Supreme Court of the United States

In the Matter of:

HAROLD KAUFMAN,

Petitioner

vs.

THE UNITED STATES OF AMERICA

Respondent.

Docket No. 53

Place Washington, D. C.

Date November 19, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

* * * *

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Harold Kaufman,

Petitioner

vs. No. 53

The United States of America

Respondent.

Washington, D. C.
Tuesday, November 19, 1968

The avove-entitled matter came on for argument at 11:45 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

BRUCE JACOB, Esq.
Emory University School of Law
Atlanta, George 30322
Counsel for the Petitioner

P R O C E E D I N G S

THE CLERK: Number 53, Harold Kaufman, Petitioner, vs. The United States.

ARGUMENT OF BRUCE JACOB, ESQ.

ON BEHALF OF THE PETITIONER

MR. JACOB: Mr. Chief Justice, may it please the Court? I am Bruce Jacob and seated at the counsel table with me is Mr. William Skinner, representing the Petitioner, Harold Kaufman. This case involves Section 2255 of the Federal Judicial Code. We feel the main issue in the case is whether a Federal inmate should be entitled to utilize Section 2255 to raise the question of whether or not he was convicted on the basis of illegally obtained evidence.

At the present time there is a conflict in the approaches taken in the various courts throughout the various circuits. This case arose in the 8th Circuit which takes the very strict view that search and seizure issues cannot be riased by 2255.

Ordinarily, they must be raised through direct appeal. Kaufman was tried in 1964 in the Eastern District of Missouri, for robbery of a Federal savings and loan association. At the trial he and his attorney had conceded that Kaufman had been the man who help up the savings and loan. The only issue it developed was whether or not he had been insane at the time. There was some evidence introduced, evidence that had been obtained from Mr. Kaufman's person and from the car he had been

driving while arrested. This evidence was introduced over the objection of counsel. During the closing argument on the issue of insanity, the prosecutors referred to some of these evidence.

Kaufman was convicted and sentenced to twenty years. He appealed and a new attorney was appointed to represent him in that appeal. Kaufman claims that he wrote to his newly appointed appellant attorney and asked that he raise all the Constitutional issues which appear in the trial record, including the issue of whether or not illegally received evidence had been used.

The attorney did not use this evidence. In April, approximately a month and a half after the oral argument, Kaufman, now at the Atlanta Penitentiary, wrote to his appellant attorney, and the letter is included in an appendix to the brief. He said, "There is a point not raised, there was an illegal search and seizure of my coats and car and this evidence violated the ulres of Preston versus the United States. This is a Constitutional question which should have been riased and please raise it at this time."

The attorney who also has submitted an affidavit which was included as an appendix of our brief, went to the Clerk of the 8th Circuit and asked whether there wasn any way to raise the issue at that time, after the oral argument. The clerk advised him that there was no formal way of raising the

issue. The clerk suggested, however, that if the attorney would send him a letter this letter would be forwarded to a panel of judges who would decide the case.

This is what happened. The letter was forwarded to the clerk and the clerk forwarded it to the panel in June of 1965. The opinion of the 9th Circuit was handed down in September of 1965 and there was no reference whatever to the search and seizure issue.

The opinion was completely silent on this issue. Kaufman then took certiorari to this court and the same attorney who represented him in the appeal filed the petition for certiorari.

One of the issues was whether or not illegal evidence had been used. In the legal argument the appellant attorney pointed out that he had attempted to raise this issue by letter but that the 8th Circuit had been silent on this issue in its decision.

In 1966, Kaufman filed a motion to vacate 2255 in the Eastern District of Missouri. Another attorney was appointed to represent him and a supplemental motion to vacate was filed and in that motion the issue of whether evidence illegally obtained from his car had been improperly used against him in the trial was raised. The motion was brought before the same judge who presided over the trial. In 1967 an order was enterred by the trial judge denying relief on all the issues and

on the 12th parge of the order only one paragraph was devoted to the search and seizure evidence. Appendix Two, said one of the issues, was the issue of whether or not illegally obtained evidence was used. "The record does not substantiate the search and seizure claim. In any event, the matter is not available as grounds for a collateral attack in the instant motion."

The judge then cited cases in the 8th Circuit which take the strict view that search issues should be in direct appeal, not collateral attack. The judge denied Kaufman the right to appeal.

Kaufman filed a motion for leave to proceed in the appellate court and that court likewise denied the motion. The very narrow issue before this court then is whether the 8th Circuit properly denied Kaufman for leave to appeal and forma popris.

In order to answer that question you must answer other questions; one of which is whether the district rule of law applied by the district judge and the district rule of law as to whether the Section 2255 was a proper rule of law.

As I have said earlier, there was a conflict among the federal circuits.

Q Did they hold the absolute law never to be raised or just the circumstances in this case?

A The case was decided by the 8th Circuit and it was

indicated that this is an absolute rule, that this is to be raised by direct appeal and not by 2255.

There are no cases I know of which the 8th Circuit has allowed it to be raised by 2255. There are a number of circuits which follow the district view.

The District of Columbia has taken a more liberal view in Thornberry vs. The District of Columbia. In that case the Court of Appeals said they would consider a motion to vacate, but that they would be tough about it.

The 5th Circuit in the Gaytan case, they have said through dicta, it is not part of the decision, but they indicated that since Map vs. Ohio, certain seizure claims have a Constitutional basis and therefore, they claimed, should be allowed to be raised by 2255, just as any other Constitutional claim.

When 2255 was adopted back in 1948, the purpose of the statute was not to narrow the Constitutional right to habeas corpus. The purpose was not to limit or narrow the remedy which had previously been available to a Federal inmate through habeas corpus. The only purpose was to simplify the mechancis involved on collateral relief. The purpose was to simplify some of the mechanics. In other words, the petition was to be filed in the trial court, rather than the court located in the district in which you were incarcerated.

This was more convenient because the trial court had all

the records and the files in the case and 2255 distribures the load of these collateral motions through the country.

Prior to 1948, the bulk of these petitions for habeas corpus were filed in districts in which Federal prisons were located. The remedy cannot be narrower than the district says this court has said in the Haymens case and Sanders vs. U. S. If it is narrower than statuatory habeas corpus under 2241, then there would be grave doubts about the Constitutionality of Section 2255.

So, we take the position that the rule of the 8th Circuit is improper, that a Federal inmate, filing a motion to vacate under 2255, should be provided the same provisions that a State inmate has.

The Solicitor General's office has argued that there may be some policy reasons for providing a different treatment for Federal inmates, that there may be policy reasons for allowing a State inmate to raise certain seizure issues, while a Federal cannot.

As Justice Scalli Wright pointed out in the Thornberry case, there are many instances in which a Federal inmate may not get even one judicial review of his search and seizure claims if he is not allowed to use the claims under 2255.

In many cases it is not used. Suppose a Federal inmate is induced to plead guilty because of the fact that the F.B.I. Has illegally seized evidence against him. There is

nothing in the record to indicate that his plea of guilty was introduced by illegally seized evidence. The only way to get at this issue is to hold a hearing under 2255 and allow evidence to be developed under this issue, or if an attorney fails to object to evidence at the trial, in a case such as this, there is nothing in a trial record to indicate that the defendant had some valid search and seizure issues and there is nothing to be reviewed on direct appeal.

The only way to question whether or not the attorney adequately represented him and the only way to get at this question of the failure to raise this question Constitutional rights is 2255.

Q Are you arguing, Mr. Jacobs, that the 2255 court must consider every Constitutional claim, even though it might have been raised on appeal or only that it should be discretionary with the 2255 court, whether or not to hear it?

A It should be discretionary in this sense, Your Honor, that if an inmate has raised the issue fully at his trial, I believe the 2255 court should at least look at this, but I don't think the 2255 court should be required to look at it.

Q I don't think in the case of a state prisoner he is entitled to have every Constitutional claim that he might have made a ground of appeal in the State courts entertained by the Federal Habeas Court, is it? Isn't that still a matter of discretion?

A I think you are right. It would be a matter of discretion in that collateral relief ---

Q Nevertheless, there is discussion in this case.

A The collateral relief cannot be used as appeal relief. You can only use it through habeas corpus or 2255. There has to be a rather serious question of the Constitutional rights before the trial court should be allowed to consider it.

CHIEF JUSTICE WARREN: We will recess for lunch.

(Whereupon, at 12:02 p.m., the court recessed, to reconvene at 12:30 the same day.)

AFTERNOON SESSION

12:40 p.m.

MR. CHIEF JUSTICE WARREN: Mr. Jacob, you may continue your argument.

MR. JACOBS: All right, sir.

Earlier, in discussing the facts, I mentioned that the appellant's attorney who had been appointed to represent him in his direct appeal, failed to raise the search and seizure issue, and Kaufman had requested him to raise the issue late.

That is, the attorney had gone to the Clerk and the Clerk advised him that there was no formal way of raising the issue at that point; that the issue had been raised informally, however, by means of a letter. But, even so, the Court did not consider the issue or apparently didn't consider it because the opinion was silent on the issue.

We feel or we believe that the advice of the Clerk was misleading and improper.

We believe there were formal ways of raising this issue even after oral argument. The attorney could have filed a supplemental brief together with a motion for leave to file a supplemental brief, or amended brief, together with a motion for leave to file an amended brief; or he could have filed an extraordinary motion to be allowed to reargue the case.

So, therefore, the Clerk's advice was somewhat

misleading.

Under all of these circumstances, we contend that the defendant's right to appeal on this one issue was unconscionably frustrated, based on denial of the right to effective representation under the Sixth Amendment, based on the denial of the statutory right to appeal on this one question, the question of whether or not illegally seized evidence had been improperly used against him. And also we feel that due process was denied him through the conduct of the Clerk in this whole set of circumstances.

Q Isn't that pretty much just practicing law by ear, when lawyers go to the Clerk and ask him what the procedures are, and then claim to rely on what he tells them, instead of doing their own homework?

A Your Honor, the attorneys should have known that there were normal ways to, I think, in discussions with other lawyers or had they done some research they would have found there were normal ways of raising the question. I agree he should not have relied entirely on the advice of the Clerk, but apparently he did. I don't think he should have, however.

The strict rule of the 8th Circuit, as we have already contended, is an incorrect rule of law and should not have been applied by the trial court in denying Kaufman any relief on his search and seizure grounds.

We also contend -- even if it could be considered

to be a valid rule of law, even if this Court should feel or find that the strict rule of the 8th Circuit is constitutional, is a correct rule of law, we believe that Kaufman at the very least should have been given a delayed or out of time appeal on this one issue, the issue of whether or not illegally seized evidence had been improperly used against him.

We have cited cases in our brief from the 5th Circuit, the Boruff case, the Lyles case, in which defendants have been frustrated in their attempts to appeal, and the Courts have given them delayed appeals or out of time appeals, and we feel that Kaufman should have had at least an out of time appeal on this one issue, should have had out of time direct appeal on the issue of whether or not illegally seized evidence was improperly used against him.

The facts in the record show that the search of Kaufman's person and the search of his car were illegal; that the evidence was improperly admitted; that the attorney adequately raised the issue at the trial; and also that the introduction of the evidence and use of the evidence by the prosecutor did not constitute harmless error.

These are the facts surrounding the search of the person and search of the car.

After the robbery, shortly after the robbery in the St. Louis area, a policeman in Alton, Illinois, which is across the Mississippi River from the St. Louis area, received

a call to be on the lookout for a red rambler which had been involved in a hit and run accident on the St. Louis side of the River.

Shortly after he received the call, a red Rambler came chugging across the bridge. The policeman followed the car. The car attempted to make a turn up a hill, skidded on the ice and jumped up over the curb and hit a tree. Kaufman was the driver of the car.

The patrolman arrested Kaufman at that point for reckless driving, driving too fast for conditions. The car was towed to a private garage.

Kaufman was taken to police headquarters, the Alton police headquarters. His person was searched and in the search of his person the police found an auto rental contract showing that the red Rambler had been rented to a person named Arthur Cooper. Also, the police found some of the proceeds of the robbery, $350 or $320, which had been taken in the robbery of the Savings and Loan.

At about the same time -- the time sequence is difficult to determine from the record -- but at the same time the private garage owner found a pistol, revolver, in the back seat of the car and he called the police and told them about it and they sent someone down to pick it up.

The FBI then arrived at the Alton police station. They were given the products of the search of Kaufman's person,

the auto rental contract and the money. They then interrogated Kaufman and he apparently made a full confession.

Due to the time sequence, due to the fact that the evidenee had been taken from his person, before the interrogation, I think it is reasonable to assume, although the record is not altogether clear on this, it is reasonable to assume that Kaufman may have been induced to make this statement to the FBI because of the fact that the evidence had been found on his person, the evidence of the crime had been found on his person. The proceeds of the illegal search of the person and the statement of Kaufman, plus the fact that the pistol, the revolver, had been found in the back seat of the car, plus the fact that Kaufman shortly after the robbery had been leaving, had been involved in a hit and run accident leaving Missouri and entering Illinois, constituted the probable cause, if the FBI had probable cause, for the search of the car.

The search of the car did not actually take place until four and a half hours after the arrest.

At this time Kaufman had not been formally charged with any federal crime. Custody at the time had been transferred to the FBI and they had taken Kaufman to St. Louis to the FBI headquarters there.

At this point two new FBI men went to the garage in Alton. They had no warrant and they made a thorough search of the car. They spent two hours searching the car and found

a number of items, including a traffic ticket from New York City, some gasoline receipts showing that the car had driven through Pennsylvania, and a Wsstern Union receipt showing that Kaufman had wired some money to his girl friend in New York while he had been traveling through Pennsylvania.

Q You referred to the search of his person as the illegal search?

A I think they are both illegal, your Honor.

Q When was he arrested?

A He was arrested at 4:45. He was taken immediately the police station. His car was immediately hauled to the private garage and the search took place apparently very shortly after 5:00.

Q While he was in the police station under arrest?

A That is right.

Q Isn't it necessary for them to make some search of the person when they get into the police station?

A This was not an ordinary inventory of the contents of his pockets conducted by the desk sergeant. This was a search by three or four policemen involved in the search.

I think it is apparent from the record this search was for the purpose of discovering evidence of the robbery; and the search had nothing to do with the arrest for reckless driving. There was no connection between the two.

This was not merely an inventory of the contents of

his pockets and the search was made at a great distance away from the car sometime after the arrest. So it cannot be considered a search incident to an arrest.

Q Do you think the search should be limited to what he has in his pockets?

A I think the police could have frisked him for weapons but this isn't what they did. They actually searched his pockets and were searching for evidence.

Q Suppose they didn't want him to have those clothes, if they had narcotics in them or some other things that are prohibited. Don't they have the right to do that?

A If this was the purpose of the search of the person, I think the search would be valid.

If the search was to inventory the contents of the pockets or put on a prison uniform, I think the search would be justified. But I don't think that was the case here.

The record indicates this was a search pure and simple for evidence of the robbery.

Q Would you say they could have gotten a warrant for the search?

A Well, if they had gotten a warrant, certainly the search would have been more justified than it was under these circumstances.

Q What do you think about getting a warrant? Was there probable cause?

A At this point I don't think there was.

Q You don't think there was probable cause to arrest?

A There was probable cause to arrest for reckless driving, but no probable cause to arrest for the crime such as robbery of the Savings and Loan. At this time all they had was suspicion concerning the robbery. They didn't have probable cause concerning the robbery of the Savings and Loan.

We believe that the facts of our case are much closer to the facts of the Preston case than they are to the facts of Cooper v. California which the Solicitor General relies upon, and we have developed this fully in our brief.

The defense attorney did not move to suppress this evidence prior to trial. At the trial he objected to the auto rental contract, the money which had been obtained in the search of Kaufman's person, and to these four pieces of paper, the receipts, and the Western Union receipt, the New York traffic ticket. He objected to all of these things.

In fact, he moved to exclude the evidence taken from the search during the search of Kaufman's person.

He did not, however, make a motion to suppress prior to trial.

The Judge considered the objections on their merits, however, and ruled upon each objection. At the time the Judge ruled on the merits of these objections, there was sufficient evidence in the transcript to allow the Judge to rule on the

validity of these searches.

Q If he failed to object or order a motion to suppress, would you still contend that he could raise it on 2255?

A I would say not unless it could be considered incompetency of counsel or inadequacy of counsel; unless this were the reason why he did not object.

Q But yuu say that here he objected to everything.

A Well, he didn't object to everything. He did not object to the gun.

Q So that the gun was in evidence properly?

A That is right.

Q You can't object to it now?

A That is right; our argument as to the gun is extremely weak. But as to the items he did object to, I think we have a valid argument.

I would like to reserve sometime to rebut.

MR. CHIEF JUSTICE WARREN: You may.

Mr. Martin.

ORAL ARGUMENT OF JOHN S. MARTIN, JR.,

ON BEHALF OF THE GOVERNMENT

MR. MARTIN: Mr. Chief Justice, and may it please the Court.

This petition brings before the Court an order of the 8th Circuit Court of Appeals which dismissed petitioner's appeal as frivolous. Therefore, there is no guiding light in

an Opinion as to what ground the Court decided the case.

Q It didn't even permit him to lodge an appeal; is that correct?

A That is right. It denied forma pauperis which, I think, under the standards articulated by this Court would have to consider that the Court determined that the appeal was frivolous.

Q The District Court first denied?

A That is right; the District Court adjudicated the merits of his claim that the taking of the drug during trial made him incompetent at that time, and then said of the search and seizure claim, it was without merit and in all events it could not be raised on collateral attack.

Q Then with respect to the appeal, the attempted appeal, the District Court first denied the petition to appeal in forma pauperis, and that was followed by a similar denial by the Court of Appeals?

A That is right. The only thing that the Court did say in its Order, that it had reviewed the entire record in this case. And I think that is important. Because I think that there are three separate grounds on which this Court could affirm the decision of the Circuit Court, the denial of the petition here.

That is one that in all events, even if we assume that the claim of search and seizure was good, that the search

was illegal, even if we assume that 2255 is a proper way to raise such a claim, a review of the record in this case will clearly establish that any error in the admission of this evidence was clearly harmless error under the standards that this Court has enunciated in Chapman v. California.

The Court rejected a rule that any constitutionality had to be considered harmful and reiterated its articulation of the harmless error rule in Fahy v. Connecticut. But the question is whether there was a reasonable possibility the evidence complained of might have contributed to the conviction.

I think another way of looking at it is if the evidence had been excluded, is there a reasonable possibility that the jury might have reached a different result?

We would submit that in this case an examination of the record shows that there is no possibility that the jury would have reached a different result had this evidence of which petitioner now complains been excluded.

In argument at more length in brief, counsel for petitioner has developed a theory on which this evidence that was seized may have had some bearing on the only defense raised at trial, the insanity defense.

Petitioner never contested the commission of the crime. Petitioner says that this evidence was used by the government to show that the petitioner acted rationally on the day of the crime, and that that fact that he acted rationally

undermined his defense of insanity.

I think the basic weakness of that position is found in the fact that the insanity defense at trial was not based on a claim that the defendant was irrational on the day he committed the crime, but rather that he was acting pursuant to an irresistible impulse; and indeed the petitioner's trial counsel argued that the fact that he behaved rationally on the day in question had no bearing on it. And I would refer the Court to page 129 of the Appendix. This is the summation of Petitioner's trial counsel. It appears half way down the page in the middle of the second full paragraph. He said to the jury:

"We know that unlike some other mental illnesses the intellect is not impaired. Changes can be schizophrenic, paranoid type. The person is still able to reason in this particular illness. He is not rendered conspicious so that walking down the street anyone can point and say 'there is a schizophrenic paranoid. That doesn't mean that he isn't in control of his actions."

So this was the theory of the defense, that petitioner could appear to be totally rational at the time he committed the offense and yet still be driven by an irresistible impulse to commit the crime.

We, therefore, submit the admission of this evidence could not possibly have affected that defense.

We would point out further, if the Court please, that the evidence that the petitioner behaved in a rational manner is overwhelming in this case.

First, the petitioner went into the bank in question and was in the bank for approximately twenty minutes before he actually pulled out a gun and announced it was a stickup.

He first went to a teller and discussed the purchase of travelers checks, whether he could give a personal check to purchase travelers checks, whether he could take out a loan to purchase them.

He then had a discussion with another bank employee concerning the taking out of a loan.

Their testimony indicates that during this entire period of twenty minutes in which he was in the bank petitioner was entirely rational. So that their evidence alone establishes that petitioner was acting rationally on that day.

In addition, the FBI agents who interviewed petitioner on that night, one of whom was with Petitioner for approximately four hours, testified that all during that time petitioner was totally coherant and responded to questioning and gave no indication of any irrationality.

This was confirmed by several of the other people who interviewed petitioner on the night of his arrest.

So the evidence was, as I said, overwhelming that petitioner was behaving rationally on the day in question.

Further, I would point to the fact that petitioner's counsel presently argues that this evidence may have led the Government to the fact that the petitioner traveled from New York to St. Louis to commit this crime, that he made stops along the way. However, that information was also available to the Government absent any of the items seized, because the record establishes during the testimony of Agent Peet, who interviewed petitioner on that evening, that petitioner fully told the agents everything about his activities on the day of and prior to the robbery.

At page 95 of the Appendix -- this was on a hearing outside the presence of the jury -- Agent Peet gives a rather extensive summary of what petitioner told him on that day, mentioning the fact that he traveled from New York to St. Louis for the purpose of committing a robbery, that he stopped in Alton, Illinois, on December 16th, the same day of the robbery, and purchased a gun; that he also purchased a holster and some ammunition; the route he traveled, etc.

So that all of these factors were also otherwise available to the Government.

Now, I submit when this record is reviewed in totality it is clear that any error in the admission of these few items that were seized from petitioner's person at the time of his arrest, when he was in custody, and from the car subsequently, would clearly be harmless error under the standards articulated

by this Court.

Having said that, I would like to turn to the question petitioner has argued at some length, and that is the question whether or not the claim of illegal search and seizure is one which can be raised on habeas corpus or its statutory counterpart, a 2255 motion; and we, of course, draw no distinction between the two types of remedies, habeas corpus or 2255.

In Sumnal v. Lodge, this Court decided that the remedy of habeas corpus was not available to test issues that could have been raised at trial and on appeal, at least where the error complained of was not a constitutional proportion.

The Court did note in some cases, even where constitutional claims had been raised and they had been denied where there was appellate relief available, we also recognize that there will be exeeptional circumstances where, even though as a general rule you might say that 2255 would not lie, exceptional circumstances may make it appropriate for the Court to provide the remedy of a habeas corpus proceeding.

We would submit that even when the questions are constitutional, there are strong policy considerations why prisoners should not be allowed to raise collateral matters that they could have raised at the trial or on direct appeal.

Q That argument isn't rested on any language of 2255, is it?

A No, it is not.

Q The language of 2255, by its term, at least, indicates that the precise claims being pressed here, the constitutional ones, are cognizable ones?

A I think basically it is a question, as you mentinned before , Mr. Justice Brennan, in discretion, in what instances does the 2255 go to the merits of the claim advanced.

It is our position there are certain constitutional issues which could be raised at trial that should not be ordinarily heard on a 2255 motion.

We recognize at the same time there are others that are so basic to the fairness of the original proceeding that even though they could have been raised--

Q Do you think the test we have had in availability of federal habeas remedy to state prisons and the extent to which discretion is to be applied by the federal habeas judge, do you think those tests are equally serviceable in the 2255 areas?

A I think they are serviceable. I think there are different considerations.

Q We did say that there are circumstances, although it is a federal constitutional claim, when a federal habeas judge is justified in refusing to entertain it, didn't we?

A That is right.

Q What I am wondering is can we have a counterpart here in 2255? Are we going to have to fashion standards here

different from those we fashioned in the federal habeas?

A I think certain things have to be taken into consideration that are different. I think your opinion in Fay v. Noia for the Court makes clear one of the purposes of the federal habeas corpus statutes to state prisoners was to make available a federal forum for the litigation of the prisoner's federal claims.

It seems to me that that federal forum has been provided here, and I think that makes a very clear distinction between the two situations.

I think also that basically some of the considerations are the same.

We would suggest that to start from a general rule, without talking for a moment about the exceptional circumstances, that there is a balancing of interests to be considered normally in a habeas corpus proceeding when a prisoner asserts denial of constitutional right.

There is society's interest in the finality of the judgment and there is the prisoner's interest in the adjudication of his claim.

Now, the question basically as we would present it would be which constitutional issues are such that they should be considered on 2255 regardless of the availability of direct appeal to handle those issues and those that should not, and we would suggest to the Court a useful analogy in

solving this problem in the general terms is provided by this Court's decisions in the cases involving retroactive application of the newly articulated constitutional principles.

In those cases the Court has recognized that the new constitutional principle should be applied retroactively, to use the words of the Court in Roberts v. Russell, "if the Constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined."

On the other hand, in the retroactive cases the Court has recognized that where the constitutional principle doesn't go to the reliability of the fact finding process, the principles should not be applied retroactively.

We submit also that where a 2255 proceeding or habeas corpus is taken sometime after the conviction, the Court should not generally allow the assertion of even constitutional claims that could have been raised on direct appeal, or at the original trial, unless the constitutional claim raised is one that seriously throws into question the reliability of the fact finding process.

We submit that the case presently before the Court presents all of the same policy considerations that were present in Linkletter v. Walker, when this Court determined not to make Mapp--

Q Suppose, Mr. Martin, you had a failure in a federal criminal trial to raise something on appeal and it is one of

those grizzly choice situations. Then what?

A Then I think you are talking about exceptional circumstances which would have to be considered.

I am talking about the normal claim where a man comes in and says--

Q If you are going to use the Linkletter and the retroactive cases, you are about to say that obviously search and seizure claims then ordinarily ought to be left to direct appeal and never be the subject of a 2255?

A Well, I would say that it ordinarily would be left to direct appeal andnot the subject of 2255.

Again I would say there may be extraordinary circumstances. For example, if the failure to raise it is such that it could amount to deprivation of counsel. And perhaps something short of that as Professor Amsterdam suggested in his article on search and seizure when he suggested it ordinarily when there are exceptional circumstances. But I think the policy consideration articulated in Linkletter, why you don't want to relitigate issues some substantial time after the trial. First, that memory is dim. Witnesses may be lost. And I think the main one, the hearing itself. It is difficult to determine the actual facts, and, two, it makes retrial very difficult. So there are those policy considerations going.

Mapp also made clear that retroactive application wouldn't serve really the purpose, the deterrent purpose of

the exclusionary rule, and we would submit similarly here that no purpose of the exclusionary rule realistically would be served by allowing this type of claim to be raised collaterally.

I think it is clear that a police officer wouldn't risk searching a car illegally knowing that the evidence would be excluded on proper motion, on the hope that perhaps it wouldn't be raised, and then it couldn't be raised collaterally.

I don't think this would have any significant impact on the deterrent effect of the exclusionary rule.

So for these reasons we submit as a general rule habeas corpus should not be allowed to test claims of illegal search and seizure, absent some claim of exceptional circumstances, and I would like to now address myself to the consideration -- before I do that, I might treat briefly one other area, since it has come up before the Court in a per curiam opinion in Jordan v. United States, where the Court did allow collateral attack on a matter that could have been raised on trial. That was the case where the claim was an unreasonable delay in bringing to trial, denial of the right to a speedy trial.

I think in that situation you have no competing interests. On the government side the matter is basically determined on the record and the time, and if the relief is granted there will not be a new trial, the case would be dismissed. So there are no finality interests really present

in that type of case. I think there habeas corpus may lie even though the matter could have been raised on direct appeal, because there the prisoner's remedy and right is to be totally released from the prosecution, and there will be no retrial.

But I think ordinarily where the claim is one that doesn't go to the integrity of the fact finding process, and, two, the remedy would really be to allow the prisoner a hearing, if he prevailed at the hearing, a retrial. Then I think that the interest in finality expressed in Linkletter v. Walker militates against allowing on habeas corpus the assertion of claims of such as illegal search and seizure, absent, as I said before, some extraordinary circumstances.

I would like to turn myself to the question whether or not there are extraordinary circumstances in this case which would justify the grant of habeas corpus.

We submit that there are not. Counsel argues that there are extraordinary circumstances because the petitioner wanted this matter raised on appeal and it was not raised.

I think, first, and counsel candidly admitted though it's petitioner's assertion that he raised this matter with counsel prior to submission of brief and oral argument at the original appeal, Kaufman's own letter, page 62, appended to the original brief of petitioner, shows he never raised the search and seizure issue with his counsel until after counsel had submitted his brief and presented oral argument.

Argument was heard on March 9th, I believe. This letter was submitted to counsel April 26th.

In addition, the letters of the Clerk of the Court also make clear the letter set forth on page 58, the Clerk of the Court to Mr. Jacob, that Kaufman's letter was submitted to the panel that decided the case, Kaufman's letter, prior to the decision of the case.

So I think it is clear that matter did get before the panel and we submit that the fact the panel didn't mention this issue in their opinion does not mean they didn't consider it, but rather I think that they agreed with petitioner's counsel, who himself stated he thought this appeal to be of little merit, at this point to be of little merit.

I think counsel on appeal made a deliberate choice. He looked at the search and seizure issue and found it to be of little merit and looked at the insanity questions and issues related thereto and determined that the best issue to raise was the insanity defense.

Q Does the record show as to the caliber of representation he had?

A Well, I think the record shows, among other things, Mr. Justice, that the man who represented him at the trial was a man of some prominence in the local Bar. He was either at the time of trial or shortly thereafter the President of the local bar association.

Also, I think, a close examination of the record at trial shows several things. One, I think that when you look at the presentation of the insanity defense, I think that it shows that petitioner was well represented. I think that counsel got the most out of the facts that were available to him.

I think that the record will also show as to why counsel did not make a search and seizure claim and in fact supports the conclusion that counsel determined that, one, the search and seizure issue meant nothing, since petitioner was going to admit the crime, and his only defense was going to be insanity; and, two, from the record, as he saw it, there was really no hope of success on the search and seizure claim because, one, the searches were apparently legal; and, two, in all events, no interest of petitioner was invaded by any search of the car that occurred.

Q Then he had another lawyer appeal?

A Yes.

Q A different lawyer, not an additional lawyer?

A A different lawyer. And that lawyer determined that the search and seizure was no good.

Q At least before the Court of Appeals?

A Then when petitioner raised it with him, he did, when submitting a petition to this Court, assert it. But I think we have here a consciencious choice of counsel on the issue,

particularly in light of the issue that was raised at the trial, that the issue was not worth raising.

Q Based on your criteria for distinguishing between the claims that are open for 2255 and those which are not; namely, whether the issue goes to the integrity of the fact finding process, why should it help if you are not going to open up search and seizure claims for 2255?

Why would it help to raise the same claim in terms of denial of counsel because the only inadequacy of counsel was that he failed to raise an issue about the admission of some evidence which is perhaps perfectly reliable evidence and which wouldn't really go to whether ornot guilt or innocence was properly determined?

A Well, I would think, Mr. Justice White, the problem is if a man had counsel which the record indicated was so inadequate; for example, if the only evidence against the defendant was illegally seized narcotics--

Q And he just plain failed to raise that?

A Then it seems to me there is some question that the man didn't get the counsel he was entitled to. And this Court has basically held that the right to counsel is retroactive at all stages.

Q It has held that. But it has never been focused on a particular issue like this.

A I think there might be some reason for drawing a

distinction.

Q I want to see how your argument is any better or any worse about 2255 as between counsel and--

A I think this goes somewhat to the criteria for exceptional circumstances that the Court has always recognized.

But I think it is exceptional circumstances has been used by the Court and recognized as something that you will consider.

If a man really hasn't been fairly treated because he never had the counsel to which he was entitled, I think he stands in better stead and has a greater right to be heard than where he was provided counsel who has performed his function in a perfectly adequate way, made certain tactical judgments as to what claims should be pursued.

Q Let's assume we thought this was a perfectly good search and seizure claim; in fact, quite good.

Would you say that that probably indicates there was inadequate counsel here?

A No, not necessarily. Because I think you still--

Q I just said "indicates."

A I still have the consideration of what the defense was at trial and what was the relation--

Q I know the question is what could it have been.

A What should it have been. Let's take that. If you exclude the illegally seized evidence, you still come to the

fact you have an overwhelming case of guilt. You have got positive identification by two eye witnesses. You have his action right after the crime. You have facts that I think probably could have been used except for the fact he thought he had more than he needed in this case.

Q So there was inadequate counsel, you say, but it was harmless error?

A No, not that it was inadeauate counsel. I think if counsel knew for example in fact he has finally confessed, he knew the eye witness testimony, that this might lead them to determine that there is no sense bothering with these issues of guilt. We have to focus and devote our time to the defense of insanity. And I think this is a reasonable judgment that counsel might make.

Q Do we know that the District Court gave a hearing initially in this case?

A Yes, sir.

Q We don't know, do we, that the Court of Appeals rested its affirmance on a view that 2255 didn't lie in this case because these matters had not be taken up on direct appeal?

A We don't know that from this case. We know that has been the consistent holding.

Q Of that Circuit?

A Of that Circuit.

Q If that were so, and if on that basis we were to

infer they affirmed because they thought 2255 didn't lie and we were to disagree with that view, should we do any more than send it back and let them wrestle with these problems?

Why should we wrestle with them up here?

A I think there may be some merit to it. I think there is the possibility the Court had had the appeal before, the direct appeal, and found, as we said, there was harmless error.

Also, I think it is clear, and I would like to refer to one thing in the record.

I think that the search of the car, the search and seizure claim is probably the more significant. I think at the time he was searched incidental to his arrest or after his arrest, although he was originally arrested because the officer inthe patrol car heard there was a hit and run and this car was involved, he was arrested and he claimed he was drunk at the time and he was then taken into custody on the traffic violation; and I think the evidence was accumulating that he had involvment with the robbery.

So I think it was reasonable when they got him back to the station to take his personal effects from him and in effect search him for the fruits of the crime which he might otherwise destroy while he was in custody.

I would like to turn to the search of the car and point out some of the things that the agents knew at the time

they did search the car. One of which I think is most important in this case is that the fact that the agents had at the time they searched the car found on petitioner, what had been taken from petitioner, the rental agreement under which that car had been rented.

All these events occurred on December 16, 1963. The petitioner had in his pocket at the time of his arrest a rental contract for the car. That rental contract provided -- and it was in evidence -- that the renter agrees to return said vehicle to owner at point of origin on or before December 15, one day before the robbery -- December 15, 1963 -- at demand of owner. If said vehicle is not returned at specified time then it may be considered conversion and may be treated the same as theft of vehicle from the street.

So the other thing in this contract is the fact that it was in the name of Arthur Cooper, not petitioner, and the contract also provides in Section 9D, the vehicle described herein shall not be operated by any person other than the renter who signed the rental agreement, to-wit, Arthur Cooper.

So that at the time this car was searched the agents knew, one, it was being used in violation of the rental contract in two respects, one of which said it should be treated as a stolen car. So they knew at the time they searched this car, one, by the terms of the contract it was considered stolen, and, two, that it was not to be returned to petitioner, it was

to be returned to the person to whom it belonged, the Metro Auto Rental Company. So there was no right of petitioner involved when they went and searched this car. They were holding the car for return to its proper owner.

We submit that under these circumstances, since petitioner had no right to the car, that there was no illegality in the search which affected petitioner. So for this reason we submit that the search and seizure was entirely proper.

In conclusion, I would just stress that we have set forth what we consider are three separate and distinct reasons why this Court may affirm the denial of the writ of habeas corpus or the 2255 motion in this case.

(1) That at best any error was harmless;

(2) That the petitioner's claim is one that is not cognizable under 2255; and

(3) That in all events the searches of which petitioner complains were entirely proper.

For these reasons we ask the Court to affirm the judgment below.

Q Concerning the last point you made about the contract, do you think the police have the right, when they find a contract of this kind and have seized property from a defendant, to read a contract and determine as between him and the lessor or the seller, that the seller has the right to the car and, therefore, they can search and take it back and give it to him?

A Well, I think there are several considerations involved, Mr. Chief Justice, one of which is that this car was the instrumentality of the crime. (2) They knew and I would assume that it is general knowledge -- I certainly know from my own experience and I think the FBI would know that the 8Z license plate, anyone in New York familiar with that would know, and I am sure the FBI are, is a rented car. They knew this was a rented car used in the perpetration of a crime and used at a substantial distance from the place of rental.

I think they have every reason to suspect at that point that the car is in fact stolen that is being used in such violation of the rental contract that really it is a conversion and theft. So I think at this point, for that reason, they have the right to examine this ontract further.

I would agree with the implication of your question that not every search gives the agents the right to look through a man's private papers. But I think such as this, when you have the car, to use the old distinction, an instrumentality of the crime.

Q That isn't the question that bothered me. You said a moment ago that they were actually holding this car for return to the property owner.

A Yes, I think when they read this contract and saw that by the terms of the contract as of December 15th the renter of the car said that that car is to be treated as stolen, they

had the obligation to hold that car for the rightful owner and not to return it; that it was by the terms of the agreement a rented car and had to be held.

Q What follows from that?

A I think it follows from that that really their search was reasonable in the circumstances and didn't violate any rights of petitioner.

Q That is your point?

A Yes, sir.

Q It isn't that gave them any reason to search the car?

A I think it also tends to follow, I would say, the Cooper side of Preston.

Q It may be that somebody had standing to object, but this fellow didn't?

A That is correct. I think they are both points, really.

MR. CHIEF JUSTICE WARREN: Mr. Jacob.

REBUTTAL ARGUMENT OF BRUCE R. JACOB, ESQ.

MR. JACOB: If it please the Court, Arthur Cooper, the man who rented the car, was Kaufman's friend. He rented the car for Kaufman's benefit.

On the 15th, the day before the robbery, Kaufman sent money back by telegraph to his girlfriend. His girlfriend cashed the money order in the presence of Arthur Cooper and Arthur Cooper presumably used that to extend the lease on the

car, so the car wasn't stolen under the terms of the contract.

As to standing, the Government during the trial never contested that the defense had standing to object to the introduction of this evidence.

The car definitely was not stolen. And I don't think a private contract such as this can make a car a stolen car. Only the laws of the soverign can declare what constitutes larceny.

We believe that the use of the illegal evidence in the trial and the references to this evidence during closing argument by the prosecutor did prejudice the defendant on the issue of insanity

All of the psychiatrists in the case, including the Government psychiatrist, agreed that Kaufman was psychotic, he was suffering from paranoid schizophrenia.

The defendant's pscychiatrist said categorically that Kaufman on the date of the crime was not able to control himself, was not able to prevent himself from committing a crime he knew to be wrong. So this was the defense, the defense of irresistible impulse.

The prosecution paraded eight lay witnesses before the jury, all testifying as to Kaufman's outward appearance on the day of the crime and the day before, how he was able to speak normally and walk normally and so on.

This, however, is only one aspect of insanity. It

is true that outward appearances have some relevance in determining insanity, but this is one part of the overall picture.

The psychiatrists know the history of the disease. They knew what pressures were on Kaufman, against Kaufman, at the time they knew how he would react in response to the pressure, and the prosecutor emphasized this one phase of insanity, the outward appearance. And the psychiatrists said that outward appearance alone is not conclusive on the issue of insanity.

In fact, you can be completely insane and yet appear to be rational.

During closing arguments the prosecutor referred to the pieces of evidence showing that Kaufman had driven the car from New York all the way to St. Louis in a period of two days, that he stopped along the way, bought gas and telegraphed his girlfriend, and so on; and as he was referring to the pieces of evidence, he said, "this defendant was insane on December 16th? And in order to determine that, you have to look at what he was doing at about that time, on the 16th, the day before, the day after. Here is a receipt showing that he drove from New York. Here is another receipt showing that he drove through Pennsylvania the day before the robbery. These things show what he was doing."

In the context in which the prosecutor referred to these items of evidence, we believe he accentuated or emphasized

the importance of these items, even though they actually had very little probative value on the issue of insanity. The prosecutor in the way he used these items of evidence emphasized they were important and in fact they were important to the prosecutor under his view of what constitutes insanity.

He believed outward appearances were conclusive. This is apparent not only from the record but from his brief.

We believe the use of the evidence cannot be considered harmless.

There was some confusion during the argument of Mr. Martin on whether the defendant's attorney at the trial or on appeal waived certain arguments concerning the introduction of illegal evidence.

MR. CHIEF JUSTICE WARREN: You may finish that statement.

MR. JACOB: The trial attorney did object to the evidence. The appellate attorney did not raise the issue, the search and seizure issue on appeal, because he thought the issue was without merit at that time. But subsequently in his petition for certiorari to this Court he did raise the issue, which shows he eventually did come around to the belief that the search and seizure issue did have merit.

MR. CHIEF JUSTICE WARREN: On behalf of the Court I desire to express our appreciation for your acceptance of our assignment to represent this indigent defendant. We

consider that a real public service and we thank you for it.

Mr. Martin, we thank you, of course, for your able representation of the Government in the case.

(Whereupon, the above-entitled oral argument was concluded.)
