Fourth Amendment: A Second-Class Constitutional Right for the Purpose of federal Habeas Corpus: Stone v. Powell
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Abstract

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On February 17, 1968, Lloyd Powell and three persons entered a liquor store in California. Powell became involved in an altercation with the store manager and, in the scuffle, shot and killed the manager's wife. Some ten hours later, an officer of the Henderson, Nevada, police department arrested Powell for violation of the Henderson vagrancy ordinance. The search incident to Powell's arrest produced a thirty-eight caliber revolver with six expended cartridges in the cylinder. Powell was extradited to California and convicted of second-degree murder in the Superior Court of San Bernardino County. On a motion to suppress, the trial court rejected Powell's argument that the evidence should be excluded because of its discovery pursuant to arrest under an unconstitutional vagrancy ordinance. On appeal to the California District Court of Appeals, the conviction was affirmed. The court concluded that the error in admitting the seized evidence was harmless beyond a reasonable doubt. Habeas corpus relief was denied by the California Supreme Court.

In August 1971, Powell filed a petition for habeas corpus relief in the United States District Court for the Northern District of California. He argued that he had been unlawfully arrested because the vagrancy ordinance was unconstitutionally vague and, therefore, that the evidence which led to his conviction should have been excluded. The district court held, however, that even if the statute was unconstitutional, the deterrent purpose of the exclusionary rule did not require the exclusion from

1. The ordinance provides: “Every person is a vagrant who: (1) Loiters or wanders upon the streets or from place to place without apparent reason or business; and (2) who refuses to identify himself and to account for his presence when asked by any police officer to do so; (3) if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.”

2. The court of appeals relied on the harmless error rule of Chapman v. California, 386 U.S. 18, 22 (1967): "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."
evidence of the fruits of a search incident to an otherwise valid arrest. The Court of Appeals for the Ninth Circuit reversed. The court concluded: "the exclusion of the evidence would deter legislators from enacting unconstitutional statutes." The United States Supreme Court reversed and held: "where the State had provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search-and-seizure was introduced at his trial."

1. SCOPE OF FEDERAL HABEAS CORPUS

The Supreme Court in *Powell* noted: "the authority of the federal courts to issue the writ of habeas corpus was established by the Judiciary Act of 1789." The scope of the "Great Writ" was limited to inquiries into the jurisdiction of tribunals passing sentence over prisoners in custody of the United States. In 1867, the writ's scope was expanded to include state prisoners. With this expansion, the federal courts became authorized to give relief where a state or federal prisoner was restrained of liberty in violation of the Constitution, a treaty, or a law of the United States. However, the limitation as to the jurisdiction of the sentencing court persisted; "[a]nd, although the concept of 'jurisdiction' was subjected to considerable strain as the substantive scope of

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3. See *Powell v. Stone*, 507 F.2d 93, 94 (9th Cir. 1974) (discussing the California Court of Appeals holding).
4. See *Powell v. Stone*, 507 F.2d 93 (9th Cir. 1974).
5. Id. at 98.
7. Id. at 3042.
8. Id.
10. See *In re Wood*, 140 U.S. 278 (1891) (no federal habeas corpus review of an adverse decision if all possible state appeals have not been made); *In re Rahrer*, 140 U.S. 545 (1891) (habeas corpus only allowed for determination of jurisdiction of the state court regarding police powers); *Andrews v. Swartz*, 156 U.S. 272 (1895) (mere error in the conduct of a trial cannot be made the basis of jurisdiction in a court of the United States to review proceedings upon writ of habeas corpus); *Pettibone v. Nichols*, 203 U.S. 192 (1906) (state prisoners held in custody of the state, charged with state criminal laws, will be left to stand trial there and may not be discharged by way of habeas corpus).
the writ was expanded, this expansion was limited to only a few classes of cases."

This jurisdictional limitation was relaxed when the Court held in *Frank v. Mangum* that if a habeas corpus court found that the State had failed to provide an adequate corrective process for a full and fair litigation of federal claims, the court could determine whether the detention was lawful, whether or not jurisdictional.

*Brown v. Allen* and *Daniels v. Allen* expanded the scope of the writ still further. These cases involved state prisoners who applied for federal habeas corpus relief, claiming that the trial courts incorrectly denied motions to quash their indictments because of alleged discrimination in the selection of grand jurors. The claimants were found to be entitled to a full reconsideration of the constitutional issues including a hearing in the federal district court, although the state supreme court had rejected these claims.

A final barrier to the broad collateral re-examination of state criminal convictions in federal habeas corpus proceedings was removed in *Fay v. Noia*. *Fay* removed the barrier created by *Daniels*, in which habeas relief was refused because papers were not timely filed. *Fay* narrowly restricted the circumstances in which a federal court may refuse to consider the merits of federal constitutional claims. The Court noted that “[d]iscretion is implicit in the statutory command that the judge . . . ‘dispose of the matter as law and justice require.’”

The question arising after *Fay* was whether there should be collateral re-examination of state criminal convictions by way of habeas corpus for all alleged constitutional violations.

In *Kaufman v. United States*, the Court held that a claim of an unconstitutional search-and-seizure was cognizable in a 28 U.S.C. § 2255 proceeding or modern post-conviction procedure. In the

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11. 96 S.Ct. at 3042. The expansion occurred primarily with regard to convictions based on assertedly unconstitutional statutes or detentions based upon an allegedly illegal sentence. *Id*. n. 8.
16. *Id*. at 438.

Federal custody: remedies on motion attacking sentence. A prisoner in custody
Kaufman case, the Supreme Court for the first time suggested that the scope of federal collateral review included state convictions involving Fourth Amendment violations. However, the instant case rejected the holding and dictum of Kaufman concerning the applicability of the exclusionary rule in federal habeas corpus review of the state court decisions pursuant to 28 U.S.C. § 2254 proceedings.19

The Supreme Court's reasons for rejecting Kaufman are two-fold. First, the Court noted that a substantial majority of the federal courts of appeal, prior to Kaufman, had concluded that collateral review of search-and-seizure claims was inappropriate on motions filed by federal prisoners under the modern post-conviction procedure.20 The primary rationale in support of this contention was that Fourth Amendment violations are different in kind from denials of Fifth and 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."21 Therefore, the Court concluded that because Fourth Amendment violations differ from Fifth and Sixth Amendment violations there should be a re-examination of the scope of federal habeas corpus jurisdiction, and that such review should be permitted only when the petitioner was not accorded a full and fair opportunity to raise and adjudicate the constitutional issue in state court. Second, the Court re-

under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the U.S., or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. A motion for such relief may be made at any time. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the U.S. attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack [emphasis added], the court shall set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

19. 96 S.Ct. at 3045, n. 16. Federal statutory habeas corpus proceedings as it applies to state prisoners is described in 28 U.S.C. § 2254.


evaluated the exclusionary rule, and questioned whether its justification (deterrence of police misconduct) requires collateral review of Fourth Amendment claims.22

2. HISTORY AND SCOPE OF THE EXCLUSIONARY RULE

The Fourth Amendment assures the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."23

In an attempt to implement this guarantee, the judicial system created the exclusionary rule.24 Prior to Weeks v. United States,25 there existed no real barrier to the introduction of evidence obtained in violation of the Fourth Amendment in criminal proceedings.26 Weeks established that a defendant could petition before trial for the return of property secured through an illegal search and seizure conducted by federal authorities.

The next step in the evolution of the exclusionary rule was the exclusion of illegally seized evidence and its fruits from state judicial proceedings.27 Wolf v. Colorado28 applied the Fourth Amendment to the states by interpreting it as "implicit in the concept of ordered liberty and as such enforceable against the states through the Fourteenth Amendment Due Process Clause." But the Court refused to impose the rule as a mandatory method of enforcement by state courts, and left them free to adopt or reject it. Finally, the exclusionary rule was held applicable to the states in Mapp v. Ohio.29

23. U.S. CONST. amend. IV.
24. See, e.g., Mapp v. Ohio, 367 U.S. 643, 648 (1961). "It meant [the exclusionary rule], quite simply, that conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . and that such evidence shall not be used at all.")
26. 96 S.Ct. at 3046. See also Adams v. New York, 192 U.S. 585 (1904). "The fact that papers . . . may have been illegally taken . . . is not a valid objection to their admissibility."); Weeks v. United States, 232 U.S. 383 (1914).
27. See Gouled v. United States, 255 U.S. 298 (1921) (an unconstitutional seizure of papers of the accused creates a duty on the trial court to entertain objection to their admission); cf. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (the Fourth Amendment protects corporations and its officers from compulsory production of corporate books and papers when the information which formed the basis of the warrant was obtained through an unconstitutional search and seizure.
3. WHETHER THE EXCLUSIONARY RULE REQUIRES FEDERAL HABEAS CORPUS RELIEF

Over the years, courts have formulated three justifications for the exclusionary rule. One justification utilized by the courts was that the accused, through the Fourth Amendment, possessed a constitutional right to exclude evidence obtained as a result of unlawful searches and seizures. The second justification was based upon the so-called "judicial integrity theory." This theory required the courts to exclude evidence obtained by the government's "unclean hands" in order that the courts not be a party to a constitutional violation. The third rationale is the deterrence theory, which was designed to remove the incentive for unlawful police searches by excluding evidence from use at trial. As stated in United States v. Calandra:

[The exclusionary rule] . . . is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any reparation comes too late. The rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.

Powell demonstrated that the courts have limited the justification of the exclusionary rule solely to the police deterrence theory. The Court then proceeded to impose further limitations on the rule, stating that the exclusionary rule has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or for the benefit of all persons. It has not been held applicable to grand jury proceedings, nor has it been applied to evidence impeaching the credibil-

33. 96 S.Ct. at 3055.
34. See, e.g., Brown v. United States, 411 U.S. 223 (1973) (no standing to contest admission of evidence seized under defective warrant since there was no legitimate expectation of privacy in the premises searched or the goods seized); Alderman v. United States, 394 U.S. 165 (1969) (Fourth Amendment violation may only be urged by those whose rights were violated by the search itself, and not those aggrieved solely by the introduction of damaging evidence).
ity of a defendant who has testified in his own defense.\textsuperscript{35} A further limitation has been the requirement of standing.\textsuperscript{36}

After delineating the exclusionary rule's historical limitations, the Court applied a cost/benefit analysis and concluded that the costs of the rule were not outweighed by its benefits.\textsuperscript{37} In its analysis, the Court considered the rule's present justification—police deterrence—and ignored the theories of personal private right and judicial integrity.

The so-called costs or disadvantages of the exclusionary rule which the Court noted are:

[F]ocus of the trial and attention of the participants therein is diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. . . . [t]he physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant; and . . . if applied indiscriminately, it may well have the opposite effect of generating disrespect for the law and administration of justice.\textsuperscript{38}

After stating what the Court believed to be the exclusionary rule's severe costs, the Court discussed its possible advantages and deemed them relatively insignificant:

There is no reason to believe, however, that the educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas review of state convictions. Nor is there any reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant.\textsuperscript{39}

\textsuperscript{36} See, e.g., Jones v. United States, 362 U.S. 257, 261 (1960) (standing has been found to exist only when the government attempts to use illegally obtained evidence to incriminate the victim of the illegal search, as distinguished from one who claims prejudice only through the use of the evidence gathered as a consequence of a search directed at someone else).
\textsuperscript{37} 96 S.Ct. at 3051.
\textsuperscript{38} Id. at 3049-50.
\textsuperscript{39} Id. at 3051. The majority also discussed the disadvantages of granting habeas corpus: (1) intrusions on values important to our system of government, such as utilization of limited judicial resources; (2) the necessity of finality in criminal trials; and (3) the minimization of friction between federal and state systems of justice.
According to the Court, therefore, the costs outweighed any benefits derived through collateral review of alleged Fourth Amendment violations.

4. RAMIFICATIONS OF THE DECISION

There are a few areas of uncertainty created by the Court's opinion. Though the Court has limited its opportunity to hear Fourth Amendment claims by state prisoners in federal collateral proceedings, it has not relinquished its right to do so. In explaining the distinction, the Court claimed: "Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both a showing [of a denial of opportunity for full and fair litigation] and a Fourth Amendment violation." 40

In light of the Supreme Court's intention to retain jurisdiction over such claims, an ambiguity arises. What does a "full and fair opportunity to litigate" mean, and how will the Court interpret it?

The Court in Powell cited the case of Townsend v. Sain. 41 In Townsend, the Court described six criteria which would require a federal district court to hold a separate evidentiary hearing in the case of collateral review of a state or federal conviction. It held:

[A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. 42

The Court continued:

[T]here cannot be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant. 43

40. Id. at 3052, n. 37.
42. Id. at 313.
43. Id. at 313-14.
Therefore, Townsend seemed to set forth the general guidelines which determine whether a federal district court should hold a hearing on habeas corpus review for want of a proper hearing on the merits at the state level. However, even in Townsend, which was decided in 1963, the Court noted: “if the prior state hearing occurred in the original trial—for example, on a motion to suppress allegedly unlawful evidence—it will usually be proper to assume that the claim was rejected on the merits.”

Thus, the two requisites for collateral review under Powell are: (1) the showing of a denial of a full and fair opportunity to litigate, which the Court in Townsend assumed will be decided on the merits in a motion to suppress; and (2) a Fourth Amendment violation. It therefore appears likely that there will be little future occasion for collateral review of Fourth Amendment violations involving state prisoners, so long as the state courts rule on the defendant’s motion to suppress.

Justice Brennan, in his lengthy dissent, recognized the costs and benefits derived from the exclusionary rule and its abolishment which the majority of the Court did not figure into their original equation. First, Brennan stated: “The denigration of constitutional guarantees and constitutionally mandated procedures, relegated by the Court to the status of mere utilitarian tools, must appall citizens taught to expect judicial respect.” To do away with federal habeas relief by using the exclusionary rule’s supposed sole justification, police deterrence, and then merely weighing costs versus benefits, such as the majority of the Court has done, defeats important constitutional safeguards.

Second, “[c]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the

44. Id. at 314.
45. 96 S.Ct. at 3071-72, where White, J., in his dissenting opinion, pointed out: Two confederates in crime, Smith and Jones, are tried separately for a state crime and convicted on the very same evidence, including evidence seized incident to their arrest allegedly made without probable cause. . . . Their convictions are affirmed by the State’s highest court. Smith does not petition for certiorari [but Jones does and is granted it]. His conviction is reversed]. . . . Smith then files for petition for federal habeas corpus. He makes no claim that he did not have a full and fair hearing in the state courts, but asserts his Fourth Amendment claim had been erroneously decided and that he is being held in violation of the Federal Constitution. . . . Smith’s petition would be dismissed, and he would spend his life in prison while his colleague is a free man.
46. Id. at 3065.
fullest opportunity for plenary federal review."\(^{47}\)

Third, he emphasized "the need for federal review of federal constitutional claims because of the Supremacy Clause of the Constitution."\(^{48}\)

Fourth, judicial integrity, a rationale which the majority de-emphasized as a justification for the exclusionary rule, should be considered a primary rationale, according to Brennan. Citing Justice Holmes, Brennan said: "It is . . . a less evil that some criminals should escape than that the government should play an ignoble part."\(^{49}\) Moreover, Brennan cited \textit{Brown v. Allen}\(^{50}\) which noted: "it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon state power and may be invoked by those morally unworthy."

Fifth, Brennan dealt with the majority's concern with comity and friction between federal and state tribunals. He pointed out that in the interest of comity, to lessen federal-state friction, collateral review requires exhaustion of state remedies and not lack of power.\(^{51}\) Therefore, collateral review dictates that federal habeas corpus review be delayed pending initial state court determination. But the Court noted: "[D]elay only was the price, else a rule of timing would become a rule circumscribing the power of the federal courts on habeas, in defiance of unmistakable congressional intent."\(^{52}\)

Finally, Brennan demonstrated how the majority's opinion lacks a constitutional basis for denying federal habeas corpus relief to state prisoners when Fourth Amendment violations are involved. He writes:

\begin{quote}
The Court adheres to the holding of \textit{Mapp} that the Constitution required exclusion of the evidence admitted at respondents' trials. However, the Court holds that the Constitution does not require that respondents be accorded habeas relief if they were accorded an opportunity for full and fair litigation of the Fourth Amendment claims in state courts. Yet once the Constitution was interpreted by \textit{Mapp} to require exclusion of certain evidence at trial, the Constitution became irrelevant to the manner in which the constitutional right was to be enforced in the federal
\end{quote}

\begin{footnotes}
48. 96 S.Ct. at 3067.
51. 96 S.Ct. at 3060.
\end{footnotes}
courts; that inquiry is only a matter of respecting Congress’ allocation of federal judicial power between this Court’s appellate jurisdiction and a federal district court’s habeas jurisdiction. Indeed, by conceding that today’s decision does not mean that the federal district court lacks jurisdiction over respondents’ claims, the Court admits that respondents have sufficiently alleged that they are in custody in violation of the Constitution within the meaning of § 2254 and that there is no constitutional rationale for today’s holding.53

Justice Brennan concluded by stating:

[A]s a practical matter the only result of today’s holding will be that denials by the state prisoners of violations of their Fourth Amendment rights will go unreviewed by a federal tribunal. I fear that the same treatment ultimately will be accorded state prisoners’ claims of violations of other constitutional rights; thus, the potential ramifications of this case for federal habeas jurisdiction generally are ominous.54

5. CONCLUSION

The holding presented in Stone v. Powell can either become as frightening as Justice Brennan perceives or as merely procedural as Justice Powell portrays.55 Whether personal rights and liberties are to be curtailed in the future or whether state courts will sufficiently uphold Fourth Amendment constitutional rights will be determined only in future court decisions.

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53. 96 S.Ct. at 3084.
54. 96 S.Ct. at 3071 (Brennan, J., dissenting).
55. “In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review . . . we emphasize the minimal utility of the rule.” 96 S.Ct. at 3052, n. 37.