BY MARC FERNICH[1]

Skirting the Stone *Bar*: *Hybrid Fourth and Sixth Amendment Claims in Federal* Habeas *Practice*

The venerable writ of *habeas corpus*, encoded at 28 U.S.C. § 2254, serves principally to remedy state court violations of the federal constitution. It is therefore curious that a key constitutional component – the Fourth Amendment ban on unreasonable searches and seizures – is generally unenforceable in federal collateral proceedings, except in one narrow instance: when the state fails to provide a full and fair opportunity to litigate the issue.

The main rationale for this prudential bar, announced by the Supreme Court in *Stone v. Powell*,[2] is that the exclusionary rule is a judicially created sanction designed to deter police misconduct, not a personal trial right of the accused.[3] And since the Second Circuit has constitutionally endorsed New York's procedure for litigating Fourth Amendment claims, federal postconviction relief is functionally unavailable absent an "unconscionable breakdown" in state court access.[4] As Justice Stevens has observed, such cases will be vanishingly rare.[5]

'Capellan v. Riley'

Illustrative is *Capellan v. Riley*, where the Second Circuit denied federal *habeas* review despite a flagrant mistake of law by the Appellate Division, First Department: contravening clear Supreme Court precedent that gave the defendant standing to contest an apartment search as an overnight guest.

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[2] 428 U.S. 465 (1976). Concomitantly, the weight of authority extends the *Stone* bar to motions to vacate convictions under 28 U.S.C. § 2255, the *habeas* analogue for federal inmates. *Compare U.S. v. Ishmael*, 343 F.3d 741, 742-43 (5th Cir. 2003) (collecting cases) with *Laaman v. U.S.*, 973 F.2d 107, 114 (2d Cir. 1992) (reserving question). On the other hand, Fourth Amendment claims *are* cognizable under New York's *habeas* statute, CPL 440.10, affording state prisoners at least one full round of collateral review on that basis. *E.g., People v. Breazil*, 31 A.D.3d 461 (2d Dept.), *app. withdrawn*, 7 N.Y.3d 810 (2006); *People v. Montgomery*, 293 A.D.2d 773, 774-76 (3d Dept.), *lv. denied*, 98 N.Y.2d 699 (2002); *People v. Mato*, 160 A.D.2d 435, 437-38 (1st Dept.), *lv. denied*, 76 N.Y.2d 988 (1990).

[3] A detailed critique of *Stone*'s logic is beyond this article's scope. Suffice to say that the decision conflates the substantive right at stake – freedom from unconstitutional searches and seizures – with the appropriate remedy for its violation – suppression of resulting evidence – significantly diluting the Fourth Amendment.

[4] *Capellan v. Riley*, 975 F.2d 67, 70 & n.1 (2d Cir. 1992).

[5] *Wallace v. Kato*, 549 U.S. 384, 399-400 (2007) (Stevens and Souter, JJ., concurring).

Invoking *Stone*, the *Capellan* Court stressed that the defendant had ample *opportunity* to present his Fourth Amendment claim. Mere legal error – however acute – does not rise to an unconscionable breakdown warranting federal intrusion, the Court hastened to add.

Rather, an unconscionable breakdown occurs only in "extreme circumstances"[6] manifesting an absence of meaningful state court inquiry. Examples may include "bribery of a judge, use of torture, or use of perjured testimony,"[7] and perhaps when a properly raised Fourth Amendment objection is wholly "ignored."[8] *But see, e.g., Gandarilla v. Artuz*, 322 F.3d 182, 185 (2d Cir. 2003) (remanding for district court determination whether defendant requested or received fair opportunity for state probable cause hearing); *Branch v. McClellan*, 2000 WL 1720934 (2d Cir. Nov. 17, 2000) (same as to whether belated partial disclosure of search warrant application constituted unconscionable breakdown).

Circumventing 'Stone'

So how does resourceful *habeas* counsel get around this daunting obstacle – variously described as "conclusive," "permanent and incurable"[9] – to "straightforward"[10] Fourth Amendment review? By recasting the claim as a violation of the Sixth Amendment right to effective trial and appellate counsel, which *is* collaterally cognizable in federal court.

Many promising suppression motions are sabotaged by shoddy lawyering, comprising errors of both omission – failing to recognize and raise a meritorious claim – and commission – raising the right claim but litigating it improperly. When that happens, federal *habeas* counsel may seek "hybrid Sixth and Fourth Amendment"[11] relief, arguing that the prisoner received constitutionally deficient state court representation in connection with a suppression-related issue.

This sort of petition challenges the caliber of defense counsel's performance in handling a Fourth Amendment claim – and thus the integrity of the process by which the disputed evidence was admitted – not the legality of the underlying search or seizure. It therefore does not run afoul of the *Stone* proscription, as the Supreme Court made clear in *Kimmelman v. Morrison*.

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6 *Poole v. People*, 2009 WL 3009356, at *6 (S.D.N.Y. Sept. 21, 2009).

7 *Ibid.*

8 *Gates v. Henderson*, 568 F.2d 830, 843-44 (2d Cir. 1977) (*en banc*) (concurring opinion).

9 *Graham v. Costello*, 299 F.3d 129, 134 (2d Cir. 2002).

10 *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

11 *Palacios v. Burge*, 589 F.3d 556, 561 (2d Cir. 2009).

The 'Kimmelman' Exception

Having neglected to conduct any pretrial discovery, defense counsel in *Kimmelman* defaulted a compelling Fourth Amendment claim by failing to bring a timely suppression motion. Remanding for a prejudice inquiry, the High Court emphasized the "separate identities"[12] and purposes of the Fourth and Sixth Amendments.

The former protects all citizens' "home[s] and affairs"[13] from unreasonable government invasion, the Court explained. In contrast, the latter's effective counsel guarantee *is* a personal trial right that helps assure the verdict's fairness and legitimacy.

Because the provisions embody "different constitutional [interests and] values,"[14] the Court concluded, a Sixth Amendment claim based on counsel's badly litigating a Fourth Amendment claim survives *Stone*'s restrictions on federal *habeas* review. As Justice Powell aptly put it:

> [R]espondent's claim is not that evidence was admitted at trial in violation of the Fourth Amendment's exclusionary rule, but rather that his counsel's failure to so argue, together with counsel's failure to conduct pretrial discovery, deprived him of his right to effective assistance of counsel. The two claims are distinct.[15]

'Kimmelman' in Action

A recent Second Circuit opinion offers an instructive example of *Kimmelman* in action. In *Palacios v. Burge*, a New York inmate filed a § 2254 petition urging that state trial counsel "rendered ineffective assistance by failing to move to suppress evidence of his show-up identification and [ensuing] confession under the Fourth Amendment."[16] Though ultimately denying the claim on the merits, the Court underscored that it encountered no *Stone* impediment.

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12 *Kimmelman*, 477 U.S. at 375.

13 *Ibid.* at 374.

14 *Ibid.* at 375.

15 *Ibid.* at 393 n.1 (Powell and Rehnquist, JJ., concurring).

16 589 F.3d at 558.

While *Stone* precludes "Fourth Amendment challenges" in collateral proceedings, the Court acknowledged, Palacios did not "squarely present" such a claim.[17] Instead, the Court said, he pressed a Sixth Amendment violation "founded primarily"[18] on inept handling of a search-and-seizure issue. More precisely, Palacios complained that New York misapplied the Supreme Court's landmark ruling on effective assistance of counsel – *Strickland v. Wash.*[19] – by holding that his attack on the show-up and its fruits had not been improperly forfeited.

The Procedural Ruling in 'Palacios'

Finding *habeas* relief available for this kind of mixed Fourth and Sixth Amendment claim, the Court explained how its elements differ from those of a conventional Fourth Amendment violation:

> Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim like Palacios's, a good Fourth Amendment claim alone will not earn a prisoner *habeas* relief. Only those *habeas* petition[er]s who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence.[20]

Accord Laaman, 973 F.2d at 113-14 (rebuffing Sixth Amendment claims alleging improper litigation of suppression issue where predicate Fourth Amendment claim lacked merit).

Conclusion

Stone's prohibition of Fourth Amendment claims on federal collateral review, however anomalous, is too well established and widely accepted to be seriously assailed. That is especially true in light of the severe *habeas* restrictions imposed by the 1996 Antiterrorism and Effective Death Penalty Act and the Roberts Court's general hostility to federal postconviction relief.

In these circumstances, enterprising *habeas* counsel can only bootstrap a plausible but poorly litigated Fourth Amendment claim as a violation of the Sixth Amendment right to effective assistance of counsel. The Supreme Court's musty decision in *Kimmelman*, as recently resurrected by the Second Circuit in *Palacios*, offers a viable avenue for doing so.

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17 *Ibid.* at 561.

18 *Ibid.* (citation and internal quotes omitted).

19 466 U.S. 669 (1984).

20 589 F.3d at 561 (citation, internal quotes and brackets omitted).