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Wax Fruit: The Cognizability of Fourth Amendment Claims in Collateral Attacks Upon Convictions

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WAX FRUIT[1]: THE COGNIZABILITY OF FOURTH AMENDMENT CLAIMS IN COLLATERAL ATTACKS UPON CONVICTIONS

In *Kaufman v. United States*[2] the Supreme Court held that a federal prisoner could collaterally challenge the validity of a conviction predicated on the admission of illegally seized evidence, notwithstanding his failure to raise the Fourth Amendment issue on direct appeal.

Harold Kaufman was indicted for armed robbery of a federally insured savings and loan association.[3] At trial defense counsel conceded that Kaufman committed the act and pleaded him insane. Counsel objected to the admission of certain evidence that tended to establish the defendant's sanity on the ground that it was inadmissible as the fruit of an illegal search, but the court overruled the objection. Kaufman's appeal was prosecuted by a newly appointed counsel who did not raise the search and seizure issue.[4] The conviction was affirmed,[5] and the Supreme Court denied certiorari.[6]

While serving sentence Kaufman filed a motion for post conviction relief under 28 U.S.C. Section 2255,[7] claiming that his conviction was based upon the admission of illegally seized evidence. The federal district court denied relief, holding that the record did not substantiate the claim of illegal search and seizure[8] and further asserting that the issue, not being assigned as error on direct appeal, was not a ground for collateral attack through a Section 2255 motion.[9] The district court and the court of appeals then denied Kaufman's application for leave to appeal *in forma pauperis*.[10] The Supreme Court granted certiorari,[11] and treated these actions by the lower courts as denying that claims of unlawful search and seizure could be raised on a motion to vacate under Section 2255.[12] This denial was in accord with overwhelming precedent throughout the federal judicial system.[13]

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[1] "Plays can close. Television you can turn off. Wax fruit lays in the bowl till you're a hundred". N. SIMON, COME BLOW YOUR HORN 80–81 (1963).

[2] 394 U.S. 217 (1969).

[3] 18 U.S.C. § 2113 (a) (d) (1964).

[4] Although newly appointed counsel did not assign the admission of allegedly illegal evidence as error, Kaufman wrote a letter requesting him to submit a fourth amendment claim to the court of appeals. Counsel forwarded the letter to the court, but the subsequent opinion affirming the conviction did not appear to pass on the search and seizure claim. See Kaufman v. United States, 394 U.S. 217, 220 n.3 (1969).

[5] Kaufman v. United States, 350 F.2d 408 (8th Cir. 1965).

[6] 383 U.S. 951 (1966).

[7] The pertinent provisions of 28 U.S.C. § 2255 (1964) are:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the . . . sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

[8] Kaufman v. United States, 268 F. Supp. 484 (E.D. Mo. 1967).

[9] *Id.* at 487.

[10] *In forma pauperis* is the manner in which an indigent defendant perfects an appeal without liability for costs. The denials to Kaufman were not accompanied by written opinions.

[11] 390 U.S. 1002 (1968).

[12] Kaufman v. United States, 394 U.S. 217, 219–20 (1969).

[13] United States v. Re, 372 F.2d 641 (2d Cir. 1967); De Welles v. United States, 372 F.2d 67 (7th Cir. 1967); Cox v. United States, 351 F.2d 280 (8th Cir. 1965); Eisner v. United States, 351 F.2d 55 (6th Cir. 1965); Kapsalis v. United States, 345 F.2d 392 (7th Cir.), *cert. denied*, 382 U.S. 946 (1965); Nash v. United States, 342 F.2d 366 5th Cir. (1965); Springer v. United States, 340 F.2d 950 (8th Cir. 1965); Armstead v. United States, 318 F.2d 725 (5th Cir. 1963); Thompson v. United States, 315 F.2d 689 (6th Cir.), *cert. denied*, 375 U.S. 843 (1963); Peters v. United States, 312 F.2d 481 (8th Cir. 1963); Warren v. United States, 311 F.2d 673 (8th Cir. 1963); Williams v. United States, 307 F.2d 366 (9th Cir. 1962); United States v. Jenkins, 281 F.2d 193 (3rd Cir. 1960); United States v. DeFillo, 182 F. Supp. 782 (S.D.N.Y. 1959), *aff'd per curiam*, 277 F.2d 162 (2d Cir. 1960); Eberhart v. United States, 262 F.2d 421 (9th Cir. 1958); Plummer v. United States, 260 F.2d 729 (D.C. Cir. 1958); Wilkens v. United States, 258 F.2d 416, (D.C. Cir.), *cert. denied*, 357 U.S. 942 (1958); White v. United States, 235 F.2d 221 (D.C. Cir. 1956).

In several cases, however, the courts have indicated a substantial degree of uncertainty as to the propriety of this rule by denying the motion on the merits and suggesting dismissal of the claim as noncognizable under Section 2255 or on alternate grounds.[14] This uncertainty is, perhaps, understandable since the federal courts regularly entertain the motion when it is based on other constitutional grounds.[15] Several lower federal courts have indicated, in dicta, that Fourth Amendment claims should also be recognized under Section 2255.[16]

Section 2255 was designed to revise federal habeas corpus relief by providing that the federal prisoner seek post conviction relief in the original sentencing court rather than in the court in the district of his confinement.[17] This change was designed to minimize the administrative difficulties encountered in a habeas corpus proceeding[18] but was not intended to narrow the scope of grounds for a collateral attack upon a conviction.[19] Thus, although the court in which to bring a 2255 application was changed, there was no modification of the rule that only error of the magnitude cognizable under a writ of habeas corpus to state prisoners formed an appropriate ground for relief.[20]

The basic uncertainty as to whether 2255 relief extended to alleged Fourth Amendment violations was accentuated by the fact that the courts of appeal have denied cognizance without enumerating reasons for distinguishing search and seizure claims for collateral relief from other constitutional grounds where relief was granted.[21] In *Thornton v. United States*,[22] however, the District of Columbia Circuit, in holding that 2255 should not be avail-

[14] *See, e.g.*, Sims v. United States, 272 F. Supp. 577 (D.C. Md. 1966), *aff'd*, 382 F.2d 294 (4th Cir. 1967), *cert. denied*, 390 U.S. 961 (1967); United States v. Rosenberg, 200 F.2d 666, 671 (2d Cir. 1952).

[15] United States v. Hayman, 342 U.S. 205 (1952) (sixth amendment right to effective assistance of counsel); Sanders v. United States, 373 U.S. 1 (1963); Thomas v. United States, 352 F.2d 701 (D.C. Cir. 1965) (fifth amendment protection against self-incrimination). Section 2255, the mechanism by which a federal prisoner may apply for collateral relief, is simply one species of the genus labeled habeas corpus. However, the term habeas corpus is more commonly affiliated with the state prisoner's request for collateral relief in a federal court which is governed by 28 U.S.C. 2254. Because the substantive extent of Section 2255 is defined by the scope of rights cognizable under a writ of habeas corpus to state prisoners, effect is given to 2255 claims having 2254 precedents. Hill v. United States, 368 U.S. 424, 428 n.5 (1962); Larson v. United States, 275 F.2d 673, 676 (5th Cir. 1960). Examples of claims cognizable under a writ of habeas corpus to state prisoners include: Arndstein v. McCarthy, 254 U.S. 71 (1920) (fifth amendment); Morgan v. DeVine, 237 U.S. 632 (1915) (double jeopardy); Rogers v. Peck, 199 U.S. 425 (1905) (due process clause of fourteenth amendment); Andersen v. Treat, 172 U.S. 24 (1898) (sixth amendment right to counsel); *Ex parte* Wilson, 114 U.S. 417 (1885) (fifth amendment grand jury right).

[16] The Tenth Circuit in Gaitan v. United States, 317 F.2d 494, 496 (10th Cir. 1963), said that the issue of the admissibility of illegally seized evidence had a constitutional basis and was therefore available under section 2255. The rationale for this conclusion was gleaned from Justice Black's concurring opinion in Mapp v. Ohio, 367 U.S. 643, 662 (1961):

> [W]hen the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

In United States v. Sutton, 321 F.2d 221, 222–23 (4th Cir. 1963), the Fourth Circuit indicated that the improper seizure of evidence in violation of the fourth amendment was a constitutional question which could be raised in an application for vacation or correction of a single sentence. The Court was concerned with the magnitude of the error committed and based its conclusion on Hill v. United States, 368 U.S. 424, 428 (1962) which distinguishes between constitutional and jurisdictional errors on the one hand and ordinary trial errors on the other. See note 20 *infra*. For support of the section 2255 cognizance on fourth amendment grounds in the district courts, *see* United States v. Winstead, 226 F. Supp. 1010 (N.D. Cal. 1964).

[17] United States v. Hayman, 342 U.S. 205, 219 (1952).

[18] Among the serious practical difficulties that had arisen in administering habeas corpus procedure to federal prisoners was the requirement that the action be brought in the court of the district of confinement. The few district courts whose territorial jurisdiction included the major federal penal institutions were required to handle an inordinate number of habeas corpus actions. During the six years preceeding enactment of section 2255 in 1948, 63% of all habeas corpus applications were filed in but 5 of the 84 district courts. *See* Speck, *Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337 (1949). The district courts encountered numerous other hurdles in attempting to decide collateral claims away from the scene of the factual situation, the homes of witnesses, and the records of the sentencing court. Because the trial records were not always available, the court in the district of confinement was often forced to consider repetitious or frivolous applications for collateral relief. Thus, in order to obviate the impediments inherent in habeas corpus procedure regarding federal prisoners, section 2255 was inserted into the 1948 Revision of the Judicial Code. *See* S. REP. No. 1559, 80th Cong., 2d Sess. 8–10 (1948).

[19] United States v. Hayman, 342 U.S. 205, 219 (1952); Hill v. United States, 368 U.S. 424, 427 (1962).

[20] Hill v. United States, 368 U.S. 424 (1962). A section 2255 request on the ground that the defendant was not given the opportunity to make a post conviction statement was disallowed because of the insignificance of the error. The Court further stated that an error which serves as an adequate ground for habeas corpus relief is a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the basic demands of fair procedure. *Id.* at 428.

[21] See cases cited note 13 *supra*.

[22] 368 F.2d 822 (D.C. Cir. 1966).

able on Fourth Amendment grounds, suggested various reasons supporting its contention. The Court asserted that pragmatic notions of finality in criminal litigation dictated that collateral relief be treated differently with regard to federal prisoners than with regard to state prisoners,[23] and that the vitality of the Fourth Amendment[24] was adequately served by the opportunity afforded a federal defendant to enforce the exclusionary rule at or before trial.[25] The Court concluded that a 2255 motion for collateral relief based on an unconstitutional search and seizure should be available only on a showing of exceptional circumstances.[26]

The government's argument in *Kaufman* was structured on the *Thornton* reasoning[27] and the decision in *Sunal v. Large*,[28] which prevented certain constitutional claims from cognizance under 2255 because the writ of habeas corpus was designed for collateral review on a judgment of conviction and not as a substitute for appeal for alleged errors committed at trial.[29]

In *Kaufman*, Mr. Justice Brennan, speaking for the majority of a divided court,[30] rejected the argument that 2255 relief was not available as a substitute for an appeal by distinguishing the limitations posed in *Sunal* on the ground that they were discussed in the context of an alleged nonconstitutional trial error, and not error of the magnitude cognizable under a writ of habeas corpus.[31] Brennan then noted that *Townsend v. Sain*[32] had held that habeas corpus was not to be denied state prisoners alleging constitutional deprivations solely because they failed to seek remedy by appeal.[33] By stating that the power of inquiry on federal habeas corpus is plenary,[34] the *Townsend* Court apparently cloaked the federal judiciary with jurisdictional authority to consider issues of constitutional magnitude on collateral appeal.[35] However, because *Townsend* involved the habeas corpus request of a state prisoner, Brennan found it necessary to review the historical development of the habeas corpus remedy in regard to state prisoners as a basis for extending collateral relief to federal prisoners.[36]

The renowned trilogy of cases that liberalized the post conviction doctrine of habeas corpus to implement justice more expeditiously[37] with regard to state prisoners included *Townsend*, *Fay v. Noia*,[38] and *Henry v. Mississippi*.[39] In *Townsend* the Court attempted to redefine and outline the guidelines as to when a petitioner convicted in a state court is entitled to an evidentiary hearing in a federal district court. The petitioner is entitled to review if:

> 1. The merits of the factual dispute were not resolved in the state hearing, or
>
> 2. The state factual determination is not fairly supported by the record as a whole, or
>
> 3. The fact-finding procedure employed by the state was not adequate to afford a full and fair hearing, or
>
> 4. There is a substantial allegation of newly discovered evidence, or
>
> 5. The material facts were not adequately developed in the state court hearing, or
>
> 6. For any reason it appears that the state trier of fact did not afford the applicant a full and fair fact hearing.[40]

Noia allowed federal collateral review of an un-

[23] *Id.* at 828–29.

[24] The vigor of fourth amendment protection would not be strengthened by the relatively minimal additional deterence afforded by collateral remedy. For the refutation of this argument see note 72 *infra* and accompanying text.

[25] Thornton v. United States, 368 F.2d 822, 828 (D.C. Cir. 1966).

[26] *Id.* at 829. A situation exemplifying "exceptional circumstances" exists where the law was changed after the time for an appeal had expired, *cf.* Warring v. Colpoys, 122 F.2d 642 (D.C. Cir.), *cert. denied*, 314 U.S. 678 (1941), as opposed to a situation in which the appeal was not perfected because the definitive ruling on the question of law had not been crystallized. Sunal v. Large, 332 U.S. 174 (1947). Exceptional circumstances are also present where a denial of constitutional rights persists through lack of counsel, Johnson v. Zerbst, 304 U.S. 458 (1938), through perjury subsequently discovered, Mooney v. Holohan, 294 U.S. 103 (1935), or through mob determination, Moore v. Dempsey, 261 U.S. 86 (1923). *See generally* Smith v. United States, 187 F.2d 192, (D.C. Cir. 1950), *cert. denied*, 341 U.S. 927 (1951).

[27] See text accompanying notes 23 and 25 *supra*.

[28] 332 U.S. 174 (1947).

[29] *Id.* at 178.

[30] The division of the Court was 5–3 with Mr. Justice Marshall not taking part.

[31] 394 U.S. at 223. See note 20 *supra*.

[32] 372 U.S. 293 (1963).

[33] *Id.* at 311–12.

[34] *Id.* at 312.

[35] *See* Brennan, *Judicial Supervision of Criminal Law Administration*, 9 CRIME AND DELINQ. 222, 231 (1963).

[36] Although the scope of relief under 2255 is defined by the rights granted to a state prisoner under habeas corpus proceedings, see note 15 *supra*, the courts continually choose to distinguish the two avenues for collateral relief. This is, perhaps, due to the fact that the federal prisoner applying for post conviction relief has had access to the federal courts while the state prisoner has not. See notes 46–48 *infra* and accompanying text.

[37] *But cf. Habeas Corpus—Waiver of Constitutional Guarantees*, 45 N.C.L. REV. 1056 (1967).

[38] 372 U.S. 391 (1963).

[39] 379 U.S. 443 (1965).

[40] Townsend v. Sain, 372 U.S. 293, 313, 318 (1963).

appealed state conviction by ruling that an allegation of unconstitutionality is not defeated by anything that may occur in state court proceedings.[41] Thus, a failure to appeal the original conviction would not bar collateral attack if the appeal were not available at the time collateral relief is requested. Although this situation would normally arise under exceptional circumstances,[42] a court, under the *Noia* doctrine, could grant relief in the interest of justice even though a prisoner knowingly failed to appeal.[43] *Henry* expanded this notion by holding that even a legitimate state interest being served by a procedural requirement neither substantiates the constitutionality of state procedure which threatens to override a federal right nor bars a challenge to the requirement on collateral attack.[44] Thus, collateral relief, as presently interpreted regarding state prisoners, permits a legitimate, viable constitutional claim which is not raised at trial or on appeal to be vindicated through the habeas corpus remedy.[45]

The government, in *Kaufman*, conceded the existence of substantial justifications for federal district court relitigation of federal contentions arising in a state criminal prosecution.[46] Its argument, however, emphasized that, unlike the state prisoner, the federal prisoner was tried in a federal forum from the beginning. Since he had the opportunity to litigate his constitutional claim before a federal judge and to appeal to a federal court of appeals, the federal judicial system has already had the "last say" and no reason exists to allow collateral relitigation.[47] Thus, the government contended that Kaufman should not be entitled to post conviction relief because considerations of finality militate against the continued existence of federal collateral remedy.[48]

Justice Brennan negated this argument by asserting that the effective protection of constitutional rights in criminal trials necessitates a continuing access to a mechanism for collateral relief.[49] "The right then is not merely to a federal forum but to a full and fair consideration of constitutional claims." [50] This position is perfectly legitimate despite the fact that it may increase the administrative burden on the federal courts. There is no assurance that the federal trial and appeal process is infallible or that new circumstances may not arise to invalidate the prior litigation.[51] No conviction should be finalized until the defendant has received a legitimate adjudication of every valid constitutional claim asserted.

Kaufman extended the rulings applicable to state prisoners with collateral search and seizure claims[52]

[41] Fay v. Noia, 372 U.S. 391, 426 (1963).

[42] See note 26 *supra*.

[43] Gladden v. Gidley, 337 F.2d 574 (9th Cir. 1964).

[44] Henry v. Mississippi, 379 U.S. 443, 447 (1965).

[45] The right to the habeas remedy is usually made conditional on the fact that the constitutional violation was not admitted due to the inexcusable neglect of the defendant in failing to object to an obvious constitutional infirmity. However, inexcusable neglect is reduced to virtual insignificance because a sixth amendment ineffective assistance of counsel issue may be proffered when an obvious constitutional violation goes unnoticed by counsel. Also, where knowledge of constitutional infirmities is clouded by abstruse state procedures, the defendant cannot be charged with inexcusable neglect. *See* Henry v. Mississippi, 379 U.S. 443 (1965).

[46] Justifications for affording a federal forum to a state prisoner include the necessity that federal courts have the "last say" with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, and the concern that state judges may be unsympathetic to federally created rights. *See* Reitz, *Federal Habeas Corpus: Postconviction Remedy For State Prisoners*, 108 U. PA. L. REV. 461 (1960). *But see* Bator, *Finality In Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 HARV. L. REV. 441 (1963); Justice Harlan's dissent in Fay v. Noia, 372 U.S. 391, 448 (1963).

[47] Thornton v. United States, 368 F.2d 822, 829 (D.C. Cir. 1966).

[48] Considerations of finality involve duplication of judicial effort, delay in setting the criminal proceeding at rest, inconvenience and possible danger in transporting a prisoner to the sentencing court for hearing, and loss of reliability in determination of the merits due to postponed litigation. *See* Amsterdam, *Search, Seizure, and Section 2255*, 112 U. PA. L. REV. 378, 383–84 (1964).

[49] Kaufman v. United States, 394 U.S. 217, 226 (1969).

[50] *Id.* at 228. In support of this conclusion Brennan cited Judge Wright's dissent in Thornton v. United States, 368 F.2d 822, 831 (D.C. Cir. 1966), which perceptively characterizes the relationship between the present interpretation of habeas corpus proceedings regarding state prisoners and the application of 2255 relief to federal prisoners by saying, "The question is not whether relitigation is necessary, but whether one adequate litigation has been afforded."

[51] Issac v. United States, 293 F. Supp. 1096 (D.S.C. 1968), held collateral relief under 2255 to be available where a conviction was made under a subsequently invalidated statute with retroactive application. Petitioner, who had been convicted of possessing a firearm which had not been registered under the National Firearms Act, was entitled to have his conviction and sentence vacated when the Supreme Court, in United States v. Haynes, 390 U.S. 85 (1968), found the specific section of the act under which petitioner was convicted to be violative of the privilege against self-incrimination. Since 2255 relief is available to correct constitutional errors retroactively applicable, it should also be available to correct constitutional errors subsequently discovered for both situations disclose unconstitutionality realized subsequent to conviction.

[52] Mancusi v. DeForte, 392 U.S. 364 (1968); Corafas v. Lavallee, 391 U.S. 234 (1968); Warden v. Hayden,

to federal prisoners by holding that, despite notions of finality, federal prisoners are no less entitled to such consideration and that there is no reason to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults of state defendants.[53]

To supplement his conclusion Brennan placed particular reliance on *Sanders v. United States*[54] where the Court reversed the denial of a second 2255 application after the first had been denied without a hearing.[55] Speaking for the *Sanders* majority, Brennan concluded that controlling weight may not be given to a denial of a prior application if it was not adjudicated on the merits or if a different issue was presented by the new application.[56] If a 2255 motion is granted where a new ground is presented through a repeat application, relief should certainly be granted on a constitutional ground initially presented subsequent to trial and appeal. In order to guarantee the full measure of constitutional protection to a federal defendant collateral relief should be available whenever a constitutional claim may arise.

The final contention promulgated by the government proposed that Kaufman's claim that evidence admitted at his trial was the fruit of an illegal search was not a proper ground for collateral attack because of the remote relationship between collateral proceedings and the deterrent function of the exclusionary rule. Brennan did not explicitly refute this contention, but rather stated that it had been rejected with regard to state prisoners[57] and, because federal prisoners were now being given equal consideration,[58] the claim should be rejected regarding federal prisoners as well.

The Court concluded that:

> Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights shall not be denied without the fullest opportunity for plenary federal judicial review.[59]

Justice Black's dissent[60] admitted that collateral attack is justifiable where the constitutional integrity of the fact finding process had been violated, but demanded that the convicted defendant raise the type of constitutional claim that casts some degree of doubt on his guilt.[61] Black noted that the historic role of the doctrine of habeas corpus was to insure against flaws in the guilt determining process.[62]

On the factual circumstances applicable to the *Kaufman* litigation, Black's analysis traverses the issue. Harold Kaufman's original plea was not guilty by reason of insanity;[63] the illegally seized evidence related to the determination of his mental condition.[64] Whether or not the accused actually committed the crime lapses into the realm of the irrelevant upon a plea of insanity. The focus of analysis should not center on the prisoner's guilt, but on whether the admission of illegally seized evidence prevented the defendant from establishing mental incompetence. Thus, because the question of guilt is devoid of practical significance when the defendant pleads insanity, Justice Black's dissent is relevant only to the extent that it relates

387 U.S. 294 (1967). Although these cases do not discuss the cognizability of search and seizure claims in a habeas corpus proceeding, the substantive effect of the decisions is to grant habeas relief on fourth amendment grounds.

[53] 394 U.S. at 228–31 (1969). Brennan rejected Thornton v. United States, 368 F.2d 822 (D.C. Cir. 1966), and adopted Judge Wright's dissent which lends conclusive support to the *Kaufman* holding:

> It would be anomalous indeed, especially in light of the interest in maintaining good federal—state relations, if defaults not precluding one adequate federal review for the constitutional claims of state prisoners precluded such a review for federal prisoners, or if defects rendering state court adjudications inadequate did not similarly affect federal court adjudications.

Id. at 831.

[54] 373 U.S. 1 (1963).

[55] Sanders v. United States, 297 F.2d 735 (9th Cir. 1961).

[56] Sanders v. United States, 373 U.S. 1, 15–17 (1963).

[57] The availability of collateral remedy works to insure the integrity of criminal proceedings at and before trial where constitutional rights are at stake. *See generally* cases cited note 52 *supra*.

[58] See note 53 *supra* and accompanying text.

[59] Kaufman v. United States, 394 U.S. 217, 228 (1968); Sanders v. United States, 373 U.S. 1, 8 (1963); Fay v. Noia, 372 U.S. 391, 424 (1963).

[60] 394 U.S. at 235. Justice Harlan, joined by Justice Stewart, also submitted a written dissent concurring to a great extent with Justice Black but disassociating himself from any implications that the availability of collateral relief turned on the petitioner's assertion of his innocence. See text accompanying notes 73–75 *infra*.

[61] Defense counsel conceded that Kaufman committed the robbery. 394 U.S. at 231. Justice Black would apparently grant collateral relief only in situations where the prisoner's innocence was obvious without regard to the repercussions of a conviction laden with constitutional infirmities.

[62] 394 U.S. at 234. *See* Mishkin, *The Supreme Court, 1964 Term—Forward: The High Court, The Great Writ, And the Due Process of Time And Law*, 79 HARV. L. REV. 56, 79–86 (1965).

[63] Kaufman v. United States, 350 F.2d 408, 409 (8th Cir. 1965).

[64] Kaufman v. United States, 268 F. Supp. 484 (E.D. Mo. 1967).

to the majority's decision in terms of the deterrent purpose of the exclusionary rule.[65] If, contrary to Black, collateral proceedings have any realistic deterrent effect on unconstitutional police activity, Kaufman should be given the opportunity of establishing his insanity without having to meet the challenge of illegally seized evidence.

The deterrent purpose of the exclusionary rule is to compel respect for the Fourth Amendment guaranty of freedom against unlawful search by removing the incentive to violate constitutional rights.[66] Regarding the degree to which the exclusionary rule should be applied, the *Kaufman* issue may be presented as the confrontation between the deterrent effect that the expansion of collateral proceedings may have regarding official illegality in the form of Fourth Amendment violation and the public interest in convicting a defendant who, by his own admission, is guilty.[67] Justice Black agreed with the decision in *Thornton v. United States*[68] which indicated that collateral attack would be of little weight in achieving the pattern of lawful conduct by enforcement officials that is the object of the exclusionary rule.[69] The *Thornton* Court felt that the fountainhead of maximum constitutional protection regarding illegal search and seizure had been crystallized in Section 41(e) of the Federal Rules of Criminal Procedure[70] and that the need for enlarging collateral review in order to assure effective vindication of the constitutional interests involved was minimal.[71]

This conclusion is antithetical to the doctrinal belief that the process of American criminal litigation must secure the constitutional integrity of the proceedings from arrest through incarceration. A semantic argument assuming that the enlargement of collateral remedies will not affect adherence to Fourth Amendment principles is based on a questionable presumption. Unless evidence can be gathered to empirically demonstrate that expanded collateral relief has absolutely no deterrent function, paramount constitutional considerations dictate the presumption that it does serve a deterrent purpose.[72] Whether the need for securing constitutional adherence is perceived to be maximal or minimal, an avenue for admonishing constitutional integrity must always remain open.

While Justice Black's dissent concerned itself with cutting back the scope of the exclusionary rule, Justice Harlan, joined by Justice Stewart, submitted a dissent disparaging the Court's refusal to reduce the scope of collateral remedy.[73] Harlan thought it unfortunate that the court used *Kaufman* to increase the availability of collateral remedy and contended that such availability should be narrowed. Harlan also dissented in *Fay v. Noia*[74] where he stated that no matter what the circumstances, one wrongly convicted must pursue his vindication through the uncertain mechanism of executive clemency.[75]

Although Harlan's position is harsh, the policy underpinnings of his position coincide with the aforementioned considerations of finality.[76] The administrative difficulties created by allowing post conviction, post appeal collateral attack on a previously uncontested constitutional point[77] can

[65] Kaufman v. United States, 394 U.S. 217, 237–40 (1969) (dissenting opinion).

[66] Elkins v. United States, 364 U.S. 206, 217 (1960).

[67] See note 61 *supra*.

[68] 368 F.2d 822, 828 (D.C. Cir. 1966).

[69] *See*, Amsterdam, *supra* note 48, at 389–90. Additional deterrence has passed the point of diminishing returns and afflicts disproportionate harm on the public interest in the confinement and rehabilitation of wrongdoers.

[70] 18 U.S.C. § 3114 (1964):

> The motion [to suppress illegally seized evidence] shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at a trial or hearing.

[71] Thornton v. United States, 368 F.2d 822, 826 (D.C. Cir. 1966).

[72] The public interest in repressing crime was long ago found to be subservient to the social need that the law "shall not be flouted by the insolence of the office." The quoted language is that of Justice Cardozo, then Judge Cardozo, in People v. DeFore, 242 N.Y. 13, 23, 150 N.E. 585, 589 (1926). The paramount social need demanding that every citizen have the type of protection designed to secure the common interest against the unlawful invasion of his property was the basis for the adoption of the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914). Whether the exclusionary rule is regarded as a judicial sanction or as a constitutional requirement, its magnitude is imbedded at the heart of American constitutional criminal law. *Compare* United States v. Wallace and Tiernan Co., 336 U.S. 793, 796 (1949) *with* Mapp v. Ohio, 367 U.S. 643, 648 (1961). Although in a particular case insistence upon such rules may appear as a technicality that benefits a guilty person, the history of the criminal law provides that tolerance of expediency in law enforcement impairs its enduring effectiveness. Miller v. United States, 357 U.S. 301, 313 (1958).

[73] 394 U.S. at 242–43.

[74] 372 U.S. 391, 448 (1963) (dissenting opinion).

[75] *Id.* at 476.

[76] See note 48 *supra*.

[77] While the problems of stale evidence and other aspects of finality are not peculiar to fourth amendment grounds for collateral relief, the analysis here will be couched in "search and seizure" language simply because the *Kaufman* litigation revolves around that issue. Where fourth amendment grounds may differ

best be analyzed by striking an analogy between fresh fruit and wax fruit.

The principle of declaring evidence inadmissible because it was procured as a result of an illegal search and seizure has been referred to as the fruit of the poisonous tree doctrine.[78] Where the fruit of the poisonous tree is contested in compliance with Section 41(e) of the Federal Rules of Criminal Procedure,[79] the problem of stale evidence is minimal because the fruit is still fresh—the litigation is proceeding, memories are vivid, and witnesses are available. However, if the claim of illegal search and seizure were entertained on collateral attack, not only might the entire trial be discarded, but, taking into account the possible unavailability of witnesses present at the original trial and lapses of memory, the fruit will have spoiled and stale evidence would become a distinct problem.[80]

Whereas fresh fruit will spoil, wax fruit will not.[81] Thus, if the fruit of an illegal search was considered to possess the longevity of wax fruit, the anti-collateral remedy analysis leads to the belief that the public interest in securing a just conviction would be prejudiced by the attenuated degree of finality in criminal litigation. The comparison between fresh fruit and wax fruit is demonstrative of the fact that it is not the physical evidence itself, but the manner in which it is obtained that should be the concern of the judiciary. Whether fruit is manifested as fresh fruit or wax fruit, it is still cognizable as fruit; whether constitutionally violative evidence is contested prior to trial or subsequent to conviction, it is still unconstitutionally seized evidence which, despite notions of finality, should not be admitted against a defendant.[82]

Since 2255 relief is now available to vindicate Fourth Amendment violations, it is conceivable that tactical delays in presenting search and seizure claims could permit guilt to go unpunished. An attorney could refrain from objecting to the admission of illegally seized evidence, avoid the issue on appeal, and request collateral relief under 2255 after a sufficient length of time had passed. Even assuming that *Kaufman* can be read so as to make irrelevant a deliberate bypassing of an objection at trial, the drawback to this is that a possibly successful suppression of evidence would be foregone and the convicted defendant would remain incarcerated until strategy dictated the tender of a 2255 claim. In any event, it is necessary to establish guidelines under which a 2255 request which has satisfied the criteria requisite to collateral relief can be rejected.

Sanders v. United States[83] enumerated basic standards governing situations in which a repeat application for 2255 relief can be denied. Collateral relief should be denied (1) where the ground for relief has been determined adversely to the applicant on a prior application and he cannot show that the ends of justice would be served by a redetermination, or (2) where the government can show that the applicant has abused the remedy.[84]

These rules should likewise be applicable to federal prisoners requesting collateral relief on a previously uncontested constitutional issue.[85] While the force of these rules would return the issue to the hands of the trial judge,[86] the applicant for collateral relief would not be summarily dismissed simply because the nature of request was based on an alleged violation of the Fourth Amendment.

While a knowing waiver of constitutional rights[87] and inexcusable neglect to proffer an objection to the admission of illegally seized evidence[88] would constitute abuses of the remedy, other standards of abuse would have to be developed on a pragmatic, case by case basis through the discretion of the trial judge. The burden to show that the ends of justice would be served by a redetermination of his conviction should be on the applicant, but he must be given the opportunity to meet this burden. Before the aura of finality encompasses his convic-

from collateral claims based on other amendments is in the repercussions of their refusal. If a collateral claim is defeated on the basis of another amendment, only one person will be affected—the person who remains in jail because of the disallowance of his claim; if a Fourth Amendment request for collateral relief is rejected, society as a whole suffers because of the diminished efficacy of the exclusionary rule.

[78] Mapp v. Ohio, 367 U.S. 643 (1961); Nardone v. United States, 308 U.S. 338, 341 (1939).

[79] Note 70 *supra*.

[80] Thornton v. United States, 368 F.2d 822, 827 (D.C. Cir. 1966). It will be remembered that *Thornton* was rejected. See note 53 *supra*.

[81] See note 1 *supra*.

[82] See note 72 *supra* and accompanying text.

[83] 373 U.S. 1 (1963).

[84] *Id.* at 15–19.

[85] Thornton v. United States, 368 F.2d 822, 833 (D.C. Cir. 1966) (dissenting opinion).

[86] One member of the federal judiciary feels that a greater reliance on the discretion of the trial judge would alleviate many of the problems in habeas corpus proceedings. *See* Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949).

[87] Knowing waiver is an intentional relinquishment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[88] See note 45 *supra*.

tion, a federal defendant should be given a complete adjudication on every constitutional claim asserted.[89] It is hoped that frivolous claims will be denied as abuses of the 2255 remedy while meritorious claims will be vindicated. The availability of collateral remedy is necessary to insure the integrity of a conviction where constitutional rights are at stake.[90]

Although Kaufman's attorney objected to the admission of the seized evidence at trial, and Kaufman himself sought to renew the objection on appeal, the Supreme Court's decision in *Kaufman* appears to entitle a federal prisoner to vindication of the Fourth Amendment defects of his trial through 2255 collateral relief even though the claim is raised subsequent to trial and appeal. The ramifications of this decision have significant potential in liberalizing the rules controlling the grounds upon which 2255 relief may be granted.

Heretofore the 2255 remedy has been summarily denied in numerous situations involving constitutional claims.[91] This is perhaps due to lack of certainty surrounding the available bases for collateral relief. However, an attempt to confine the right to collateral relief, whether in 2255 or habeas corpus proceedings, into special, all inclusive categories could lead to a denial of relief where it would proper.[92] Thus, because of the unsystematized nature of the law regarding collateral relief, a rational determination of the proper grounds on which to perfect a collateral appeal is extremely difficult.[93] *Kaufman* alleviated this difficulty to a great extent.

Alternative patterns of reasoning were available to the *Kaufman* Court which would not have significantly affected the state of law regarding collateral relief. Firstly, the Court could have fit *Kaufman* into the "exceptional circumstances"

[89] One commentator has noted different degrees of finality depending upon the time at which the search and seizure claim is raised. *See* Amsterdam, *supra* note 48, at 386–88. He notes four different situations as to the time of collaterally proffering a fourth amendment claim: (a) following a plea of guilty, *see, e.g.*, White v. Peppersack, 352 F.2d 470 (4th Cir. 1965); Sullivan v. United States, 315 F.2d 304 (10th Cir. 1963); Simms v. United States, 272 F. Supp. 577 (D.C. Md. 1966); (b) following trial and appeal where the issue was not raised, *see, e.g.*, Cox v. United States, 351 F.2d 280 (8th Cir. 1965); Peters v. United States, 312 F.2d 481 (8th Cir. 1963); White v. United States, 235 F.2d 221 (D.C. Cir. 1956); United States v. Walker, 197 F.2d 287 (2d Cir. 1952); (c) following trial at which the issue was raised and decided adversely to the accused, and the accused (i) failed to perfect an appeal, *see, e.g.*, United States v. Sutton, 321 F.2d 221 (4th Cir. 1963); Williams v. United States, 307 F.2d 366 (9th Cir. 1962), or (ii) did not raise the issue on appeal, *see, e.g.*, Kaufman v. United States, 394 U.S. 217 (1969); Nash v. United States, 342 F.2d 366 (5th Cir. 1965); Sinks v. United States, 318 F.2d 436 (7th Cir. 1963); (d) following trial and appeal where the issue was raised and decided adversely to the accused, *see, e.g.*, Eisner v. United States, 351 F.2d 55 (6th Cir. 1965). A fifth category that should be added to those recognized by Professor Amsterdam is a request for collateral review following a trial at which the issue was not raised and an appeal where it was raised under Rule 52(b) of the Federal Rules of Criminal Procedure which provides that "[D]efects affecting substantial rights may be noticed although they were not brought to the attention of the court." *See, e.g.*, Gendron v. United States, 340 F.2d 601 (8th Cir. 1965); United States v. DeFillo, 182 F. Supp. 782 (S.D.N.Y. 1959), *aff'd per curiam* 277 F.2d 162 (2d Cir. 1960). Although there may be some difference with regard to finality in these situations, the courts should not make these distinctions in reaching their decisions. The sweeping language in *Kaufman* is authority for granting collateral relief on a fourth amendment ground regardless of when it was raised. See text accompanying notes 96 and 98 *infra*.

[90] Justice Frankfurter, dissenting in Sunal v. Large, 332 U.S. 174, 187 (1947), said, "[T]he writ is necessary to prevent a complete miscarriage of justice." Frankfurter supported Judge Learned Hand's analysis of what was to be regarded as a miscarriage of justice. *See* United States *ex rel* Kulick v. Kennedy, 157 F.2d 811 (2d Cir. 1946); *Ex parte* Craig, 282 F. 138, 155 (2d Cir. 1922) (dissenting opinion). Justice Douglas' dissent in Hodges v. United States, 368 U.S. 139 (1961), indicated that any error of constitutional magnitude not alleviated through collateral relief would result in a miscarriage of justice.

[91] *See, e.g.*, Hall v. United States, 235 F.2d 838 (D.C. Cir. 1956) (defective indictment); Bishop v. United States, 223 F.2d 582 (D.C. Cir. 1955) (defendant was insane at the time the crime was committed); Adams v. United States, 222 F.2d 45 (D.C. Cir. 1955) (prosecution employed intemperate language in argument to jury); United States v. Rosenberg, 200 F.2d 666 (2d Cir. 1952) (prejudicial publicity preceeded or surrounded trial); Smith v. United States, 187 F.2d 192 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 927 (1951) (confession admitted at trial was obtained as a result of illegal detention); Hastings v. United States, 184 F.2d 939 (9th Cir. 1950) (erroneous instructions to jury); Taylor v. United States, 177 F.2d 194 (4th Cir. 1949) (evidence was insufficient to justify a conviction); and cases cited in United States v. Edwards, 152 F. Supp. 179 (D.D.C. 1957), *aff'd.* 256 F.2d 707 (D.C. Cir. 1957), *cert. denied*, 358 U.S. 847 (1958).

[92] See Justice Rutledge's dissent in Sunal v. Large, 332 U.S. 174, 188–89 (1946).

[93] *Cf. The Writ of Habeas Corpus in the Federal Courts*, 35 COLUM. L. REV. 404, 412 (1935):

> In the absence of statutory or precedential *indicia* availability of *habeas corpus* can rationally be determined in terms of the relative values, as applied to the specific defect, of the finality of judicial determination, and flexibility in reexamination of errors in the interests of human liberty.

While purely theoretical tests may be created to determine the grounds upon which collateral relief may be granted, they are of little practical significance to a federal prisoner requesting 2255 relief on a ground not previously considered in collateral proceedings.

doctrine of the *Thornton* decision and granted 2255 relief on that basis. Because appellate counsel did not preserve trial counsel's challenge to the admission of illegally seized evidence despite his client's express wishes,[94] the Court could have conceivably ruled that 2255 relief was available because exceptional circumstances prohibited the court of appeals from passing on the search and seizure claim. Thus, since 2255 relief was always available under exceptional circumstances,[95] *Kaufman* would be restricted to granting collateral relief on Fourth Amendment grounds only upon a showing of exceptional circumstances causing the failure to raise the issue at trial or on appeal. However, the Court chose to reject *Thornton*[96] and thereby indicated that collateral relief would be available anytime a Fourth Amendment claim was requested regardless of the ability to demonstrate the existence of exceptional circumstances.

Secondly, if the *Kaufman* Court had simply alluded to the habeas corpus decisions regarding state prisoners with Fourth Amendment claims[97] and extended 2255 relief on that basis, the decision would have had restricted import. The doctrine denying 2255 relief on search and seizure grounds would be overturned, but no added significance could be gleaned from the opinion. The Court, however, chose to discuss the Fourth Amendment question in unrestricted language:

> The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of *constitutional rights* relating to the criminal trial process requires the continuing availability of a mechanism for relief.[98]

The language of the Court indicates that *Kaufman* is cogent authority for granting 2255 relief on any constitutional ground.

By rejecting the two available approaches, the *Kaufman* Court is in effect intimating that all constitutional claims are cognizable under Section 2255 whenever they may be brought if the applicant can demonstrate that he is not abusing the remedy. This result creates a flexible categorization of the grounds available for collateral relief so that every person indicated for a crime will be entitled to a full and fair adjudication of every valid constitutional impediment asserted regardless of proecdural defaults. It is herein submitted that the constitutional preservation of individual rights and the assurance against their deprivation are paramount to considerations of administrative time pressure and, therefore, a mechanism for collateral relief should be available to insure the constitutional integrity of criminal litigation.

[94] See text accompanying note 4 *supra*.
[95] See note 26 *supra* and accompanying text.
[96] Note 53 *supra*.
[97] Note 52 *subra*.
[98] Kaufman v. United States, 394 U.S. 217, 226 (1969) (emphasis added); see also, *Id.* at 229; "Thus, collateral relief . . . contributes to the present vitality of *all constitutional rights*. . . ." (emphasis added).