Washington and Lee Law Review

Volume 35 | Issue 1 Article 14

Winter 1-1-1978

Applying Stone V. Powell: Full And Fair Litigation Of A Fourth Amendment Habeas Corpus Claim

APPLYING *STONE V. POWELL:* FULL AND FAIR LITIGATION OF A FOURTH AMENDMENT HABEAS CORPUS CLAIM

The proper scope of federal habeas corpus[1] relief has long been a matter of concern for the Supreme Court.[2] Although at common law the habeas corpus court only had jurisdiction to ensure that persons in custody were properly charged and brought to trial within a specific time,[3] the scope of inquiry in habeas corpus proceedings is no longer limited to the question of jurisdiction. Rather, the writ has become a means by which a federal court exercises post-conviction review over the judgment of another court[4] by effectively supervising the protection of federal constitutional rights in addition to the proper exercise of jurisdiction.[5] Federal statutes[6] provide that habeas corpus relief is available to those persons "in custody in violation of the Constitution or laws . . . of the United States."[7] Because the use of the writ has been extended beyond its historic functions at common law,[8] the Supreme Court recently considered a limitation on the availability of habeas corpus relief in *Stone v. Powell*[9] and restricted habeas corpus with respect to fourth amendment claims.

Federal court application of the writ of habeas corpus to review the judgment of a state court after the conviction and sentencing of an individ-

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[1] The phrase "habeas corpus" commonly refers to the "Great Writ," *habeas corpus ad subjiciendum,* which existed at common law in both England and the United States. Stone v. Powell, 428 U.S. 465, 474-75 n.6 (1976). Historically, the writ was used to challenge the legality of confinement and to obtain the presence of an imprisoned party before the court. *See* P. BATOR, P. MISKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURT AND THE FEDERAL SYSTEM 1426-27 (2d ed. 1973); Oaks, *Legal History in the High Court — Habeas Corpus,* 64 MICH. L. REV. 451, 459-61 (1966).

[2] *See generally Developments in the Law — Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1042-43 (1970) [hereinafter cited as *Habeas Corpus*].

[3] Oaks, *Habeas Corpus in the States — 1776-1865,* 32 U. CHI. L. REV. 243, 244-45 (1965); *see* Collings, *Habeas Corpus for Convicts — Constitutional Right of Legislative Grace?,* 40 CALIF. L. REV. 335, 341-61 (1952). Early cases limited the use of the writ to testing the jurisdiction of the trial court so that granting habeas corpus relief was proper only when the trial court lacked jurisdiction. *Ex parte* Parks, 93 U.S. 18, 22 (1876); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 203 (1830).

[4] *See, e.g.,* Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ,* 66 YALE L. J. 50 (1956) [hereinafter cited as Pollack]; Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners,* 108 U. PA. L. REV. 461 (1960); Schaefer, *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1 (1956).

[5] A prisoner was entitled to habeas corpus relief not merely when the trial court lacked jurisdiction, but whenever it had no constitutional authority or power to condemn the prisoner. *Hans Nielson,* 131 U.S. 176, 184 (1889).

[6] Federal courts may inquire into the legality of the confinement of a state prisoner, 28 U.S.C. § 2254(a) (1970), or a federal prisoner. 28 U.S.C. § 2255 (1970); *see* United States v. Hayman, 342 U.S. 205, 219 (1952) (§ 2255 remedy equivalent to the common law writ).

[7] 28 U.S.C. § 2241(c)(3) (1970); *see, e.g.,* Carafas v. LaVallee, 391 U.S. 234 (1968); Peyton v. Rowe, 391 U.S. 54 (1968).

[8] Stone v. Powell, 428 U.S. 465, 494 (1976).

[9] 428 U.S. 465 (1976).

ual originated in *Brown v. Allen.*[10] In *Brown,* the Court expanded the scope of federal habeas corpus relief by holding that all federal constitutional rights which had been extended to the states[11] were cognizable in a federal habeas corpus action.[12] Although in previous habeas corpus proceedings the merits of constitutional claims had been considered,[13] a review of the merits was limited to determining the adequacy of the state court procedures.[14] The *Brown* decision, however, permitted federal courts to reconsider a constitutional claim in a federal habeas corpus proceeding even if the state court system had already given fair consideration to the issues.[15]

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[10] 344 U.S. 443 (1953); *see Habeas Corpus, supra* note 2, at 1056.

[11] *See* note 22 *infra.*

[12] 344 U.S. at 463-64. The Court had previously expanded the scope of federal habeas relief. *E.g., Ex parte* Siebold, 100 U.S. 371 (1879) (constitutionality of statute creating crime questioned; habeas corpus appropriate to inquire into the legality of imprisonment under such statute); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873) (judge lacked authority to impose sentence; therefore, the court had no jurisdiction and habeas corpus was the proper remedy).

The appropriateness of using the trial court's lack of jurisdiction as the sole basis for granting habeas corpus relief was questioned in Frank v. Mangum, 237 U.S. 309 (1915), and Moore v. Dempsey, 261 U.S. 86 (1923). In both cases, a state petitioner claimed denial of his due process rights as a result of conviction in an allegedly mob-dominated trial. Although in *Frank* the Court found that the trial court had jurisdiction and did not order consideration of the claim on the merits, 237 U.S. at 326-29, the *Moore* Court allowed the federal habeas corpus judge to reach the merits of petitioner's allegation. 261 U.S. at 91. While one commentator has viewed *Moore* as overruling *Frank,* Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding,* 74 HARV. L. REV. 1315, 1329 (1961) [hereinafter cited as Reitz], the two cases have been reconciled on the grounds that both decisions support the proposition that redetermination of a claim on federal habeas corpus review is necessary when the state judicial process has been so inadequate that the federal court cannot be confident that the state has fulfilled its obligation to apply federal law. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441, 489 (1963) [hereinafter cited as Bator]. Therefore, confusion as to the proper interpretation of the *Moore* and *Frank* opinions obscured the necessity of defining the issues properly cognizable on habeas corpus, *Habeas Corpus, supra* note 2, at 1052, and the Court worsened the situation by continuing to base its decisions on the jurisdiction rationale. For example, in Johnson v. Zerbst, 304 U.S. 458, 465-68 (1938), the Court granted habeas corpus relief holding that a federal trial court did not have jurisdiction over a defendant who was denied assistance of counsel. Alternatively, the Court might have identified the right to counsel as a claim properly cognizable in a habeas corpus proceeding. Because of such confusion in the Court's analysis, the limits of habeas corpus were poorly defined. *See generally* Bator, *supra.*

[13] *See, e.g.,* Johnson v. Zerbst, 394 U.S. 458 (1938); Moore v. Dempsey, 261 U.S. 86 (1923); *see* note 12 *supra.*

[14] *Habeas Corpus, supra* note 2, at 1056-57. Inadequacy of state court procedure might be shown in a case where appellate review had been provided, but the inability of the appeals court to look beyond the record had prejudiced the disposition of the claim. *Id.* at 1059.

[15] 344 U.S. at 463-64. In *Brown,* the defendant claimed that he was denied due process because coerced confessions were introduced against him at trial and because the grand and petit juries were selected from taxpayer listings which were predominantly composed of white citizens. *Id.* at 466. Although these contentions were considered by the state supreme court, the state adjudication was not considered binding on the federal court. Even if the state process was procedurally fair, the state court conclusions were held not to be binding if there was any possibility that a federal constitutional right had not received adequate consideration. *Id.* at 508. The same rationale asserted by the *Brown* Court has been advanced to justify providing a federal forum for state prisoners. *Habeas Corpus, supra* note 2, at 1060-61. Since

Reconsideration of the constitutional claim was not limited to issues of law. The federal judge had discretion to hold an evidentiary hearing to repeat the fact-finding process.[16] Furthermore, *Brown* indicated that this repetition was mandatory in "unusual circumstances"[17] or when the state fact-finding process was tainted by a "vital flaw."[18] By unequivocally establishing a broad role for habeas corpus jurisdiction under which federal courts were free to inspect both the legal conclusions and the fact-finding process of the state courts, the *Brown* Court created possible tension between state and federal courts.[19] After *Brown,* the decisions of state court judges deciding federal questions properly raised in state litigation could be reversed by federal district court judges on habeas corpus review.[20] Where the state court had fully litigated the issues, conflicts with the principles of finality[21] were created. In addition, *Brown's* extension of habeas corpus relief to encompass all constitutional claims[22] created the possibility of severe strain on the judicial system by expanding the opportunity for state prisoners to file frivolous claims.[22]

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state judges might be inclined to concentrate on state substantive goals in reaching their decisions, providing a federal forum protects individual rights while creating a greater likelihood of uniform application of federal constitutional law to all state prisoners. *Id.*

[16] 344 U.S. at 478, 503-06.

[17] *Id.* at 463.

[18] *Id.* at 506. No attempt, was made, however, to illustrate the situations in which "vital flaws" or "unusual circumstances" might be found. *See* text accompanying notes 25-27 *infra.*

[19] The concept of federalism includes the conflict created when state and federal courts exercise concurrent jurisdiction over federal questions. Bator, *supra* note 12, at 454. Since federal review of a state court judgment on such issues casts doubt upon the integrity of the state system, federal courts are generally unwilling to invalidate a state conviction. *Habeas Corpus, supra* note 2, at 1095. Therefore, before *Brown,* the tensions arising out of federalism conflicts led the federal courts to relitigate facts in habeas corpus proceedings only where the state court adjudication had failed to protect federal constitutional rights. *Id.* at 1040-41.

[20] Federal-state comity requires federal court deference to the state court's determination until the higher state courts have an opportunity to consider the matter in controversy. C. WRIGHT, LAW OF FEDERAL COURTS § 107 (1976) [hereinafter cited as WRIGHT]. Because *Brown* made review of the facts found by the state trial court discretionary, *see* note 16 *supra,* the *Brown* decision conflicted with the rule of comity. *See* WRIGHT, *supra.* For the purposes of habeas corpus proceedings, the rule of comity has now been embodied in the exhaustion requirement, *Wright, supra* at § 53, and codified at 28 U.S.C. § 2254(b), (c) (1970). *See* note 38 *infra.*

[21] The concept of finality is rooted in the idea that a satisfactory end to the litigation must eventually be achieved. Bator, *supra* note 12, at 442. Finality is promoted for a number of reasons including conservation of judicial resources, maintenance of the trial judge's sense of responsibility and enhancement of the effectiveness of the criminal procedural system by assuring that one violating the law will receive swift punishment. Bator, *supra* note 12, at 445-52. Consistent with finality principles, the federal habeas corpus statutes provide that a district judge is not required to entertain successive petitions once the legality of a prisoner's detention is determined on a writ of habeas corpus unless the prisoner alleges new grounds for relief. 28 U.S.C. § 2244(a) (1970).

[22] At the time of the *Brown* decision, many constitutional safeguards had not been imposed upon the states through the fourteenth amendment. *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment extended to states); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment extended to states).

The expansionary trend begun by *Brown* and the problems accompanying the changing scope of the writ were augmented by the Court's decision in *Townsend v. Sain.*[24] In *Townsend,* the Court specified the circumstances necessitating fact-finding hearings in federal habeas corpus proceedings.[25] A federal evidentiary hearing under *Townsend* is required whenever the habeas corpus petitioner does not receive a full and fair fact-finding hearing in the state court system.[26] By making a federal evidentiary hearing mandatory in certain situations where the state court had not "reliably" found the relevant facts,[27] the *Townsend* Court broadened the scope of factual inquiry in habeas corpus proceedings.[28] Since the completeness of the state inquiry was critical to the question of whether a new hearing was mandatory, the *Townsend* decision sanctioned further federal supervision of the state courts.[29] Finally, by allowing new evidentiary hearings in an expanded number of situations, the *Townsend* standard[30] strained the allocation of judicial resources by requiring cumbersome evidentiary hearings.[31]

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[23] Frivolous petitions were filed in increasing numbers in an attempt to abuse the remedy afforded by the Great Writ even before *Brown. See, e.g.,* Dorsey v. Gill, 148 F.2d 857, 862 (D.C. Cir.), *cert. denied,* 325 U.S. 890 (1945) (in a five-year period, five prisoners filed 50, 27, 24, 22, and 20 petitions respectively); Goodman, *Use and Abuse of the Writ of Habeas Corpus,* 7 F.R.D. 313, 315 n.8 (1948) (from 1937-47, six prisoners in Alcatraz penitentiary filed a total of 68 petitions). For an argument that the sheer number of cases may overstate the burden on the federal judiciary, see Wulf, *Limiting Prisoner Access to Habeas Corpus — Assault on the Great Writ,* 40 BROOKLYN L. REV. 253 (1973). *See also* Shapiro, *Federal Habeas Corpus: A Study in Massachusetts,* 87 HARV. L. REV. 321 (1973).

[24] 372 U.S. 293 (1963). *See generally* Wright, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 YALE L. J. 895 (1966) [hereinafter cited as *Fact-Finding Responsibility*].

[25] A federal evidentiary hearing under Townsend is required when: 1) the merits of the factual dispute are not resolved in the state hearing; 2) the state factual determination is not fairly supported by the record; 3) the fact-finding procedure employed by the state court is inadequate to afford a full and fair hearing; 4) there is a substantial allegation of newly discovered evidence; 5) the material facts are not fully developed at the state court hearing; or 6) the state trier of fact does not afford the habeas petitioner a full and fair hearing on a constitutional claim for any reason. 372 U.S. at 313.

[26] 372 U.S. at 312-13; *see* note 25 *supra.*

[27] 372 U.S. at 312-13.

[28] In *Brown,* a new fact-finding proceeding was mandatory only when the state process had been infected with a "vital flaw," 344 U.S. at 506. The *Townsend* Court responded to *Brown's* failure to define a "vital flaw" by articulating a standard which expanded the number of situations in which federal fact-finding hearings are mandatory. *See Habeas Corpus, supra* note 2, at 1121-22.

[29] In order to determine whether the *Townsend* criteria had been satisfied, *see* note 25 *supra,* the federal habeas court had to undertake a thorough examination of the state records and procedures. *See Habeas Corpus, supra* note 2, at 1122-23.

[30] The *Townsend* standard has been codified in the federal habeas corpus statute. 28 U.S.C. § 2244(b), (c) (1970).

[31] *Townsend* strains judicial resources by requiring a federal fact-finding hearing even though there is no claim of inadequacy as to facts already found in the state hearing. For instance, if a federal hearing is required by *Townsend* because the prisoner alleges substantial newly discovered evidence, there will be no reason to distrust the findings made at the state

The possibilities for further expansion of the situations requiring new fact-finding hearings in federal habeas corpus proceedings were recognized in *Fay v. Noia.*[32] In *Fay,* the Court held that an adequate and independent state ground for decision[33] would no longer preclude review of a constitutional claim in a federal habeas corpus proceeding.[34] Therefore, according to *Fay,* federal habeas corpus jurisdiction is conferred whenever the petitioner alleges a deprivation of his constitutional rights which was not corrected in the state court proceedings.[35] Adding to the trend allowing federal court consideration of state prisoners' constitutional claims,[36] *Fay* held that a procedural default would preclude a petitioner from raising his claim on habeas corpus only in those cases where the petitioner had bypassed state procedures deliberately.[37] Moreover, federal courts may ex-

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fact-finding hearing. While these findings should be given weight in the federal hearing, *Habeas Corpus,* note 2 *supra,* at 1131, there is nothing in *Townsend* to suggest that such consideration is mandatory. Thus, in this situation, a new Townsend hearing could result in wasteful and unnecessary expenditure of judicial resources.

[32] 372 U.S. 391 (1963).

[33] The adequate and independent state ground doctrine was originally developed as a means of preventing federal courts from reviewing state decisions which rested on independent and dispositive state substantive grounds. Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875) (federal question decided against appellant; the Court could not review decision on title dispute settled under state law). The doctrine was later extended to preclude review of decisions resting on state procedural grounds. *See, e.g.,* Herb v. Pitcairn, 324 U.S. 117 (1945) (failure to follow proper state transfer procedures to maintain jurisdiction could constitute independent and adequate state ground). Under the adequate and independent state ground doctrine, federal courts can only review the correctness of decisions of a state's highest courts where federal issues are involved and the state issue is not dispositive. Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875). *See generally* Reitz, *supra* note 12, at 1340-52.

[34] 372 U.S. at 438. The Court distinguished *Murdock, see* note 33 *supra,* by noting that it involved the propriety of federal courts deciding questions of state substantive law. *Id.* at 431. In *Fay,* however, the only substantive question was found to be federal. *Id.* Therefore, a practical appraisal of the state interest involved in *Fay* could not justify the federal courts' enforcement of the adequate state ground rule in a federal habeas corpus proceeding. *Id.* at 433.

[35] *Id.* at 426-27.

[36] The full effect of the broadened scope of federal habeas corpus relief after *Fay* and *Townsend* became evident as the numbers of petitions filed by state prisoners increased. From 1963 to 1964, habeas corpus petitions filed by state prisoners in federal district courts rose from 1,903 to 3,531, an increase of 85.5%. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 156 (1964). This increase could also be partially attributable to the Court's due process decisions. By applying federal constitutional rights to the states, the Court granted state prisoners new grounds for seeking habeas corpus relief. *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963) (due process requires that indigent state defendants be afforded appointed counsel at trial).

[37] 372 U.S. at 438. The *Fay* Court distinguished between waiver and deliberate bypass for the purpose of determining when federal habeas corpus relief should be granted. *Id.* at 439-40. Waiver was defined as "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 439, *quoting* Johnson v. Zerbst, 304 U.S. 458, 464 (1938). In contrast, deliberate bypass occurs where some positive gain can be derived from forfeiting state remedial procedures, such as splitting claims in the hopes of being granted multiple hearings. *See,*

cuse noncompliance with the exhaustion requirement[38] where application to the state court would be futile and time consuming.[39]

The effects of this expansion were magnified by the Supreme Court decision in *Kaufman v. United States*[40] which increased the number of situations in which *Fay* and *Townsend* could be applied. In *Kaufman,* the Court indicated that state prisoners alleging fourth amendment violations were entitled to federal habeas corpus relief.[41] Although the fourth amendment had been extended to the states in *Mapp v. Ohio,*[42] the question of whether application of the exclusionary rule in a federal habeas corpus

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e.g., Murch v. Mottram, 409 U.S. 41 (1972) (petitioner withheld claim for relief in state post-conviction proceeding; deliberate bypass found on subsequent assertion of claim); Sanders v. United States, 373 U.S. 1 (1963) (petitioner purposely withheld claim in federal habeas corpus proceeding hoping to be granted two hearings). *See generally* Note, *State Criminal Procedure and Federal Habeas Corpus,* 80 HARV. L. REV. 422 (1966).

A state court finding of waiver based solely on the failure of the accused to appeal or to object at the proper time would not be binding on the federal courts because such a waiver is properly reviewable under *Fay.* 372 U.S. at 439. A deliberate bypass of state review, however, may preclude later review of constitutional claims in the federal courts. 372 U.S. at 438. The presence or absence of a deliberate bypass must be determined largely on the facts of each case. *Habeas Corpus, supra* note 2, at 1107. In *Fay,* no deliberate bypass was found since the defendant's failure to appeal could not be deemed a "merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures." 372 U.S. at 440.

[38] If state remedies are still available to the petitioner, the exhaustion rule requires that the federal court must decline to entertain the habeas corpus petition unless state corrective procedure is either unavailable or for some reason ineffective to protect the rights of the prisoner. 28 U.S.C. § 2254(b) (1970). The exhaustion doctrine requires that the states be given an opportunity to correct constitutional defects before the federal court can provide habeas relief by upsetting the state conviction. Schlesinger v. Councilman, 420 U.S. 738, 755-56 (1975); Darr v. Burford, 339 U.S. 200, 204 (1950); *see* note 20 *supra.*

In *Fay,* the defendant had been convicted of felony murder and was sentenced to life imprisonment. Fearing that a new trial and possible subsequent conviction would result in the imposition of the death sentence, the defendant failed to appeal. 372 U.S. at 394, 396. His petition for habeas corpus was dismissed by the district court on the grounds that he had failed to exhaust state remedies in accordance with the federal statute. 372 U.S. at 396. The *Fay* Court found that the defendant's failure to make timely appeal in the state court, thereby forfeiting his rights to state court review, did not prejudice his right to subsequent federal court relief because the exhaustion requirement applied only to those state remedies still available when the application for habeas corpus relief was filed. *Id.* at 399.

[39] 372 U.S. at 437. One requirement for the futility exception to apply is that the state court must recently have ruled adversely to petitioner's position. *Habeas Corpus, supra* note 2, at 1099. Although the futility exception conflicts with the purposes of the exhaustion doctrine, allowing petitioner to proceed directly to the federal courts in such a case eliminates the wasteful use of judicial resources resulting from unsuccessful applications to state courts and hastens the correction of state court errors. *Id.*

[40] 394 U.S. 217 (1969).

[41] *Id.* at 225. In dictum, the *Kaufman* Court mentioned three previous cases in which state prisoners had obtained federal habeas relief based on their claims that they were convicted on the basis of illegally obtained evidence. *Id., citing* Mancusi v. DeForte, 392 U.S. 364 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); Warden v. Hayden, 387 U.S. 294 (1967).

[42] 367 U.S. 643 (1961). *See generally* Note, *Fourth Amendment in the Balance — The Exclusionary Rule After Stone v. Powell,* 28 BAYLOR L. REV. 611 (1976).

proceeding was constitutionally compelled[43] was not clear.[44] The *Kaufman* Court indicated that the rule was applicable in all habeas corpus actions;[45] the decision firmly established that all constitutional claims raised by state prisoners were cognizable in federal post-conviction relief proceedings.[46] Combined with the new situations necessitating fact relitigation after *Fay* and *Townsend,* the broad spectrum of claims cognizable after *Kaufman* and *Brown* drastically altered the nature of habeas corpus relief. From a simple device for testing jurisdiction, the Great Writ had become a comprehensive tool by which the federal courts could protect federal constitutional rights.[47]

The Supreme Court gradually began to reverse the expansionary trend[48]

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[43] Because the sole reference to habeas corpus in the Constitution concerns only the situations in which its availability can be properly suspended, U.S. CONST. art. I, § 9 cl.2, and since the exclusionary rule was not literally required by the fourth amendment, *see* note 58 *infra,* the *Kaufman* Court's characterization of the exclusionary rule as a personal constitutional right was crucial to its decision. 394 U.S. at 226. Because the *Stone* Court later viewed the exclusionary rule as a judicially created remedy, Stone v. Powell, 428 U.S. 465, 482-83 (1976), its application in federal habeas corpus proceedings was not mandatory. *See id.* For an exhaustive argument that due process requires that the exclusionary rule be deemed a personal constitutional right, see Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement,* 59 MINN. L. REV. 251 (1974).

[44] *Compare* Warren v. United States, 311 F.2d 673 (8th Cir. 1963) (exclusionary rule not applied by state court; federal prisoner's claim of illegal and illegal search and seizure not cognizable on habeas corpus) *with* Thornton v. United States, 368 F.2d 822 (D.C. Cir. 1966) (application of exclusionary rule for fourth amendment claims could be heard only in exceptional circumstances).

[45] 394 U.S. at 225-27.

[46] *Habeas Corpus, supra* note 2, at 1066.

[47] McFeeley, *Habeas Corpus and Due Process: From Warren to Burger,* 28 BAYLOR L. REV. 533, 546 (1976). The expansion of the writ was not acclaimed universally. Early attempts to limit the writ were made during the 84th Congress, H.R. No. 5649, 84th Cong., 1st Sess. (1955), and the 90th Congress, S.917, 90th Cong., 1st Sess. § 702(a) (1968). More recently, a bill was introduced in the 93rd Congress to amend the federal habeas corpus statute, 28 U.S.C. § 2254 (1970). S.567, 93rd Cong., 1st Sess. (1973). The purpose of S.567 was to amend the federal habeas corpus statute to entertain writs of habeas corpus filed by prisoners in state custody if 1) the prisoner was in custody in violation of the Constitution of the United States; 2) the violation related to the reliability of the fact-finding process; and 3) the petitioner demonstrated that a different result would probably have obtained if the constitutional violation had not occurred. 119 CONG. REC. 2221-22 (1973). For futher discussion of this and other limiting proposals, see Bator, *supra* note 12, at 453; Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142 (1970) [hereinafter cited as Friendly]; Pollack, *supra* note 4, at 57; Wulf, *supra* note 23, at 254; Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners — Reform or Revocation?,* 61 GEO. L. J. 1221, 1222 (1973).

[48] *See* Tollett v. Henderson, 411 U.S. 258 (1973); Murch v. Mottram, 409 U.S. 41 (1972); Picard v. Connor, 404 U.S. 270 (1971). *But see* Lefkowitz v. Newsome, 420 U.S. 283 (1975). In *Lefkowitz,* the Supreme Court reconsidered the general rule that habeas corpus relief is precluded by a valid guilty plea. *See* note 50 *infra.* The *Lefkowitz* Court held that when a defendant pleads guilty pursuant to state law without waiving his right to state appellate review of unsuccessful pretrial motions to suppress, his right to habeas corpus review of the trial court's ruling on these motions is not foreclosed. 420 U.S. at 293. *See* Note, *Lefkowitz v. Newsome: The Supeme Court Takes Another Look at Guilty Pleas,* 33 WASH. & LEE L. REV. 223 (1976) [hereinafter cited as *Guilty Pleas*].

because it appeared that the broadened scope for federal habeas corpus relief placed an undue burden on the federal judicial system.[49] Although the restrictions placed on the writ first affected isolated procedural areas,[50] the Court's desire to limit the scope of substantive claims cognizable in federal habeas corpus was exemplified in *Stone v. Powell.*[51] In *Stone,* the petitioner was arrested for violating a vagrancy ordinance, but was later charged with murder and convicted on the basis of evidence seized in a search pursuant to the vagrancy arrest.[52] Alleging that the evidence should have been excluded because the vagrancy ordinance was unconstitutional and the subsequent arrest was illegal, the petitioner unsuccessfully presented his claim before the state appellate courts.[53] Although the federal district court denied his petition for habeas corpus, the Ninth Circuit accepted petitioner's contention and granted relief.[54] After considering the proper scope of federal habeas corpus relief, the Supreme Court reversed.[55] The Court held that where the state had provided an opportunity for full and fair litigation of the fourth amendment claim, s state prisoner could not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.[56]

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[49] *See* note 60 *infra.*

[50] *E.g.,* Tollett v. Henderson, 411 U.S. 258 (1973). *Tollett* held that a valid guilty plea made on advice of counsel precludes any inquiry into constitutional violations allegedly occurring before the plea unless the inadequacy of counsel is proven. The *Tollett* decision represents an exception to the rule that a voluntary and intelligent guilty plea generally bars later habeas corpus attack on proceedings occurring before the plea was made by allowing habeas corpus attack where the inadequacy of counsel is proven. *Guilty Pleas, supra* note 48, at 226-27. This rule had been developed in the "guilty plea trilogy" of Brady v. United States, 397 U.S. 742 (1970), McMann v. Richardson, 397 U.S. 759 (1970), and Parker v. North Carolina, 397 U.S. 790 (1970).

[51] 428 U.S. 465 (1976). The possibility that the Court might take such affirmative action to restrict the writ had been suggested previously by Justice Powell in his concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973). Although *Schneckloth* involved the validity of a consent search, Justice Powell considered the issue of the permissible scope of federal collateral review of a state prisoner's fourth amendment claims to be more important. *Id.* at 250 (Powell, J., concurring). He maintained that any federal inquiry should be confined to the issue of whether the petitioner was provided a fair opportunity to raise the constitutional challenge and to have the question adjudicated in the state courts. *Id.* at 266. Adopting a threshhold requirement from Justice Black's dissent in *Kaufman,* 394 U.S. at 242, Justice Powell suggested that the convicted defendant must raise a constitutional claim that casts doubt upon his guilt in order to qualify for federal habeas corpus review. 412 U.S. at 258. One commentator, concerned that increasing numbers of frivolous petitions could cause a severe drain on judicial resources, advocated a similar position. *See* Friendly, *supra* note 47, at 160 (prisoner must show a fair probability that, in light of all the evidence including that alleged to have been illegally admitted, the trier of fact would have entertained reasonable doubt of his guilt).

[52] 428 U.S. at 469-470.

[53] *Id.* at 470.

[54] Powell v. Stone, 507 F.2d 93 (9th Cir. 1974), *rev'd,* 428 U.S. 465 (1976).

[55] 428 U.S. 465 (1976).

[56] *Id.* at 494. In addition, Justice Powell, writing for the majority, argued that the history of the writ did not support petitioner's contention that the exclusionary rule should be applied

In limiting the scope of habeas corpus relief, the *Stone* Court considered the burden imposed on the federal judicial system in habeas corpus proceedings.[57] Since application of the exclusionary rule,[58] resulting in suppression of the evidence, was not literally required by the fourth amendment,[59] the Court found that reconsideration of fourth amendment claims on collateral review was not constitutionally compelled.[60] In *Stone,* the

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in federal habeas corpus proceedings. 428 U.S. at 474-81. After noting that evidence seized in violation of the fourteenth amendment was admissible prior to the decision in Weeks v. United States, 232 U.S. 383 (1914), Justice Powell concluded that the principal justification for the extension of the exclusionary rule to the states in *Mapp* was the belief in the rule's deterrent effect. 428 U.S. at 482, 484. Relying heavily on post-*Mapp* decisions which did not require application of the rule, *see* note 58 *infra,* the *Stone* majority found that the application of the exclusionary rule was not a personal constitutional right. 428 U.S. at 486. By characterizing the rule as a judicially created tool, *id.* at 482, its application was restricted to those areas "where its remedial objectives are thought most efficaciously served." *Id.* at 486-87, *quoting* United States v. Calandra, 414 U.S. 338, 348 (1974).

[57] *See* note 60 *infra.*

[58] Implementation of the exclusionary rule enforces the fourth amendment proscription against illegal search and seizure by prohibiting introduction at trial of evidence gained as a result of a fourth amendment violation. Stone v. Powell, 428 U.S. at 482. The primary rationale supporting the rule is that police misconduct will be deterred when the rule is applied to exclude evidence seized incident to illegal searches because the evidence usually is needed to support a conviction. *Id.* at 486. This justification, however, did not compel universal application of the rule, which had been partially limited prior to *Stone. See, e.g.,* United States v. Calandra, 414 U.S. 338 (1974) (fourth amendment does not preclude presentation of illegally seized evidence in grand jury proceeding); Alderman v. United States, 394 U.S. 165 (1969) (evidence not excludable if obtained in violation of rights of someone other than person trying to suppress evidence).

[59] The Constitution provides only that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. U.S. CONST. amend. IV. Because no express mention of the exclusionary rule is made, the Court has declined to apply the rule without considering whether application of the rule is constitutionally required. *See, e.g.,* United States v. Janis, 428 U.S. 433 (1976); Gerstein v. Pugh, 420 U.S. 103 (1975).

[60] 428 U.S. at 481. Collateral review through a habeas corpus proceeding affords the petitioner an opportunity to attack the integrity of the state court judgment in the federal court system. Conventional justifications for allowing collateral review through habeas corpus include: 1) the necessity that federal courts have the final word on questions of federal law; 2) the inadequacy of state procedures to raise and preserve federal claims; 3) the concern that state judges may be unsympathetic to federal rights; and 4) the institutional limitations on the exercise of the Supreme Court's certiorari jurisdiction to review state convictions. Kaufman v. United States, 394 U.S. 217, 225-26 (1969). The *Stone* Court, however, found that resort to habeas corpus for purposes other than assuring that no innocent person suffers an unconstitutional loss of liberty resulted in "serious intrusions" on important governmental values. 428 U.S. at 491 n.31. These values included the effective utilization of limited judicial resources, the need for finality, *see* note 21 *supra,* considerations of federal-state comity, *see* note 20 *supra,* and the maintenance of the constitutional balance upon which the federalism doctrine is based, *see* note 19 *supra.* 428 U.S. at 491 n.31, *citing* Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring). A typical fourth amendment claim raised on habeas corpus was perceived by the *Stone* Court as having little bearing on the "basic justice" of the prisoner's incarceration. 428 U.S. at 491 n.31. Since the guilt or innocence of the accused was not at issue, the Court found that such claims were generally inappropriate for collateral review. *Id.*

grant of relief where the claim had been adequately heard on prior state review was not justified where the costs of applying the exclusionary rule outweighed the utility of extending the rule on collateral review.[61] Because the costs of applying the rule were particularly burdensome in a habeas corpus proceeding,[62] relief was denied whenever the requirement of an opportunity for full and fair litigation of the claim had been met.[63]

The effectiveness of the *Stone* full and fair litigation standard depends

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[61] *Id.* at 489.

[62] The *Stone* Court found that the costs of the rule, in diverting attention from the guilt or innocence of the accused and suppressing reliable evidence, were increased in a collateral proceeding. 428 U.S. at 489-91. Although the Court found that application of the rule at trial and on direct review was justified by its effect of deterring law enforcement officials from violating the fourth amendment, *id.* at 492-93, the remoteness of the rule's efficacy on collateral review was perceived as having reached a point of diminishing returns, beyond which its continued application was felt to be a "public nuisance." *Id.* at 493, *quoting* Amsterdam, *Search, Seizure, and Section 2255: A Comment,* 112 U. PA. L. REV. 378, 389 (1964).

[63] 428 U.S. at 494. In a dissenting opinion, Justice Brennan interpreted the Court's holding as a "substantial evisceration of federal habeas corpus jurisdiction," *id.* at 503, and accused the majority of attempting to judicially modify the federal habeas corpus statutes in denigration of the congressional duty to confer federal habeas jurisdiction under Article III of the United States Constitution. 428 U.S. at 506, 512. Justice Brennan actually feared that the Court was laying a foundation for a similar withdrawal of federal habeas corpus jurisdiction in other areas. 428 U.S. at 517.

In reply to these accusations, the Court emphasized that the *Stone* decision did not affect the federal court's jurisdiction over a fourth amendment claim. *Id.* at 494, 495 n.37. Rather, the majority maintained that the decision limited the application of the exclusionary rule only in cases where the full and fair litigation standard had been met. *Id.* The Court's assertion that *Stone* did not affect the federal court's jurisdiction is questionable. Technically, federal courts still have jurisdiction over all fourth amendment claimants who can show that they have been denied the opportunity to fully and fairly litigate their claims in the state courts. *See* Fay v. Noia, 372 U.S. at 426-27. Practically, however, the *Stone* decision limits jurisdiction over all claimants who fail to make the preliminary showing of a denial of an opportunity to fully and fairly litigate their claim because the court must refuse to exercise its jurisdiction under *Stone* if the petitioner fails to make the preliminary showing. Previously, under *Kaufman, Townsend,* and *Fay,* the federal district courts had discretion to conduct evidentiary hearings and to consider the claim on the merits. *See* note 23 *supra.* While *Stone* arguably imposes only a technical limitation on the scope of the writ, the decision actually limits the substantive scope of the writ as well.

Although a withdrawal of jurisdiction in non-fourth amendment areas would be a potential expansion of *Stone,* the question of such a withdrawal was not reached in Wainwright v. Sykes, 97 S. Ct. 2497 (1977). Petitioner, a state prisoner, challenged the voluntariness of his confession; however, federal habeas corpus relief was unavailable because of his failure to object to admission of the confession in the trial court. *Id.* at 2500. The *Sykes* Court declined to decide whether *Stone* extended to a "bare allegation" of a fifth amendment violation where an opportunity for full and fair litigation was afforded in the state proceedings. *Id.* at 2506 n.11.

Prior to *Sykes,* other grounds of collateral attack had been foreclosed to state prisoners in decisions which may have foreshadowed *Stone. E.g.,* Estelle v. Williams, 425 U.S. 501, 512-13 (1976) (habeas corpus relief denied to state prisoner required to stand trial in prison clothes because he failed to object to being tried in such clothing); Francis v. Henderson, 425 U.S. 536, 542 (1976) (defendant's failure to challenge the composition of the grand jury which indicted him was held to preclude habeas corpus relief where defendant could not show "cause" for not objecting or "actual prejudice" from all white grand jury).

on the federal courts' use of the standard to reduce the burden on the federal judicial system. Because the *Stone* opinion provided little guidance on the application of the "opportunity for full and fair litigation" standard, subsequent federal court interpretations of the standard have varied.[64] The *Stone* Court's failure to adequately define full and fair litigation has left the federal courts with the responsibility of interpreting the standard. After examining the state court proceedings, many lower federal courts have denied habeas corpus relief without articulating the standard which was applied.[65]

Although the *Stone* Court did not define the full and fair litigation standard, it indicated that *Townsend* was relevant in determining when full and fair litigation had been provided.[66] The literal use of *Townsend* to interpret the standard, however, may be improper. *Townsend* considered the adequacy of state fact-finding hearings in determining whether a federal court in a habeas corpus action could reconsider the facts.[67] In contrast, *Stone* considered whether granting habeas corpus review of the legal issue was justified, regardless of the adequacy of the fact-finding process.[68] Given this difference, if the *Stone* Court's citation of *Townsend* was intended to indicate that full and fair litigation had been denied whenever the *Townsend* criteria had not been satisfied, review of the legal issue would be proper whenever the state fact-finding process is inadequate. Therefore, *Stone* would have little effect on the scope of habeas corpus relief because *Stone* would merely reiterate *Townsend* in a search and seizure context. A more acceptable view is that the *Stone* Court intended the citation of *Townsend* to establish criteria for federal courts to use in

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[64] *Compare* Gates v. Henderson, No. 76-2065 (2d Cir. Jan. 12, 1977) *with* O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977).

[65] *See, e.g.*, Chavez v. Rodriguez, 540 F.2d 500 (10th Cir. 1976) (per curiam) (petitioner received pre-trial evidentiary hearing on fourth amendment claim, renewed claim during trial, and claim was sole issue on direct appeal); Williams v. Ohio, 547 F.2d 40 (6th Cir. 1976) (per curiam) (petitioner's claim considered in state trial court, state appellate court, and state supreme court); Szarez v. Perini, 422 F. Supp. 8 (N.D. Ohio 1976) (state court transcript indicated beyond doubt that opportunity for full and fair litigation had been provided in the state courts).

[66] 428 U.S. at 494 n.36.

[67] *See* text accompanying notes 25-28 *supra*.

[68] *See* 428 U.S. 465 (1976). Apart from the fact that *Townsend* applied specifically to the adequacy of the state fact-finding hearings, 372 U.S. at 312-13, a fundamental difference between *Stone* and *Townsend* may render *Townsend's* applicability to the full and fair standard less meaningful. While under *Townsend* the federal habeas court has wide discretion to make its own findings of fact and always makes its own conclusions of law, the federal court under *Stone* may be required to defer to state determinations of both. Boyte, *Federal Habeas Corpus After Stone v. Powell: A Remedy Only For The Arguably Innocent?*, 11 U. RICH. L. REV. 291, 318 n.115 (1977) [hereinafter cited as Boyte]. Because the *Stone* Court may therefore be more willing to accept state findings of fact, the determination of whether the prisoner was afforded full and fair litigation becomes more complicated since the *Stone* Court may not be as willing to probe the state record as the *Townsend* Court requires. *Id.* Conceivably, therefore, compliance with the full and fair litigation standard of *Stone* in state proceedings would not necessarily constitute full and fair litigation under *Townsend*.

judging compliance with the full and fair standard. Under this view, both *Stone* and *Townsend* may have independent significance. Where full and fair litigation of the legal issue has been denied under *Stone* and habeas corpus relief is granted, the *Townsend* criteria may still apply to the question of the adequacy of the state fact-finding process.

In *Townsend,* the Court held that a new evidentiary hearing was required whenever the state process had failed to fully and fairly develop the factual issues.[69] Therefore, the *Townsend* criteria provide a definition of adequacy for state fact-finding proceedings.[70] Fullness and fairness under *Townsend* can be equated with procedural due process,[71] with the *Townsend* criteria describing the procedural due process requirements for fact-finding hearings. Because the *Townsend* definition of fullness and fairness is relevant to *Stone,*[72] the opportunity for full and fair litigation would require habeas corpus review of a fourth amendment claim whenever procedural due process has been denied in the state system.[73]

At least one federal court has found that *Stone's* requirement of an opportunity for full and fair litigation requires that the *Townsend* criteria be satisfied. In *Gates v. Henderson,*[74] an examination of the state transcripts revealed that the state court had failed to develop evidence crucial to the appellant's fourth amendment claim in accordance with *Townsend.*[76] Where the petitioner's fourth amendment claim was neither

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[69] *Habeas Corpus, supra* note 2, at 1122.

[70] The "adequacy" of a state proceeding depends on the procedures and opportunities available to the petitioner at trial and on direct review as well as the extent to which petitioner took advantage of those opportunities. *Habeas Corpus, supra* note 2, at 1123 n.47.

[71] "Full" and "fair," when used by the Supreme Court, have been interpreted to require a procedure which satisfies the constitutional minimums of procedural due process. M. FORKOSCH, CONSTITUTIONAL LAW § 183, 202 n.48 (2d ed. 1969) [hereinafter cited as FORKOSCH]. The following actions on the part of the state may constitute a denial of procedural due process: 1) use of false or tainted evidence to gain conviction; 2) misrepresentation of the evidence; 3) suppression of evidence favorable to the accused; 4) denial of adequate counsel; 5) obstruction of justice by allowing prejudicial publicity or mob domination. FORKOSCH, *supra* at § 419, 460-61. In a criminal proceeding, procedural due process requires that the conviction be supported by substantial evidence which has been carefully weighed and considered during the fact-finding process. *See, e.g.,* Kentucky Alcoholic Beverage Control Bd. v. Jacobs, 269 S.W.2d 189 (Ky. App. 1954).

[72] 428 U.S. at 494 n.36.

[73] Interpreting *Stone* to require reconsideration of a fourth amendment claim only when procedural due process has been denied in the state system would be consistent with the policies expressed in *Stone* against repetitive litigation. In a case where procedural due process has been denied, the fourth amendment claim would not be considered in the state court system. Thus, consideration of the claim in a habeas corpus proceeding would not unjustifiably waste judicial resources where none had ever been expended in considering the claim. The *Stone* proscription against needless litigation, *see* text accompanying notes 61-63 *supra,* would apply only where the claim had been fully explored at trial or on direct review at the state level. In such a case, the opportunity for full and fair litigation would clearly have been afforded.

[74] Gates v. Henderson, No. 76-2065 (2d Cir. Jan. 12, 1977), *cert. denied,* 46 U.S.L.W. 3453 (Jan. 17, 1978) (No. 77-5741).

[75] Gates v. Henderson, slip op. at 1360.

[76] *See* note 25 *supra.*

considered in the trial court nor on direct review,[77] the Second Circuit found dismissal of the petition inappropriate.[78] Because satisfaction of the *Townsend* requirement to fully develop evidence crucial to the claim was a "critical precondition" to the application of *Stone,*[79] the case was remanded for a hearing on the merits of appellant's fourth amendment claim. Even though the *Stone* Court may not have intended every failure to meet the *Townsend* criteria to constitute a denial of full and fair litigation,[80] the *Gates* result is still consistent with *Stone. Stone* referred to the necessity of providing the opportunity for full and fair litigation both at trial and on direct review.[81] The opinion, however, did not indicate that the opportunity had to be provided both in the trial court and at the appellate level. *Stone* thus requires that full and fair litigation at least be afforded at one level of the state system.[82] In *Gates,* petitioner's claim was never considered on the merits in the state system.[83] Therefore, the grant of relief was appropriate since consideration of the claim could not constitute needless litigation within the meaning of *Stone.*[84]

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[77] In *Gates,* trial counsel failed to make a specific objection on fourth amendment grounds so that the claim was not preserved for appellate review. People v. Gates, 24 N.Y.2d 666, 301 N.Y.S. 2d 597, 249 N.E.2d 450 (1969). Habeas corpus relief was denied by the federal district court which found that the failure to make a specific objection in compliance with state procedure constituted an adequate and independent basis for the state court's decision. Gates v. Henderson, No. 73-3865 (S.D.N.Y. May 27, 1976). Because the state opinion did not specifically discuss their reasoning and expose their findings with regard to trial counsel's objection, the federal appeals court found the dismissal of the petition inappropriate since *Stone* did not affect the federal district court's obligation to insure that state findings and reasoning are adequately set forth in the record. Gates v. Henderson, slip op. at 1356-57.

[78] *Id.* at 1357.

[79] *Id.* at 1360.

[80] *See* text accompanying notes 69-73 *supra.*

[81] 428 U.S. at 489, 490, 493, 494 n.37.

[82] *Id.* at 469, 482, 494.

[83] Gates v. Henderson, slip op. at 1355.

[84] Although other cases have rejected the *Townsend* criteria for determining what constitutes full and fair litigation, the results of these cases appear to be consistent with the *Stone* policy. In Pulver v. Cunningham, 419 F. Supp. 1221 (S.D.N.Y. 1976), the petitioner had presented his claim in the state trial court, but alleged denial of full and fair litigation because facts material to his claim were not available in time for him to make the best use of them at trial. *Id.* at 1223. Although the federal district court found that the state evidentiary hearing had failed to adduce the material facts as required by *Townsend, see* note 25 *supra,* the opportunity for full and fair litigation had been provided. *Id.* at 1224. The *Pulver* court held that the opportunity to litigate was provided whenever the appellate process on direct review was available to correct the errors of the trial court. *Id.* Therefore, in order to qualify for habeas corpus relief, the petitioner would have to demonstrate that the state appellate process was inadequate to correct the errors of the trial court. *Id.* Since the petitioner in *Pulver* was unable to make such a showing, relief was denied. *Id. Pulver,* therefore, is consistent with *Stone's* proscription against unnecessary relitigation because the petitioner presented his claim before the appellate court, where the claim was rejected because it had already received fair consideration in the trial court.

In *Gates,* however, the failure to develop evidence crucial to the appellant's fourth amendment claim in accordance with *Townsend* resulted in a total deprivation of the opportunity to have the merits of the claim considered. Because the failure to comply with the

Even where the *Townsend* requirements with respect to the adequacy of the fact-finding process are met at the state level, the opportunity for full and fair litigation has been held to require that the claim be considered on the merits either at trial or on direct review. In *Simmons v. Clemente,*[85] the state supreme court refused to hear testimony on the petitioner's fourth amendment claim after holding that the state trial court's findings were fairly supported by the record.[86] Because no "serious procedural errors" were found in the state supreme court's refusal to hold a hearing, the Second Circuit denied habeas corpus relief[87] holding that the state courts had provided the opportunity for full and fair litigation where the petitioner's claim was decided on the merits in the trial court and no inadequacies were found in the state appellate procedures.[88]

Similarly, in *United States ex rel. Conroy v. Bombard,*[89] the court limited the review of petitioner's fourth amendment claim to a consideration of the treatment the claim received in the state courts.[90] Although relief was denied on the basis of *Stone,* the *Conroy* court indicated that where a petitioner shows that adequate procedures for litigation of his claim are unavailable or that the hearing judge is biased or is not following proper procedures, the opportunity for full and fair litigation is lacking and habeas corpus relief would be appropriate.[91] Allowing relief in the instances enumerated in *Conroy* would be consistent with *Stone,* which implied that the application of the exclusionary rule in a habeas corpus proceeding might be justified only when the benefits of the rule's application outweighed the costs. Because the costs[92] normally associated with considering a fourth amendment claim on collateral review in terms of using scarce judicial resources would be incurred only once when the state court had never adequately considered the claim, habeas corpus relief would be justi-

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Townsend criteria did not have the same result in *Pulver,* both *Gates* and *Pulver* are distinguishable on their facts. According to both cases, a failure to meet the *Townsend* standard constitutes a denial of the opportunity for full and litigation only when the failure under *Townsend* prevents the claim from ever being heard on the merits.

[85] 552 F.2d 65 (2d Cir. 1977).

[86] *Id.* at 68-69.

[87] *Id.* at 69.

[88] *Id.* The federal district court in United States ex rel. Petillo v. New Jersey, 418 F. Supp. 686 (D.N.J. 1976), held that the denial of a hearing at the state trial court on the issue of the veracity of affidavits submitted for search warrants constituted a lack of full and fair litigation under *Stone. Id.* at 688-89. The defendant's claim that the affidavits were procured by police perjury, rendering his arrest and search illegal, had never been litigated. Therefore, the *Petillo* court found that defendant's claims fell "squarely within the remaining ambit of the application of the exclusionary rule on collateral review." *Id.* at 689. In *Petillo,* the "remaining ambit" for the application of the exclusionary rule comprehended a case where the merits of the petitioner's fourth amendment claim were never considered in the state judicial process. As for the *Simmons* court, full and fair litigation seemed to require that the claim be considered on the merits by the state courts, either at trial or on direct review.

[89] 426 F. Supp. 97 (S.D.N.Y. 1976).

[90] *Id.* at 110.

[91] *Id.* at 109.

[92] *See* note 60 *supra.*

fied. Where full and fair litigation has been interpreted to require a determination of the claim on the merits, a petitioner must show that his fourth amendment claim was not adequately determined on the merits in the state court system in order to qualify for federal habeas corpus relief.[93] This interpretation is desirable, both in terms of *Stone* and the goal of safeguarding individual federal rights. While avoiding the necessity of costly relitigation, requiring consideration of the claim once on the merits assures that constitutional rights will be adequately protected.

A showing of inadequate state procedure, however, may not always be sufficient to require habeas corpus relief. Since *Stone* literally requires only that the opportunity for full and fair litigation be provided, the standard has been interpreted to preclude habeas corpus relief even where the applicant's claim was never decided on the merits in the state courts. In *O'Berry v. Wainwright,*[94] the Fifth Circuit held that where the state court was faced with a fourth amendment claim but chose to resolve the claim on an independent and adequate state ground,[95] the *Stone* requirement of an opportunity to fully and fairly litigate claims was satisfied so long as the state ground did not interfere with federal rights.[96] Emphasizing that *Stone* required only an opportunity for full and fair litigation,[97] the *O'Berry* court found that petitioner's federal rights had not been denied since he had sufficient opportunity to raise his federal claim in the trial court.[98]

Although *O'Berry* was decided on the adequate and independent state ground basis, the court nevertheless interpreted the full and fair standard in dictum. In cases where the facts underlying the fourth amendment claim were disputed, the *O'Berry* court concluded that full and fair litigation requires consideration of the facts by the trial court and the availabil-

[93] Pulver v. Cunningham, 419 F. Supp. 1221, 1224 (S.D.N.Y. 1976). Cases in which state process was adequate include: Sandovol v. Aaron, 562 F.2d 13 (10th Cir. 1977) (petitioner afforded evidentiary hearing in trial court, claim twice considered on direct review); Jordan v. Estelle, 551 F.2d 612 (5th Cir. 1977) (granting of writ reversed on appeal because the state court findings were extensive enough that the federal district court relied on them in granting writ); Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976) (claim litigated at trial and on collateral challenge to state supreme court); Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976), *cert. denied,* 97 S. Ct. 2633 (1977) (state supreme court completely reviewed claim); Rigsbee v. Parkinson, 545 F.2d 56 (8th Cir. 1976) (fourth amendment claim fully explored in trial court); George v. Blackwell, 537 F.2d 833 (5th Cir. 1976) (claim considered at trial and on direct review).

[94] 546 F.2d 1204 (5th Cir.), *cert. denied,* 97 S. Ct. 2981 (1977).

[95] In *O'Berry,* the defendant claimed that a warrantless search of his car was unconstitutional, but the claim was never raised at his trial or considered on its merits in any state postconviction proceeding. 546 F.2d at 1210. Although the petitioner argued his claim fully before the state appellate court, the claim was dismissed without a hearing due to his failure to comply with Florida's contemporaneous objection rule at the trial court level. O'Berry v. Wainwright, 300 So.2d 740 (Fla. Dist. Ct. App. 1974). Under the contemporaneous objection rule, the petitioner's failure to bring his contentions before the trial court does not preserve the objection for appellate review. *Id., see* note 33 *supra.*

[96] 546 F.2d at 1216-17.

[97] *Id.* at 1217.

[98] *Id.* at 1218.

ity of meaningful appellate review of both the facts and the legal issue.[99] Where the facts underlying the claim are undisputed, as in *O'Berry,* full and fair consideration requires only that the state appellate court give full consideration to the fourth amendment claim.[100] Full and fair consideration therefore required that the defendant be given a full hearing on his claim and the facts underlying the claim at least once at the state level if such a hearing was requested.[101]

By using the adequate and independent state ground as an additional basis for denying relief under *Stone,* the *O'Berry* court ignored the implications of *Fay.*[102] Under *Fay,* petitioner's failure to comply with a procedural rule would bar habeas corpus relief only if the petitioner had deliberately bypassed state procedure.[103] The *O'Berry* court, however, found that the procedural rule which limited state review served a legitimate state interest by conserving state judicial resources and therefore could justifiably prevent petitioner from vindicating his federal rights.[104] Although doubt has recently been cast upon the continued validity of *Fay,*[105] the Fifth Circuit's use of the adequate state ground doctrine to deny habeas corpus relief where the claim was never considered on the merits is an unwarranted extension of *Stone.* If the *O'Berry* rule is followed, the question of the fullness and fairness of the litigation under *Stone* will be avoided whenever an adequate and independent state ground prevents the claim from being heard on the merits.

Harmless error[106] also has been used as an independent basis for deny-

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[99] *Id.* at 1213.

[100] *Id.*

[101] *Id.*

[102] *See* text accompanying notes 32-37 *supra. See generally* Recent Cases, *Circuits Split Over Application of Stone v. Powell's "Opportunity for Full and Fair Litigation,"* 30 VAND. L. REV. 881 (1977). [hereinafter cited as *Circuits Split*].

[103] *See* note 37 *supra. But see* Francis v. Henderson, 425 U.S. 536 (1976). In *O'Berry,* a deliberate bypass could not be found. The defendant gained no tactical advantage by failing to object to the evidence in the trial court. Even if he knowingly relinquished his right to object in the trial court, federal habeas corpus review would still be permissible in the absence of deliberate bypass. Fay v. Noia, 372 U.S. 391 (1963).

[104] 546 F.2d at 1217-18. The *O'Berry* court applied Henry v. Mississippi, 379 U.S. 443 (1965), to the facts of the case. Under *Henry,* a litigant's procedural defaults in state proceedings will prevent him from vindicating his federal rights so long as the procedural rule serves a legitimate state interest. *Id.* at 448-49. The *O'Berry* court's reliance on *Henry* is misplaced if *Fay* is still good law, because *Fay* makes the *Henry* rule inapplicable on habeas corpus review. *See Circuits Split, supra* note 102, at 889.

[105] *See, e.g.,* Francis v. Henderson, 425 U.S. 536 (1976) (in absence of deliberate bypass, defendant's failure to challenge composition of grand jury before trial precluded habeas corpus relief where cause for failure to object and actual prejudice from all-white jury not shown).

[106] Harmless error has no effect on the result of a trial in which it is made. Note, *Harmless Constitutional Error: A Reappraisal,* 83 HARV. L. REV. 814, 815 (1970). Where there is a reasonable possibility that the alleged error might have contributed to the conviction, such an error cannot be considered harmless. Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963). Before constitutional error is held harmless, however, the reviewing Court must declare that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 26

ing habeas corpus relief under *Stone*. In *Cole v. Estelle*,[107] the Fifth Circuit held that *Stone* precluded review of a state court finding that the admission of illegally seized evidence is harmless error.[108] Because the petitioner had received a proper opportunity to litigate his fourth amendment claim in the state courts, habeas corpus relief was denied.[109] The use of harmless error to deny relief in *Cole* is consistent with *Stone*. Unlike the situation in *O'Berry*,[110] the merits of petitioner's claim in *Cole* had been considered in the state system. Because the state appellate court had held the evidence inadmissible, petitioner was afforded a full hearing on the issue. Where state procedure had provided the opportunity for full and fair litigation, the denial of federal habeas corpus relief was justified under *Stone*.

The *Cole* and *O'Berry* courts' emphasis on the opportunity to litigate suggests an alternate interpretation of *Stone* in which the "opportunity to litigate" may not be coextensive with "full and fair litigation." Under this view, the fact that an opportunity to litigate existed would be sufficient to comply with *Stone* even if the opportunity was never exercised. In neither *Cole* nor *O'Berry*, however, did the Fifth Circuit consider whether the "opportunity" mentioned in *Stone* required mere presentation of the claim or the opportunity to have the claim decided on the merits. Because the *O'Berry* court found that the opportunity required by *Stone* had been provided where the claim was never considered on the merits, the "opportunity to litigate" for the Fifth Circuit may require only that the claim be presented.[111] Because there has been no further support for the contention that *Stone* requires only presentation of the claim in the state courts, as opposed to determination on the merits, *O'Berry* may be viewed as a unique case. If *O'Berry* is accepted, then the Fifth Circuit's emphasis on the opportunity required by *Stone* may be properly considered only as a semantic distinction.

The decisions in *O'Berry* and *Cole* illustrate the confusion that *Stone's* full and fair litigation standard has generated. Under the interpretation of

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(1967); *see* Vitello v. Gaughan, 544 F.2d 17 (1st Cir. 1976), *cert. denied*, 97 S. Ct. 1969 (1977).

[107] 548 F.2d 1164 (5th Cir. 1977).

[108] *Id.* at 1165. In *Cole*, evidence which had been introduced at trial was held inadmissible by the state appellate court. Petitioner's robbery conviction was affirmed on the grounds that the admission of the evidence was harmless beyond a reasonable doubt. Cole v. State, 484 S.W.2d 779, 784 (Tex. Crim App. 1972); *see* Moore v. Cowan, No. 76-1859 (6th Cir. Aug. 26, 1977).

[109] 548 F.2d at 1165.

[110] *See* note 95 *supra*.

[111] Other courts have construed the "opportunity" to litigate requirement of *Stone* to concern only the adequacy of the state adjudication process. Accordingly, the cases further indicate that the correlative "full and fair" requirement is fulfilled when the merits of the claim are heard at one level of the state system. Hines v. Auger, 550 F.2d 1094 (8th Cir. 1977) (opportunity did not require that petitioner's claim be decided on the merits on direct review); Denti v. Comm'r of Correctional Serv., 421 F. Supp. 557 (S.D.N.Y. 1976) (opportunity did not require a new fact-finding hearing on direct review where merits of claim considered by trial court). These views of what *Stone* does not require are concerned with the adequacy of the state process. In these cases, the full and fair requirement is fulfilled when the merits of the claim are heard at one level of the state system.

the majority of the federal courts,[112] the opportunity for full and fair litigation is satisfied whenever state procedure has been adequate to deal with petitioner's fourth amendment claim.[113] Because adequacy will depend largely on the facts of each case, the full and fair litigation standard does little to clarify the law of federal habeas corpus with regard to fourth amendment claims. While the *Stone* Court considered a situation where the petitioner presented his claim twice in the state courts and had the claim decided on the merits both times,[114] the *O'Berry* court found that the full and fair standard was satisfied where the petitioner's claim was presented in the state appellate court but never decided on the merits.[115] Although consideration of the claim on the merits at one level of the state system would protect individual rights without unnecessarily wasting judicial resources, full and fair litigation may require a fourth amendment claim to be decided on the merits both at trial and on direct review. The requirements for full and fair litigation must be clarified before *Stone's* effectiveness in limiting the scope of federal habeas corpus and reducing the burden on the federal judiciary can be accurately appraised.[116]

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[112] *See, e.g.*, Simmons v. Clemente, 552 F.2d 65 (2d Cir. 1977).

[113] In Swain v. Pressley, 430 U.S. 372, 381-84 (1977), the United States Supreme Court upheld a District of Columbia post-conviction review statute which limits the habeas corpus jurisdiction of the federal courts in a manner consistent with *Stone*. Modeled after the federal habeas corpus remedy, 28 U.S.C. § 2244 (1970), the District of Columbia statute restricted the scope of federal habeas corpus review of District of Columbia convictions. D.C. CODE § 23-110 (1973). This statute established a form of collateral review to be administered by the District of Columbia Superior Court in the first instance, D.C. CODE § 23-110(a) (1973), and by the District of Columbia Court of Appeals on review. D.C. CODE § 23-110(f) (1973). The provision deprived the federal district court of habeas corpus jurisdiction unless the remedy provided by the statute was "inadequate or ineffective" to test the legality of the detention. D.C. CODE § 23-110(g) (1973). The *Swain* Court, however, declined to consider what a showing of inadequacy or ineffectiveness would entail. 430 U.S. at 383 n.20. Nevertheless, the Court upheld the statute against a challenge that it unconstitutionally suspended the writ of habeas corpus under art. I, § 9 cl.2, of the United States Constitution. Because the federal courts could still hear a petition in those undefined situations where the statutory remedy was "inadequate or ineffective" to consider the issues, the jurisdiction of the federal courts was safeguarded. 430 U.S. at 381. The test of inadequacy or ineffectiveness established by the District of Columbia statute would seem to be commensurate with the finding of inadequacy necessary to show that the opportunity for full and fair litigation had been denied. *See* text accompanying note 91 *supra*. Viewed in this light, the statute involved in *Swain* merely made the adequacy of the new District of Columbia procedure the focal point for granting habeas corpus relief. As such, the statute amounted to little more than a codification of the *Stone* decision.

[114] 428 U.S. at 470-71; *see* text accompanying notes 53-55 *supra*.

[115] 546 F.2d at 1207-08, 1213; *see* note 95 *supra*.

[116] Recently, the number of habeas petitions has been declining, from 9,063 in 1970 to 7,833 in 1976. ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 93-96 (1976). The total of all state and federal prisoner petitions constitutes only 15.2 per cent of the federal district court's workload. *Id.* The extent to which *Stone* will further this decline is speculative at present since a certain number of frivolous petitions can be expected in any event. *See* note 23 *supra*. Nonetheless, the amount of judicial resources expended on each individual petition should decrease. Because *Stone* requires a prima facie showing that the opportunity for full and fair litigation has been denied, a brief examination of the state record

In enunciating the full and fair standard, the Supreme Court may have purposefully made the *Stone* decision vague. Disturbed by the burgeoning workload of the federal district courts, the Supreme Court simply may have been trying to return to the common law scope of the writ[117] by denying habeas corpus relief where the "opportunity for full and fair litigation" has been satisfied. Because *Stone's* restriction on the scope of habeas corpus relief was based on the diminishing value of the exclusionary rule and the increasing costs of its application on collateral attack,[118] the *Stone* rationale cannot be extended logically to restrict habeas corpus claims based on other constitutional rights.[119] The continuing erosion of the exclusionary rule cannot provide an adequate basis for the refusal to entertain claims based on fifth amendment violations.[120] Therefore, by leaving the limitation announced in *Stone* intentionally vague, the Court may be able to adjust the scope of habeas corpus relief by clarifying the full and fair standard and leaving the exclusionary rule rationale intact.

By effectively foreclosing federal remedies for state defendants where full and fair litigation is provided, the *Stone* decision also may be an invitation to the state courts to assume a more active role in protecting individual rights.[121] Chief Justice Burger has suggested that the state courts develop more adequate post-conviction proceedings for their own prisoners, believing that developments in that area will help relieve the burden on the federal district courts and eliminate a major source of friction in federal-state relations.[122] Although improving state remedies may have desirable effects in reducing the federal habeas corpus workload,[123]

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will enable the court to summarily dismiss the petition in many cases without reaching the merits of the claim and necessitating a burdensome evidentiary hearing.

[117] *See* text accompanying notes 3-7 *supra.*

[118] *See* text accompanying notes 58-63 *supra.*

[119] *See* Boyte, *supra* note 68, at 298.

[120] In order to extend *Stone* to cover fifth amendment violations, the Court would first have the difficult task of characterizing the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), as a judicially created tool instead of a personal constitutional right. *See* Boyte, *supra* note 68, at 318 n.116.

[121] *See generally* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977). Some state courts have construed state constitutional provisions to guarantee more protection than their federal constitutional counterparts. *See, e.g.,* State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (consent to custodial search must be tested by waiver standard); People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974) (suspect is entitled to assistance of counsel at any pretrial lineup or photographic identification procedure); State v. Sklar, 317 A.2d 160 (Me. 1974) (right to trial by jury exists even for petty offenses).

[122] Burger, *The State of the Judiciary - 1970,* 56 A.B.A.J. 929, 931 (1970); *see* Hopkins, *Federal Habeas Corpus: Easing the Tension Between State and Federal Courts,* 44 ST. JOHN'S L. REV. 660, 670-71 (1970).

[123] Wright and Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 YALE L.J. 895, 901 n.21 (1966); *see* ABA ADVISORY COMMITTEE ON SENTENCING AND REVIEW, STANDARDS RELATING TO POST-CONVICTION REMEDIES 2 (Approved Draft) 19-20 (1968); Note, *Criminal Procedure - The North Carolina Post-Conviction Hearing Act: A Procedural Snare,* 55 N.C. L. REV. 653, 659 (1977); Note, *State Criminal Procedure and Federal Habeas Corpus,* 80 HARV. L. REV. 422, 428-38 (1966).

the task of protecting federal constitutional rights should not be left to the state courts in the absence of a definitive congressional or judicial policy. Only through the establishment of a firm policy will the Court be able to eliminate the confusion which has resulted from the full and fair litigation requirement announced in *Stone*, and thereby clarify the appropriate scope of federal habeas corpus relief.

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