. 1964); United States v. Carrell, 231 F. Supp. 724 (D.D.C. 1964), where the court intimated that § 2255 could not be used to provide relief if the defendant's counsel did not file his appeal within the appropriate time even though the Court of Appeals had previously remanded the case to the court to determine whether the defendant actually had informed his attorney to file the appeal. Carrell v. United States, 335 F.2d 686 (D.C. Cir. 1964). The action of the Court of Appeals seems to imply that it considered § 2255 an appropriate means of relief.

82 Glouser v. United States, 296 F.2d 853 (8th Cir. 1961); Mitchell v. United States, 254 F.2d 954 (D.C. Cir. 1958).

83 Desmond v. United States, 333 F.2d 378 (1st Cir. 1964); Calland v. United States, 323 F.2d 405 (7th Cir. 1963). This court did not specifically mention the remedy which was available but presumably it was a § 2255 hearing.

84 Desmond v. United States, *supra* note 83.

85 *Id.* at 380.

own, lost this right. Most importantly, cases such as *Desmond* furnish a persuasive reason for the adoption of a provision which would allow a belated appeal in instances where the appeal was not filed within the prescribed time because of excusable neglect. This "persuasive reason" is simply that these cases might not have arisen if an "excusable neglect" rule had existed. The defendant's claim would be promptly decided in the belated appeal and resort to collateral relief would be unnecessary.

IV. Summary and Conclusions

In order to examine the problem of balancing the interest in securing a finis to the litigation with fair treatment of the defendant who has failed to note a timely appeal, one must consider the present practices of the courts when confronted with an untimely petition for an appeal, and the collateral relief which may be available if the belated appeal is denied. As we have seen, both the federal courts and courts of states which do not have a statutory provision governing an excusable delay generally dismiss any untimely appeal, regardless of the cause for the delay.[86] The defendant then may attempt to secure relief through a collateral remedy. A state prisoner may pursue his state's postconviction remedy, but oftentimes the remedy is not of sufficient scope to rectify even the constitutional infirmities of his conviction;[87] therefore, the state prisoner may be compelled to resort to the federal writ of habeas corpus. If the state prisoner has a claim of constitutional magnitude, he will not be deprived of the writ simply because he had unwittingly failed to file a timely notice of appeal in the state court.[88] A federal prisoner who has a constitutional claim and who has lost his right to appeal because of laxity in noting his appeal can probably secure collateral relief in a § 2255 hearing.[89] While the mere fact that the defendant has lost his right to appeal because of his attorney's negligence is not a sufficient reason for resort to the extraordinary remedy,[90] recent cases indicate that § 2255 is an appropriate means of relief for a defendant who was fraudulently deprived of his right to appeal by his attorney.[91]

In view of these facts, one can advance a persuasive argument that both the federal and the state rules should provide for an extension of the period in which an appeal may be filed when excusable neglect was the cause for the delay. Such a provision will frequently eliminate the use of the more circuitous collateral remedies and, obviously, an appeal is the preferred and most appropriate mode of review. An "excusable neglect" provision will also aid the defendant who has a meritorious claim which could be rectified on appeal but which is not within the scope of the more limited collateral remedies. It would seem difficult to argue that, regardless of the cause of the failure to note a timely appeal, the defendant should be deprived of his only opportunity to correct the errors that may have been committed. The loss of the right to appeal is a sub-

86 See text accompanying notes 19-31 and 35-36 *supra.*
87 See text accompanying notes 51-58 *supra.*
88 Fay v. Noia, 372 U.S. 391 (1963); see text accompanying notes 60-66 *supra.*
89 See text accompanying notes 68-75 *supra.*
90 See text accompanying notes 75-80 *supra.*
91 See text accompanying notes 83-85 *supra.*

stantial one; to lose it because of circumstances beyond the defendant's control arouses a sense of injustice.

Admittedly, one can also assert valid arguments against the adoption of an "excusable neglect" provision. It is possible that such a rule would be grossly abused by the fabrication of a multitude of spurious claims. Prisoners who have lost their right to appeal can be expected to conjure up ingenious excuses for their failure to note a timely appeal, and may not hesitate to embarrass the responsible attorney by falsely accusing him of negligence.[92] Indeed, it has been intimated that the proposed provision would unseal the proverbial Pandora's box.[93] However, there are numerous factors which may deter abuse of an "excusable neglect" rule. We can rely to some extent on the ability of a court to expose and to ferret out the fictitious claims. Also, the defendant must prove both that the failure to note the appeal was not of his doing, and that sufficient grounds for an appeal exist. Finally, a reasonable time limitation within which the delayed appeal may be recognized can be established. Such a time limitation is probably a necessity even though in rare instances it may prevent a defendant, who has a meritorious claim and who does in fact have a valid excuse for his failure to file the appeal, from securing relief.[94]

The problem of balancing the interests of prompt criminal administration and finality of litigation and the sometimes competing interest of assuring that justice has been done is not susceptible to an invulnerable solution. Panaceas are not easily achieved where important but inconsistent interests are involved. It is submitted, however, that a provision permitting a belated appeal where the failure to note the appeal within the time prescribed was caused by excusable neglect is a sufficiently practicable one. The provision properly sacrifices expediency in the interest of promoting the courts' dominant purpose of doing justice and, therefore, is preferable to the procrustean practice of refusing an untimely appeal, regardless of the cause of the delay.

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92 See, *e.g.*, Peoples v. United States, 337 F.2d 91 (10th Cir. 1964); United States v. Carrell, 231 F. Supp. 724 (D.D.C. 1964).

93 United States v. Carrell, *supra* note 86 at 728.

94 A defendant, who excusably failed to file his appeal even within the extended time period, could conceivably resort to the collateral remedies.