Bestmanns

Hand Note

1. Use Traynor quote - p. 18 Ret.

2. Use Baxter in Reg. heat of 1867 Act (Sec 13) 7, 8.

3. Fed Ct now at an CT of Review over ST. CTs as if performing an appellate function - Sel. 13 15, 16

4. Use quote from Block v. Harbor (p. 242)
in Kaufman - important

5. Read + use Thornton; 368 F. 822

6. Only works as to overall Kaufman & apply a balancing test - 25
   Balance the advantage of Rule
   its disadvantages (only 29 - 29

7. State criminal process now are subject to extensive safeguards - Only 28
Considerations

History of H/C
Provenance of H/C

E/Rule

Values to be balanced

Condition

Financihly
Friendly – J. Inequeale Irrelevant
38 49 of CLR 142

Theor: “corrections should be subject to collateral attack only when the prisoner supplements his merit plea with a colorable claim of innocence.” 1462
(Note: The applies to all collateral attacks – not just 4th Amend.
& not just of state corrections)

Sentence in question – 143, 145
Quote from Jackson – 143

Surprise of Man from War at extent of our effort to "undo judgments of correction." – 143

Collateral attacks almost unknown in England – 145

Rarely are its concerned with genuine issues of guilt or innocence – Schaefer – 145, 248
Reason why collateral attack
carries a "serious burden of justification":

1. Defeat the ends of swift
certain justice—deterrence (146)

2. Unreliability—due to long delay.
H/C often yrs. after trial. Ev. & memory
faded—147

3. Drain upon Resources—judge,
prosecutor & ally. sewer—148

4. Prejudice the few meritorious
claim—quote from Jackson—149

5. Finality—Harm to quote—149

Brennan's dictum (about "notion
of finality, being irrelevant when
life or liberty is at stake") is destroyed
by Friendly—bottom p.149, 150

H/C (collateral attack) originally confined
to procedural defects (151) or that
a statute was unconst(151)
Analyzers of how Act of 1867 were continued to support collateral attack for the denial of any "vested right." - 154

Although the statutory language in the same for "law" as for "constitutions" collateral attack is not allowed because the court has misinterpreted a law of the U.S. Swaval v. U.S. 332 U.S. 174 (See ante at 170 cited in note 65 - p 154)

Friendly: No "premise" mandated a second round of allegation simply because the alleged case is "constitutional." 155

Brown v. Allen was decided before most of provisions of Bill of Rights were "incorporated" by 14th (156) (pre- Giles). How incorporation has been persuasive see Kirk tabulation - 155, 156

"Colorable Shaming of innocence" defined - 160

Discussion specifically of 4th Amendment, claiming it of the unsoundness of Kaufman - 161, 162
Little risk of injustice — emphasize today awareness of rights & with counsel in all cases — excellent statement — 162

Friendly address most of his article to the Fed. System. At 164 et seq. he discusses Fed Rev. of state cases & would apply same rule — 167

Fay v. Noria — was wrong as to meaning of H/C — 170, 171

Test of 1867 is not "constitutional" — Congress can restrict jury — 171
Statement - including facts

1. The Relationship of H/C to Federalism

Favor of Court & nature of 1867 Act assumed that H/C embodied the civil law meaning - 4

Fay v. Norie mis-stated common law meaning - 5

Marshall's op in Ex parte Watson - 6

No intent by Congress to overturn civil law - 7

(Note: although this section started out talking about Federalism it ended up saying that H/C (or subordinated both fed. & feudal) to "reach" of civil.)
III. Address the Relevance of Finality

Table just about finality
- hurry Amsterdam

Then cite Reardon

Note: This should be condensed
and perhaps read more closely do proceed
see I

See I & II apply generally
for all filed H/C review. They
do not address the exact rule
for the narrower issue in this case

III. Address the purpose of /id
- namely to correct injustice

Beginning & end of Section III
are good need revision & tying
in - substance of Section is excellent
IV. Discusses Exclusionary Rule  
- Generally & as applied to 4th Amendment claims (as Black's) this does not
  focus on Fed. Rule. But discussion
  is broadly critical of Ex. Rule -
  as was Friendly's Article - rather
  favor drawing a sharper focus on
  4th Amendment claims (as Black's do did)

\[
\begin{align*}
\text{IV} & \quad 22.55
\end{align*}
\]
May 10, 1973

No. 71-732 Schneckloth v. Bustamonte

MEMORANDUM TO THE CONFERENCE:

I am circulating herewith a concurring opinion in the above case.

As I have noted in Conference, the same question is present in Cupp and Cady. My present thought, if this is appropriate, is to incorporate by reference this opinion as a concurrence in these two cases also. The opinion in Cady has not yet been circulated, but I assume that it will be written in accord with the Conference vote.

L. F. P., Jr.
Sally - I will receive no further memos with page numbers. Here is the remodeled Bustamonte! I hope I've been able to streamline it without losing the thrust of what I've wanted to say. Twenty pages of beautifully written and researched text have been mercilessly excised.

I still felt it necessary to allude to the exclusionary rule frequently. I have tried to make it absolutely clear that we are distinguishing between the exclusionary rule on direct and collateral proceedings and that the Fourth Amendment area is the only one we're talking about at this point.

First 4 pts. are OK. See III in good but I need better documentation. It must be rewritten. (I have not made myself clear. Section re history re weak - Jay's copy draft)

Consider moving II to be I; then we write III to buttress the view that policy considerations support construction of 254(c) which limits within more extends H/C, These policy considerations include

Purpose of H/C
Purpose of E/R
Function of rehabilitation
Expenditure of State/Ted Reler
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71-732 Schneckloth v. Bustamonte
June 8, 1973

No. 71-732 Schneckloth v. Bustamonte

Dear Chief and Bill:

As you were good enough to join my concurring opinion in the above case, I thought you might be interested in the enclosed note from Irving Kaufman.

Sincerely,

Mr. Chief Justice

Mr. Justice Rehnquist

Enclosure
June 11, 1973

No. 71-732 Schneckloth v. Bustamonte

Dear Potter:

In view of your sympathy with the position I took in Bustamonte, I thought possibly you would be interested in the enclosed copy of a note recently received from Irving Kaufman.

Sincerely,

Mr. Justice Stewart

Enclosure

LFP/gg
June 19, 1973

Bustamonte

Dear Chief and Bill:

The enclosed letter from Prof. Bator (whom I do not know except through his writing) indicates that perhaps all of Academe will not think that our Bustamonte opinion signifies the end of all justice.

Sincerely,

The Chief Justice
Mr. Justice Rehnquist

lfp/ss
Enc.
June 14, 1973

Mr. Justice Lewis F. Powell, Jr.
United States Supreme Court
Washington, D.C. 20543

Dear Mr. Justice Powell:

This is just a note to say what a pleasure it was to read your splendid opinion in Schneckloth v. Bustamonte, and to express my appreciation for your generous treatment of my own work on habeas corpus. I guess my testimony is perhaps interested; nevertheless I did want to say that the opinion seems to me to march with an almost irrefutable power and elegance.

Your opinion seems to promise a fresh, new, rigorous look at the habeas corpus situation, one which it clearly deserves.

Sincerely yours,

Paul M. Bator
Professor of Law

P.S. You may conceivably be interested in the treatment of habeas in the new edition of Hart & Wechsler; in the "Notes" in Chapter 10, we tried to pull together in up-to-date form an economical and sharp survey of the major issues and considerations.
From Reporter's Office

Supreme Court of the United States

Memorandum

Sept. 11, 1973

Please return to Justice Powell's Chambers. This was used in connection with Justice Powell's opinion in No. 71-732, Schneckloth v. Bustamonte.