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Federal Habeus Corpus: A Major Step Toward Phasing Out the Exclusionary Rule

John B. Gallagher

to find one.[84] The Court's ambivalence on the public interest aspect of the instant case may be an attempt to avoid embracing a definitive position in this admittedly murky area.

The instant case clearly eliminated any remnants of the notion that purely commercial speech is unprotected by the first amendment. In addition, it represented the first time that the Supreme Court held for consumers asserting a first amendment right to know in attacking a state statute regulating prescription drug price advertising. Indeed, the invocation of the first amendment appears to have been the decisive element in the Court's decision. Although uncomfortable inconsistencies may still exist in the free speech area, the result reached by the instant case diminishing the impact of the commercial speech doctrine was sound. While the instant decision was limited to prescription drug price advertising by pharmacists, one may anticipate that prices of product-like services of other professions will soon be made available to the consumer.[85]

FREDERICK MANN

FEDERAL HABEAS CORPUS: A MAJOR STEP TOWARD PHASING OUT THE EXCLUSIONARY RULE*

Stone v. Powell, 96 S. Ct. 3037 (1976)

Defendant Powell[1] was convicted of murder in a state court, partly on the

84. While at first glance it seems the Court was attempting to say advertising is indispensable to the proper allocation of resources in a free enterprise system, it seems equally plausible that it was attempting to show by way of example that a public interest element, no matter how dubious in nature, could always be fabricated so as to justify a commercial advertisement: "To this end, the free flow of commercial information is indispensable. . . . *And if it is indispensable* to the proper allocation of resources in a free enterprise system . . . ." *Id.* (emphasis added).

85. Although there may be some truth to the observation that "[i]t is the American habit, extraordinary to other democracies, to resolve many of our social, economic, philosophical, and political questions in lawsuits," Brennan, *supra* note 54, at 2, state legislative action may be a better alternative solution. *See* Fla. Laws 1976, ch. 5 §2, to be codified as FLA. STAT. 484.105 (Florida State Board of Dispensing Opticians prohibited from regulating price advertising by dispensing opticians); Note, *supra* note 9, at 128.

*EDITOR'S NOTE: This case comment was awarded the *George W. Milam Award* as the outstanding case comment submitted by a Junior Candidate in the fall 1976 term.

1. This decision was actually based on a consolidation of two cases; the other case was Wolff v. Rice, 96 S. Ct. 3037 (1976). On August 17, 1970 an Omaha police officer was killed by an exploding bomb. Based on information that the police had received, a warrant was obtained to search Rice's home for explosives. Admitting to evidence the explosives discovered on this search, the trial court rejected Rice's claim that the search warrant was invalid because the supporting affidavit was defective. *See* State v. Rice, 188 Neb. 728, 730, 199 N.W. 2d 480, 484 (1972). The Supreme Court of Nebraska affirmed Rice's conviction, holding the search warrant valid. *Id.* at 728. Rice then sought a writ of habeas corpus from the United States District Court for Nebraska. The district court concluded that the search warrant was invalid since the supporting affidavit was defective under Spinelli v. United States, 393 U.S.

basis of evidence claimed to have been illegally obtained.[2] Since he was arrested under the authority of an unconstitutional vagrancy ordinance,[3] Powell contended that the revolver that the police found in his possession at the time of the arrest should not have been admitted into evidence. After exhausting his direct appeals,[4] Powell applied for a writ of habeas corpus from a federal district court.[5] Finding that the arresting officer had probable cause,[6] the district court concluded that even if the ordinance was unconstitutional it was not necessary to apply the exclusionary rule to an otherwise valid arrest. The court of appeals reversed,[7] stating that the ordinance was unconstitutionally vague and that the evidence derived from the illegal arrest should have been excluded for the purpose of deterring legislators from enacting unconstitutional statutes. The United States Supreme Court granted certiorari[8] and HELD, that unless a state prisoner can show he was denied an opportunity for a full and fair litigation of a fourth amendment claim in the state system, he may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial.[9]

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410 (1969). Rice v. Wolff, 388 F. Supp. 185 (D.C. Neb. 1974). The Eighth Circuit Court of Appeals affirmed for substantially the reasons stated by the District Court. Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975). The United States Supreme Court granted certiorari. 422 U.S. 1055 (1975).

2. Respondent Powell was convicted of murder in a California state court. On February 17, 1968 he allegedly shot a liquor store owner in a scuffle following an attempt to steal a bottle of wine. Ten hours later, Powell was arrested in Henderson, Nevada, for violating the Henderson vagrancy ordinance. In a search incident to that arrest, a revolver was found on his person. At his trial a criminologist testified that the gun was the one used to murder the store owner. The trial court rejected Powell's contention that the revolver should have been excluded from evidence because the vagrancy ordinance was unconstitutional. See Powell v. Stone, 507 F.2d 93, 94 (9th Cir. 1974).

3. The ordinance provides: "Every person is a vagrant who: (1) Loiters or wanders upon the streets or from place to place without apparent reason or business and (2) who refuses to identify himself and to account for his presence when asked by any police officer to do so (3) if surrounding circumstances are such as to indicate to a reasonable man that public safety demands such identification." *See* Stone v. Powell, 96 S. Ct. 3037, 3039 n.1 (1976). This statute was declared unconstitutional by the Ninth Circuit Court of Appeals. Powell v. Stone, 507 F.2d 93 (9th Cir. 1974).

4. Powell's conviction was affirmed by a California district court of appeal. The court concluded that even if the ordinance was unconstitutional, the testimony of the criminologist was harmless error. The Supreme Court of California denied Powell's petition for habeas corpus relief. *See* Powell v. Stone, 507 F.2d 93, 94 (9th Cir. 1974) (the state court decisions are unreported).

5. 28 U.S.C. §2254 (1970).

6. *See* Stone v. Powell, 96 S. Ct. 3037, 3040 (1976).

7. Powell v. Stone, 507 F.2d 93 (9th Cir. 1974). The court relied primarily on Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) and Anderson v. Nemetz, 474 F.2d 814 (9th Cir. 1973) (holding unconstitutional a similarly phrased Arizona statute).

8. 422 U.S. 1055 (1975). In the order granting certiorari the Court requested counsel to address the question: "Whether . . . respondent's claim that the gun discovered as a result of a search incident to that arrest violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution is one cognizable under 28 U.S.C. §2254." *Id.*

9. 96 S. Ct. at 3052.

Although the writ of habeas corpus[10] is specifically mentioned in the Constitution,[11] early decisions required that any prisoner's right to such a writ must be established by Congress.[12] The first congressional grant of such authority to the federal courts was included in the Judiciary Act of 1789,[13] but was limited to federal prisoners. It was not until the Habeas Corpus Act of 1867 that the writ was extended to a state prisoner who was "restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States . . . ."[14] Initially, the Supreme Court interpreted this statute to mean that the federal courts could only review the state's "corrective process" and not the substantive claim itself.[15] However, in *Brown v. Allen*,[16] the Court concluded that regardless of the adequacy of the state court's procedure, the federal courts could review or rehear a state prisoner's federal claim and decide the case on the merits.[17] Because of the strict rule that denied the habeas corpus remedy to prisoners who had failed to exhaust all possible state appeals,[18] it was not until a series of cases decided by the Warren Court in the early 1960's that the full effect of the *Brown* decision was felt. Broadening the writ, these decisions reversed the former rule and stated that in order to qualify for the habeas corpus remedy the state prisoner need only exhaust the state remedies still open to him, not all the remedies that were ever open to him.[19] These decisions opened the federal courts to a large number of state prisoners who had let their deadlines for appeal expire. In addition, the Court permitted successive habeas corpus petitions[20] and extended the writ to state prisoners released on parole.[21]

This movement significantly increased the availability of habeas corpus and permitted the federal courts to review more frequently the records of state criminal proceedings. Moreover, *Townsend v. Sain*[22] required that a federal

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10. When used in this comment, the term "habeas corpus" refers to the statutory federal writ of habeas corpus as codified in 28 U.S.C. §§2241-54 (1970).

11. U.S. Const. art. I, §9, cl.2 states: "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."

12. Ex parte Bollman, 8 U.S. (4 Cranch.) 75, 94 (1807). *See* Collings, *Habeas Corpus for Convicts — Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 345 (1952). For an excellent summation of the history of habeas corpus in America, *see* Miller, *New Looks at an Ancient Writ: Habeas Corpus Reexamined*, 9 U. RICH. L. REV. 49 (1974).

13. Act of Sept. 24, 1789, ch. 20, §14, 1 Stat. 73. *See* Carroll, *Habeas Corpus Reform: Can Habeas Survive the Flood?*, 6 CUM. L. REV. 363, 366 (1975).

14. Act of Feb. 5, 1867, ch. 28 §14, 1 Stat. 385, (*codified in* 28 U.S.C. §2241(c)(3) (1970). *See* Carroll, *supra* note 13, at 366.

15. Frank v. Mangum, 237 U.S. 304, 333 (1915). *See Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1049 (1970).

16. 344 U.S. 443 (1953).

17. *Id.* at 508.

18. *See* Daniels v. Allen, 344 U.S. 443, 487 (1953). *Daniels* was decided jointly with *Brown*.

19. Fay v. Noia, 372 U.S. 391, 399 (1963). This case is codified at 28 U.S.C. §2254(c) (1970).

20. Sanders v. United States, 373 U.S. 1 (1963). However, the Court explicitly stated that the court presiding over the second habeas corpus petition could consider whether or not the same claim was rejected earlier.

21. Jones v. Cunningham, 371 U.S. 236 (1963).

22. 372 U.S. 293 (1963).

court grant an evidentiary hearing to a habeas applicant in a specific set of instances,[23] many of which determined whether the state court appeared to have given the applicant a "full and fair" hearing. The majority in *Townsend* left to the trial judge the power to hold evidentiary hearings at his discretion in all cases not covered by the conditions that required hearings.[24]

When the Court held in *Mapp v. Ohio*[25] that the exclusionary rule had to be applied by the state courts, many courts and authorites naturally assumed that any evidence admitted pursuant to an illegal search and seizure would be grounds for a federal writ of habeas corpus.[26] The Court in *Mapp* stated that the fourth amendment's right of privacy, when applied to the states by the due process clause of the fourteenth amendment, requires the exclusion of unconstitutionally seized evidence from state criminal proceedings.[27] Thus *Mapp* plainly held that the admission of illegally obtained evidence in a state criminal trial was a violation of the Constitution.[28] Since the federal habeas statute stated that if a person was in state custody in violation of the Constitution a writ of habeas corpus should be granted,[29] federal courts soon began to review search and seizure cases to determine if the exclusionary rule was being applied in the state courts. Most federal courts reasoned that if the rule was not being applied, the state prisoner was being held "in violation of the Constitution . . . ."[30] The precise question of whether an illegal search and seizure claim is properly cognizable under the federal habeas statute never came before the Court until the instant case. Nevertheless, the Supreme Court itself decided many of the exclusionary rule cases on certiorari from federal habeas corpus proceedings involving state prisoners.[31] This trend of federal habeas

23. *Id.* at 313. The Court states that: "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Id.*

24. *Id.*

25. 367 U.S. 643 (1961).

26. *See, e.g.*, Pope, *Suggestions for Lessening the Burden of Frivolous Applications*, 33 F.R.D. 409, 413-14 (1962). In fact, the only point of contention seemed to surround the question of whether prisoners who were convicted on the basis of illegally seized evidence prior to the *Mapp* decision could now seek the habeas corpus remedy. For a discussion of the retroactivity issue, *see* Note, *Collateral Attack of Pre-*Mapp v. Ohio *Convictions Based on Illegally Obtained Evidence in State Courts*, 16 RUTGERS L. REV. 587, 595 (1962).

27. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

28. The *Mapp* Court stated that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.* at 655.

29. 28 U.S.C. §2254(a) (1970) provides that: "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."

30. *Id. See, e.g.*, Montana v. Tomich, 332 F.2d 987 (9th Cir. 1964); United States v. Tracy, 233 F. Supp. 423 (E.D. Pa. 1964), *aff'd* 350 F.2d 658 (3d Cir. 1965).

31. Lefkowitz v. Newsome, 420 U.S. 283, 294 (1975) (White, J., dissenting). The dissent

review of state search and seizure cases climaxed with *Kaufman v. United States*[32] in which the Court ruled that it was unable to restrict "access by federal prisoners with illegal search-and-seizure claims to federal collateral remedies, while placing no similar restriction on access by state prisoners."[33] The Court in that case not only recognized the trend, but in fact seemed to endorse it.

Recently the Burger Court has tended to restrict the accessibility of federal habeas corpus to state prisoners.[34] For example, the Court held that if a prisoner pleaded guilty after receiving advice of counsel "within the range of competence demanded of attorneys in [a] criminal case," this would be deemed a waiver of any claim that his confession was coerced.[35] In addition the Court held that if a state prisoner had deliberately by-passed state procedures by failing to assert all his claims in the state habeas hearing, he would be barred from federal habeas corpus relief.[36] This restriction, coupled with a growing minority of Justices that dislike the exclusionary rule,[37] led to Justice Powell's proposal in *Schneckloth v. Bustamonte*[38] that the Court restrict collateral review of state prisoners' fourth amendment claims to the question of "whether

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claimed that as a statutory matter the exclusionary rule was not cognizable under 28 U.S.C. §2254(a); Cardwell v. Lewis 417 U.S. 583 (1974); Cady v. Dombrowski, 413 U.S. 433 (1973); Adams v. Williams, 407 U.S. 143 (1972); Whiteley v. Warden, 401 U.S. 560 (1971); Chambers v. Maroney, 399 U.S. 42 (1970), *rehearing denied* 400 U.S. 856 (1970); Harris v. Nelson, 394 U.S. 286 (1969); Mancusi v. Deforte, 392 U.S. 364 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); Warden v. Hayden, 387 U.S. 294 (1967).

32. 394 U.S. 217 (1969).

33. *Id.* at 226. "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. The Court cited *Mancusi*, *Carafas*, *Warden*, and *Henry* as support for this statement. See note 30 *supra*. In addition, many authorities assumed that the question had already been answered. *See Developments in the Law, supra* note 15, at 1063. Just prior to the instant decision the Court on April 26, 1976, released a new model form to be used in applications for habeas corpus under 28 U.S.C. §2254. Under question twelve of that form, there was a list of the most frequently raised grounds for relief in habeas corpus proceedings. Section (c) stated: "Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure."

34. For a complete review of habeas corpus and the Burger Court, *see* Miller, *supra* note 12, at 68-76.

35. McMann v. Richardson, 397 U.S. 759, 771 (1970).

36. Murch v. Mottram, 409 U.S. 41 (1972), *rehearing denied* 409 U.S. 1119 (1972).

37. *See* Oregon v. Hass, 420 U.S. 714, 723 (1975) (excluding evidence to impeach a defendant who testifies because of a lack of *Miranda* warnings, "would pervert [a] constitutional right into a right to falsify. . . ."); United States v. Calandra, 414 U.S. 338, 348 (1974) (The exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."); Schneckloth v. Bustamonte, 412 U.S. 218, 271 (1973) ("[T]he case for the exclusionary rule varies with the setting in which it is imposed.") Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 424 (1971) (Burger, C. J., dissenting) ("I believe the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust. . . ."). *See also* Irons, *The Burger Court: Discord in Search and Seizure*, 8 U. RICH. L. REV. 433 (1974).

38. 412 U.S. 218 (1973).

the petitioner was provided a fair opportunity to raise and have adjudicated the question in [the] state courts."[39]

The majority opinion in the instant case, written by Justice Powell,[40] reviewed the history of habeas corpus and concluded that the question of whether search and seizure claims are properly cognizable under the federal habeas corpus statute had never before been presented in a petition accepted for certiorari.[41] Distinguishing earlier cases, Justice Powell noted that in *Kaufman* the Court had only "assumed" in "dictum"[42] that the failure to exclude illegal evidence would be a basis for federal review of a state court decision. Therefore, the majority proposed that there was no precedent by which the Court was bound. Rejecting the "dictum" of *Kaufman,* the majority concluded that when the federal courts are presented with an application for a writ of habeas corpus from a state prisoner, the courts should not apply the exclusionary rule unless they first establish that the prisoner was denied "an opportunity for full and fair litigation" of his fourth amendment claim at trial and on direct review.[43]

The instant decision is based on a balancing test that weighs the benefits and detriments of allowing the federal courts to review state court determinations of search and seizure questions. Initially, Justice Powell emphasized that the "exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment."[44] Like all judicial rules, its existence must be justified in light of the competing policies that aid the truthfinding process of the judicial system. The majority found this approach consistent with two earlier decisions. In *Walder v. United States,*[45] the Court allowed the admission of illegally seized evidence to impeach the credibility of a defendant testifying at his own trial. The Court had also allowed the use of illegally seized evidence in grand jury proceedings in *United States v. Calandra.*[46] Thus, the majority reasoned that the question before them was to be resolved by "weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims."[47]

Assuming that the exclusionary rule discouraged law enforcement officials

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39. *Id.* at 250. Justice Powell was joined in his concurring opinion in *Schneckloth* by Chief Justice Burger and Justice Rehnquist.

40. 96 S. Ct. at 3039. In the instant case, Justice Powell implemented the proposal that he made in his concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973).

41. But see note 32 *supra.* In answer to the question of why, if the issue had not been ruled on before, had the Court decided habeas corpus claims of state prisoners whose only complaint was an illegal search and seizure, the Court quoted Justice Black as saying "only in the most exceptional cases will we consider issues not raised in the petition." 96 S. Ct. at 3045 n. 15.

42. 96 S. Ct. at 3045 n. 16.

43. *Id.* at 3046.

44. *Id.*

45. 347 U.S. 62 (1954). For a contrary interpretation of *Walder, see* Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1217-18 (1971).

46. 414 U.S. 338 (1974).

47. 96 S. Ct. at 3049.

from violating the fourth amendment,[48] the majority stated that it would still adhere to the implementation of the exclusionary rule at the trial level and on direct appeal,[49] even though many guilty defendants are given a windfall that runs counter to the American concept of justice. However, the Court stated that the application of the rule is not justified when the cumulative costs[50] of federal review are weighed against "the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal."[51] In summary, the majority emphasized that if there has already been an opportunity for a full and fair litigation, the contribution of the exclusionary rule in a habeas corpus proceeding to the effectuation of the fourth amendment is so minimal, and the costs are so high, that its application is unjustified.

Dissenting, Justice Brennan[52] concluded that in light of the explicit language of the federal habeas corpus statute[53] there are only two possible ways to construe the majority's opinion.[54] The Court is holding either that as a matter of statutory construction the respondents are not being held "in custody in violation of the Constitution,"[55] or that the particular considerations of this

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48. The Court expressed its doubt that the exclusionary rule actually discouraged policemen from violating the fourth amendment. 96 S. Ct. at 3051. In United States v. Janis, 96 S. Ct. 3021, 3031 n.22 (1976), the Court noted: "No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied." *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 475 n.593 (1974); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L. J. 681 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. L. REV. 740 (1974).

49. 96 S. Ct. at 3051.

50. These costs, noted Justice Powell, result not only in a windfall to the criminal but also in "serious intrusions on values important to our system of government." 96 S. Ct. 3050 n.31. Justice Powell listed those intrusions in Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973): "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."

51. 96 S. Ct. at 3051.

52. Justice Brennan was joined by Justice Marshall in this dissent. Justice White essentially agreed with Justice Brennan's dissent but also stated that: "I feel constrained to say, however, that I would join four or more other Justices in substantially limiting the reach of the exclusionary rule as presently administered under the Fourth Amendment in federal and state criminal trials." 96 S. Ct. at 3072.

53. See note 29 *supra*.

54. Only Chief Justice Burger wrote a concurring opinion. He stated that the use of the exclusionary rule should be modified, if not completely abandoned, for the reasons stated in his dissent in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 414 (1971). However, unlike his dissent in *Bivens*, he was no longer ready to wait for Congress to enact alternatives. Instead, he felt that the legislative machinery would not function until the rule had been abolished. 96 S. Ct. at 3052.

55. 28 U.S.C. §2254 (a) (1970). See note 29 *supra*.

case are sufficient to allow the Court to rewrite the jurisdictional statutes enacted by Congress.[56] The first possibility, the dissent concluded, is not a valid claim if *Mapp* is to remain good law. Contending that the exclusionary rule was held to be a constitutional right in *Mapp,* the dissent reasoned that the erroneous admission of such evidence is a violation of the United States Constitution. If this assumption were not true, then there is no basis for applying such a rule to state court proceedings. Therefore, *Mapp* must have interpreted the exclusionary rule as an ingredient of the fourth amendment and not just "a judicially created remedy." According to the dissent, constitutional rights do not vanish after direct appeals have been exhausted.[57]

The other possible ground seen by the dissent for the majority's opinion was a new interpretation of the habeas corpus statutes. This interpretation would necessarily allow judicial discretion in determining which constitutional rights are reviewable. The dissent feared that this judicial dilution of a federal statute, could be used in the future to restrict federal habeas corpus relief for violations of other constitutional rights:[58] "it is for *Congress* to decide what the most efficacious method is for enforcing *federal* constitutional rights and asserting the primacy of federal law."[59]

The instant case shifts the focus of the federal district court in habeas corpus proceedings from an inquiry into fourth amendment claims to a consideration of whether the defendant's claim was fully and fairly litigated. It is questionable whether this shift will significantly reduce the burden on the federal judicial system.[60] After the instant decision, the reviewing court must check the record of the state court proceedings to determine if the defendant was afforded a full and fair trial; previously, the district court examined the record to decide if the state court had correctly applied the exclusionary rule. In fact, the district court's review of the fourth amendment claims was never a severe burden. One of the most time consuming activities is the holding of an evidentiary hearing;[61] the decision in the instant case still requires this hearing when the state record does not meet the *Townsend* criteria.[62] Thus, the federal courts will still have to spend the same amount of time holding evidentiary trials and reviewing state court records.

One of the strongest objections to removing a state prisoner's federal collateral remedy stems from concern that state judges may be unsympathetic to

56. Justice Powell disputed this contention of Justice Brennan. *See* 96 S. Ct. 3052 n.37.

57. *Id.* at 3061.

58. Justice Brennan stated: "I am therefore justified in apprehending that the groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction, if not for all grounds of alleged unconstitutional detention, then at least for claims—for example, of double jeopardy, entrapment, self-incrimination, *Miranda* violations, and use of invalid identification procedures—that this Court later decides are not 'guilt-related.'" *Id.* at 3062-3063.

59. *Id.* at 3060.

60. Habeas corpus petitions by state prisoners rose from 5,339 in 1966 to 7,843 in 1975, a 46.9% increase. However total petitions rose 126.1%. *See,* ANNUAL REPORT OF THE DIRECTOR OF ADMINISTRATIVE OFFICES OF THE UNITED STATES COURTS 207 (1975).

61. *See* Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on* Schneckloth v. Bustamonte, 1975 WIS. L. REV. 484, 496.

62. See note 23 *supra.*

federally created rights.[63] In many states judges are elected to office,[64] which renders them more susceptible to popular pressure.[65] Furthermore, fearing that state procedures may be inadequate to preserve federal rights,[66] some commentators argue that there should be a federal forum to enforce a federal right.[67] After the instant decision, in order to get his fourth amendment claim reviewed by a federal judge who is insulated from outside pressures by lifetime tenure, a state prisoner will have to seek certiorari review from the United States Supreme Court.[68] Because of the institutional constraints on an already crowded docket, the Court has accepted the fact that certain federal claims will not be reviewed in a federal forum.[69] The Court, in the instant case, is thus establishing two kinds of constitutional rights, those that are reviewable by the federal courts and those that are not. In making this distinction, the Court has adopted the rationale rejected by the *Kaufman* majority that a fourth amendment claim is different in kind from that based on the fifth or sixth amendments because it does not "impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable."[70]

In support of this restructuring of the right to federal habeas corpus, Justice

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63. *See* Kaufman v. United States, 394 U.S. 217, 225 (1969).

64. "As of 1975 . . . 26 states use elections as [their] primary means of selecting trial judges." *See* Atkins, *Judicial Elections — What the Evidence Shows*, 50 FLA. B.J. 152 (1976).

65. As a justice of the Supreme Court of Illinois put it: "While it is hard indeed for any judge to set apart the question of the guilt or innocence of a particular defendant and focus solely upon the procedural aspects of the case, it becomes easier, I think, in a reviewing court, where the impact of the evidence is diluted." Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956).

66. "[N]ot all of the states have adequate procedures for collateral review of federal constitutional issues." *Id.* at 24.

67. Prior to the *Mapp* decision, several older commentaries stressed the need for a federal forum to adjudicate a federal right. "[A]n awareness by state tribunals that the procedural barrier to state review would not be deemed necessarily a barrier to federal review, would provide an incentive for state courts to reach serious constitutional claims and vindicate them in proper cases." Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 442 (1961). "The right to a federal writ of habeas corpus is a constitutional guarantee to a state prisoner that deprival of his liberty does not depend on vagaries of state laws, policy, and practices." Leighton, *Federal Supremacy and Federal Habeas Corpus*, 12 ST.L.U.L.J. 74, 85 (1967). "It would seem that federal courts should specialize in federal law and federal rights and be available to determine cases in which the outcome will be controlled by issues about federal rights." Trautman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 VAND. L. REV. 445, 470 (1954). *See also*, Schaefer, *supra* note 65, at 1 (a state judge reiterates the need for a federal habeas corpus forum).

68. Since the Court has already said that a state need not provide appellate review after a full and fair trial, the United States Supreme Court may be the last and only chance for review that a prisoner has. Although this is not a severe threat now, the problem may increase if states relax their standards in response to minimized federal review. *See* Lindsey v. Normet, 405 U.S. 56 (1972); Schaefer, *supra* note 65 at 24.

69. The effect of this decision is not unlike the result in Miller v. California, 413 U.S. 15 (1973), *rehearing denied*, 414 U.S. 881, in which the Court decided to let the state courts decide for themselves what standards for pornography are to be used in their courts. *But cf.* Jenkins v. Georgia, 418 U.S. 153 (1974) (where the Court held that the standards had been misapplied and overturned a state jury's determination of obscenity).

70. Kaufman v. United States, 394 U.S. 217, 224 (1969).

Powell argued that the removal of this collateral remedy will ease the friction caused by lower federal courts reversing state appellate court decisions.[71] However, the cases that are precluded by the instant decision are those in which the federal courts would be protecting the federal rights of defendants; these cases do not present great potential for federal-state conflict. More acute friction arises when a federal court determines that the state court proceeding was totally inadequate and orders a full factual hearing.[72] These types of cases are not prevented by the instant decision. Thus, the instant case has prevented collateral review of cases that take the least time, create the least friction, and that would have prevented a flood of petitions for certiorari to the Supreme Court.

Probably the most important question left unanswered by the Court's decision is what constitutes an opportunity for a "full and fair" litigation of a fourth amendment claim. The majority left a hint by citing to the *Townsend* case after quoting the precise language of that decision. In *Townsend* the Court gave six specific instances in which the state courts would be considered not to have provided a full and fair evidentiary hearing.[73] In addition, the federal habeas statute, essentially codifying the *Townsend* rule, supplies some further instances in which evidentiary hearings are required.[74] In implementing these criteria a district court must examine four basic areas to determine whether federal review of a search and seizure claim is appropriate. First, the court must inquire whether the prisoner was adequately represented by counsel.[75] Second, there must be a review of whether the issues of fact tendered by the defendant were fully resolved on the merits.[76] Third, the transcripts of the

71. 96 S. Ct. at 3050 n.31.

72. *See* Tushnet, *supra* note 61, at 496.

73. See note 23 *supra.*

74. "In any proceeding . . . for a writ of habeas corpus . . . the merits of a factual issue, made by a State court . . . shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit —(1) that the merits of the factual dispute were not resolved in the State court hearing; (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or (7) that the applicant was otherwise denied due process of law in the State court proceeding; (8) or unless . . . such factual determination is not fairly supported by the record." 28 U.S.C. §2254(d) (1970).

75. *See* Boyd v. Dutton, 405 U.S. 1 (1972) (where a state prisoner pleaded guilty without counsel, a hearing was granted); Hawkins v. Bennett, 423 F.2d 948 (8th Cir. 1970) (even though the state was not required to provide counsel at a state habeas corpus proceeding, a hearing was still granted); Wesley v. Alabama, 488 F.2d 30 (5th Cir. 1974) (since appointed counsel, did not participate, a hearing was ordered); Hayes v. Holman, 346 F.2d 991 (5th Cir. 1965) (question as to whether the defendant had waived counsel, hearing granted).

76. *See* Gibson v. Blair, 467 F.2d 842 (5th Cir. 1972) (the trial judge, utilizing the wrong standard, ruled that evidence was irrelevant, hearing granted); Roach v. Bennett, 392 F.2d 743 (8th Cir. 1968) (when the defendant pleaded guilty, there was a question as to his mental competency, hearing granted); Hall v. Page, 367 F.2d 352 (10th Cir. 1966) (hearing

crucial state proceedings must be available.[77] Fourth, the factual determinations of the state court must be fairly supported by the record as a whole.[78]

The instant case is a good example of the controversial technique that the Burger majority employs to obtain results that are contrary to earlier opinions without overruling or distinguishing those opinions.[79] To accomplish this goal, the Court employs a two step method. First, the majority reiterates its philosophy that everything not directly related to the specific issue resolved in the earlier case is to be viewed only as "dictum."[80] Second, the Court then claims to hear "for the first time" questions which it earlier answered only in "dictum".[81] As in the instant case, this tactic allows the majority to attack many of the basic premises that were assumed correct by earlier Courts. While appearing to follow the doctrine of stare decisis, the majority utilizes this technique to achieve a desired result despite the limitations of past decisions.

The critical importance of the instant decision lies in the Court's willingness to expand its *Calandra* rationale that the exclusionary rule is a judicially created remedy rather than a personal constitutional right.[82] This characterization is a departure from the *Mapp* decision which stated that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments."[83] Moreover, the instant holding puts into question the source of the Court's power to enforce the exclusionary rule against the states. If it is not a personal constitutional right, it may alternatively be seen as a form of "quasi-constitutional law" created by the Court to protect constitutional liberites.[84] This new construction of the exclusionary rule allows the majority to subject it to a

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granted where the defendant claimed his confession was coerced). *See also* United States *ex rel.* Lewis v. Henderson, 520 F.2d 896 (2d Cir. 1975) *cert. denied*, 423 U.S. 998 (1975) (no specific factual findings were made, thus a hearing was granted).

77. *See* Elliott v. Alabama, 493 F.2d 1348 (5th Cir. 1974) (hearing granted where no transcripts were made at the time the defendant pleaded guilty, and the circumstances were questionable); Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973) (hearing granted where the transcript of the psychiatrist's testimony was missing).

78. *See* Dulin v. Henderson, 448 F.2d 1238 (5th Cir. 1971) (the record did not support a finding that the defendant had knowledgeably waived his rights, hearing granted); Vera v. Beto, 422 F.2d 1052 (5th Cir. 1970) (result was backed by evidence on the record, hearing was not granted).

It is important to note that these standards focus on the state court's factual determinations and not the appropriateness of their application of the law to the facts.

79. *Compare* Francis v. Henderson, 96 S. Ct. 1708 (1976) *with* Fay v. Noia, 372 U.S. 391 (1963) *and* Alexander v. Louisiana, 405 U.S. 625 (1972). *Compare* Greer v. Spock, 424 U.S. 828 (1976) *with* Flower v. United States, 407 U.S. 197 (1972). *Compare* Hudgens v. N.L.R.B., 424 U.S. 507 (1976) *with* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza Inc., 391 U.S. 308 (1968) *and* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

80. Stone v. Powell, 96 S. Ct. at 3045 nn. 15 & 16 (1976).

81. *Id.* at 3045 n. 16.

82. United States v. Calandra, 414 U.S. 338, 348 (1974). See notes 44 & 46 *supra* and accompanying text.

83. 367 U.S. 643, 657 (1961).

84. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 3-10. (1975). For Professor Monaghan the most troublesome feature of a constitutional common law is its potential to be used as the vehical to turn due process and equal protection rights into a subconstitutional level of law.

balancing test which weighs the need of society to determine accurately the quilt or innocence of the defendant in a criminal trial against the need of the individual to be protected from police encroachment on fourth amendment rights. The instant case demonstrates that the Court is anxious to review each facet of the exclusionary rule. In addition, the Court is demanding that the rule's use in every instance be fully justified by its purposes – deterring police violations of the fourth amendment and maintaining judicial integrity. In this sense, the instant case uses the framework of the appellate process to set a boundary beyond which the Court will refuse to find a deterrent effect on the police community. Similarly, the instant case has continued the process of de-emphasizing the importance of judicial integrity as a factor in determining whether the courts should admit the fruits of illegal police behavior. As a result there has been a trend that shifts the emphasis from protecting defendants' rights to a consideration of the needs of society regarding law enforcement. Hopefully, legislatures, discerning this trend, will either find alternative means of protecting defendants' rights[85] or will secure the earlier precedents by writing the exclusionary rule into law.[86]

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85. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting) (suggesting that the government waive its sovereign immunity as to the tort damages caused by its employees for an illegal search and seizure); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U. L.Q. 621 (discussing a large list of possible alternatives including the traditional tort actions and recent proposals for modifying the tort actions, S. 881, 93rd Cong., 1st Sess., (1973)); LaFave, *Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police*, 30 MO. L. REV. 566 (1965) (proposing that the police must be more effectively trained so that the exclusionary rule can have its desired effect); Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUDICATURE 75 (1974) (proposing a joint liability plan, which would hold the governmental unit that had jurisdiction over the police officer liable as well as the officer himself); Roche, *A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeals Board*, 30 WASH. & LEE L. REV. 223 (1973) (setting up an Administrative Board to compliment the other alternative remedies); Comment, *Use of §1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 104 (1970) (contending that the courts should use their injuctive form of relief in addition to a court monitor to insure that the order is implemented; these monitors would be objective observers who would aid federal judges in the enforcement of their injunctive orders).

86. FLA. CONST. art. I, §12, provides that "Articles or information obtained in violation of this right [to be free from unreasonable searches and seizures] shall not be admissible in evidence."