In the

Supreme Court of the United States

JOSEPH ANTHONY DAVIS,)
)
Petitioner,)
)
v.) No. 72-1454
)
UNITED STATES)

Washington, D.C.
February 26, 1974

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JOSEPH ANTHONY DAVIS, Petitioner,	:	
v.	:	No. 72-1454
UNITED STATES	:	

Washington, D. C.

Tuesday, February 26, 1974

The above-entitled matter came on for argument at 11:36 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, Jr., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, Jr., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MARVIN M. KARPATKIN, ESQ., 1345 Avenue of the Americas, New York, New York 10019
For the Petitioner

EDMUND W. KITCH, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530
For the Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1454, Joseph Anthony Davis against the United States.

Mr. Karpatkin.

ORAL ARGUMENT OF MARVIN M. KARPATKIN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KARPATKIN: Mr. Chief Justice, and may it Please the Court:

This case is here on certiorari for review of the Ninth Circuit's denial of postconviction relief under 28 U.S.C. Section 2255 to Petitioner Joseph Anthony Davis, who was convicted of refusal of induction into the Armed Services.

It is conceded that he was ordered to report as a delinquent without a prior physical examination and the statement of acceptability as the Selective Service regulations require for all persons not delinquents.

It is likewise conceded that he was declared delinquent by his local Board because it unilaterally determined that he did not comply with a prior order to report for a physical examination and it is also conceded that but for his delinquency status, he could not have been ordered to report for induction without the prior pre-induction physical examination and a statement of

acceptability issued at least 21 days before the induction date.

His conviction was affirmed by the Ninth Circuit notwithstanding an argument made on direct appeal that his delinquency induction order was invalid under the doctrine established by this Court in Gutknecht against the United States.

While Petitioner's case was pending before this Court on certiorari, a change in the law occurred. The Ninth Circuit decided United States against Fox, a case concededly identical to that of Davis, holding that the Gutknecht Doctrine required the invalidation of delinquency-based induction orders when the order to report without a prior physical examination and statement of acceptability was based upon a declaration of delinquency.

Postconviction relief was sought on the basis of this intervening Fox decision and denied by the District Court and the Ninth Circuit.

Thus there are two principal questions, may it please the Court, in this case. The first is whether post-conviction relief under 2255 is available when there has been an intervening change in the law to the 2255 Petitioner's benefit in a case concededly identical to Petitioner's case on the facts and on the law, which was decided after Appellate affirmance of Petitioner's conviction and while a

prior petition ofr certiorari was pending.

Based on, I respectfully submit, some unexplained and inexplicable notion of law of the case which was totally erroneous, the Ninth Circuit held per curiam that there was no basis for 2255 relief because Petitioner's claim had been advanced, albeit unsuccessfully, in the absence of the new law, on direct appeal.

Indeed, the change in the law occurred four months after the direct appeal.

The Government has apparently confessed error, either in whole or in part, on this point but argues against postcinviction relief for other reasons which, we respectfully submit, are without merit.

The second question, of course, and perhaps the fundamental question, is whether the intervening new law decision in United States against Fox, which invalidated a species of delinquency sanction, which was not before this Court in Gutknecht, the sanction of induction without a prior preinduction physical examination and a statement of acceptability, was a proper interpretation by the Fox court of this Court's decision in Gutknecht and also this Court's decision in Oestereich.

Gutknecht and Oestereich, as will be recalled, of course, invalidated somewhat more dramatic species of delinquency sanctions than that involved in this case.

And the Government admits that Davis, this case, and Fox are utterly identical, which the Ninth Circuit, again, astonishingly refused --

QUESTION: What if we disagreed with the Court of Appeals that -- on the availability of 2255 and the circumstances? Wouldn't we just remand to have them get to the issue they thought shouldn't be reassessed?

MR. KARPATKIN: That is certainly a possible solution, Mr. Justice White but I respectfully suggest that since -- that if Fox is the law and if Fox is correct, that a remand would be an unnecessary waste of judicial time on the part of the Ninth Circuit and perhaps, I even fear to think, on the part of this Court because this case has been in the Ninth Circuit on three occasions and these very arguments were brought to the attention of the Ninth Circuit and when we were previously here on certiorari, indeed, we suggested that this Court might wish to remand to the Ninth Court with a suggestion for reconsideration, but thus far, nothing has availed.

QUESTION: Has the Ninth Circuit continued to follow Fox since the Fox decision? Setting aside this case, then.

MR. KARPATKIN: Your Honor, we cite in our brief the one or two Ninth Circuit decisions which cite and follow Fox and we find no others and none depart from it. If I may

represent to the Court as a member of the Bar of the Ninth Circuit, I have been informed by United States attorneys in the Ninth Circuit that it is the uniform proscecutorial process to act as if Fox is the law. Indeed, a United States attorney told me that Fox is considered the son of Gutknecht.

QUESTION: The son of Gutknecht?

MR. KARPATKIN: Yes.

QUESTION: Umn hmn. And so the attorney now would prosecute him for refusing an order to take a physical exam?

MR. KARPATKIN: Yes, your Honor, which, of course, is the very gist of the constitutional defect in the prosecution here. The man was prosecuted for a crime of which he could not have constitutionally committed under this Court's decision in the Gutknecht case.

QUESTION: I thought that maybe the Ninth Circuit was ruling that Fox would not be retroactive.

MR. KARPATKIN: It is hard to glean that from the Ninth Circuit's brief opinion.

QUESTION: It didn't say that in those specific words, but --

MR. KARPATKIN: The Ninth Circuit, to the extent that it said anything in the brief opinion, which is reprinted in the Appendix, said that they do not agree that Fox changed the law and it also made the specious, I

respectfully suggest, law of the case argument. But, of course, the day after Fox, or the same day as Fox, another panel of the Ninth Circuit in the case of Zack against Benson, applied Fox, obviously retroactively, since it --

QUESTION: It is the same kind of situation?

MR. KARPATKIN: Yes, your Honor. In our reply brief we cite the statement of fact from Zack against Benson, which makes this clear and I am sure the Government won't contest it.

QUESTION: What have the other circuits done with the Fox record, if anything?

MR. KARPATKIN: Your Honor, the Fifth Circuit, in the Batiste case, presaged Fox, presaged the Ninth Circuit and announced the same kind of per se decision, reasoning from this Court's decision in Gutknecht, that even though it might be interesting to speculate on whether or not there was acceleration in fact, we believe that Gutknecht requires us to hold that any delinquency-based induction order is per se invalid. That is the decision of the Fifth Circuit in Battiste. The Government views the decision somewhat differently but I am sure your Honors can read it.

The Fourth Circuit, in Dobie, took a somewhat different view. The Fourth Circuit, in Dobie, stated that where there is a delinquency-based induction order, there is a heavy burden of proof upon the Government to show that there

was not acceleration in fact.

QUESTION: In fact.

MR. KARPATKIN: Yes and the Fourth Circuit in Dobie, in a very careful decision by Judge Butzner, pointed out the only proper standard which can be used to overcome this heavy burden of proof and we submit that that is an alternative ground on which the decision below must be reversed but we would hope that it would be reversed on Fox on Battiste grounds rather than on Dobie grounds.

QUESTION: But excpet for Fox, Battiste, Dobie, et cetera -- Battiste and Dobie in those two circuits, the other circuits have not dealt with it?

MR. KARPATKIN: No, your Honor, there are various decisions of district courts but I am not aware of any other circuits dealing with it.

Of course, the underlying question presented by this case is the scope and the legal significance of the constitutional holding of this Court in Gutknecht. I believe that it is apparent, from a reading of the Gutknecht decision, that the essential holding is that Congress never vested the authority to induct as delinquents in either the President or the Selective Service System and that any such standardless delegation would be unconstitutional.

Now, as I noted before, the case has been to the Ninth Circuit three times and to this Court twice and,

consequently, it has a somewhat elongated history which we try to set forth and explicate in our briefs.

But the essence, the essential facts which provided the basic legal posture of the case, is that the local Board, in effect, accused Petitioner of failing, without reasonable excuse, I assume, to appear at a physical examination, that it warned him that he might be delinquent and that in that warning, stated that he would be denied various rights under the law and subject to induction and shortly thereafter, it declared him a delinquent and notified him that he had been declared a delinquent by reason of his failure to appear at a physical examination and also by reason of his failure to keep the Board informed of his current address.

As we set forth in the record in the briefs, many of these notices which Petitioner was charged with not receiving and was being delinquent on the basis of, were not received by him or, there is no record that they were ever received by him.

Needless to say, the determination that he committed these infractions, if, indeed, he committed them, was made unilaterally by the Board. There was no hearing. There was no opportunity for any presentation of witnesses. There was no opportunity even for the personal appearance and appeal which is normally available under Selective Service

classificational process.

QUESTION: But whatever the cause, he managed for more than two years to avoid taking a physical.

MR. KARPATKIN: We don't know, Mr. Justice Powell, the facts and the records shows that.

QUESTION: The fact was, he did, although ordered to do so.

QUESTION: Although ordered to do so and although the notices were sent to the address given by him. I don't know that this is relevant, but I was just interested in your statement.

MR. KARPATKIN: Mr. Justice Powell, it is also a crime to violate the Selective Service regulation that requires one to keep the Selective Service Board informed of current address and, indeed, there are many prosecutions for that offense, just as there are many prosecutions for failure to appear at a physical. But Petitioner was not prosecuted for either of these offenses. Rather, he was ordered to report for induction and prosecuted for induction refusal.

I submit that if this Court said in Gutknecht that Congress never gave the President or never authorized him to give to the Selective Service any power to set up a delinquency scheme for priority induction, then, regardless of what might be the underlying factual situations of other

infractions, that the Board never had authority to send him an induction order.

QUESTION: I understand your legal position. I was just curious that you were trying to elicit our sympathy for a fellow who managed for more than two years to avoid the draft.

MR. KARPATKIN: The only thing I can say in response to that, Mr. Justice Powell, is that since there was never any hearing, since there was never any due process determination, indeed, there was never even any quasi-due process determination, I don't think it is really fair to speculate that he avoided the draft or that he had good and bona fide reasons for not responding to those notices. Because no finding was ever made.

QUESTION: Well, what would be a good, bona fide -- I'm afraid we are off on a wild goose chase, but what would be a good and bona fide reason for not responding to a direction to take a physical exam?

MR. KARPATKIN: Well, I presume --

QUESTION: In fact or in law.

MR. KARPATKIN: I presume illness. I presume unavailability because of some other legal commitment, impossibility of performance.

QUESTION: For two years?

MR. KARPATKIN: Or I presume that Boards often --

Boards often postpone physicals upon the request of the registrant.

QUESTION: But this Board didn't.

QUESTION: It didn't get any request.

MR. KARPATKIN: I'm sorry?

QUESTION: It didn't get any request from the registrant.

MR. KARPATKIN: No, your Honor.

QUESTION: It just got a -- his absence.

MR. KARPATKIN: I submit that this is not the brunt of our argument.

QUESTION: No, I know it isn't.

QUESTION: We are wasting his time. This question has nothing to do with the issue.

QUESTION: No, I know it doesn't.

QUESTION: It is tough enough, the one we have to face, to have to --

QUESTION: Well, probably you are accustomed to answer questions that are put to you by the Court, aren't you?

MR. KARPATKIN: I try to as best I can, your Honor.

In any event, on appeal of Petitioner's conviction, the Ninth Circuit reversed and remanded to consider in the light of Gutknecht. This was Davis I. On remand, the District Court gave the same narrow

interpretation to Gutknecht which the Government now advances and which has since been disapproved by the Ninth Circuit in Fox.

On the remand hearing, the Court held that Petitioner's induction had not been accelerated in fact, based largely on the opinion testimony of the local board clerk to the effect that Petitioner would have been ordered to report in any event on or prior to the date of his order to report as a delinquent.

The Ninth Circuit affirmed per curiam, holding that there was no acceleration within the meaning of Gutknecht. Certiorari was sought based on the tripartite circuit conflict and denied by this Court, after the Court had been informed of the intervening Fox decision.

A petition for rehearing out of time, accompanied by a full brief on the merits, was presented to the Ninth Circuit but denied without opinion and, consequently, this 2255 proceeding was started and denied by the district judge without opinion and by the Ninth Circuit in Davis III.

I respectfully submit that a change in the law occurred, although disputed by the Davis III panel, as conceded by the Government and is self-evident and the apparent basis for the denial of relief by the court below on some notion of law of the case is likewise, concededly erroneous.

Indeed, the Government does not deny that change in the law is a proper subject for Section 2255. What the Government attempts to do is to minimize the statements by this Court in Sanders and Kaufman that an intervening change in the law is appropriate -- is an appropriate subject for postconviction relief and then the Government asks some rhetorical questions and engages in some handwringing as to the dire effects of recognizing the change in the law based on nonbinding decisions from other circuits. But that, indeed, is a red herring because there is no such issue before this Court.

Petitioner seeks only the benefit of the law of the circuit which has jurisdiction over the court which has convicted him.

QUESTION: Is there some difference of opinion between you and your brother as to whether Gutknecht was a constitutional decision? That is, a decision based upon a constitutional violation.

MR. KARPATKIN: There is a considerable difference.

QUESTION: I thought so.

MR. KARPATKIN: And precisely the point that I am about to address, Mr. Justice Stewart.

QUESTION: Okay, fine.

MR. KARPATKIN: It is our view -- and this, perhaps, is the fundamental question in this case, though it

is very hard to find what is the fundamental question, that the Government's argument that Section 2255 relief is only available if there is a denial of a fundamental constitutional right and there was no such denial here, totally mischaracterizes and minimizes the holdings in Gutknecht and Fox. In fact, in our view, Gutknecht is a constitutional decision of the first magnitude because it holds that Selective Service Boards are without power to promulgate and enforce delinquency regulations.

The decision in Gutknecht --

QUESTION: Because they were not authorized by the statute to do so. Is that it? Basically?

MR. KARPATKIN: Because they are not authorized -- neither the President nor the Selective Service System were authorized by Congress to do so.

QUESTION: Right. That was the basic holding.

MR. KARPATKIN: Yes, your Honor. And if that is so, it seems to me it is incredibly myopic or worse for the Government to say that since there was not a specific provision of the Bill of Rights which the Court pointed its finger at in Gutknecht that it can't be considered a constitutional holding.

QUESTION: What if it wasn't? What if it wasn't a constitutional holding? Does it make any difference?

MR. KARPATKIN: There are members of this Court,

your Honor --

QUESTION: What is your position?

MR. KARPATKIN: Your Honor?

QUESTION: What is your position?

MR. KARPATKIN: My position is that it does not make a difference. My position is that even --

QUESTION: You hold that position, too. You have two positions, if you are wise.

MR. KARPATKIN: Yes, your Honor. The first position is that Gutknecht is a constitutional holding and I advance that as the major position but even if Gutknecht is seen as a nonconstitutional holding, we have, of course, first, 2255 the statute itself, which has constitutional laws and we have the absence of any decision by this Court which states other than indicta that 2255 is only available in a constitutional case and then, I respectfully suggest, we have a perhaps commonsense argument, if I may advance it.

There are certain types of rights which it seems to me that, even though they have not been ensconced with a constitutional category by this Court, are so fundamental that their denial would have to be the basis for 2255 relief and, take for example, if someone is denied the right to an appeal.

Now, this Court has said on many occasions that it is not clear whether there is a constitutional right to

an appeal but, of course, there is a statutory right to an appeal and, surely, someone who from mischance is denied a right to an appeal and if some prisoner sent in a writ three years after he had been denied a right to an appeal based on 2255, I doubt if he could be properly denied a hearing on whether he was improperly denied his right to an appeal which is nonconstitutional.

If I may just pursue the constitutional point one minute more. The Government says that there is no reference to any provision of the Constitution in the Gutknecht case but Gutknecht relies on Kent against Dulles and Kent against Dulles, in turn, cites the famous Youngstown against Sirrer case and also, perhaps even more famous and somewhat older, Panama Refining case and both of these cases obviously stand for the proposition that where there is an absence of law, where there is an absence of authority, then it is beyond constitutional power and if one needs to put one's finger on a constitutional clause, I respectfully suggest to my learned brother that the constitutional clause is Article I, Section I.

QUESTION: I thought Panama Refining turned on delegation and absense of standards. Is it a constitutional holding?

MR. KARPATKIN: Mr. Chief Justice Hughes cites Article I, Section I and we have extracted what we believe is

a fair summary and quotation from that opinion in our reply brief which we have just recently filed, Mr. Justice Rehnquist. But I think to argue that Gutknecht is not a constitutional holding is to argue that Panama Refining and Youngstown are not constitutional holdings and I submit such an argument is absurd.

If there is any more fundamental argument than a violation of the Constitution because of the violation of the constitutional provision, it is acting in the absence of constitutional authority.

Now, of course, there are also Fifth Amendment procedural due process questions which the Government at various points in its brief seems to partially concede.

Now, the fact that Gutknecht and Fox must be retroactively applied, I respectfully submit, is another reason why Section 2255 relief is appropriate here.

Of course, the retroactivity argument which the Government vigorously argues against our position, assumes that Fox is correct, otherwise he wouldn't be here talking about retroactivity. Indeed, we wouldn't even be here talking about 2255.

Now, of course, first, Fox has already been held retroactive by the very circuit which decided it.

Second, Gutknecht has been retroactively applied universally and we cite all the cases on page 46 of

our brief. I would particularly and respectfully invite the Court's attention to the very careful analysis of retroactivity of Gutknecht by Chief Judge Zavatt in United States against Kelly.

Moreover, there is no need, there is no occasion to engage in the pragmatic Linklett -Stovall-type analysis which the Government urges upon us because this is not a case which seeks to determine the retroactivity of procedural rules which govern the conduct of a trial.

Like Robinson against Neil, as Mr. Justice Rehnquist points out in the opinion for the Court, this case is similar to a valid claim of double jeopardy because if Fox is correct, then there will not be any fact-finding burden and there will not be any further trial. There will be no question of the integrity of the fact-finding process because the fact-finding process is at an end.

Finally, the ends of justice will be served by granting postconviction relief and we are reminded in Kaufman and in Sanders and in other decisions that that must always be borne in mind.

I first may say that the problems which have been raised by Justices of this Court and by distinguished scholars, some of which I refer to in Mr. Justice Powell's concurring opinion in Schneckloth against Bustamonte, are not, simply not available in this case.

There is no problem here of any deliberate bypass of other available remedies.

Petitioner has been knocking at every conceivable judicial gate looking for a remedy these past years.

Furthermore, there is obviously no delicate question of federal-state relations and, as I stated before and as I think should be stressed, there is no question here of a guilty person going free because of some exclusionary rule or some similar prophylactic device.

If Fox is correct -- and Mr. Justice Powell, if I may again respond to your prior question, the Ninth Circuit, in Fox, indicated that they weren't very happy about his Selective Service history, either. But if Fox is correct, then the induction order is invalid and the indictment just must be dismissed because the crime of induction refusal has just not been committed.

Now, the Government, at one point, notes the various scholarly criticism of 2255 but then at another point states that even if Fox is right and even if this is a meritorious claim, there nevertheless should not be 2255 relief because of the Government's own conception of how narrow it should be.

The Government, therefore, is making its own unique --

QUESTION: Which is what the Court of Appeals

for the Ninth Circuit said, I take it?

MR. KARPATKIN: May it please the Court, I just don't know what the Court of Appeals for the Ninth Circuit --

QUESTION: At least it wasn't available because of some idea of law of the case?

MR. KARPATKIN: Yes, your Honor, yes, and I don't believe that the Government is seriously --

QUESTION: I doubt if they'd espouse that idea.

MR. KARPATKIN: I don't think so but there is, as we note in our reply brief, they sneak it in somewhere towards the end of their brief as a partial reason.

But I think that the Government is making its own unique contribution to this debate on the scope of 2255. While many justices and scholars are arguing that it should be construed so as not to help the guilty, the Government now argues that it should also be construed so as not to help the innocent and that, I think, is the import of the Government saying that 2255 should be narrowed even beyond that suggested in the various critical literature which I have referred to.

With the Court's permission, I'll save the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: I think we'll not ask you to start for one minute, Counsel.

We'll resume after lunch.

[Whereupon, a recess was taken for luncheon from 11:59 o'clock a.m. to 1:02 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Kitch.

ORAL ARGUMENT OF EDMUND W. KITCH, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KITCH: Mr. Chief Justice, and may it please the Court:

The Government in this case has three independently sufficient reasons that the judgment of the Ninth Circuit below should be affirmed.

It is a rhetorical difficulty with our posture that in order to argue any one point we must, for purposes of argument, concede the validity of Petitioner's position on the other two points and then my brother has been able to find that, cumulatively, we concede our entire case.

Our three points are that the subject matter of the claim is not cognizable in the Section 2255 proceeding brought after the judgment of conviction has become final, that, in any event, the conviction of the District Court was proper and that if it was not proper and the rule of United States against Fox is correct, that rule should not be applied retroactively.

In our brief, we argue the merits of the conviction: First, for purposes of exposition. However,

logically, this Court must reach the jurisdictional issue under 2255 before it would reach the merits and therefore, I will address the 2255 question first.

This is a question of considerable importance on which even a casual reading of the many court of appeals opinions dealing with 2255 reveal a need for this Court's attention.

For instance, Zack against Benson in the Ninth Circuit on which Petitioner relies, is a holding on all points in accord with his position. In that case the Ninth Circuit was not aware that there was a 2255 issue to be addressed before relief should be automatically granted.

I have discussed our position in this case with a number of members of the Bar of some experience who, although finding our position persuasive, have expressed some surprise in saying that although they hadn't really thought about it, they always understood that the federal system was a double trial, double appeal system.

You went in first, your conviction and appeal and then you had a second bite at the apple.

Now, as I think we have argued in our brief and on the basis of the authorities in our brief, it is clear the 2255 plays a very narrow role in the administration of criminal justice.

The reasons, the policy reasons for this narrow

scope of collateral attack after a criminal judgment becomes final are, I think, important ones and bear repition here.

First of all, is the importance of finality through the function of the criminal law itself, the functions of rehabilitation and deterrence. If criminal law cannot rehabilitate, if the convicted defender is constantly faced with the uncertainty about whether his conviction is really valid, whether if he just didn't raise one more claim he would, in fact, discover that he had been wrongly and unjustly convicted. Also, if --

QUESTION: Now, I take it you are talking about the availability of 2255, no matter what the issue is, if it is once it has been decided on appeal.

MR. KITCH: These are general policy reasons why 2255 is narrowly available.

QUESTION: Well, we'd have to retreat from some cases to agree with you, wouldn't we?

MR. KITCH: No, sir. I think our opinion, our position in this case is sustainable under all of the views of habeas corpus which have been advanced in the opinions of this Court, your opinion in Fay against Noia or the dissenting opinion in Schneckloth

Your opinion in Fay against Noia assumes that in habeas corpus we are talking about allegations of denial of fundamental constitutional rights which go to the very heart

of the process of justice itself and that is not the kind of issue and claim which Petitioner makes in this case.

QUESTION: So you do make -- I asked you a question whether you would distinguish between various issues and you now say you would.

MR. KITCH: Oh, I misunderstood. We certainly -- there are different kinds of issues which have historically and under the opinions of this Court been treated differently under 2255.

QUESTION: And you would treat 2255 and habeas corpus together for this purpose?

MR. KITCH: Yes.

QUESTION: And write out the words or weed out the words "laws of the United States."

MR. KITCH: No, your Honor.

QUESTION: You wouldn't?

MR. KITCH: The section --

QUESTION: What ones do you save?

MR. KITCH: The section reads, "A prisoner in custody under sentence of a court claiming the right to be released upon upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States."

QUESTION: And the habeas statute has comparable words, doesn't it?

MR. KITCH: The habeas statute has comparable --

QUESTION: Except it says, "Detained by a state in violation of the law."

MR. KITCH: That is correct.

QUESTION: Yes.

MR. KITCH: And not a sentence of a court which is imposed after error in the trial.

QUESTION: You distinguish that from --

MR. KITCH: Yes.

QUESTION: -- "Detention in violation of the" constitutional laws and the habeas statute?

MR. KITCH: No, no, no. The sentence itself is not illegal. This is collateral attack. It goes to the legality of the sentence and the modern habeas corpus practice, which this Court has developed, has said that certain errors are of such a fundamental nature that they affect the very legality of the sentence itself. But not every error is an error which affects the legality of a sentence.

This Court's own policy on finality, on -- in criminal judgments is set out in the Federal Rules of Criminal Procedure adopted by this Court.

Rule 33 is the --

QUESTION: You don't mean "adopted by this Court." You mean sent to the Congress by this Court.

MR. KITCH: Sent to the Congress by this Court

after this Court approved them. Rule 33 provides --

QUESTION: It just transmitted them. It couldn't approve them.

MR. KITCH: Well --

QUESTION: That is a continuing debate, Counsel, which you probably can't solve here.

QUESTION: That's a House debate.

MR. KITCH: The Congress has acceded in the rules as transmitted by the Court.

QUESTION: Right.

MR. KITCH: And the rules provide, in Rule 33 in the motion for new trial which is the great traditional method for correction of errors after judgment in the trial court, that errors -- and allegations of the discovery of new evidence when relief was sought under Rule 33 -- relief should be sought within two years and as to all other errors, relief should be sought within seven days.

Now, I think that the policy reflected Rule 33, which is subject to -- can be revised -- is a policy which emphasizes the values of finality. And 2255 is not a substitute for or an alternative version of Rule 33.

It is a statute which makes available to the sentencing court a remedy in the great tradition of habeas corpus for errors of a fundamental constitutional nature affecting the legality of the sentence, not just all errors

of law which the court may or may not have made in the course of its trial.

And "or law" in 28 U.S.C. 2255 does not mean that all errors of law are cognizable in a 2255 proceedings and this Court has always described the section and writ of habeas corpus in precisely those terms.

Some of the other policy reasons for the narrow scope, the collateral attack to criminal judgments are spelled out in Mr. Justice Powell's dissent in Schneckloth and I will not deal with them further.

QUESTION: I didn't think Mr. Justice Powell dissented in Schneckloth.

MR. KITCH: You are quite right, his concurring, special concurring opinion, one concurred in by only three justices of the Court. You are quite right.

Another factor, I think, that finality serves is the important factor of insuring that the effort in trying criminal cases is concentrated in the first trials and that there is not a general feeling of an always available, another remedy that we will try defense line I at this trial and defense line II --

QUESTION: Well, your proposition is that habeas corpus and 2255 are fundamentally the same for this purpose.

MR. KITCH: Yes.

QUESTION: A state criminal trial, constitutional

issue presented to state court, denied conviction, conviction sustained and constitutional question decided adversely in the State Supreme Court; petition for certiorari here, denied. Constitutional question raised in habeas corpus, dismissed for lack of jurisdiction.

MR. KITCH: No. Because it has been litigated before?

QUESTION: Yes.

MR. KITCH: In the state courts?

QUESTION: Yes.

MR. KITCH: No, we do not rely upon the aspect of prior litigation of the issue. If, in this case --

QUESTION: Well, do you think the Court of Appeals for the Ninth Circuit did?

MR. KITCH: Their opinion is enigmatic and brief. They appear to, to some extent.

QUESTION: You disown that, then?

MR. KITCH: We do not rely upon that theory and the reason is that we feel that here there has been a vigorous and effective effort to pursue all remedies and that the fact that remedies were pursued in direct appeal should not result in their denial in collateral attack if they are available, that this Petitioner should not be in a worse position than a petitioner who had not appealed. In fact, he should be in a better position because he has responsibly

pursued his remedies and he is quite correct when he says he is in that position. We don't think he should be penalized for failing to responsibly pursue his remedies.

Now, there is a separate issue, related issue in the habeas corpus tradition about when the failure to pursue remedies available on direct appeal results in a denial of the right to the writ and, of course, in Sunal against Large, in the opinion by Mr. Justice Douglas, the Court said that the failure to appeal there resulted in denial of the availability of the writ.

That issue is not before us and the extent to which that by-pass of remedies has to be conscious, knowing or real the level of waiver is a separate issue.

There may be cases where the failure to pursue a remedy will, of itself, deny habeas corpus relief, collateral attack relief without regard to the nature of the issue. But where the relief has been pursued on direct appeal, I don't think we can responsibly say that Petitioner has somehow lost his collateral remedies.

Now, the history of habeas corpus has been canvassed in the opinions of this Court and in the literature and its limited scope has always been emphasized, and we rely upon those precedents in that history and there is not, as far as we are aware, precedent of this Court where habeas corpus has issued for non -- for a claim which did not relate

to the denial of a nonconstitutional right.

I'd like to turn now and discuss the -- argue the question as to whether the conviction was proper and Petitioner's argument on the merits.

In our view, the Gutknecht decision is simply not in point as far as this case is concerned. As we read Gutknecht, it held that the delinquency regulations were not -- could not be used by the Selective Service Sytem to punish registrants for failure to comply with the violations of the regulations, that the punitive scheme of the statute is a criminal scheme and that the enforcement through the criminal law is the exclusive means for extracting compliance with the regulations promulgated by the Selective Service.

And in the Gutknecht case, of course, the record clearly shows an application of just such a punitive use of a delinquency regulation. As soon as the petitioner in Gutknecht had -- the defendant in Gutknecht had sent his draft card in to the draft board, he was declared delinquent and immediately ordered to report for induction.

Now, the record here is quite different. The record here shows that between the initial notice to report for a physical examination and the final second order of induction, there was the long and patient effort by this draft board to locate and to obtain from the registrant fundamental substantial compliance with his obligations

under Selective Service System.

When he failed to appear for his first physical examination, he wrote to the Board and explained that he had been ill. The Board responded simply by ordering him for another physical examination.

Just as he was about to be declared a delinquent after having failed to appear twice, he appeared again and gave a new address and the Board then did not have him prosecuted for failing to appear for a physical, the Board merely sent him an order to that address to appear for induction.

Due to this patience, and the record is ambiguous as to whether this was a young man who was confused about his obligations or a young man who was attempting to evade his obligations and that, I think, accounts for the patience of the Board, by the time the induction order came about, he was behind others in the same age category who had complied with their obligations under the statute and had been ordered for induction and were inducted.

So he benefited from the difficulties he had with the Selective Service System, whatever the reasons that they occurred.

Now, the delinquency regulations, as they remain after Gutknecht, continue to serve other purposes than those held bad in Gutknecht.

They enable the Selective Service System simply to keep track of the compliance status registrant. They enable the Service to notify registrants of compliance difficulties and they reflect, I think, together with the amendment to the regulation in 1970 to simply provide for induction orders without medical examination, a policy of minimal criminalization. That is, if young men can be induced to report for induction, even though they did not report for a medical examination, there is not an effort to escalate the sanction and to make everyone who does not appear for a medical examination an immediate subject of a prosecution under the criminal statute.

In the face of this argument, the position of the Petitioner is that since, under the regulations, you had to be declared delinquent to be inducted without a medical examination, he lost his right to a preinduction medical examination, that this right conferred by the regulation was of such a substance that it required that he not be convicted and that it be available in collateral attack.

In his reply brief to our opposition petition for certiorari, Petitioner suggested his real theory was there was a statutory right relying upon the Castillo opinion to a preinduction physical. That argument he has now abandoned.

If there is any technical error in the processing of this induction order as a result of the complexities that

fall out of Gutknecht and the time that this induction order was issued before the Selective Service opinion system had the advantage of the Gutknecht opinion, we argue that error is entirely technical. It is harmless error and would not be available in any case at the original trial as a defense and, therefore, also, the conviction is proper.

Now, as to retroactivity --

QUESTION: It is, Mr. Kitch, a criminal offense, or it can be. It is a criminal offense to wilfully fail to report for a physical examination.

MR. KITCH: That is correct.

QUESTION: And is that an offense of the same gravity in terms of the permissable punishment and the offense of failing to report for induction?

MR. KITCH: Yes, it is my understanding that it is all under the same section of the statute, 462 --

QUESTION: That is what I thought.

MR. KITCH: -- which provides for, generally, penalty for violation of Selective Service regulations.

QUESTION: So if Fox remains the law, the Government could simply bring the charge of failing to report for the physical examination, couldn't it?

MR. KITCH: Well, I think that we could do that or we could -- we really have no problem after the amendment of the regulations in 1970 which eliminated the

category of delinquency as the basis for issuing an induction order without a preinduction physical.

If men do not appear for their physical, the system can move ahead without the physical and the induction order can be issued in normal course without any declaration of delinquency and at that point, the issue is drawn.

QUESTION: But wouldn't it, with or without a declaration of delinquency, would it be procedurally proper to order a man for induction who hadn't been given a physical examination under the present set-up?

MR. KITCH: Yes.

QUESTION: It would.

MR. KITCH: Yes.

QUESTION: It is.

MR. KITCH: Yes. The regulations were so drawn.

QUESTION: Whether or not he disregarded a direction to show up for a physical?

MR. KITCH: The amended regulation is reprinted in our brief at page 7.

QUESTION: Seven?

MR. KITCH: "Notwithstanding any other provision, when a registrant classified I-A --" and so on -- "has refused or otherwise failed to comply with an order to report for and submit to an Armed Forces physical exam, he may be selected in order to report for induction even though he has

not been found acceptable."

In other words, the regulation basically requires the examination, the statement of acceptability and then it provides an exception for persons who fail to report to the Board.

QUESTION: Who have refused. My question is, can --

MR. KITCH: [Overriding] But it is not a formal declaration of delinquency. It doesn't go through the delinquency regulations.

QUESTION: But it is basically the same provision, isn't it? In substance?

MR. KITCH: Yes, precisely.

QUESTION: But for a person who hasn't refused, it violates the procedures of the Selective Service Act to call a person for induction who has not been even asked to have a physical examination. Is that correct?

MR. KITCH: That is correct, yes. Yes.

QUESTION: And that continues to be true?

MR. KITCH: That continues to be true.

QUESTION: As it was true at the time of --

MR. KITCH: Yes.

QUESTION: Mr. Davis' induction and it continues to be true as it was at the time of his induction that if a person refuses a physical examination, he can then,

nevertheless, be called for induction. The only difference now is, you don't label it as delinquency.

MR. KITCH: Right, and therefore, we don't have the argument that relying -- the argument can't be made that relying upon delinquency regulations under Gutknecht as a precondition for issuance of the order. And this should be emphasized.

QUESTION: That continues to be true, therefore, now, as it was then that the Government can prosecute him for refusal to report for a physical examination.

MR. KITCH: That is also true.

QUESTION: And that carries the same penalty, you just told me, as a refusal to report for induction.

MR. KITCH: Right, although I think you can tell from many of the cases that, often, the induction order is issued and then if the induction takes place, that is the end of it. If there isn't induction, then sometimes the induction charge is joined with the physical charge.

Here, there was a two-year gap between the physical and the induction which may have been a factor in the failure to join the physical -- the failure to appear for the physical in the charge.

QUESTION: Mr. Kitch --

MR, KITCH: But I think it is important to emphasize that under the preamended procedures, the

pre-Gutknecht procedure and the procedure now, the physical is still given before induction occurs. It is given at the induction station and if -- if the young man is found not acceptable by the military, he is not inducted. He still has the right, if you will, he is still able to demonstrate his unsuitability for the Armed Forces and avoid the effect of the induction order. It is just --

QUESTION: And then is he -- he cannot be prosecuted, I suppose, if he is found physically disabled -- disabled, he cannot then be prosecuted even though he has absolutely defied a previous order to report for a physical. Is that correct?

MR. KITCH: Well, no, he could be prosecuted for that, within the statute of limitations, but I believe it is our policy not to prosecute for that offense alone where he has appeared for induction and been found unfit.

QUESTION: Found unfit and doesn't pass his physical.

MR. KITCH: That is right. I think one has to understand this is difficult business of the administration of the Selective Service System involving young men, many of whom are confused about their obligations and rights and if the induction order, instead of proceeding from the failure to appear for the physical right to criminal prosecution but proceeding through the induction order, the induction order, which has a little more gravity to it, it

may make many of these young men realize that they actually should appear and have to appear and may keep out of the criminal justice system any young men of good intent who are confused and I think that is the policy, the benevolent policy that is reflected in the records in this case and underlines the thrust and so it is just a very different matter than the Court was dealing with in Gutknecht.

Sir, you had a question?

QUESTION: I think you answered the question I had in mind, that Mr. Davis would have had a physical examination in any event, he would have had that examination before he could have been inducted in any event.

Is that correct?

MR. KITCH: That is correct.

QUESTION: The district judge so found.

MR. KITCH: Yes, he did and that is provided for under the Armed Forces regulations.

On retroactivity, again, the Court in Zack against Benson on which Petitioner relies, seems to have held the rule retroactive but without stating that it is an issue present in the case and I don't think the Petitioner urges that we are now foreclosed from having review of the retroactivity of the Ninth Circuit rule once this case is here but we do feel the issue is the retroactivity of Fox and not the retroactivity of Gutknecht.

Of course, if, as Petitioner contends, the rules are precisely the same, that there is just no meaningful distinction between the cases, then this point has no separate merit, but we think the rules are quite distinguishable and we think that the analysis of retroactivity requires that the Court look at the possible purposes for the Fox rule, an issue on which the opinion of the Ninth Circuit is not a very expansive. But as far as we really make out, the rule does have the effect of just saving the courts from the kind of collateral factual inquiry that was made here on remand and examination of the delivery lists and that kind of inquiry a court might well feel is not really essential to the system since induction can be accomplished through amendment of the regulations without delinquency declaration and in that purpose, it seems to me it is achieved by perspective application and the fact that the courts are called upon to examine for acceleration in facts in those few cases where induction orders occurred before the Gutknecht opinion is not such a burden on the courts as to require retroactive application of the Fox rule.

MR. CHIEF JUSTICE BURGER: You have about six minutes left, Mr. Karpatkin.

MR. KARPATKIN: Thank you, Mr. Chief Justice.

REBUTTAL ARGUMENT OF MARVIN M. KARPATKIN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KARPATKIN: It may come as a surprise to the Government, but we believe that this issue, at least in one sense, has been before this Court before and that was when this Court had before it a petition for certiorari in the case of the United States against Peet from the Ninth Circuit.

QUESTION: Peet?

MR. KARPATKIN: Peet, P-E-E-T, Mr. Justice, cited in our brief on page 43.

QUESTION: Thank you.

MR. KARPATKIN: That, in Peet, on the basis of Gutknecht, the conviction was vacated and remanded for resentencing since there was a two-count conviction in that case and Peet had been declared delinquent for non-appearance at his physical examination. Of course, there was no written opinion but a vacation of a judgment of a court of appeals, I always understood, is action on the merits.

Now, it is our basic contention that there are three species of delinquency sanctions which were created in the delinquency regulations and that each and all of them are equally invalid because equally without a congressional authorization.

Congress did not authorize delinquency induction without a physical examination and without a statement of

acceptability any more than it authorized punitive reclassification as in the case of Oestereich or accelerated induction, as in the case of Gutknech.

The offense to the basic constitutional right that is involved is not so much the facts of any particular case or the nature of the sanction but the offense is the existence of this delinquency power because it implies an extrapenal sanction, the sanction of induction, under extraordinary conditions for asserted wrongdoings.

Now, perhaps, Congress has this power under the Constitution. The Solicitor General speculates, at Note 17 of his brief, as to whether Congress might have the power to induct draft card burners but the fact is, that Congress has not sought to exercise that power, to either give it to the President or to the Selective Service System, and I submit that in the words of Oestereich and Gutknecht that what we have here is sheer administrative lawlessness, blatantly lawless conduct on the part of the executive authority creating this power and bestowing it by executive order to the administrative agencies.

Now, insofar as prejudice is concerned, Petitioner Davis was prejudiced because he was inducted without this congressional authorization. His prejudice was as great as someone who was prejudiced by being tried and convicted before a judge without jurisdiction or, perhaps

more to the point, for an act, however it might be considered reprehensible, which had not been declared a crime.

It seems to me that the effect of Gutknecht is, as in United States against United States Coin and Currency, is to declare that persons who have failed to report for induction following a declaration of delinquency are constitutionally immune from punishment and that any acts which they may have committed may be susceptible to other kinds of criminal enforcement, but not susceptible to this kind of criminal enforcement because it has never been authorized by the only body under Article I, Section I which has the power to authorize punishment ot Congress.

Consequently, I don't think that there is any point to getting into a discussion as to whether Davis and others criminally situated are prejudiced by not having the 21-day statement of acceptability in time to seek to obtain review, by not having two physical examinations rather than one and by not having all of the rights to seek additional deferments and exemptions which, as this Court knows from the Elder case, are automatically cut off upon the issuance of an induction order.

Now, some reference has been made to new section -- Section 1631.7 in the colloquy between Mr. Justice Stewart and the Solicitor General.

We respectfully submit that the new section 1631.7,

which, presumably, allows induction upon a finding of refusal without the use of the badge word "delinquency" does not cure the problem and was not the basis of the Ninth Circuit decision in Fox.

We would respectfully refer to the Court the opinion of Chief Judge Consio in United States against Castillo in the District of Puerto Rico, which was cited in our brief but I do not believe the decision has yet been reported. And Judge Consio points out that a rose is a rose is a rose and that a local board making a unilateral due processless determination that someone refused to attend a physical, without using the word "delinquency," is just as much offending the Gutknecht principle as the local board that does it with the utilization of the badge word, "delinquency."

Insofar as concerns Zack against Benson, I don't know whether the Ninth Circuit was aware or was not aware of what the Solicitor General thinks it should have been aware, but I do know what was said to the Ninth Circuit in the briefs which were presented for it and the first line of the argument points out that this is a Section 2255 case and the Ninth Circuit is fully aware of the fact, in Zack against BEnson, the brief of which I just read from that it was a 2255 case and that was before it.

Of course, it does not preclude this Court, but

it certainly shows the view taken by the one panel in the Ninth Circuit which has ruled on it.

Finally, the Government speaks of the purposes of deterrence and rehabilitation of Section 2255. The purposes of deterrence, it seems to me, are completely satisfied by the existence of the alternative sanction of prosecution -- of prosecution and conviction for failure to report for a physical examination which carries the same five-year, $10,000 maximum penalty as refusal of induction and insofar as concerns the purpose of rehabilitation, I wonder what rehabilitative purpose is served by allowing two men in exactly the same situations to be in the status of one being free and the other being under a criminal conviction and possibly in jail.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:35 o'clock p.m., the case was submitted.]