Granucci (Dep. AG Calif.)

Stewart emphasized that EIR could not be imposed on states unless it was a constitutional requirement. Granucci agreed but noted that work was not a H/C case. The EIR might be imposed on states without for trial purposes without extending it to H/R.

Suggest limiting principles (see Brief)

Peterson (for Rehe.

(Relain on Reheis - but Reheis noted that we refused to apply R/5 retroactively because the 4% amendment violation did not go to 'truth finding process.')
Petersen (cont.)
Kammerloher (Ant A/C-Nebraska)

Nothing with recording!

Cunningham (for Rest!

Stewart noted that this case could not have arisen prior to Mapp in 1961. There was a conflict in lower ct as to H/C review of 4th Amend until Kaufman 1965.

Relies on Shelly v. Kramer.

Argues that E/R is compelled by Court.

Disagrees with Calendar.

Thinks Congress could limit scope at H/B but cannot change E/R.

Stewart says Berkowitz says E/R has nothing to do with fairness of trial.
The Chief Justice: Reverse

Wolff v. Rice (Potter's name)

Conf. 2/24/76

Reversed

Agree with Justice Blackmun, except would attack
EIR re troactively cannot
be reconciled with applying it with
Collateral review in different, deference is of
no consequence at that time.
Quality of decision making in
Fed. Ct. is adversely affected
by heavy load of H/C cases.

Brennan, J.: Affirm

Views have not changed.

Stewart, J.: Not prepared to vote

Would not allow Weeks
v. U.S. had from a rule
of EIR in Fed. Ct. nothing
more or less.
Ehrlich also applied
a rule of EIR only.
Weeks was a bolt out
of the blue. (Overruled
Wolff v. Colorado)
No case in this Ct
than convened whether
EIR applies in collateral
attack.
Rehnquist, J. Rehnquist

E/R should be modified.
Should have an objective good faith rule. This is Byrom's preference.
(Byron thinks a good faith test is answer)
Good faith should include that of predecessor.

Blackmun, J. Reverse

No possible difference in these cases.
Nothing to talk of legis. action.

Powell, J. Reverse

See my memo. dictated this A.M.
- the substance of which I presented

Rehnquist, J. Rehnquist

could join modification of E/R in favor of a standard of objective search.
Also could join my Bostamenti.

We know from Calandra that all unlawful ev. is not excluded.
In Court. matter E/R need not be applied in collateral attack.
MEMORANDUM

TO: Mr. Justice Powell DATE: February 26, 1976
FROM: Greg Palm

Summary of arguments against permitting 4th Amendment Claims under § 2254

1. History and Language: Section 2254 provides that courts should have the power to grant habeas writs whenever a person is being held "in violation of the Constitution or laws or treaties of the United States." As originally construed by this Court, this power was limited to an examination of the jurisdiction of the sentencing court. In the leading case of *Ex parte Watkins*, 3 Pet. 193, 203, the Court stated:

> An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.

Over time the Court steadily expanded the scope of the writ (much of the early expansion was due to the fact criminal convictions were not generally reviewable by the Supreme Court until the latter part of the last century) culminating in the view developed in *Fay v. Noia*, 372 U.S. 391 (1963), that habeas petitioners might raise any constitutional claim, unless there has been a failure to exhaust or intentional waiver. This history is important in that it demonstrates that the operative phrase of the statute presents no immutable obstacle to the view that you first espoused in *Scheneckloth v. Bustamonte*, 412 U.S. 218, 250 (1972). Moreover, read literally the language of
the section would require a prisoner to be freed if confined in violation of any law. But it is my understanding that the Court has never pushed the writ that far. See *Sunal v. Lange*, 332 U.S. 174 (1947).

Also useful with respect to the literal language of the statute is the idea, adhered to in *Fay*, that habeas is an equitable remedy and discretion is therefore an important ingredient:

"Discretion is implicit in the statutory command that the judge . . . 'dispose of the matter as law and justice require,' 28 U.S.C. § 2242. . . ." 372 U.S., at 438.

Justice Black emphasized the equitable nature of habeas in his dissent in *Kaufman*. Of course, when *Fay* talked of discretion it was quite clear that this discretion was not meant to include the right to not consider 4th Amendment claims. But the principle that habeas is equitable in nature has recently been applied by Justice Stewart in *Francis v. Henderson* to say that a state prisoner can't challenge the composition of the grand jury on habeas. Consequently the principle may be of some use here. Justice Black made the argument that the possibility of the applicant's innocence must be an important factor in the equitable balance. In *Bustamonte* you opted for a similar position. The innocence position is useful in that it permits a balance to be drawn against allowing a particular habeas claim: the arguments in favor of finality of state court judgments outweigh the need for habeas relief in the context of 4th Amendment claims since the evidence is often
the most probative available and there is no question of innocence. (There is a problem with the innocence rationale to the extent that Justice Stewart declined to join Justice Black's reliance on that idea in Kaufman; he was willing, however, not to permit 4th Amendment claims in § 2255 petitions; perhaps his only point was to limit the scope of his dissent to the Fourth Amendment.)

In Bustamonte you examined the legislative history of the 1966 Amendments to § 2254 and concluded that there was nothing there which is inconsistent with the innocence rationale. I agree that there is no compelling evidence that the innocence rationale is wrong. But I do not think that that history is very relevant to the issue here. It is true that the amendments were designed to limit habeas in certain respects, but Congress was not concerned with the kind of claims that might be asserted. Moreover, the House and Senate Reports recognize the facts that this Court's cert jurisdiction does not permit adequate review of federal claims. Finally, I think that the reliance placed on the state of the law regarding § 2255 cases at the time of the 1966 Amendments is misplaced. It is true that 8 of 10 Circuit Courts of Appeal did not permit 4th Amendment claims by federal prisoners under § 2255. It is also true, however, that many, if not most, of the circuits that did not permit such claims to be raised in § 2255 permitted them to be raised by state prisoners under § 2254. Thus, to the extent that statistic is relevant, it is in fact cuts the other way.
2. Policy:
   
   A. Federalism Principle: friction between state and federal courts (Bustamonte):
      
      The weight accorded this factor, as well as the side of the scale on which it is placed, turns entirely on the perceptions one has regarding the need to have federal courts pass on federal constitutional claims. The argument will be that whenever the State affords the individual an adequate process for presenting his constitutional claims there is no need to have them re-tried in a federal forum. This assumes that state court judges will be as vigilant as federal court judges in adhering to the Constitution and that any slippage can be caught on review by this Court. (A related notion is the idea that having one more court pass on a claim does not assure that the final result reached is correct; it only increases the likelihood of a different result).

   B. Finality: Balance between finality interests and interest in freeing those convicted because of evidence seized in violation of the 4th Amendment weighs in favor of the former. These finality interests include:
      
      1. duplication of judicial effort
      2. delay in setting the criminal proceeding to rest
      3. postponed fact limitation; inherently less reliable: (a) respecting the postconviction claim itself; (b) respecting the issue of guilt if the
collateral attack succeeds in a form which allows retrial. These finally interests outweigh the interest in freeing a person whose guilt is not in question. The only real interest under this Court's recent decisions is the deterrence value of the exclusionary rule as a protector of 4th Amendment values. The argument will be that the federalism and finality interests identified above outweigh the marginal deterrent effect of applying the exclusionary rule in this context.*

G.P.

* An alternative approach to this case would be to hold as a matter of constitutional construction the 4th Am. exclusionary rule enunciated by Mapp need not be applied on collateral review. Cf. (Calandra, Innes, Abderan...).
28 U.S.C. 2254 provides for federal habeas review on behalf of a state prisoner "only on the ground that he is in custody in violation of the Constitution . . . of the United States".

A prisoner who has had a fair opportunity to assert his Fourth Amendment claim in a state trial and on appeal to a state court is not in custody in violation of the Constitution.

He may be in custody in violation of the Exclusionary Rule, but we have said three times (since Mapp) that this Rule is not a personal constitutional right. See Calandra, Tucker and Peltier.

The Exclusionary Rule was developed by this Court as a means of implementing the constitutional protection against unreasonable searches and seizures. There can be no doubt that Congress could modify the Rule (for example, as suggested by the American Law Institute) or substitute some other means of implementing the constitutional provision.

Unless this is true, a good many extremely thoughtful scholars and judges have been wasting a lot of time in considering the problem of the societal injury resulting from the mechanical or absolutist application of the Exclusionary Rule. See, for example, articles by Friendly, Oaks and - most recently - by Professor Monaghan in the November issue of the Harvard Law Review; the protracted by the ALI, and the like.
Atty., were on the brief, submitted on the brief for appellee.

Before BASTIAN, Senior Circuit Judge, and WRIGHT and LEVENTHAL, Circuit Judges.

LEVENTHAL, Circuit Judge:

[1] In this case we are asked to reconsider our doctrine that ordinarily a claim of illegal search and seizure may not be raised collaterally under 28 U.S.C. § 2255. Our prior holdings (supra, note 1) are in accord with the opinions of most of the other circuits, which have ruled that collateral review is not available, either on the law or by way of evidentiary hearing. However, there have been recent statements to the contrary—technically in dicta—in circuit opinions based on views believed to be inherent in and required by recent Supreme Court opinions. Accordingly we have reexamined our earlier position. We confirm prior holdings (supra, note 1) are in accord with the opinions of most of the other circuits, which have ruled that collateral review is not available, either on the law or by way of evidentiary hearing.2 However, there have been recent statements to the contrary—technically in dicta—in circuit opinions based on views believed to be inherent in and required by recent Supreme Court opinions. Accordingly we have reexamined our earlier position. We confirm our earlier position. We have reexamined our earlier position. We confirm

On June 1, 1960, appellant Charles J. Thornton was arrested at his home by Federal narcotics agents. After indictment


2. E.g., United States v. De Fillo, 182 F. Supp. 782 (S.D.N.Y.1959), aff’d per curiam on appeal to the court of appeals below, 277 F.2d 162 (2d Cir. 1960); United States v. Jenkins, 251 F.2d 193 (3d Cir. 1958); Nash v. United States, 342 F.2d 366 (5th Cir. 1965); Armstead v. United States, 318 F.2d 725


4. At the hearing appellant abandoned the claim that he never received a prelim-
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Cites as 368 F.2d 822 (1966)

- appellant was permitted to testify. Because of the intimate relationship between the illegal search and inadequate counsel points the court allowed counsel to probe the circumstances of the arrest and search without ruling whether this kind of issue might properly be raised on a Section 2255 motion. Appellant testified that he was awakened at 4:30 A.M. on June 1, 1960, by a loud rapping at his front door. While he arose to answer the knock, he heard someone "busting" or "kicking" in the porch door. When he opened the door, his visitors identified themselves as federal officers and claimed they had a warrant for his arrest. They were invited in, and proceeded to search appellant and his apartment. In the course of their examination, they discovered and seized personal effects, and in addition an address book and a slip of paper linking appellant to some of his co-defendants. The admission of these two items in evidence at the trial is the basis of appellant's Fourth Amendment claim. The Government did not cross-examine appellant on the circumstances of the arrest.

On the issue of ineffective assistance of counsel, appellant testified that his counsel had not queried him about the details of the arrest, and despite assurances that he would recover appellant's personal effects made no motion to that end. Appellant admitted that he might not have requested his counsel to recover the address book and slip of paper, or mentioned their incriminating potential.

[2] Appellant's former counsel, called to the stand, had no recollection of the details of the consultations and proceedings of five years ago. The court and the parties agreed to let the record speak for itself. The transcript of the original trial revealed that counsel for the co-defendants did most of the questioning; that although the suppression motion was not made by appellant's lawyer, yet that attorney concurred in the motion of counsel for co-defendants, who indeed served as lead counsel during the entire trial. The court held that the failure to file an independent motion in appellant's behalf to suppress the evidence in question did not under the circumstances amount to a constitutional inadequacy of counsel. We affirm this ruling, and do not consider the point to require further discussion.

Insofar as the motion rested on the unreasonableness of the search and seizure, it was denied with a ruling by the court that as a matter of law the admission in evidence of the fruits of an illegal arrest, search, or seizure cannot serve as the basis of a motion under § 2255.

[3, 4] The extent of relief and review available on a § 2255 motion is the same as that open to a petitioner seeking vindication of his rights by the habeas corpus route. The only difference is that Congress enacted § 2255 in the 1948 Judicial Code in order to provide a less cumbersome remedy, through consideration by the sentencing court rather than the district of confinement. United States v. Hayman, 342 U.S. 205, 219, 72 S.Ct. 263, 96 L.Ed. 232 (1952); Hill v. United States, 368 U.S. 424, 427-428, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962).

[5, 6] Many opinions declare that collateral attack, as by habeas corpus, is available to correct the denial of a constitutional right. This is the general rule but it is not an absolute. These expressions do not obliterate the doctrine that the normal and customary method of correcting trial errors, even as to constitutional questions, is by appeal, and that habeas corpus cannot serve as a substitute for the regular judicial process of trial and appeal in the absence of cir-

[7, 8] As noted in Smith v. United States, 88 U.S.App.D.C. 80, 85, 187 F.2d 192, 197 (1950), cert. denied, 341 U.S. 927, 71 S.Ct. 792, 95 L.Ed. 1358 (1951): "Where the alleged error of the trial court is in the admission of evidence subject to correction on appeal, and there is representation by counsel, habeas corpus is not the appropriate remedy." Collateral review is available, however, for the denial of a constitutional right accompanied by "weakness in the judicial process which has resulted in the conviction", such as lack of counsel, perjury undiscovered, mob domination, etc. Id. at 86, 187 F.2d at 198.

[9] Whether collateral attack is permissible depends on the nature of the constitutional claim, the effectiveness of the direct remedies, and the need for choices among competing considerations in quest of the ultimate goal of achievement of justice. The decision is not predetermined by the absolute availability of judicial power, but reflects the need to fathom and delineate the claims and circumstances that make the exercise of power appropriate.7 The courts are called on to evolve and provide procedures and remedies that are effective to vindicate constitutional rights. However, where effective procedures are available in the direct proceeding, there is no imperative to provide an additional, collateral review, leaving no stone unturned, when exploration of all avenues of justice at the behest of individual petitioners may impair judicial administration of the federal courts, as by making criminal litigation interminable, and diverting resources of the federal judiciary. Sunal v. Large, supra, 332 U.S. at 182, 67 S.Ct. 1588.

[10] Our rejection of the availability of collateral review for claims of unreasonable search and seizure (in the absence of exceptional circumstances) is not attributable to a low regard for the significance of the Fourth Amendment in our times and civilization. On the contrary, the magnitude of the Fourth Amendment in our constitutional constellation has prompted unusual remedies by Congress, as well as the courts. For more than fifty years, evidence secured by unconstitutional means has been held inadmissible at trial.8 Exclusion at trial was supplemented, not in time but in effectiveness, by unusual remedies permitting pre-trial suppression of the items unlawfully seized. These remedies were developed both through the power of equity to forestall injury, and through a dynamic jurisdiction built on an inherent supervisory authority over the prosecution, an authority construed to embrace not only the attorney in court but to reach back to the previous activity of the enforcement agents underlying the prosecution. This judicial fountainhead of authority is now crystallized in and survives Rule 41(e) of the Federal Rules of Criminal Procedure. Smith v. Katzenbach, 122 U.S.App.D.C. 113, 117–119, 351 F.2d 810, 814–816 (1965).

Thus the diligence and dynamism of the federal courts have provided remedies to maximize protection of these particular constitutional rights. Remedies are available not only during the trial, but at its commencement and indeed prior to the inception of the trial and if need be the indictment. The corollary, however, is a contraction of the need for enlarging collateral review in order to assure effective vindication of the constitutional interests involved.

At the same time it becomes appropriate to consider the substantial disadvantages of collateral review in terms of judicial administration. First in time...

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there is the reasonable anticipation of a larger number of hearings on petitions that will prove to be insubstantial in fact. We would resolutely breast a flood of frivolity to rescue the stray meritorious claim if we were needed for effective vindication of constitutional protection, and there were no comprehensive procedure available at and before trial. Compare Machibroda v. United States, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962). Here as already observed that effort is not required to vindicate the rights involved, and on the contrary this use of the courts would defer other cases that do present substantial claims and calls on judicial time.9 Second is the difficulty of belated determinations. The ascertainments of what constituted a cause, typically a subtle and indeed elusive question, is made incomparably more difficult and often artificial as recollections dim and witnesses are unavailable.10 The difficulty is not eradicated by noting that the accused would have the burden of proof. The narration of the events which he now provides, after protracted and intense ruminations, may unwarrantedly overshadow the cloudy recall of officers for whom this was but one case among hundreds. When the inquiry is made at trial or seasonably ordered on direct appeal, there is enough proximity to the problem to permit at least the probability of a searching inquiry. But postpone the adjudication until some collateral proceeding years hence and the examination is likely to be phantasmic. See generally Linkletter v. Walker, 381 U.S. 618, 637, 85 S.Ct. 1751, 14 L.Ed.2d 601 (1965); Hodges v. United States, 168 U.S.App.D.C. 375, 377, 282 F.2d 858, 860 (1960) (en banc), cert. dismissed, 388 U.S. 139, 82 S.Ct. 235, 7 L.Ed.2d 184 (1961). Last but by no means least is the fact that the court can take timely corrective action without jettisoning the trial if a valid search and seizure claim is presented at or before trial. But if the claim were entertained on collateral attack it would not only scrap the completed trial but also, taking into account the possible subsequent unavailability of witnesses present or available at the original trial, might well imperil the public interest in securing a just conviction.

Courts should be reluctant to let general considerations of administration require injustice in the particular case. That reluctance is overcome by the weighty consideration, diluting the fear of particular injustice, that the claim of unreasonable search and seizure does not weaken the probative value of the evidence against the accused. It is partly because the rule of exclusion is not a truth-protecting device that the Supreme Court decreed last year that Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), would be given only prospective effect in State convictions. Linkletter v. Walker, supra. Collateral attack is negated not only by the rule

5. For a recent article commenting on the difficulty faced by Federal courts in keeping up with the volume of judicial business, see Wright, The Federal Courts --A Century After Appomattox, 52 A.B.A. J. 742, 743 (1966).

We appreciate that the administrative considerations outlined in this paragraph apply to collateral review generally, and specifically indeed to collateral attack on this ground of ineffectiveness of counsel, which may be intertwined with a search and seizure contention. But as this case illustrates the evidence as well as the determination may be different when the court is considering only ineffective assistance of counsel; here, for example, there was no need to call the arresting officers as witnesses. The heavy burden resting on the applicant claiming ineffective assistance of counsel is not likely to be ignored. Hence ineffective assistance of counsel is not likely to be tolerated as a backdoor for arguing search and seizure claims. In any event the balancing of interests involved leads to different conclusions as to availability of collateral review for these different contentions.

against retrospectivity, which is relevant but not controlling, but by the consideration that collateral attack would be of little if any weight in achieving the pattern of lawful conduct by enforcement officials which is the objective of the exculsory rule. Enforcement officials know that evidence unreasonably seized is subject to exclusion by resort to a variety of motions. There is no basis for supposing that their conduct will be substantially influenced by the additional possibility of an inquiry years hence. Compare Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 389–90 (1964), who suggests that additional deterrence, if any, has passed the point of diminishing returns, and inflicts disproportionate harm on the public interest in confinement and rehabilitation of wrongdoers. That courts will not pursue ad infinitum the objective of deferring a blundering constabulary is vividly illustrated by the rule that prohibits an accused from objecting to evidence obtained by the unreasonable search of another, so long as his own property or privacy was not disturbed, even though the evidence incriminates him and may be a critical ingredient in the prosecution’s case against him. Wong Sun v. United States, 371 U.S. 471, 491–492, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

In our view the rule here applied is fully consonant with the spirit as well as holdings of recent Supreme Court decisions. Nothing in Sanders v. United States, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed. 2d 148 (1963), points in the opposite direction. The Court there merely reconfirmed the principle that notions of res judicata have no bearing on habeas or § 2255 inquiries. Therefore the fact that a point was not raised in the first collateral petition is no bar to later consideration. Accordingly if a point could have been considered if it had been presented in the first collateral motion or petition, its omission from the first petition is not by itself a bar to its consideration in a subsequent application. Here, however, the type of error is one, we think, that is not appropriate for consideration in any § 2255 motion.

One Circuit has focused on a reference in Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962), that an error was “neither jurisdictional nor constitutional,” as a declaration that a claimed violation of any constitutional right is subject to collateral review under § 2255. See United States v. Sutton, 321 F.2d 221, 222 (4th Cir. 1963). We do not interpret this isolated remark in Hill to reflect a radical extension of relief under § 2255. It is noteworthy that this phrase was immediately qualified by the more traditional standard, when the Court noted that the deficiency was not “a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure.” 368 U.S. at 428, 82 S.Ct. at 471.

Nor is our result contrary to the recent Supreme Court opinions markedly extending the power of federal courts to inquire by habeas corpus into the validity of state convictions assailed on the ground that federal constitutional rights have been violated. See, e. g., Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). We assume for present purposes that federal habeas corpus will lie, at least to some extent, to consider the claim of a state prisoner that he was convicted on the basis of the fruits of an unconstitutional search and seizure. Compare Henry v. State of Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965). We do not read these cases, however, as portending a change by which federal convictions would be laid vulnerable to collateral attack. Rather they recognize a different and fundamental concern, and

11. If it is hypothesized that an officer might be ready to cope with an inquiry at trial but unwilling to grapple with a post-trial hearing when his memory has dimmed, that would suggest he might be likewise deterred by such prospect from making even searches and seizures he considers reasonable.
THORNTON v. UNITED STATES
Cit. as 366 F.2d 822 (1966)

reflect the principle that except in the most flagrant cases of waiver or default, such as "deliberate bypassing" of the state forum, a state prisoner is entitled to a federal forum on his federal constitutional claims. The significance of fact finding in a federal forum on the all-important constitutional facts has resulted in the unique, and at first encounter startling, consequence that federal collateral review is apparently preferred over direct appeal (to the Supreme Court) as providing optimum federal judicial consideration. In any event, the recent decisions broadening collateral review as an assurance of the federal judicial process to state accused afford no comparable collateral machinery to federal prisoners who have already had access to the federal judicial process: access to a federal trial judge — indeed under § 2255 to the same federal judge if available; access to an array of effective federal remedies for rooting out the fruits of unreasonable searches; and access to the federal appellate system.

The exceptional circumstances that may warrant reference to § 2255 for the claim of unconstitutional search and seizure would include instances of "weakness in the [Federal] judicial process which resulted in the conviction." Smith v. United States, supra. Such instances would include claims of ineffective assistance of counsel resulting in a denial of Sixth Amendment rights. The proper limits of such a claim need not be defined here. It suffices that the Sixth Amendment claim by appellant has not prevailed. We do not undertake to consider what other "exceptional circumstances" may warrant an evidentiary hearing in a collateral review based on unreasonable search or seizure. In this case there was access to the federal court system, no showing of ineffective assistance of counsel, and no other allegations indicating that appellant was frustrated from presentation of the claim of unreasonable search or seizure at or before trial. We see no exceptional circumstances leading us to stretch an exception to the general rule against collateral review.

Affirmed.

J. SKELLY WRIGHT, Circuit Judge (dissenting):

This appeal from denial of a motion under 28 U.S.C. § 2255 presents two questions. The first, whether counsel at Thornton's trial was ineffective, is easily disposed of. It is based almost entirely on appellant's claim that his rights under the Federal Constitution were being violated, remarked that the case was "not being tried under the Federal Constitution." Estes v. State of Texas, 381 U.S. 532, 556, 85 S.Ct. 1628, 1638, 14 L.Ed.2d 543 (1965) (Warren, C. J., concurring). The Supreme Court may be concerned that other state judges, though not saying so overtly, likewise fail to provide an understanding and objective consideration of Federal constitutional claims.

13. Appellant does not contend that the failure to appeal the denial of the suppression motion establishes ineffective assistance of counsel. We examined the record on the original appeal, and found a number of substantial points ably presented. Of course even a strong point at trial may be weak on appeal if the issue is one of fact and there is evidence both ways.

14. See Amsterdam, supra, at 391 n. 60.
Fourth Amendment Claims under § 2254

Three years ago in *Bustamonte* I concluded:

"I would hold that federal collateral review of a state prisoner's Fourth Amendment claims - claims which rarely bear on innocence - should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts."

Four members of this Court agreed with the foregoing view. A majority of the concluded in *Bustamonte*, however, that it was unnecessary then to confront this issue.

**Argument in favor of 4th Amendment Claims**

Few people - judges or scholars - argue that societal interests are served - on balance - by the absolute, mechanical rule that is now followed. This rule authorizes federal collateral review, usually years after the crime, of a prisoner's claim. He will have presented this claim to a state trial court, it will have been reviewed by the state appellate court and perhaps certiorari denied by this Court. Often many years later, a single district judge will find some defect in the search warrant and order an admittedly guilty defendant released. At this time, the state may not have the evidence to retry him.

The end result: a single federal judge has overruled two state courts; a defendant, not entitled under our
Constitution even to a right of appeal, in effect has had three or four chances - not to show his innocence but to prove some technical fault by law enforcement; judicial systems, federal and state, further have been burdened; the convicted defendant, rather than focusing on rehabilitation while in prison, is filing habeas corpus petitions; the objective of finality in the law is frustrated; the defendant, often a professional criminal, is put back on the street; and public respect for the law understandably suffers. No one possibly could sustain the affirmative of an argument that this mechanical, blind type of justice, serves society.

But the argument for continuing what I deeply believe is an injustice to societal interests also seems to me to be mechanical rather than rational.

It starts with a ruling by four Justices in *Mapp*, applying a rule of evidence - the Exclusionary Rule - to the states in constitutional terminology. The issue had not been argued in *Mapp* nor discussed in Conference. Without ever reexamining the issue, the Court has now followed *Mapp* for more than a decade. It is said that *Mapp* now controls these cases.

**The Statute - § 2254**

§ 2254 provides for federal habeas review on behalf of a state prisoner "only on the ground that he is in custody in violation of the Constitution". The argument goes that *Mapp* constitutionalized the Exclusionary Rule, and therefore
§ 2254 compels habeas review.

Recent Authority to the Contrary

Three times within the last two years, a majority of this Court (six Justices in one instance) have said - in effect - that Mapp cannot be read as creating a personal constitutional right in the Exclusionary Rule. Nothing in the 4th Amendment itself supports the Rule, and certainly nothing supports an absolute, unbending rule. In any event, we have decided - unless the Court now wishes to change its mind - that the Rule itself is not a constitutional right. Calandra, Tucker and Peltier.

Distinction between Trial and Habeas Corpus

One may concede some tension between what was said in Mapp and what has been said in Calandra, Tucker and Peltier. But the tension can be resolved in several ways, without overruling Mapp. May I say here that I have no disposition to abolish the Exclusionary Rule in trials and direct appeals, although I would read some rationality into the Rule. We need not address this issue today.

The Exclusionary Rule is simply a means - one means - of implementing the constitutional protection against unreasonable searches and seizures. In effect, it is a rule of evidence - and certainly one not engraved in marble.
This Court has never expressly held, in an opinion addressing the issue, that the Rule must be applied in habeas corpus. There is a footnote in Kaufman, but this is dictum. To be sure, courts have applied it in habeas, but without confronting or addressing the reason for doing so. As stated in my Bustamonte opinion, I would not extend the Rule to collateral review - certainly of 4th Amendment claims that have been reviewed in the state courts. But it is unnecessary, perhaps, to go as far as I would be willing.

Habeas Corpus has characteristics of an equitable remedy

As noted in Fay v. Noia, 372 U.S. at 438:

"Discretion is implicitly in the statutory command that the judge 'dispose of the matter as law and justice require' 28 U.S. § 2242. . . ."

Justice Black emphasized the equitable nature of habeas in his dissent in Kaufman. Justice Stewart, recently, in Francis v. Henderson, recognized the equitable nature of habeas in holding that a state prisoner cannot challenge the composition of the grand jury on habeas.

There are few equities on the side of a defendant who asserts a 4th Amendment claim on habeas, usually years after his conviction. The deterrence rationale of the Exclusionary Rule is virtually non-existent at that time. There are powerful equities on the other side: the interest of finality of judgments; federalism; and the overwhelming public interest of compelling guilty defendants to serve their terms.
But there can be cases – even 4th Amendment cases – when the equities would justify applying the Exclusionary Rule on habeas review.

I suggest that reverting to equitable principles would be consistent with history, justice, common sense and the public interest.

L.F.P., Jr.
My notes used at conference of 2/27/76 when Court voted in favor of my Bustamonte position (as dictated & not edited)
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Four members of this Court agreed with the foregoing Court view. A majority of the Court concluded in Bustamonte, however, that it was unnecessary then to confront this issue.

**Argument in favor of 4th Amendment Claims**

Few people - judges or scholars - argue that societal interests are served - on balance - by the absolute, mechanical rule that is now followed. This rule authorizes federal collateral review, usually years after the crime, of a prisoner's claim. He will have presented this claim to a state trial court, it will have been reviewed by the state appellate court and perhaps certiorari denied by this Court. Often many years later, a single district judge will find some defect in the search warrant and order an admittedly guilty defendant released. At this time, the state may not have the evidence to retry him.

The end result: a single federal judge has overruled two state courts; a defendant, not entitled under our
Constitution even to a right of appeal, in effect has had three or four chances - not to show his innocence but to prove some technical fault by law enforcement; judicial systems, federal and state, further have been burdened; the convicted defendant, rather than focusing on rehabilitation while in prison, is filing habeas corpus petitions; the objective of finality in the law is frustrated; the defendant, often a professional criminal, is put back on the street; and public respect for the law understandably suffers. No one possibly could sustain the affirmative of an argument that this mechanical, blind type of justice, serves society.

But the argument for continuing what I deeply believe is an injustice to societal interests also seems to me to be mechanical rather than rational.

It starts with a ruling by four Justices in Mapp, applying a rule of evidence - the Exclusionary Rule - to the states in constitutional terminology. The issue had not been argued in Mapp nor discussed in Conference. Without ever reexamining the issue, the Court has now followed Mapp for more than a decade. It is said that Mapp now controls these cases.

The Statute - § 2254

§ 2254 provides for federal habeas review on behalf of a state prisoner "only on the ground that he is in custody in violation of the Constitution". The argument goes that Mapp constitutionalized the Exclusionary Rule, and therefore
§ 2254 compels habeas review.

Recent Authority to the Contrary

Three times within the last two years, a majority of this Court (six Justices in one instance) have said - in effect - that Mapp cannot be read as creating a personal constitutional right in the Exclusionary Rule. Nothing in the 4th Amendment itself supports the Rule, and certainly nothing supports an absolute, unbending rule. In any event, we have decided - unless the Court now wishes to change its mind - that the Rule itself is not a constitutional right. Calandra, Tucker and Peltier.

Distinction between Trial and Habeas Corpus

One may concede some tension between what was said in Mapp and what has been said in Calandra, Tucker and Peltier. But the tension can be resolved in several ways, without overruling Mapp. May I say here that I have no disposition to abolish the Exclusionary Rule in trials and direct appeals, although I would read some rationality into the Rule. We need not address this issue today.

The Exclusionary Rule is simply a means - one means - of implementing the constitutional protection against unreasonable searches and seizures. In effect, it is a rule of evidence - and certainly one not engraved in marble.
This Court has never expressly held, in an opinion addressing the issue, that the Rule must be applied in habeas corpus. There is a footnote in Kaufman, but this is dictum. To be sure, courts have applied it in habeas, but without confronting or addressing the reason for doing so. As stated in my Bustamonte opinion, I would not extend the Rule to collateral review - certainly of 4th Amendment claims that have been reviewed in the state courts. But it is unnecessary, perhaps, to go as far as I would be willing.

Habeas Corpus has characteristics of an equitable remedy

As noted in Fay v. Noia, 372 U.S. at 438:

"Discretion is implicit in the statutory command that the judge 'dispose of the matter as law and justice require' 28 U.S. § 2242. . . ."

Justice Black emphasized the equitable nature of habeas in his dissent in Kaufman. Justice Stewart, recently, in Francis v. Henderson, recognized the equitable nature of habeas in holding that a state prisoner cannot challenge the composition of the grand jury on habeas.

There are few equities on the side of a defendant who asserts a 4th Amendment claim on habeas, usually years after his conviction. The deterrence rationale of the Exclusionary Rule is virtually non existent at that time. There are powerful equities on the other side: the interest of finality of judgments; federalism; and the overwhelming public interest of compelling guilty defendants to serve their terms.
But there can be cases - even 4th Amendment cases - when the equities would justify applying the Exclusionary Rule on habeas review.

I suggest that reverting to equitable principles would be consistent with history, justice, common sense and the public interest.

L.F.P., Jr.
Justice Powell:

I assumed Conference was to begin at 10:09. In any case I was not able to locate a whole lot. Attached is the portion of Stewart's opinion to which I referred. Also attached are relevant parts of Fay where the equitable principle is referred to. Obviously Fay used this in a more limited sense. Stewart has expanded the concept in Henderson. (Also the portion of Black's dissent in Kaufman that is relevant.)

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practice in this area has been far from uniform, and even greater divergency has characterized the practice of the lower federal courts.

For the present, however, it suffices to note that rarely, if ever, has the Court predicated its deference to state procedural rules on a want of power to entertain a habeas application where a procedural default was committed by the defendant in the state courts. Typically, the Court, like the District Court in the instant case, has approached the problem as an aspect of the rule requiring exhaustion of state remedies, which is not a rule distributing power as between the state and federal courts. See pp. 417–420, supra. That was the approach taken in the Spencer and Daniels decisions, the most emphatic in their statement of deference to state rules of procedure. The same considerations of comity that led the Court to refuse relief to one who had not yet availed himself of his state remedies likewise prompted the refusal of relief to one who had inexcusably failed to tender the federal questions to the state courts. Either situation poses a threat to the orderly administration of criminal justice that ought if possible to be averted. Whether in fact the conduct of a Spencer or

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36 Moore v. Dempsey, 261 U. S. 86, is the most striking example of the Court's seeming refusal to give effect to a state procedural ground, though the Court's language is ambiguous. 261 U. S., at 91–92.

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a Daniels was inexcusable in this sense is beside the point, as is the arguable illogicality of turning a rule of timing into a doctrine of forfeitures. The point is that the Court, by relying upon a rule of discretion, avowedly flexible, *Frisbie v. Collins*, 342 U.S. 519, yielding always to "exceptional circumstances," *Bowen v. Johnston*, 306 U.S. 19, has refused to concede jurisdictional significance to the abortive state court proceeding.

III.

We have reviewed the development of habeas corpus at some length because the question of the instant case has obvious importance to the proper accommodation of a great constitutional privilege and the requirements of the federal system. Our survey discloses nothing to suggest that the Federal District Court lacked the power to order Noia discharged because of a procedural forfeiture he may have incurred under state law. On the contrary, the nature of the writ at common law, the language and purpose of the Act of February 5, 1867, and the course of decisions in this Court extending over nearly a century are wholly irreconcilable with such a limitation. At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from *Magna Charta* but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State pro-
edies available to him when he applies for federal habeas corpus relief gives state courts the opportunity to pass upon and correct errors of federal law in the state prisoner’s conviction. And the availability to the States of eventual review on certiorari of such decisions of lower federal courts as may grant relief is always open. Our function of making the ultimate accommodation between state criminal law enforcement and state prisoners’ constitutional rights becomes more meaningful when grounded in the full and complete record which the lower federal courts on habeas corpus are in a position to provide.

V.

Although we hold that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings, we recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, “dispose of the matter as law and justice require,” 28 U. S. C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. United States ex rel. Smith v. Baldi, 344 U. S. 561, 573 (dissenting opinion). Among them is the principle that a suitor’s conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable. We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.
decision had become what is generally considered "final"—he filed in the Federal District Court the present motion under 28 U. S. C. § 2255, asking that his sentence be vacated on the ground, among others, that the trial court had committed error in not suppressing the evidence against him because the articles had been obtained by an unlawful search and seizure. Despite the fact that he has never, either in his trial or in this proceeding, asserted that he had not actually physically committed the robbery with a pistol, and despite the fact that this plainly reliable evidence clearly shows, along with the other evidence at trial, that he was not insane, the Court is reversing his case, holding that he can collaterally attack the judgment after it had become final. I dissent.

My dissent rests on my belief that not every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus or § 2255 proceedings after a conviction has become final. This conclusion is supported by the language of § 2255 which clearly suggests that not every constitutional claim is intended to be a basis for collateral relief.1 And, as this Court has said in Fay v. Noia, with reference to habeas corpus,

"Discretion is implicit in the statutory command that the judge . . . 'dispose of the matter as law and justice require,' 28 U. S. C. § 2243 . . . ." 372 U. S. 391, 438.

Of course one important factor that would relate to whether the conviction should be vulnerable to collateral

1"If the court finds that the judgment was rendered without jurisdiction, or 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." 28 U. S. C. § 2255. (Emphasis supplied.)
attack is the possibility of the applicant's innocence. For illustration, few would think that justice requires release of a person whose allegations clearly show that he was guilty of the crime of which he had been convicted.

I agree with the Court's conclusion that the scope of collateral attack is substantially the same in federal habeas corpus cases which involve challenges to state convictions, as it is in § 2255 cases which involve challenges to federal convictions. The crucial question, however, is whether certain types of claims, such as a claim to keep out relevant and trustworthy evidence because the result of an unconstitutional search and seizure, should normally be open in these collateral proceedings. This question was fully and carefully considered by the Court of Appeals for the District of Columbia Circuit in Thornton v. United States, 125 U. S. App. D. C. 114, 368 F. 2d 822 (1966), and I agree substantially with the opinion of Judge Leventhal for the majority of that court, which states:

"[G]enerally a claim by a federal prisoner that evidence admitted at his trial was the fruit of an unconstitutional search or seizure is not properly the ground of a collateral attack on his conviction. As further noted below, this rule is subject to an exception for special circumstances . . . ."

"Many opinions declare that collateral attack, as by habeas corpus, is available to correct the denial of a constitutional right. This is the general rule but it is not an absolute . . . ."

"The courts are called on to evolve and provide procedures and remedies that are effective to vindicate constitutional rights. However, where effective procedures are available in the direct proceeding, there

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Continuation of motion
taken in Wolff:
If other judges knew they had
rest., they would act
with greater care.

A "good faith" test
in illusory. Would not
agree with this.
There is a fundamental
diff. between collateral
attack & instead trial.
Need not reach whether
S/R applies on absolute in
fed. collateral attack (Kaufman)
Would not have joined Kaufman.