Marquette Law Review

Volume 39
Issue 3 *Winter 1955-1956*

Article 6

The Right to Bail Upon Review in the Federal Courts

Maria Lubitz

THE RIGHT TO BAIL UPON REVIEW IN THE FEDERAL COURTS

INTRODUCTION

Upon review the right of a convicted person to enlargement on the condition of giving security for his presence arises from the principles and practice of the common law as implemented by the criminal rules promulgated for the federal courts. After conviction, the right to bail is discretionary, while before trial it is mandatory except in capital cases.[1] It is the purpose here to review the conditions imposed by rule and decision on the right to bail upon review.

The leading case of *Hudson v. Parker*,[2] decided under the first declaration by the Supreme Court of the common law rule,[3] defines the nature of the right as permissive rather than absolute. The reason for allowing a person his freedom not only before trial, but also after conviction is found in the reluctance to compel anyone to undergo punishment, "until he has been finally adjudged guilty in the court of last resort."[4] This is the underlying theory of the present law.[5]

Upon review appellants have a right, not to bail per se, but "to the exercise of the fair judicial discretion of the judges . . . in deciding their application."[6] The granting of bail is not "a matter of grace or favor."[7] The problem presented by an application for bail, pending appeal, is clearly stated by Justice Butler in his capacity as Seventh Circuit Justice in *United States v. Motlow*.[8] The decision on the application is to be primarily conditioned on the character of the appeal. It is not to be determined on "the merits of the case."[9] Factors to be considered to this end are the nature of the case, the trial and the assignment of errors. The nature of the crime charged or "the probable guilt or innocence"[10] of the applicant are not germane to the issue on application for bail, pending appeal. The purpose to which judicial discretion is to be exercised in the granting or withholding of bail is "to discourage review sought, not with hope of a new trial, but

---

[1] Stack v. Boyle, 342 U.S. 1 (1951), opinion of Jackson, J.
[2] 156 U.S. 277 (1895).
[3] Rule 36(2), 139 U.S. 706 (1891). Text: Where such writ of error is allowed in the case of a conviction of an infamous crime . . . the Circuit Court or District Court, or any Justice or Judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.
[4] *Supra*, note 2 at 285.
[5] This quotation from the case is frequently cited. Recent cases which refer to it are Bryson v. United States, 223 F.2d 775 (9th Cir. 1955); Yanish v. Barber, 73 S.Ct. 1105 (1953); Stack v. Boyle, *supra*, note 1.
[6] Rossi v. United States, 11 F.2d 264, 266 (8th Cir. 1926).
[7] United States v. Motlow, 10 F.2d 657, 662 (7th Cir. 1926).
[8] *Supra*, note 7.
[9] *Ibid.* at 663.
[10] *Ibid.* at 662.

on frivolous grounds, merely for delay."[11] Factors other than the frivolity of the appeal and delay in its prosecution that have been considered material to the determination by the courts have been the likelihood of escape which might be implied from the character of the defendant and the nature of the offense charged,[12] as well as the possibility of a repetition of the crime charged by the applicant while at large.[13]

While the conditions governing the right to bail upon review have not been questioned, serious concern has been expressed over the extended liberty enjoyed by persons convicted of crime, pending appeal.[14] This contributed to an attempt at a more precise definition of the conditions on which bail might be granted in *Rule VI of the Criminal Appeals Rules,*[15] effective in 1934. Incidental to this restatement of the existing law, the burden of proving the substantiality of the appeal was apparently shifted to the applicant.[16] The existence of a substantial question to be determined on appeal was a prerequisite, but not the only factor that conditioned the decision on the application. Bail was denied in *United States v. Delaney*[17] because the appeal lacked substantiality. But the applicant had been indicted with another for the same offense and had voluntarily disappeared until after the trial of the other. Such conduct, the court indicates, would have been sufficient had there been some doubts as to the probabilities of reversal, to resolve them in favor of the government.

Rule 46 (a) (2), Federal Rules of Criminal Procedure

Application for bail upon review is now made under *Rule 46(a)(2) of the Federal Rules of Criminal Procedure,*[18] which provides as follows:

> "Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge allowing

---

[11] *Ibid.* at 663.
[12] United States v. Motlow, *supra,* note 7; Rossi v. United States, *supra,* note 6.
[13] Rossi v. United States, *supra,* note 6; United States ex rel. Estabrook v. Otis, 18 F.2d 689 (8th Cir. 1927).
[14] United States v. Delaney, 8 F.Supp. 224 (D.N.J. 1934).
[15] Rule VI, Criminal Appeals Rules, 28 U.S.C.A. §723(a) (1934). Text: Bail. The defendant shall not be admitted to bail pending an appeal from a judgment of conviction save as follows: Bail may be granted by the trial judge or by the appellate court, or where the appellate court is not in session, by any judge thereof, or by the circuit justice.
Bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the appellate court.
[16] United States v. Delaney, *supra,* note 14.
[17] *Ibid.*
[18] Fed. Rules Cr. Proc. Rule 46(a)(2), 18 U.S.C.A. (1952).

bail may at any time revoke the order admitting the defendant to bail."

The Rule substantially restates the existing law except that the provisions to bail pending certiorari and the right of revocation are new.[19] The language of the Rule as well as the expressed intent of its framers indicates adherence to established principles governing this subject. The use of the word "may" was deliberate. It was substituted for the proposed "shall" on the recommendation of Chief Justice Stone.[20] As before, the applicant is not entitled to bail as of right on the presumption that the conviction is correct. He has, however, the right to apply for bail. Where there is a substantial question to be determined on the appeal, the approval of the application remains within judicial discretion.

Substantial Question

Generally, the only issue presented by an application for bail under Rule 46(a)(2) is the substantiality of the appeal. What constitutes substantiality has in itself been considered a substantial question.[21] It requires something less than a showing that applicants are entitled to a reversal.[22] Substantiality may be found in questions "on which unbiased, learned and intelligent students of law might reasonably differ."[23]

Phrases used to describe questions that are deemed substantial are "fairly debatable",[24] "not yet decided by that court",[25] and "fairly doubtful . . . not trivial or merely technical, but (having) substantial importance to the merits."[26] This issue has been considered by Justice Douglas in his capacity as Ninth Circuit Justice. He declares that this condition of Rule 46(a)(2) is met by questions "new and novel", presenting "unique facts not plainly covered by the controlling precedents", or involving "important questions concerning the scope and meaning of decisions of the Supreme Court."[27] In a recent case Justice Douglas held a question to be substantial where "there is a contrariety of views concerning it in the several circuits."[28] He also states that a substantial question within the meaning of the Rule is

---

[19] Barron And Holtzhoff, Federal Practice And Procedure, Vol. 4, §2503 (1951).

[20] Williamson v. United States, 184 F.2d 280, n. 281 (2nd Cir. 1950). Justice Jackson here quotes excerpts from the unpublished history of Rule 46(a)(2) in the files of that Court.

[21] Herzog v. United States, 75 S.Ct. 349 (1955).

[22] United States v. Motlow, *supra*, note 7.

[23] United States v. Delaney, *supra*, note 14.

[24] United States v. Warring, 16 F.R.D. 524, 526 (D.Md. 1954); United States v. Stephenson, 110 F.Supp. 623, 627 (D.Alaska 1953); D'Aquino v. United States, 180 F.2d 271, 272 (9th Cir. 1950).

[25] United States v. Barbeau, 92 F.Supp. 196, 202 (D.Alaska 1950).

[26] Williamson v. United States, *supra*, note 20 at n. 281.

[27] D'Aquino v. United States, *supra*, note 24, at 272.

[28] Herzog v. United States, *supra*, note 21.

presented where the appellate court should give directions to its district judges on the question, or "if in the interests of the administration of justice some clarification of an existing rule should be made."[29] He describes how the conclusion as to substantiality is reached by an analogy to the procedure before the Supreme Court upon application for writs of certiorari. In looking to the soundness of the errors alleged, the judge or justice takes into consideration "whether there is a school of thought, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail."[30] For the purpose of the Rule it is sufficient that "one judge would be likely to see merit in the contention."[31]

The purpose of the requirement of a substantial question to be determined on appeal is to absolutely deny bail where the appeal has no merit and is frivolous. However, when the court which will hear the appeal on the merits determines the application for bail, its decision is not to be taken as a prejudging of the issues of the appeal.[32]

Judicial Discretion

Although no serious controversy as to the general interpretation of Rule 46(a)(2) had arisen prior to 1950, four cases decided that year were thought to indicate conflict or at least varying trends in its application in different circuits.[33] This has importance beyond the question of possible conflict because it concerns the problem of the exercise of judicial discretion in the granting or denial of bail upon review after a conclusion as to the substantiality of the appeal has been reached. To determine whether there is actual conflict these cases should be considered in the light of the character and conduct of the applicants, the nature of the offense charged, as well as the decisions and reasoning.

In *D'Aquino v. United States*,[34] the applicant "Tokyo Rose" had been convicted of treason. Justice Douglas granted bail on the ground that the appeal presented a substantial question. He further stated that where it may be shown that an applicant though guilty beyond doubt "may have been denied the kind of trial that even a traitor to our country is entitled to under the Constitution and laws"[35] bail should be granted. The application was approved subject to "provi-

[29] *Id.* at 351.
[30] *Id.* at 351.
[31] *Id.* at 351.
[32] United States v. Iacullo, 225 F.2d 485 (7th Cir. 1955).
[33] The possibility of conflict was discussed by a number of student writers. See the following: *Bail, pending appeal, mandatory or discretionary?* 1 Cath. U. L. Rev. 93-9 (1950); *Federal Criminal Procedure—granting of bail after conviction*, 26 N.Y.U. L. Rev. 191-7 (1951); 64 Harv. L. Rev. 662-4 (1951); 37 Va. L. Rev. 447-9 (1951).
[34] *Supra*, note 24.
[35] *Id.* at 272.

sions safeguarding the interests of the United States against dilatory tactics."[36]

In *United States v. Burgman*,[37] where the applicant had also been convicted of treason, Judge Holtzhoff, one of the framers of Rule 46(a)(2) finds two conditions imposed thereby. First, the appeal must present a substantial question, and second, the case must be one in which in the exercise of judicial discretion it would be proper to grant bail. Bail was denied in this case because the appeal was found to embody no substantial question and also for the reason that it would not be proper to grant bail after conviction where it had been denied before trial. That treason is not an extraditable offense was considered as relevant to securing the presence of the applicant. The *D'Aquino* case was held not applicable because there substantiality of the appeal was found.

A similar interpretation as to the conditions imposed by the Rule is followed in the Second Circuit decision of *Williamson v. United States*.[38] This was an application to Justice Jackson for an extension of bail after the Court of Appeals had revoked bail but allowed a temporary extension pending the application to the Justice. The revocation was grounded on the improper conduct of the applicants. Bail was granted for the reason that the ground of the revocation did not remove the substantiality of the appeal which had been conceded originally by the government. The decision is, however, primarily concerned with the second of the conditions defined in the *Burgman* case. Justice Jackson finds a limited discretion as to the determination of the propriety of granting or denial of bail where the first condition is met. Here the post-conviction activities of the applicants, making speeches and writing articles which were found not to contain any advocacy of the violent overthrow of the government, were held not to warrant denial. A caution as to the exercise of the power of judicial discretion is expressed, namely that it not be used to "coerce men to forego conduct as to which the Bill of Rights leaves them free,"[39] nor to imprison persons for "predicted but as yet unconsummated crimes."[40] This would indicate that the commission of a crime, or grave and imminent danger resulting from the enlargement of the applicant may be such factors as in themselves warrant denial.

Bridges v. United States[41] is concerned with issues similar to those of the *Williamson* case. The applicant filed a motion in the Court of

[36] *Id.* at 272.
[37] 89 F.Supp. 288 (D.C. 1950).
[38] *Supra*, note 20.
[39] *Id.* at 283.
[40] *Id.* at 282.
[41] 184 F.2d 881 (9th Cir. 1950). In this case notice of appeal was filed July 1950, and the appeal decided against the applicant. This was reversed by the Supreme Court in 345 U.S. 979 (1953). As a later case, Bryson v. United

Appeals to modify or vacate an order by the trial court revoking bail. Concluding that the revocation proceedings had not disturbed the findings as to substantiality, the Court granted bail. No suggestion was found that the applicant might escape or not prosecute his appeal. As to the post-conviction activities of this controversial labor leader in following the Communist position during the Korean situation, the Court held that these did not warrant denial since no crime had been committed thereby. Here, as well as in the previous case, concern was expressed for the effect of subjecting an accused Communist to the punishment of imprisonment pending appeal of his conviction. The following sentence of the opinion, however, was thought to raise the question whether the court held the granting of bail to be mandatory on the finding of substantiality: "But where a meritorious question exists, bail becomes a matter of right, not of grace."[42]

May it then be said on the basis of these four cases that the Ninth Circuit decisions, i.e. *D'Aquino* and *Bridges* interpret Rule 46(a)(2) as imposing only the conditions of substantiality of the appeal and making the granting of bail mandatory on this being met, while the other Circuits hold this to be a condition precedent to the exercise of judicial discretion as to the propriety of granting bail? It is submitted that, in the light of the definition of the Rule stated in the *Burgman* case, there is no apparent conflict as to the conditions imposed thereby on the right to bail upon review, nor is there conflict as to established principles governing this right. In each case, the primary concern is for the substantiality of the appeal, the first condition to be met. Where this is found to exist, bail is granted; where lacking, bail is denied. Each case looks to the propriety of granting bail under the circumstances of the case. Justice Douglas disposes of this question by making the grant conditional to a diligent prosecution of the appeal. In the *Williamson* and *Bridges* cases, where the conduct of the applicants gave rise to the question of propriety of allowing the enlargement of the applicants, it is held that where a substantial question existed to be determined on appeal, the particular conduct of these applicants although certainly controversial did not constitute grounds for denial. In the absence of any indication by the court in the *Burgman* case as to what would have been the result had a substantial question been found, the difference of opinion as to the bailability of the offense of treason after conviction between this case and the *D'Aquino* case might be reconciled within the subjective latitude of judicial discretion. The supposedly controversial sentence of the *Bridges* case appears less so in the light of the almost identical language of earlier

States, 223 F.2d 775 (9th Cir. 1955), points out, if bail had been denied here, the applicant would have had to serve three years of his sentence.

[42] *Id.* at 884.

decisions defining the nature of the right of an applicant to bail upon review, which are cited in the opinion.[43]

More recent decisions which deal with the problem of judicial discretion, after a conclusion had been reached as to the substantiality of the appeal, appear consistent with the application of the Rule in these cases. In *Christoffel v. United States*,[44] active participation in Communist party affairs was held not to constitute sufficient grounds for denial of bail where the appeal presented a substantial question. Bail was denied in *United States v. Glazer*[45] where the applicant had been convicted of income tax evasion because it was not shown that the appeal was substantial, "or, that in the court's discretion defendant should be admitted to bail pending appeal."[46] The court does not elaborate, however, what gave rise to the denial on the second, disjunctive ground. In *Yanish v. United States*,[47] Justice Douglas holds that the applicant's membership in the Communist Party and his work for a Communist paper did not warrant denial since he had no previous criminal record and such activities constituted no danger to the community. In another decision[48] by Justice Douglas, where the applicant had been convicted of income tax evasion, it is noted that there is no likelihood of his escape. One recent Ninth Circuit decision, *Johnson v. United States*,[49] in which the majority and dissenting opinions agree that denial is warranted for lack of substantiality, there is also agreement that "this court has never had in mind that Rule 46(a)(2) is a mandate for the general allowance of bail on appeal."[50] Similarly, a Seventh Circuit decision, *United States v. Iacullo*,[51] after reiterating that the granting of bail rests in sound judicial discretion and cannot be demanded as a matter of right, adds "nor does the presence of a substantial question make bail mandatory."[52]

It should be noted that a number of cases[53] considered the likelihood of escape a factor next in importance to frivolity and delay in determining the application, and generally fixed the amount and terms of bail on standards relevant to the purpose of assuring the presence of the defendant. This suggests some overlapping of the discretionary power as to granting or denial and the determination of the

[43] Rossi v. United States, *supra*, note 6; United States v. Motlow, *supra*, note 7.
[44] 196 F.2d 560 (D.C. Cir. 1951).
[45] 14 F.R.D. 86 (E.D.Mo. 1952).
[46] *Id.* at 90.
[47] 73 S.Ct. 1105 (1953).
[48] Herzog v. United States, *supra*, note 21.
[49] 218 F.2d 578 (9th Cir. 1954).
[50] *Id.*, dissent on other grounds, at 580.
[51] 225 F.2d 458 (7th Cir. 1955).
[52] *Id.* at .
[53] Herzog v. United States, *supra*, note 21; Rossi v. United States, *supra*, note 6; United States v. Motlow, *supra*, note 7; Hudson v. Parker, *supra*, note 2.

amount and the terms on which bail might be granted. *Rule 46(c) of the Federal Rules of Criminal Procedure*[54] states that where bail is granted it shall be in such amount as "will insure the presence of the defendant." Among factors listed as material to the determination of this amount are "the nature and circumstances of the offense charged" and "the character of the defendant." This provision has been held to apply to bail before as well as after trial.[55] The danger of escape, however, is considered a "calculated risk", one "which the law takes as a price of our system of justice."[56] The word "insure" in this section has been interpreted to mean "assure."[57] In *United States v. Barker,*[58] where the applicant had been convicted of mail fraud and criminal contempt, the court found no substantiality as to the appeal from the latter conviction, and the applicant had to serve this sentence. However, the appeal from the mail fraud conviction was found not to be frivolous, and bail was granted thereon. That "the defendant may be a security risk" and his "calculated and studied contempt"[59] together with the affidavit of his previous bondsman that he intended to flee made it essential that bail be fixed in a substantial amount. Where the amount of bail set by the trial court had the effect of keeping the applicant in jail because he was unable to raise the required amount, $50,000 in this instance, the appellate court in *Bryson v. United States*[60] ordered this reduced. In view of the substantiality of the appeal, and the facts that the applicant had no prior record of any criminal offense and that there was no danger of flight, the court felt that keeping the applicant in jail under these circumstances would be in "complete disregard of the principle established by the Supreme Court in the case of *Hudson v. Parker.*"[61]

Procedure under Rule 46(a)(2) after Denial by Trial Court

A number of recent decisions raise another question with respect to Rule 46(a)(2), namely, whether the application to the appellate court, or a judge thereof, or to the circuit justice is in the nature of a trial *de novo*. The principle that the ruling of the trial judge "is not

---

[54] Fed. Rules Cr. Proc. Rule 46(c), 18 U.S.C.A. (1952). Text: If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of evidence against him, the financial ability of the defendant to give bail, and the character of the defendant.

[55] Bryson v. United States, 223 F.2d 775 (9th Cir. 1955).

[56] Stack v. Boyle, *supra,* note 1 at 8.

[57] United States v. Schneidermann, 102 F.Supp. 52, 73 (S.D.Cal. 1951). (reversed on other grounds.)

[58] 11 F.R.D. 421 (N.D.Cal. 1951).

[59] *Id.* at 423.

[60] *Supra,* note 55.

[61] *Id.* at 777.

and should not be final"[62] appears from the language of the Rule, as well as that of earlier provisions. It should be noted here, that, under *Rule 38(c) of the Federal Rules of Criminal Procedure,*[63] which must be read in conjunction with Rule 46(a)(2), it must now be shown that application to the court below either was not practicable, or that it has been made and denied, stating the reasons for denial. It would appear from a number of cases that such application is in the nature of a trial *de novo,* not only from the frequency with which denial by a trial court was reversed, but also from the express statements by judges and justices in determining such applications. Justice Butler states that denial by the trial court and two judges of the appellate court should be "considered thoughtfully"[64] but not be allowed to control a just exercise of discretion in determining the application. In the *Rossi* case the appellate court found an "imperative duty"[65] to exercise its own discretion. Justice Douglas, after giving "deference" to the judgments of the courts below, held that where doubts remain, the justice "alone must resolve them."[66] In *Carlisle v. Landon*[67] it is stated that in determining the motion for bail pending appeal, the appellate court is not "reviewing as for correction or errors, the action taken by the district court, but is considering whether the applicant is presently entitled to be enlarged upon bail."[68]

Two recent decisions by Justice Frankfurter as Second Circuit Justice appear to point to a different policy. In *Albanese v. United States*[69] bail was denied on the ground that the petition could not be granted unless the record revealed a clear abuse of discretion by the appellate court in denying bail, even though the questions sought to be raised on appeal were not frivolous. It is indicated, however, that a renewal of the application would be entertained if delay in the prosecution of the appeal might be ascribed to the government. In *Patter-*

---

[62] *Proceedings of Institute on Federal Rules of Criminal Procedure,* 5 F.R.D. 243 (1946).

[63] FED. RULES CR. PROC. RULE 38(c), 18 U.S.C.A. (1952). Text: "Application for Relief Pending Review. If application is made to a court of appeals or to a circuit judge or justice of the Supreme Court for bail pending appeal or for an extension of time for filing the record on appeal or for any other relief which might have been granted by the district court, the application shall be upon notice and shall show that application has been made and denied, with the reason given for denial, or that the action on the application did not afford the relief to which the applicant considers himself to be entitled."

[64] United States v. Motlow, *supra,* note 7 at 663.

[65] Rossi v. United States, *supra,* note 6 at 265.

[66] Herzog v. United States, *supra,* note 21 at 350.

[67] 206 F.2d 191 (9th Cir. 1953). This was a proceeding upon a motion for bail pending appeal from the District Court's judgment denying the relator a writ of habeas corpus. The Court held that it did not have the power to enlarge the relator on bail.

[68] *Id.* at 193.

[69] 75 S.Ct. 211 (1954).

son v. United States,[70] on the assumption that the appeal would be heard as promptly as possible, bail was denied on the ground that the Justice would have to find an abuse of discretion to reverse the finding of the Court of Appeals. Another case, *Johnson v. United States,*[71] should be noted here. This particularly emphasizes that the question of substantiality should be determined on the whole record of the case when this is considered by the appellate court, although here the lack of substantiality was so patent that bail was denied on that ground, and not for the reason that the whole record was not before the court. This requirement does not appear from the language of Rule 38(c), nor was it noted in prior cases.

The reason underlying the policy of these latter decisions may be found in the persistent concern with what has been termed "the spectacle of convicted defendants at large on bail, pending unnecessary delays on appeal."[72] This concern is also revealed in what Judge Holtzhoff considers one of the purposes of the previous law of which Rule 46(a)(2) is a restatement, namely "the restriction of the enlargement of convicted defendants on bail."[73] This concept would seem to narrow the scope of the exercise of judicial discretion as understood by Justice Butler.[74]

While this new policy is probably not intended to impair established principles governing the right to bail upon review, nevertheless, some consequences of its application may possibly constitute a watering down of these principles. Denial of bail because of delays in the prosecution of the appeal, regardless of its substantiality, would seem to increase the possibility that the applicant might have to serve at least part of his sentence even though his conviction were reversed on appeal.[75] Furthermore, denial of bail where the sentence imposed on conviction is short, may render nugatory the right of appeal. Undoubtedly, this policy would have the desired effect of moving the applicant to pursue his appeal with expeditiousness. Whether it would result also in the expedition of the federal criminal appellate procedure, the slowness and cumbersomeness of which are admittedly similarly responsible for the lengthy enlargements of convicted defendants and the frequent reversals of denials of bail[76] is not so certain. It may perhaps be questioned whether the remedy for this serious problem

[70] 75 S.Ct. 256 (1954). Here the conviction was reversed on appeal in United States v. Patterson, 219 F.2d 659 (1955).
[71] *Supra,* note 48. A similar approach is followed in United States v. Iacullo, *supra,* note 31.
[72] United States v. Delaney, *supra,* note 14, at 227. The Court quotes from an article by Chief Justice Hughes in BAR ASS'N. J., June 1934.
[73] United States v. Burgman, *supra,* note 36 at 289.
[74] United States v. Motlow, *supra,* note 7.
[75] See note 70.
[76] United States v. Fiala, 102 F.Supp. 899 (W.D.Wash. 1951); YANKWICH, *Release on Bond by Trial and Appellate Courts,* 7 F.R.D. 271 (1947).

lies in further restriction of the conditions on which bail may be granted where, as the dissent in the *Johnson* case says it results in "the cutting into human rights."[77]

SUMMARY

The generally accepted interpretation of the present law under Rule 46(a)(2) imposes the following conditions on the right to bail upon review. First, it must be shown that the applicant is honestly pursuing legal means to obtain a reversal of his conviction by proving the substantiality of his appeal. This is an absolute prerequisite to the granting of bail. Second, it must be shown that the case is one in which in judicial discretion it is proper to allow the enlargement of the applicant with regard to the danger of flight or delay in the prosecution of the appeal, as well as danger to the community resulting from the applicant's post-conviction activities.

The development of the rules implementing the common law principles governing the right to bail upon review reflects a balancing of two interests, that of the individual not to be unjustly imprisoned, and that of society to see speedy justice done. There appears a shifting emphasis in the end to which judicial discretion is exercised from the protection of the interest of the individual to that of the public. This emphasis appears more pronounced in some decisions than in others. However, there does not seem to be any real conflict as to the application of the present Rule, nor as to the underlying principles of the right to bail upon review.

MARIA LUBITZ

[77] Johnson v. United States, *supra,* note 48 at 580.