Louisiana Law Review

Volume 37 | Number 1
Fall 1976

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THE FOURTH AMENDMENT EXCLUSIONARY RULE IN FEDERAL HABEAS CORPUS

In two separate state proceedings, respondents' objections to evidence allegedly obtained by unlawful searches and seizures were overruled at trial and unsuccessfully argued on appeal.[1] Respondents subsequently petitioned for federal writs of habeas corpus[2] and secured relief in the Eighth and Ninth Circuits.[3] The Supreme Court reversed and *held* that when a state has provided an opportunity for full and fair litigation of a fourth amendment claim, federal courts may not grant federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial. *Stone v. Powell*, 96 S. Ct. 3037 (1976).

The writ of habeas corpus, developed early in common law[4] and provided for in the United States Constitution,[5] was only available to federal prisoners[6] until 1867 when Congress extended the remedy to state applicants.[7] Originally, the Supreme Court limited the writ to those petitioners who questioned the jurisdictional competence of the trial court;[8] but, in 1915,[9] the Court indicated that relief for grounds other than lack of jurisdiction would be appropriate upon a finding that the state had failed to provide an adequate "corrective process."[10] The 1953 case of *Brown v. Allen*[11] further broadened habeas corpus to allow federal review of state fact-finding even when the state corrective procedures were adequate. Final

1. The United States Supreme Court consolidated *People v. Powell* (Cal. Dist. Ct. of App., Oct. 1969) and *State v. Rice*, 788 Neb. 728, 199 N.W.2d 480 (1972), in the instant case, *Stone v. Powell*, 96 S. Ct. 3037 (1976).

2. Powell v. Stone (N.D. Cal. 1971) (relief denied); Rice v. Wolff, 388 F. Supp. 185 (D. Neb. 1974) (relief granted).

3. Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975) (affirming the district court's grant of relief); Powell v. Stone, 507 F.2d 93 (9th Cir. 1974) (reversing the district court's denial of relief).

4. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 444 & n.6 (1963).

5. U.S. CONST. art. I, § 9.

6. *E.g.*, *Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845).

7. The Habeas Corpus Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. For a discussion of the Act see Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965).

8. *E.g.*, Bergemann v. Backer, 157 U.S. 655 (1895).

9. Frank v. Mangum, 237 U.S. 309 (1915).

10. *Id.* at 335. Bator, *supra* note 4, at 489 n.131. The new grounds included *any* constitutional violation where a state failed to provide an adequate remedy. *E.g.*, *Ex parte* Hawk, 321 U.S. 114 (1944) (issue was the effective assistance of counsel).

11. 344 U.S. 443 (1953).

expansion by the Court in 1963 eliminated the requirement that petitioners exhaust state remedies prior to applying to the federal courts[12] and further expanded the fact-finding powers of the federal district courts.[13] But recently the Court has departed from this expansive trend and has limited the scope of habeas corpus.[14]

Although the fourth amendment exclusionary rule was first applied to the federal courts in 1914,[15] it was not imposed upon the states until 1961, in *Mapp v. Ohio.*[16] The Court justified this rule by stressing the "imperative of judicial integrity" and the need to deter improper police conduct.[17] Subsequent decisions have restricted the rule's application by balancing these justifications against competing interests.[18]

Every new fourteenth amendment right judicially formulated for the protection of criminal defendants has furnished new grounds for habeas corpus relief,[19] and the exclusionary rule, prior to the instant case, was no exception. The Court enforced the rule in habeas actions on numerous occasions without discussing the issue of whether federal habeas corpus is an appropriate forum for litigating violations of the fourth amendment.[20]

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12. Fay v. Noia, 372 U.S. 391 (1963).

13. Townsend v. Sain, 372 U.S. 293 (1963). Prior to this decision, where the state court had held an evidentiary hearing, federal district courts were restricted to a review of undisputed facts from the state court's record. *Townsend* made evidentiary hearings mandatory where the state court's evidentiary hearing was not found to be full and fair. The requirements of *Townsend* and *Fay* were later embodied in 28 U.S.C. § 2254.

14. Francis v. Henderson, 96 S. Ct. 1708 (1976) (when a state prisoner fails to challenge timely the composition of the grand jury, federal courts will not grant habeas corpus relief without a showing of cause and actual prejudice); Estelle v. Williams, 96 S. Ct. 1691 (1976) (when a state prisoner is tried in prison garb and fails to object timely, no habeas corpus relief will be granted absent a showing that the state compelled his attire).

15. Weeks v. United States, 232 U.S. 383 (1914).

16. 367 U.S. 643 (1961).

17. *Id.* at 658-59; Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 668-69 (1970).

18. *E.g.*, United States v. Calandra, 414 U.S. 338 (1974) (grand jury tradition of openness outweighed the usefulness of the rule in grand jury proceedings); Alderman v. United States, 394 U.S. 165 (1969) (state's interest in prosecuting crime necessitates standing requirements for the use of the rule).

19. Meador, *Accommodating State Criminal Procedure and Federal Postconviction Review*, 50 A.B.A.J. 928 (1964). The Supreme Court imposed "the rules of the fourth, fifth, sixth, and eighth amendments concerning unreasonable searches and seizures, double jeopardy, speedy trial, compulsory self-incrimination, jury trial in criminal cases, confrontation of adverse witnesses, assistance of counsel, and cruel and unusual punishment, upon state criminal trials. . . . The result of these developments has been a vast expansion of the claims of error in criminal cases for which a resourceful defense lawyer can find a constitutional basis." Friendly, *Is Innocence*

Eventually, in *Kaufman v. United States*,[21] the Supreme Court confronted this issue and held that failure to apply the exclusionary rule properly at trial provided a basis for habeas corpus relief for federal prisoners[22] and, in dictum, indicated that the same was true for state applicants.[23] Several recent opinions have expressed disfavor with *Kaufman*'s approach.[24]

In the instant case, the Supreme Court examined the evolution of habeas corpus, particularly noting the expanded use of the writ for the review of alleged illegal searches and seizures.[25] The majority[26] stated that this expansion had occurred without a full evaluation of whether such a remedy should be available for fourth amendment claims and that the *Kaufman* analysis thus should be reconsidered in light of the nature and purpose of the exclusionary rule.[27] The Court concluded that the rule is not a personal right, but a judicially formulated device for the purpose of deterring illegal police conduct.[28] Following previous decisions which balanced various costs and benefits to determine the most effective areas in which to apply the rule, the Court decided that in a habeas corpus proceeding the benefits of the rule are outweighed by the costs of applying it.[29]

Irrelevant? Collateral Attack on Criminal Judgments, 38 U. CHI. L. REV. 142, 155-56 (1971).

20. *E.g.*, Mancusi v. Deforte, 392 U.S. 364 (1968); Carafas v. Lavalle, 391 U.S. 234 (1968).

21. 394 U.S. 217 (1969).

22. *Kaufman* involved a petition pursuant to 28 U.S.C. § 2255, the post-conviction remedy available to federal prisoners. The grounds for relief under § 2255 include those grounds found in 28 U.S.C. § 2254 (habeas corpus relief for state prisoners).

23. 394 U.S. at 225.

24. Justice Harlan stated that this expansion of habeas corpus jurisdiction "constitutes an unsound extension of the historic scope of the writ. . ." Mackey v. United States, 401 U.S. 667, 684-85 (1971); Desist v. United States, 394 U.S. 244, 260-62 (1969) (Harlan, J., dissenting). For a detailed discussion see the concurring opinion of Justice Powell in *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973).

25. Stone v. Powell, 96 S. Ct. 3037, 3042-45 (1976).

26. The majority opinion was delivered by Justice Powell with Justices Stewart, Blackmun, Rehnquist, and Stevens concurring. A separate concurring opinion was issued by Chief Justice Burger. The dissenting opinions were delivered by Justices Brennan and White with Justice Marshall concurring in Brennan's dissent.

27. *Stone* "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 . . . [the] court over the lower federal courts, . . . the rationale for its application in that context is also rejected." 96 S. Ct. at 3045 n.16.

28. *Id.* at 3048.

29. *Id.* at 3048-52. Commenting on the costs of applying the rule, the Court found

The *Stone* decision reveals that there is a point in the criminal justice process at which the right to invoke the exclusionary rule detaches.[30] The majority maintains that this detachment occurs sometime prior to federal collateral review and justifies this approach on the basis of the rule's minimal deterrent value in habeas corpus.[31] The decision leaves the possibility that, upon a finding that the exclusionary rule does not deter police misconduct, it may be further modified or even abandoned.[32]

The decision also creates uncertainties regarding the future of habeas corpus. One reasonable explanation of *Stone* is that the Supreme Court was motivated by policy considerations to abstain on behalf of the federal system from relitigating fourth amendment claims when there has been full and fair state adjudication.[33] If the only policy with which the Court was concerned is a desire to limit the reach of the fourth amendment, the decision will have little effect upon the relationship of habeas corpus with other constitutional rights. If, instead, the majority was also relying on an increasing confidence

that "the focus of the trial, and the attention of the participants therein, is diverted from the ultimate question of guilt or innocence. . . . Moreover, the physical evidence sought to be excluded is typically reliable. . . . Application of the rule thus deflects the truthfinding process and often frees the guilty." The Court also found that the benefit of deterrence ". . . would [not] be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus. . . ." *Id.* at 3049-50.

30. *Cf.* Kirby v. Illinois, 406 U.S. 682 (1972) (the Court evaluated at what point the need for counsel became critical and determined that the right to counsel *attaches* at the initiation of the prosecution).

31. 96 S. Ct. at 3049-50.

32. The Court specifically stated that there is no evidence that the exclusionary rule has any deterrent effect upon the police, but for the purposes of this decision, the deterrent effect would be assumed. *Id.* at 3051. Chief Justice Burger's concurring opinion expresses disfavor with this assumption referring to it as "speculative and unsubstantiated. . ." *Id.* at 3054. It would appear that the presentation of convincing evidence that there is no deterrent effect would rebut this presumption.

33. In a footnote, the majority states "we hold only that a federal court *need not* apply the exclusionary rule on habeas review of a Fourth Amendment claim. . ." *Id.* at 3052 n.37. Read in isolation, this would appear to indicate that the district courts would still have discretion in deciding whether to entertain such claims; but, read in context, the language suggests that the Supreme Court, and not the lower federal courts, has exercised its discretion in abstaining on behalf of the entire federal system. Another recent decision specifically uses the abstention approach in refusing to review claims of improper jury composition when the defendant failed to object timely. The Court stated, "There can be no question of a federal district court's power to entertain an application for a writ of habeas corpus in a case such as this . . . This court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power." Francis v. Henderson, 96 S. Ct. 1708, 1710 (1976).

in the state courts[34] or attempting to arrest the recent increase in the federal caseload,[35] the decision may be an initial move to limit the entire area of habeas corpus.

An alternative interpretation of *Stone* is that the Court was declaring that since the respondents received full and fair litigation in state courts, they were not being held in violation of the Constitution,[36] which is a requirement for the federal courts to grant writs of habeas corpus.[37] If this interpretation is correct, state prisoners may lack a cause of action for habeas corpus petitions based on a formidable array of fifth[38] and sixth[39] amendment rights.[40]

Stone does not forbid federal habeas corpus review of fourth amendment claims; however, such review is permissible only upon a showing that a state prisoner was denied an opportunity for full and fair litigation of his claim in state court.[41] Although the meaning of "full and fair litigation" is

34. *See* 96 S. Ct. at 3051 n.35. One writer considers the previous lack of confidence in state courts to have been the basis for the expansion of habeas corpus. Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 466-72 (1960).

35. Bailey, *Federal Habeas Corpus—Old Writ, New Role: An Overhaul for State Criminal Justice*, 45 B. U. L. REV. 161, 163-64 (1965).

36. The argument for this position is that the prisoner is legally detained if held pursuant to sentence of a competent court, even though there may be an error of law or fact, since the prisoner has been accorded procedural due process. Sunal v. Large, 332 U.S. 174, 182 (1947); Bator, *supra* note 4, at 444-62; Friendly, *supra* note 19, at 152.

37. 28 U.S.C. § 2254(a) provides: "The Supreme Court, a circuit justice, 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." Justice Brennan, in dissent, proposes that the absence of this requirement would remove jurisdiction from the federal courts. The better view is that jurisdiction remains vested in the federal courts, but instead, the state prisoner loses his cause of action.

38. *E.g.*, Michigan v. Tucker, 417 U.S. 433, 446-47 (1974) (right to *Miranda* warnings); Fuller v. Alaska, 393 U.S. 80, 81 (1968) (violation of the Federal Communications Act prohibiting wiretapping); Tehan v. Shott, 382 U.S. 406, 416 (1966) (prohibition of comments by the judge or prosecutor on the failure of the defendant to testify).

39. *E.g.*, Destefeno v. Woods, 392 U.S. 631, 633 (1968) (right to jury trial); Stovall v. Denno, 388 U.S. 293, 297 (1967) (right to counsel at line-ups and show-ups).

40. This interpretation of *Stone* would appear to directly affect these rights. They have been restricted in their application through the process of balancing and exist in great part for the purpose of deterrence. *See* Williams v. United States, 401 U.S. 646, 655 & n.7 (1971).

41. 96 S. Ct. at 3052 n.37.

not well developed in the decision,[42] the Court did state that there must be an opportunity to litigate fourth amendment claims at trial and on direct review.[43] The decision does not indicate whether "full and fair" requires a state appeal of right[44] and also leaves unclear whether the states must provide *any* form of habeas corpus relief.[45]

Closely related to which state forums are required is the question of what procedures will be considered adequate within these forums.[46] The Court has previously required that state defendants be provided the representation of counsel at trial[47] and on appeal of right;[48] but whether the Court will also require the availability of counsel in state habeas corpus is uncertain.[49] Also, where a state prisoner was not permitted to raise his claim at trial due to his failure to observe state procedural requirements, it would appear the petitioner would be precluded from federal habeas corpus as long as an opportunity to raise the claim was provided and the procedural requirement served a legitimate state purpose.[50]

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42. *Stone* does not rely on the pre-*Brown v. Allen* decisions for the meaning of "full and fair," although the opinion does refer to these cases in its historical summary. These decisions found a lack of full and fair litigation where there was no state remedy: *Mooney v. Holohan*, 294 U.S. 103 (1935), where the trial was a sham and the state failed to correct this wrong; *Moore v. Dempsey*, 261 U.S. 86 (1923), where the state failed to judge the issue because it was not raised in the proper forum; *House v. Mayo*, 324 U.S. 42 (1945); and where the state practices denied state habeas corpus relief, *White v. Ragen*, 324 U.S. 760 (1945).

43. 96 S. Ct. at 3052 n.37. *Direct review* should include, in addition to appeal, the Supreme Court's writ of certiorari. It would also appear possible that the writ might be granted to consider claims arising in state habeas corpus proceedings.

44. If the Court requires that the appeal be of right, then the decision will have a significant impact in Louisiana, since appeal from certain convictions is discretionary. LA. CONST. art. V, § 5 (appeal for imprisonment of six months or less).

45. For a discussion of the remedies provided by the states see Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 466-72 (1960).

46. In the pre-*Brown* era, the Court granted relief only if the procedures were so inadequate as to deny due process. *E.g.*, Moore v. Dempsey, 261 U.S. 86 (1923).

47. Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel at trial extends to all cases where the defendant is imprisoned).

48. Douglas v. California, 372 U.S. 353 (1963). *See* Ross v. Moffitt, 417 U.S. 600 (1974) (constitution does not require appointed counsel on discretionary appeals where there has been a previous appeal of right).

49. This requirement would have little effect upon Louisiana, since the state supreme court has held that counsel must be appointed for all habeas corpus proceedings where there is an evidentiary hearing. Cherry v. Cormier, 281 So. 2d 99, 102 (La. 1973). For a discussion of this issue see Note, 19 MIAMI L. REV. 432, 444 (1965).

50. *See* Francis v. Henderson, 96 S. Ct. 1708 (1976).

An alternative to fourth amendment claims which might provide access to federal courts is the allegation of incompetent counsel.[51] The present constitutional standard requires a showing of "gross error" and "serious dereliction" in order for relief to be granted on this ground.[52] Notwithstanding these requirements, effective counsel is an expanding concept which adapts to new circumstances.[53] Although courts have consistently held that an attorney's failure to raise or properly argue an issue is not grounds for granting defendant relief for incompetent counsel,[54] *Stone* creates a new circumstance which may force the courts to reconsider the counsel's participation in the forfeiture of the defendant's rights.[55]

In Louisiana, *state* habeas corpus proceedings should continue to provide state prisoners with a cause of action for unreasonable searches and seizures. The first basis for this belief lies in Article I, Section 5 of the Louisiana Constitution which was clearly an attempt to expand fourth amendment rights,[56] and in which the exclusionary rule is implicitly guaranteed.[57] The Louisiana provision grants standing to raise the claim of unreasonable search and seizure in the "appropriate court"[58] and the manner in which the Louisiana Supreme Court interprets this language will determine the outcome of the prisoner's action on state constitutional grounds.[59]

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51. *See, e.g.*, Francis v. Henderson, 96 S. Ct. 1708 (1976); Estelle v. Williams, 96 S. Ct. 1691 (1976); McMann v. Richardson, 397 U.S. 759, 770-71 (1970).

52. Tollett v. Henderson, 411 U.S. 258 (1973); McMann v. Richardson, 397 U.S. 759 (1970). Many of the lower courts have denied relief for claims which failed to show that the trial was a "mockery of justice." Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 & n.76 (1973).

53. *E.g.*, Bastida v. Braniff, 444 F.2d 396 (5th Cir. 1971); Hintz v. Beto, 379 F.2d 937 (5th Cir. 1967).

54. "Appellate courts have been so willing to excuse questionable decisions and omissions as 'trial tactics' that almost any error can be ignored under that rubric." Bazelon, *supra* note 52, at 38.

55. The preclusion of the constitutional issue from habeas corpus makes it absolutely essential that the attorney raise constitutional issues at the appropriate time and argue them properly.

56. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 23, 24 (1973); Jenkins, *Declaration of Rights*, 21 LOYOLA L. REV. 9, 29 n.92 (1975).

57. Hargrave, *supra* note 56, at 22.

58. LA. CONST. art. I, § 5 provides: "[A]ny person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court."

59. By concluding that the state habeas corpus proceeding is not the "appropriate court," the Louisiana Supreme Court could preclude state prisoners' claims based on this provision.

The second basis for this argument results from the wording of the state habeas corpus statute, which provides a cause of action where the state prisoner "was convicted without due process of law."[60] While the federal statute speaks in terms of the prisoner's present status,[61] the Louisiana provision refers to what has transpired in the past. It would appear analytically sound to distinguish the two statutes by concluding that the state prisoner *was* convicted in violation of due process, but having received "full and fair litigation," *is not* being held in violation of the Constitution.

Stone, in conjunction with other recent decisions of the Court,[62] erodes the substantive content of the exclusionary rule to a point where the Court may be on the verge of complete abandonment of the rule as a constitutional requirement,[63] despite the clear language of *Mapp*,[64] and marks a significant departure from prior jurisprudence concerning the writ of habeas corpus. In so doing, the Court left unanswered serious questions relating to the adjudication of fourth amendment claims. Such confusion creates potential areas of litigation and uncertainty concerning the States' new role.[65] *Stone* clearly signals a retreat in the area of individual rights but where this retreat will cease is not indicated.

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60. LA. CODE CRIM. P. art. 362(9).

61. 28 U.S.C. § 2254 provides: ". . . on the ground that he *is* in custody in violation of the Constitution . . ." (emphasis added).

62. See Justice Brennan's dissent in *United States v. Martinez-Fuerte*, 96 S. Ct. 3074, 3087 (1976), and the cases cited therein.

63. See note 31, *supra*.

64. 367 U.S. 643, 655 (1961).

65. See text at notes 42-49, *supra*, where there is a discussion of the confusion over the necessary state forums and the procedures to be followed in those forums.