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The Unpredictable Writ - The Evolution of Habeas Corpus

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The Unpredictable Writ—The Evolution of Habeas Corpus

Congress has provided access to federal courts for state and federal prisioners who contest the constitutionality or legality of their convictions.[1] Section 2254 of Title 28 pertaining to state

1. 28 U.S.C. § 2254 (1971) 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."
   b. prevents habeas consideration unless the state court remedies are exhausted, unavailable, or existing circumstances render them ineffective to protect the prisoner rights.
   c. requires the applicant to exhaust "any available procedure" within the state.
   d. states that any written factual determinations on the merits by the state court shall be presumed correct unless:
      1. the factual merits were not resolved,
      2. the state factfinding procedure was not adequate for a full and fair hearing,
      3. all material facts were not fully developed in the state court,
      4. the state court was without subject matter or personal jurisdiction,
      5. the state court failed to appoint counsel for an indigent applicant,
      6. the applicant did not actually have a full, fair and adequate hearing,
      7. a denial of due process occurred at the state hearing, or
      8. the state court record pertaining to the sufficiency of the evidence supporting the factual determination is missing *and* the federal court concludes, after reviewing the whole record, that the factual determination is not fairly supported by the record.
   d. an evidentiary federal hearing is mandated at which the applicant has the burden of proving "by convincing evidence" that the state factual determination was wrong. However, if any of the 8 exceptions are proved by the applicant, or manifestly appear, or are admitted by the respondent, this burden does not apply.
   e. provides for the procedure whereby the state record shall be produced for the federal court and subsection
   f. renders such records admissible in the federal court.

28 U.S.C. § 2255 (1971) provides: "A prisoner in custody under sentence of a [federal court] claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, 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 [sentencing court] to vacate, set aside, or correct the sentence." This statute also allows the motion to be made at any time and to be served on the United States attorney. Unless the motion is patently without merit, a hearing must occur and if the motion is granted the

prisoners, clearly refers to this remedy as habeas corpus and section 2255 has been construed as the statutory equivalent of habeas corpus by the United States Supreme Court.[2] Basically the remedy of habeas corpus is invoked whenever any prisoner alleges that he is in custody in violation of the United States Constitution or federal law.[3] However, section 2255, relating to federal prisoners, specifies additional grounds for invoking habeas corpus relief; imposition of excessive sentence, lack of jurisdiction by the sentencing court, or sentencing which gives rise to collateral attack.[4] All of these grounds have traditionally been construed very broadly in order to maximize the effectiveness of the "Great Writ." As Mr. Justice Fortas observed, "Its province, shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judical inquiry may be had into the legality of the detention of a person.[5]

The constitutional right to be secure from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution has been zealously enforced by requiring both state and federal courts to exclude all fruits of an unlawful search and seizure.[6] Because of the importance ascribed to the Fourth Amendment as evidenced by the extreme

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judge shall vacate the judgment, discharge or resentence the prisoner, or grant a new trial. The prisoner need not be produced at hearing and the federal court need not entertain successive identical motions. Further, the ruling may be appealed as a habeas application could and no other habeas corpus applications shall be entertained unless this 2255 motion is shown to be adequate or ineffective. The effect of § 2255 was aptly stated in Thornton v. United States, 368 F.2d 822, 825 (D.C. Cir. 1966): "The extent of relief and review available on a § 2255 motion is the same as that open to a petitioner seeking vindication of his rights by the habeas corpus route. The only difference is that Congress enacted § 2255 in the 1948 Judical Code in order to provide a less cumbersome remedy, through consideration by the sentencing court rather than the district of confinement." Kaufman v. United States, 394 U.S. 217, 221 (1969), stated "Section 2255 revised the procedure by which federal prisoners are to seek such relief but did not in any respect cut back the scope of the writ."

2. Sanders v. United States, 373 U.S. 1, 14: "As we said just last Term, 'it conclusively appears from the historic context in which §2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined.' " (Citing from Hill v. United States, 368 U.S. 424, 427).

3. *See* note 1 *supra*.

4. *Id.*

5. Carafas v. LaVallee, 391 U.S. 234, 238 (1968). *See* Peyton v. Rowe, 391 U.S. 54 (1968). In accord is Fay v. Noia 372 U.S. 391, 426 (1963) which elaborated on the writ's historic position: "At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which . . . in this country was embodied in the written Constitution."

6. Mapp v. Ohio, 367 U.S. 643 (1961).

sanction of exclusion applied to ensure its protection, it would seem appropriate to afford all prisoners alleging violations of that fundamental right the remedy of federal habeas corpus.

> The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief.[7]

Until recently it was well established that federal courts could entertain habeas corpus applications by state prisoners who alleged violations of the Fourth Amendment.[8] However, that rule has now been changed as a result of the recent United States Supreme Court decision in *Stone v. Powell*,[9] joined with *Wolff v. Rice*.[10]

Following *Powell* the rule is now ". . . that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[11] It is evident that this rule is a significant retreat from prior interpretations of the "Great Writ's" broad scope; that it departs from the sensible trend enunciated in *Kaufman v. United States*;[12] and that the analysis used minimizes the rationale favoring use of federal courts as guardians of constitutional rights. Further, this crucial decision sets an ominous precedent for further erosions of federal habeas corpus power in defiance of the legislative intent behind 28 U.S.C. sections 2254 and 2255.

Support for this thesis will be garnered from an examination of the historical development of habeas corpus in the United States, the significance of the *Kaufman* decision, and comparison between the *Powell* majority opinion, the *Powell* dissenting opinion and the *Kaufman* analysis. Further, the underlying purposes of the exclusionary rule will be compared to the underlying purposes of the habeas corpus remedy itself. Finally, poten-

7. Kaufman v. United States, 394 U.S. 217, 226 (1969).
8. "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.
9. 96 S.Ct. 3037 (1976).
10. *Id.*
11. *Id.* at 3052.
12. 394 U.S. 217 (1969).

tial future developments and problems will be explored with particular reference to questions left unanswered by *Powell*.

HISTORICAL OVERVIEW

Federal habeas corpus jurisdiction was initially conferred by the Judiciary Act of 1789. Although not expressed in the Act, the substantive scope of the writ was found to be governed by common law principles.[13] Thus the federal courts could only consider habeas corpus claims of federal prisoners. Further, the inquiry was limited to reviewing the jurisdiction of the sentencing court.[14] The Habeas Corpus Act of 1867,[15] referred to by Mr. Justice Powell as "the direct ancestor of contemporary habeas corpus statutes,"[16] extended the remedy to all prisoners, federal or state, who were incarcerated in violation of the United States Constitution or federal statutes. However, prior to 1915 this latter Act continued to be construed to limit inquiry to the jurisdiction of the sentencing court.[17]

In *Frank v. Mangum*[18] the Court abolished this jurisdictional limitation holding that a court reviewing a habeas corpus application could inquire into the merits of the claim if the applicant had not been given an opportunity in the state court to raise his constitutional argument. The jurisdictional limitation was replaced with the test of whether the state had provided adequate "corrective process" for comprehensive litigation of all federal claims.

In 1953, with *Brown v. Allen*,[19] the "adequacy of corrective process" review limitation was abandoned in favor of "actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions".[20] Federal habeas corpus power was thus extended to allow for a *de novo* review of any state prisoner's claim. However, in a companion case, *Daniels v.*

13. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93-94 (1807).
14. Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830).
15. "[T]he several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . ." Act of Feb. 5, 1867, ch.28, § 1, 14 Stat. 385.
16. Schneckloth v. Bustamonte, 412 U.S. 218, 252 (1973).
17. In re Wood, 140 U.S. 278 (1891); In re Rahrer, 140 U.S. 545 (1891); Andrews v. Swartz, 156 U.S. 272 (1895); Bergemann v. Backer, 157 U.S. 655 (1895); Pettibone v. Nichols, 203 U.S. 192 (1906).
18. 237 U.S. 309 (1915).
19. 344 U.S. 443 (1953).
20. This was Mr. Justice Powell's observation in *Schneckloth*, 412 U.S. at 256.

Allen,[21] a new limitation appeared. In *Daniels* the petitioner had failed to make a timely appeal and the Court held that this procedural failure precluded a federal habeas review. Thus, a legitimate state procedural bar would prevent collateral review by the federal courts.

In 1963, with the decision in *Fay v. Noia*,[22] this procedural compliance limitation was abolished except in cases where the petitioner had intentionally bypassed the required state procedures.[23] Noia and two other defendants had been convicted of murder solely on the basis of signed confessions. Noia failed to appeal but his codefendants successfully established on their state appeals that coercion rendered all of the confessions invalid. The Court affirmed a court of appeals' ruling and allowed the federal court to entertain Noia's habeas corpus application despite his failure to take a direct appeal. Observing that the traditional purpose of the writ was ". . . to test any restraint contrary to fundamental law . . .,"[24] the Court in *Fay* held:

> Obedient to this purpose, we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings.[25]

The new definition of the substantive scope of the writ was more flexible: "Discretion is implicit in the statutory command that the judge . . . 'dispose of the matter as law and justice require' 28 U.S.C. § 2243."[26] In describing habeas corpus as a remedy for "whatever society deems to be intolerable restraints . . ." and the appropriate applicants as "persons whom society has grievously wronged and for whom belated liberation is little enough compensation,"[27] the *Fay* decision placed great emphasis on the equitable discretion of the judge hearing a habeas corpus application. He was viewed as the most appropriate person to determine the propriety of the claim because "habeas

21. 344 U.S. 482 (1953).
22. 372 U.S. 391 (1963).
23. Judge Wright, dissenting, referred to this test in Thornton v. United States, 368 F.2d 822, 833 (D.C. Cir. 1966) as ". . . the deliberate bypassing test articulated in *Noia* . . ."
24. 372 U.S. at 426.
25. *Id.*
26. *Id.* at 438.
27. *Id.* at 401-02, 441.

corpus has traditionally been regarded as governed by equitable principles . . . (and) among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks."[28]

It became increasingly evident that instead of narrowing the applicability of the writ, the Court was narrowly restricting the circumstances under which a federal judge could refuse to hear habeas corpus applications. Thus, the substantive scope of the writ was broadened and the emerging trend was to increase the use and effectiveness of the writ.

Did this broad scope of habeas corpus encompass a state prisoner's claim of a Fourth Amendment violation? Or, as Mr. Justice Powell asked when he addressed the "overriding issue" in *Schneckloth v. Bustamonte*,[29] what is "the extent to which federal habeas corpus should be available to a state prisoner seeking to exclude evidence from an allegedly unlawful search and seizure?"[30] Additionally, to what extent can federal collateral review attach to a search and seizure claim by a federal prisoner under 28 U.S.C. § 2255.

Fourth Amendment Habeas Corpus Claims

Prior to *Kaufman v. United States*,[31] decided in 1969, there was a split of authority among the federal circuits regarding the availability of collateral relief to a federal prisoner asserting a Fourth Amendment claim. The cases denying the applicability of section 2255[32] to search and seizure claims applied the rationale that there was a distinction between Fourth Amendment violations and Fifth or Sixth Amendment violations. The latter violations were viewed as impugning the integrity of the fact-finding process or giving rise to unreliable evidence whereas the former violations did not. It was argued that the exclusionary rule which protected Fourth Amendment rights was meant only to deter violation of those rights by law enforcement officials and not to cast doubt on the reliability of the evidence secured once the rights had been violated. Since a Fourth Amendment violation was deemed less serious than violations of other constitutional rights, the extraordinary remedy of

28. *Id.* at 438.
29. 412 U.S. 218 (1973).
30. 412 U.S. at 250.
31. 394 U.S. 217 (1969).
32. *See, e.g.*, United States v. Jenkins, 281 F.2d 193 (3rd Cir. 1960); Eisner v. United States, 351 F.2d 55 (6th Cir. 1965); United States v. Re, 372 F.2d 641 (2nd Cir.), *cert. denied*, 388 U.S. 919 (1967); Williams v. United States, 307 F.2d 366 (9th Cir. 1962); Armstead v. United States, 318 F.2d 725 (5th Cir. 1963).

habeas corpus was deemed inappropriate. However, some circuits were willing to allow relief based on Fourth Amendment claims.

In *United States v. Sutton*[33] the appellant had been convicted of federal alcohol violations in the district court, had failed to perfect a timely appeal and sought to assert a search and seizure violation in a section 2255 motion. The prosecutor contended that Sutton's failure to exhause his direct appeal remedies barred raising the issue in a section 2255 motion.[34] The appellate court did not agree, recognizing a distinction between constitutional or jurisdictional defects on one side and ordinary trial errors on the other. Reliance was placed on language from *Hill v. United States*[35] where a defendant attempted to assert a violation of the Federal Rules of Criminal Procedure in a section 2255 motion and was barred by a five to four decision:

> It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure.[36]

Further support was derived from *Sonnier v. United States*[37] where a defendant, convicted of counterfeiting United States Treasury checks, was prevented from asserting a defense of non-execution of the checks in a section 2255 motion. The *Sutton* court recognized an implied affirmation of this constitutional/trial error dichotomy in *Sonnier*.[38] Thus, the *Sutton* court enunciated a workable method of applying section 2255 to a claim of a fundamental or constitutional right and held that a Fourth Amendment claim could be raised under section 2255:

> In the instant case, the alleged error is a violation of the Fourth Amendment, which guarantees against unreasonable searches and seizures . . . . We therefore reach the substantive legal issue, whether the conviction was based upon evidence obtained in an unreasonable search and seizure.[39]

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33. 321 F.2d 221 (4th Cir. 1963).
34. "Reliance is placed on the line of cases declaring the familar rule that the provisions of this section [2255] may not be utilized to retry a criminal case or to raise questions which were open on appeal from the judgment of conviction. *See, e.g.*, Sonnier v. United States, 314 F.2d 69, 70-71 (4th Cir. 1963)." *Id.* at 222.
35. 368 U.S. 424 (1962).
36. *Id.* at 428.
37. 314 F.2d 69 (4th Cir. 1963).
38. 321 F.2d at 222.
39. *Id.* at 222-23.

Gaitan v. United States[40] was another appellate decision which supported the view that a Fourth Amendment violation was so significant that it should be cognizable in a section 2255 proceeding. Gaitan was convicted of narcotics violations in federal court under the "silver platter" doctrine which allowed fruits of a state's illegal search and seizure to be used by federal authorities without violating the Fourth Amendment. Subsequently, the decision in *Elkins v. United States*[41] disapproved the silver platter doctrine and Gaitan attempted a second direct appeal which was unsuccessful. Thereafter, Gaitan moved under section 2255 to vacate his conviction. The Court stated, "[we have] consistently held that errors in the admission of evidence must be reviewed on appeal and do not afford a basis for collateral attack."[42] Nonetheless, section 2255 was viewed as allowing a "collateral inquiry into the validity of a conviction"[43] which was available whenever the defendant's constitutional rights had been denied. The court in *Gaitan* was confronted with the question of whether the exclusionary rule itself was a constitutional right. In reviewing *Mapp v. Ohio*[44] the court found ample cause to rely on the reasoning that it was part and parcel of the Fourth Amendment itself and to reject the theory that the exclusionary rule was a mere rule of evidence.[45] Thus, ". . . we take it that, under *Mapp*, the issue of the admissibility of illegally seized evidence has a constitutional basis and, hence, the section 2255 remedy is available."[46] The sound reasoning advanced by the *Sutton* and *Gaitan* cases favored extending section 2255 to any federal prisoner asserting a good faith constitutional or fundamental right.

In 1966, in *Thornton v. United States*,[47] a different rule for section 2255 relief to federal prisoners asserting Fourth Amendment violations was presented. The court of appeals had been called upon to review the propriety of a federal prisoner's search and seizure claim in a section 2255 motion.[48] Although

40. 317 F.2d 494 (10th Cir. 1963).
41. 364 U.S. 206 (1960).
42. 317 F.2d at 495.
43. *Id.*
44. 367 U.S. 643 (1961).
45. "It is an essential part of both the Fourth and Fourteenth Amendments." *Id.* at 657. Also, *see* Mr. Justice Black's concurring opinion where, after comparing the Fourth and Fifth Amendments, he concluded that "a constitutional basis emerges for the exclusionary rule." *Id.* at 661.
46. 317 F.2d at 496.
47. 368 F.2d 822 (D.C. Cir. 1966).
48. The defendant had been convicted of federal narcotics violations and asserted both that there had been an illegal search and seizure of incriminating

conceding that "the courts are called on to evolve and provide procedures and remedies that are effective to vindicate constitutional rights" and ". . . the diligence and dynamism of the federal courts have provided remedies to maximize protection of these particular rights,"[49] the court declined to extend section 2255 to search and seizure claims absent "special circumstances:"

> We confirm that generally a claim by a federal prisoner that evidence admitted at his trial was the fruit of an unconstitutional search or seizure is not properly the ground of a collateral attack on his conviction . . . . Collateral review is available, however, for the denial of a constitutional right accompanied by "weakness in the judicial process which has resulted in the conviction," such as lack of counsel, perjury undiscovered, mob domination, etc.[50]

The degree of weakness which must appear was not discussed at length.[51] Save for a few examples, no workable standard was enunciated whereby a federal trial court could uniformly extend habeas corpus to a federal prisoner with a Fourth Amendment claim. The *Thornton* court did go so far as to pronounce which standard did not apply, refusing to find that the *Sutton* constitutional/trial error dichotomy stood for, "a declaration that a claimed violation of any constitutional right is subject to collateral review under § 2255."[52] The court observed that in *Sutton* this dichotomy was qualified by the traditional habeas corpus application to a fundamental defect causing complete injustice or to an omission running contrary to basic demands of fair procedure. Although a certain reliance on this traditional standard was implied, little of the discussion was focused on why the failure of lower courts to apply the exclusionary rule would not be classified as a fundamental defect.[53] Rather, the *Thornton* court emphasized several practical considerations

papers and that he had been denied effective counsel. The latter claim was found to be without merit and was not discussed by the court.

49. 368 F.2d at 826.

50. 368 F.2d at 824, 826.

51. "We do not undertake to consider what other 'exceptional circumstances' may warrant an evidentiary hearing in a collateral review based on unreasonable search or seizure." *Id.* at 829.

52. 368 F.2d at 828.

53. The Court seemed to feel that eliminating certain constitutional claims from the scope of § 2255 would increase its overall effectiveness: "The corollary, however, is a contraction of the need for enlarging collateral review in order to assure effective vindication of the constitutional interests involved." *Id* at 826.

tending to discourage the extension of section 2255 to search and seizure claims of federal prisoners.

First was the problem of judicial administration. An increasing number of habeas corpus claims were flooding the courts and it was feared that the mass of frivolous claims would obscure the few meritorious ones. However, this argument tended to ignore the legitimate role of judges as initial determiners of the merits of habeas corpus applications. "Discretion is implicit in the statutory command that the judge . . . 'dispose of the matter as law and justice require.' 28 U.S.C. § 2243."[54] Second, the court addressed the question of "belated determinations;" that is, the passage of time would tend to impair memories of witnesses or perhaps add to their unavailability. In this vein, Mr. Justice Fortas' observations on the long path faced by a habeas corpus petitioner, even one released prior to habeas corpus adjudication, seem relevant: "He should not be thwarted now and [be] required to bear the consequences of assertedly unlawful conviction simply because the path has been so long that he has served his sentence."[55] Finally, *Thornton* relied on the rationale that collateral review would not significantly enhance the purpose of the exclusionary rule, a point developed more fully in *Powell/Rice, infra*. Relying on these points the *Thornton* court foreclosed collateral protection of the constitutional right against unlawful searches and seizures, absent special circumstances, for federal prisoners.

A parallel question concerned the status of a *state* prisoner's Fourth Amendment claim in a section 2254 habeas corpus application. The *Thornton* court had proceeded on the assumption that federal habeas corpus was undisputably available to a state convict with a Fourth Amendment claim:

> We assume for present purposes that federal habeas corpus will lie, at least to some extent, to consider the claim of a state prisoner that he was convicted on the basis of the fruits of an unconstitutional search and seizure.[56]

Even the dissent in *Thornton*, viewing *Fay v. Noia*,[57] proceeded under this assumption:

> But *Noia*, a habeas corpus case, leaves little room for this approach,

54. 372 U.S. at 438.

55. Carafas v. LaVallee, 391 U.S. 234, 240 (1968). This case overruled Parker v. Ellis, 362 U.S. 574 (1960), which had held that expiration of a prisoner's sentence while awaiting habeas corpus review rendered the habeas claim moot. The *Carafas* court recognized that there were inevitable delays in court processes and in exhaustion of direct appeals which were mandatory.

56. 368 F.2d at 828.

57. 372 U.S. 391 (1963).

> and it has generally been assumed since then that, at least with respect to state prisoners, federal collateral relief was available for *all* constitutional deprivations.[58] (emphasis added)

Further, the *Thornton* dissent observed that *Linkletter v. Walker*, [59] dealing with whether the exclusionary rule should be applied retroactively, rested on "the assumption that habeas corpus was available for state prisoners' Fourth Amendment claims."[60] *Thornton* recognized the trend of recent decisions to afford state prisoners with meritorious constitutional claims the opportunity to seek federal habeas relief under section 2254.[61]

Thornton stated that its decision concerning rights of federal prisoners could be reconciled with Supreme Court decisions which dealt with state prisoners' habeas corpus applications.[62] In *Townsend v. Sain*[63] the Warren Court was called upon to grant a habeas corpus hearing based on the petitioner's allegations of illegal admission of a coerced confession.[64] The Court discussed the need for an independent collateral review and hearing of contested facts in a habeas corpus application:

> It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. Thus, a narrow view of the hearing power would totally subvert Congress' specific aim in passing the Act of February 5, 1867, of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution.[65]

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58. 368 F.2d at 830-31. Cited in support of this proposition, and as an illustration of the wide spectrum of possible constitutional claims, were Dillon v. Peters, 341 F.2d 337, 339 (10th Cir. 1965); Henry v. Mississippi, 379 U.S. 443 (1965); Hubbard v. Tinsley, 336 F.2d 854 (10th Cir. 1964); United States ex rel. West v. LaVallee, 335 F.2d 230 (2nd Cir. 1964); Nelson v. Hancock, 229 F. Supp. 132 (D. Conn. 1964); United States ex rel. Holloway v. Reincke, 229 F.Supp. 132 (D. Conn. 1964).

59. 381 U.S. 618 (1965).

60. 368 F.2d at 831.

61. *Id.* at 829. *Thornton* also adopted the rationale of *Fay* for granting Section 2254 relief: "There are substantial justifications, it is argued, such as the limitations on direct review in the Supreme Court, to afford state criminal defendants a meaningful federal forum . . ." *Id.*

62. "[Concerning *Fay v. Noia* and *Townsend v. Sain*], [w]e do not read these cases as portending a change by which federal convictions would be laid vulnerable to collateral attack." 368 F.2d at 828.

63. 372 U.S. 293 (1963).

64. *Townsend* specifically dealt with the hearing provisions of 28 U.S.C. 2243 and its application to a petitioner who alleged coercion on his direct appeal, a state habeas corpus attempt. The trial court denied a hearing on the merits but the Warren Court ordered a hearing.

65. 372 U.S. at 312. As for which constitutional claims were cognizable:

The conclusion became inescapable that the overwhelming trend was to extend federal collateral review to state prisoners' constitutional claims. The decision in *Kaufman v. United States*[66] solidified that trend and reestablished the availability of federal collateral review to federal prisoners.

KAUFMAN V. U.S.[67]

The defendant in *Kaufman* had been convicted in federal court of armed robbery and had exhausted his federal appeals. Subsequently he moved to vacate his conviction under section 2255 on the basis that his sanity (a contested issue) had been adjudicated based on inadmissible evidence illegally seized from his automobile. Since both the district court and court of appeals had relied on the line of cases barring collateral review of Fourth Amendment claims under section 2255, and because there was a split of authority as to the propriety of section 2255 applications in this situation, the Supreme Court was determined to define the substantive scope of the "Great Writ" and its proper context.

The Court proceeded on the initial assumption that search and seizure claims of state prisoners are cognizable through federal habeas corpus: "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."[68] While it might be contended that this premise was dictum because the issue at hand was the applicability of section 2255 to a federal prisoner's Fourth Amendment claim, the similarity of purpose between sections 2254 and 2255, leads to the conclusion that this is highly persuasive as it is the cornerstone upon which the *Kaufman* decision rests. No contrary au-

"State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution." *Id.* This would certainly appear broad enough to encompass a Fourth Amendment claim.

66. 394 U.S. 217 (1969).

67. *Id.*

68. *Id.* at 225. The *Kaufman* Court rested this thesis on solid ground. A number of decisions were cited as examples of this rule successfully. Mancusi v. DeForte, 392 U.S. 364 (1968) (wherein the defendant asserted illegal seizures of papers by state officials in a federal habeas corpus proceeding, after exhausting his unsuccessful state appeals); Carafas v. LaVallee, 391 U.S. 234 (1968) (where petitioner was allowed to contest an illegal search and seizure in a federal collateral proceeding despite the expiration of his sentence pending the habeas hearing); Warden v. Hayden, 387 U.S. 294 (1967) (where, although the Court found no illegal search due to the exigent circumstances, the defendant was allowed to contest his state robbery conviction on fourth amendment grounds in a federal habeas corpus proceeding); and Henry v. Mississippi, 379 U.S. 443 (1965).

thority was referred to and subsequent decisions seem to adopt this premise as controlling.[69] Particularly, Mr. Justice Powell's observation in *Schneckloth* tends to bear out the theory that section 2254 encompassed Fourth Amendment claims:

> In short, on petition for habeas corpus or collateral review filed in a federal district court, whether by state prisoners under § 2254 or federal prisoners under § 2255, the present rule is that Fourth Amendment claims may be asserted and the exclusionary rule must be applied in precisely the same manner as on direct review.[70]

It was thus incontrovertable that the high court believed that the legislative intent of section 2254 was to encompass all major constitutional or fundamental claims, including those arising under the Fourth Amendment. As will be seen, this rule's death-knoll has been sounded in *Powell/Rice*.

Regarding the split of authority on federal prisoner habeas corpus search and seizure claims the Court commented: "The courts of appeals which have denied cognizance under § 2255 to unconstitutional search and seizure claims have not generally supplied reasons supporting their apparent departure from this course of our decisions (i.e., the extension to Fourth Amendment claims)."[71] Although acknowledging that section 2255 could not be used to appeal ordinary trial errors, the majority asserted that it could serve as a means to appeal constitutional claims,[72] unlike section 2254 which expressly required exhaustion of direct appeals prior to resort to habeas corpus. Thus *Kaufman* implied that the reach of section 2255 was broader than that of section 2252 because federal prisoners were granted access without proving exhaustion of direct appeals as state prisoners were required to do.

Kaufman rejected the government's theory that a Fourth Amendment claim should be distinguished from other constitutional claims because the former, "does not impugn the integrity of the fact-finding process or challenge evidence as inherently

69. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970); Whiteley v. Warden, 401 U.S. 560 (1971); Adams v. Williams, 407 U.S. 143 (1972); Dady v. Dombrowski, 413 U.S. 433 (1973); Cardwell v. Lewis, 417 U.S. 583 (1974); Lefkowitz v. Newsome, 420 U.S. 583 (1974).

70. 412 U.S. at 251.

71. 394 U.S. at 222.

72. The Court cited Hill v. United States, 368 U.S. 424 (1962) and Townsend v. Sain, 372 U.S. 293 (1963) in support of this proposition.

unreliable . . . ."[73] Instead, the Court held that section 2255 relief must be afforded to search and seizure claims, and in so doing expressly rejected *Thornton* and its "special circumstances" approach to this crucial question.[74]

In *Kaufman* the government had conceded that federal habeas corpus was available to state prisoner's search and seizure claims but argued that the policies behind this rule, as enunciated in *Fay v. Noia*, did not apply to a federal prisoner's claims. Those policies were based on 1) the inadequacy of state procedures to raise and preserve federal claims, 2) the concern that state judges may be unsympathetic to federally-created rights, 3) the practical restraints on the high court's certiorari review of a state prisoner's direct appeal, and 4) the necessity that federal courts be the final arbiters of federal law. However, the Court reasoned that these policy considerations were not sufficiently unique to support the denial to federal prisoners what was undoubtedly available to state prisoners:

> Conceding this distinction, we are unable to understand why it should lead us to restrict, completely or severely, access by federal prisoners with illegal search-and-seizure claims to federal collateral remedies, while placing no similar restrictions on access by state prisoners.[75]

Rather, the *Kaufman* Court enunciated other major policies which amply supported extension of section 2255.

Thornton's emphasis on finality requirements was criticized as being overshadowed by the congressional intent that prisoners retain a continuous avenue to air constitutional claims in the federal courts. That is, ". . . full protection of their constitutional rights requires the availability of a mechanism for collateral attack."[76] Evidently the Court reasoned that effective vindication of meritorious constitutional claims, the Fourth Amendment included, was of far greater relative importance than the exaltation of principles of *res judicata*.[77]

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73. 394 U.S. at 224.

74. "We thus reject the rule announced in the majority opinion in *Thornton* and adopt the reasoning of Judge Wright's dissent in that case . . ." *Id.* at 230. *Thornton's* dissent rested on the rationale that 1) federal courts should have the "last say" on federal law questions, 2) the difficulities encountered in determining whether the lower court ruled on the issue and full merits or conducted a "full and fair" hearing under the *Townsend* standard, and 3) possible new law or newly discovered facts on the subject prior to habeas corpus review.

75. *Id.* at 226.

76. *Id.* at 228.

77. *See* Sanders v. United States, 373 U.S. 1, 8 (1963): "The inapplicability of *res judicata* to habeas, then, is inherent in the very role and function of the writ." *See also* Fay v. Noia, 372 U.S. at 423 where the Court recognized the "familiar principle that *res judicata* is inapplicable in habeas proceedings."

Another policy considered was the maintenance of judicial integrity. "The availability of post-conviction relief serves significantly to secure the integrity of proceedings at or before trial and on appeal."[78] The federal courts being charged with the protection of constitutional rights, this duty does not cease upon the completion of the direct appeal. Rather, it was felt that the federal courts are under an affirmative duty to review the trial court's ruling under the same circumstances which enable state prisoners to assert habeas corpus claims. With one exception, the *Kaufman* Court adopted the circumstances announced in *Townsend v. Sain*:[79] 1) if the factual merits were not resolved at the trial level, 2) if the lower court determination was not supported by the record, 3) if newly discovered evidence is alleged, 4) if material facts were not adequately developed in the lower court, or 5) if the lower court did not afford the defendant a "full and fair fact hearing." The sixth category listed in *Townsend*, whether the fact-finding procedure was adequate was held to be inapplicable because of the presumption of adequacy of federal procedures.[80] Thus, both state and federal constitutional habeas corpus claims are made subject to the same scrutiny so that judicial integrity can be uniformly maintained.

The *Kaufman* dissenting opinions generally advocated that *Thornton's* "special circumstances" approach should be adopted. They alluded to a number of reasons why the substantive scope of habeas corpus should be constricted as to both state and federal prisoners,[81] among which were: diversion of the limited federal judiciary at the cost of minimizing theories of finality, the recent increase in habeas corpus applications coinciding with this opportunity to narrow the writ's availability and the minimal benefits insuring to both society and the defendant.

However, Mr. Justice Black's dissent regarding the exclusionary rule was most significant. He relied on the line of reasoning

78. 394 U.S. at 229.

79. *Supra*, note 63.

80. Incidentally, all six of these circumstances are substantially embodied in 28 U.S.C. § 2254 (1971). *See* note 1 *supra*.

81. The dissent drew no distinction between § 2254 and § 2255 regarding the elimination of Fourth Amendment habeas claims: "I agree with the Court's conclusion that the scope of collateral attack is substantially the same in federal habeas corpus cases which involve challenges to state convictions as it is in § 2255 cases which involve challenges to federal convictions." 394 U.S. at 233.

which held Fourth Amendment claims to be of a different stature because they do not challenge the reliability or truth of the evidence seized. Being concerned only with the manner in which the challenged evidence had been obtained, such claims were not believed to require the same habeas corpus protection as other constitutional claims which focused on the very guilt or innocence of the accused.

> I would not let any criminal conviction become invulnerable to collateral attack where there is left remaining the probability or possibility that constitutional commands related to the integrity of the fact-finding process have been violated.[82]

Under Mr. Justice Black's guilt-innocence/trial error dichotomy habeas corpus would be available only to those petitioners asserting constitutional claims bearing on their innocence.[83] This dichotomy was later advocated by Mr. Justice Powell in his concurring opinion in *Scheckloth v. Bustamonte*[84] and became a key rationale supporting the Court's holding in *Powell*. It is interesting to note that in *Kaufman's* dissent Justice Harlan joined by Justice Stuart disavow any support of this guilt-innocence/trial error dichotomy, stating "I must, however, disassociate myself from any implications . . . that the availability of this collateral remedy turns on a petitioner's assertion that he was in fact innocent, or on the substantiality of such an allegation."[85]

A final argument advanced by the *Kaufman* dissenters for not extending habeas corpus relief to allow a collateral review of search and seizure claims was that such review would play no role in deterring Fourth Amendment violations. Thus, there was no compelling reason to allow habeas corpus to a defendant contesting a failure to apply the exclusionary rule. No contrary authority regarding other purposes of the exclusionary rule were addressed.

Nonetheless, the *Kaufman* majority chose to follow the rational trend of extending federal habeas corpus to all meritori claims of fundamental or constitutional significance. This trend was abruptly halted on July 6, 1976.

STONE V. POWELL/WOLFF V. RICE[86]

On February 18, 1968 Lloyd Powell had been searched inci-

82. *Id.* at 241.
83. ". . . I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt." *Id* at 242.
84. 412 U.S. 218, 250 (1973).
85. 394 U.S. at 242.
86. 96 S. Ct. 3037, hereinafter cited as *Powell*.

dent to an arrest in Nevada for violation of a city vagrancy statute. A pistol was seized during this search which connected him with a California murder. At his murder trial in California he contended that the vagrancy statute was unconstitutionaly vague[87] thereby rendering the arrest and search illegal. However, the court of appeals affirmed his conviction,[88] and the California Supreme Court denied state habeas corpus relief. The district court denied federal habeas corpus because the Nevada officer had acted in good faith and because the admission of the evidence was deemed harmless. Subsequently the federal court of appeals granted habeas corpus relief declaring the statute unconstitutional, the arrest void, and the resultant search and seizure illegal.[89]

In the companion case, Rice had been convicted of murder in Nebraska on the basis of evidence seized from his house pursuant to a search warrant. Rice attacked the underlying affidavit for the warrant claiming that the magistrate had been required to go beyond the fact of the affidavit and to incorporate supplementary information in direct contravention of the rule announced in *Aguilar v. Texas*[90] and *Spinelli v. United States*.[91] The Supreme Court of Nebraska affirmed the conviction on direct appeal and, oddly enough, referred to information outside the affidavit in finding it valid. Rice subsequently proceeded under section 2254 for federal habeas corpus relief. The district court, citing *Spinelli* and *Aguilar*, ruled that the affidavit was clearly insufficient to demonstrate probable cause and thus the search warrant and resultant seizure were found to have been illegal. The court of appeals affirmed the habeas corpus relief on substantially the same grounds.

The Supreme Court granted certiorari and joined the two

87. The Supreme Court had recently invalidated a substantially similar vagrancy statute in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

88. The California Court of Appeal declined to address the legality of the arrest and search because they deemed the error "harmless" under the standard of Chapman v. California, 386 U.S. 18 (1967). Incriminating testimony had been received from a victim and from Powell's accomplices.

89. Although under these circumstances evidentiary exclusion would not serve to deter law enforcement officers, it would serve to deter the legislature from enacting unconstitutional statutes and thereby serve the public interest.

90. 378 U.S. 108 (1964).

91. 393 U.S. 410 (1969).

cases for hearing and determination. Mr. Justice Powell, writing for a divided court,[92] expressed the Court's opinion that the grant of federal habeas corpus relief was not constitutionally required for a Fourth Amendment claim by a state prisoner who had been provided a full and fair opportunity to litigate the claim in state court. In so ruling the Court reversed the developing trend solidified in *Kaufman*, gave rise to many unanswered questions, and set a dangerous precedent with wide-ranging ramifications for innumerable prisoners who had previously relied on the Congressional designation of the federal courts as vindicators of all constitutional rights.

Purposes Of The Exclusionary Rule

Inasmuch as *Powell* involved a plea for collateral application of the exclusionary rule, the majority addressed the historical development of the exclusionary rule. "Post-*Mapp* decisions have established that the rule is not a personal constitutional right."[93] Rather, the rule is merely ". . . a judicially created means of effectuating the rights secured by the Fourth Amendment."[94] Thus, it was reasoned that it was within the Court's discretion whether or not to apply the rule to collateral review. Viewing the purpose of the exclusionary rule as primarily deterrence the Court determined that federal collateral application of the rule could be precluded without offending the Constitution. But is the exclusionary rule only a judicial remedy and nothing more?

In a vigorous dissent, Justices Brennan and Marshall stated ". . . unlike the Court [we] consider that the exclusionary rule is a constitutional ingredient of the Fourth Amendment . . . ."[95] In so stating, Mr. Justice Brennan reaffirmed his position stated in dissent in *United States v. Calandra*:

> Rather, the exclusionary rule is "part and parcel of the Fourth Amendment's limitation upon (government) encroachment of individual privacy" . . . . The exclusionary rule is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera.[96]

The *Powell* majority achieves a significant down-play of the

92. Justices Powell, Stewart, Blackmun, Rehnquist and Burger (also concurring) were in the majority. Justices Brennan, Marshall and White dissented.

93. *Powell* at 5319.

94. *Id.* at 5318. The Court cited United States v. Calandra, 414 U.S. 338 (1974); United States v. Peltier, 442 U.S. 531 (1975); and Terry v. Ohio, 392 U.S. 1 (1968) in support of this premise.

95. *Id.* at 5333.

96. United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J. dissenting).

importance of the exclusionary rule lending credence to its decision by not ascribing a constitutional origin to the rule. However, an examination of *Mapp* indicates that the exclusionary rule was intended as a fundamental right inherent in the Fourth Amendment:

> Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the Wolf case. In short the admission of the new constitutional right by Wolf could not tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.[97]

By not recognizing the rule as "an essential ingredient" of the right of privacy and as a "constitutional privilege" the Court erodes the force of *Mapp* and drifts toward Chief Justice Burger's often expressed goal, the complete elimination of the exclusionary rule.[98] This is particularly troubling in light of *Mapp's* observations that the steadfast line of cases following *Wolf*[99] demonstrated that "the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions."[100] By not deeming the exclusionary rule a constitutional right the *Powell* Court makes it much easier to ultimately deny the writ which was intended primarily to redress constitutional deprivations.

The Court recited two purposes for the exclusionary rule: 1) to deter unlawful police conduct and 2) to preserve the integrity of the judicial process. The majority terms this latter purpose a "limited force"[101] and Chief Justice Burger's concurring opinion terms it "fatally flawed"[102] because of traditional restrictions on challenging the introduction of illegally seized evidence at trial. Included within these restrictions are the fact that the defendant himself must object to introduction, he must demon-

97. Mapp v. Ohio, 367 U.S. 643, 655-56 (1961).
98. "Despite its avowed deterrent objective, proof is lacking that the exclusionary rule, a purely judge-created device based on 'hard cases,' serves the purpose of deterrence." *Powell* at 5323 (Burger, C.J. concurring).
99. 338 U.S. 25 (1949).
100. Mapp v. Ohio, 367 U.S. at 655.
101. *Powell* at 5319.
102. *Id.* at 5323.

strate standing to object, he can be impeached by such evidence, and he cannot object to grand jury review of such evidence. If the integrity of the judicial process is so dependent on the exclusionary rule, the *Powell* majority questions why these traditional restrictions still apply.

Although the Court mentions *Elkins v. United States*[103] as referring to judicial integrity, it does not fully raise and address authorities in support of this justification for the exclusionary rule. *Elkins* had cited Justice Brandeis' 1928 view regarding the continued need for judicial integrity, and consequent respect: "In a government of laws existence of the government will be imperilled if it fails to observe the law scrupulously. . . . If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[104]

This minimization of the role of the exclusionary rule in protecting judicial integrity is subject to criticism. Once a specific defendant enters the trial process he is entitled to rely on that judicial integrity and the traditional restrictions noted by the majority can be reconciled with these requirements of justice. The requirements of objection and standing by the defendant only ensure that there is a person who may actually be injured by a rupture in the judicial process. The use of tainted evidence for impeachment can be justified by the equitable doctrine, "he who seeks equity must do equity." Surely a defendant who defies the judicial process by perjuring himself on the stand has waived his right to demand that the rest of the proceeding observe judicial integrity by refusing admission of illegally-seized evidence. Finally, the term "judicial integrity" implies the presence of the judiciary, something a grand jury proceeding cannot claim. Thus, judicial integrity does not apply to the grand jury as it does to a courtroom proceeding.

In truth, maintaining judicial integrity is a key justification for requiring the exclusionary rule. The courts should be the symbol of judicial integrity and, as such, should refuse to allow the introduction of evidence seized in violation of the Fourth Amendment. As was aptly stated in *McNabb v. United States*,[105] ". . . a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has com-

103. 364 U.S. 206 (1960).
104. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting).
105. 318 U.S. 332 (1943).

manded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of the law."[106] Also illustrative of the importance properly ascribed to judicial integrity is Mr. Justice Brennan's dissent in *Calandra*, a case which denied the rule's application to grand jury proceedings:

> The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.[107]

It should be quite clear that what the *Powell* Court summarily dismissed as not being furthered by the rule, was actually its key justification.[108] By eliminating consideration of whether federal collateral review was necessary to ensure judicial integrity in the state courts, the Court ensured support for its subsequent ruling.

The *Powell* Court did emphasize the importance of deterrence as a valid purpose of the rule. Two cases relied on by the Court are worthy of comment. In *Linkletter v. Walker*[109] the deterrent effect was considered heavily in denying retroactive application of the rule but the Court also found that such an application would not further ". . . the administration of justice and the integrity of the judicial process."[110] In *United States v. Peltier*,[111] another case concerned, *inter alia*, with retroactivity of the exclusionary rule, the Court spoke of "considerations of

106. *Id.* at 345.
107. 414 U.S. at 357.
108. Insight can be gained from the case that developed the rule: "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizure . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." Weeks v. United States, 232 U.S. 383, 391-94 (1914). In accord is Terry v. Ohio, 392 U.S. 1, 12-13 (1968): "The rule also serves another vital function—'the imperative of judicial integrity' [citing *Elkins*]. Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."
109. 381 U.S. 618 (1965).
110. *Id.* at 637.
111. 422 U.S. 531 (1975).

either judicial integrity or deterrence of Fourth Amendment violations. . . ."[112] This type of heavy emphasis on the deterrence aspect tends to fly in the face of the history of the rule:

> This downgrading of the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the history and purpose of the rule.[113]

Nevertheless, in *Powell* the Court centers on the deterrence rationale and weighs the potential advancement of this policy against the costs of providing habeas corpus review. The result is the denial of collateral relief.

THE COST/BENEFIT BALANCE

In balancing the costs and benefits of the exclusionary rule, the Court relied essentially on those costs noted in *Schneckloth* and considered by *Kaufman*, i.e., 1) effective utilization of a limited judiciary, 2) necessity of finality, 3) minimization of federal/state friction, and 4) maintenance of the constitutional balance of federalism.[114] A further cost emphasized by the Court was that the rule diverts the trial focus away from the key issue of guilt or innocence, once again resurrecting the guilt-innocence/trial error dichotomy which had been rejected in *Kaufman*. The *Powell* dissent responded that most of the costs would have already occurred at trial and should not properly be assessed to the process of collateral review.[115]

The only benefit enunciated was the possible deterrence of future violations of the Fourth Amendment. Conspicuously absent from mentioned benefits were those listed in *Fay* and addressed in *Kaufman*: 1) the legislative intent that federal courts have the "last say" regarding federal law, 2) the inadequacy of state procedures to raise and preserve federal claims, 3) the potential that state judges may be unsympathetic to federally created rights[116] and 4) the practical restraints on the Court's

112. *Id.* at 538. Also enlightening is the conclusion of a case note on *Peltier*: "It is the Court and not the police officer who permits illegally seized evidence to be used against the defendant, and it is this principle that seems to have been lost somewhere along the path from *Mapp* to *Peltier*." Note, *U.S. v. Peltier-The Good Faith Belief of the Policy Officer*, 3 PEPPERDINE L.R. 386, 393 (1976).

113. United States v. Calandra, 414 U.S. 338, 356 (1974) (Brennan, J. dissenting).

114. 412 U.S. at 259.

115. *Powell* at 3060 n.10.

116. A striking example of this is Estes v. Texas, 381 U.S. 532, 556 (1965) where the trial judge responded to the defendant's contention that his Constitutional rights were being violated, that the case was "not being tried under the Federal Constitution." *See also* Thornton v. United States, 368 F.2d 882, 889

direct certiorari review.[117] Had these benefits also been weighed it is certain that the Court would have had difficulty justifying its "balance." As the *Powell* dissent notes, *Fay, Brown*, and *Kaufman* represent ". . . reasoned decisions that those policies were an insufficient justification for shutting the federal habeas corpus door to litigants with federal constitutional claims in light of such countervailing considerations. . . ."[118]

FINALITY

It would seem that *Fay* and *Kaufman* had terminated the practice of exalting finality of judgments over individual and fundamental rights. As it was said in *Sanders v. United States*:[119] "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."[120] Perhaps the Court reasoned that the cumulative effect of the lack of finality, coupled with the other enumerated costs, would tip the balance in favor of their ultimate result. However, this reasoning tends to foreclose collateral attack at the possible expense of violating due process requirements. "Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed."[121] Furthermore, Congress undoubtedly intended to place federal courts in a supervisory capacity over state courts regarding constitutional claims.[122] The Court does not even pay lip-service to that legislative intent.

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n.11 (1966): "The Supreme Court may be concerned that other state judges, though not saying so overtly, likewise fail to provide an understanding and objective consideration of Federal constitutional claims." Note also, in Wolf v. Rice, 96 S. Ct. 3037 (1976), the Nebraska Supreme Court's failure to follow the constitutional mandates of *Spinelli* and *Aguilar*, *supra* notes 90 and 91.

117. Kaufman v. United States, 394 U.S. at 225-26.

118. *Powell* at 3064 (Brennan, J. dissenting).

119. 373 U.S. 1 (1963).

120. *Id.* at 8.

121. Townsend v. Sain, 372 U.S. 293, 312 (1963).

122. "No binding weight is to be attached to the State determination. The Congressional requirement is greater. The State Court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." Brown v. Allen, 344 U.S. 443, 508 (1953).

DIVERSION OF TRIAL FOCUS[123]

Inasmuch as the Court re-adopts the guilt-innocence/trial error dichotomy they put the very value of the fourth amendment at issue. This, in turn, determines the propriety of applying federal habeas corpus, an admittedly extraordinary remedy, to Fourth Amendment claims:

> Whether collateral attack is permissible depends on the nature of the constitutional claim, the effectiveness of the direct remedies, and all need for choices among competing considerations in quest of the ultimate goal of achievement of justice.[124]

Can the value of any given constitutional right hinge on whether it goes to the guilt or innocence of the defendant? There is no historical support for this position.[125] As for modern precedent the *Powell* dissent notes:

> There is no foundation in the language or history of the habeas statutes for discriminating between types of constitutional transgressions, and efforts to relegate certain categories of claims to the status of "second-class rights" by excluding them from that jurisdiction have been repulsed.[126]

Enforcing such a dichotomy has the effect of revoking the broad power granted to the federal courts by Congress to hear *all* constitutional claims. The *Powell* decision does not provide justification or support for the determination of a hierarchy of constitutional rights. Instead, the Court has invaded the legislative province by developing its own measure of constitutional stature.

In adopting this dichotomy the Court directly contravenes its own rule as laid down in *Kaufman*;

> Thus collateral relief contributes to the present vitality of all constitutional rights whether or not they bear on the integrity of the fact-finding process . . . . The application of (the exclusionary rule) is not made to turn on the existence of possibility of innocence . . . ."[127]

Ironically the Court does not overrule *Kaufman*, a point which troubles the dissent.[128] In any case, the application of this dichotomy of constitutional rights does not reduce the costs weighed by the Court. As was observed in *Thornton*, ". . . finality is disturbed by enforcement of all constitutional rules, many

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123. The dissent comments that the trial focus is bound to be diverted by *any* constitutional claim that requires litigation. *Powell* at 3065 n.16).

124. Thornton v. United States, 368 F.2d at 826.

125. "I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt." Schneckloth v. Bustamonte, 412 U.S. at 257 (Powell, J. concurring).

126. *Powell* at 3065 (Brennan, J. dissenting).

127. Kaufman v. United States, 394 U.S. at 229.

128. *Powell* at 3063 n.14 states that *Kaufman* "obviously does not survive."

of which apply regardless of the innocence or guilt of the accused."[129]

Finally, a practical problem arises. There is a very fine line between constitutional claims going to the question of guilt or innocence and claims which supposedly impugn the reliability of the evidence. As the dissent notes, a groundwork is being laid for withdrawal of federal habeas corpus power for claims of entrapment, double jeopardy, self-incrimination, *Miranda* violations, and invalid identification procedures.[130] Actually, the list could be endless depending upon the composition of the high court at any given time. It should be clear that such a state of affairs is diametrically opposed to the non-priority system that the Constitution was intended to establish.[131]

In its zeal to eliminate the abuses of "technicality" assertions the Court tramples vindication of good faith constitutional claims.

> However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness.[132]

This same reasoning could brand the Court's habeas corpus restriction as "a short-cut method." Evidently the Court is hopeful that the end will justify the means.

FEDERAL/STATE FRICTION

The Court's recognition of the need to minimize federal/state friction is basically a reiteration of the concept adopted in *Elkins*. "The very essence of a healthy federalism depends upon the avoidance of needless conflict between the state and federal courts."[133] The Court indicates it is concerned lest the federal

129. Thornton v. United States, 368 F.2d at 832 (Wright, J. dissenting).
130. *Powell* at 3062-63 (Brennan, J. dissenting).
131. "[The majority disregards] the ordering of priorities under the Constitution forged by the Framers and this Court's sworn duty is to uphold that Constitution and not to frame its own." *Id.* at 5330 (Brennan, J. dissenting).
132. Miller v. United States, 357 U.S. 301, 313 (1958). *See also* Olmstead v. United States, 277 U.S. 438, 485 (1928): "To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."
133. 364 U.S. at 221.

habeas corpus power offend the state courts. As the dissent observes, it appears to be much easier to adopt the ". . . seeming premise that the rights recognized in *Mapp* somehow suddenly evaporate after all direct appeals are exhausted."[134] This simplistic approach regarding habeas application is a misconception of the function of federal habeas corpus.[135]

Certainly there must be a balancing of responsibility and mutual respect between the federal and state courts. However, there is a need for federal collateral review of state court decisions on constitutional claims. Federal habeas corpus provides a much needed uniformity and stability to the mire which presently engulfs the Fourth Amendment. As *Mapp* noted: "Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches."[136]

There is a need for federal court supervision over state courts.[137] As recognized in *Fay v. Noia*, Supreme Court certiorari is not adequate for this purpose. Furthermore, federal court supervision is compatible with the Supremacy Clause of the United States Constitution for ". . . federal law is higher than state law."[138] As the *Powell* dissent observes, state judges are subject to election pressures, unlike federal judges, and they may be influenced by political considerations in ruling on "technicalities."[139] Additionally, addressing the expressed goal of the majority to reinstill trust in state judges, the dissent argues causes the abnegation of a duty expressly conferred on the federal courts which demonstrates a mistrust for federal judges.[140]

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134. *Powell* at 3061 (Brennan, J. dissenting).

135. "So also, the traditional characterization of the writ of habeas corpus as an original . . . civil remedy for the enforcement of the right to personal liberty, rather than a stage of the state criminal proceedings or as an appeal therefrom, emphasizes the independence of the federal habeas proceedings from what has gone before." Fay v. Noia, 372 U.S. 391, 423-24 (1963).

136. 367 U.S. at 658.

137. Schneckloth v. Bustamonte, 412 U.S. at 269 (Powell, J. concurring).

138. *Powell* at 3067 (Brennan, J. dissenting) citing Brown v. Allen, 344 U.S. at 510.

139. *Id.*

140. *Id.* at 5331. In accord is Townsend v. Sain, 372 U.S. 293, 312-13 (1963) which advocated the advantages of federal habeas over direct review: "The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary . . . . The federal district judges are more intimately familiar with state criminal justice, and with the trial of fact, than are we, and to their sound discretion must be left in very large part the administration of federal habeas corpus."

Actually the *Powell* decision itself may well place a strain on federal/state relations. Throughout the opinion the majority only addresses itself to search and seizure claims under section 2254. Although the dissent is quick to point out that the decision, in effect, overrules both federal and state prisoner's access to federal habeas corpus,[141] the effect on section 2255 is not clear. Conspicuously absent from the *Powell* majority decision is any mention of this rule's applicability to federal prisoners' Fourth Amendment claims. This invokes the delicate situation mentioned in the *Thornton* dissent:

> It would be anomalous indeed, especially in light of the interest in maintaining good federal-state relations, if defaults not precluding one adequate federal review for the constitutional claims of state prisoners precluded such a review for federal prisoners, or if defects rendering state court adjudications inadequate did not similarly affect federal court adjudications.[142]

It could well be that by failing to address section 2255 the Court has allowed one collateral route to remain open while closing another.

ALTERNATIVE SOLUTIONS

Perhaps the best solution for the Court would have been to wait for Congress to restrict the scope of the remedy that it had so broadly fashioned. The *Powell* dissent makes a very convincing argument based on the statutory language itself. The admission of illegally seized evidence is a violation of the Constitution under *Mapp*. This constitutional violation does not die with direct appeal, but, rather, exists until rectified. Unless the constitutional error is harmless under the standard of *Chapman v. California*,[143] the defendant is "in custody in violation of the Constitution" as expressed in section 2254 and is entitled to federal habeas corpus relief. Unless and until Congress restricts the permissible application of section 2254 the Court is bound to interpret the habeas corpus statute according to the expressed legislative intent. The dissent notes that "subsequent congressional efforts to amend those jurisdictional statutes to effectuate the result my Brethren accomplish by judicial fiat have consistently proved unsuccessful."[144] In its haste to cut back on

141. *Powell* at 3058 n.5.
142. 368 F.2d at 831.
143. 386 U.S. 18 (1967).
144. *Powell* at 3068 (Brennan, J. dissenting).

habeas applications the Court has invaded the legislative province.[145]

A more appropriate solution to the problem caused by the volume of applications would be to adopt the "abuse of remedy" or "abuse of writ" approach of *Wong Doo v. United States*.[146] Under this approach each habeas corpus application would be disposed of according to sound judicial discretion and, if the government could prove that a particular defendant was abusing the writ or asserting a frivolous claim, the court could reject the writ. This approach, essentially a return to *Fay*'s discretion standard, would prevent dilatory tactics. When a valid claim has not been raised initially a presumption would arise that the default entailed an abuse of remedy. However, the petitioner would be able to rebut the presumption by proving his default was excusable. The key is that burden would rest with him only if the above-mentioned presumption was invoked. If *Powell* is followed the burden will always rest with the defendant to show lack of a full and fair litigation of his claim in the lower court whereas under *Wong Doo* the government would typically sustain the initial burden of proof.[147] It seems that the ends of justice would thus be better served by requiring the party seeking to bar habeas corpus relief to show its impropriety in a given case.

FUTURE RAMIFICATIONS

One major problem the dissent in *Powell* foresees is the dilemma faced by those innumerable defendants who had requested federal courts intervention on a search and seizure issue only to have that court temporarily abstain from entertaining their Fourth Amendment claims pending a state court hearing. These federal courts are now unable to offer a forum to those petitioners who had relied on their ultimate availability.[148]

One certain future effect is a drastic cut-back on other

145. Such a judicial invasion of the legislative province could have drastic constitutional effects: "Moreover, if construed to derogate from the traditional liberality of the writ of habeas corpus . . . § 2254 might raise serious constitutional questions." Sanders v. United States, 373 U.S. 1, 11-12 (1963) citing Fay v. Noia, 372 U.S. 391, 406 (1963). *Sanders* (further cites U.S. CONST. art. I, § 9, cl. 2: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." 373 U.S. at 12 n.6.

146. 265 U.S. 239 (1924). The defendant had deliberately withheld an available second ground for relief while pursuing the first. His action was deemed inequitable and relief was denied.

147. "[I]t rests with this Government to make that claim [abuse of writ] with clarity and particularity in its return to the order to show cause." 334 U.S. at 292.

148. *Powell* at 3060-61, n.10.

grounds for invoking habeas corpus relief. In the same term as *Powell*, in *United States v. MacCollom*,[149] the Court held that denial of a free appellate transcript to an indigent defendant is not a proper ground for habeas corpus relief under section 2255. Also decided in the same term was *Francis v. Henderson*[150] wherein the Court held that a challenge as to the unconstitutional composition of a grand jury was not cognizable under section 2254 absent a strong showing of actual prejudice. In *Francis* it was further held that defendant's failure to raise the issue before trial barred him from raising it in a collateral attack. Evidently the Court is returning to the position that a legitimate state procedural bar will preclude federal collateral review.[151]

Finally, the exclusionary rule itself can be expected to be further eroded. In *United States v. Janis*[152] the Court held that the rule should not be applied to a tax case in which a defective affidavit led to the illegal seizure of defendant's records and, in turn, to a tax levy which he sought to avoid. Such continued erosion of the exclusionary rule brings to mind Mr. Justice Brennan's warning in *Calandra*:

> In *Mapp*, the Court thought it had "closed the only courtroom door remaining open to evidence secured by official lawlessness" in violation of Fourth Amendment rights . . . . The door is again ajar. As a consequence, I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search-and-seizure cases. . . .[153]

CONCLUSION

It is evident that *Powell* signals the Burger Court's design to decrease the availability of federal forums for state defendants. It represents a glaring insensitivity to legitimate claims of violations of constitutional rights. This is a dangerous trend for it is the courts who are charged with enforcing the Constitution. "It is the duty of the courts to be watchful for the constitutional

149. 96 S. Ct. 2086 (1976).
150. 96 S. Ct. 1708 (1976).
151. Recognition of a state procedural bar is directly contrary to *Fay v. Noia*, 372 U.S. 391 (1963).
152. 96 S. Ct. 3021 (1976).
153. United States v. Calandra, 414 U.S. at 365 (Brennan, J. dissenting).

rights of the citizen, and against any stealthy encroachments thereon."[154] That duty has been conspicuously breached in this case.

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154. Boyd v. United States, 116 U.S. 616, 635 (1886).