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Criminal Procedure—Coram Nobis—Not Available Where Counsel Has Failed to File Timely Notice of Appeal When Requested by Defendant

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procedure, failed to consider the fact that this majority-to-convict precedure originated in New York before the Constitution was adopted, was being used at the time that document was adopted and basically has been used ever since.[44] With that in mind, it would be difficult to argue that the procedure violates due process of law as it was known to the framers of that Constitution. Significant however, is the fact that the procedure was origanally set up for the convenience of the accused,[45] whereas today it is used to expedite the business of the Criminal Court of the City of New York. The convenience of the court has never been a convincing factor when weighed against the rights of an accused in a criminal prosecution..

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CORAM NOBIS—NOT AVAILABLE WHERE COUNSEL HAS FAILED TO FILE TIMELY NOTICE OF APPEAL WHEN REQUESTED BY DEFENDANT

In two recent cases, defendants were sentenced to prison terms following their felony convictions. Joseph Marchese and Thomas Kling decided to appeal and so informed their attorneys. Both were assured that notice of appeal would be filed, but neither attorney took the necessary action. Attempting to reinstate the lost right to appeal, defendants applied to their respective trial courts by writ of error coram nobis.[1] From the orders of the trial courts denying hearings, defendants appealed to the Appellate Division, Second Department, where the orders were affirmed. Defendants then appealed to the Court of Appeals which *held*, in both cases, affirmed, without opinion (three judges dissenting,[2] voting to reverse and order hearings). Coram nobis is not available where counsel assigned for trial (*Kling*) or retained by defendant (*Marchese*) had been requested to file notice of appeal, had promised to do so, but failed in that task. *People v. Kling*, 19 A.D.2d 750, 242 N.Y.S.2d 977 (2d Dep't 1963) (one judge dissenting),[3] *aff'd mem.*, 14 N.Y.2d 571, 198 N.E.2d 46, 248 N.Y.S.2d 661 (1964), *motion to amend remittitur granted*, 14 N.Y.2d 687, 198 N.E.2d 913, 249 N.Y.S.2d 884 (1964), *petition for cert. filed*, Misc. Calendar, July 1, 1964 (No. 198); *People v. Marchese*, 19 A.D.2d 728,

44. *Supra* notes 6, 8 and 10.
45. *Supra* note 6.

1. If the trial court found that the excuses were adequate as a matter of law, it would order hearings to determine the factual sufficiency of defendants' assertions. Then, upon a finding that the excuses were supported by facts, the court would vacate the original judgment of conviction and impose a new sentence at that time. This would have the effect of giving defendants a new time in which to appeal.

2. The same three judges dissented in both cases: Desmond, C.J., Fuld and Bergan, JJ.

3. Noted in 15 Syracuse L. Rev. 578 (1964). Previous to this Appellate Division decision the following occurred: *Appeal dismissed*, 11 A.D.2d 917 (2d Dep't 1958) (failure to prosecute); *cert. denied*, 361 U.S. 935 (1960); *petition for writ of habeas corpus denied*, 188 F. Supp. 470 (N.D.N.Y. 1960), *affirmed*, 306 F.2d 199 (2d Cir. 1962) (existing state remedy); *dismissal of appeal vacated*, (App. Div. 2d Dep't) 148 N.Y.L.J. 16 (Oct. 11, 1962).

242 N.Y.S.2d 464 (2d Dep't 1963), *aff'd mem.*, 14 N.Y.2d 695, 198 N.E.2d 916, 249 N.Y.S.2d 888 (1964), *petition for cert. filed*, Misc. Calendar, August 18, 1964 (No. 388).

Under the common law, review by an appellate court of a final judgment in a criminal case was not deemed essential to due process of law.[4] It is also well settled that there is no constitutional *right* to appeal.[5] Where appeal is allowed it is by the grace of statutory prescription.[6] In New York practice,[7] statutory provisions must be followed explicitly in order to preserve the right to appeal. Any appeals filed thirty days after rendition of judgment,[8] the statutory time limit, will be summarily dismissed.[9] There are some exceptions to this harsh rule,[10] but these are minimal and granted only in extreme circumstances. Judgments dismissing late appeals for failure to file timely notice are very common and it is generally held that there is no denial of due process in such action.[11] This first hurdle of timely notice is important because once notice has been filed defendant will be able to proceed even though he has failed to perfect the appeal. He need only show that his neglect in failing to perfect the appeal was excusable. The failure of an attorney which deprived the client of his right to appeal in the instant cases could be the basis of an excuse which would allow a defendant to proceed where the notice had been filed.[12] But the instant cases do not deal with a failure to perfect resulting in dismissal of the appeal. Here, no notice of appeal had ever been filed. The questions presented in the instant cases are: (1) What remedy may the client pursue in order to establish the neglect which led to his being denied his right to appeal, and (2) can counsel's neglect serve as a sufficient basis for redress?

The writ of error coram nobis utilized by Kling and Marchese in the

4. McKane v. Durston, 153 U.S. 684, 688 (1894); *accord*, McGuire v. Hunter, 138 F.2d 379 (10th Cir. 1943), *vacated on other grounds*, 322 U.S. 710 (1943); see also 12 Am. Jur. *Constitutional Law* § 638 (1938).

5. Matter of Ryan, 306 N.Y. 11, 114 N.E.2d 183 (1953); 24 C.J.S. *Criminal Law* § 1628 (1961); *but see* In re Opinion of the Judges, 26 Okla. Crim. 41, 221 Pac. 1041 (1924) (capital case); see also Okla. Stat. Ann. tit. 22, § 1051 (1951).

6. Matter of Ryan, *supra* note 5; *accord*, People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427 (1945), *cert. dismissed*, 326 U.S. 687 (1945) (petitioner died).

7. See N.Y. Code Crim. Proc. § 517.

8. N.Y. Code Crim. Proc. § 521; compare, A.B.A. Section of Judicial Administration, Internal Operating Procedures of Appellate Courts (1961) at 49 where the committee reports that ". . . the time allowed for giving notice of appeal varies from 10 to 90 days. . . ." The committee further observes: "it would seem that a rule requiring notice of appeal to be filed in 10 days, with a possible extension of up to 30 days for good cause shown, would be desirable."

9. See, *e.g.*, People v. King, 273 N.Y. 646, 8 N.E.2d 36 (1937). A new provision has been incorporated into the Criminal Procedure Code which adds a safeguard to the defendant's rights: upon dismissal the court is now required to notify the attorney who appeared *and* the defendant, himself, of the action taken. See Code Crim. Proc. § 537-a. Previously no such notice was deemed necessary.

10. N.Y. Code Crim. Proc. § 521-a; compare Burns' Ind. Stat. Ann. § 9-3305 (Cum. Supp. 1964); N.H. Ann. Stat. ch. 508, § 7 (1955); R.I. Gen. Laws § 9-21-6 (1956).

11. *E.g.*, State v. Fordsham, 139 Mont. 222, 362 P.2d 413 (1961).

12. N.Y. Code Crim. Proc. § 524-a; see People v. Adams, 12 N.Y.2d 417, 190 N.E.2d 529, 240 N.Y.S.2d 155 (1963), noted in 13 Buffalo L. Rev. 162 (1963).

instant cases has a varied history in New York criminal procedure. Traditionally, it has been used to bring to the court's attention matters occurring during trial which did not appear on the record, and resulted in a judgment which should never have been rendered.[13] Accordingly, coram nobis has been held available to review a judgment where it was alleged that the procurement of a plea of guilty was based on trickery, deceit, coercion or fraud.[14] It is also available where incompetency of counsel is alleged,[15] raising constitutional problems of due process and right to counsel; but not where counsel's mere negligence or error of judgment is advanced.[16] The New York Court of Appeals has in recent years expanded the scope of coram nobis where no other remedy could be utilized.[17] This expanded scope makes coram nobis available ". . . to secure a review of any error . . . which has deprived the defendant of substantial justice . . ."[18] or ". . . to redress an injury . . . which has deprived him of due process of law . . . ."[19] Thus, where a prisoner has been prevented by a state officer or agency from filing his timely notice of appeal, coram nobis has been held available.[20] A petition alleging that defendant's mental condition after trial had prevented him from filing notice

13. See People v. Hairston, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961); 24 C.J.S. *Criminal Law* § 1606(2) (1961).

14. Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943); *accord*, People v. Berger, 9 N.Y.2d 692, 173 N.E.2d 243, 212 N.Y.S.2d 425 (1961); People v. Picciotti, 4 N.Y.2d 340, 151 N.E.2d 191, 175 N.Y.S.2d 32 (1958); People v. Richetti, 302 N.Y. 290 (1951); People v. Kincaid, 15 A.D.2d 870, 225 N.Y.S.2d 56 (4th Dep't 1962); *contra*, People v. Vellucci, 13 N.Y.2d 665, 191 N.E.2d 468, 240 N.Y.S.2d 992 (Desmond, C.J., Fuld and Foster, JJ., dissenting), *cert. denied*, 375 U.S. 868 (1963); People v. Hernandez, 8 N.Y.2d 345, 170 N.E.2d 673, 207 N.Y.S.2d 668 (1960), *cert. denied*, 366 U.S. 976 (1961) (Douglas, J., dissenting); People v. Tomaselli, 7 N.Y.2d 350, 165 N.E.2d 551, 197 N.Y.S.2d 697 (1960) (Desmond, C.J., dissenting); People v. Battice, 5 N.Y.2d 946, 156 N.E.2d 920, 183 N.Y.S.2d 564 (1959) (Desmond, C.J., and Fuld, J., dissenting, citing People v. Picciotti, *supra*, and cases therein.), *motion to amend remittitur granted* 6 N.Y.2d 882, 160 (N.E.2d 129, 188 N.Y.S.2d 1002 (1959), *cert. denied*, 361 U.S. 967 (1960).

15. See generally Annot., 74 A.L.R.2d 1390 (1960).

16. People v. Brown, 7 N.Y.2d 359, 165 N.E.2d 557, 197 N.Y.S.2d 705 (1960) (Desmond, C.J., dissenting, citing People v. Picciotti and People v. Richetti, *supra* note 14), *cert. denied*, 365 U.S. 821 (1961). "The test . . . is whether the alleged incompetency of his counsel deprived the defendant of his right to adequate legal representation as to make his conviction a mockery of justice." People v. De Bernardo, 199 Misc. 563, 569, 106 N.Y.S.2d 515, 521 (Bronx County Ct. 1950); *cf.* Edwards v. United States, 256 F.2d 707 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958); Dennis v. United States, 177 F.2d 195 (4th Cir. 1949); see also Mitchell v. United States, 254 F.2d 954 (D.C. Cir. 1958) (trial counsel refused to appeal where defendant couldn't pay fee), *cert. denied*, 371 U.S. 838 (1962); United States v. Peabody, 173 F. Supp. 413, (W.D. Wash. 1958) (must be plain reversible error at trial), *cert. denied*, 361 U.S. 841 (1959).

17. People v. Sullivan, 3 N.Y.2d 196, 144 N.E.2d 6, 165 N.Y.S.2d 6 (1957); *accord*, People v. Hairston, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961); see 24 C.J.S. *Criminal Law* § 1606(2) (1961); see generally Frank, Coram Nobis (1953).

18. Paperno & Goldstein, Criminal Procedure in New York 709 (1960).

19. People v. Sullivan, 3 N.Y.2d 196, 198, 144 N.E.2d 6, 8, 165 N.Y.S.2d 6, 9 (1957).

20. People v. Hairston, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961) (failure of prison officials to provide postage to make notice of appeal); People v. Guhr, 5 A.D.2d 688, 169 N.Y.S.2d 256 (2d Dep't 1957) (prevented by prison officials from communicating with attorney, but many errors at trial also claimed); *cf.* Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951) (prison rules required warden to ban exit of papers); Cochran v. Kansas, 316 U.S. 255 (1942) (officials suppressed documents).

of appeal necessitated a hearing.[21] Another hearing was ordered where an indigent defendant claimed that his counsel had told him that he couldn't appeal because he had no funds with which to procure a transcript of the trial record where a statute made such transcript available without cost.[22] In another case, coram nobis relief was granted where assignment of counsel for purposes of appeal had been denied;[23] but where counsel merely expressed an opinion as to chances of success on appeal and defendant contended that he had been thereby *prevented* from taking an appeal, coram nobis was held to be unavailable.[24]

In the instant cases, the Appellate Division opinions merely reiterate the principle that where timely notice of appeal has not been filed, coram nobis relief is not available without a showing of action by a state agency or officer, or where there are other mitigating circumstances such as those described above.[25] In *Kling*, the Appellate Division holds that there must also be a showing of reversible error at the trial in order to be granted an appeal once the time has run.[26] The defendants' contentions in both cases that acts of counsel prevented their appeals are dismissed by the Appellate Division where it is noted that a court cannot stand as surety for the performance of counsel. The majority was not persuaded by defendants' contentions that they were lulled into a false sense of security by the assurances of counsel.[27] Concerning the assigned versus retained aspect of counsel, the Appellate Division further finds in *Kling* that the duties of assigned counsel terminate with the rendition of judgment, and therefore any post-conviction promise by him becomes the act of retained counsel, negating any possibility of construing the promise to act as the action of a state agency or officer or "state action." The Appellate Division notes in both cases that granting of the relief sought would have the effect of enlarging the time to appeal. Since precedent dictates strict observance of the statutory limitations, it is concluded that coram nobis should not be utilized under these circumstances. "If the time to appeal is to be extended, it must be done by legislative action."[28]

21. People v. Hill, 8 N.Y.2d 935, 168 N.E.2d 841, 204 N.Y.S.2d 172 (1960), *affirming* 9 A.D.2d 451, 195 N.Y.S.2d 295 (2d Dep't 1959); People v. Zarcone, 15 A.D.2d 505 (2d Dep't 1961).

22. People v. Coe, 16 A.D.2d 876, 228 N.Y.S.2d 249 (4th Dep't 1962).

23. People v. Kalan, 2 N.Y.2d 278, 140 N.E.2d 357, 159 N.Y.S.2d 480 (1957) (*held*, denial of rights under N.Y. Const. art. I, §§ 6, 11 (due process, equal protection)).

24. People v. Bjornsen, 40 Misc. 2d 986, 244 N.Y.S.2d 551 (Sup. Ct. 1963).

25. People v. Kling, 19 A.D.2d 750, 242 N.Y.S.2d 977 (2d Dep't 1963); People v. Marchese, 19 A.D.2d 728, 242 N.Y.S.2d 464 (2d Dep't 1963).

26. The court cites Mitchell v. United States, 254 F.2d 954 (D.C. Cir. 1958), *cert. denied*, 371 U.S. 838 (1962), for this proposition of law. This requirement of reversible error is apparently nullified by the Court of Appeals, where reliance on *Brown* and *Tomaselli* evidences no need for such a harsh test.

27. Kling, Brief for Appellant, pp. 5-11; Marchese, Brief for Appellant, pp. 5-6.

28. People v. Kling, 19 A.D.2d 750, 751, 242 N.Y.S.2d 977, 979; People v. Marchese, 19 A.D.2d 728, 242 N.Y.S.2d 464; *accord*, People v. Roberts, 25 Misc. 2d 321, 325, 201 N.Y.S.2d 844, 848 (Oneida County Ct. 1960): "While this may seem a harsh result, it is a problem for the Legislature and not the Courts," *rev'd on other grounds*, 13 A.D.2d 719, 213 N.Y.S.2d 833 (4th Dep't 1961) (The reversal was required because a hearing was

In *Kling*, the majority in the Court of Appeals based their holding solely on the authority of two cases: *People v. Tomaselli*,[29] and *People v. Brown*.[30] Tomaselli, aged sixteen at the time of his trial, had urged inadequacy of counsel where counsel had been assigned from the courtroom at the arraignment, had conferred with him for ten minutes, and when Tomaselli admitted his guilt, urged him to plead guilty. Brown's court-appointed counsel had advised against calling eyewitnesses who had made favorable statements about him. A hearing of these charges was not required in either case. The reasoning was that it would be futile to hold a hearing because, as a matter of law, no relief could be granted even if defendants' assertions were found to be factually true. The dissenters in *Kling* also relied on two cases: *People v. Hairston*,[31] and *People v. Adams*.[32] Hairston had been prevented by prison officials from complying with the thirty day time limit for filing notice of appeal. Adams' court-appointed counsel had filed a notice of appeal but the appeal was dismissed for failure to perfect. Adams contended that he lost the right to appeal without ever knowing he had it, since his counsel had never informed him of any action taken. In both cases, defendants stated sufficient facts which as a matter of law would entitle them to relief. Therefore, it was held that hearings were necessary at which defendants would have an opportunty to substantiate their assertions. The Court of Appeals in *Marchese* was totally mute. No authority was cited by either majority or minority. For the purposes of this note, the writer has assumed that *People v. Kling* was controlling.

Were either of these cases civil actions, neglect of this degree would be expected to give rise to liability on the part of the attorneys involved.[33] But here, forfeiture of the right to appeal has resulted in the continued imprisonment of defendants, with no relief in sight. In a recent federal criminal case, it was stated that ". . . one who justifiably believes that he is represented by counsel and who instructs his counsel to appeal and is assured by counsel that the appeal will be filed, should not suffer a loss of rights if counsel proves faithless . . . ."[34] But that very right to appeal has been forfeited in the instant cases. In cases where state action was alleged it has been relatively easy for the Court of Appeals to order a hearing.[35] In *Kling*, however, no state action was apparent.[36] The Appellate Division would further require a showing of

necessary to determine the truth of incompetency of counsel charges—notice of appeal grounds were insufficient in themselves.).

29. 7 N.Y.2d 350, 165 N.E.2d 551, 197 N.Y.S.2d 697 (1960) (Desmond, C.J., dissenting).

30. 7 N.Y.2d 359, 165 N.E.2d 557, 197 N.Y.S.2d 705 (1960) (Desmond, C.J., dissenting).

31. 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961).

32. 12 N.Y.2d 417, 190 N.E.2d 529, 240 N.Y.S.2d 155 (1963), noted in 13 Buffalo L. Rev. 162 (1963).

33. See generally Annot., 45 A.L.R.2d 5 (1956); see Pete v. Henderson, 124 Cal. App.2d 487, 269 P.2d 78 (1st Dist., Div. I 1954).

34. Calland v. United States, 323 F.2d 405 (7th Cir. 1963). It must be noted, however, that the dissenting judge would require a further showing of reversible error.

35. See authorities cited note 20 *supra*.

36. The appellant in *Marchese* did not seek to invoke state action but rather ad-

reversible error.[37] This requirement would seem to be satisfied, if at a hearing, Kling's contentions of coached identification and suppression of evidence could be substantiated. It seems, however, that this is not what is required. The state's Brief on Appeal verbalized the true requirement:[38]

> To grant special permission to this appellant, because his rights were allegedly lost by an act of omission of another, but not by the State or by the Court, does not preclude or bar a requirement that appellant show that such grant is not a worthless gesture. A showing of merit, is particularly required here . . . .

But, it must be remembered, the very purpose of the hearing is to assess the merit of defendant's allegations. A requirement of a showing of merit to qualify for a hearing is premature to say the least. It should be sufficient that the defendant allege facts which as a matter of law would entitle him to relief should they be found true upon a determination at a hearing. The majority of the Court of Appeals in *Kling* relies wholly on *Brown* and *Tomaselli*, disposing of the case on state action grounds. Cases granting hearings where there was no state action alleged are seemingly dismissed without comment.[39] Appellant, in an attempt to get within the state action formulation, argued that assignment of counsel by a court is tantamount to state action. But the Appellate Division sidestepped this argument by holding that the duties of assigned counsel terminate with the rendition of judgment, converting any act of counsel after trial into the act of retained counsel. The lack of usefulness of this distinction between assigned and retained counsel is conceded even by the state in *Marchese*.[40] This writer has also been informed that during the oral argument of *Marchese* the Court of Appeals noted that any argument on this question would not be profitable. In any event, the cases have not held the actions of assigned counsel to be state action;[41] therefore, for purposes of the instant cases, the distinction is entirely irrelevant.[42] Neither the Court

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dressed himself to the problem by arguing that coram nobis should be available where appeal has been prevented merely by circumstances beyond his control as was the case in both *Hairston* and *Adams*.

37. 19 A.D.2d at 750, 242 N.Y.S.2d at 979.

38. Brief for Respondent, p. 14.

39. *E.g.*, People v. Hill, 8 N.Y.2d 935, 168 N.E.2d 841, 204 N.Y.S.2d 172 (1960); People v. Kincaid, 15 A.D.2d 870, 225 N.Y.S.2d 56 (4th Dep't 1962).

40. Brief for Respondent, p. 4; *accord*, Porter v. United States, 298 F.2d 461 (5th Cir. 1962); see Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289, 300 & n.72 (1964); *but cf.* People v. Kling, Brief for Respondent, p. 12: "Neither as retained counsel nor as assigned counsel, was the obligation of [counsel] to file the Notice of Appeal attributable to the Court or to the State. Even if [counsel] had promised to do this gratuitous act, coram nobis relief is not available. . . ."

41. See People v. Hernandez, 8 N.Y.2d 345, 170 N.E.2d 673, 207 N.Y.S.2d 668 (1960), *cert. denied*, 366 U.S. 976 (1961); People v. Tomaselli, 7 N.Y.2d 350, 165 N.E.2d 551, 197 N.Y.S.2d 687 (1960).

42. The rationale that the acts of assigned counsel are state action is further exploded when it is realized that both assigned and retained counsel are equally officers of the court. The real issue is the harm done by counsel due to his failure to act, not the characterization of it as the act of either assigned or retained counsel. This idea is unsuccessfully argued in *Marchese*. Perhaps of special note is a rule recently promulgated by the Appellate

of Appeals nor the Appellate Division in *Kling* or *Marchese* discuss a lower court decision rendered in the previous year. In that case a hearing was granted when the defendant was prevented from complying with the statutory requirements because his attorney had promised to file a notice of appeal, but because the trial fees had not been fully paid, failed to do so.[43] It is assumed that such a holding would not withstand attack on appeal.

The legislative intent to deal strictly with excuses concerning notices of appeal is reduced by the Court of Appeals to terms of state action. But in considering the state and federal constitutional guarantees of right to counsel, due process and equal protection,[44] both appellants have constructed arguments which deserve some notice. The larger issue in the instant cases is whether neglect of counsel is at least equal to the frustration of an appeal due to state action as defined by the New York courts. Surely an accused ". . . requires the guiding hand of counsel at every step of the proceedings against him. . . ."[45] The argument that a decision allowing hearings in cases such as these will encourage persons to attack the competency of their counsel is hardly sufficient. The federal courts have held that once the state provides an appellate procedure, due process and equal protection must be accorded.[46] Therefore, ". . . the possibility, or probability, that such [hearings] will be numerous is no answer at all . . . ."[47] Where constitutional questions of such import are raised, as they have been in the instant cases,[48] "fundamental concepts of due process, decisions of the United States Supreme Court and of our own [Court of Appeals], and the very nature of the *coram nobis* type of relief—all demand a trial of such sworn assertions."[49] The question of practical consequence now is: Will the strength of the state action concept be deemed a sufficient basis for the decisions of the New York Court of Appeals or will the United States Supreme Court be forced to deal with the constitutional questions of due process and right to effective counsel?

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Division, Fourth Department (Unnumbered Rule, effective Apr. 2, 1964, as reported in Buffalo Daily Law Journal, April 9, 1964, p. 1, col. 1) requiring assigned trial counsel, if requested by defendant, to file notice of appeal before duties are fully discharged. In this connection, a recent federal case is pertinent: Coffman v. Bomar, 220 F. Supp. 343 (M.D. Tenn. 1963) (habeas corpus utilized to void a conviction where counsel failed to satisfy specific statutory duty requiring state court-appointed counsel to perfect appeal, in contravention of fourteenth amendment guarantees).

43. People v. Longale, 37 Misc. 2d 528, 235 N.Y.S.2d 871 (Jefferson County Ct.), *aff'd mem.*, 19 A.D.2d 696, 242 N.Y.S.2d 635 (4th Dep't 1963); *but see* Owsley v. Cunningham, 190 F. Supp. 608, 611 (E.D. Va. 1961) (". . . failure of an attorney to note and perfect an appeal affords no right to a hearing under 28 U.S.C.A. § 2255.").

44. U.S. Const. amend. VI & XIV; N.Y. Const. art. I, §§ 6, 11; see Note, *Effective Assistance of Counsel*, 49 Va. L. Rev. 1531 (1963).

45. Powell v. Alabama, 287 U.S. 45, 69 (1932).

46. Griffin v. Illinois, 351 U.S. 12 (1956).

47. People v. Richetti, 302 N.Y. 290, 295, 97 N.E.2d 908, 910 (1951).

48. People v. Kling, Brief for Appellant, pp. 15-23, People v. Marchese, Brief for Appellant, pp. 8-10.

49. People v. Richetti, 302 N.Y. 290, 295, 97 N.E.2d 908, 910 (1951).