

SEARCH, SEIZURE, AND SECTION 2255: A COMMENT

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The Fourth Circuit has recently said,¹ in considered dictum,² that a claim of illegal search and seizure³ is available as a ground for section 2255 relief⁴ to a federal defendant who raised the claim at trial but failed to perfect a timely appeal from conviction. This issue is one of many receiving new scrutiny as conceptions of the appropriate scope of postconviction inquiry expand. Its resolution by the Fourth Circuit, ignoring an impressive body of contrary holdings by the courts of appeals⁵ and the apparently contrary implications of *Abel v. United States*,⁶ finds considerable support in Mr. Justice Brennan's

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¹ *United States v. Sutton*, 321 F.2d 221 (4th Cir. 1963) (dictum).

² The statement is gratuitous, as the court affirmed on the merits of the search and seizure claim the district judge's denial of collateral relief. The search was plainly legal on either of two independent grounds. See *Draper v. United States*, 358 U.S. 307 (1959); *Scher v. United States*, 305 U.S. 251 (1938); and, as to the scope of the search, e.g., *Hagans v. United States*, 315 F.2d 67 (5th Cir.), cert. denied, 84 Sup. Ct. 68 (1963). It is also easily sustainable under the construction which the Fourth Circuit, *United States v. Walker*, 307 F.2d 250 (4th Cir. 1962), in common with other circuits, e.g., *Armada v. United States*, 319 F.2d 793 (5th Cir. 1963); *United States v. Thomas*, 319 F.2d 486 (6th Cir. 1963); *Lawson v. United States*, 254 F.2d 706 (8th Cir. 1958), gives to *Carroll v. United States*, 267 U.S. 132 (1925), despite Mr. Justice Jackson's discussion of *Carroll* in *United States v. Di Re*, 332 U.S. 581, 584-87 (1948). One cannot but regard the instant case as a most unlikely vehicle (no pun intended) for announcement of a radical expansion of § 2255 relief.

³ That is, a claim predicated upon the fourth amendment and the exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1914).

⁴ 28 U.S.C. § 2255 (1958) is presently the principal collateral mechanism by which a federal prisoner may challenge the validity of his conviction. See *United States v. Hayman*, 342 U.S. 205, 210-19 (1952), for the history of the section. Relief under § 2255 has been said to be "exactly commensurate" with that previously available in habeas corpus. *Hill v. United States*, 368 U.S. 424, 427 (1962); *Sanders v. United States*, 373 U.S. 1, 13-14 (1963). For purposes of this discussion, "scope of relief available under § 2255" and "scope of available collateral relief" may be treated as interchangeable terms. See, e.g., *Burns v. United States*, 321 F.2d 893 (8th Cir. 1963).

⁵ E.g., *Griffin v. United States*, 258 F.2d 411 (D.C. Cir.), cert. denied, 357 U.S. 922 (1958) (alternative ground) (issue raised at trial; no appeal); *United States v. Jenkins*, 281 F.2d 193 (3d Cir. 1960) (same, *semble*); *Armstead v. United States*, 318 F.2d 725 (5th Cir. 1963) (issue not raised at trial; no appeal); *Thompson v. United States*, 315 F.2d 689 (6th Cir.), cert. denied, 84 Sup. Ct. 93 (1963) (history not set forth); *Sinks v. United States*, 318 F.2d 436 (7th Cir. 1963) (issue raised at trial; no appeal); *Warren v. United States*, 311 F.2d 673 (8th Cir. 1963) (issue raised at trial; *in forma pauperis* appeal refused); *Williams v. United States*, 307 F.2d 366 (9th Cir. 1962) (issue raised at trial; untimely appeal filed); *Way v. United States*, 276 F.2d 912 (10th Cir. 1960) (issue not raised on trial or appeal). *But see Gaitan v. United States*, 317 F.2d 494 (10th Cir. 1963) (unconsidered dictum) (change of law).

⁶ 362 U.S. 217, 230-34 (1960). The Court's refusal to consider Abel's fourth amendment attack on the administrative warrant, a claim first raised on certiorari after explicit disavowal in the district court, seems to assume the unavailability of the claim on collateral attack. Since the issue was strictly one of law, not depending on

obiter in *Fay v. Noia*⁷ that all constitutional issues can be raised collaterally.⁸ The Supreme Court's cases do not go as far as the obiter however, and, with particular regard to a search and seizure claim, there may be significant reasons to deny a federal prisoner the collateral remedy.

One must distinguish at the outset the problem of federal habeas corpus for state prisoners.⁹ Professor Bator's weighty argument¹⁰

litigable facts, Supreme Court disposition on the merits would have been in order if the claim were one which would survive direct appeal. (Concededly, an alternative explanation of the disposition is that the Court did not regard the claim as one warranting its consideration on certiorari at the time, at least absent appropriate raising of the issue in the lower courts. I find the alternative the less plausible because I believe that Mr. Justice Frankfurter would have invoked the Court's certiorari discretion if he relied on it.) Moreover, for purposes of barring collateral availability (as opposed to barring appellate consideration as "plain error" under FED. R. CRIM. P. 52(b)), it should be immaterial that Abel's counsel expressly told the trial court that he was not standing on the point. Whether a claim is thus overtly disavowed or simply not brought to the attention of the trial court is largely a matter of litigation fortuities and the perceptiveness of the particular district judge. Disavowal may be, as well as failure to put the claim forward, the product of counsel's ignorance, unpreparedness, or bad judgment; it does not, more or less than failure to put the claim forward, affect any of the considerations, see text accompanying notes 30-37 *infra*, weighing for or against postconviction recognition of a claim.

⁷ 372 U.S. 391, 409 (1963). See also Mr. Justice Douglas' dissent in *Hodges v. United States*, 368 U.S. 139, 140 (1961).

⁸ The Fourth Circuit's opinion takes the broad ground that "constitutional" and "jurisdictional" claims are, as such, collaterally available. It does not cite *Fay v. Noia*, 372 U.S. 391 (1963), but relies solely upon a passage in *Hill v. United States*, 368 U.S. 424, 428-29 (1962), which visibly fails to bear the weight assigned it. True, other more solid passages may be found among the unpruned shoots that grow in the "untidy area" (Mr. Justice Frankfurter, dissenting, in *Sunal v. Large*, 332 U.S. 174, 184 (1947)) of Supreme Court federal collateral attack cases, e.g., *Nielsen*, Petitioner, 131 U.S. 176, 184 (1889) ("A party is entitled to a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner."); *Sanders v. United States*, 373 U.S. 1, 16 (1963) (assertion that a coerced confession is "a distinct ground for federal collateral relief" which may or may not be addressed to § 2255 as distinguished from federal habeas corpus for state prisoners, compare *id.* at 15, text under numeral II, with *id.* at 15 n.8). But these passages, too, are far from establishing a general doctrine of the collateral availability of constitutional contentions. E.g., *Ex parte Bigelow*, 113 U.S. 328 (1885); *In re Belt*, 159 U.S. 95 (1895); *Glasgow v. Moyer*, 225 U.S. 420 (1912) (issue first raised on appeal; this should make no difference). The "untidy area" has recently been exhaustively canvassed by the opinions in *Fay v. Noia*, 372 U.S. 391 (1963), and by Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). See also Judge Fahy's excellent opinion in the first (1959) *Hodges* appeal, set out in *Hodges v. United States*, 282 F.2d 858, 864 (D.C. Cir. 1960), cert. dismissed, 368 U.S. 139 (1961) (an opinion whose reasoning survives its reliance on *Darr v. Burford*, 339 U.S. 200 (1950)), and Judge Friendly's careful statement in *United States v. Sobell*, 314 F.2d 314, 322-23 (2d Cir. 1963). See also *Vandergrift v. United States*, 313 F.2d 93, 95 (9th Cir. 1963). Neither does the Supreme Court's reversal in *Jordan v. United States*, 352 U.S. 904 (1956) (per curiam), reversing 233 F.2d 362 (D.C. Cir. 1956), suggest more than that denial of a speedy trial, there in issue, may in some circumstances work such prejudice against the possibility of a fair trial as to outweigh the considerations which elsewhere preclude untimely assertion of even constitutional rights by an accused. Cf. *United States v. Chase*, 135 F. Supp. 230 (N.D. Ill. 1955); text at notes 30-37 *infra*. It can hardly be supposed that *Jordan*, rendered without opinion and without dissent, was intended fundamentally to remake the law of federal-prisoner collateral relief.

⁹ 28 U.S.C. § 2241 (1958).

¹⁰ Bator, *supra* note 8.

notwithstanding, there are substantial justifications for federal district court litigation or relitigation of federal contentions invoked in bar of a state criminal conviction. Volume of cases and inadequate state procedures make reliance on the Supreme Court unsatisfactory here;¹¹ the Court is not properly a routine enforcement agency; in any event, with perhaps greater reason than supports the district courts' federal question, civil rights, and specified removal jurisdictions—not to speak of the diversity jurisdiction¹²—it makes good sense to give a state criminal defendant a federal judge to try the facts underlying his federal constitutional claim.¹³ Absent an applicable removal provision, *Brown v. Allen*¹⁴ thus construed the federal habeas corpus jurisdiction, and *Fay v. Noia*¹⁵—maugre Mr. Justice Brennan's excursus into the history of the writ as it affected federal prisoners before enactment of section 2255—did no more than hold that a claim which might have been relitigated by a federal district judge following disposition on the merits by a state court may also be relitigated, or initially litigated, by a federal district judge to whom the prisoner comes without having properly put his federal claim before the state judiciary.

Consideration of the large federal-state significance of this latter holding is beyond my purpose; accepting *Fay v. Noia* as the law, I advert to it only to point out that it does not speak to the condition of the federal prisoner. The federal accused, unlike the state accused, is given a federal forum from the start. He may litigate his constitutional contention to a federal trier, take a direct appeal to a federal court of appeals;¹⁶ if he does and loses on the merits, there is no reason (absent a botched presentation by counsel¹⁷ or a claim of new

¹¹ Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960).

¹² 28 U.S.C. §§ 1331, 1343, 1441-43, 1332 (1958), respectively. Compare Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953); ALLI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 36-44 (Tent. Draft No. 1, 1963). The analogy between the federal habeas corpus and removal jurisdictions was explicitly drawn in *Fay v. Noia*, 372 U.S. 391, 415-16 (1963), and justifies the hearing standards of *Townsend v. Sain*, 372 U.S. 293 (1963).

¹³ I therefore concur with Professor Bender that federal habeas corpus lies to review a state prisoner's claim based upon *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Ker v. California*, 374 U.S. 23 (1963). See Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650, 655-57 (1962). I do not discuss the retroactivity question. Compare *Hall v. Warden*, 313 F.2d 483 (4th Cir.), cert. denied, 374 U.S. 809 (1963), with *United States ex rel. Linkletter v. Walker*, 323 F.2d 11 (5th Cir. 1963).

¹⁴ 344 U.S. 443 (1953).

¹⁵ 372 U.S. 391 (1963).

¹⁶ 28 U.S.C. § 1291 (1958), whence review by certiorari may be had in the Supreme Court, 28 U.S.C. § 1254 (1958).

¹⁷ By botched presentation I do not mean such egregious ineptitude of counsel as will per se sustain a sixth amendment ineffective-assistance-of-counsel claim. For the prevailing sixth amendment standard, see, e.g., *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958). See discussion in note 60 *infra*.

evidence¹⁸) to allow relitigation collaterally.¹⁹ Of course when the constitutional contention is *not* disposed of on the merits at trial and on appeal (or when the disposition is impugned by a botched presentation or new evidence), there is substantially more justification for its collateral availability. But this is a matter involving considerations other than those which determined *Fay v. Noia*. Granted Mr. Noia does not lose the federal habeas corpus hearing, to which *Brown v. Allen* entitles him from the beginning, merely because he fails to press his federal claim before a state tribunal which in no case could dispose of it definitively against him. It does not follow that the federal accused who fails to present a timely and effective constitutional contention to a potentially dispositive federal forum thereby gains a second litigating opportunity which would not otherwise have been open to him.

Whether he should have such an opportunity with respect to a search and seizure claim is a question requiring initial inquiry into

¹⁸ By new evidence I do not mean evidence acquired under circumstances which qualify it as "newly discovered" for purposes of relief under FED. R. CRIM. P. 33. The rule is available for claims of after-discovered evidence tending to show prejudicial error in the trial process, e.g., *Mitchell v. United States*, 368 U.S. 439 (1962) (per curiam), *vacating* 293 F.2d 161 (D.C. Cir. 1961); *Holmes v. United States*, 284 F.2d 716 (4th Cir. 1960); *Rubenstein v. United States*, 227 F.2d 638 (10th Cir. 1955), *cert. denied*, 350 U.S. 993 (1956), as well as for claims of after-discovered evidence going to the merits. But to obtain relief within the rule, a defendant must meet certain requirements, including the traditional requirement of due diligence, e.g., *United States v. Costello*, 255 F.2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937, *rehearing denied*, 358 U.S. 858 (1958), and the two-year limitation of rule 33. See discussion in note 60 *infra*.

¹⁹ It can hardly be contended that a second federal trier is more likely to come to "truth" (putting aside Mr. Pirandello's problem) than a first; *within* a judicial system, therefore, there is ordinarily no justification for failing to give preponderant weight to the considerations underlying the doctrine of collateral estoppel. If a fairly tried disposition on the merits of a first § 2255 motion will allow denial without hearing of a repeater paper under § 2255, ¶ 5 (as *Sanders v. United States*, 373 U.S. 1 (1963), seems to envision), then a similarly fairly tried disposition on the merits at trial and on direct appeal ought equally to allow denial without hearing of the *first* paper under the "files and records" provision of § 2255, ¶ 3. E.g., *Malone v. United States*, 257 F.2d 177 (6th Cir. 1958); *Davis v. United States*, 311 F.2d 495 (7th Cir.), *cert. denied*, 374 U.S. 846 (1963); *Franano v. United States*, 303 F.2d 470 (8th Cir.), *cert. denied*, 371 U.S. 865 (1962); *Fiano v. United States*, 291 F.2d 113 (9th Cir.), *cert. denied*, 368 U.S. 943 (1961) (alternative ground). Compare *Heflin v. United States*, 358 U.S. 415 (1959), *reversing* 251 F.2d 69 (5th Cir. 1958) (rule 35). Compare *Fay v. Noia*, 372 U.S. 391, 423 (1963) ("Hence, the familiar principle that *res judicata* is inapplicable in habeas proceedings . . . is really but an instance of the larger principle that void judgments may be collaterally impeached."), *with Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931). As a practical matter, with federal postconviction litigation today confined largely to the identical courts before which direct litigation was had, see note 27 *infra*, a claim raised collaterally following its rejection on the merits of direct appeal is bound to receive short shrift, whether the judge describes his ruling as "collateral estoppel" or "we've done this once already."

Where the constitutional claim has thus been disposed of on direct appeal by a court of appeals and certiorari has been denied, I take it no one would seek to support the availability of collateral relitigation on the ground that by such relitigation another opportunity for discretionary Supreme Court review is afforded. Such an argument sustains the entertaining of repeater motions ad infinitum or it sustains nothing.

considerations which in general govern the availability of section 2255 to raise contentions not disposed of on the merits of direct appeal.²⁰ I do not pretend to attempt a definitive formulation, but sketch my premises.²¹

(1) Traditionally, two sets of characteristics of collateral litigation have shaped the federal doctrines defining the scope of post-conviction remedies. First, there has been what may be called a "jurisdictional" factor involved where the collateral proceeding places a claim before a different tribunal from that in which the direct proceeding is had. This jurisdictional factor—concerned with the allocation of power among court systems²²—was a critical determinant in the development by the English common-law judges of the writ of *habeas corpus ad subjiciendum* as an instrument to preserve and enlarge their jurisdiction at the expense of rival courts.²³ The "jurisdictional" language inherited from the English tradition was conveniently twisted by the Supreme Court of the United States, in the nineteenth century, to resist the imposition on the Court by *habeas corpus* of a general reviewing function over federal criminal cases which the lack of statutory authority for direct review prior to 1889 made manifest that Congress did not intend the Court to have.²⁴ The adage that the writ went only to inquire into jurisdiction adequately

²⁰ For the reasons stated in note 19 *supra*, I begin with the proposition that a § 2255 motion may be denied on the papers if: (1) it presents only issues already rejected on the merits of direct appeal by a court of appeals, and (2) it contains neither allegations of new evidence, note 18 *supra*, nor allegations of a botched presentation by counsel, note 17 *supra*. In note 60 *infra*, I consider the effect of the latter allegations.

²¹ The substance of parts (1) and (2), following, was presented in a lecture, Jan. 29, 1963, before the Federal Defense Panel Seminar, as one of five sessions on basic criminal procedure sponsored by the Philadelphia Bar Association's Committee on Professional Education in conjunction with the Junior Bar Association. In view of the opinions in *Fay v. Noia*, 372 U.S. 391 (1963), and Professor Bator's excellent treatment, note 8 *supra*, expanded documentation here is unnecessary.

²² During the critical nineteenth century struggle for national supremacy in this country, the writ of *habeas corpus* was a frequent weapon both of the national and the state courts. In addition to the history set out in *Fay v. Noia*, *supra* note 21, at 401 n.9, see, e.g., 2 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 258-64, 332-43 (rev. ed. 1932) (Booth's case); 2 *id.* at 344-45 (the Oberlin rescue cases); Trieber, *The Relationship of the State and National Courts*, 42 AM. L. REV. 321, 333 (1908) (other fugitive slave law collisions).

²³ See 9 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 104-25 (1926); Jenks, *The Story of the Habeas Corpus*, 18 L.Q. REV. 64 (1902).

²⁴ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830); and following the Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (as to which, see *Frank v. Mangum*, 237 U.S. 309, 329-31 (1915); *but see Bator*, *supra* note 8, at 474-77), e.g., *Ex parte Parks*, 93 U.S. 18 (1876); *Ex parte Bigelow*, 113 U.S. 328 (1885). Before 1889 there was, in practical effect, no appellate review in federal criminal cases. See the statutory development set forth in *Bator*, *supra* note 8, at 473 n.75. Occasion for possible Supreme Court review on certificate of division of opinion in the circuit court was rendered rare by the practice of single district judges holding circuit court. See FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 31-32, 79-80 (1927).

confined the Court's appellate activity, while desired expansions were worked under the aegis of the "jurisdictional" conception²⁵ which blew balloon-thin and burst in *Johnson v. Zerbst*.²⁶ Within the present framework of federal trial and appellate jurisdiction, collateral attack by section 2255 motion takes the federal convict into no forum which he might not reach directly.²⁷ Whatever its contemporary significance in the administration of federal habeas corpus for state prisoners, the "jurisdictional" concept has lost all useful meaning as a measure of intrafederal (section 2255) review.²⁸ In this area it is neither necessary nor worth the contortion required to preserve the old phraseology for the purpose of investing "jurisdiction" with new epicyclic connotations: "to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void."²⁹

(2) The second—and presently determinative—set of characteristics of collateral litigation may be denominated aspects of a "finality" factor. They involve (a) duplication of judicial effort; (b) delay in setting the criminal proceeding at rest; (c) inconvenience and possibly

²⁵ *E.g.*, *Ex parte Siebold*, 100 U.S. 371 (1879). The same circumstance—lack of congressional authorization of direct Supreme Court review—which ordinarily served the Court as a counsel of self-restraint in the exercise of its habeas corpus jurisdiction, also created inordinate pressure for expansion of the writ's scope in the "hard," otherwise unreviewable criminal case.

²⁶ 304 U.S. 458 (1938); see *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942) (per curiam).

²⁷ Both direct and collateral routes make available appeal as of right to the appropriate circuit court of appeals, with discretionary review by certiorari in the Supreme Court. See note 16 *supra*; 28 U.S.C. §§ 2253, 2255, ¶ 6 (1958). Concerning the exercise of the Supreme Court's "original" powers, see Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, in 1962 SUPREME COURT REVIEW 153 (Kurland ed.). Since the shift in 1948 from habeas corpus in the district of confinement, *Ahrens v. Clark*, 335 U.S. 188 (1948), to § 2255 motion in the sentencing court, 28 U.S.C. § 2255, ¶ 1 (1958), as the principal mode of federal-prisoner collateral attack, 28 U.S.C. § 2255, ¶ 7 (1958); *e.g.*, *Birchfield v. United States*, 296 F.2d 120 (5th Cir. 1961), federal prisoners pursue their collateral remedies not merely in the same sort of forum in which they litigated directly, but in the identical court, frequently before the identical judges. See, *e.g.*, D.C.N.D. ILL. R. 23, ¶ 7, set out in Appendix 2 to Committee on Habeas Corpus, U.S. Judicial Conference, *Report*, 33 F.R.D. 367, 391, 393 (1963). (The same is true of the coram nobis remedy under United States v. Morgan, 346 U.S. 502 (1954), and of motions under FED. R. CRIM. P. 32(d), 33, and 35, where these are applicable.)

²⁸ This is not intended to suggest that advocacy eschew use of the "jurisdictional" rubric when the nature of the claim will bear the label. The text of the statute retains the word: "If the court finds that the judgment was rendered without jurisdiction, . . . 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 grant appropriate relief]." 28 U.S.C. § 2255, ¶ 3 (1958). (Emphasis added.) Compare 28 U.S.C. § 2255, ¶ 1 (1958). And the courts remain rather hospitable—indeed, perhaps unduly hospitable under the "exceptional circumstances" doctrine of *Bowen v. Johnston*, 306 U.S. 19 (1939)—to "jurisdiction"-sounding claims. *E.g.*, *United States v. Lovely*, 319 F.2d 673 (4th Cir.), *cert. denied*, 84 Sup. Ct. 210 (1963) (rejecting claim on merits); *Hilderbrand v. United States*, 261 F.2d 354 (9th Cir. 1958). But *Toy Toy v. Hopkins*, 212 U.S. 542 (1909), refuses to allow collateral litigation de hors the original record of contested facts underlying the "jurisdictional claim."

²⁹ *Fay v. Noia*, 372 U.S. 391, 423 (1963). Compare *Brennan Judicial Supervision of Criminal Law Administration*, 9 CRIME & DELINQUENCY 227, 232 (1963).

danger in transporting a prisoner to the sentencing court for hearing; (d) postponed litigation of fact, hence litigation which will often be less reliable in reproducing the facts (i) respecting the postconviction claim itself, and (ii) respecting the issue of guilt if the collateral attack succeeds in a form which allows retrial (the burden of proof of guilt on retrial, of course, remaining with the prosecutor). In combination, these finality considerations amount to a more or less persuasive argument against the cognizability of any particular collateral claim, the strength of the argument depending upon the nature of the claim, the manner of its treatment (if any) in the conviction proceedings, and the circumstances under which collateral litigation must be had. A claim that the movant pleaded guilty to a crime under a statute unconstitutional "on its face" offends none of the finality elements significantly;³⁰ a claim that he was irresponsible by reason of insanity at the time of the crime³¹ for which he was ten years ago given a full trial without his raising the issue, significantly offends them all.^{32, 33}

³⁰ The only enumerated element even colorably involved is (b), the matter of repose. Repose in conviction under a constitutionally unauthorized statute, however, does not serve the deterrent or rehabilitative purposes of the criminal law. But for *Glasgow v. Moyer*, 225 U.S. 420 (1912) (claim first raised on habeas corpus appeal, but this should make no difference), the Supreme Court has consistently entertained federal prisoners' collateral challenges to the "face" constitutionality of the underlying criminal statute. *E.g.*, *Baender v. Barnett*, 255 U.S. 224 (1921) (rejecting claim on merits); *Matter of Gregory*, 219 U.S. 210 (1911) (same); *Ex parte Yarbrough*, 110 U.S. 651 (1884) (same); *Ex parte Curtis*, 106 U.S. 371 (1882) (same); *Ex parte Siebold*, 100 U.S. 371 (1879) (same). Two cases cited to the contrary in Bator, *supra* note 8, at 474 n.77, are, I think, inapposite: *In re Lincoln*, 202 U.S. 178 (1906), apart from its alternative reliance on the mootness ground of *Ex parte Baez*, 177 U.S. 378 (1900), rests on the principle of *Ex parte Mirzan*, 119 U.S. 584 (1887), that the Supreme Court will not ordinarily exercise its original habeas jurisdiction where remedies in the lower courts are available; and *Henry v. Henkel*, 235 U.S. 219 (1914), involves pretrial application for the writ, as to which compare *Rodman v. Pothier*, 264 U.S. 399 (1924), *with Bowen v. Johnston*, 306 U.S. 19 (1939), and see, *e.g.*, *Jones v. Perkins*, 245 U.S. 390 (1918) (disposition on another ground); *Johnson v. Hoy*, 227 U.S. 245 (1913) (alternative ground); *In re Chapman*, 156 U.S. 211 (1895). The rule may well be different where the challenge is to the statute as applied and evidence must at some point be taken on the issue; query, however, the propriety of refusing relief in *Heinecke v. United States*, 316 F.2d 685 (D.C. Cir.), *cert. denied*, 84 Sup. Ct. 101 (1963) (obscenity), where the evidence, presumably, was documentary.

³¹ As distinguished from the claim of incompetency to stand trial. The latter claim is collaterally available. *E.g.*, *Bishop v. United States*, 350 U.S. 961 (1956) (*per curiam*); *Bostic v. United States*, 298 F.2d 678 (D.C. Cir. 1961); *United States v. Cannon*, 310 F.2d 841 (2d Cir. 1962); *Nelms v. United States*, 318 F.2d 150 (4th Cir. 1963); *Gregori v. United States*, 243 F.2d 48 (5th Cir. 1957); *Taylor v. United States*, 282 F.2d 16 (8th Cir. 1960); *Bell v. United States*, 269 F.2d 419 (9th Cir. 1959). The Tenth Circuit is *contra, e.g.*, *Nunley v. United States*, 283 F.2d 651 (10th Cir. 1960), but seemingly on the narrow ground that 18 U.S.C. § 4245 (1958) provides an exclusive administrative channel of relief.

³² *Bishop v. United States*, 223 F.2d 582 (D.C. Cir. 1955), *rev'd on other grounds*, 350 U.S. 961 (1956); *Hereden v. United States*, 286 F.2d 526 (10th Cir. 1961); *cf. Taylor v. United States*, 282 F.2d 16 (8th Cir. 1960) (plea) (remand on other grounds).

³³ In the case of federal habeas for state prisoners, the total impact of the finality considerations as they operate uniquely upon each habeas corpus case is a part of the gross price which the federal system pays under *Brown v. Allen* to give the prisoner his federal judge. The price is high, no doubt, but the stakes are also high

Against the weight of whatever argument the finality factor presents in a particular case must be heard the counter-arguments of considerations which may militate in favor of collateral availability: the argument that there existed some obstacle or impediment to the accused's use of ordinary direct procedures for making his contention;³⁴ the argument that the error in his case appears so patent "on the face" of the

for the prisoner, and the alternatives—leaving federal "fact," together with much of federal "law," to the state trier; establishing federal removal jurisdiction over state criminal cases involving federal defensive claims—seem no less unsatisfactory. What for present purposes needs reiterating is that under *Brown v. Allen's* resolution of the federal-state dilemma it is inevitable from the outset that a state accused who is convicted after state rejection on the merits of his federal claim will have a federal collateral forum, whereas there is no such inevitability in the case of the federal accused. Mr. Justice Brennan rightly states the issue in *Fay v. Noia* as whether a failure directly to press the federal claim should be penalized by withdrawal of the otherwise open federal forum; he resolves that issue by concluding that the penalty is unnecessary. *Fay v. Noia*, 372 U.S. 391, 433-34 (1963). With the federal accused, however, the question is not one of penalty—not whether he shall be taxed by unusual consequences for failing timely to raise his claim; it is whether, in light of the finality considerations as they affect his case, the system best serves the ends of a rational criminal justice by providing him an unusual second opportunity to litigate.

³⁴ (1) Certain challenges to a conviction proceeding necessarily involve the assertion that, if the facts underlying the challenge are true, the conviction proceeding offered inadequate opportunity to litigate the ground of the challenge itself. Consider (a) the incompetency cases, note 31 *supra*, (b) the claim of violation of the sixth amendment right to counsel in that defendant neither had nor waived counsel, e.g., *Johnson v. Zerbst*, 304 U.S. 458 (1938) (trial); *Walker v. Johnston*, 312 U.S. 275 (1941) (plea), or that counsel was ineffective, e.g., *Frاند v. United States*, 289 F.2d 693 (10th Cir. 1961) (trial); *Reed v. United States*, 291 F.2d 856 (4th Cir. 1961) (alternative ground) (plea), or (c) the claim that defendant's guilty plea was coerced, e.g., *Thomas v. United States*, 271 F.2d 500 (D.C. Cir. 1959); *Domenica v. United States*, 292 F.2d 483 (1st Cir. 1961), induced by promises of leniency, e.g., *Machibroda v. United States*, 368 U.S. 487 (1962); *Shelton v. United States*, 356 U.S. 26 (1958) (per curiam), *reversing on confession of error* 246 F.2d 571 (5th Cir. 1957), or not understandingly made, e.g., *United States v. Davis*, 212 F.2d 264 (7th Cir. 1954); *Smith v. United States*, 309 F.2d 165 (9th Cir. 1962) (prosecutor misled defendant). (2) In other cases there may be allegations of litigation obstacles extrinsic to the claims sought to be raised collaterally. A hearing has been given on allegations that government officials physically obstructed defendant's attempt to appeal. *Hill v. United States*, 256 F.2d 957 (6th Cir. 1958), *aff'd after remand*, 268 F.2d 203 (6th Cir.), *cert. denied*, 361 U.S. 854 (1959). *But see Thompson v. United States*, 315 F.2d 689 (6th Cir.), *cert. denied*, 84 Sup. Ct. 93 (1963). *Judicial frustration of the right to appeal by denial of leave to proceed in forma pauperis* prior to *Coppedge v. United States*, 369 U.S. 438 (1962), has not yet been recognized as a distinct ground of relief. See *Armstrong v. United States*, 320 F.2d 330 (6th Cir. 1963). The Ninth Circuit's recent decision in *Dodd v. United States*, 321 F.2d 240, 245 (9th Cir. 1963), that trial counsel's failure to take an appeal notwithstanding instructions by defendant to do so authorizes collateral review of the trial proceedings at least for "plain reversible error in the trial," constitutes the first significant break since *Council v. Clemmer*, 165 F.2d 249 (D.C. Cir. 1947), *aff'd after remand*, 177 F.2d 22 (D.C. Cir.), *cert. denied*, 338 U.S. 880 (1949), in a considerable body of cases denying relief where appeal has been lost by counsel's wilful or careless neglect. See, in addition to the numerous cases cited in *Dodd v. United States*, *supra*, *Bolden v. United States*, 320 F.2d 662 (7th Cir. 1963); *Williams v. United States*, 307 F.2d 366 (9th Cir. 1962); *Moore v. Aderhold*, 108 F.2d 729 (10th Cir. 1939); *cf. Hodges v. United States*, 282 F.2d 858 (D.C. Cir. 1960), *cert. dismissed*, 368 U.S. 139 (1961), with which compare the Fifth Circuit's ingenious appeal-time-tolling holding in *Boruff v. United States*, 310 F.2d 918 (5th Cir. 1962). Similar in spirit to *Dodd* is *Calland v. United States*, 323 F.2d 405 (7th Cir. 1963). (3) See generally *United States ex rel. McCann v. Adams*, 320 U.S. 220 (1943) (confession of error), and the excellent general discussion in *Smith v. United States*, 187 F.2d 192 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 927 (1951).

conviction record that, far from engaging the court in further factual inquiry, his claim self-evidently demonstrates a failure of the judicial process shocking to the court's house-cleaning sense;³⁵ the argument that the right he invokes is fundamental in the sense that its enforcement in his case is important to society.³⁶ I advisedly pose the competing determinants in terms of "arguments" and "counter-arguments" rather than as factors in a mathematical formula. Where determinants are, as here, merely clustering points for vague accumulations of attitudes and factual assumptions,³⁷ greater precision at the level of generalization would be useless.

(3) Coming specifically to the search and seizure question, I find that the factors favoring finality may range from moderately to strongly persuasive. The search and seizure claim may be proffered collaterally (a) following a guilty plea, (b) following trial [and appeal] at which the issue was not raised, (c) following trial at which the issue was raised and decided adversely to the accused, whereupon the accused (i) failed to perfect an appeal (for any of a number of reasons) or (ii) did not raise the issue on appeal, or (d) following trial and appeal on both of which the issue was resolved against the accused.³⁸ I have said that in situation (d) collateral attack should not be available, since it serves no function but to put before the same

³⁵ Compare the cases disallowing collateral attack where the movant proposes to show by evidence aliunde that the charging paper fails to charge an offense, e.g., *United States v. Gallagher*, 183 F.2d 342 (3d Cir. 1950), *cert. denied*, 340 U.S. 913 (1951) (plea); *Clark v. United States*, 273 F.2d 68 (6th Cir. 1959), *cert. denied*, 362 U.S. 979 (1960) (plea), or where it appears that the paper may be technically insufficient, e.g., *Hutcheson v. United States*, 320 F.2d 721 (D.C. Cir.), *cert. denied*, 84 Sup. Ct. 198 (1963) (trial); *Stegall v. United States*, 259 F.2d 83 (6th Cir.), *cert. denied*, 358 U.S. 886 (1958) (trial); *Roth v. United States*, 295 F.2d 364 (8th Cir. 1961) (trial), with the cases allowing collateral attack where the paper affirmatively alleges facts which demonstrate that no federal offense was committed, e.g., *Melvin v. United States*, 316 F.2d 647 (7th Cir. 1963) (plea); *Martney v. United States*, 216 F.2d 760 (10th Cir. 1954) (plea). But see the Seventh Circuit's extraordinary extensions of this latter doctrine in *Robinson v. United States*, 313 F.2d 817 (7th Cir. 1963) (trial), and *Lauer v. United States*, 320 F.2d 187 (7th Cir. 1963) (trial). Compare *Rivera v. United States*, 318 F.2d 606 (9th Cir. 1963) (trial) (remanded on other grounds).

³⁶ Claims of constitutional dimension will ordinarily be seen as more "fundamental" in this sense than nonconstitutional claims. See note 8 *supra* and accompanying text. But the constitutional nature of the claim is not *eo ipso* sufficient to justify its collateral availability; the Court's cases allowing relief have all been within the category of "those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." *Waley v. Johnston*, 316 U.S. 101, 105 (1942). (Emphasis added.)

³⁷ Attitudes, for example, respecting the importance of certain constitutional claims; factual assumptions respecting the causes of criminal behavior, the means of operation (if any) of the criminal law as a deterrent of prohibited conduct, and the factors which affect treatment and the prisoner's adjustment under treatment.

³⁸ Other possible litigation situations resolve themselves basically into the enumerated ones.

or another federal judge or set of federal judges issues which the federal judiciary has once resolved as competently as there is any reason to believe the federal judiciary can resolve them.³⁹ The Fourth Circuit case presents situation (c) (i)⁴⁰ which, with situation (c) (ii), is weakest for finality. Still, the finality factors here are considerable: (A) A second federal district judge will have to read the trial transcript and hear argument (probably by appointed counsel) in order to rule upon a claim already litigated before one federal district judge. (B) It has been proved beyond the trier's reasonable doubt by reliable (albeit allegedly unconstitutionally obtained) evidence that the movant is one of that class of persons who the Congress has decreed shall be subject to criminal penalties in order to restrain them (if necessary) and rehabilitate them (if possible) and to deter others from engaging in similar undesirable conduct. Concededly, we know virtually nothing about the actual operation of the deterrent and rehabilitative principles upon which the legislation is based, but—at least pending acquisition of more complete knowledge—it is not a presumptuous working assumption that long-protracted adversary litigation of an issue in the nature of a plea in bar hardly furthers the deterrent or rehabilitative efficacy of the law.⁴¹ (C) If the movant's claim prevails, the Government will face its burden of proof on retrial after a more or less substantial lapse of time that would not have been occasioned had the search and seizure issue been pressed on direct appeal.⁴² In the case of search and seizure situations (a) and (b) *supra*—where the claim is made for the first time collaterally—there are (D) the problem of delayed litigation of the search and seizure issue itself, ordinarily an issue turning on contested facts not susceptible of documentary proof,⁴³ and (E) the various custodial prob-

³⁹ See note 19 *supra* and accompanying text. The qualifications in notes 17 and 18 *supra* are discussed in note 60 *infra*.

⁴⁰ Although the Fourth Circuit's opinion is not clear on the point, it appears that the search and seizure issue was litigated collaterally on the basis of the trial transcript and that no evidentiary hearing was had on the § 2255 motion.

⁴¹ Professor Bator puts the point less tentatively. Bator, *supra* note 8, at 451-52.

⁴² It is difficult to know in what percentage of cases suppression before trial would leave the Government sufficient untainted evidence to proceed, and in what percentage of that percentage a lapse of time would make the untainted evidence unavailable. One may hazard, however, a few tentative assertions. (1) Claims of illegal search and seizure are frequent in narcotics and liquor cases. (2) In such cases, the use of "special employees" and undercover agents will frequently cause the Government (a) to go to trial on evidence obtained at the time of a defendant's arrest without presenting other available evidence which would disclose the identity of employees or agents, and (b) in the not unusual case where several transactions might be proved against the defendant, to prosecute only for those transactions whose possible litigation does not necessitate unmasking of employees or agents. (3) Special employees, particularly, tend to pergrinism and, although available at the time of initial prosecution, may thereafter stray.

⁴³ Concededly, the commonplace doctrines of collateral attack put the burden of persuasion on the movant to establish his § 2255 claim. *E.g.*, *Twining v. United States*, 321 F.2d 432 (5th Cir. 1963). In search and seizure cases, however, the

lems involved in bringing the prisoner into court when his presence at a collateral hearing is necessary.⁴⁴

(4) These last two considerations offer grounds for distinction among the litigation situations supposed;⁴⁵ however, for reasons which are common to all search and seizure claims, I would hold even a slight finality interest sufficient to deny the collateral remedy. The dispositive factor, I think, lies in one dimension of a problem briefly mentioned above: how important it is to society that the movant's claim be enforced.⁴⁶ The claim here is of a right to have illegally obtained evidence excluded at trial. I conclude not only that society has no interest in the enforcement of such a claim collaterally, but that society has the strongest sort of interest against its enforcement.

I do not mean to revivify here the entire exclusionary rule debate. *Weeks*⁴⁷ has long since settled the basic issue in the federal courts—rightly I believe. However, it will not do to forget that the *Weeks* rule is a rule arrived at only on the nicest balance of competing considerations and in view of the necessity of finding some effective judicial sanction to preserve the Constitution's search and seizure guarantees. The rule is unsupportable as reparation or compensatory dispensation to the injured criminal;⁴⁸ its sole rational justification is the experience of its indispensability in "exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part

allocation of the burden is likely to be relatively unimportant. Issues here turn on such questions as whether the accused consented to a search (ordinarily a question to be resolved by crediting one of two irreconcilable versions of the facts), or whether there was probable cause for arrest without a warrant (a question which can practically be resolved in no other way than to ask that the Government affirmatively show the facts on the basis of which its agents acted).

⁴⁴ Petitioner's presence will be necessary whenever he asserts that he can testify to facts pertinent to his collateral claim. *E.g.*, *Juelich v. United States*, 316 F.2d 726 (5th Cir. 1963), and cases cited therein.

⁴⁵ Of course, in situation (a), the guilty plea, the courts reject a search and seizure claim summarily. *E.g.*, *Edwards v. United States*, 256 F.2d 707 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958); *United States v. Zavada*, 291 F.2d 189 (6th Cir. 1961). This is consonant with the attenuation of taint principle. Notes 53, 56 *infra*.

⁴⁶ See text at note 36 *supra*.

⁴⁷ *Weeks v. United States*, 232 U.S. 383 (1914).

⁴⁸ "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960) (speaking of "the exclusionary rule," *ibid.*, elsewhere identified as, or with, "the exclusionary rule of *Weeks*," *id.* at 210, 218). What Mr. Justice Black said for the Court concerning the doctrine of *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), applies equally to the *Weeks* rule itself: "It is an extraordinary sanction, judicially imposed, to limit searches and seizures to those conducted in strict compliance with the commands of the Fourth Amendment." *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 796 (1949). *But see* *Mapp v. Ohio*, 367 U.S. 643, 661-66 (1961) (Black, J., concurring). Compare Mr. Justice Clark's description of the *Weeks* rule in *Mapp*, *supra* at 648, as a "clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard."

of federal law-enforcing officers.”⁴⁹ As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering,⁵⁰ pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest as declared by Congress.

Let me put the case another way. In every litigation in which exclusion is in issue, a strong public interest in deterring official illegality is balanced against a strong public interest in convicting the guilty.⁵¹ As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance. The courts apparently have recognized this; the foggy doctrines of “standing”⁵² and “attenuation of taint”⁵³ appear responsive to it. The Supreme Court has not yet constituted every criminal accused a private Attorney General,⁵⁴ to enforce the fourth amend-

⁴⁹ Mr. Justice Frankfurter, dissenting, in *Elkins v. United States*, 364 U.S. 206, 233, 235 (1960). Save for a single penultimate paragraph, Professor Bender's demonstration that the exclusionary rule of *Mapp* obtains no support from self-incrimination principles is equally applicable to *Weeks*. Bender, *supra* note 13, at 664-68. The demonstration is plainly sufficient without the paragraph, and I rest on it. As for the judicial house-cleaning argument, this seems to me to involve a *petitio principii*. If the fourth amendment does require judicial scrutiny of evidence to assure against its unlawful obtention, the court that does not scrutinize indeed has an unclean house. But if the amendment does not require scrutiny—as, for example, it does not require scrutiny into the legality of arrest of the accused who is haled before the court, see note 56 *infra*,—then I fail to see wherein uncleanness lies. I take it that a court may not permissibly be driven by disgust to discharge an accused merely because he has been shabbily treated, but that the court may attach legal consequences to its disgust only within the limits of the judiciary's function to enforce by appropriate means the Constitution and laws. See *United States v. Mitchell*, 322 U.S. 65 (1944). Compare *Elkins v. United States*, *supra*, with *Burdeau v. McDowell*, 256 U.S. 465 (1921).

⁵⁰ I echo Mr. Justice Cardozo, then Judge Cardozo, in *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

⁵¹ The undisputably reliable character of the physical evidence which, in the main, has felt the burden of the exclusionary rule, justifies the word “guilty.” I would hesitate to use the term in a contested confession case. And I do not intend to suggest by “public interest in convicting the guilty,” that the public interest needs—or that Congress wants—conviction of every individual who violates the law. I mean only that Congress conceives the public interest to require conviction in all cases in which the Government elects to prosecute and proves its substantive case.

⁵² *E.g.*, *Tindle v. United States*, No. 17806, D.C. Cir., Oct. 10, 1963; *United States v. Serrano*, 317 F.2d 356 (2d Cir. 1963); *Armada v. United States*, 319 F.2d 793 (5th Cir. 1963) (uncontested).

⁵³ *E.g.*, *Wong Sun v. United States*, 371 U.S. 471 (1963) (Wong Sun's arrest); *Walder v. United States*, 347 U.S. 62 (1954); *Wayne v. United States*, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 84 Sup. Ct. 125 (1963); *United States v. Paroutian*, 319 F.2d 661 (2d Cir. 1963); *United States v. Zimple*, 318 F.2d 676 (7th Cir.), *cert. denied*, 84 Sup. Ct. 128 (1963) (alternative ground); *cf. Smith v. United States*, No. 17466, D.C. Cir., Sept. 26, 1963 (Mallory).

⁵⁴ Judge Frank, in *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *re-manded for consideration of mootness*, 320 U.S. 707 (1943).

ment,⁵⁵ nor has it said that illegal arrest or illegal search and seizure stand per se as a bar to prosecution.⁵⁶ Where the lines of "standing" and "attenuation" will ultimately fall I confess I cannot guess. I do not now see any rational way to run them, for the point which they appear designed (albeit inarticulately and unsystematically designed) to mark—the point of diminishing returns of the deterrence principle—cannot be known until much more is known about the way deterrence works in fact than now seems knowable.⁵⁷ But if there is one class of cases that I would hazard to say is very probably beyond the point of diminishing returns, it is the class of search and seizure claims raised collaterally. For, so far as the law enforcement officer or the prosecutor is concerned, the incidence of such cases is as unforeseeable as the flip of a coin; the option to raise the claim directly lies solely with the defense.

Indeed, perhaps the flipped-coin image puts the matter best. If a court has no reason to believe that entertaining a search and seizure claim in every case in which it is proffered will have greater deterrent effect than entertaining the claim in fifty percent of the cases chosen at random, there is substantial justification for flipping the coin. Fifty percent of the persons affected whom Congress wants convicted would thus be convicted, and the conduct of the law enforcement officers none the worse. Of course no court would flip a coin in fact; that is not a way in which a court may operate; it appears intolerably arbitrary and would furnish cause for dangerous resentment by the criminal accused. What is wanted is a line or lines to serve the flipped coin's purpose without the flipped coin's manifest caprice. "Standing" and "attenuation" doctrines are no more than this; the historically sanctioned distinction between direct and collateral attack

⁵⁵ *Wong Sun v. United States*, 371 U.S. 471 (1963) (Wong Sun's challenge to Yee's narcotics).

⁵⁶ *E.g.*, *Bynum v. United States*, 274 F.2d 767 (D.C. Cir. 1960); *Morgan v. United States*, 319 F.2d 711 (D.C. Cir.), *cert. denied*, 84 Sup. Ct. 158 (1963); *United States v. Hughes*, 311 F.2d 845 (3d Cir. 1962); *Wells v. United States*, 311 F.2d 409 (10th Cir. 1962), *cert. denied*, 373 U.S. 925 (1963) (§ 2255). And see the forfeiture cases collected in *United States v. \$1,058.00 in United States Currency*, 323 F.2d 211 (3d Cir. 1963) (claim of illegality not constitutional); Note, 72 *YALE L.J.* 1062, 1067 (1963); *cf.* *Frisbie v. Collins*, 342 U.S. 519 (1952); *e.g.*, *Orcutt v. Wyoming*, 308 F.2d 61 (10th Cir. 1962). See also *People v. Parham*, 32 U.S.L. Week 2136 (Cal. Sept. 12, 1963). Compare *State v. Cory*, 382 P.2d 1019 (Wash. 1963) (electronic eavesdropping on defendant-attorney interviews); Judge Wright concurring, in *Gilliam v. United States*, 323 F.2d 615, 616 (D.C. Cir. 1963) (police brutality).

⁵⁷ *Cf.* *Elkins v. United States*, 364 U.S. 206, 218 (1960). I concede that the "standing" and "attenuation" doctrines have not been put explicitly on the ground of practical limitation upon the deterrent principle. Neither has any other explanation been offered for them. Once the theory of judicial compensating dispensation has been put aside, however—as I think it must be, see notes 48-49 *supra*,—there remains no satisfactory basis for the doctrines but the desirability and possibility of drawing lines, consistent with effective deterrence, which yet do not make every constable's blunder the occasion of a criminal's escape.

provides another available line, probably clearer than these, and which in addition, in another aspect, tends to serve the finality factors discussed above.⁵⁸

It will be objected that I am being cavalier with fundamental constitutional rights and years of human life. The years are years which valid legislation has provided shall be time served, and the rights at best are a hypostasis of all the remedies which the courts for sufficient reason give. Once a court has recognized that in the case of *A* and *B* and *C* certain consequences favorable to them are required by the interests of the social order, there is naturally a tendency to regard the consequences as "rights" of *A*, *B*, and *C*, and to demand their extension to *D*, who would be similarly circumstanced but for the fact that the social interests in question appear to be amply served by application of the consequences in three cases out of four. If *D* is indistinguishable from *A*, *B*, and *C* save by some unseemly fluke—or if the cost of extending the consequences to *D* is not considerable—the court may properly refuse to draw the line at *D*. But the cost in the search and seizure cases is, I think, substantial, and I would make available distinctions. I entirely concede we do not now know enough about the practical working of the exclusionary rule or the practical impact of collateral litigation to draw the final balance with assurance. "[F]or the present, I should not increase the handicap on society."^{59, 60}

⁵⁸ One possible resolution of the exclusionary problem is to leave the application of the exclusionary rule, to some extent, to the discretion of the trial judge—as the English, for example, handle violations of the Judge's Rules. In exercising such discretion, a federal district judge might take account, *inter alia*, of the gravity of the constitutional violation, other remedies practically available in the particular case, the Government's need for the evidence sought to be suppressed, and the nature of the crime charged. There are serious dangers in such a proposal—among them, (1) introduction of a new litigable issue with its opportunities for appellate reversals requiring retrial; (2) possible actual or apparent arbitrariness on the part of the trial judges; (3) possible development in practice of accepted "exceptions" to the exclusionary rule which in fact operate to write holes in the fourth amendment; (4) possible failure of the system as a whole to maintain the incidence of exclusion at an effective deterrent level. On the other hand, under the present practice which requires the judge inexorably to decapitate the Government if he finds even the least egregious, least intrusive constitutional violation—a violation, perhaps, attributable largely to the vagueness of concepts like probable cause, search "incident" to arrest, consent—it is not evident to me that the wanted sympathy of the district judges, triers of fact, toward the purposes of the fourth amendment will invariably be maintained.

⁵⁹ Mr. Justice Jackson's separate opinion reported in *Watts v. Indiana*, 338 U.S. 49, 57, 62 (1949).

⁶⁰ The text of this Comment deals with the appropriate disposition of a § 2255 motion which raises a search and seizure claim without alleging particularizing circumstances calculated to obstruct the claim's presentation in the conviction proceedings. No such allegations are recited in the Fourth Circuit (*Sutton*) case. I would handle allegations of this sort as follows:

(a) *Botched presentation by counsel*, note 17 *supra*, or *counsel's negligent failure to raise or preserve the claim*. The discussion in text accompanying notes 45-59 leads me to conclude that relief should be denied unless counsel's conduct is so grossly inept as to sustain a sixth amendment ineffective-assistance claim. See notes 17, 34 *supra*. In matters of guilt as well as matters of fair procedure, our litigation system largely commits the fortunes of an accused to the practically unreviewable efficacy of

his lawyer; I am *least* disturbed that he should be bound by his lawyer's lack of ability or effort in the search and seizure case, where the exclusionary claim which counsel botches is a "right" given the accused only in a representative capacity. I would give relief in situations meeting generally applicable ineffective-assistance standards (by which I do not mean to approve the extremely illiberal standard that prevails today), not to vindicate the accused's exclusionary "right" but to vindicate his interest and the system's interest in the fact and appearance that the accused be not convicted without at least minimally tolerable assistance of counsel for his defense. The right to counsel is not merely a procedural device for assuring other interests of the accused; it is an independently significant element of fair and fair-seeming procedure, and should be enforced as such. See *People v. Ibarra*, 32 U.S.L. WEEK 2242 (Cal. Nov. 14, 1963), which may, however, carry the principle too far on the facts.

(b) *New evidence.* Note 18 *supra*. In the case of some claims other than search and seizure, allegations of new evidence not meeting the requirements of FED. R. CRIM. P. 33 might suffice to tip the balance, see text accompanying notes 30-37 *supra*, in favor of collateral relief. In the search and seizure situation my principal reasons for denying a collateral remedy clearly apply notwithstanding such new evidence. See text accompanying notes 45-59 *supra*. The case of after-discovered evidence pertinent to a search and seizure contention and which does meet the rule 33 requirements is, for me, a borderline case, but I would grant the relief. I am influenced by concern lest a contrary rule encourage prosecutorial concealment or the justified suspicion of prosecutorial concealment, for in any case in which facts become known to the defense only after conviction it is difficult to ascertain and virtually impossible to prove the extent to which the prosecution is responsible for information having remained unknown at an earlier date. In this aspect, I think sufficient protection is afforded by the generally applicable standards of rule 33. This is not the place to discuss those standards in detail; it may be noted that the due diligence requirement has seen some recent relaxation in favor of indigent defendants with court-appointed counsel. *Delbridge v. United States*, 262 F.2d 710 (D.C. Cir. 1958); *Helwig v. United States*, 162 F.2d 837 (6th Cir. 1947); *Smith v. United States*, 283 F.2d 607 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 938 (1961), 370 U.S. 950 (1962) (dictum).

(c) *Change of law governing the legality of search and seizure.* Because the purposes of the exclusionary rule are not served by retrospective application of new rules governing the conduct of law-enforcement officers, I would deny relief. Cf. *Bender*, *supra* note 13.

(d) *Other obstructions to presentation of the claim in the conviction proceedings.* Note 34 *supra*. These should be treated in the same manner as claims that counsel's representation was inadequate, and for the same reasons. The discussion in the text accompanying notes 45-59 *supra* indicates that there is no reason to allow collateral attack in these cases unless the obstruction is of such a nature—the bribed judge, mob domination, government suppression of appeal papers, etc.—as itself to amount to violation of due process of law. Due process violations of this character, of course, carry their own justifications for collateral vindication. See note 34 *supra*; cf. *Bator*, *supra* note 8, at 455-60.

I do not ignore an argument which may be made for collateral relief in many of these cases: that to allow collateral attack furnishes a spur for the improvement of unsatisfactory criminal trial procedures. Within the federal judicial system itself, it seems to me the argument is not weighty. True, better procedures are called for: broader discovery, more searching inquiry before the acceptance of guilty pleas, more adequate systems for the appointment of competent counsel. But the Supreme Court's rulemaking power is wide and if visibly bad procedures do not provide the motive for their own correction, more is wrong with the administration of criminal justice than § 2255 can remedy.