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Thomas M. Kilbane Jr.

CASENOTES

STONE v. POWELL: SCOPE OF HABEAS CORPUS RESTRICTED

The most notable feature of the historical evolution of federal habeas corpus[1] is the expansion of the substantive scope of the writ, from the common law limitation on the writ to an inquiry into the jurisdiction of the sentencing court, to the recognition that the writ would reach all constitutional claims.[2] In turn, the importance of the writ grew and its impact on the administration of criminal justice intensified as the kinds of claims that could be labeled "constitutional," and thereby cognizable on habeas corpus, became more numerous and less elementary.[3]

Perhaps the culmination of this interplay of expanding federal habeas corpus jurisdiction and expanding constitutional rights was reached in *Kaufman v. United States*,[4] in the context of the recently fully constitutionalized exclusionary rule.[5] In

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1. *Habeas corpus* is a Latin phrase meaning literally:

> 'have the body.' The import is that you have the man before the court in person (and explain by what authority you are detaining him). It is a legal device to give summary relief against illegal restraint of personal liberty. The legal process employed for this purpose is the *writ of habeas corpus*. . . . It has for its object the speedy release by judicial decree, of a person who is illegally restrained of his liberty . . . . It is a writ of inquiry directed to the person in whose custody the prisoner is detained, requiring the custodian to bring the prisoner before the judge or court, that appropriate judgment may be rendered upon judicial inquiry into the alleged unlawful restraint.

R. PERKINS, CRIMINAL LAW AND PROCEDURE 922-23 (4th ed. 1972). The 1948 Judicial Code recodified habeas corpus (28 U.S.C. §§ 2241-2255), without altering its scope. Post-conviction relief for state prisoners by way of habeas corpus is now provided chiefly in 28 U.S.C. § 2254 (1970), while post-conviction relief for federal prisoners by way of a statutory motion to vacate is now provided separately in 28 U.S.C. § 2255 (1970). In United States v. Hayman, 342 U.S. 205 (1952), it was held that the rights afforded under § 2255 remained as broad as those afforded on habeas corpus; *accord*, Davis v. United States, 417 U.S. 333 (1974); Hill v. United States, 368 U.S. 424 (1962); *see* Annot., 41 L. Ed. 2d 1193 (1975). Unless the context otherwise requires, the use of the term "habeas corpus" in this article includes both § 2254 and § 2255.

2. *See* notes 29-46 and accompanying text *infra*.

3. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1040 (1970) [hereinafter cited as *Developments*]. *See generally* H.J. FRIENDLY, *The Bill of Rights as a Code of Criminal Procedure*, in BENCHMARKS 235 (1967).

4. 394 U.S. 217 (1969), *noted in* 38 GEO. WASH. L. REV. 501 (1970).

5. In Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court abrogated the common law rule that the admissibility of evidence is not affected by the illegality of the means by which it is obtained, and held that evidence unlawfully seized by federal officers is inadmissible

Kaufman the Court was confronted with the question of whether a federal prisoner's claim of unconstitutional search and seizure should be cognizable in a post-conviction proceeding under 28 U.S.C. § 2255. Both the Government as respondent and Justice Black in dissent argued that:

> [a]lthough . . . habeas corpus has been thought of broadly as a means of securing redress for the violation of any 'constitutional right', it was true until Mapp v. Ohio . . . that almost every 'constitutional right' referred to in this sense played a central role in assuring that the trial would be a reliable means of testing guilt.[6]

But *Kaufman* squarely held that a federal prisoner's claim that unconstitutionally seized evidence was admitted against him at trial, in violation of the exclusionary rule, was properly subject to collateral review,[7] notwithstanding that this kind of constitutional claim was only recently recognized and was less elementary than other constitutional claims.[8] The *Kaufman* Court also, by way of dictum, confirmed that state prisoners' search-and-seizure claims were cognizable in habeas corpus proceedings under 28 U.S.C. § 2254.[9]

The recently decided case of *Stone v. Powell*[10] expressly rejected both the holding and the dictum of *Kaufman*.[11] Justice Powell, writing for the majority, held that where the state has provided the opportunity for full and fair litigation of a

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in federal criminal prosecutions against the victim of the seizure where timely objection has been made; *accord*, Gouled v. United States, 255 U.S. 298 (1921). In Wolf v. Colorado, 338 U.S. 25, 27-29 (1949), the Court held that the fourth amendment right to be free from unreasonable searches and seizures is implicit in the concept of ordered liberty and thereby enforceable against the states through the fourteenth amendment due process clause, but that the exclusionary rule would not be applied to the states as "an essential ingredient of the right." For a discussion of the status of the rule in the states during this interim period see Annot., 50 A.L.R.2d 531 (1956). In Mapp v. Ohio, 367 U.S. 643, 655, 657 (1961), the exclusionary rule was held to be "an essential part of both the Fourth and Fourteenth Amendments" and declared applicable to the states: "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *See* Annot., 84 A.L.R.2d 959 (1962).

6. 394 U.S. at 236 (Black, J., dissenting).

7. *Id.* at 231.

8. *Developments*, *supra* note 3, at 1040.

9. 394 U.S. at 225-28.

10. 96 S. Ct. 3037 (1976) (a consolidation of two cases, *Stone v. Powell* and *Wolff v. Rice*).

11. 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. To the extent the application of the exclusionary rule in *Kaufman* did not rely upon the supervisory role of this Court over the lower federal courts, . . . the rationale for its application in that context is also rejected.

Id. at 3045 n.16 (1976). The *Kaufman* Court did not rely on the supervisory rationale to any significant extent; *see* notes 53-58 and accompanying text *infra*.

search-and-seizure claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that unconstitutionally seized evidence was admitted against him at trial in violation of the exclusionary rule. The significance of the decision is twofold: not only does it cast doubts upon the continued vitality of the exclusionary rule, but it also signals the end of the expansion of federal habeas corpus jurisdiction, and the beginning of a contraction that will be "of considerable importance to the administration of criminal justice."[12]

FACTS AND PROCEDURAL HISTORY

Powell, respondent in *Stone v. Powell*, was convicted of murder in a California Superior Court. During an argument with the manager of a liquor store, respondent shot and killed the manager's wife. Ten hours later respondent was arrested in Henderson, Nevada, for violation of a local vagrancy ordinance. The arresting officer conducted a search incident to the arrest and discovered the murder weapon. At respondent's murder trial the officer's testimony was introduced, over respondent's objection that the evidence should have been excluded because the vagrancy ordinance was unconstitutional and the arrest and search therefore invalid.

A California District Court of Appeal affirmed, finding it unnecessary to reach the issue of the admissibility of the evidence as it concluded that any error in admission of the testimony was harmless under *Chapman v. California*.[13] Powell's petition for state habeas relief was then denied.

Respondent then petitioned for a writ of federal habeas corpus in federal district court, alleging that he was in custody in violation of the Constitution, and thereby entitled to relief under the federal habeas corpus statute.[14] The court held that the arresting officer had probable cause and that even if the vagrancy ordinance was unconstitutional, the exclusionary rule should not apply to the fruits of an otherwise valid arrest.[15] In the alternative, the court held that any error in admission of the evidence was harmless.

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12. 96 S. Ct. at 3039.

13. 386 U.S. 18 (1967). For an examination of the harmless error question in the search-and-seizure context see Annot., 30 A.L.R.3d 128 (1970).

14. 28 U.S.C. § 2254(a) provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

15. The district court's opinion was unreported.

The court of appeals reversed, holding the vagrancy statute unconstitutional, the arrest and search therefore illegal, and the admission of the evidence therefore erroneous.[16] Exclusion in such a case would deter enactment of such unconstitutional statutes and uphold the imperative of judicial integrity.[17]

Rice, respondent in *Wolff v. Rice*, was convicted in a Nebraska state court of murder, in connection with the bombing death of a policeman. The prosecution relied in part on evidence seized pursuant to a search warrant. Respondent's motion to suppress the evidence seized on the ground that the warrant was invalid was denied. On appeal the Supreme Court of Nebraska upheld the validity of the warrant and affirmed.[18]

Respondent then filed a petition for a writ of habeas corpus[19] in the United States District Court for Nebraska. The court held that the affidavit in support of the search warrant was fatally defective and the search warrant therefore invalid.[20] The court then rejected the state's alternative contention that probable cause justified the search.[21] The court of appeals affirmed on the same reasoning.[22]

Stone and Wolff, the wardens of the state prisons where Powell and Rice respectively were being held, petitioned for certiorari, raising the issue of the scope of federal habeas corpus and the role of the exclusionary rule upon collateral review of cases involving search-and-seizure claims. In the orders granting certiorari the Supreme Court requested that counsel address themselves to the question of the cognizability of search-and-seizure claims on federal habeas corpus.[23] The Court reversed and held 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.[24]

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16. Powell v. Stone, 507 F.2d 93 (9th Cir. 1974).
17. *Id.* at 98. The contention by the appellee that failure to apply the exclusionary rule should not be cognizable on habeas corpus was raised "for the record" and dismissed as "contrary to recent precedent." *Id.* at 97 n.4.
18. State v. Rice, 188 Neb. 728, 199 N.W.2d 480 (1972).
19. *See* note 14 *supra*.
20. Rice v. Wolff, 388 F. Supp. 185, 190-94 (D. Neb. 1974) (citing Whiteley v. Warden, 401 U.S. 560 (1971); Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964)).
21. 388 F. Supp. at 195-202.
22. Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975).
23. Stone v. Powell, Wolff v. Rice, 422 U.S. 1055 (1975).
24. Stone v. Powell, 96 S. Ct. 3037, 3046 (1976).

THE SUPREME COURT OPINION

Historical Background[25]

Though the Constitution provided that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended"[26] and the first grant of federal court jurisdiction authorized federal courts to issue writs of habeas corpus,[27] neither delineated the substantive scope of the writ. The courts adhered to the common law principle that habeas corpus jurisdiction was limited to an inquiry into the jurisdiction of the sentencing court.[28]

The Habeas Corpus Act of 1867[29] extended federal habeas corpus to state prisoners and did provide a statement as to the substantive scope of the writ. The federal courts were authorized "to grant writs in all cases where any person may be restrained of his or her liberty in violation of the Constitution . . . ."[30] Despite the breadth of the language used, courts continued to limit the writ to an inquiry into the jurisdiction of the sentencing court.[31]

However, not long afterwards began a lengthy and fitful expansion of the scope of issues cognizable on habeas. The concept of the lack of jurisdiction of the sentencing tribunal was expanded[32] to include allegations going to the illegality of the sentence,[33] and to the unconstitutionality of the statute under which the petitioner was convicted.[34] A more significant expan-

25. The *Stone* Court's summary of the historical development of federal habeas corpus appears in 96 S. Ct. at 3042-45.

26. U.S. CONST. art. I, § 9.

27. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81 (supplemented by Habeas Corpus Act of 1867, later codified in 28 U.S.C. §§ 2241-2255 (1970)). The writ in the Judiciary Act of 1789 was limited to federal prisoners. *See* Bator, *Finality in Criminal Law and Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 465-66 (1963) [hereinafter cited as Bator].

28. *See, e.g., Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201-03 (1830); *accord, Ex parte* Kearney, 20 U.S. (7 Wheat.) 38 (1812); *see* Bator, *supra* note 27, at 466; *Developments*, *supra* note 3, at 1043.

29. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

30. *Id.*

31. *Developments*, *supra* note 3, at 1049-50:

> The broad language of the 1867 Act was not taken as an invitation to review all federal questions once decided by the state court. The traditional test remained: the petitioner would be released only if the committing court was without jurisdiction. Indeed, under the then current view of fourteenth amendment due process rights, if a state prisoner had been convicted by a court with jurisdiction, he had been accorded the process which was due.

Id. (footnotes omitted). *See* Bator, *supra* note 27, at 479 & n.91, 481-82.

32. Hart, *Foreward: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 104 (1959) [hereinafter cited as Hart].

33. *See, e.g., Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873); *see also* Bator, *supra* note 27, at 467-68; *Developments*, *supra* note 3, at 1046.

34. *See, e.g., Ex parte* Siebold, 100 U.S. 371 (1879); *see also* Bator, *supra* note 27, at 468.

sion was undertaken in *Frank v. Mangum*[35] and realized in *Moore v. Dempsey*.[36] Though scholars differ as to the respective effects of the two decisions,[37] it seems clear that *Frank* stands for the proposition that, if the federal habeas corpus court

> finds that a state tribunal has failed to supply 'corrective process' with respect to the full and fair litigation of federal questions, *whether or not 'jurisdictional,'* in a state criminal proceeding, a court on habeas may appropriately inquire into the merits in order to determine whether the detention is lawful.[38]

It seems equally clear that *Moore* carried the law beyond *Frank*,[39] because the Court in *Moore* proceeded affirmatively to redetermine the petitioner's federal due process claim on the merits.[40] At any rate, the two cases taken together definitely expanded the scope of habeas corpus review: due process claims were now cognizable.[41]

The next stage in the expansion of the substantive scope of habeas corpus was the decision in *Brown v. Allen*.[42] There the Supreme Court affirmed petitioners' convictions but not on the ground that the petitioners had been accorded due process in the state courts, as was held in *Frank v. Mangum*. Rather, the *Brown* Court considered and rejected on the merits the petitioners' constitutional claims, even though those claims had been fully adjudicated in the state courts.[43] Though the Court in *Stone* never made this explicit,[44] *Brown* is viewed by the commentators as standing for the proposition that all constitutional claims were cognizable on federal habeas corpus, regardless of whether the state court had provided due process or had fully

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35. 237 U.S. 309 (1915).
36. 261 U.S. 86 (1923).
37. *Compare* Bator, *supra* note 27, at 489 (*Moore* viewed as reconcilable with *Frank*), *with* Hart, *supra* note 32, at 105 (*Frank* viewed as discredited by *Moore*) *and* Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1329 (1961) (*Frank* viewed as overruled by *Moore*). *See Developments, supra* note 3, at 1050-54.
38. Bator, *supra* note 27, at 486-87. The Court in Frank v. Mangum, 237 U.S. 309, 335 (1915), concluded that the state court had supplied adequate "corrective process" and that therefore there was no need to inquire into the merits.
39. *Developments, supra* note 3, at 1052.
40. *Id.* The Court in Moore v. Dempsey, 261 U.S. 86, 91 (1923), apparently concluded that adequate "corrective process" had not been supplied.
41. *See, e.g., Developments, supra* note 3, at 1115-16.
42. 344 U.S. 443 (1953) (state prisoners' petitions for federal habeas corpus relief on the ground that racial discrimination in grand and petit jury selections rendered their detention "in violation of the Constitution" under 28 U.S.C. § 2254, despite the fact that their claim had been fully litigated in the state courts; both the district court and the court of appeals denied their petitions on that ground, and the Supreme Court granted certiorari).
43. Bator, *supra* note 27, at 500.
44. 96 S. Ct. at 3043.

and fairly considered the claim.[45] The federal habeas corpus court could readjudicate the state prisoner's constitutional claim on the merits, despite the fact that the claim had been fully litigated on the merits in the state courts, because the state court may have misconceived a federal constitutional right[46] or may have applied an erroneous constitutional standard, as was clearly the case in the Nebraska Supreme Court's affirmance of respondent Rice's conviction.[47] *Stone v. Powell* abrogates the holding of *Brown v. Allen* as to fourth amendment claims that were raised and considered on the merits in the state courts.

After reviewing the history of the expansion of issues cognizable on habeas corpus,[48] the Court in *Stone* noted that during this period of expansion, the question of whether exceptions should exist with regard to particular categories of constitutional claims was never considered by the Supreme Court.[49] However, the Court further noted that a majority of the lower federal courts had concluded that fourth amendment claims of federal prisoners were not cognizable under 28 U.S.C. § 2255.[50] The chief reason advanced for this discrimination among constitutional rights, according to the Court,

> was that Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment rights in that claims of illegal search and seizure do not 'impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers.'[51]

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45. *Developments, supra* note 3, at 1057, 1117; Bator, *supra* note 27, at 444; Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 155 (1970) [hereinafter cited as Friendly]; Hart, *supra* note 32, at 106.

46. Brown v. Allen, 344 U.S. at 508 (Frankfurter, J.).

47. State v. Rice, 188 Neb. 728, 199 N.W.2d 480 (1972). One basis of the Nebraska court's affirmance of respondent's conviction was its position that an otherwise defective affidavit for search warrant may be supplemented by additional facts brought out later at a suppression hearing, a position clearly untenable in the light of several explicit Supreme Court decisions. *See* Whiteley v. Warden, 401 U.S. 560, 565 n.8 (1971); Spinelli v. United States, 393 U.S. 410, 413 n.3 (1969); Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964).

48. The Court also discussed, 96 S. Ct. at 3043-44, the further expansion of habeas corpus in Fay v. Noia, 372 U.S. 391 (1963), which held that a state prisoner's failure to appeal to raise a coerced confession claim, motivated by the fear of a possible death sentence on retrial, would not alone bar federal habeas corpus review. The *Fay* decision also confirmed that habeas corpus would lie to reach all constitutional claims. *Id.* at 434. *See also* Townsend v. Sain, 372 U.S. 293 (1963) (a state prisoner's claim of coerced confession not raised on appeal was cognizable on habeas corpus within the guidelines established by the Court).

49. 96 S. Ct. at 3044.

50. *Id.* at 3044 & n.12. *See* Thornton v. United States, 368 F.2d 822, 824 (D.C. Cir. 1966) and cases cited therein.

51. 96 S. Ct. at 3044 (quoting Kaufman v. United States, 394 U.S. 217, 224 (1969)).

The quoted portion of the above argument was raised by the Government in *Kaufman*. The Court, while considering the argument in the majority opinion, rejected it and went on to hold that federal prisoners' claims were cognizable under 28 U.S.C. § 2255.[52] But the chief reason advanced by the *Kaufman* Court for its holding was that, supposedly, this argument had already been rejected in prior Supreme Court decisions extending the federal habeas corpus remedy to state prisoners, and the fact that federal prisoners had already had their day in federal court was no good reason to discriminate between state and federal prisoners here.[53] However, as was made clear in *Kaufman* by Justice Black in dissent and is stressed by the Court in *Stone*, the precedent value of the "string of citations that supposedly settle the question" is most weak;[54] in no case relied on by the majority in *Kaufman* had the issue of the cognizability of search-and-seizure claims on habeas corpus ever been addressed.[55]

However, the *Kaufman* Court also advanced the argument that adequate protection of constitutional rights in a criminal trial requires the continuing availability of a mechanism for relief.[56] The availability of federal collateral remedies functions as a safeguard of the integrity of criminal proceedings before trial, at trial, and on appeal, and assures the preservation of all constitutional rights whether or not related to the integrity of the factfinding process.[57] As Justice Brennan argued in his dissent in *Stone*, the threat of habeas corpus requires that all trial and appellate courts "conduct their proceedings in a manner consistent with established constitutional standards."[58] The Court

52. 394 U.S. at 231.

53. 394 U.S. at 225-26. "Our decisions leave no doubt that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial." *Id.* at 225.

54. *Id.* at 239 & n.7. *See* Stone v. Powell, 96 S. Ct. at 3045 n.15; Note, *Kaufman v. United States*, 38 GEO. WASH. L. REV. 501, 503 & n.18, 505 n.27 (1970).

55. Of the cases cited by the *Kaufman* Court, Mancusi v. De Forte, 392 U.S. 364 (1968), was concerned with the issue of standing to raise a constitutional claim; Carafas v. La Vallee, 391 U.S. 234 (1968), with the issue of custody as a prerequisite to petition for the writ; Warden v. Hayden, 387 U.S. 294 (1967), with the legality of the seizure and the admissibility of the evidence itself; Henry v. Mississippi, 379 U.S. 443 (1965), with the adequate state ground limitation on Supreme Court *appellate* review; in none was the issue of cognizability of search-and-seizure claims addressed. *See also* Linkletter v. Walker, 381 U.S. 618 (1965) (a state prisoner's federal habeas corpus proceeding, holding that the *Mapp* exclusionary rule would not be applied retroactively, without discussing the scope of federal habeas corpus).

56. 394 U.S. at 226.

57. *Id.* at 229.

58. 96 S. Ct. at 3064 (Brennan, J., dissenting) (emphasis omitted) (quoting Desist v. United States, 394 U.S. 244, 262-63 (Harlan, J., dissenting)); *see* Mackey v. United States, 401 U.S. 667, 687 (1971) (Harlan, J., concurring).

in *Stone* never squarely confronted this rationale, although it was argued by respondents in *Stone*, but merely chided respondents for their basic mistrust of state proceedings as fair and competent adjudications of federal constitutional rights. In addition, the Court declared its unwillingness to assume a present general lack of appropriate sensitivity to constitutional rights in the state courts.[59]

Finally, the *Stone* Court acknowledged that, despite the fact that re-evaluation of the scope of federal habeas had been called for from several quarters,[60] the Supreme Court continued to accept jurisdiction in habeas corpus cases in which prisoners claimed that unconstitutionally seized evidence was erroneously admitted against them at trial.[61] But after *Kaufman* the issue of the cognizability of search-and-seizure claims on habeas corpus was not squarely presented to the Court until *Stone v. Powell*, in which the Court concluded that the view espoused in *Kaufman* was unjustified "in the light of the *nature and purpose of the Fourth Amendment exclusionary rule.*"[62]

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59. 96 S. Ct. at 3051 n.35.

60. *E.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring), *criticized in* Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte*, 1975 WIS. L. REV. 484. *See also* Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378 (1964); Bator, *supra* note 27, at 441-62, 502-28; Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A.J. 323 (1971); Friendly, *supra* note 45; Miller & Shepherd, *New Look at an Ancient Writ: Habeas Corpus Reexamined*, 9 U. RICH. L. REV. 49 (1974); Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?*, 21 DE PAUL L. REV. 740 (1972). However, the writ has not been without supporters. *See, e.g.*, Carroll, *Habeas Corpus Reform: Can Habeas Survive the Flood?*, 6 CUM. L. REV. 363 (1975); Chisum, *In Defense of Modern Federal Habeas Corpus for State Prisoners*, 21 DE PAUL L. REV. 682 (1972); Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved*, 21 DE PAUL L. REV. 701 (1972); Wulf, *Limiting Prisoner Access to Habeas Corpus—Assault on the Great Writ*, 40 BROOKLYN L. REV. 253 (1973).

61. 96 S. Ct. at 3045 (citing Lefkowitz v. Newsome, 420 U.S. 283 (1975) (state prisoner's habeas corpus petition granted on ground that narcotics conviction resulting from introduction of evidence seized under an unconstitutionally vague loitering statute was obtained in violation of the Constitution); Cardwell v. Lewis, 417 U.S. 583 (1974) (habeas petition denied on merits); Cady v. Dombrowski, 413 U.S. 433 (1973) (habeas corpus petition denied on merits)). Other cases in which the Court reviewed forth amendment claims raised by habeas corpus petition, not cited by the Court in *Stone*, include: Adams v. Williams, 407 U.S. 143 (1972) (petition denied on merits); Whiteley v. Warden, 401 U.S. 560 (1971) (warrantless arrest without probable cause invalidated subsequent search, evidence seized should have been excluded, petition granted on merits); Chambers v. Maroney, 399 U.S. 42 (1970) (petition denied on merits). *See* Harris v. Nelson, 394 U.S. 286 (1969) (mandamus proceeding to compel lower federal court to permit discovery in state prisoner's federal habeas corpus proceeding on search-and-seizure claim, writ of mandamus granted).

62. 96 S. Ct. at 3045 (emphasis added). The view espoused in *Kaufman* was as follows:

> [T]he effectuation of the Fourth Amendment, as applied to the States through the Fourteenth Amendment, requires the granting

Nature and Purpose of the Exclusionary Rule

The Court's examination of the exclusionary rule began with a summary of its historical evolution.[63] Particular stress was placed on the fact that the "exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment."[64] The Court then proceeded to an evaluation of the principal reasons for application of the exclusionary rule, the normative and the factual justifications.[65]

The Normative Justification

The normative justification for application of the exclusionary rule, variously alluded to as the "imperative of judicial integrity,"[66] proceeds on the basis that courts should not participate in illegal behavior by using unconstitutionally seized evidence.[67] The Court in *Stone* demonstrated persuasively the limited force that this justification has had in past decisions involving the scope of the exclusionary rule,[68] and concluded

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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 since those amendments were held in *Mapp v. Ohio* . . . to require exclusion of such evidence at trial and reversal of conviction upon direct review.

Id. (footnote omitted).

63. *Id.* at 3046-47. *See* note 5 *supra.*

64. *Id.* at 3046. *Accord,* United States v. Janis, 96 S. Ct. 3021, 3035 (1976) (holding that evidence seized by a state criminal law enforcement officer pursuant to a defective warrant is nonetheless admissible in a federal civil tax proceeding).

65. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 666-72 [hereinafter cited as Oaks].

66. 96 S. Ct. at 3047 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)). *Elkins* abrogated the "silver platter" doctrine, whereby, prior to the application of the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961), evidence unconstitutionally seized by state officers could be handed on a "silver platter" to federal authorities for use in federal criminal proceedings, although under Weeks v. United States, 232 U.S. 383 (1914), such evidence would have been inadmissible in federal criminal proceedings had it been unlawfully seized by federal officers.

67. Oaks, *supra* note 65, at 666, 668. *See* Terry v. Ohio, 392 U.S. 1, 13 (1968); Mapp v. Ohio, 367 U.S. 643, 659 (1961); Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting); *id.* at 484-85 (Brandeis, J., dissenting); Weeks v. United States, 232 U.S. 383, 394 (1914).

68. 96 S. Ct. at 3047. The Court noted that, logically extended, the normative justification would require abandonment of: the requirement of timely objection to the admission of illegally seized evidence, Henry v. Mississippi, 379 U.S. 443 (1965); the requirement of standing to object to the admission of illegally seized evidence, Alderman v. United States, 394 U.S. 165 (1969); the proposition that a court has jurisdiction over the defendant's person, though unconstitutionally seized, Frisbie v. Collins, 342 U.S. 519 (1952); the permissible use of illegally seized evidence in grand jury proceedings, United States v. Calandra, 414 U.S. 338 (1974); the permissible use of illegally seized evidence for impeachment purposes, Walder v. United States, 347 U.S. 62 (1954). As Professor Oaks has observed, "[a]lthough the normative justification . . . continues to appear in the rhetoric of Supreme Court

that this justification is limited in the first instance and becomes minimal in the context of habeas corpus review of search-and-seizure claims.[69] As to why it becomes minimal, the only support that the Court offers consists of oblique references to the arguments that the evidence sought to be excluded is typically highly probative, and is frequently seized in good-faith reliance on existing law.[70] As Chief Justice Burger's concurring opinion[71] and Justice White's dissenting opinion[72] demonstrate, both reasons are chiefly arguments against the application at trial of the exclusionary rule in its present form, and are by no means limited to the context of habeas corpus review of search-and-seizure claims; both arguments indicate that hostility to the exclusionary rule itself underlies the decision in the case at hand.

The Factual Justification

The Court then turned to the principal rationale for application of the exclusionary rule, the factual argument that exclusion of illegally seized evidence will deter law enforcement officials from the illegal behavior.[73] Deterrence of fourth amendment violations has been termed the "single and distinct" purpose of the exclusionary rule.[74] The Court placed heavy stress on this and on the fact that in post-*Mapp* decisions the rule is not considered a personal constitutional right,[75] but rather a judicial remedy created to protect fourth amendment rights in general through its deterrent effect.[76] The Court concluded that the rule's application should be limited to those areas where its deterrent purpose would be advanced.[77]

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decisions, it is doubtful that this argument decides cases." Oaks, *supra* note 65, at 669.

69. 96 S. Ct. at 3048.

70. *Id.* at 3047 & n.23.

71. *Id.* at 3052 (Burger, C. J., concurring) (expressing his willingness to limit the scope of the exclusionary rule to cases of "egregious, bad-faith conduct," and perhaps to eliminate the rule altogether). *See* Bivens v. Six Unknown Named Federal Agents, 403 U.S. 388, 411 (1971) (Burger, C. J., dissenting).

72. 96 S. Ct. at 3071 (White, J., dissenting) (expressing his disagreement with the holding of the majority, but indicating his willingness to modify the exclusionary rule so as to prevent its application at trial in cases of seizures made in good-faith reliance on existing law).

73. Oaks, *supra* note 65, at 671.

74. Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 413 (1966).

75. 96 S. Ct. at 3048. For a discussion of the premise that recognition of this principle inevitably leaves the exclusionary rule vulnerable to repeal see Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

76. 96 S. Ct. at 3048 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974), and citing United States v. Peltier, 422 U.S. 531, 538-39 (1975); Terry v. Ohio, 392 U.S. 1, 28-29 (1968); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966); Linkletter v. Walker, 381 U.S. 618, 637 (1965)).

77. "As in the case of any remedial device, 'the application of the rule has been restricted to those areas where its remedial objectives are

The Court then examined decisions in which the deterrence that application of the exclusionary rule would have in a particular context was deemed to be outweighed by the costs that application of the rule would engender. It was this cost/benefits analysis or balancing process that determined that the exclusionary rule would not be applied to grand jury proceedings,[78] to the introduction of illegally seized evidence for impeachment purposes,[79] and with regard to those who were not the victims of the illegal search;[80] the same balancing process was evident in cases considering whether search-and-seizure holdings should be applied retroactively,[81] and in cases addressing the "attenuation-of-the-taint" doctrine.[82] The Court then proceeded to apply this balancing test to the case at hand.

Cost/Benefits Analysis

The question posed by the case at hand was whether state prisoners' claims that unconstitutionally seized evidence was admitted against them at trial, in violation of the fourth and fourteenth amendment exclusionary rule, resulting in their conviction and detention in violation of the Constitution, should be cognizable on federal habeas corpus review; or whether the fact that their claims had been given full and fair consideration in the state courts foreclosed federal habeas corpus review.[83] The answer, according to the Court, was to be determined by balancing "the utility of the exclusionary rule against the costs of

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thought most efficaciously served.'" 96 S. Ct. at 3048 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

78. United States v. Calandra, 414 U.S. 338 (1974).

79. Walder v. United States, 347 U.S. 62 (1954).

80. Brown v. United States, 411 U.S. 223 (1973); Alderman v. United States, 394 U.S. 165 (1969).

81. Desist v. United States, 394 U.S. 244 (1969); Linkletter v. Walker, 381 U.S. 618 (1965).

82. Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, 371 U.S. 471, 491-92 (1963). The same balancing process has also been employed in lower courts in the context of parole revocation hearings, United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970) (illegally obtained evidence held admissible in parole revocation hearings); and in the context of sentencing, United States v. Schipani, 315 F. Supp. 253 (E.D.N.Y. 1970), *aff'd*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971), *noted in* 71 COLUM. L. REV. 1102 (1971) (unlawfully seized evidence inadmissible at trial may be used in sentencing where evidence is reliable and not gathered to influence the sentencing judge). *But see* Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968), *cert. denied*, 397 U.S. 925 (1970) (illegally obtained evidence not admissible for sentencing purposes since wide range of possible sentence may have been the incentive for the illegal seizure). *See* Annot., 22 A.L.R. FED. 856 (1975).

83. 96 S. Ct. at 3049, 3052 & n.36. "Full and fair consideration" means here that the trial court must hold an evidentiary hearing and reach and decide the constitutional claim on the merits. Townsend v. Sain, 372 U.S. 293, 314 (1963).

extending it to collateral review of Fourth Amendment claims."[84]

The Court stressed the costs of applying the exclusionary rule at trial and on appeal: "application of the rule . . . deflects the truthfinding process and often frees the guilty."[85] These costs, said the Court, persist with special force when the exclusionary rule is applied on habeas corpus review.[86] In turn, the benefits that would be achieved by making search-and-seizure claims cognizable on habeas corpus are minimal in both the short run, in terms of additional deterrence, and in the long run, in terms of contributing to an awareness of fourth amendment values.[87] Thus, since costs outweigh benefits, a federal court may not "*apply the exclusionary rule on habeas review*" of a search-and-seizure claim unless there is a showing that the state prisoner was denied the opportunity for full and fair litigation of his claim at trial and on direct review.[88]

In developing the foundation for its holding the Court reviewed the evolution of the writ and determined that constitutional claims have not always been cognizable on habeas corpus. It noted the weak precedent value of the decisions relied on by the *Kaufman* Court. It then established that the exclusionary rule is neither an absolute nor a personal constitutional right, that its function is deterrence, and that its application in a particular context is only mandated where the benefits to be derived thereby are not outweighed by costs. The Court demonstrated how this balancing process operated in various cases,[89] such as *United States v. Calandra*, which held that the exclusionary rule need not be applied in grand jury proceedings.[90] Then the Court performed this balancing process to determine if federal courts must "apply the exclusionary rule on habeas review."[91]

However, in formulating the issue as whether federal courts must "apply the exclusionary rule on habeas review," the Court clearly gave primacy to what was at best a collateral issue in the case at hand. Rather, the principal question presented for

84. 96 S. Ct. at 3049.
85. *Id.* at 3050. *See, e.g.*, Bivens v. Six Unknown Named Federal Agents, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting); People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926); Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-91 (1964) (*but see* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 476 n.598 (1974)); Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 22-23 (1964); Friendly, *supra* note 45, at 161-62; Oaks, *supra* note 65, at 736-55; Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).
86. 96 S. Ct. at 3052.
87. *Id.* at 3051-52. *See* Oaks, *supra* note 65, at 668, 756.
88. 96 S. Ct. at 3052 n.37 (emphasis added).
89. *See* notes 78-82 and accompanying text *supra*.
90. 414 U.S. 338 (1974).
91. 96 S. Ct. at 3052 n.37.

decision was whether a state court's failure to apply the exclusionary rule at trial is a constitutional claim cognizable on federal habeas review. As Justice Brennan cogently argues in dissent, the constitutional cost/benefits analysis approach to this case is completely illogical so long as *Mapp v. Ohio*[92] remains undisturbed;[93] and the majority decision does leave *Mapp* and the exclusionary rule as applied at trial undisturbed.[94] Yet, *Mapp* undoubtedly held that the Constitution requires that state courts exclude unconstitutionally seized evidence from the trial of the victim of the illegal seizure. If the evidence is not excluded and the defendant is convicted and detained, his custody is in violation of the Constitution.[95] But, somehow, he is no longer in custody in violation of the Constitution when he seeks habeas corpus relief on the ground that the trial court, in violation of the Constitution, misapplied constitutional principles and failed to apply the exclusionary rule at trial. There is no question of applying the exclusionary rule on collateral review here, no costs to be weighed against benefits as to whether the rule should be extended to habeas corpus proceedings, because all of the costs of applying the rule should already have been incurred at trial or on direct review if the state court had performed its constitutional duty. As such, these costs were assessed and considered outweighed when the exclusionary rule was fashioned.[96]

Therefore, "shorn of the rhetoric of 'interest balancing' used to obscure what is at stake in this case," what is taking place in *Stone* is the relegation of fourth amendment rights to second-class status for purposes of collateral review,[97] and the contraction of the scope of habeas corpus, marking the end of a period

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92. 367 U.S. 643 (1961).

93. 96 S. Ct. at 3058 (Brennan, J., joined by Marshall, J., dissenting). Justice Brennan continues:

> Under *Mapp*, as a matter of federal constitutional law, a state court *must* exclude evidence from the trial of an individual whose Fourth and Fourteenth Amendment rights were violated by a search or seizure that . . . resulted in the acquisition of that evidence. . . . When a state court admits such evidence, it has committed a *constitutional* error, and unless that error is harmless . . . it follows ineluctably that the defendant has been placed 'in custody in violation of the Constitution' within the comprehension of 28 U.S.C. § 2254. In short, it escapes me as to what logic can support the assertion that the defendant's unconstitutional confinement obtains during the process of direct review . . . but that the unconstitutionality then suddenly dissipates at the moment the claim is asserted in a collateral attack on the conviction.

Id. at 3058-59.

94. 96 S. Ct. at 3051.

95. "The erroneous admission of such evidence is a violation of the Federal Constitution—*Mapp* inexorably means at least this much, or there would be no basis for applying the exclusionary rule in state criminal proceedings . . . ." *Id.* at 3059 (Brennan, J., dissenting).

96. *Id.* at 3060 n.10.

97. *Id.* at 3058, 3061.

of expansion that had been underway for over a hundred years.[98] And it is not unlikely that the reversal of this trend will continue.[99] Though there may be sound reasons and policy for contraction of the scope of habeas corpus,[100] the constitutional interest-balancing rationale employed by the *Stone* Court is inadequate support for the result.

CONCLUSION

That *Stone v. Powell* represents a reversal of the trend of expanding federal habeas corpus jurisdiction is obvious. The contraction of the cognizability of fourth amendment claims to those which did not receive full and fair consideration at trial and on direct review puts habeas corpus jurisdiction in this context back to a pre-*Brown v. Allen*[101] position. As to search-and-seizure claims on federal habeas corpus, the state of the law today is where it was when *Frank v. Mangum*[102] was handed down in 1915. If the state or the federal trial court provides adequate corrective process, that is, a hearing and decision on the merits, for the full and fair litigation of search-and-seizure claims, then those claims are not cognizable on federal habeas corpus, even if there is constitutional error in the adjudication.

The effect that *Stone* will have is uncertain. The possibility of further contraction of federal habeas corpus jurisdiction, especially as to other constitutional claims deemed non-guilt related is certainly present.[103] An even more troubling implication is the possibility that removal of the threat of federal collateral review will lead to a less conscientious application of the exclusionary rule in the state courts and to a watering down of fourth amendment rights.[104] In any event, the importance of the decision, in its reversal of the trend of expanding federal habeas corpus jurisdiction, and in its possible evisceration of the exclusionary rule, is undeniable. One can only hope that future decisions

98. *See* notes 29-46 and accompanying text *supra*.
99. *See* 96 S. Ct. 3061-68 *passim* (Brennan, J., dissenting). Justice Brennan's second ground for dissent (that the majority decision represents a judicial rewriting of the habeas corpus statutes, and is therefore "an arrogation of power committed solely to the Congress,") lacks the devastating logic of his first, because although the basic statutory formulation of habeas corpus jurisdiction has remained unchanged since the Habeas Corpus Act of 1867 (Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385), that jurisdiction has been the subject of a myriad of judicial rewritings. That the *Stone* Court contracts rather than expands the scope of habeas corpus review should not obscure this basic historical fact. *See Developments*, *supra* note 3, at 1269.
100. *See, e.g.*, Bator, *supra* note 27, at 441-62, 502-28; Friendly, *supra* note 45.
101. 344 U.S. 443 (1953).
102. 237 U.S. 309 (1915).
103. 96 S. Ct. at 3062-63 (Brennan, J., dissenting).
104. *Id.* at 3071.

in the areas of habeas corpus and the exclusionary rule will, in the words of Justice Brennan, "at least be accomplished with some modicum of logic and justification not provided today."[105]

Thomas M. Kilbane, Jr.

105. *Id.* at 3070.