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JUDICIAL DISCRETION IN BAIL AFTER CONVICTION

Harry Bridges was convicted of perjury and, pending appeal, was admitted to bail. Subsequently, the Korean conflict developed. The government moved to revoke bail on the grounds that Bridges, being a Communist and head of the important World Federation of Trade Unions which the government alleged to be Communistic, was pursuing conduct detrimental to the war effort and security of the United States. The trial court revoked bail. Bridges appealed. *Held*, that since a meritorious question existed in his appeal from the perjury conviction, Bridges was entitled to bail pending appeal as a matter of right. "But where a meritorious question exists, bail becomes a matter of right, not grace." *Bridges v. United States*, 184 F.(2d) 881 (9th Cir. 1950).

The court relied heavily on dictum in the leading case of *Hudson v. Parker*: "The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment of punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."¹

In further support of its theory, the court cited four cases. However, it is submitted that none of these cases (which will no be disussed) clearly stands for the proposition that bail is a matter of right after conviction and pending appeal. In *McKnight v. United States*, the court said: "Detention pending the writ is only for the purpose of securing the attendance of the convicted person. . . . If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief."² The words, "there is no excuse" strongly imply that bail after conviction is not a matter of right but rather a matter in the sound judicial discretion of the court. The court in the case of *United States v. Motlow* declared that the bail after conviction is a matter of judicial discretion, indicating strongly, however, that there should be good reason for denying such bail.³ This indication is perhaps what the court in the instant case relied on. Though the Circuit Justice in *D'Aquino v. United States* held that defendant was entitled to bail, it is submitted that he reached this decision by an exercise of discretion, and not because it was defendant's right.⁴ In *Rossi v. United States*, it was held that the discretion of the judge in admitting or denying bail was not to be exercised on the basis of a mere personal preference, but should rest on sound reason and precedent.⁵ Through all of these cases there are indications and statements that bail, after conviction and pending appeal, is not a matter of mere favor or grace. However, sound judicial

1. 156 U.S. 277, 285. 15 Sup. Ct. 450, 453, 39 L.Ed. 424, 427 (1895).

2. 113 F. 451, 453 (6th Cir. 1902).

3. 10 F.(2d) 657 (7th Cir. 1926).

4. 180 F.(2d) 271 (9th Cir. 1950).

5. 11 F.(2d) 264 (8th Cir. 1926).

discretion in the matter of bail is as different from favor or grace as is the "right" to bail. Perhaps it is this distinction which the court in the instant case failed to note, and which failure led it to declare bail a matter of right after conviction. The court, in the instant case, by what appears to be erroneous interpretations of the above cases, committed itself to a proposition which seems totally inaccurate.

"Although there is some authority to the contrary, the courts quite uniformly take the view that constitutional guaranties of the right to bail refer only to cases in which the accused has not yet had trial, and do not confer the right to bail after a conviction and pending an appeal therefrom."⁶ "It is held almost without exception that such constitutional provisions for bail refer only to cases in which the accused has not yet had a trial."⁷ "The constitutional provision in the Bill of Rights has reference only to the cases in which the accused has not had a trial, and applies to all persons prior to conviction, but does not refer to cases wherein a conviction has been had in a court of competent jurisdiction."⁸ It has been held that the Eighth Amendment to the United States Constitution requires legislation creating the right to apply for bail to make it effective.⁹ Thus the present right is covered by the Federal Rules of Criminal Procedure, Rule 46 (a) (2) and decisions which have reference to general constitutional or statutory provisions as to bail are pertinent to the question in issue. By dictum, the court in *State v. Bradsher* said: "After conviction, there is no constitutional right to bail."¹⁰ "This constitutional guaranty does not apply to bail after conviction."¹¹

Rule 46 (a) (2) provides that: "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 or justice allowing bail may at any time revoke the order admitting the defendant to bail."¹²

Where the facts were almost identical with those of the *Bridges* case, it was said by Justice Jackson in granting bail as a matter of discretion, that: "To remain at large, under bond, after conviction and until the courts complete the process of settling substantial questions which underlie the

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6. 6 Am. Jur. 80, par. 42.
 7. Ex parte Womack, 62 Okla. Crim. 290, 71 P.(2d) 494 (1937).
 8. Ex Parte Herrndon, 18 Okla. Crim. 68, 192 Pac. 820, 19 A.L.R. 804 (1920). In this case, a provision in the Oklahoma Constitution grants bail as a matter of right in all except capital cases.
 9. United States v. Hudson, 65 F. 68 (W.D. Ark. 1894).
 10. 189 N.C. 401, 403, 127 S.E. 349, 351, 38 A.L.R. 1102, 1104 (1925).
 11. Sioux Falls v. Marshall, 48 S.D. 378, 204 N.W. 999, 45 A.L.R. 447 (1925). See also: Ex Parte Halsey, 124 Ohio St. 318, 178 N.E. 271, 77 A.L.R. 1232 (1931); Hicks v. State, 179 Tenn. 601, 168 S.W. (2d) 781 (1943); Ex parte Berry, 198 Wash. 317, 88 P.(2d) 427 (1939); Ex parte Schriber, 19 Idaho 531, 114 Pac. 29, 37 L.R.A. (N.S.) 693 (1911); Ex parte Ezell, 40 Tex. 451, 19 Am. Rep. 32 (1874).
 12. Federal Rules of Criminal Procedure 46 (a) (2), 18 U.S.C.A. p. 505.

determination of guilt cannot be demanded as a matter of right. It rests in sound judicial discretion."¹³ In explaining this conclusion, Justice Jackson reviewed the unpublished history of Rule 46 (a) (2), and concluded: "It is apparent that the language of the rule was not casual or loose and that the basis for claiming bail as a matter of right was deliberately eliminated."¹⁴

In Wyoming, Section 3-5414 of the 1945 Wyoming Compiled Statutes gives the *right* to bail pending appeal: "The judge of the trial court, or any justice of the supreme court in any criminal cause shall, on such appeal being perfected, admit the defendant to bail in sum such as shall be deemed proper in all bailable cases, and the district court, after conviction, shall also stay the execution of the judgment or sentence pending the taking of the appeal, and in bailable cases, admit the defendant to bail." There are no decisions expressly construing this statute. In the case of *State v. Sorrentino*, where the only question on appeal was the length of imprisonment of the defendant, bail was denied, but the court strongly implied that the right exists as stated in the statute in all other cases.¹⁵

The court, in the instant case, for all practical purposes, disregarded any construction of Rule 46 (a) (2), stating what it regarded as the guiding principle on the subject. It arrived at this "guiding principle" largely by following the quotation in *Hudson v. Parker*, above, and thus unduly enlarged the effect of all statutes granting bail generally, as distinguished from statutes expressly granting bail after conviction. However, by the weight of authority, bail, after conviction and pending appeal, does not exist as a matter of right in the absence of a statute. Perhaps the court was led to declare it a right by a reluctance to provide propaganda for the Communists by imprisoning Bridges before the final determination of his case. If so, the same result could have been reached, without the seeming error, by granting bail on discretionary grounds. It was not necessary to declare that bail was a matter of right, and thus rest the decision on unstable grounds and a definitely minority viewpoint.

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THE STATE OF SPECIFIC COMMODITY HAULERS AND
THE MOTOR CARRIER ACT

The expressed objectives of Wyoming's Motor Carrier Act are "The promotion of the safety of the highways, the collection of a fair and adequate compensatory fee for the commercial use of highways constructed

13. *Williamson v. United States*, 184 F. (2d) 280 (2d Cir. 1950).

14. *Williamson v. United States*, 184 F. (2d) 280 (2d Cir. 1950).

15. 32 Wyo. 410, 233 Pac. 142 (1925).