

169

Supreme Court of the United States

October Term, 1968

In the Matter of:

- - - - -X
ADOLPHO RODRIQUEZ,
Petitioner,
vs
UNITED STATES,
Respondent.
- - - - -X

Docket No. 749

Office-Supreme Court, U.S.
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C O N T E N T S

ORAL ARGUMENT OF:

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William Ross Wallace, Esq.
on behalf of Petitioner 2

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on behalf of Respondent 14

REBUTTAL ARGUMENT OF:

William R. Wallace, Esq.
on behalf of Petitioner 36

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - - x
4 Adolpho Rodriquez, :
5 Petitioner, :
6 v. : No. 749
7 United States, :
8 Respondent. :
9 - - - - - x

10 Washington, D. C.
11 Wednesday, March 26, 1969.

12 The above-entitled matter came on for argument at
13 10:10 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE, Associate Justice
22 ABE FORTAS, Associate Justice
23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

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BEATRICE ROSENBERG
Criminal Division
Department of Justice
Washington, D. C.
Counsel for Respondent

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: No. 749, Adolpho Rodriguez,
3 Petitioner, versus the United States.

4 THE CLERK: Counsel are present.

5 MR. CHIEF JUSTICE WARREN: Mr. Wallace.

6 ORAL ARGUMENT OF WILLIAM ROSS WALLACE, ESQ.

7 ON BEHALF OF PETITIONER

8 MR. WALLACE: Mr. Chief Justice and may it please the
9 Court.

10 This is a case that comes up on the petition under
11 Section 2255, a Federal prisoner who claims that he was
12 improperly denied his right of appeal.

13 His petition alleges that he is of Mexican descent,
14 did not speak the language well. The trial was conducted
15 through an interpreter. At the conclusion of the trial and
16 after the time of sentence the prisoner alleged that he requested
17 the interpreter to ask the court and to ask his counsel to
18 arrange for his appeal.

19 He also alleges that his counsel agreed to do so.
20 And that an oral notice of appeal, if there is such a thing,
21 was given but no written notice conforming to the statute
22 was filed.

23 The prisoner originally and within six or seven weeks
24 after the time of sentence filed what I suppose you would call
25 an application for a late appeal.

1 That was denied by Judge McBride, the District Judge
2 in Sacramento and by the Circuit Court of the Ninth Circuit,
3 upon the grounds that under the rule of the Ninth Circuit an
4 application for a right of appeal, late, where a prisoner
5 claimed that he had been denied that right of appeal must also
6 show some basis for the appeal.

7 In other words, it must show not only that he was
8 deprived of that constitutional right but he must show that he
9 had something upon which some reasonable basis upon which to
10 appeal.

11 The proceedings were in 1963. In 1966 the prisoner
12 then filed an application under Section 2255 and that applica-
13 tion was very much more detailed than the previous ones. He
14 had apparently risen in the hierarchy of the jail and had been
15 there long enough to learn a little more English and that was
16 a better job than the first one.

17 There again and without hearing, without reference to
18 the transcript, without reference to his counsel and without
19 reference to the United States Attorney, Judge McBride denied
20 that application and again he then filed his motion to have
21 the appeal heard in forma pauperis in the Court of Appeals for
22 the Ninth Circuit.

23 The court again without hearing denied that motion,
24 again on the basis of the rule in the Ninth Circuit that in
25 addition to showing the deprivation of the right to appeal a

1 prisoner must show something more at least must show the basis
2 of an appeal.

3 The cases in California in our Circuit are not
4 wholly clear whether he has to show conclusively or whether
5 the Judge here talked about rights constitutional or otherwise
6 but in any event it is clear that in our circuit different from
7 most of the circuits a prisoner claiming his deprivation of
8 his right to appeal must show that he, if granted that right, has
9 at least a reasonable basis upon appeal.

10 Now in the application for the motion for the writ
11 of certiorari the prisoner set forth these facts. The Solicitor
12 General in his opposition felt that a prisoner should at least
13 show something that would indicate some basis for an appeal.

14 In our opening brief I pointed out that here was a
15 prisoner of Mexican descent having very little knowledge of the
16 language. He was tried with four or five other people, at
17 least two or three of whom had separate counsel. The whole
18 proceeding was conducted through an interpreter.

19 And how in heaven's name a person under those cir-
20 cumstances would be able to recognize and remember what errors
21 occurred at the trial that might give him some basis for an
22 appeal seemed to me an impossibility.

23 I think in the Solicitor's brief they have in effect
24 waived that point. They seem not to rely any further upon the
25 basis that something should be done that the prisoner must show

1 something beside the actual deprivation of his right of appeal.

2 The brief of the Solicitor of the United States in
3 this case seems to have waived that point and be really talking
4 about whether this prisoner should now have a hearing, or
5 whether this Court should send this matter back to the District
6 Court to permit the District Court to interrogate and take
7 affidavits from the trial lawyer that this man had or whether
8 he has to bring the prisoner down from McNeill's Island.

9 We are talking now I think only of mechanics. My
10 own view of the matter and I think I can express it easily is
11 that if we take the rule of the Boruff case which as described
12 in Hannigan simply says a prisoner who is deprived of his
13 right of appeal or a prisoner's right of appeal with the ten
14 day period during which that right must be exercised does not
15 commence to run until such period as the prisoner is effectively
16 represented by counsel.

17 Now, after our original brief I obtained from the
18 court reporter in Sacramento the transcript of the last day of
19 the trial. That is to say, the transcript of the day upon
20 which this prisoner was sentenced, this prisoner and the
21 others.

22 Oddly enough that transcript shows no oral notice
23 of appeal. Although the lower court and the Circuit Court in
24 our circuit had both said it was there. In other words, we have
25 a judicial finding based on no fact whatever, an obvious result

1 of not even looking at the transcript.

2 However, the transcript does contain a very much more
3 important -- on page 3 of the appendix to my reply brief --
4 the counsel then makes the motion not in very good language but
5 he said it is just proceeding in forma pauperis in behalf of
6 Adolpho Rodriquez and Etta Rodriquez while they are before the
7 court, hereafter if they are transported away we would have to
8 have them returned to make a motion before the court.

9 Judge McBride then says no, I don't wish to take up
10 that motion at this time. It is 5 minutes after 12. We have
11 taken all morning on it. I have no idea what your motion is
12 and all motions have to be in writing.

13 Well, it was clear at that moment that the counsel
14 who had been retained by Rodriquez and his wife for the trial
15 was advising the court that he was stepping out.

16 You know the only purpose in making a motion of that
17 sort is to indicate to the court that he was through, that
18 lawyer was finished, and the motion to proceed in forma
19 pauperis could only mean that he was in effect suggesting to
20 the court that he was through, the court should appoint a new
21 counsel and permit the man to appeal.

22 Section 37(a), Rule 37(a) says very clearly that if
23 a prisoner is not represented by counsel, then the court must
24 advise him of his right to appeal and the Clerk must enter the
25 notice.

1 Now it would have been perfectly simple to have
2 accomplished that purpose at that time. Now we are five or
3 six years later, yes, six years later. He has been in jail
4 for six years. It seems to me perfectly clear that on the
5 basis of the transcript the court can well now state that the
6 prisoner's right to appeal commences at such time as the court
7 in Sacramento appoints for him counsel and permits him then
8 to enter his appeal.

9 Now I think there is no point in my discussing the
10 rule in the Ninth Circuit where I think because of their desire
11 in the circuit and a very proper one to prevent repetitious
12 applications under Section 2255 they laid out a lot of rules.
13 I think the lower courts misunderstood the Dodd case somewhat.

14 But in any event while I can only agree with the
15 courts in their desire to prevent to the extent they can,
16 repetitious petitions under Section 2255, that has nothing to
17 do with the right of a prisoner to be secure in his right of
18 appeal.

19 Now this is not a case that can easily arise again.
20 Because as your Honors well know, under the change of rule, no
21 matter whether the prisoner is represented or not any longer
22 the courts all now advise him of his right of appeal and if
23 counsel is not going to take it the court simply instructs the
24 clerk to enter the order.

25 So that we are talking about a situation that

1 certainly is not one to plague us in the future. This is a
2 simple situation of a man having very little knowledge of the
3 language whose trial counsel was not willing apparently to
4 proceed past the trial who attempted to make clear to the
5 Trial Court that he was withdrawing and whose failure and I
6 think it a very serious failure on the part of the counsel was
7 that he failed to file the proper motion.

8 Either that afternoon or on the following day. He
9 did nothing further.

10 Q What would the motion have been?

11 A I think it would have been a motion, your
12 Honor, to permit the prisoner to proceed in forma pauperis on
13 the appeal it would have meant I think also the appointment by
14 the court of counsel for the prisoner.

15 Q The difficulty I have is that reading Roman III
16 of the appendix to your reply brief, there is no real indi-
17 cation there of any wish to appeal, of any desire or purpose
18 or wish to appeal.

19 A That I agree, your Honor. I think we have this
20 odd situation.

21 The first time this came up Judge McBride said in
22 his first opinion that the prisoner claimed that he had made
23 an oral notice of appeal.

24 The case then went up before Judge Chambers and
25 Judge Bone in the Circuit and somehow or another Judge Bone,

1 I think, wrote the opinion. Judge Bone said the right that
2 notice of appeal, oral notice of appeal, was given by retained
3 counsel. That was the basis of that.

4 Q You don't read the record as supporting that
5 statement, do you? I don't.

6 A I don't read this record as supporting it, no.

7 Q That is what I mean.

8 A No. Then it came down again on Section 2255
9 application before Judge McBride and Judge McBride then said
10 that an oral notice had been made. It goes back on up to the
11 Circuit and Judge Jerkberg and I have forgotten who else was
12 on the panel, they then affirm again that this oral notice
13 was given.

14 I can find no oral notice.

15 On the other hand, I can understand perfectly well
16 that a Mexican prisoner would think that this motion that the
17 man was making under this forma pauperis motion was just that
18 and obviously it was intended as that.

19 Q How do we know that?

20 A It could have no other purpose, your Honor.

21 The prisoner to appear in forma pauperis if he is
22 just going to the jail house, there is no purpose of his having
23 the motion made except to have counsel appointed for him so
24 he could appeal. If he had no other purpose. Otherwise he
25 has got his 20 years in the Federal prison.

1 It seems to be one of the clearest cases that I know
2 of of a failure for whatever reason of counsel to protect the
3 right of the client to appeal.

4 Now I can understand Judge McBride, it had been a
5 long 5 or 6 week's trial, conducted through an interpreter
6 and a lot of lawyers and he was a little weary, I guess,
7 himself and shut the man off before he had completed his motion.

8 Now that does not excuse counsel -- He is retained
9 counsel -- for not completing that motion and making it in
10 writing and making it wholly clear.

11 On the other hand, it would seem to me an extraordinary
12 thing for a court to hold that the prisoner clearly wanted to
13 appeal -- he has alleged in all his papers that he wanted to
14 appeal. There has been no denial on the part of anybody that
15 he wanted to appeal.

16 He was denied his right of appeal, not on this basis,
17 of this motion because nobody had ever even seen it. But
18 denied it only on the basis that even assuming he wanted his
19 right of appeal and that it should be given to him he must
20 show in addition to that a basis upon which an appeal might be
21 successful.

22 In other words, in our circuit they have confused
23 the constitutional rights provision under Section 2255 with
24 the right of direct appeal. They have taken the right of
25 direct appeal if it is late and added to it a demand that a

1 prisoner be able to show, not only that he was improperly
2 denied of his right of appeal but that having been so denied
3 he still has valid grounds for an appeal.

4 Now, of course, that is a wholly impossible task
5 for a prisoner in this situation who obviously has no knowledge
6 of law, for him now to try six years later and recall what
7 happened in the trial and what the trial errors were, it is
8 perfectly impossible.

9 It seems to me perfectly clear that this prisoner
10 should be granted a hearing. I don't know that even granting
11 a hearing is necessary. But at least that I would think would
12 be the minimum that the prisoner can have a hearing, his
13 counsel can be brought in and it can be established, the facts
14 can be established, the record is available, the transcript --
15 the notes at least -- are available and the United States
16 Attorney is available, Mr. Minelli, his counsel is available.

17 The case I think is one that illustrates better than
18 most the difficulties that arise when these matters are handled
19 in the lower courts without reference to counsel and without
20 reference even to the transcript.

21 Because obviously here we have gotten off on the
22 basis of somebody's recollection when five minute's work in
23 reading the transcript and a few minutes in calling Mr. Minelli
24 would have established that what Mr. Minelli was saying was I
25 have represented the prisoner at the trial, I am not going to

1 represent him further and I ask the Court to appoint counsel
2 to do so.

3 Q Is there any indication at this point, what,
4 if anything, he would be able to present on appeal?

5 A I have no idea.

6 I can say wholly ex parte, your Honor, simply from
7 discussing this matter over the telephone with Mr. Minelli,
8 I tried to get him two or three times. He is a very busy trial
9 lawyer and I was never able to make an appointment. He told
10 me that he thought he had at least one valid ground of appeal.

11 But that this had been a long trial. He felt he had
12 not been compensated as he should have been and that he was not
13 going to take the thing up on appeal. That he told the prisoner
14 he would not take it up on appeal for him but that he would
15 arrange it.

16 Well, the prisoner, you recall in his petition said
17 this lawyer said he would arrange it. Well, the arranging it
18 was this forma pauperis business but he failed to do it.

19 So I think we have got a clear case where the
20 prisoner was improperly deprived of his right, the right is
21 an absolute right that in the absence of the prisoner
22 knowledgeably waiving or giving up that right, there is not
23 any indication here that this prisoner gave up any right to
24 appeal knowingly. There is every indication from the fact
25 that the prisoner started within six weeks, a few days after the

1 30 days went by he was writing out the first somewhat feeble
2 attempt to get himself an appeal.

3 So it is clear that he wanted one. It is clear from
4 my going through the records and my discussion with Mr. Minelli
5 that the prisoner and his wife wanted to appeal.

6 Q What has happened to the petitioner's wife?

7 A The petitioner asked me, wrote to me and asked
8 me if I could find out where his wife was. He has not been
9 able to communicate with her I think he said since 1943 or 44.

10 Q She was convicted?

11 A She was convicted.

12 Q I see.

13 A And sent to Terminal Island Prison, I think, in
14 Southern California.

15 He asked me if I would write to her brother and I
16 did and I received no reply. I have not tried to communicate
17 with her in the Federal prison if she is still there.

18 Q She, too, seems to have been ---

19 A Yes.

20 But he has no knowledge of where she presently is
21 and she may for all I know still be in the prison in California.

22 Thank you.

23 MR. CHIEF JUSTICE WARREN: Miss Rosenberg.

1 ORAL ARGUMENT OF BEATRICE ROSENBERG

2 ON BEHALF OF RESPONDENT

3 MISS ROSENBERG: May it please the Court.

4 There really is a very narrow, almost no disagreement
5 between petitioner and the Government in this case.

6 The cases are quite clear and quite general through-
7 out the court that there are two situations which do call for
8 some relief on bi-collateral remedy where prisoner claims
9 that he has been denied the right of appeal.

10 One is where his counsel has not told him anything
11 about his rights of appeal and has abandoned him and the other
12 is if counsel has been guilty of what the court sometimes call
13 broad but if you look at the case is a matter to overreach it.

14 There doesn't seem to be any conflict on the propo-
15 sition that if a counsel assures the defendant that he will
16 take care of his appeal and then deliberately does nothing,
17 not just sit, the fact that this is a basis for collateral
18 relief.

19 Where the Ninth Circuit and possibly two other
20 circuits although their decisions are not wholly clear have
21 been different where there has been a conflict is on the
22 question of whether in addition to alleging a deprivation of
23 the right to appeal the prisoner has to show that there was
24 some basis of appeal.

25 And the Ninth Circuit is the one that insisted on

1 this requirement. We understand what they were trying to do
2 which was try to sift the wheat, the good case from the bad
3 one and we assume that if a man had a good point on appeal
4 it would take a vote to his contention that counsel deliber-
5 ately didn't do it.

6 However, on reflection we have come to the conclusion
7 that we can't support that as a requirement for requiring
8 action in the District Court and the reason for that is that
9 it seems to us not wholly consonant with the real remedy that
10 you are trying to get at, what collateral relief was primarily
11 and originally designed to do was to take care of the person
12 who got caught in the coils of the law either the judge or
13 the prosecution or his own attorney.

14 And it seems to us that those who are most likely to
15 abuse, that really kind of make up stories that we do encounter
16 could meet the Ninth Circuit requirement with no difficulty.
17 But the truly honest, ignorant person who had been overreached
18 by an unscrupulous lawyer would find it most difficult to
19 specify whether there was legal error at his trial and for
20 that reason we do not urge the Ninth Circuit rule.

21 But since the case is here we do think there are
22 some things this court could help clarify with respect to
23 this kind of a claim or perhaps even more generally with respect
24 to this question of what does a judge do when he gets an
25 allegation of this kind.

1 I think no one who has had experience with them can
2 fail to appreciate the fact that a lot of these are simply
3 not true and the result of wishful thinking.

4 On the other hand, there are some that are.

5 We have agreed that if what this petitioner alleges
6 in his petition for a writ of certiorari which is much more
7 detailed and much more specific than his allegations in the
8 District Court, we have agreed that if what he alleges in the
9 petition for certiorari were alleged to the District Court
10 the District Court would have to do something.

11 We find it a little difficult to fault the District
12 Court on not acting on what it had before it. But even
13 assuming -- it is true that the District Court rested on the
14 Ninth Circuit rule which we are not defending but even on
15 the petition of the District Court it seems to us the petition
16 is not specific enough as the petition for certiorari is
17 to require action and we think that is different.

18 We think you have a right to require specific alle-
19 gations in the District Court about what went on with his
20 lawyer. We can't expect an ignorant prisoner to know where
21 this legal error at a trial but he can know what went on with
22 his lawyer.

23 Now, in the petition, he alleges something which is
24 fairly consistent with what petitioner's counsel says. He
25 has discovered ex parte. He says that he asked the attorney

1 to appeal. Petitioner's trial counsel gave oral notice of
2 appeal. I assume he considered this rather cryptic motion to
3 be an oral notice of appeal.

4 Then he says petitioner's wife was then placed in a
5 room to await transportation back to the county jail and that
6 one of his other papers in the record says he was held in the
7 county jail for 30 days. But at this point he says, while they
8 were waiting petitioner's trial counsel came to see petitioner
9 and his wife and told him he would arrange for the cases to
10 be appealed.

11 Now that is the part that we don't know what happened
12 then. That is after this hearing, whatever went on there.
13 And whether it is true or not I have no way of knowing.

14 But we agree that if that allegation if counsel said
15 he would arrange for their cases to be appealed, which appears
16 only in the petition for certiorari, it may to the District
17 Court call for some action.

18 But the question is, what action.

19 And I think that this is important not only in this
20 situation which we hope will arise rarely in view of the new
21 rules but even more basically generally in 2255 when you get
22 allegations often made out of whole cloth what is a judge to
23 do and it seems to me that this court decisions in both
24 Walker against Johnston in 312 United States and in Machibroda
25 have been misunderstood.

1 In both of those cases there were responsive affi-
2 davits filed and the court held on the basis of those responsive
3 affidavits where one side said "X" and the other said exactly
4 the opposite that the Court could not decide the matter on
5 affidavits that there had to be a hearing.

6 And I think there has been a tendency as a result of
7 that to consider that affidavits have no part at all in 2255
8 applications.

9 Q As a result of what case?

10 A Machibroda.

11 Q Machibroda, I thought so.

12 A And before that Walker against Johnston.
13 Although in both of those cases there were affidavits. What
14 the court said as I read both of those cases is these affi-
15 davits present a clear-cut conflict of testimony and we have
16 something as clear-cut as that it has to be resolved in a
17 hearing.

18 I presume if the lawyer in this case said I did not
19 arrange, I did not tell the defendant I would arrange for
20 the appeal, and the defendant said he did, there might be of
21 necessity a hearing except for what I am going to say next
22 because I don't think that is enough.

23 It seems to me that the first thing you do in 2255
24 generally and certainly in this situation is to try to get a
25 responsive pleading. In one form or another.

1 Now this Court, just last Monday in the Harris
2 case talked about flexibility of procedures. I don't think
3 it has to be a formal responsive pleading like the old return
4 in habeas corpus because that wouldn't be meaningful. But
5 what you do want is to get something in the record which seems
6 to me would most easily take the form of an affidavit, getting
7 from in this case the attorney, since the Government has no
8 part in all of this. This was retained counsel and the
9 Government obviously knew nothing of what went on here. Get
10 from the attorney a response.

11 Now I can conceive of several responses which might
12 settle the whole question one way or another.

13 For example, if the attorney says he haddid tell me
14 he would like to appeal and I said I didn't feel that I could
15 do it for less than X dollars and that I did not feel it was
16 part of my obligation to tell him anything about his rights
17 in forma pauperis. Why? Because we don't have to have a
18 hearing. We just go ahead with an appeal if that is the
19 situation.

20 On the other hand, we had a case, I think this term,
21 maybe last, in which a prisoner alleged that his attorney had
22 deliberately failed to go ahead with his appeal and the
23 attorney had filed in court a written consent signed by the
24 prisoner to dismiss the appeal.

25 I think experienced attorneys faced with charges

1 are probably being careful if they decide not to go ahead
2 with an appeal to get some sort of acknowledgement from counsel
3 because counsel appointed and abused, and appointed as well
4 as retained are subject to a great many charges, by prisoners,
5 very few of which prove to be justified.

6 However, there may be other situations.

7 An Attorney may say I didn't feel the case had any
8 merit. I was convinced that this client had a great deal of
9 money. And I, therefore, saw no need to inform him of his
10 rights in forma pauperis.

11 In that kind of a situation at least the issues are
12 narrower. The court has the legal question to decide. Does
13 a retained counsel have to inform a man he believes to be
14 nonindigent of his rights?

15 Q Miss Rosenberg, is there any place along the
16 line where you considered giving the prisoner a lawyer?

17 A Oh, I think that if it becomes -- once you get
18 a responsive pleading, a man says as this prisoner says here
19 while we were waiting counsel said he would arrange for an
20 appeal, and he didn't do it. And I left convinced that my
21 appeal was going through.

22 Now I think we get a reply from the lawyer first
23 before we give him a lawyer. We get a responsive pleading
24 whether it is in the form of a request to the United States
25 Attorney to get it ---

1 Q When, if ever, does the prisoner get a lawyer?

2 A If, from the lawyer's response it becomes
3 clear he was deprived of his right of appeal, of course, you
4 give him a lawyer and you give him a transcript and you go
5 ahead with the appeal.

6 If it becomes clear from the response that you have
7 a kind of an issue of fact that can't be determined on affi-
8 davits then you give him a lawyer and have a hearing under
9 2255, and if it is decided that he does have a right of appeal
10 you give him a lawyer on appeal.

11 There is no question that if the appeal is allowed
12 he is given a lawyer. The question is, can't we get a re-
13 sponsive pleading which at least serves the function of
14 narrowing the issues and which may even avoid the necessity
15 of a hearing before we have to give him a lawyer.

16 Q My problem is if I understand you correctly
17 that in this very case once this petitioner had a lawyer the
18 lawyer was able to say it properly so that you admit that if
19 that had been filed in the District Court it would have had
20 to have been heard.

21 Doesn't that mean that when he gets back to the
22 District Court he has to have a lawyer?

23 A Your Honor, he didn't have a lawyer except a
24 prison lawyer and I guess a pretty good one in this case.

25 The allegations that we consider sufficient are the

1 in the petition for writ of certiorari before counsel here
2 was appointed.

3 Q That is the one?

4 A That is the one.

5 Q Well, he can't have that one in court because
6 he is still in prison?

7 A All we are saying is these allegations that he
8 makes here are the kind that a prisoner can make, particularly
9 in the light of this Court's decision in Johnson against Avery
10 and the system that has been developed in the Federal prisons
11 in most of them of having assistance to petitioners he can
12 say what he said here.

13 This isn't asking him for legal point. This is
14 simply asking him to say what happened between him and his
15 lawyer.

16 Now all we said was, if this same kind of an alle-
17 gation, just copy, were put to th District Court the District
18 Court would have to do something. We admit that.

19 The question is, what does the District Court do
20 with that point? We say the first thing the District Court
21 does before it appoints a lawyer or before it decides to
22 hold a hearing is to ask for a responsive pleading from the
23 person that knows.

24 Which is the lawyer in this case and would be in
25 the form of an affidavit.

1 And it seems to us that this serves at least the
2 function of narrowing the issues. Because if a lawyer does
3 say yes, he wanted to appeal and I said no, I wouldn't do it
4 unless he paid me "X" dollars but I felt no need to do
5 anything further even to informing him of his rights in forma
6 pauperis then the District Court doesn't have to hold a
7 hearing. It just has to appoint a lawyer and let the appeal
8 proceed.

9 Q Vacate the sentence I suppose so ---

10 A Well, there are two different ways of doing it
11 and I think the one that your Honor suggests is a better one.
12 It is a way suggested by the District of Columbia and by
13 the Eighth Circuit, I believe, which is to vacate the sentence
14 and resentence so that the 10 days for appeal starts to run,
15 and, of course, at that point he has to appoint a lawyer for
16 him.

17 I think that is a better way. And it had problems
18 before because there would have been problems of credit on
19 sentence, but in view of the new statute which gives a prisoner
20 credit on a sentence for all the time spent in jail for that
21 offense, these problems would not arise and it seems to me more
22 expeditious and correct to have the sentence vacated and the
23 appeal proceed in that situation.

24 Q How long?

25 A And I think that it would if I may respectfully

1 so suggest be desirable that an opinion indicate so that the
2 courts who are faced with the problems will know what to do.

3 Q What is the other alternative procedure,
4 Miss Rosenberg?

5 A Pardon?

6 Q What is the other alternative procedure? You
7 said there were two of which this one you thought was
8 preferable.

9 A The other alternative has been for the District
10 Court on 2255 to consider the issues and say there is no
11 issue here that is worth an appeal.

12 Or there is an issue here worth an appeal and I
13 think the appellate court would rule this way and so I will
14 order a new trial or I wouldn't.

15 I think that is undesirable because it doesn't
16 remedy the wrong. The wrong is the failure to appeal and it
17 seems to me, therefore, that if you are going back to where
18 the wrong occurred you should give him the appeal immediately
19 and have the Court of Appeals pass on it rather than the
20 District Judge form whose rulings in a sense when he is trying
21 to appeal ---

22 Q Miss Rosenberg, wouldn't you think that in a
23 situation of this kind where we have an ignorant, illiterate
24 foreigner who is being tried for an offense and he hears this
25 colloquy in court and then shortly after 30 days attempts to

1 perfect his appeal and in two subsequent proceedings the
2 District Court examining the records and remembering what
3 happened on both occasions treated this as an oral notice
4 of appeal, and the two different panels of the Court of
5 Appeals considered it as an oral notice, do you not believe
6 that that brings a case to us in a form where we should decide
7 whether the Ninth Circuit rule is right or wrong instead of
8 trying to limit it in this way that you have been trying to
9 do?

10 A Oh, we have been agreeing ---

11 Q Why do you try --

12 A No, I think the Court ---

13 Q -- to narrow this down? Why isn't the man
14 entitled? Do you want the judge to say if he does come in now
15 and say I want an appeal on these grounds, and have the judge
16 pass on his own actions and say, no, it isn't good enough,
17 you can't appeal?

18 Why isn't he entitled to an appeal?

19 A Well, your Honor, I said I thought the preferable
20 procedure would be to have the judge vacate the judgment and
21 allow time for appeal. I think that would be the preferable
22 procedure.

23 Well, now on this question of ---

24 Q I didn't understand that you agreed that this
25 case should go back and he should be granted an appeal.

1 I thought you said he should go back and have affi-
2 davits signed by himself and contra-affidavits filed by
3 counsel and so forth and then have the judge determine whether
4 or not this was a notice of appeal.

5 A Oh, your Honor, I don't think that I can on my
6 own say that counsel was derelict in his duty without having
7 counsel heard. I don't know what happened.

8 Q Well, somebody was obviously derelict. Who was
9 it? Was it the petitioner? Was it the lawyer? Was it the
10 judge?

11 A I don't know.

12 Q Or was it the Court of Appeals? Somebody has
13 been derelict here.

14 A I don't know, your Honor.

15 I do know that there are cases in which there is a
16 determination, counsel has said to a prisoner, I do not think
17 there is anything to be gained by appeal.

18 Q We have nothing like that in this case. There
19 has nothing been said like that here.

20 A We don't know what has been said, your Honor.
21 We know what the prisoner has said.

22 Q What is the exact disposition that you think
23 should be made of this case?

24 A I think the proper is for this Court to rule
25 that the prisoner need not show ground for appeal. That, if

1 the allegations in his petition can be sent back to consider
2 whether the allegations in the petition for a writ of certiorari
3 -- let me say that on the basis of the allegations in the
4 petition for a writ of certiorari the District Court must
5 determine whether the petitioner has been deprived of his
6 right of appeal.

7 Now I think this does.

8 Q Isn't that the issue that is here right now?

9 A No, it is whether he stated a basis.

10 Q I beg your pardon?

11 A It is whether he has stated a claim which the
12 District Court should consider. And we agreed that he has
13 stated a claim which the District Court should consider but I
14 do think that counsel is entitled to be heard.

15 Now if counsel chooses to say that I should have gone
16 ahead, all right. But as I tell, your Honor, I have seen
17 cases where prisoners have said counsel refused to take an
18 appeal for me and then counsel has come forward with a
19 document which the prisoner has signed agreeing to dismiss
20 the appeal.

21 I don't think it is unfortunate I think that this
22 case has taken so long. It is unfortunate that his first
23 attempts weren't considered more carefully. But if we are
24 establishing the general rule I have seen too many cases where
25 counsel was abused, unnecessarily, to accept prisoner's word

1 as a general matter. I agree that if what Mr. Wallace says
2 he has learned informally was correct maybe the easiest way
3 in this case would be that. But I am in no position to say
4 that counsel was derelict without knowing the facts.

5 Q Are you suggesting that there should be a
6 remand here for the purpose of framing an issue as to what went
7 on between this man and his lawyer?

8 A Yes.

9 Q And depending on that, whether there would be
10 a hearing or not? Is that it?

11 A That is right.

12 That is our position now. The reason I hesitated
13 when you first asked me is we suggested in our brief that what
14 was said in the District Court was so unspecific compared to
15 what is said in the petition for certiorari that it would be
16 appropriate to just let him start all over again.

17 However, I don't think that is terribly important.
18 He has made these very specific allegations and in light of
19 the fact that counsel is convinced that they have a basis in
20 this case, then I think that it could well be a remand to
21 consider this.

22 But I do think that we cannot in a sense convict
23 counsel without giving him a chance to say what his version
24 of the event is.

25 Q Do we have to convict counsel or do we have

1 to interpret what he said to the court and determine how the
2 court understood what the counsel said? Isn't that what we
3 are after here rather than to try a lawyer. We aren't trying
4 any lawyer.

5 This man made a motion in court and he mentioned
6 that the defendant wanted to go ahead in forma pauperis. And
7 the court twice on subsequent proceedings has considered that
8 as an oral notice of appeal and two different panels of the
9 Court of Appeals has interpreted it in the same way.

10 Now, why do you say to us that we shouldn't inter-
11 pret it that way for the purpose of determining whether this
12 man gave notice of appeal?

13 A Well, your Honor, the judge said to counsel
14 you have to file a written ---

15 Q I beg your pardon?

16 A The judge even in this hearing said to counsel
17 you have to file a written notice. The prisoner himself said
18 he did confer with counsel after sentencing. Something went
19 on there.

20 Q Something went on. It is demonstrated in
21 court from what counsel said.

22 A No, after sentencing. This was at sentencing.

23 Q At sentencing his counsel said this man wanted
24 to proceed in forma pauperis and the court interpreted that
25 evidently as an abandonment of the client and a desire

1 from that moment for him to proceed in forma pauperis. And
2 within 30 days or shortly after 30 days the defendant was
3 trying to get into the courts. And what more do we need when
4 the courts have interpreted below the way they have?

5 A It still seems to me that the defendant has said
6 that counsel promised to do something counsel didn't do.

7 Not it is very simple if that is the fact and
8 counsel agrees it is the fact. I agree there is nothing
9 further to do. We don't need a hearing. He gets his right of
10 appeal.

11 Q You know full well that if this case goes back
12 and counsel says no I didn't tell him I would appeal, what I
13 said in court was what I meant. You know that the court is
14 not going to believe Rodriguez as against a practicing lawyer
15 in the city, don't you?

16 So he is denied the right of appeal then in spite of
17 the fact that the courts below and all these occasions have
18 said that except for the fact that he didn't delineate what
19 his cause of appeal was that he couldn't appeal.

20 That is the issue they decided. Not that he didn't
21 give an oral notice of appeal, but that he didn't give the
22 reasons why he was appealing. And they say because of that
23 and because of our rule he can't have an appeal.

24 Now, why can't we say if you don't abide by that
25 Ninth Circuit rule, Miss Rosenberg, why can't we say that the

1 Ninth Circuit rule is wrong, that the man did give oral notice
2 of appeal in the courtroom, that his counsel abandoned him there
3 and left him in forma pauperis and that he didn't have to in
4 those circumstances delineate the issues that he intended to
5 raise and decide the case in that manner.

6 Inasmuch as two Courts of Appeals have done it and
7 the District Court twice.

8 A Well, I think, your Honor, you are if so ruling
9 accusing ---

10 Q I beg your pardon?

11 A I think that we are accusing counsel of a dere-
12 liction of duty without hearing counsel.

13 Now, I agree that the indication in this particular
14 case are, that this man should be given a right of appeal
15 except that one of the things that is surprising on the other
16 hand I must say is that there were other defendants represented
17 by other counsel, separate counsel.

18 Now I am going to believe one may have not understood
19 his obligations completely. I find it hard to believe that I
20 think it is four different counsel. I am not sure. Didn't do
21 so.

22 However, I think that we have rules here that must
23 be applied across the board. And we cannot fail to face the
24 fact that there are many prisoners who simply create stories
25 out of whole cloth that sound very convincing and turn out not

1 to be, to be absolutely false on documentary evidence.

2 So that in having general rules about what a court
3 should do I think that we have to consider that question and it
4 is what happens generally.

5 Q Miss Rosenberg, what is the predicate for your
6 position here? Is it the rule of criminal procedure or is it
7 a supervisory power or some constitutional provision?

8 A What?

9 Q Is it the right of counsel you are talking about?

10 A Counsel on appeal?

11 Q What reason do we give for -- what violation
12 may there have been here?

13 A Well, there could have been a violation of the
14 right to counsel.

15 Q I didn't hear you.

16 A Well, there could have been a violation of the
17 right to counsel, affecting petitioner's counsel in the sense
18 that does counsel's duty extend to carrying through to the point
19 of at least notifying of a right of appeal and what he should
20 do and particularly when it is retained counsel, does counsel
21 have a right ---

22 Q Now does retained counsel -- if he fails to
23 follow his orders or fails to follow his agreement, that is
24 a deprivation of a right to counsel?

25 A If counsel has overreached in some form or

1 another that is the Calland case in the Seventh Circuit.

2 Q Yes. That is overreaching, but you would throw
3 in with that negligence?

4 A Well, pure negligence is very hard to reconcile.

5 Q Well, I know it is hard. But I am asking
6 what you think the answer is.

7 A I think it must be a little more than negligence.
8 It must be a failure in form of the rights.

9 Q Just plain negligence, just forgetting about it
10 or he puts it in the wrong drawer or his secretary is sick?

11 A That is Robinson.

12 Q That may be Robinson, but what is your Department
13 of Justice position on this?

14 A My Department of Justice position pure negligence
15 without any overreaching aspect is not enough.

16 Q Well, then I would suppose you would say there
17 would have to be a hearing in this case based on your position?

18 A Not necessarily. Because he says that counsel
19 agreed and then deliberately failed to take any steps. Now
20 if counsel admits that there doesn't have to be a hearing.

21 Q Deliberate.

22 A Said I wouldn't do it under the Calland case.
23 If counsel says the only way you can take an appeal is to pay
24 me \$500 and you don't tell him that you can get an appeal
25 another way that in and of itself is a negligence.

1 Q Because we have repeated cases here as you well
2 know, where the claim is that either -- well, you wouldn't
3 distinguish in this respect between appointed and re-
4 tained counsel, would you?

5 A Well, I think there is a possibility of a
6 distinction. If you have a client who is known to have
7 \$100,000, I don't think you have to tell him of his rights to
8 appeal as an indigent. But where you say, I think you have a
9 good case on appeal ---

10 Q Let us assume there is an appointed counsel.
11 Let us assume counsel in this case had been appointed and the
12 same thing happened. You wouldn't have any different reaction?

13 A No. The cases are clear that appointed counsel
14 is under a duty to either take a notice of appeal and ask for
15 withdrawal or to notify the defendant of what must be done.
16 He must inform him of the time for appeal.

17 Let me say, of course, that this is, we hope, a
18 darn question.

19 Q Well, you seem to be making a difference between
20 appointed and retained counsel?

21 A No, I think the only difference is the situation
22 of a retained counsel saying to the defendant whom he does not
23 know to still have funds, I think you have a good case on appeal
24 but I won't do it unless you pay me \$5,000.

25 Now if this is a client known to have \$100,000, I

1 don't think a retained counsel is under a duty to tell him
2 about the rights to proceed in forma pauperis.

3 On the other hand, if you have in this situation a
4 case where counsel assumed that counsel felt he wasn't ade-
5 quately paid for the trial, and he really did think his client
6 was now a pauper, then he is under a duty to tell him about
7 his rights as an indigent.

8 And if appointed ocounsel has been appointed on the
9 assumption that theclient was indigent he is under a duty to
10 tell him.

11 Q All right.

12 Assume they tell him and the client says please appeal
13 and neither the appointed counsel nor the retained counsel does
14 so, are they both under the same standard?

15 A Yes,

16 Q And so your line, the Department of Justice
17 suggests to the court in all of these cases where there is
18 failure of counsel to take some step which he had aeither agreed
19 to do or the client expected him to do that we ought to draw
20 a line between the negligence and the deliberateness?

21 A Yes.

22 Q And pure negligence you would say that whether
23 the counsel is retained or not or appointed the client is
24 stuck with his counsel?

25 A That is right.

1 Q Miss Rosenberg, isn't the real question here
2 whether there was, whether the prisoner deliberately gave up
3 his right to appeal? That is to say, whether there was a
4 deliberate failure to appeal. And that can be established
5 (a) by proof of a decision on the client part or the acquies-
6 cence of the lawyer's decision.

7 On the other hand, if the lawyer fails for whatever
8 reason to advise the client of his right of appeal, then at
9 least arguably there was no waiver or voluntary surrender of
10 the right of appeal.

11 And all of these are questions for the District Court
12 to look into and decide in this case once we -- if we do get
13 past the obstacle presented by the Ninth Circuit's ruling in
14 this case that since the petitioner failed to state a basis of
15 his appeal it will not consider the appeal.

16 Have I summed it up correctly?

17 A Right.

18 MR. CHIEF JUSTICE WARREN: Mr. Wallace, have you
19 finished your time or -- no, you have some more time.

20 REBUTTAL ORAL ARGUMENT OF WILLIAM R. WALLACE, ESQ.

21 ON BEHALF OF PETITIONER

22 MR. WALLACE: I think I can finish very shortly.

23 I should like to address myself first to the question
24 asked by Mr. Justice Marshall.

25 I think it is obvious in a situation of this kind

1 that immediately on remand counsel must be appointed for the
2 prisoner. I don't think the court should be calling in a
3 former lawyer and asking him to make an affidavit ex parte
4 again. I think the ex parte business, we have had too much of
5 that in this case already.

6 I think if counsel had been called in in the first
7 instance, and the United States Attorney called in in the first
8 instance we wouldn't be here.

9 Q Well, is there a constitutional right to a
10 lawyer in 2255?

11 A In the Boruff case in the Fifth Circuit the
12 Court says we think it is not an unwarranted construction of
13 the Rule 37(a)(2) to construe the words defendant not repre-
14 sented by counsel to mean a defendant not represented by
15 counsel during the 10-day period after which failure to file
16 a notice of appeal would forever bar such a right.

17 Q Well, at least, I suppose if this court ruled
18 that there should be a hearing the practice in the Ninth
19 Circuit would be to appoint counsel?

20 A I would think so, yes, your Honor.

21 Q They do appoint counsel when they have hearings?

22 A That is correct, your Honor.

23 Q Mr. Wallace, you are not suggesting are you
24 that this court should tell the District Court at this stage
25 how to go about ascertaining the resolution of the issue of

1 face if one develops?

2 A No, I am suggesting this court should not do so.

3 Q We should not, and you are not suggesting, are
4 you, that at this point we should instruct the District Court
5 that it should or should not appoint counsel for the ascertain-
6 ment or whether this petitioner's lawyer did or did not advise
7 him about his right to appeal, did or did not fail to perfect
8 the appeal?

9 A Well, I would assume, your Honor, if this case
10 were sent back to the District Court and the rule of the Ninth
11 Circuit is overruled by this court and this case is remanded
12 to the District Court to determine whether this prisoner has
13 a right of appeal, all of these things will be taken care of.

14 Q Then the District Court will go ahead and take
15 care of its own.

16 A The thing I was objecting to was that some kind
17 of a proceeding happened before the court held a hearing. I
18 think the prisoner is entitled to be present or at least
19 entitled to have counsel and then the Court can go on and
20 have whatever kind of an investigatory hearing it wants.

21 So long as it is confined only the question of this
22 man's right of appeal and not to the question of whether his
23 appeal is granted would be a good one. I don't think that is
24 any business of the District Court.

25 MR. CHIEF JUSTICE WARREN: Before you sit down, I

1 just want to say to you that the Court is conscious of the fact
2 that you are representing this indigent defendant by assignment
3 from us and we consider that a real public service on the part
4 of the lawyers to do that and we always appreciate it and we
5 appreciate your services in this case.

6 Miss Rosenberg, of course, we always appreciate your
7 able and very active representation of the Government in such
8 cases.

9 MR. WALLACE: I thank you, your Honor. It has been
10 a rewarding experience.

11 (Whereupon, at 11:15 a.m. the oral argument in the
12 above-entitled matter was concluded.)
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