BRUCE'S "OTHER" SUPREME COURT CASE

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PRELUDE

> [I]n *Stone v. Powell*, the Supreme Court slammed the federal habeas door virtually shut to Fourth Amendment claims. . . . [I]n light of the more recent decision of the Court in *Stone v. Powell*, which . . . marks acceptance of the line of argument made by the government in *Kaufman*, the holding in that case appears to have lost its vitality. This has been recognized by the Supreme Court and the lower courts.[1]

. . .

Shakespeare mused that "All the world's a stage, And all the men and women merely players."[2] If this is true (with age I have come to believe it is), then Bruce's life is a Frank Capra production. Bruce is George Bailey—as well as Jimmy Stewart. I could start Bruce's story with the sledding accident when he lost his hearing, but time is short, and I will skip ahead. The story I want to tell is from Bruce's early days as a lawyer in the 1960s. It involves the famous constitutional case he argued before the Warren Court; the one that became standard textbook reading in Criminal Procedure courses across the country. The one where the accused is later portrayed by an Academy-Award-winning actor in a made-for-television movie.[3] And if you think you have seen this production

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1. WAYNE R. LAFAVE, SEARCH & SEIZURE: TREATISE ON THE FOURTH AMENDMENT § 11.7(g) (5th ed. 2018) (internal citations omitted).

2. WILLIAM SHAKESPEARE, AS YOU LIKE IT act II acene VII (1599), http://shakespeare.mit.edu/asyoulikeit/full.html.

3. A DEADLY BUSINESS (Thebaut Frey Prods. 1986).

before, think again. Neither Clarence Gideon nor Henry Fonda play a part.[4]

ACT I: DOG DAY AFTERNOON

Harold Kaufman was a love-struck, middle-aged New York crook trying to support his "girlfriend" and her three children.[5] At 4 p.m. on December 16, 1963, Kaufman walked into the Roosevelt Federal Savings & Loan Association in Jennings, Missouri, "conversed with two employees, pulled a gun, announced a holdup, and demanded and received cash in excess of $300 [—including 50 sequentially numbered and recorded one-dollar bills—] and travelers checks [totaling] $11,520."[6] He then ordered everyone into a rear supply room and fled.[7] The robbery took less than twenty minutes.

Kaufman fled the bank in a red, rented 1963 Rambler (with New York plates) and headed for the Mississippi River's Illinois state line.[8] Sometime around 4:35 p.m. an Alton (Illinois) police officer observed Kaufman's red Rambler cross the bridge from Missouri.[9] Although the precise reason for the police officer's stopping Kaufman is unclear (the government claimed it was because he side-swiped another car in Missouri while fleeing the bank,[10] while Kaufman asserted it was because he was driving recklessly in Illinois),[11] it was undisputed that Kaufman's arrest was for a traffic violation. He was not known at that time to have robbed a federally-insured bank.

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4. Gideon v. Wainwright, 372 U.S. 335 (1963), of course, was all of these things, with Oscar-winning-actor Henry Fonda portraying Clarence Gideon in the 1980 made-for-television movie. Bruce, by the way, was played by Nicholas Pryor, a well-known soap opera actor at that time in the television movie about *Gideon*. GIDEON'S TRUMPET (Hallmark Hall of Fame Prods. 1980). I guess Jimmy Stewart was busy.

5. *See* Kaufman v. United States, 323 F. Supp. 623, 629–30 n.5 (E.D. Mo. 1971).

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

7. *Id.*

8. *Kaufman*, 323 F. Supp. at 625.

9. *Id.*; Brief for the United States at 5, *Kaufman v. United States*, 394 U.S. 217 (1969) (No. 53) [hereinafter Br. for the U.S.].

10. The government claimed that, at around 4:35 p.m., an Alton (Illinois) police officer received a radio broadcast to stop a red Rambler for the hit-and-run accident in Missouri. Br. for the U.S., *supra* note 9, at 5. Kaufman contested this factual point before the Supreme Court. Reply Brief for Petitioner' at 2, *Kaufman v. United States*, 394 U.S. 217 (1969) (No. 53) [hereinafter Reply Br. for Pet'r]. The Eighth Circuit later, on remand, sided with the government's version of events. Kaufman v. United States, 453 F.2d 798, 800 (8th Cir. 1971).

11. Reply Br. for Pet'r, *supra* note 10, at 2.

Everyone agreed that after Kaufman crossed the bridge his Rambler slid on ice and crashed into a tree. This made his apprehension relatively easy. Kaufman exited the car, told the police officer at the scene that his name was "Donald Taylor," and claimed to be drunk. Kaufman was arrested, and at the direction of the police officer, his car was towed to a private garage owned by a man named Cliff Martin.[12]

Within an hour or so of Kaufman's arrival at the Alton Police Station, the Federal Bureau of Investigation (FBI) got word and sent an agent to retrieve him.[13] During questioning by this FBI agent in the Alton Police Station, Kaufman admitted that he drove from New York to St. Louis in the Rambler and then robbed the bank.[14] Meanwhile, the Alton police delivered to the FBI agent the items taken from Kaufman's person following his arrest for reckless driving.[15] These items included a rental contract for the car and $352.03 in cash (including the fifty one-dollar bills from the robbery).[16] Kaufman was taken into federal custody at about 8 p.m. that evening.[17]

While Kaufman was being questioned, his wrecked Rambler was being inspected by the garage's owner, Martin. When Martin noticed a revolver on the back seat, he phoned the police officer who arrested Kaufman.[18] The officer went to the garage and instructed the garage operator to remove the revolver from the car and lock it in a drawer in his office at the garage.[19]

At about 9 p.m. that evening, FBI agents searched Kaufman's car at Martin's garage.[20] They did not have a warrant.[21] Inside the car they found some stolen money orders,[22] two packets containing the stolen traveler's checks, a traffic summons from New York City (dated December 14), two gasoline sales receipts from Pennsylvania (dated December 15), a receipt for a Western Union

12. *Kaufman*, 323 F. Supp. at 625–26.

13. Brief for Petitioner at 6, *Kaufman v. United States*, 394 U.S. 217 (1969) (No. 53) [hereinafter Br. for Pet'r].

14. *Kaufman*, 323 F. Supp. at 627–28.

15. *Id.* at 626; Br. for Pet'r, *supra* note 13, at 6.

16. Kaufman v. United States, 453 F.2d 798, 800 (8th Cir. 1971).

17. *Id.*

18. *Id.*

19. Br. for the U.S., *supra* note 9, at 7–8.

20. *Kaufman*, 453 F.2d at 800; Br. for Pet'r, *supra* note 13, at 6–7.

21. *Kaufman*, 453 F.2d at 800.

22. Kaufman did not object to their introduction into evidence. Kaufman v. United States, 323 F. Supp. 623, 629 (E.D. Mo. 1971).

telegraph money order (dated December 15) sent by Kaufman using the name Paul King from Harrisburg, Pennsylvania to Kaufman's claimed girlfriend (Patricia Scott) in New York, and a receipt from Wittel's Gun Shop in Alton where he bought the handgun used in the holdup.[23]

At his federal bank robbery trial, the evidence seized from Kaufman's person was admitted into evidence over his appointed lawyer's[24] objection. The revolver and packs of travelers' checks taken from the car were admitted into evidence without objection. The gun shop receipt was not admitted into evidence.[25] Several other items recovered from the car—the traffic summons, gasoline receipts, Western Union receipt, and New York traffic summons—were admitted into evidence over Kaufman's lawyer's objection.[26]

Kaufman's defense at trial was insanity. In 1960, he had been diagnosed at a state psychiatric hospital as suffering from a "'schizophrenic reaction, paranoid type, in partial, rather stable remission.'"[27] Kaufman's ostensible girlfriend,[28] Scott, testified that Kaufman experienced nervous and erratic behavior, and she worried for his safety.[29] He claimed to be indebted to a crime figure

23. *Id.*; *see also Kaufman*, 453 F.2d at 800 (describing the robbery, arrest, subsequent search, and items recovered); Kaufman v. United States, 350 F.2d 408, 411 (8th Cir. 1965) (noting that Scott was described by defense as not being Kaufman's girlfriend and that she had spurned his amorous advances); Kaufman v. United States, 268 F. Supp. 484, 490 (E.D. Mo. 1967) (observing that Scott had previously been convicted of attempted burglary, was later deported by federal authorities, and indicated that she apparently was interested only in the money Kaufman could provide to support her and her children).

24. Counsel, John R. Barsanti Jr., had been appointed shortly after Kaufman's arrest on December 20, 1963 to represent him. *See Kaufman*, 350 F.2d at 415. Barsanti was a fine lawyer and one-time President of the St. Louis Bar Association, but he was not a criminal defense lawyer. Bruce wondered in communications with me whether Barsanti was "familiar with the Fourth Amendment and the necessity of filing a motion to suppress evidence when a search had been unlawful." Letter from Bruce Jacob to Mark Brown, 4 (Aug. 14, 2018) (copy on file with *Stetson Law Review*). To Barsanti's credit, he at least objected to some of the evidence. Still, it is somewhat strange that he would object only to some of the evidence seized from Kaufman's car as opposed to all of it.

25. Br. for Pet'r, *supra* note 13, at 7 n.1.

26. His lawyer, however, did not move to suppress any of the items he objected to before trial. The Solicitor General argued that this constituted a forfeiture of the Fourth Amendment challenge. *See* Br. for the U.S., *supra* note 9, at 35–36. In the end, the lower courts on remand did not agree. Both the district court and the Eighth Circuit entertained Kaufman's Fourth Amendment challenges. Kaufman v. United States, 323 F. Supp. 623, 629 (E.D. Mo. 1971); *Kaufman*, 453 F.2d at 800.

27. *Kaufman*, 350 F.2d at 410.

28. Only in his mind, as things turned out; Scott testified that she did not return his amorous advances. The Eighth Circuit stated that she had "spurned" him. *Id.* at 411.

29. Br. for the U.S., *supra* note 9, at 10–11.

and, according to a New York City police officer, had once acted as an informant.[30]

Kaufman was convicted on August 24, 1964 and was sentenced to twenty years imprisonment.[31] On direct appeal, his freshly appointed lawyer, Walter E. Diggs Jr., argued several points but failed to advance any claim that the search of Kaufman's car was illegal.[32] Following oral argument in the Eighth Circuit, Kaufman wrote Diggs and asked him to raise the legality of the car's search with the court.[33] Diggs forwarded this letter to the Clerk of the Eighth Circuit, who informed Kaufman's lawyer that it had been delivered to the appellate panel of judges who heard the case.[34] The panel, in an opinion by then-Judge Harry Blackmun,[35] on September 8, 1965 affirmed the conviction without mentioning the legality of the search of the car.[36] Rehearing was denied on October 18, 1965.[37]

Acting with the assistance of Diggs and another lawyer, Robert O. Hetlage, Kaufman attempted to take his case to the Supreme Court.[38] In addition to claiming what amounted to a *Brady*[39] violation and asserting that he had been improperly medicated at trial, Kaufman argued to the Supreme Court that the search of his car was illegal.[40] His petition was denied on March 21, 1966.[41]

Kaufman then turned to the lone collateral mechanism for winning release available to federal inmates: 28 U.S.C. § 2255, the modern equivalent to what is colloquially known as habeas corpus.[42] Acting without an attorney, Kaufman complained that the medication given to him during trial left him unable to effectively assist his attorney in violation of the Sixth

30. *Id.* at 11.

31. United States v. Kaufman, 393 F.2d 172, 174 (7th Cir. 1968).

32. Kaufman v. United States, 394 U.S. 217, 220 n.3 (1969); Reply Br. for Pet'r, *supra* note 10, at 6.

33. *Id.*

34. *Id.*

35. *Id.*; Kaufman v. United States, 350 F.2d 408, 408 (8th Cir. 1965).

36. *Id.*

37. *Id.*

38. Br. for Pet'r, *supra* note 13, at 15.

39. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring that prosecutors disclose potentially exculpatory evidence to the defense).

40. Br. for the U.S., *supra* note 9, at 12.

41. Kaufman v. United States, 383 U.S. 951 (1966).

42. For state prison inmates, the federal collateral relief mechanism is found in 28 U.S.C. § 2254 (1996). Both are often referred to as federal habeas corpus.

Amendment.[43] As he did in his unsuccessful petition for certiorari, he also claimed that the government had unlawfully suppressed exculpatory evidence.[44] The judge, who had also presided at his federal trial, appointed counsel, A.H. Hamel, and set a hearing. Kaufman's newly appointed counsel then added to Kaufman's § 2255 application the claim that the warrantless search of his car violated the Fourth Amendment.[45]

The United States District Court for the Eastern District of Missouri rejected all of Kaufman's claims. Regarding the last, the Fourth Amendment claim, the court suggested two reasons for denying it; the first being procedural default and the next that Fourth Amendment claims were not cognizable on collateral review: "[T]his matter was not assigned as error on Kaufman's appeal from conviction and is not available as a ground for collateral attack on the instant § 2255 motion."[46] Kaufman's attempted appeal to the Eighth Circuit was rejected; the appellate court (in an order once again signed by then-Judge Blackmun) went so far as to even summarily deny him leave to appeal *in forma pauperis*.[47] In short, Kaufman's appeal was deemed frivolous.

Kaufman set his sights once again on the Supreme Court. He was now living in Atlanta, at the federal penitentiary, where he arrived on January 28, 1965.[48] Fortunately for him, Bruce Jacob was also in Atlanta by this time. Not in prison, of course, but teaching at Emory University.

ACT II: THE PAPER CHASE

Following his argument in *Gideon*, Bruce left his job with the Florida Attorney General's Office and entered private practice. His days in private practice were numbered, and he shortly decided to make his move to legal education. His first academic stop was

43. Kaufman v. United States, 268 F. Supp. 484, 486 (E.D. Mo. 1967).

44. *Id.* at 488–90.

45. *Id.* at 487.

46. *Id.* (internal citations omitted). The cases cited by the District Court stand for the proposition that Fourth Amendment claims are not cognizable on collateral review.

47. Kaufman v. United States, 394 U.S. 217, 219 (1969). There was no published opinion. The Eighth Circuit's perfunctory, unpublished disposition is quoted in full in the government's principal brief. *See* Br. for the U.S., *supra* note 9, at 14. Although not reflected in this quotation, Bruce has informed me that then-Judge Blackmun signed the Eighth Circuit's order.

48. United States v. Kaufman, 393 F.2d 172, 174 (7th Cir. 1968).

Emory University, where, at the suggestion of a federal judge (and using a Ford Foundation grant), he established a legal assistance program for inmates at the federal penitentiary in Atlanta.

The legal assistance program Bruce constructed included fifty-three law students reviewing queries and complaints made by inmates. Bruce supervised the operation, and with students in tow, would visit the prison "every couple of days" to drop off forms at the prison library, retrieve those that had been completed, and interview inmates who sought assistance. Within two months, the program had over nine hundred inmates seeking assistance. Of all of these queries and complaints, it was the very first one Bruce picked up that caught his eye. It was from Harold Kaufman.

Kaufman was on his own at this point. With the assistance of counsel, Kaufman had already lost twice in the Eighth Circuit and once in the Supreme Court—but these lawyers were now gone. Now serving time at the prison in Atlanta, Kaufman had filled out one of the forms Bruce left in the library. During his next visit, Bruce found Kaufman's form and read what he had to say.

Using the form, Kaufman described his case as best he could. Later, at his first meeting with Bruce, he told him "that his goal when he was growing up in Brooklyn was to become one of the 'Ten Most Wanted Criminals,' which had their photos in every post office at that time. But the problem was, he just did not have the ability to become a famous criminal."

Because the Eighth Circuit had denied his petition for rehearing on August 4, 1967,[49] Bruce understood that a petition for review in the Supreme Court would have to be filed in short order. He had only ninety days from the date of the denial to do so, and by the time he was put in contact with Kaufman, that time had dwindled to about sixty days. With three extra days added to the time computation for mailing, and the exclusion of the last weekend from the computation, this meant that a petition for certiorari would have to be filed no later than Monday, November 6, 1967. Bruce needed all the time he could find; he filed the petition on that last day.[50]

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49. Br. for the U.S., *supra* note 9, at 1.

50. Copies of the Petition for Certiorari, the government's response to it, and Bruce's reply, have apparently been lost to history. Only the briefs, the appendix, and the transcript of the oral argument have been preserved in the designated depositories (either as paper or as microfiche). Bruce's own files were accidentally destroyed during his move from Macon to St. Petersburg. He was left with just a handful of papers related to the case. I have

Bruce worked feverishly on the Petition with one of his students in the program, William F.C. Skinner Jr.,[51] a twenty-five-year-old Vietnam War veteran. Several other Emory law students, including Thomas E. Baynes (who would go on to work for the program after Bruce left),[52] assisted Bruce and Skinner in their effort to meet that deadline. This was not an easy task. Kaufman's case was complicated, and there were hundreds of pages of documents to be considered. Bruce decided that the best issue for Supreme Court review was whether the warrantless search of Kaufman's car violated the Fourth Amendment. The evidence should have been suppressed under the exclusionary rule.

Getting to this Fourth Amendment issue, however, was a problem. Kaufman was seeking habeas corpus. In order to use habeas corpus, one must ordinarily properly preserve an issue both in the trial court and on direct appeal. A "deliberate bypass,"[53] Bruce understood, would result in a procedural forfeiture of the claim. If this happens, the issue might not be considered at all on collateral review.[54]

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attempted—through references to and quotations from the petition, response, and reply found in the briefs, and from Bruce's formal statement of the "Questions Presented"—to reconstruct the points made in the petition and response, as well as the order they were presented.

51. Skinner was a third-year Emory law student who Bruce described to me as "one of the smartest of the fifty-three students in the program. . . . He wore glasses and looked like a scholar," Bruce says. "He did a very good job." Letter from Bruce Jacob to Mark Brown 2–3 (Aug. 14, 2018) (copy on file with *Stetson Law Review*).

52. Baynes was a third-year Emory law student who, according to Bruce, was "[o]ne of the hardest working students in the program. . . . At the end of the first year of the [Legal Assistance for Inmates] [P]rogram he graduated," Bruce explained, and "I had enough money from our first grant—from the National Defender Project, which in turn had been funded by the Ford Foundation—to hire Tom Baynes as Assistant Director of the program. . . . When I left for Harvard, Baynes took over." *Id.* at 4.

53. This was the rule established in *Fay v. Noia*, 372 U.S. 391, 470 (1963), and was still controlling when *Kaufman* was heard. It was not long after the Supreme Court heard *Kaufman* that the Court began to substantially modify this "deliberate bypass" standard, e.g., *Frances v. Henderson*, 425 U.S. 536, 544 (1976), and *Davis v. United States*, 411 U.S. 233, 245 (1973), until it was finally replaced by a less forgiving "cause and prejudice" standard in 1977. *See* Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977) (under this approach, an inmate must explain good cause for and prejudice resulting from his lawyer's failure to raise an issue at trial or on direct appeal).

54. Because Kaufman was convicted in federal court, his failure to ensure that the Eighth Circuit entertain his Fourth Amendment claim could have proved some benefit to Kaufman on collateral review. While lower courts at that time often refused to hear questions that had been heard in § 2255 proceedings on direct review, there was some disagreement about whether they ought to hear constitutional claims that had not been addressed on direct appeal. *Issues Cognizable*, 83 HARV. L. REV. 1042, 1062–66 (1970). Bruce thus had to walk a fine line between arguing that Kaufman's case had not been heard and that his claim had not deliberately bypassed appellate review.

Although Kaufman's lawyer at trial had objected to the use of the evidence found in the car, he had not moved to suppress it beforehand. Worst yet, his lawyer on appeal did not raise the Fourth Amendment issue in his brief to the Eighth Circuit. The issue was only brought to the attention of the Eighth Circuit, if at all, by way of Kaufman's belated letter to his appointed counsel, who had forwarded it to the clerk of the Eighth Circuit. The Eighth Circuit, for its part, said nothing about the Fourth Amendment claim when it denied Kaufman's appeal. No one knew if it had considered the issue or deemed it defaulted.

This problem was confounded by the Eighth Circuit's subsequent failure to explain on collateral review why it was rejecting Kaufman's application. It said nothing about the Fourth Amendment or anything else when it rejected Kaufman's appeal from the District Court's denial of collateral habeas corpus relief.[55]

Bruce discovered that there was a significant split of authority surrounding whether federal courts could address Fourth Amendment violations using habeas corpus.[56] One line of authority, which had been embraced by the Eighth Circuit in previous cases, held that because the Fourth Amendment's exclusionary rule was only prophylactic, not itself of constitutional dimension, and not directed at ensuring accuracy in the truth-finding function, it could not be pressed collaterally on habeas corpus.[57] Several other circuits disagreed, thus leaving the magical "split" that Supreme Court lawyers always look for when trying to convince the Court to take a case.

But he had to convince the Supreme Court to entertain this issue. The Eighth Circuit's failure to discuss on collateral review whether it could hear Kaufman's Fourth Amendment argument, together with Kaufman's lawyer's failure to raise the Fourth Amendment in his appellate brief on direct appeal, left Bruce with a doubly high hurdle to overcome. He had to convince the Supreme Court that there was no debilitating procedural default on direct appeal, and then he had to convince the Supreme Court that the Eighth Circuit's rejection of Kaufman's Fourth Amendment claim on collateral review was because of its rule precluding Fourth Amendment claims from being raised collaterally.

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55. *See* Br. for the U.S., *supra* note 9, at 14 (quoting the Eighth Circuit's order).
56. *See* Br. for Pet'r, *supra* note 13, at 20–23 (describing circuit split).
57. *Id*.

Once he had established the needed circuit split,[58] Bruce argued that "the court of appeals improperly refused to consider his search and seizure claim on direct appeal."[59] He added, "in view of the disposition of [Kaufman's] search and seizure claim on direct appeal and on collateral attack in the district court, he was improperly denied appellate review of that claim by the court of appeals[] . . . ."[60] Thus, even if the Eighth Circuit on collateral review had invoked a procedural bar, Bruce argued, that was wrong and would justify review all by itself.

Of course, even assuming these were all legitimate points, none of them alone or in combination could ensure that the Supreme Court would hear the case. The Supreme Court's appellate jurisdiction in 1967 (as it remains today) was largely discretionary. The Court only has to hear the cases it wants to hear. Today it receives several thousand petitions for review and grants fewer than one hundred. Back in 1967, the Court received approximately one-thousand petitions for certiorari and accepted fewer than one in ten.[61] The odds were certainly stacked against Kaufman.

The government's response to Kaufman's petition focused on these and other procedural points: first, "petitioner could not raise the search and seizure claim collaterally because he had not assigned it as error on direct appeal."[62] Next, "petitioner's failure to move to suppress the evidence at trial precluded him from raising the issue on appeal, and therefore, it was not available on collateral attack."[63] Last, "petitioner had conceded the commission

58. *Id.* at 20, 22.

59. Br. for the U.S., *supra* note 9, at 14 (quoting Petitioner's Petition for Writ of Certiorari).

60. *Id.* (quoting Petitioner's Petition for Writ of Certiorari).

61. Quantifying with certainty how many of the cases decided by the Court were taken up by certiorari is difficult. Unlike today, the Supreme Court during its 1967 Term (when Kaufman's petition was granted) had a large measure of mandatory appellate jurisdiction. Data indicates that it decided 110 cases during the 1967 Term, but not all of these would have been taken up through certiorari. *The Supreme Court 1967–68—The Term in Review*, CQ ALMANAC, https://library.cqpress.com/cqalmanac/document.php?id=cqal68-1283377 (last visited Mar. 12, 2019). I think it is safe to say that most of these, but still fewer than one hundred, came to the Court through certiorari.

62. Br. for the U.S., *supra* note 9, at 15 (quoting its Response to Petition).

63. *Id.*

of the robbery at trial."[64] His defense was insanity.[65] What did a traffic summons, two gasoline receipts, and a Western Union receipt (the only items seized from the car that were objected to at trial) have to do with that?[66]

Given the many difficulties Kaufman's case presented, one wonders how Bruce convinced the Supreme Court to take it. Today's Supreme Court looks for procedural quirks to justify denying review. It favors clear and clean issues. It would not touch a case with the procedural problems presented in Kaufman's. Yet it did—on April Fool's Day, 1968.[67]

Having granted the petition, the next step for the Supreme Court was to appoint counsel. Even though Bruce had written and filed the petition, he had done so voluntarily with no assurance that he would be the lawyer who argued the case. It was still up to the Court to appoint Kaufman's counsel. It likely would have appointed whomever Kaufman chose, so long as that lawyer was a member of the Supreme Court Bar, but this was not guaranteed. And now that the petition for review had been granted, many of the best appellate lawyers in the country would be clamoring to take Kaufman's case. He had the pick of the litter, and he chose Bruce. The Court, on May 6, 1968, made the appointment official.[68]

Bruce, Skinner, another lawyer named Thomas E. Baynes Jr.[69] who had joined the team, and Bruce's students worked on Kaufman's brief throughout the summer of 1968, a summer that proved doubly busy for Bruce. Not only was he preparing his brief for the Kaufman case, he was also in the process of moving his

64. *Id*.

65. Bruce informed me that "Kaufman showed no signs to me of being insane or mentally ill, and I met with him a number of times and talked with him twice while he was in the Witness Protection Program."

66. *See* Br. for the U.S., *supra* note 9, at 16 ("[P]etitioner conceded the commission of an armed robbery and defended solely on the ground of insanity."). Bruce had filed a reply to the government's opposition to the petition asserting that the prosecutor at trial, in response to Kaufman's objection, had stated that "all the papers in the car are essential to our prosecuting on the insanity issue." *See id.* at 15 n.2 (quoting petitioner's reply brief to the government's memorandum in opposition at 2). The government responded to this in its brief: "No such statement appears at that point [in the record], or at any other point, in the record." *Id.*

67. Kaufman v. United States, 390 U.S. 1002 (1968).

68. Kaufman v. United States, 391 U.S. 901 (1968).

69. At the end of his Brief, Bruce graciously noted that he was "[a]ssisted in the preparation of this brief by Attorney Thomas E. Baynes, Jr. and law students Fred W. Ajax, William C. Turner, William R. Rappaport, Charles R. Hohman Jr., William J. Terry, and Dennis J. Lanahan Jr." Br. for Pet'r, *supra* note 13, at 49.

family to Cambridge, Massachusetts. Bruce was to enter Harvard's graduate program that fall. (By 1970, while still at Harvard, Bruce had helped establish the Harvard Prison Legal Assistance Project.)[70]

Kaufman's petition posed three questions: First, "[w]hether a sentence based upon evidence obtained through an unreasonable search and seizure in violation of the Fourth Amendment is subject to collateral attack under 28 U.S.C. § 2255."[71] Second, "[w]hether [a] failure of [the] Court of Appeals, in petitioner's direct appeal from his conviction, to consider [the] issue of improper search and seizure . . . entitles petitioner to consideration of the search and seizure issue in a proceeding under 28 U.S.C. § 2255."[72] And last, "[w]hether evidence obtained through a warrantless search of petitioner's automobile [and person] . . . was properly admitted in evidence against petitioner at his trial for robbery of a savings and loan association."[73]

Bruce's Brief,[74] filed on August 13, 1968, began with a thorough recitation of the facts.[75] He explained how Kaufman was arrested, why Kaufman was arrested, and the details surrounding the search of his person and automobile.[76] He also detailed the trial, Kaufman's first appeal, his attempt to present his Fourth Amendment claim to the Supreme Court following the denial of his direct appeal, and the subsequent collateral proceedings.[77] Bruce explained that Kaufman's trial lawyer had made the proper objections,[78] and put particular emphasis on how important the physical evidence was to the prosecution's case. He quoted the prosecutor's closing argument at length, including the prosecutor's pointing to the items taken from Kaufman's person and car: "These are some of the things showing what he was doing when he was

70. Letter from Bruce Jacob to Mark Brown 3 (Aug. 14, 2018) (copy on file with *Stetson Law Review*).

71. Br. for Pet'r, *supra* note 13, at 3.

72. *Id.*

73. *Id.*

74. I supplied Bruce with a draft of this Article, and he offered several helpful suggestions. One was that the brief he filed with the Court was "Skinner's [his law student's] brief as well as mine. He did a good job helping me." Letter from Bruce Jacob to Mark Brown 3 (Aug. 14, 2018) (copy on file with *Stetson Law Review*). For sake of convenience, I refer to the brief singularly as "Bruce's Brief."

75. Br. for Pet'r, *supra* note 13, at 4.

76. *Id.* at 5–7.

77. *Id.* at 8–17.

78. Bruce devoted two paragraphs near the end of his Brief to explaining why a motion to suppress was not needed. *Id.* at 46–47.

coming from New York to St. Louis in this automobile . . . ."[79] He returned to this theme at the close of his Brief, stating that "it cannot be said that the introduction of evidence illegally obtained from Kaufman's car and his person was harmless error relative to his defense of insanity, since evidence was introduced to show that he was calm, coherent, logical, etc. shortly before the robbery."[80]

Bruce made much of the failure of Kaufman's appellate lawyer to raise the Fourth Amendment issue: "Kaufman wrote to him [from jail] . . . and told Mr. Diggs that there were several points which should be raised in the appeal, including the issue of whether or not evidence obtained from his person and his car . . . should have been excluded . . . ."[81] Later, after the brief had been filed, Kaufman wrote again to inform his lawyer about the recently decided *Preston v. United States*[82] case, which seemed to make clear that the search of the Rambler was illegal.[83] Bruce quoted at length from Diggs' affidavit as to what he did to raise the Fourth Amendment claim before the Eighth Circuit:

> I was still of the opinion that the illegal search and seizure issue was without merit. However, I determined to take every precaution to follow his desires, and accordingly, went to the court and discussed with the clerk the matter of raising the issue . . . at that time.[84]

It was the clerk, Diggs claimed, who advised him that "there was no formal way to bring the issue of [the] illegal search and seizure before the court at that time."[85] Diggs followed the clerk's advice and sent Kaufman's letter citing the *Preston* case to the "judge who had heard [his] argument."[86] Following the Eighth Circuit's rejection of Kaufman's appeal, Bruce argued, Diggs (with

79. *Id.* at 12 (emphasis deleted).
80. *Id.* at 47.
81. *Id.* at 12–13.
82. 376 U.S. 364 (1964).
83. Br. for Pet'r, *supra* note 13, at 13.
84. *Id.* at 14. This would later be required of a lawyer in Diggs' position, Bruce explained to me, by *Anders v. California*, 386 U.S. 738, 744 (1967), which stated that even though an appointed lawyer finds no merit in a particular point, "[a] copy of counsel's brief should be furnished [to] the indigent and time allowed him to raise any points that he chooses."
85. Br. for Pet'r, *supra* note 13, at 14.
86. *Id.*

the help of another lawyer, Robert O. Hetlage)[87] specifically included the Fourth Amendment argument in Kaufman's unsuccessful petition for writ of certiorari filed with the Supreme Court.[88]

Bruce then turned to the merits of the case. He began by again describing the circuit split that justified review.[89] Bruce observed that, notwithstanding this split, the Supreme Court had never suggested that only particular constitutional claims could be raised through habeas corpus.[90] Habeas corpus, he pointed out, was guaranteed by Section 9 of Article I of the United States Constitution[91] and had repeatedly been used by state prisoners to present Fourth Amendment claims.[92] The legislative history behind § 2255, which applied to federal prisoners, proved that it was not intended to be treated differently.[93]

Bruce next addressed the failure of Kaufman's lawyer to raise the Fourth Amendment claim on direct appeal.[94] "Every convicted federal criminal defendant has a statutory right to appeal, and a right to representation by counsel in such appeal."[95] Kaufman's lawyer had failed to provide effective representation in this regard; he should not have relied on the erroneous advice of the court's clerk.[96] Kaufman "has thus been deprived of due process and effective representation by counsel, at least on this one issue."[97] Never comfortable criticizing anyone, Bruce added in a footnote: "In all fairness, it should be pointed out appointed appellate counsel did an excellent job in briefing and presenting those points which he did raise in Kaufman's behalf."[98]

The searches, of course, were what Bruce needed to attack. If they were patently lawful, the Court would not bother with his other points. Bruce thus devoted a significant portion of his Brief

87. *See* Reply Br. for Pet'r, *supra* note 10, at 6 (explaining that another attorney, Robert O. Hetlage, assisted Diggs with Kaufman's certiorari petition taken from the denial of his direct appeal).
88. Br. for Pet'r, *supra* note 13, at 15.
89. *Id.* at 20–21.
90. *Id.* at 25.
91. *Id.* at 23.
92. *Id.* at 26.
93. *Id.* at 24–25.
94. *Id.* at 28.
95. *Id.* (internal citations omitted).
96. *Id.* at 33–34.
97. *Id.* at 34.
98. *Id.* at 34 n.4.

to his charge that they violated the Fourth Amendment. First, he observed that at the time Kaufman was arrested and searched by local police, they did not have probable cause to believe he was involved in a robbery.[99] Next, he pointed out, the search was "made some time after the arrest and at some distance from the scene of the arrest on the traffic charge."[100] "Once an accused is under arrest and in custody, a search made at another place, without a warrant, is simply not incident to the arrest . . . ."[101]

As for the search of the Rambler, Bruce had a stronger argument. He focused on *Preston v. United States*, the case that Kaufman had discovered while in prison. The facts in *Preston* were strikingly similar to Kaufman's; the suspect had been arrested for vagrancy, his car was towed to a garage, and then several hours later was searched without a warrant.[102] Inside the car was evidence of a bank robbery, leading to the vagrant's conviction. The Supreme Court ruled the search illegal.[103] This was the heart of Bruce's case, at least if he could overcome the procedural obstacles.

The government's brief, nominally signed by the Solicitor General, Erwin N. Griswold,[104] was filed one month later.

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99. *Id.* at 42.

100. *Id.*

101. *Id.* at 43.

102. *Id.* at 36–37; 376 U.S. 364, 367–68 (1964). The Court in *Preston* stated:

> Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. But this does not decide the question of the reasonableness of a search at a later time and at another place.

Id. (internal citations omitted).

103. Br. for Pet'r, *supra* note 13, at 37. Bruce all but conceded that the recovery of the pistol from the car was lawful. The best he could do was argue that the Supreme Court's distinction between private searches and those by police officers "should no longer be followed and that searches by private individuals should be covered under the exclusionary rule as well as searches by police." *Id.* at 40.

104. Bruce had no contact with Griswold, even though the latter's name was on the government's brief. Br. for the U.S., *supra* note 9, at 1. *All* of Bruce's discussions about the case were with John S. Martin, Jr., the Assistant Solicitor General who argued the case before the Supreme Court. Bruce informed me that "Martin was in complete charge of the case." For convenience, I call the government's brief "Griswold's Brief" in this Article to distinguish it from the oral argument tendered by Martin. Griswold, whom I had lunch with during the 1993 Term while I was working at the Supreme Court, held the distinction (or so we were told) of having argued more cases than any other attorney before the Supreme Court (notwithstanding his not arguing the *Kaufman* case). He served as Solicitor General

Griswold's legal argument proceeded along three paths: first, the evidence of Kaufman's guilt was so overwhelming that any error was harmless.[105] Second, Fourth Amendment claims, because they do not impeach the truth-seeking function, are not cognizable on collateral review.[106] Finally, the Fourth Amendment simply was not violated.[107]

As a seasoned advocate before the Supreme Court, Griswold did his best to spice up these claims with procedural points, like "petitioner's failure properly to present his search and seizure claim at trial and on direct review should bar him from raising that claim collaterally."[108] He also attempted to shade the facts to make his argument more appealing. For instance, Griswold argued that because Kaufman had been arrested for a hit-and-run accident, "which is hardly a minor traffic violation,"[109] the search of his person for weapons and valuables "was a necessary precaution to protect the police and to safeguard [his] property."[110] He also asserted that "[a]t the time the F.B.I. agent searched the automobile, it was known that it had been used as an instrumentality in the commission of a federal offense" and was owned by someone else.[111] "The automobile, therefore, was properly taken into custody; it was to be retained by federal authorities until trial and then returned to its owner."[112]

Griswold turned to Kaufman's appellate lawyer, Diggs, and argued that Diggs did not raise the Fourth Amendment issue because he realized it lacked merit.[113] This was reinforced by Kaufman having filed his 1965 petition for certiorari (which raised the Fourth Amendment issue) pro se.[114] Griswold suggested that his lawyer would not raise the matter for him because he knew it was frivolous.

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under Presidents Johnson and Nixon, was at one time Dean of the Harvard Law School, and was in private practice for a number of years.

105. Br. for the U.S., *supra* note 9, at 20–21.

106. *Id.* at 27.

107. *Id.* at 40.

108. *Id.* at 17.

109. *Id.* at 41.

110. *Id*. (citing Terry v. Ohio, 392 U.S. 1, 22, 27 (1968)); Preston v. United States, 376 U.S. 364, 367 (1964). *Terry*, which authorizes pat downs for weapons based on reasonable suspicion, was decided on June 10, 1968, just three months before Griswold filed his brief for the government. 392 U.S. at 1.

111. Br. for the U.S., *supra* note 9, at 19.

112. *Id.* at 19–20.

113. *Id.* at 19, 39.

114. *Id.* at 12.

Griswold also attempted to disprove Kaufman's factual claim that during the unlawful automobile search, the FBI had discovered a receipt showing that the pistol had been purchased by Kaufman in Alton. The receipt, Bruce had argued in his Brief, led the FBI to the gun shop owner's identity and that of another witness, John Davis, who testified for the government. This fruit of the poisonous tree, Bruce argued, could have affected the jury's understanding of Kaufman's insanity defense. Griswold claimed that the receipt was actually found on Kaufman's person and not in the automobile.[115] It was not objected to and could not be considered at this late date.

In his reply, Bruce first responded to and corrected Griswold's factual claims point by point. Bruce noted that Kaufman "was not arrested for 'hit-and-run,' as is claimed, but for a minor traffic offense."[116] Citing the Alton arresting officer's testimony (given in a subsequent Indiana bank robbery proceeding),[117] Bruce quoted the arresting officer as admitting that Kaufman had been arrested in Illinois for "a traffic violation—reckless driving, for driving too fast for road conditions."[118]

Bruce next explained that Griswold's claim that the car was being held by federal authorities at the time of the search to return it to its true owner was incorrect. Rather,

> [t]he car was sent to the garage because it could not be left on the street. There is no showing in the record that the Alton Police had a right to impound the car other than for Kaufman's convenience. There is nothing in the record to indicate that, as of the time of the F.B.I. search, the Alton Police had transferred the car . . . to the F.B.I.[119]

Further, Bruce observed there was no evidence that Kaufman had taken the car from its true owner:

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115. *Id.* at 25 & n.7.

116. Reply Br. for Pet'r, *supra* note 10, at 2.

117. Kaufman had robbed a bank in Indianapolis on November 20, 1963 before he robbed the bank in Missouri. United States v. Kaufman, 393 F.2d 173, 174 (7th Cir. 1968). He claimed insanity as his defense there, too. The jury did not agree, and the conviction was upheld on appeal. *Id.* at 178. The United States Supreme Court denied review on February 24, 1969, one month before it ruled in his favor in the Missouri case. *See* Kaufman v. United States, 393 U.S. 1098 (1969).

118. Reply Br. for Pet'r, *supra* note 10, at 2.

119. *Id.* at 3.

> It is true that the car had been rented in the name of Arthur Cooper, a friend of Kaufman's in New York. However . . . the car was rented by Cooper for Kaufman's use and benefit, Kaufman had sent money to Cooper to extend the lease on the car, and Kaufman was fully entitled to use the car.[120]

As for the government's claim that the receipt for the gun was found on Kaufman's person, Bruce noted that the record evidence relied upon in the government's brief described only that "a receipt for $29.53" was found on his person.[121] This receipt:

> was actually a receipt given to Kaufman by the police or F.B.I. for the difference between the total amount of money found on Kaufman's person after his arrest and the proceeds of the robbery. The receipt . . . was not a receipt for the purchase of the pistol, as has been claimed by the government.[122]

Bruce filed his reply on November 9, 1968.[123] He would be on a plane to Washington within a week.

ACT III: MR. JACOB GOES TO WASHINGTON

The Supreme Court that granted Kaufman's petition for writ of certiorari in April 1968 consisted of Chief Justice Warren and Justices Hugo Black, William Douglas, John Marshall Harlan, William Brennan, Potter Stewart, Byron White, Aba Fortas, and the Court's newest addition, Thurgood Marshall (confirmed on August 30, 1967).[124] Because Justice Marshall was Solicitor General when Kaufman took his first appeal to the Supreme Court in 1966, he would not participate in Kaufman's case.[125] The

120. *Id.* at 2.
121. *Id.* at 4–5.
122. *Id.*
123. Reply Br. for Pet'r, *supra* note 10.
124. *List of Supreme Court Justices of the United States*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/list-of-Supreme-Court-justices-of-the-United-States-1788861 (last visited Jan. 19, 2019).
125. Kaufman v. United States, 390 U.S. 1002 (1968). Justice Marshall did not participate in the certiorari decision. *Id*. The transcript of the oral argument reflects Justice Marshall's presence that day, which Bruce has confirmed: "I am fairly certain that he was on the bench." Oral Argument Transcript at 1, Kaufman v. United States, 394 U.S. 217 (1969) (No. 53) [hereinafter Oral Arg. Tr.]; Letter from Bruce Jacob to Mark Brown 2 (Aug. 14, 2018) (copy on file with *Stetson Law Review*). Today's practice has a recused Justice generally absenting himself or herself from the courtroom, but that may not have been the Warren Court's practice.

remaining eight Justices who participated in the certiorari decision heard the merits.[126]

On June 13, 1968, at the conclusion of the Supreme Court's October 1967 Term, the Chief Justice (fearing Richard Nixon might win the White House)[127] announced his resignation. As luck would have it, however, the Chief Justice would remain on the Court to hear Bruce's case. Chief Justice Warren and President Johnson had arranged for Abe Fortas' elevation to the Chief' position, but this plan fell apart for both political reasons and Justice Fortas' questionable finances.[128] Justice Fortas withdrew his nomination, Justice Warren agreed to remain as Chief until a replacement was confirmed, and the 1968 October Term proceeded with both Justices on the Court. They were seated together with their Brethren in the Courtroom on Tuesday, November 19, 1968, when Bruce's case was called for argument.

Bruce and his wife, Ann, arrived at Washington National Airport from Boston on Sunday morning, November 17, 1968. Their round-trip flight cost eighty-four dollars. They stayed at the Dodge House Hotel,[129] checking out and returning to Boston on Tuesday afternoon immediately following the argument. William Skinner also flew to Washington (with his parents) to watch the argument. They would sit in the front row just behind the well-polished brass bar that separated Supreme Court lawyers from the

126. Bruce confided to me that he was pleased to see Justice Fortas sitting on the bench and believed that Justice Fortas may have helped him with a question or two. Because the Justices are not identified on the official transcript and are only made known if a lawyer (as Martin occasionally did) addresses them by name, it is impossible to discern which friendly questions Fortas asked. Bruce met Justice Fortas, of course, during the *Gideon* argument, where Justice Fortas was appointed to represent Clarence Gideon. Bruce told me he had "good feelings" about the case, that it was a "real pleasure" to argue, and he felt from the start it was a "good case."

127. Earl Warren loathed Richard Nixon and dared not afford him the opportunity to appoint his successor. *See* G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 307–08 (1982) (detailing that Chief Justice Warren intended to resign while President Johnson remained in office, and that should no successor be selected by the next term, Justice Warren stated that he would be "obliged to act as Chief Justice").

128. *Id.* at 309–10.

129. The Dodge House Hotel was located on the corner of Capitol Street and E Street, just one block east of Union Station (on Capitol Hill). It was opened in October of 1921, torn down in 1972, and replaced by the 400 North Capitol Plaza office complex, which still stands there today. John DeFerarri, *Lost Washington: The Grace Dodge Hotel*, GREATER GREATER WASHINGTON (Apr. 13, 2011), https://ggwash.org/view/8981/lost-washington-the-grace-dodge-hotel. By the time Bruce and Ann stayed there, the Dodge House had been remodeled and fitted with a lounge called "The Place On The Hill." *Id.* Whether Bruce found it necessary or useful to visit this Place On The Hill before or after argument is not known. Most, I think, would have.

public, and Bruce identified Skinner as his co-counsel at oral argument.[130]

Arguing against Bruce that day was a thirty-three-year-old Assistant to the Solicitor General named John S. Martin, Jr.[131] Martin was a Brooklyn native who graduated from Columbia Law School in 1961. He had argued four prior cases to the Supreme Court on behalf of the government, losing three of them.[132] But his pedestrian batting average before the high Court was no measure of his skill. Martin was sharp. His previous experiences translated into an almost conversational posture inside the courtroom. He would not be arguing to the Court; he would be helping the Court reach the proper result.

When Bruce and Ann arrived at the Court that morning, they discovered that the room was, in Bruce's words, "almost empty." Bruce would have sat in the lawyer's section, while Ann took a close seat in the gallery. At 10:00 a.m. sharp, the Court Marshal called everyone to attention:

> The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and

130. According to the transcript of oral argument, after stating his name to the Court, Bruce informed the Court that "seated at the counsel table with me is Mr. William Skinner, representing the Petitioner, Harold Kaufman." Oral Arg. Tr., *supra* note 125, at 2. Bruce told me, however, that Skinner was a law student when he worked on the case, and that after Bruce arrived in Cambridge (which would have been the fall of 1968) he phoned the Clerk of the Supreme Court "advising him of William Skinner's role and asking permission for him to sit at counsel table with me during the argument . . . . We were turned down . . . ." Letter from Bruce Jacob to Mark Brown 3 (Aug. 14, 2018) (copy on file with *Stetson Law Review*). Bruce also told me that "Skinner flew to Washington and was in the audience for the arguments, with one or both of his parents. The room was almost empty, and they sat as close to me as possible, just barely on the other side of the bar, in the front row." *Id.* at 4. Skinner was ostensibly identified on Bruce's Brief as co-counsel, though it appears he would not have been licensed to practice law when the Brief was filed in August 1968. It is doubtful that Skinner would have been allowed to sit at counsel's table.

131. *See Biography of John S. Martin, Jr.*, WIKIPEDIA (Sep. 7, 2018), https://en.wikipedia.org/wiki/John_S._Martin_Jr. Martin authored the Brief for the United States, though it carried the name of the Solicitor General, Erwin Griswold, over his. *See supra* note 104, at 1.

132. Sabbath v. United States, 391 U.S. 585, 591 (1968) (lost); United States v. Neifert-White Co., 390 U.S. 228, 233 (1968) (won); Schneider v. Smith, 390 U.S. 17, 27 (1968) (lost); Katz v. United States, 389 U.S. 347, 359 (1967) (lost).

> give their attention, for the Court is now sitting. God save the United States and this Honorable Court![133]

The Court's first order of business would have been swearing in new members of the Supreme Court Bar.[134] After that, although there is no record, the Court would have announced its lone opinion in the case of *Carroll v. President and Commissioners of Princess Anne*.[135] These preliminaries, of course, took time, and the first argument, *Foster v. California*,[136] did not begin until 10:50 a.m. *Kaufman v. United States* was scheduled second on the morning docket, with two additional cases set for the afternoon.[137]

Each side at oral argument is commonly allotted thirty minutes, which translates into an argument ordinarily lasting one hour.[138] *Foster*, according to its transcript, finished a few minutes early just before 11:45 a.m. At this point, one might think that the Court would have taken its break for lunch. But it did not. The Chief Justice immediately called for *Kaufman*, and Bruce rose to the lectern.[139]

The Supreme Court's lectern, then and now, has lights to assist counsel with time management. Today there are two lights[140]—one white, the other red—with the white light's illumination meaning that counsel has five minutes remaining.

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133. Ryan C. Black et al., *Chief Justice Burger and the Bench: How Physically Changing the Shape of the Court's Bench Reduced Interruptions During Oral Argument*, 43 J. S. CT. HIST. 83, 87 (2018).

134. There is no record of whether this occurred on November 19, 1968.

135. 393 U.S. 175 (1968). Justice Fortas wrote for a unanimous Court that the City of Princess Anne had violated the First Amendment rights of a white militant group by enjoining, ex parte, their public assembly. There is no transcript of what Justice Fortas said, but judging from the time invested, he must have thoroughly explained the result.

136. 394 U.S. 440 (1969).

137. The afternoon cases were *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453 (1969), and *McDonald v. Bd. of Election Comm'r's of Chi.*, 394 U.S. 802 (1969).

138. Black et al., *supra* note 133, at 87.

139. One can listen to the case's oral argument at *Kaufman v. United States*, OYEZ, https://www.oyez.org/cases/1968/53 (last visited Jan. 19, 2019). A comparison of the audio recording with the official written transcript of the oral argument reveals how rudimentary transcription services were in 1968. Even in proceedings before the Supreme Court of the United States, the stenographer would sometimes summarize sentences and points made by counsel, omitting and even changing words. This was even true of questions asked by the Court. For sake of convenience, quotations from the argument in this Article are from the official transcript, which unfortunately is not completely accurate.

140. Bruce informed me that he remembers three lights: one green, one yellow, and one red, but also indicated that he could not be certain after fifty years.

Red, of course, means stop.[141] Bruce would keep a close eye on these lights during his argument.

Bruce began by explaining the facts and procedural posture of the case. His thorough exposition gave rise to no questions. In fact, the first question asked came about eight minutes into his argument, when the Court queried whether the Eighth Circuit had an "absolute law" that prohibited habeas petitioners from raising Fourth Amendment claims.[142] Bruce responded that it did: "There are no cases I know of which the [Eighth] Circuit has allowed it to be raised by 2255."[143] Bruce then launched into a scholarly historical explanation of the purpose behind § 2255 when it was adopted in 1948:

> 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 mechanics involved on collateral relief. . . . [T]he petition was to be filed in the trial court, rather than the court located in the district in which you were incarcerated.[144]

Five minutes later, the Court asked, "Are you arguing, Mr. Jacobs [sic], 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 . . . ?"[145] Recognizing that absolute arguments can spring traps, Bruce responded: "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 . . . ."[146] The Court shot back, "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?"[147] Bruce carefully replied, "I think you are right. . . . There has to be a rather

141. I never witnessed how good a traffic cop Chief Justice Warren was, but Chief Justice William Rehnquist policed his lights with a vengeance. When the red light came on he would cut the lawyer off, thank him or her, and move on to the next order of business.

142. Oral Arg. Tr., *supra* note 125, at 5.

143. *Id.* at 6.

144. *Id.*

145. *Id.* at 8.

146. *Id.*

147. *Id*.

serious question of the Constitutional right before the trial court should be allowed to consider it."[148]

And with that, after he had argued for just over twelve minutes, the Chief Justice stopped him: "We will recess for lunch."[149] Today, of course, the Supreme Court does not take a lunch after one attorney has argued,[150] let alone during the middle of an attorney's argument. But things were different fifty years ago. The Court, per its practice,[151] took a break for lunch at noon—in the middle of Bruce's argument.

Upon return to the lectern after a forty-five-minute break, Bruce turned to Kaufman's appellate lawyer's mistake:

> We feel . . . that the advice of the Clerk was misleading and improper. We believe there are formal ways of raising this issue even after oral argument. The attorney could have filed a supplemental brief together with a motion for leave . . . or he could have filed an extraordinary motion to be allowed to reargue the case.[152]

He continued, "the defendant's right to appeal on this one issue was unconscionably frustrated, . . . [a] denial of the right to effective representation under the Sixth Amendment. . . ."[153] Several circuits, Bruce pointed out, had allowed "delayed appeals or out of time appeals" where defendants' appeals had been "frustrated."[154] Kaufman's lawyer should have investigated this and made the proper motion.

Finally, Bruce reached the heart of his claim, the Fourth Amendment. Like all good lawyers, Bruce put on a belt with his suspenders. While he felt the search of the car presented his better argument, he also challenged the search of Kaufman's person,

148. *Id.* at 9.

149. *Id.*

150. I never witnessed nor heard of a lunch break in the middle of an argument until I read the *Kaufman* argument transcript and then looked at others from the same era. The Rehnquist Court, I know, did not mimic this practice. Chief Justice William Rehnquist would occasionally get up during argument and leave the bench only to return in short order. Lawyers were forewarned that he might do so to relax his bad back. But he never stopped a lawyer in mid-sentence for any kind of break.

151. A review of transcripts from the 1968 Term reveals that this practice was common when the Court had scheduled both morning and afternoon arguments. At noon, the Court expected and called for its lunch, regardless of whether a lawyer was in the middle of an argument or a thought.

152. Oral Arg. Tr., *supra* note 125, at 10.

153. *Id.* at 11.

154. *Id.* at 12.

which had been preserved at trial by objection (though not a motion to suppress).[155] Apparently having driven Ramblers himself, Bruce aptly described what the Alton police observed that cold day: "[A] red Rambler . . . chugging across the bridge."[156] When the car "skidded on the ice and jumped up over the curb and hit a tree,"[157] Bruce stated, the "patrolmen arrested Kaufman . . . for reckless driving, driving too fast for conditions."[158]

Bruce argued that the search of Kaufman's person far exceeded a permissible inventory search: "This was a search by three or four policemen . . . 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."[159] When asked by the Court whether police had a right to search a prisoner for "narcotics . . . or some other things that are prohibited" in the jail, Bruce conceded that was permissible.[160] "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."[161] Asked, "Was there probable cause?" Bruce responded, "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."[162]

As for the illegality of the car search, Bruce relied, as he did in his Brief, on *Preston v. United States*.[163] There, under facts very much like those in Kaufman's case, Bruce observed, the Court held that a search of an automobile that had been towed after an arrest could not be justified as an incident of that arrest. Bruce stated: "We believe the facts of our case are much closer to the facts of the

155. *Id.*

156. *Id.* at 13. It was a 1963 Rambler, Kaufman v. United States, 453 F.2d 798, 800 (8th Cir. 1971), meaning it was made by American Motors (AMC). Nash had originally produced the Rambler line, but it was acquired by AMC in the early-1960s. I delivered a 1960s-vintage AMC Rambler to a customer once in my youth while working at my father's gas station; I can attest to the fact that about all it could do was "chug."

157. Oral Arg. Tr., *supra* note 125, at 13.

158. *Id.*

159. *Id.* at 15.

160. *Id.* at 16.

161. *Id.*

162. *Id.* at 16–17.

163. 376 U.S. 364 (1964). The Court in *Preston* ruled that "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Id.* at 367–68.

Preston case than they are to facts of *Cooper v. California*[164] which the Solicitor General relies upon, and we have developed this fully in our brief."[165]

Bruce saw the white light come on and knew he was short on time. He quickly pointed out that the trial lawyer had properly objected to the evidence, conceded that he could not challenge evidence (like the revolver) which had not been objected to, and reserved the rest of his time (less than three minutes) for rebuttal.[166]

It was then Mr. Martin's turn. He closely followed the government's brief, focusing on three points: first and foremost, any error that was committed was harmless. Kaufman admitted the robbery, Martin said, and his defense was insanity: "there is no possibility that the jury would have reached a different result had this evidence . . . been excluded."[167] The seized evidence did not prove anything and led to nothing: "petitioner fully told the agents everything about his activities on the day of and prior to the robbery."[168] Next, Martin argued that Kaufman's constitutional claim was not cognizable under § 2255. This was the essence of the government's case, of course, for if Martin could win this point, most convicted prisoners (both state and federal) could lose their access to habeas corpus. Martin stated that the government "dr[e]w no distinction between the two types of remedies, habeas corpus or 2255,"[169] meaning that the principle should be applied across-the-board to state prisoners as well as federal inmates.

Martin next noted that the Court had already ruled that non-constitutional matters could not be tested on habeas.[170] "We would

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164. 386 U.S. 58 (1967). In *Cooper*, the Supreme Court held that while a remote search of an automobile cannot be justified as incident to arrest, it may still be proper as an inventory search:

> Their subsequent search of the car—whether the State had 'legal title' to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. . . . It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it.

Id. at 61–62.

165. Oral Arg. Tr., *supra* note 125, at 17.

166. *Id.* at 18.

167. *Id.* at 20.

168. *Id.* at 23.

169. *Id.* at 24.

170. *Id.*

submit," Martin posited, "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."[171]

Martin was shooting the works. He was going beyond merely arguing that Fourth Amendment exclusionary rule claims (being of dubious constitutional character) brought by federal prisoners were not cognizable on habeas corpus. He was claiming that many constitutional claims—whether brought by federal or state inmates—should simply not be heard collaterally through habeas corpus.

Justice Brennan—who would later author the Court's opinion—jumped in: "[T]he language of 2255, by its term[s], at least, indicates that the precise claims being pressed here, the constitutional ones, are cognizable ones?"[172] Martin refused to back down: "There are certain constitutional issues which could be raised at trial that should not be ordinarily heard on a 2255 motion."[173] But sensing he had gone too far, Martin then hedged: "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—."[174] He would not finish before being cut off by Justice Brennan: "Do you think the test we have had in availability of federal habeas remedy to state prison[ers] . . . [is] equally serviceable in the 2255 areas?"[175]

Justice Brennan's reference was to his decision in *Fay v. Noia*,[176] which ruled that state prisoners can press constitutional claims on federal habeas corpus even when they had not raised those claims in the state-court proceedings.[177] Justice Brennan wanted to know if § 2255 was different—something Martin had indicated was not the case when he started. Justice Brennan

171. *Id.*
172. *Id.* at 25.
173. *Id.*
174. *Id.*
175. *Id.*
176. 372 U.S. 391 (1963).
177. *Fay* established the "deliberate bypass" standard, which forgave most procedural defaults by state inmates and allowed them to bring their constitutional claims to federal court under habeas corpus. *Id.* at 398–99. This forgiving standard by 1976 had been erased by the Supreme Court, and inmates were required to demonstrate "cause and prejudice" to overcome procedural defaults. Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 123–24, 123 n.45 (1991).

asked, "Are we going to have to fashion standards here different from those we fashioned in federal habeas?"[178]

Martin did what good appellate lawyers do—he backed away from his previous point. Justice Brennan, he now realized, would never allow the Court to restrict the Fourth Amendment claims of state prisoners.[179] He therefore eschewed his previous equation between state and federal prisoners and explained that state prisoners are different; *Fay v. Noia* was premised on a state prisoner's opportunity to use "a federal forum for the litigation of the prisoner's federal claims."[180] With federal inmates, he stated, "It seems to me that the federal forum has been provided here, and I think that makes a very clear distinction between the two situations."[181]

Once he had isolated § 2255 and presumably addressed Justice Brennan's concern, Martin turned to establishing a workable standard for distinguishing between constitutional claims. The solution, he argued, "is provided by this Court's decisions in the cases involving retroactive application of the newly articulated constitutional principles."[182] Under this standard, Martin observed, a constitutional claim could only be considered if it "seriously throws into question the reliability of the fact finding process."[183]

Martin pointed out that the Court in *Linkletter v. Walker*[184] had chosen not to retroactively apply *Mapp v. Ohio*'s[185] extension of the Fourth Amendment exclusionary rule to states.[186] This was because the introduction of illegally obtained evidence did not impeach the fairness of a trial. The same should hold true with collateral review under § 2255. In the absence of "extraordinary

178. Oral Arg. Tr., *supra* note 125, at 25–26.

179. The Court had previously entertained Fourth Amendment claims raised by state prisoners under § 2254, as Bruce had pointed out in his Brief. Br. for Pet'r, *supra* note 13, at 26. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967) (abrogating under the Fourth Amendment the "mere evidence" rule, which had prohibited the seizure of certain kinds of evidence). But it had never squarely addressed the argument being made by Martin that Fourth Amendment claims were not proper candidates for collateral review under habeas corpus. It had always assumed as much.

180. Oral Arg. Tr., *supra* note 125, at 26.

181. *Id.*

182. *Id.* at 27.

183. *Id.*

184. 381 U.S. 618, 640 (1965).

185. 367 U.S. 643, 660 (1961).

186. Oral Arg. Tr., *supra* note 125, at 27.

circumstances," Martin argued, Fourth Amendment claims should not be entertained in § 2255 proceedings for this same reason.[187]

Under the facts in Kaufman's case, Martin claimed, there were no extraordinary circumstances justifying hearing Kaufman's Fourth Amendment claim. Kaufman's attorneys at both the trial[188] and appellate levels were more than competent. In response to a question from Justice Harlan, Martin stated that "the man who represented him at the trial was a man of some prominence in the local Bar."[189] His appellate lawyer, meanwhile, made a "conscientious choice . . . on the issue" and decided not to raise the Fourth Amendment on appeal.[190]

Justice White wondered how an exclusionary rule challenge could ever satisfy the high bar that Martin had set:

> 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 [sic] guilt or innocence was properly determined?[191]

Martin replied that perhaps a failure to object to the only evidence presented against a defendant—"illegally seized narcotics," for example—might give rise to inadequate assistance justifying collateral review.[192]

The Court continued: "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?"[193] Not necessarily, Martin answered, because one must

187. *Id.* at 28. Martin would lose this particular battle, but the government would eventually win the retroactivity war. By the end of the 1980s, the Rehnquist Court had fashioned a result that accepted much of Martin's correlation. *See* Kinports, *supra* note 177, at 175 (explaining that a new constitutional rule that is not given retroactive effect "even if the claim is a valid one, it is not applicable on habeas").

188. In his brief, Griswold observed that Kaufman's trial lawyer was "able and experienced, who subsequently was elected president of the St. Louis Bar Association." Br. for the U.S., *supra* note 9, at 4. The reference was to John R. Barsanti Jr., who sometime after Kaufman's 1964 trial had become the president of his local bar association.

189. Oral Arg. Tr., *supra* note 125, at 31.

190. *Id.* at 32–33.

191. *Id.* at 33.

192. *Id.*

193. *Id.* at 34.

consider "what the defense was at trial."[194] Here, "you still come to the fact you have an overwhelming case of guilt."[195]

The Court then turned to the uncertainty created by the Eighth Circuit's failure to render a full opinion: "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[en] taken up on direct appeal?"[196] Martin agreed, noting that the Eighth Circuit's "consistent holding" was that it would not hear Fourth Amendment claims on habeas corpus.[197] The Court then forecasted its plan for the case, asking, "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, [why] should we do any more than send it back and let them wrestle with these problems?"[198]

Martin, of course, was stumped. This is not what the government wanted at all. The best he could do was concede "there may be some merit" to the Supreme Court's suggestion, but then defended by stating that it was also possible that the Eighth Circuit had found harmless error.[199] Sensing both that his time was short and his case was slipping away, Martin wisely changed the subject. The Fourth Amendment, he claimed, could not have been violated because Kaufman had no standing to challenge the search of the Rambler.

The rental contract taken from Kaufman's person, Martin said, indicated that he was in violation of the Rambler's lease. The car should have been returned to the New York rental office "one day before the robbery."[200] Reading from the lease, Martin stated, "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."[201] Further, Martin argued, the rental agreement was in the name of "Arthur Cooper, not petitioner, and the contract also provides . . . the vehicle . . . shall not be operated by any person other than the renter who signed the rental

194. *Id.*
195. *Id.* at 34–35.
196. *Id.* at 35.
197. *Id.*
198. *Id.* at 35–36. This is an example of the stenographer not accurately reporting the Court's question. "Why" was omitted in the official transcript.
199. *Id.* at 36.
200. *Id.* at 37.
201. *Id.*

agreement, to-wit, Arthur Cooper."[202] Kaufman, Martin observed, was not Cooper, and "there was no right of petitioner involved when they went and searched this car."[203]

Just as the red light flicked on and Martin prepared to take his seat, the Chief Justice stopped him. Here began the longest series of questions put to either Bruce or Martin that day:

> [D]o 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?[204]

Martin responded that here the police "knew this was a rented car used in the perpetration of a crime and used at a substantial distance from the place of rental."[205] While "not every search gives the agents the right to look through a man's private papers," because of the facts presented here, "they have the right to examine this [c]ontract further."[206]

The Chief Justice persisted: "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."[207] Martin responded, "they had the obligation to hold that car for the rightful owner."[208] The Court asked again: "What follows from that?" Martin answered, "it follows from that . . . their search was reasonable in the circumstances and didn't violate any rights of petitioner."[209] The Court then asked whether this is what "gave them any reason to search the car?"[210] Martin replied, "I think it also tends to follow . . . the *Cooper* side of *Preston*."[211] The Court closed with a friendly offering, "It may be that somebody had standing to object, but this fellow didn't?"[212] Martin jumped on the answer, "That is correct."[213] And with that, he wisely retired.

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202. *Id.*
203. *Id.* at 38.
204. *Id.*
205. *Id.* at 39.
206. *Id.*
207. *Id.*
208. *Id.* at 39–40.
209. *Id.* at 40.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*

Bruce had little time remaining for rebuttal, so he chose this last line of questioning as his starting point. He noted that Kaufman the day before the robbery had wired money to Cooper to extend the rental, "so the car wasn't stolen under the terms of the contract."[214] "As to standing," Bruce stated, "the Government during the trial never contested that the defense had standing to object to the introduction of this evidence."[215]

Bruce then turned to the potential prejudice the introduction of this evidence caused Kaufman:

> 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?"[216]

Bruce knew his clock was ticking, so he quickly moved to his next point: "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."[217] But before he could say more the red light came on—his time had expired. The Chief Justice assisted him: "You may finish that statement."[218] Bruce explained that the trial attorney had objected to the evidence now being challenged, but that the appellate counsel had failed to raise the issue "because he thought the issue was without merit at that time."[219] "But subsequently," Bruce observed, "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."[220]

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214. *Id.* at 40–41.

215. *Id.* at 41. Because this was Fourth Amendment standing and not Article III standing, the government's failure to raise the issue at trial could constitute a waiver.

216. *Id.* at 42.

217. *Id.* at 43.

218. *Id.*

219. *Id.*

220. *Id.* When Kaufman was tried and convicted in August of 1964, the *Preston* case (decided on March 23, 1964) was both quite new and a bit surprising. We moderns too often assume that technology was always available and that lawyers of long ago had instant access to new legal developments. Kaufman's trial counsel in August of 1964 was excusably, I think, unaware of *Preston*, which had come down just four months before Kaufman's trial.

With that, the Chief Justice thanked Bruce: "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."[221] The case was submitted, and Bruce's work day was over.

Bruce and Ann returned to Boston that afternoon. On December 13, 1968, Bruce sent to the Clerk of the Supreme Court his list of expenses. He had handled the case pro bono, of course, so he asked for no fee. But he was still entitled to his travel expenses, which came to $84.50. Half of that total was for his plane ticket. His two-day stay at the Dodge House was $21, his seven meals came to $11, parking was $4.50, cab fare totaled $3, and his tips for "Hotel, Cabs and Restaurants" came to $3. Bruce explained to the Clerk that while Ann had accompanied him, "I have tried to estimate what my own expense was, not our joint expense."[222] He added, "The Dodge House receipt, attached, is a special receipt which I requested to show what the bill would have been if I had been alone, staying in a single room."[223]

ACT IV: THE VERDICT

The Supreme Court's decision in *Kaufman v. United States*[224] was handed down on Monday, March 24, 1969.[225] It was a close case, decided by a bipartisan five-to-three vote. (Justice Marshall, of course, had recused himself, or it most certainly would have been six to three.) Justice Brennan wrote the majority opinion. He was joined by the Chief Justice and Justices Douglas, White, and Fortas. Justice Black wrote a vehement dissent, arguing that

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Kaufman's appellate counsel, who was also apparently unaware of *Preston*, could not share this excuse. *Preston* had been out for one year when he filed the appeal. The facts of *Preston* were so similar to Kaufman's that had he known about it he certainly should have raised it on appeal. Still, given Kaufman's decision to plead insanity, it may be that both lawyers could be excused for not fully considering and addressing the searches of Kaufman's car and his person.

221. *Id.* at 43–44.

222. Letter from Bruce Jacob to Honorable E.P. Cullinan, Clerk, Supreme Court of the United States (Dec. 13, 1968) (copy on file with *Stetson Law Review*).

223. *Id.*

224. Kaufman v. United States, 394 U.S. 217 (1969).

225. A handful of Fourth Amendment/habeas corpus opinions came down with *Kaufman* that same day. *E.g.,* McInnis v. Ogilvie, 394 U.S. 322 (1969) (per curiam); Taglianetti v. United States, 394 U.S. 316 (1969) (per curiam); Giordano v. United States, 394 U.S. 310 (1969) (per curiam); Harris v. Nelson, 394 U.S. 286 (1969); Kaiser v. New York, 394 U.S. 280 (1969); Desist v. United States, 394 U.S. 244 (1969).

actual innocence was required for a federal inmate to collaterally attack a conviction: "I cannot possibly agree with the Court."[226] Justice Harlan, joined by Justice Stewart, also dissented, though they did not join Justice Black's position on actual innocence.[227]

Justice Brennan began by quickly disposing of the two procedural obstacles that had vexed Bruce. Justice Brennan observed that the Court "treat[ed] the actions of the District Court and the Court of Appeals as grounded on the view . . . that claims of unlawful search and seizure 'are not proper matters to be presented by a motion to vacate sentence under § 2255.'"[228] Next, he accepted Bruce's argument that Kaufman had adequately attempted to raise his Fourth Amendment claim before the Eighth Circuit:

> This certainly is not a case where there was a "deliberate by-pass" of a direct appeal. Appointed counsel had objected at trial to the admission of certain evidence on grounds of unlawful search and seizure, but newly appointed appellate counsel did not assign the admission as error either in his brief or on oral argument of the appeal. After oral argument of the appeal, however, petitioner wrote a letter to appellate counsel asking him to submit to the Court of Appeals a claim of illegal search and seizure of items from his automobile. Counsel forwarded petitioner's letter to the Clerk of the Court of Appeals who notified counsel that petitioner's letter had been given to the panel which had heard and was considering the appeal.[229]

With those obstacles put aside, Justice Brennan turned to whether Fourth Amendment claims qualify for consideration on habeas corpus. He rejected the government's invitation to treat federal prisoners differently. Even though they had already proceeded through a federal forum, "[t]he right . . . is not merely to a federal forum but to a full and fair consideration of constitutional claims."[230] "Federal prisoners are no less entitled to such consideration than are state prisoners."[231]

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226. *Kaufman*, 394 U.S. at 242 (Black, J., dissenting).

227. *Id.* (Harlan, J., dissenting) ("I must . . . disassociate myself from any implications [in Justice Black's dissent] that the availability of this collateral remedy turns on a petitioner's assertion that he was in fact innocent, or on the substantiality of such an allegation.").

228. *Id.* at 219–20.

229. *Id.* at 220 n.3.

230. *Id.* at 228.

231. *Id.*

Next, Justice Brennan dismissed the government's claim that only those rights that are basic to overall fairness should be cognizable on habeas: "Collateral relief, unlike retroactive relief, contributes to the present vitality of all constitutional rights whether or not they bear on the integrity of the fact-finding process."[232] And as for the government's suggestion that Fourth Amendment claims should be treated differently because the exclusionary rule is merely prophylactic, Justice Brennan stated the argument proved too much: "It brings into question the propriety of the exclusionary rule itself."[233]

Last but not least, Justice Brennan could not agree with the government's claim that because Kaufman admitted the robbery and asserted insanity he was less entitled to—and in less need of—collateral relief: "Surely that defense, any more than any other defense, cannot be prejudiced by the admission of unconstitutionally seized evidence."[234] Brennan concluded with a profound ruling on the reach of habeas corpus: "[A] claim of unconstitutional search and seizure is cognizable in a § 2255 proceeding."[235] Justice Brennan's accompanying rejection of any difference between § 2255 and § 2254 proceedings meant that this was true for state prisoners, too.

Kaufman, Justice Brennan concluded, was entitled to "further proceedings consistent with this opinion."[236] For those, his case would have to be returned to the District Court where it began.

ACT V: AND JUSTICE FOR ALL

In November of 1969 the same judge (John Keating Regan)[237] who had convicted Kaufman, conducted a one-hour hearing to reconsider whether he should be awarded collateral relief. Kaufman was once again appointed counsel.

Kaufman wrote Bruce on November 13, 1969 to report that the hearing before Judge Regan did not go well. He was "sure they are

232. *Id.* at 229.
233. *Id.*
234. *Id.* at 229–30.
235. *Id.* at 231.
236. *Id.*
237. Judge Regan was a Navy Lieutenant during the Second World War. He was nominated by President Kennedy, himself a naval officer during World War II, in 1962. *Biography of John Keating Regan*, WIKIPEDIA, https://en.wikipedia.org/wiki/John_Keating_Regan (last visited Mar. 12, 2019).

going to deny me on standing and overwhelming evidence of guilt."[238] He added, "There is no doubt in my mind [Judge] Regan will deny me, and the Eighth Circuit, being what it is, will go along, and I'm convinced the new Supreme Court will not help."[239] He thanked Bruce: "Enough of my troubles, please be assured, always, of my gratitude for your interest and friendship."[240]

Kaufman, who was by that time a seasoned jailhouse lawyer, was spot on. Judge Regan on February 4, 1971—in a lengthy and thorough opinion—ruled against Kaufman on every point.[241] The travelers checks taken from the Rambler, he ruled, were admissible because there had never been an objection. Additionally, "[a]t best, the travelers checks themselves constituted cumulative evidence."[242] "We are at a loss to understand," Judge Regan continued, "and counsel for Kaufman has not enlightened us, how the admission of these travelers checks, in the circumstances of this case, could conceivably have borne upon, much less prejudiced, the defense of insanity."[243]

Judge Regan turned to the gun taken from the Rambler by the garage owner. First, this was harmless error, Judge Regan stated.[244] And if it was not, the gun's seizure and admission into evidence was still proper because it "was not the result of a search in the legal sense."[245] Judge Regan explained that "Martin, the owner of the towing service, was not looking for evidence of a crime. All he knew was that a disabled car involved in a street accident for which the driver had been arrested was ordered removed from the street."[246] Because Martin was not a state actor, his retrieval of the gun from the car did not violate the Fourth Amendment.[247] The search of Kaufman's person, meanwhile, was proper because it was a simple inventory following arrest.[248]

238. Letter from Harold Kaufman to Bruce Jacob 1 (Nov. 13, 1969) (copy on file with *Stetson Law Review*).
239. *Id.* at 2.
240. *Id.*
241. Kaufman v. United States, 323 F. Supp. 623, 630 (E.D. Mo. 1971).
242. *Id.* at 626.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 626–27. Judge Regan also observed that Kaufman's new lawyer had failed to challenge the search of his person in his renewed collateral challenge. *Id.* at 627, 627 n.1.

The FBI's search of the automobile proved a bit more problematic. Still, Judge Regan found that it, too, was lawful. First, Judge Regan ruled that Kaufman lacked standing to challenge the search:

> Kaufman unequivocally stated that he had stolen the Rambler in New York. We do not credit his recent testimony that at a later date (but apparently before trial and long after the search) he recanted this statement. His present version is that although Arthur Cooper in fact had rented the automobile in New York, such rental was really on Kaufman's behalf and in any event he had Cooper's consent to operate the vehicle. In this connection, we note various provisions of the Rental Contract which are inconsistent with Kaufman's testimony, wholly aside from the fact that it is not corroborated by Cooper. In the body of the Rental Agreement are explicit agreements that the car will not be removed from "this state" (New York) without the written consent of the rental agency, or 100 miles from point of origin (New York City), and that any failure to return the vehicle on or before the specified date (December 15, 1963) "may be treated the same as theft of vehicle from street." Moreover, there is the further explicit provision, in capital letters, that the vehicle shall not be operated "By any person other than the Renter (Cooper) who signed the Rental Agreement." And in capital letters immediately below Cooper's signature is the equally explicit statement that "This Rental Agreement is not transferable."[249]

Judge Regan then ruled that even if Kaufman had standing, the Rambler's search was constitutional. The FBI had probable cause to search the car, which "was then known to have been used as an instrumentality in the commission of the bank robbery, a federal offense, and Kaufman was then being held on that charge."[250] The search was therefore proper.

If all of this were not enough to justify keeping Kaufman behind bars, Judge Regan next added that he could not "see the remotest possibility of any prejudice to [Kaufman's insanity] defense by the admission of these exhibits."[251] Judge Regan stated:

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249. *Id.* at 628–29.

250. *Id.* at 629 (italics omitted).

251. *Id.* Judge Regan went into some detail:

> That Kaufman was a resident of New York City was established by his own evidence. So, too, was the fact that once or twice a week he was wont to leave

> [T]here is not the slightest suggestion in the record that Kaufman's mental condition was of such a nature that he could not conduct normal business transactions . . . . His skill as a driver is another matter. It appears from Miss Scott's testimony that he was as reckless a driver in New York as he proved to be in Missouri and Illinois.[252]

Kaufman appealed once again to the Eighth Circuit, which this time heard the case without a future Supreme Court Justice sitting on the panel. The Eighth Circuit had little difficulty disposing of both the search of Kaufman's person and the introduction of the gun taken from the Rambler into evidence. The former was a proper inventory,[253] and the latter was neither objected to nor even "a search in the legal sense."[254]

The FBI's search of the Rambler, however, was another matter: "We cannot agree with the trial court that this search was not remote in time from the federal arrest, was based on probable cause, and therefore reasonable."[255] It explained that:

> [T]he probable cause for the search of the car did not exist at the time Kaufman was arrested but developed after Kaufman was in jail and after the car was in the garage; there was no

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> that city for the purpose of making a "score", the expression he used for robberies. And when he last left New York before his arrest in Alton he told Pat Scott, the woman he "loves", that it was his intention to "pull a job for Christmas." That the Rambler had been rented by Arthur Cooper in New York City is admitted. All that the traffic summons showed is that the automobile was still in New York in the early evening of December 14, 1963. The fact that Kaufman thereafter drove the car from New York to St. Louis is beyond dispute. He so told Peet. That he was required to purchase gasoline en route is perfectly apparent, even absent any evidence, the distance considered.

Id. at 629–30.

252. *Id.* at 630.

253. Kaufman v. United States, 453 F.2d 798, 801 (8th Cir. 1971).

> [T]here was probable cause for his arrest; and the "inventory" of the items on his person was not a search intended to obtain the fruits of a crime or evidence relating thereto. We agree that this "search" or "inventory" was proper under those circumstances and that the cash and the rental contract for the car were properly admitted into evidence.

Id.

254. *Id.*

255. *Id.* at 802.

> danger of the car being removed from the scene; and there was ample time for the FBI to obtain a warrant.[256]

The introduction into evidence of the travelers' checks, the gasoline receipts, and the Western Union receipt was therefore erroneous. Still, the Eighth Circuit was not finished. It agreed with Judge Regan that none of this prejudiced Kaufman's defense:

> It is true that from these receipts, the route Kaufman used to travel from New York to Missouri was established, and the identity of his girlfriend, Pat Scott, was disclosed. But driving a car that far is no proof of sanity, and the testimony of Miss Scott was offered, not by the Government but by Kaufman; and she is the only witness who testified positively that in her opinion Kaufman was not sane at the time of the robbery.[257]

The gun shop receipt, meanwhile, was not offered into evidence, and there was no showing made by Kaufman that the gun shop owner's identity was a fruit of this receipt. "[T]he place of sale could have been traced from the serial number on the gun, and the gun had been obtained legally from the car after being discovered by the garage owner."[258]

Kaufman would remain in prison. But not for long. The Eighth Circuit's decision was handed down on December 23, 1971.[259] Sometime in 1972—the precise date is not available—Kaufman was paroled.[260] Why is not clear. His twenty-year sentence should have run until at least 1984. Even with time off for good behavior,

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256. *Id.*

257. *Id.* at 803.

258. *Id.* In closing, the Eighth Circuit stated:

> We are convinced from a careful reading of all of the evidence that any evidence which was received either directly or indirectly as a result of the search of the car did not have any material effect on the minds of the jury in reaching its decision that Kaufman was sane when the robbery was committed. In our opinion, it was at most harmless error beyond a reasonable doubt and not sufficient to warrant vacating the judgment of conviction and sentence.

Id. at 804.

259. *Id.* at 798.

260. Linda Rapattoni, *Charges That Mafia Controls Toxic Waste Industry*, UPI (Jan. 18, 1986), https://www.upi.com/Archives/1986/01/18/Charges-that-Mafia-controls-toxic-waste-industry/7736506408400/ ("Kaufman, 62, was released from prison in 1972 after serving 20 years for check forgery and bank robbery."); Clifford Terry, *CBS Witnesses 'A Deadly Business,'* CHI. TRIB. (Mar. 4, 1986), http://articles.chicagotribune.com/1986-03-04/features/8601160574_1_mob-dumping-politicians (stating that Kaufman was "[r]eleased on parole in the early '70s").

one would think (especially given his contemporaneous conviction for robbing another bank in Indiana)[261] that he would have served more than eight or nine years for his federal crimes. Further, Kaufman had been sentenced in 1964 to a term of seven and one-half to ten years for his New York convictions, which was to be served following his federal sentence.[262] His release to the public (rather than to the State of New York) after only about nine years is inexplicable.

Or maybe it can be explained. Kaufman did not petition for certiorari from the Eighth Circuit's decision. This was unusual given that he had already twice done so (once successfully) in connection with his Missouri conviction, and once with his Indiana bank robbery conviction. Why not try again? Bruce (after reading a draft of this Article) suggested to me the answer:

> In about 2002 I had my last phone conversation with Harold Kaufman. He estimated that he served about 12 years less than he would have served if we had not won our case. He gave me the impression that his case in St. Louis, after the Supreme Court victory, had ended in a plea agreement of some kind that was satisfactory to him.

Still, one wonders whether by 1972 the federal government worried much about the Supreme Court reversing the Eighth Circuit's decision and ordering another trial for Harold Kaufman. The Court had changed since Chief Justice Warren's departure, and its interest in the rights of the criminally accused had waned to say the least. The government must have known this. It could not have been that the government had grown tired of arguing with Kaufman.

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261. Kaufman had committed several crimes as part of the spree that led him to Missouri. In addition to unspecified state-law crimes committed in New York for which he was convicted in 1964 (and sentenced to seven and one-half to ten years for), he robbed at least one other federally insured bank. United States v. Kaufman, 393 F.2d 172, 173 (7th Cir. 1968). On November 20, 1963, just before his bank robbery in Missouri, Kaufman had robbed a bank in Indianapolis, Indiana. *Id.* He claimed insanity as his defense there, too. The jury did not agree, and the conviction was upheld on appeal. *Id.* at 178. The Supreme Court denied review on February 24, 1969, one month before it ruled in his favor in the Missouri case.

262. Kaufman v. United States, 268 F. Supp. 484, 490 (E.D. Mo. 1967) (stating that "since he is under sentence not only in this Court and in the Southern District of Indiana, but is also still to serve a term of some 7 1/2 to 10 years consecutive to the sentence imposed in this Court for an offense against the State of New York to which he pleaded guilty," it was not likely he would have an opportunity to see his girlfriend soon).

Perhaps a promising additional explanation lies in the services Kaufman could offer the government upon his release. Not long after he was paroled, it seems Kaufman became an undercover operative in the government's battle against organized crime in New Jersey. Even before his bank robbery conviction, remember, Kaufman had "cooperated" with New York City police in their efforts to arrest an underworld figure.[263] Could it be that Kaufman agreed to do so again on a bigger stage in exchange for early release?[264]

Whatever the reason behind his early release, it is undisputed that Kaufman no later than 1976 had become an important government informant. His activities were made into a television movie in 1986 entitled "A Deadly Business," starring Academy-Award winning actor Alan Arkin as Kaufman.[265] According to the movie and contemporaneous news reports, Kaufman had infiltrated the Gambino family's control of waste disposal in New Jersey.[266] Even before the movie was released, the head of the New Jersey investigation called Kaufman "one of the most important witnesses New Jersey has."[267] The investigator added that Kaufman's "testimony has so far led to the indictment of 57 defendants in two pending cases."[268]

Kaufman entered the federal Witness Protection Program no later than 1980.[269] He was fifty-six years old. He claimed in an interview at the time his movie was released (in 1986) that he was "unemployed and living on $1,236 a month under the Federal Witness Protection Program."[270] Kaufman was paid forty-thousand dollars by CBS for the television rights to his story, thus helping him somewhat with his precarious financial situation.[271] Hopefully

263. Kaufman v. United States, 350 F.2d 408, 411 (8th Cir. 1965).

264. Kaufman's movie, *A Deadly Business*, does not support my surmise. The movie has it that Kaufman went to federal authorities sometime after his release and re-introduction to organized crime because he worried about children's exposure to toxic waste that was being dumped in New Jersey. *See* A DEADLY BUSINESS, *supra* note 3. I suspect this was cinematic license.

265. *See* Rapattoni, *supra* note 260.

266. *Id.*

267. Joanne Omang, *Mob Is in Waste Disposal Business FBI Informant Tells House Panel*, WASH. POST (Dec. 17, 1980), https://www.washingtonpost.com/archive/politics/1980/12/17/mob-is-in-waste-disposal-business-fbi-informant-tells-house-panel/d7e7b7a6-a8c4-4c13-830a-0997def97895/?utm_term=.03001d00ad21.

268. *Id*.

269. *Id*.

270. *See* Rapattoni, *supra* note 260.

271. *Id*.

by this time he had learned that crime does not pay. But who knows? His whereabouts and activities after 1980 are unknown.[272]

EPILOGUE

Harold Kaufman's life was something of a comedic film noire. He was a clumsy crook with underworld pretensions who had fallen hopelessly in love with a British prostitute living in New York City. He roamed the country robbing banks in an AMC Rambler (of all things), and after (understandably) being apprehended, he pleaded temporary insanity.[273] He three times petitioned the Supreme Court for his release, won a new hearing (thanks to Bruce), and somehow talked his way out of a twenty-seven-year prison sentence. Kaufman would be about ninety-four years old if he were alive today.[274]

The Supreme Court's decision in *Kaufman* had its own life—brief as it was. It opened the doors to habeas courts, was reprinted in all the standard texts,[275] and was written about in countless law review articles.[276] Sadly, within twenty years *Kaufman*'s existence would be all but erased.[277]

Not long after Bruce made his argument and Kaufman won his case, the Warren Court closed its doors. Warren Burger took charge in the fall of 1969. Richard Nixon had been elected President (as Warren had feared), and within three years he changed the Court. Nixon parlayed his "silent majority's" concern

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272. Kind of like D-Day of "Animal House" fame.

273. Bruce told me that Kaufman was clearly a "clumsy, inept criminal." But then Bruce added, "He made up for it though, by doing just the opposite—sending organized crime figures to prison and having a movie made about him."

274. On August 16, 2018, Bruce checked with the FBI to see if Kaufman happened to still be alive. All the agent could say was that Kaufman was no longer in the Witness Protection Program. This suggests that he had passed away by that date.

275. When I was teaching Criminal Procedure in the late 1980s and early 1990s, the *Kaufman* case was still offered as a significant historical development by the preeminent text of the time. Y. KAMISAR, ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, QUESTIONS 1522 (7th ed. 1990).

276. *See, e.g.*, Welsh S. White & Robert S. Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970); *Developments in Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1042 (1970).

277. Most of the popular Criminal Procedure texts by the end of the millennium had removed any mention of *Kaufman*. *See* J. DRESSLER & G. THOMAS, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES (1999); J. HADDAD, ET AL., CRIMINAL PROCEDURE: CASES AND COMMENTS (5th ed. 1998); J. ISRAEL, ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT (2013). *But see* S. SALTZBURG & D. CAPRA, AMERICAN CRIMINAL PROCEDURE 1529 (6th ed. 2000) (briefly mentioning *Kaufman* as a historical prelude to *Stone*).

about law and order into four conservative appointments to the Supreme Court before the end of his first presidential term. Along with Chief Justice Burger, Nixon put through Justices Powell, Rehnquist, and Blackmun,[278] none of whom had any sympathy for criminal suspects. This new Burger Court would immediately begin the process of rewriting the constitutional rules of criminal procedure and the law of habeas corpus.

In terms of habeas corpus, the most immediate damage was done by *Stone v. Powell*,[279] which was handed down in 1976. Justice Powell's majority decision in *Stone*, joined by Chief Justice Burger and Justices Stewart, Blackmun, Rehnquist, and Stevens, overruled *Kaufman* in concluding that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[280]

Powell pretended that he was not overruling *Kaufman*; he was just limiting it to federal inmates. "The discussion in *Kaufman* of the scope of federal habeas corpus rests on the view that the effectuation of the Fourth Amendment . . . requires the granting of habeas corpus relief when a prisoner has been convicted in state court on the basis of evidence obtained in an illegal search or seizure. . . ."[281] Until *Stone*, Justice Powell claimed, "we have not had occasion fully to consider the validity of this view."[282] "The issue in *Kaufman* was the scope of § 2255. Our decision today rejects the dictum in *Kaufman* concerning the applicability of the exclusionary rule in federal habeas corpus review of state-court decisions pursuant to § 2254."[283]

Then, adding one last nail to *Kaufman*'s coffin, Justice Powell noted: "To the extent the application of the exclusionary rule in *Kaufman* did not rely upon the supervisory role of this Court over

278. Then-judge Blackmun, remember, had ruled against Kaufman on direct appeal. And contrary to popular brief, Justice Blackmun was far from liberal when he joined the Court. He was plainly a law-and-order appointment, Chief Justice Warren Burger's "Minnesota Twin." Finlay Lewis, *Terms of Estrangement*, WASH. POST (July 9, 1995), https://www.washingtonpost.com/archive/opinions/1995/07/09/terms-of-estrangement/eec92d60-3bc7-49e2-9cd0-93d520679906/?utm_term=.59fc6aed6274.

279. 428 U.S. 465 (1976).

280. *Id.* at 482.

281. *Id.* at 480–81. Justices Brennan, Marshall, and White dissented.

282. *Id.* at 481.

283. *Id.* at 481 n.16.

the lower federal courts, the rationale for its application in that context is also rejected."[284] State prisoners could no longer press Fourth Amendment claims on habeas corpus and federal prisoners had no legal right to do so either—at least not outside the Supreme Court's "supervisory role," whatever that meant. Justice Powell's ruse could hardly pass the laugh test, and the vast majority of lower courts did not even attempt to parse his cryptic comment. Following *Stone*, the lower federal courts simply refused to hear Fourth Amendment challengers brought by federal prisoners under § 2255.[285]

The *Kaufman* decision itself was an obvious casualty of the years that immediately followed. The people involved in Kaufman's stage production, meanwhile, all went on to exemplary and distinguished careers. Bruce's opposing counsel before the Supreme Court, John S. Martin Jr., engaged in government work for a number of years before moving to private practice. His luck before the Court was no better after *Kaufman* than before—he lost both of the cases he argued before the Supreme Court after losing *Kaufman*[286]—but in 1990 he was appointed to the federal bench (Southern District of New York) by President Bush. Judge Martin would render a number of decisions over the years denying habeas relief to convicted inmates under the holding of *Stone v. Powell*.[287]

Then-judge Blackmun, who rejected Kaufman's Fourth Amendment claim on direct appeal, was elevated to the Supreme Court in 1972. He joined Justice Powell's majority opinion in *Stone v. Powell* and consistently proved to be a law-and-order jurist through the 1970s and into the 1980s. With age and wisdom, he drifted toward the Warren Court's more liberal philosophies, but this did not occur until his vote in the criminal realm was rendered almost irrelevant. Just months before his retirement in 1994, for example, Justice Blackmun announced his opposition to the death penalty—way too late in the day to change anything.[288] At his

284. *Id.*(citations omitted).

285. *See* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 907 n.282 (1984) ("Since *Stone v. Powell*, lower federal courts have barred federal prisoners' fourth amendment habeas petitions if the prisoner had had a prior 'opportunity for full and fair litigation.'").

286. United States v. Wilson, 421 U.S. 309, 319 (1975) (lost); Leary v. United States, 395 U.S. 6, 54 (1969) (lost).

287. *See, e.g.*, Aziz v. Warden of Clinton Corr. Facility, Dannemora, N.Y., No. 92 Civ. 0104, 1992 WL 249888, at *2 (S.D.N.Y. Sept. 23, 1992) (relying on *Stone* in denying a federal habeas petition for a state court conviction under 28 U.S.C. § 2254).

288. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari). I was fortunate enough to have worked at the Court that Term and, with all

passing in 1999 he was rightly remembered for his views on individual dignities, personal rights, and common decencies—things that are woefully lacking in today's polarized political and judicial culture.

Abe Fortas, Bruce's opponent in *Gideon* and friendly face on the Court in *Kaufman*, resigned under a cloud of suspicion on May 14, 1969—just weeks after casting a decisive fifth vote in *Kaufman*. Still, he was able to return to private practice and by all accounts was successful. He was replaced at the Supreme Court by Harry Blackmun. Fortas passed away in 1982.

Judge John Keating Regan, Kaufman's nemesis on the District Court who had three times rejected Kaufman's Fourth Amendment claims, served until 1977. Both before and after his encounters with Harold Kaufman, he was considered "unsympathetic to civil rights plaintiffs."[289] A perusal of his habeas corpus and prison conditions opinions indicates he was not sympathetic to the rights of inmates either.[290] He served as a senior judge until his death in 1987.[291]

Bruce's "co-counsel," William F.C. Skinner Jr., went on to a successful legal practice in Decatur, Georgia. He practiced for over thirty-eight years until his death in 2008.[292] Thomas E. Baynes, who assisted in writing Bruce's brief and then took over Bruce's program at Emory, went on to teach at Nova's Law School before

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of the Court's staff, was invited to Justice Blackmun's informal farewell to those of us at the Court. He was a fine man, well-liked by all at the Court.

289. *Guide to the John Keating Regan Papers*, ST. HIST. SOC'Y OF MO. (July 1984), https://shsmo.org/manuscripts/stlouis/s0173.pdf (providing information on how to review Judge Regan's papers that are physically located at the State Historical Society of Missouri). Judge Regan's most famous civil rights case was the textbook matter of *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115 (E.D. Mo. 1966), *aff'd*, 379 F.2d 33 (8th Cir. 1967), *rev'd*, 392 U.S. 409 (1968), where he held that 42 U.S.C. § 1982 the Civil Rights Act of 1866 did not preclude private racial discrimination in the sale of houses. A suburban developer in St. Louis had refused to sell a parcel of land for home construction to an African-American couple, both of whom worked for the federal Veterans Administration. Judge Regan's holding for the developer came down on the wrong side of history and was overturned by the Supreme Court.

290. *See, e.g.*, Fields v. Gander, 572 F. Supp. 63 (E.D. Mo. 1983) (rejecting prison conditions case), *rev'd*, 734 F.2d 1313 (8th Cir. 1984); Kellick v. Wyrick, 427 F. Supp. 710 (E.D. Mo. 1977) (denying habeas corpus).

291. *Federal Judicial Service of Regan, John Keating*, FED. JUD. CENTER, https://www.fjc.gov/history/judges/regan-john-keating (last visited Nov. 18, 2018).

292. *William F.C. ("Bill") Skinner Jr., Obituary*, ATLANTA J.-CONST. (Nov. 26, 2008), https://www.legacy.com/obituaries/atlanta/obituary.aspx?n=william-f-c-skinner-bill&pid=120650920&fhid=5281.

being appointed a federal Bankruptcy Judge in Tampa.[293] He passed away on December 16, 2009.[294]

The law students who assisted Bruce all graduated to successful legal careers. Fred W. Ajax Jr. graduated from the Emory Law School in 1969, taught in the Law School's Trial Advocacy Program, and now practices law in Atlanta. William C. Turner graduated from Emory in 1969, moved to Washington to work for the Securities and Exchange Commission, relocated to Las Vegas to work for the United Sates Attorney's Office, and now serves as a Special Master for the Nevada state courts. William R. Rapoport graduated from Emory in 1970 and moved to California. He practiced law there (including a stint in the local prosecutor's office) until he passed away on April 2, 2018.[295] Charles R. Holman Jr. graduated from Emory in 1969, served as a law clerk to the Honorable Richard Freeman in the Northern District of Georgia, and practiced law until his death on June 18, 2017.[296] William J. Terry graduated from Emory in 1970, moved to Florida, and is presently practicing with the Tampa City's Attorney's Office. Dennis J. Lanahan Jr. graduated from Emory in 1969, practiced in Florida for a number of years and now lives in North Carolina.

. . .

As for Bruce, well, he is still Bruce—my friend, mentor and role model.[297] He has had, and continues to lead, a wonderful life.

293. One of the courtrooms at the federal courthouse in Tampa was named for him. Gary White, *Thomas Baynes, Federal Judge From Lake Wales, Dies at 69*, LAKELAND LEDGER (Dec. 18, 2009), http://www.theledger.com/news/20091218/thomas-baynes-federal-judge-from-lake-wales-dies-at-69.

294. *Id.*

295. *William (Bill) Rapoport, Obituary*, THE DAILY J. (May 26, 2018), https://www.smdailyjournal.com/obituaries/william-bill-rapoport/article_99e414b2-6061-11e8-8c36-4728443cc5f8.html.

296. *Charles R. Holman, Jr., Obituary*, THE ATLANTA J.-CONST. (June 21, 2017), https://www.legacy.com/obituaries/atlanta/obituary.aspx?n=charles-holman&pid=185858382&fhid=5304.

297. Along with George Bailey and Jimmy Stewart.