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Comment

THE "OPPORTUNITY" TEST OF STONE V. POWELL:
TOWARD A REDEFINITION OF
FEDERAL HABEAS CORPUS

I. INTRODUCTION

The federal writ of habeas corpus has traditionally afforded a mechanism whereby the constitutional defects of a criminal conviction may be collaterally attacked. Its function is to test "the legality of the detention of one in the custody of another" by providing a federal corrective proceeding designed to ensure reliable and consistent constitutional adjudication. To achieve this end in compliance with the constitutional command against suspension of this writ, Congress conferred upon the federal courts the power to issue the writ of habeas corpus to state and federal prisoners detained in violation of federal law. Since this broad...
statutory mandate subjects the grant of federal habeas relief to the
discretion of the federal courts, the standards governing the exercise of that
discretion in accordance with due process determine the propriety of federal
habeas relief. The development and application of these standards are of
particular importance to those federal or state prisoners for whom the
federal habeas court serves as the last resort to remedy violations of their
constitutional rights.

In its recent decision in Stone v. Powell, the Supreme Court established
a new standard for determining the reviewability of state prisoners' fourth
amendment claims of unconstitutional detention under the habeas corpus
jurisdiction of the federal courts. In a clear departure from the firmly
established principle that collateral relief in federal court is available to
rectify any constitutional deprivation, the Stone Court held that "where

§ 2254, relating to habeas relief for state prisoners, deserves close attention. Section
2254 provides in pertinent part:

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.
Id. § 2254(a). Federal prisoners may utilize a comparable statutory remedy under 28
6. This discretion is circumscribed by the limitations imposed upon the federal
courts by statute. See 28 U.S.C. §§ 2241 & 2254 (1970). These limitations are general,
however, and leave to the courts the responsibility for deciding the circumstances
under which the grant of habeas relief is appropriate. See note 5 supra. See generally
Developments, supra note 1, at 1045–62.
7. One commentator has noted that "[t]he importance of the expanded federal
habeas jurisdiction has been magnified

by the growth of fourteenth amendment due
process doctrines." Developments, supra note 1, at 1041. Since the application of much
of the Bill of Rights to the states brought the states' criminal processes under closer
federal supervision, state prisoners whose constitutional claims are rejected through-
out the state court system and on certiorari to the Supreme Court have often looked to
the federal district courts for habeas relief. Id.
8. 428 U.S. 465 (1976). For a discussion of the Stone decision, see notes 27–43 and
accompanying text infra.
9. The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects,
against unreasonable searches and seizures, shall not be violated, and no
warrants shall issue, but upon probable cause, supported

by oath or affirmation, and particularly describing the place to be searched, and the persons or things to
be seized.
U.S. CONST. amend. IV.
The "exclusionary rule" is a "judicially created means of effectuating the
The rule bars the use at trial of evidence obtained as a result of an unconstitutional
search or seizure. Id. at 483. It was first articulated in the context of federal
643 (1961) (exclusionary rule applicable to the states through the operation of the fourth
and fourteenth amendments).
10. See 428 U.S. at 494.
11. See Brown v. Allen, 344 U.S. 443, 446–50 (1953). In Brown, the scope of habeas
corpus jurisdiction was expanded to include all federal constitutional claims raised by
state prisoners. Id. Prior to Brown, the inquiry under federal habeas review related to
the adequacy of the process whereby the federal questions at issue were resolved. See
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 corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."^{12}

Subsequent to Stone, lower federal courts considering the reviewability of state prisoners' fourth amendment claims on habeas corpus have encountered difficulty determining when the "opportunity for a full and fair litigation" of such claims has been afforded a state prisoner.\(^{13}\) It is submitted that the resolution of this seminal issue will have a drastic and far-reaching impact, since a finding that the state court afforded a prisoner the opportunity for a full and fair consideration of his fourth amendment claim will have the effect of preventing the exercise of federal court review.\(^{14}\)

The apparent command of Stone to federal courts is to grant habeas corpus review of fourth amendment claims only where the habeas petitioner attacks the process whereby the result of a state court adjudication was achieved.\(^{15}\) Specifically, only those claims relating to the fullness and fairness of the opportunity to litigate in state court, not the result of the state

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Frank v. Mangum, 237 U.S. 309 (1915) (federal habeas review appropriate where state failed to provide adequate "corrective process"). The Brown Court held that a state prisoner was entitled to full reconsideration on federal habeas corpus of his fifth and fourteenth amendment claims despite the apparent adequacy of the state corrective process. 344 U.S. at 460-65. Brown therefore established the rule that a federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the U.S. Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings.

Wainwright v. Sykes, 433 U.S. 72, 87 (1977). For a discussion of Wainwright, the most recent case concerning the scope of federal habeas jurisdiction, see notes 132-48 and accompanying text infra.

In Brown and one of its companion cases, Daniels v. Allen, state prisoners petitioned for federal habeas relief on the grounds that the trial courts improperly admitted into evidence certain confessions and ignored discrimination in the selection of jurors. 344 U.S. at 466-76, 482-83. The Court ruled that Brown was entitled to reconsideration of his claims in federal court notwithstanding the rejection of these claims on direct appeal to the highest state court. Id. at 466-76. In Daniels, however, the Court refused to reconsider the claims of a petitioner whose failure to comply with state procedural rules relating to the timely filing of an appeal to the state appellate court was deemed sufficient to bar federal habeas review. Id. at 486-87.

12. 428 U.S. at 494 (footnotes omitted).


15. See Stone v. Powell, 428 U.S. 465, 494 (1976). Stone has been interpreted to mean that federal habeas relief is appropriate where available state procedures were insufficient to allow the state court to "meaningfully consider" the defendant's claim. See, e.g., Gates v. Henderson, 568 F.2d 830, 844 (2d Cir. 1977) (en banc) (Oakes, J., concurring), cert. denied, 434 U.S. 1038 (1978); United States ex rel. Conroy v. Bombard, 426 F. Supp. 97, 109 (S.D.N.Y. 1976). See also Sandoval v. Aaron, 562 F.2d 13 (10th Cir. 1977); Chavez v. Rodriguez, 540 F.2d 500 (10th Cir. 1976).
court adjudication, appear to be cognizable after Stone. Generally, however, state prisoners have sought habeas relief after Stone not by attacking state procedures as such, but by challenging the use of those procedures to deny substantive rights in their particular case. Federal courts have therefore been required to interpret the content and meaning of Stone's "opportunity" test rather than rigidly apply the process/substance distinction suggested above.

The problems of delineating the contours of the "opportunity" test have arisen in two basic factual contexts: 1) where the defendant fails to properly raise his fourth amendment claim in state court notwithstanding the availability of adequate state procedures, and consequently the court never considers the merits of that claim; and 2) where the defendant presents his claim in state court and the court resolves the claim on its merits but applies an erroneous constitutional standard. This comment will discuss the lower federal court decisions applying Stone in the context of this categorical framework in an effort to discover whether Stone's ambiguous "opportunity" test has been invested with any discernible structure.

II. THE Stone DECISION

In 1953, the landmark Supreme Court decision of Brown v. Allen established that all federal constitutional questions raised by state prisoners were reviewable on federal habeas corpus. Almost twenty years later the Court, in Kaufman v. United States, decided that all constitutional claims in federal habeas corpus proceedings initiated by federal prisoners were cognizable. In light of these sweeping decisions, the availability of federal habeas review has not been a function of the particular type of constitutional issue sought to be raised in a collateral attack. Before Stone, the

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18. See notes 62-166 and accompanying text infra.
19. See notes 167-212 and accompanying text infra.
21. 344 U.S. at 446-50. Section 2241 of the Judicial Code empowers federal district courts to grant writs of habeas corpus to prisoners in custody in violation of the Constitution, 28 U.S.C. § 2241(c)(3) (1970). Under this jurisdictional grant, the Brown Court held that federal courts could redetermine the merits of a constitutional claim even after it had been fully and fairly adjudicated by the state courts. 344 U.S. at 508.
23. Id. In Kaufman, a federal prisoner argued that federal habeas review should be available to redress his claim that evidence admitted at trial was unconstitutionally seized. Id. at 218–20. Although his trial counsel had properly objected to the admission of this evidence, the habeas petitioner was unable to secure review of this question on direct appellate review. Id. at 220 n.3. The Court concluded, as a matter of statutory construction, that there was no basis for restricting "access by federal prisoners with illegal search-and-seizure claims to federal collateral remedies, while placing no similar restriction on access by state prisoners." Id. at 226.
Supreme Court had confirmed the availability of the federal habeas forum to consider state prisoners' claims of admission at trial of illegally seized evidence without discussing the type of constitutional issue in question. The *Stone* Court, however, adopted a "novel interpretation" of the habeas statutes "without expressly overruling or distinguishing any of [this] diametrically contrary precedent." The *Stone* decision consolidated two cases involving murder convictions in state courts based on evidence obtained by searches and seizures alleged by the habeas petitioners to have violated their fourth amendment rights. After the state courts had rejected the petitioners' contentions that the fourth amendment prevented the admission of this evidence, each petitioner obtained a writ of federal habeas corpus pursuant to review of the merits of these fourth amendment claims by the federal courts.


27. *Id.* at 469–74.

28. *Id.* at 468. In one of these cases, *Stone* v. *Powell*, the habeas petitioner was arrested for violation of a city vagrancy ordinance which he alleged was unconstitutional. *Id.* at 469–70. The subsequent search incident to the arrest revealed a revolver which was later discovered to have been the weapon used in a murder committed shortly before petitioner's arrest, and this evidence was later deemed sufficient to convict petitioner of second-degree murder. *Id.* at 470. The state appellate court held that the police officer's testimony regarding the search and discovery of the weapon was at most harmless error and refused to consider whether the ordinance was unconstitutionally vague. *Id.* *See* Chapman v. California, 386 U.S. 18 (1967) (before a constitutional error can be held to be harmless, court must find it was harmless beyond a reasonable doubt).

In the companion case to *Stone*, *Wolff* v. *Rice*, the habeas petitioner challenged the sufficiency of a search warrant authorizing the search of his home. 428 U.S. at 472–73. The trial court denied petitioner's motion to suppress the incriminating evidence derived from this search. *Id.* at 472. On appeal, the Supreme Court of Nebraska concluded that the affidavit supporting the warrant demonstrated sufficient probable cause for issuance of the warrant when considered in light of the testimony adduced at the suppression hearing. *State v. Rice*, 188 Neb. 728, 738–39, 199 N.W.2d 480, 487–88 (1972).


Justice Powell's majority opinion first examined the historical framework within which federal habeas jurisdiction had gradually expanded. Noting that it had never directly considered "whether exceptions to full review [of all claims involving constitutional questions] might exist with respect to particular categories of constitutional claims," the Court distinguished between claims derived from a "judicially created remedy" and those which arose from a "personal constitutional right." The Court characterized the exclusionary rule as "a judicially created means of effectuating the rights secured by the Fourth Amendment," apparently

30. 428 U.S. at 474-82. Justice Powell interpreted the Brown decision and Fay v. Noia, 372 U.S. 391 (1963), as significantly expanding the scope of habeas corpus relief. 428 U.S. at 476-78. One commentator on Stone has pointed out that this position reflects substantial disagreement with the reading of habeas corpus development set forth in Fay. See The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 214 n.10 (1976). For a discussion of the Fay decision, see note 91 infra.

31. 428 U.S. at 478-79. The majority noted that many lower federal court decisions had concluded that collateral review of fourth amendment claims filed by federal prisoners was inappropriate under § 2255 of the Judicial Code, 28 U.S.C. § 2255 (1970). 428 U.S. at 479. According to the Court, the rationale behind this view proposed that search and seizure claims are unique because they do not "impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers." Id. at 479, quoting Kaufman v. United States, 394 U.S. 217, 224 (1969).

32. 428 U.S. at 486, quoting United States v. Calandra, 414 U.S. 338, 348 (1974). Although the Court did not supply a definition of this term, the characterization of the exclusionary rule in this manner was apparently intended to signify that such a "remedy" was entitled to a lesser degree of protection than should be accorded a constitutional "right." The distinction between the two is related to the purposes each is intended to serve. A judicially created "remedy" such as the exclusionary rule is designed "to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). The rule does not provide a means to redress the injury to the privacy of an illegal search victim. In contrast, a "personal constitutional right" is intended to protect the interests of the aggrieved party by focusing on his particular predicament and accommodating his specific needs. See United States v. Calandra, 414 U.S. 338, 347-48 (1974).

In his dissent in Stone, Justice Brennan objected to the description of the exclusionary rule as "a judicially created remedy." 428 U.S. at 510 (Brennan, J., dissenting). He had made the same criticism in Calandra, in which he warned prophetically that "for the first time, the Court today discounts to the point of extinction the vital function of the rule to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct." 414 U.S. at 360 (Brennan, J., dissenting).

33. 428 U.S. at 486. Without citing support for this proposition, the Stone Court stated that "[p]ost-Mapp decisions have established that the [exclusionary] rule is not a personal constitutional right." Id.

In his dissent, Justice Brennan argued that the distinction between "a judicially created remedy" and "a personal constitutional right" was one of form and not substance. Id. at 510-11 (Brennan, J., dissenting). At the heart of the dissent's refutation of this distinction lay the fact that the exclusionary rule, mandating that evidence obtained in an illegal search or seizure be excluded at trial, is constitutionally based. Id. at 514 (Brennan, J., dissenting). Since a defendant convicted on the basis of unconstitutionally seized evidence is clearly "in custody in violation of the Constitution" under § 2241, it is submitted that the majority's distinction does not logically justify the Court's hostility to federal jurisdiction to redress violations of fourth amendment rights.
intending to signify that the exclusionary rule was a "remedy" entitled to lesser protection than a constitutional right. Contrasting the deterrent purpose of this rule with the notion that its usefulness as a remedial device should be limited "to those areas where its remedial objectives are thought most efficaciously served," Justice Powell employed a cost/benefit analysis to determine whether fourth amendment questions on federal habeas review should be addressed on the merits.

The majority posited that the long recognized cost of the exclusionary rule was its tendency to "[deflect] the truthfinding process and often [free] the guilty." In addition, the majority noted that federal collateral review of exclusionary rule claims would inevitably impose additional costs to those incurred at trial and on direct review, including ineffective use of limited resources.

The functional approach inherent in this cost/benefit analysis has been criticized as inconsistent with the symbolic qualities of constitutional rights. Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 YALE L. J. 1035, 1091-95 (1977). The conceptualization of rights entirely in functional terms "also represents a transition from the discourse of rights to that of interests." Id. at 1092. It has thus been argued that a functional inquiry into a right's consequences for accuracy should not be permitted to "crystallize a functionalist reduction of the right's content." Id.

In his dissent in Stone, Justice Brennan criticized the majority's reliance on the functional approach to ordering constitutional rights on similar grounds:

The Court . . . argues that habeas relief for non-"guilt-related" constitutional claims is not mandated because such claims do not affect the "basic justice" of a defendant's detention . . . ; this is presumably because the "ultimate goal" of the criminal justice system is "truth and justice." This denigration of constitutional guarantees and constitutionally mandated procedures, relegated by the Court to the status of mere utilitarian tools, must appall citizens taught to expect judicial respect and support for their constitutional rights. Even if punishment of the "guilty" were society's highest value — and procedural safeguards denigrated to this end — in a constitution that a majority of the members of this Court would prefer, that is not 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. The procedural safeguards mandated in the Framers' Constitution are not admonitions to be tolerated only to the extent they serve functional purposes that ensure that the "guilty" are punished and the "innocent" freed; rather, every guarantee enshrined in the Constitution, our basic charter and the guarantor of our most precious liberties, is by it endowed with an independent vitality and value, and this Court is not free to curtail those constitutional guarantees even to punish the most obviously guilty.

428 U.S. at 523-24 (Brennan, J., dissenting) (footnote omitted) (emphasis in original).

See Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. PA. L. REV. 378, 388-89 (1964) (application of exclusionary rule "beyond the confines of necessity" harms the public interest).
judicial resources, disruption of finality in criminal trials, friction between state and federal courts, and disruption of the balance of federalism. Contrasted against the alleged minimal incremental deterrent effect of applying the rule on federal habeas review, Justice Powell concluded that these costs far outweighed any benefits relating to the furtherance of fourth amendment rights absent a showing that the opportunity to litigate a fourth amendment claim was denied. Restricting the availability of the federal habeas forum to only those petitioners demonstrating both a fourth amendment violation and denial of a full and fair opportunity to have that violation rectified in state court was therefore consistent, in the majority’s view, with both the purposes and rationale of the exclusionary rule and habeas corpus jurisdiction.


39. In the Court’s judgment, the view that federal habeas review would facilitate deterrence of fourth amendment violations “rests on 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.” 428 U.S. at 493 (footnote omitted). See generally Amsterdam, supra note 37, at 389 (with increasing application, deterrent effect of exclusionary rule reaches a point of diminishing returns).

40. 428 U.S. at 494–95.

41. Id. at 493–96. In a vigorous dissent, Justice Brennan was unable to discern a legitimate constitutional rationale for the majority’s withdrawal of federal habeas jurisdiction. Id. at 515 (Brennan, J., dissenting). He charged that the Court’s “interest balancing” analysis was a rhetorical veneer employed to obscure the fact that the decision could not properly rest on constitutional grounds. Id.

The dissent further maintained that by “[e]mploying the transparent tactic that today’s is a decision construing the Constitution, the Court usurps the authority — vested by the Constitution in the Congress — to reassign federal judicial responsibility for reviewing state prisoners’ claims of failure of state courts to redress violations of their fourth amendment rights.” Id. at 535 (Brennan, J., dissenting). The dissent alleged that the actual basis of the Stone decision was the court’s “novel reinterpretation of the habeas statutes,” which would require that district courts “routinely” deny habeas relief to prisoners “in custody in violation of the Constitution or laws . . . of the United States” as a matter of “judicially manufactured” judicial discretion. Id. at 515–16 (Brennan, J., dissenting) (citation omitted). Rejecting this constitutional “interest balancing” approach as untenable, the dissent maintained that the majority simply dressed its holding in “constitutional garb” in order to disguise its rejection of the longstanding principle that there are no “second class” constitutional rights for purposes of habeas corpus jurisdiction. Id. at 515 (Brennan, J., dissenting).

Justice Brennan also attacked the majority’s construction of the functional relationship between the exclusionary rule and the writ of habeas corpus. Id. at 512–13 n.10. (Brennan, J., dissenting). He argued that the “costs of applying the exclusionary rule on habeas should already have been incurred at the trial or on direct review if the state court had not misapplied federal constitutional principles.” Id. (emphasis in original). Since Mapp v. Ohio, 367 U.S. 643 (1961), had established that these costs were outweighed by the need to protect fourth amendment rights, “[t]he only proper question on habeas is whether the federal courts . . . are to permit the States free enjoyment of the fruits of a conviction which by definition were only obtained through violations of the Constitution as interpreted in Mapp.” 428 U.S. at 512–13 n.10 (Brennan, J., dissenting).

Moreover, in the dissent’s view, the majority opinion “portends substantial evisceration of federal habeas corpus jurisdiction” in defiance of the congressional
In an important footnote, the *Stone* majority rejected the view that federal oversight of state court application of the exclusionary rule was essential to effectuate fourth amendment values. In fact, the rationale supporting the *Stone* decision was premised on the Court's conviction that the state courts could serve as "fair and competent forums for the adjudication of federal constitutional rights," notwithstanding differences in institutional environment between state and federal courts and irrespective of the lack of appropriate sensitivity to constitutional claims exhibited by some state judges in the past.

The fundamental problem presented by the *Stone* decision is the identification of those cases in which *Stone's* "opportunity" standard has not been met, since the Court failed to provide specific guidelines for determining what constitutes a "full and fair opportunity to litigate" a fourth amendment claim in state court. A close examination of the *Stone* opinion, however, does afford lower courts some direction. In fact, three aspects of the *Stone* decision support a "collateral estoppel" interpretation of the "opportunity" test, under which actual litigation in state court would be essential to preclude federal habeas review.

First, the majority's formulation of the "opportunity" test was apparently derived from Justice Powell's concurring analysis in *Schneckloth v. Bustamonte*, in which it was suggested that federal habeas review of search and seizure claims should be limited "solely to the question of mandate. *Id.* at 503 (Brennan, J., dissenting). See note 5 supra. In light of the continued vitality of *Mapp* as the prevailing constitutional rule and the clear congressional intent that federal courts exercising habeas review must stand ready "to rectify any constitutional errors," the dissent argued that the Court's categorization of constitutional rights and broad withdrawal of federal habeas jurisdiction constituted an ominous usurpation of the legislative authority to prescribe a judicial forum to redress violations of constitutional rights. *Id.* at 506, 529, 535 (Brennan, J., dissenting). The dissent also found it "simply inconceivable that constitutional deprivation suddenly vanishes after the [state] appellate process has been exhausted." *Id.* at 511 (Brennan, J., dissenting).

42. *See* *Stone* at 502 n.146. 43. *Id.* One recent commentator has expressed the view that *Stone* gives state court adjudications of a class of federal constitutional claims "substantial immunity from the exercise of federal habeas." *Spritzer*, *supra* note 24, at 501–02 (footnote omitted). He noted that this immunity is contingent only upon the state courts having followed adequate procedures. *Id.* at 502 n.146.

44. As a result this question has been left open for development on a case-by-case basis, thus forcing lower courts to establish the appropriate criteria based on the particular set of facts presented. *See*, e.g., *Pulver v. Cunningham*, 419 F. Supp. 1221, 1224 (S.D.N.Y. 1976), aff'd, 562 F.2d 198 (2d Cir. 1977); *United States ex rel. Conroy v. Bomard*, 426 F. Supp. 97, 109 (S.D.N.Y. 1976).

45. The rule of collateral estoppel provides that where an issue of fact or, in limited circumstances, an issue of law "essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties." *Developments in the Law — Res Judicata*, 65 *Harv. L. Rev.* 818, 840 (1952) (footnote omitted). The requirement that an issue actually be litigated in a previous action is essential to the application of collateral estoppel to that issue when it arises in subsequent litigation between the parties. *Id.* *See* *Cromwell v. County of Sac*, 94 U.S. 351 (1876).

whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts.\textsuperscript{47} Although it is unlikely that the Stone majority unintentionally omitted the three words emphasized above from its “opportunity” test, the Court’s citation to Justice Powell’s concurring opinion in Schneckloth suggests that actual consideration on the merits in state court may constitute an implicit prerequisite to the application of the “opportunity” test.\textsuperscript{48}

More persuasive support for this view may be inferred from the Stone Court’s citation to Townsend v. Sain.\textsuperscript{49} In Townsend, the Court held that a federal evidentiary hearing must be afforded a state prisoner in federal court on habeas corpus review if the habeas applicant did not receive a full and fair evidentiary hearing in state court.\textsuperscript{50} In an effort to establish the specific standards governing the application of this general rule, the Townsend Court prescribed the circumstances justifying the grant of an evidentiary hearing in federal court:

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.\textsuperscript{51}

Under the first criterion of the Townsend standards, federal relitigation of the facts underlying a constitutional claim is appropriate where the merits of such a claim were not resolved by the state court.\textsuperscript{52} Perhaps the Stone Court intended its reference to Townsend to permit the inclusion of the standards enunciated therein within the ambit of the “opportunity” test.

\textsuperscript{47} Id. at 250 (Powell, J., concurring) (emphasis supplied).
\textsuperscript{49} 372 U.S. 293 (1963). The question of the appropriate weight to be given to the Stone Court’s citation to Townsend is further complicated by the fact that the Court referred to Townsend only in a footnote to the summary of its holding and preceded its citation with a “cf.” signal. See 428 U.S. at 494 n.36, citing Townsend v. Sain, 372 U.S. 293 (1963).
\textsuperscript{50} Id. at 312.
\textsuperscript{51} Id. at 313. These criteria are reflected in the 1966 amendments to § 2254 of Judicial Code, 28 U.S.C. § 2254 (1970) yet the amendments are not “a direct statutory codification of Townsend on the question when evidentiary hearings are mandatory.” Developments, supra note 1, at 1141. Instead the amendment assumes that a hearing will be held and addresses the question of whether the state’s factual conclusions should be deemed presumptively correct at the federal hearing. Id. at 1122 n.46. Notwithstanding their distinguishable purposes, the amendment and the Townsend decision contain similar language and clearly reinforce each other. Some courts, however, have gone further and treated the amendment as a codification of Townsend. See, e.g., Maxwell v. Turner, 411 F.2d 805, 807 (10th Cir. 1969); United States ex rel. Hughes v. McMann, 405 F.2d 773, 776 (2d Cir. 1968); White v. Swenson, 261 F. Supp. 42, 60 (W.D. Mo. 1966) (en banc).
\textsuperscript{52} See text accompanying note 51 supra.
Finally, it would appear from the factual background of the Stone decision that actual consideration on the merits of a fourth amendment claim in state court is a prerequisite to the application of Stone's estoppel rule, which forecloses federal habeas review when the "opportunity" standard has been satisfied. In each of the two cases consolidated for review in Stone, the state courts had clearly addressed the merits of the habeas petitioner's fourth amendment claim. It is submitted that the consideration on the merits by the respective state courts made plausible the Stone Court's assertion that state courts should be entrusted with the primary responsibility for protection of fourth amendment rights.

The persuasiveness of these factors, particularly the applicability of the Townsend criteria to Stone's procedural standard, has been greatly disputed in the lower federal courts. Although most courts have rejected "a literal

53. The characterization of the Stone test as an estoppel rule is intended to emphasize the conclusiveness of state court adjudications which comport with the "opportunity" standard.

54. 428 U.S. at 470, 472. Petitioner Lloyd Powell, one of the state prisoners seeking habeas relief in Stone, contended at trial that any testimony regarding the search incident to his arrest and subsequent discovery of incriminating evidence should be excluded because the vagrancy ordinance pursuant to which he was detained was unconstitutionally vague. Id. at 470–71. After the trial court rejected this contention, Powell presented his argument to the state appellate court, which concluded that any error in admitting testimony regarding the search and seizure was harmless beyond a reasonable doubt. Id. at 470. It was thus unnecessary to pass upon the legality of the arrest and search. Id. In granting habeas relief to Powell, the Ninth Circuit held this ordinance unconstitutional under the vagueness standards enunciated in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Powell v. Stone, 507 F.2d 93, 95 (9th Cir. 1974), rev'd, 428 U.S. 465 (1976). The Stone Court never addressed this issue since it ruled that Powell had been afforded "a full and fair opportunity to litigate" his claim in state court. 428 U.S. at 471 n.2, 481–82.

Petitioner David Rice, the other habeas litigant in Stone, filed a motion with the trial court to suppress items seized in a search of his home pursuant to an allegedly invalid search warrant. Id. at 472. After denial of his motion, Rice appealed the issue to the state supreme court, which held that the search warrant was valid. Id. See State v. Rice, 188 Neb. 728, 199 N.W.2d 480 (1972). Upon appeal the federal district court disagreed, ruling the supporting affidavit defective under Spinelli v. United States, 393 U.S. 410 (1969), and Aguilar v. Texas, 378 U.S. 108 (1964). Rice v. Wolff, 388 F. Supp. 185, 190–94 (D. Neb. 1974), aff'd., 513 F.2d 1280 (8th Cir. 1975), rev'd sub nom. Stone v. Powell, 428 U.S. 465 (1976).

55. See 428 U.S. at 493–94 n.35. See also text accompanying notes 42 & 43 supra. 56. The Fifth Circuit has recognized "that Townsend is of some help in defining 'full and fair adjudication' by a state court." O'Berry v. Wainwright, 546 F.2d 1204, 1211 (5th Cir.), cert. denied, 428 U.S. 911 (1977). Two factors mentioned by the O'Berry court, however, limited the usefulness of the Townsend criteria in the context of the Stone test. First, the court pointed out that since Townsend technically applied only to determinations of whether full and fair consideration of a fact issue has been afforded by a state court, the Townsend test was not directly relevant where the issues in dispute were legal only. 546 F.2d at 1211. Second, the O'Berry court cautioned that the intended uses of the Townsend and Stone tests were clearly divergent. Id. In Townsend, the question before the Court was the propriety of a rehearing in federal court when facts were in dispute, not whether a federal court had jurisdiction to consider the merits of a habeas petitioner's claim. Townsend v. Sain, 372 U.S. 293, 312–13 (1963). The O'Berry court noted that in the situation present in Townsend the Court's determination of whether the petitioner was afforded a full and fair hearing on the relevant factual issues did not operate to deny the petitioner access to the
engrafting" of Townsend as the sole measure of full and fair consideration when legal questions are at issue, the Townsend criteria are generally conceded to supply some guidance in deciding whether an adequate opportunity to litigate has been provided in state court. For example, the Townsend criteria suggest that a denial of federal habeas review must be preceded by a resolution on the merits of the fourth amendment claim by a state court, but do not address the underlying issue of the reason for the failure or refusal of state courts to confront the merits of constitutional claims. An increasing number of federal courts, therefore, have been forced federal forum. Rather, the effect of a finding that such a hearing had been afforded was simply to require a federal court to accept the state court's findings of fact while ruling on the petitioner's claim. Contrarily, the practical effect of a finding under Stone that a state prisoner had a full and fair opportunity to litigate his claim in state court will be to preclude federal court adjudication of that claim. The O'Berry court was explicit with respect to this preclusive effect: "Despite the assertions of the Supreme Court in Stone to the contrary, we would be blind to reality to pretend that the practical effect of that decision is not a limitation on federal court jurisdiction." Considering the two factors mentioned above, the O'Berry court concluded that "it would be rash . . . to borrow wholesale the Townsend formula for use in the Stone situation." The court did recognize, however, that the Townsend criteria could "shed some light on the problem at hand." The court then looked to Stone for clues as to the meaning of its "opportunity" test. Consistent with this analysis, the Fifth Circuit also rejected Townsend as the sole measure of Stone's "opportunity" test in a case presenting only questions of law. Graves v. Estelle, 556 F.2d 743, 746 (5th Cir. 1977). In Graves, the court was confronted with a district court ruling that Stone did not block a petitioner's right to federal court adjudication of his fourth amendment claim because the state court's judgment concerning probable cause to arrest was not fairly supported by the record, thus entitling petitioner to relief under the second criterion of the Townsend test. See text accompanying note 51 infra. The Graves court rejected application of this Townsend criterion and refused to allow a federal court to overrule a state court's resolution of the question of whether there was probable cause for a particular search. 556 F.2d at 746. Reasoning that a finding of probable cause required a factual determination supplemented by a legal conclusion, the Graves court refused to accord the Townsend criterion controlling weight, and therefore refrained from reconsideration of the state court's probable cause determination.

In a similar vein, a district court has concluded that the failure, at a state suppression hearing, to adduce the material facts relative to a fourth amendment claim and thereby qualify as a full and fair fact hearing under Townsend did not indicate that the petitioner was denied a full and fair opportunity to litigate under Stone. See Pulver v. Cunningham, 419 F. Supp. 1221, 1224 (S.D.N.Y. 1976), aff'd, 562 F.2d 198 (2d Cir. 1977). According to the Pulver court, the opportunity to litigate encompassed more than simply an evidentiary hearing in trial court; it also included "that corrective action available through the appellate process on direct review of the judgment of conviction." 419 F. Supp. at 1224. The Pulver court noted that the adequacy of the appellate process was not addressed by the Townsend Court, and therefore concluded that Townsend furnished only limited guidance for a court seeking to define the scope of Stone's "opportunity" test. See Graves v. Estelle, 556 F.2d 743, 746 (5th Cir. 1977).

See note 55 supra.

59. See text accompanying note 51 supra.

to attempt to resolve this issue in deciding whether or not to apply Stone’s estoppel rule.61

III. FAILURE TO RAISE FOURTH AMENDMENT CLAIMS DESPITE AVAILABLE STATE PROCEDURES

The Stone Court did not specifically address the propriety of federal habeas review where a state court failed to resolve the merits of a habeas petitioner’s fourth amendment claim.62 A number of lower federal courts, however, have construed the “opportunity” test to eliminate the federal forum for vindication of fourth amendment rights notwithstanding the failure of state courts to confront the merits of a habeas petitioner’s fourth amendment claim.63 In O’Berry v. Wainwright,64 the United States Court of Appeals for the Fifth Circuit reversed the grant of habeas corpus relief issued by a district court on the grounds that evidence obtained as a result of an unconstitutional search of petitioner’s automobile was introduced at trial.65 The Fifth Circuit refused to consider the merits of the petitioner’s fourth amendment claim despite the fact that the claim was raised for the first time in state court at the appellate level and was disposed of not on the merits but, according to the O’Berry court, “on an independent, adequate, non-federal state ground.”66

Similarly, in Gates v. Henderson,67 the United States Court of Appeals for the Second Circuit dismissed a petition for habeas corpus filed by a state prisoner who had failed to properly raise his fourth amendment claim in state court as required by state law.68 These cases demonstrate that Stone is susceptible to an interpretation which acquiesces in state imposed procedural bars to the vindication of fourth amendment rights.69


62. Whether this failure to reach the merits is a product of inadequate state procedures or a defendant’s procedural default has been held to be decisive under Stone. Although the Stone Court did not directly confront the issue of procedural default, subsequent decisions have viewed such default as dispositive of the question whether a full and fair opportunity to litigate was afforded a defendant in state court. See, e.g., O’Berry v. Wainwright, 546 F.2d 1204 (5th Cir.), cert. denied, 433 U.S. 911 (1977); Maxey v. Morris, 440 F. Supp. 56 (E.D. Ill. 1977).


64. 546 F.2d 1204 (5th Cir.), cert. denied, 433 U.S. 911 (1977). For a discussion of O’Berry, see text accompanying notes 70–93 infra.

65. 546 F.2d at 1218.

66. Id. at 1216 (footnote omitted). The “nonfederal state ground” consisted of the state appellate court’s judgment that the petitioner had failed to raise his fourth amendment claim by a “proper and timely” objection before the trial court, thereby preserving the objection for appellate review. Id. See note 77 and accompanying text infra.

67. 568 F.2d 830 (2d Cir. 1977) (en banc), cert. denied, 98 S. Ct. 775 (1978).

68. 568 F.2d at 840. For a discussion of Gates, see notes 94–120 and accompanying text infra.

A. The O'Berry Decision

In O'Berry, a state prisoner sought federal habeas relief pursuant to a fourth amendment claim despite his failure to raise that claim at trial and without having taken a direct appeal from his conviction in state court.\(^7\) The petitioner raised his claim for the first time before the state appellate court by means of a state habeas corpus petition.\(^7\) The Florida District Court of Appeal refused to address the merits of the petitioner's claim that his fourth amendment rights had been violated by a warrantless search and seizure of his automobile, reasoning that since the petitioner had failed to raise a timely objection at trial to the introduction of the evidence derived therefrom, in accordance with a state procedural rule\(^7\) requiring contemporaneous objections to all but "fundamental error," he did not properly preserve his objection for appellate review.\(^7\)

Petitioner thereafter filed a federal habeas corpus petition in the United States District Court for the Southern District of Florida, alleging a violation of his fourth amendment right to remain free from an unreasonable search and seizure and his sixth amendment right to effective assistance of counsel.\(^7\) The district court found no violation of petitioner's sixth amendment rights but determined that he was entitled to be released or to have a retrial within a reasonable time because his fourth amendment rights had been abridged.\(^7\) On appeal by the state, the United States Court of Appeals for the Fifth Circuit reversed the district court and held that a

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\(^7\) 546 F.2d at 1207. O'Berry was convicted in state court on two counts of rape. Id. at 1207. At trial, his court appointed counsel did not object to testimony by a detective that defendant's automobile, searched without a warrant approximately 36 hours after the rape, had recently been wiped clean of fingerprints. Id. Petitioner's trial counsel unilaterally made the decision not to appeal, and the petitioner was not advised of his counsel's failure to file an appeal. Id. n.6. Years later, pursuant to state post-conviction remedy procedures, petitioner raised the objection that his fourth amendment rights had been violated when evidence of the allegedly illegal search and seizure of his automobile was admitted into evidence at trial. Id. at 1207–08. After an evidentiary hearing held in the Florida District Court of Appeal, this claim was rejected largely on the grounds that petitioner's contentions were not properly preserved for appellate review. O'Berry v. Wainwright, 300 So. 2d 740 (Fla. Dist. Ct. App. 1974). See note 80 infra. After thus exhausting his state remedies, petitioner filed a habeas corpus petition in the United States District Court for the Southern District of Florida. 546 F.2d at 1209.

\(^7\) 546 F.2d at 1207. Petitioner was granted a belated state habeas review of his conviction on the grounds that his court appointed trial counsel's unilateral decision not to appeal the conviction constituted state action sufficient to frustrate petitioner's right to appeal. Id. n.6.

\(^7\) See O'Berry v. Wainwright, 300 So. 2d 740 (Fla. Dist. Ct. App. 1974); Simpson v. State, 211 So. 2d 862 (Fla. Dist. Ct. App. 1968) (where no fundamental error exists, defendant must make timely objection to the introduction of evidence in order to preserve his objection for appellate review). In State v. Smith, 240 So. 2d 807 (Fla. 1970), the Supreme Court of Florida defined the fundamental error rule of the Florida courts as "error which goes to the foundation of the case or goes to the merits of the cause of action." Id. at 810, quoting Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970).

\(^7\) Id.
federal court was precluded by the Stone decision from considering the merits of the petitioner's fourth amendment claims on federal habeas corpus. The court concluded that Stone's "opportunity" test was satisfied "where the state court is squarely faced with Petitioner's Fourth Amendment claim, but chooses to resolve that claim on an independent, adequate, non-federal state ground, at least where that state ground does not unduly burden federal rights."
The O'Berry court found that the state appellate court had been "squarely faced" with petitioner's fourth amendment claims. The court stated that the petitioner had taken full advantage of this opportunity to set forth the facts and law supporting his fourth amendment claims, and rejected the petitioner's argument that the full and fair consideration requirement established by Stone was not satisfied where the state court disposed of these claims not on the merits but on due process considerations concerning the fairness of the trial. The Fifth Circuit declined to review the state court decision, finding that the state procedural rule requiring contemporaneous objections to evidentiary rulings served a legitimate state interest and therefore qualified as an adequate and independent state ground of decision. The O'Berry court held that the state court's resolution

78. 546 F.2d at 1213.
79. Id. at 1217.
80. Id. at 1210. The Fifth Circuit noted that the state appellate court had placed "particular significance" on the fact that none of the critical contentions of the petitioner were brought before the trial court by a proper and timely objection; consequently, they have not been preserved for appellate review. Except where fundamental error is involved, and we find none to exist here[,] it is essential that a defendant properly and timely object to the introduction of evidence in order to preserve his objection for appellate review.

81. Id. at 1218. Citing the Supreme Court's analysis of the state contemporaneous objection rule involved in Henry v. Mississippi, 379 U.S. 443 (1965), the majority adopted the following appraisal of the state interest supporting the procedural rule enforced by the O'Berry decision: "By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided." 546 F.2d at 1218, quoting Henry v. Mississippi, 379 U.S. 443, 448 (1965). Significantly, the majority did not read Stone as overruling Henry's formulation of the adequate state ground theory. 546 F.2d at 1217.

In Henry, the Supreme Court reaffirmed the principle that federal courts "will decline to review [on appeal] state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions." 379 U.S. at 446. The Court disposed of this case, which reached the Supreme Court not by habeas corpus but upon the grant of certiorari, by remanding to the state court for a determination of whether counsel's noncompliance with the trial court's contemporaneous objection rule constituted a deliberate bypass of state procedures and therefore a waiver. Id. at 450-53. For a discussion of the waiver rule and Henry v. Mississippi, see Developments, supra note 1, at 1106-12. See also Fay v. Noia, 372 U.S. 391, 399 (1963) (failure to appeal need not be intelligent and understanding waiver of right to appeal).

Despite the O'Berry court's reliance on Henry, it is submitted that the independent state ground theory is inappropriate to the question of the proper exercise of federal habeas review. The Henry Court recognized that a litigant's procedural default in state proceedings does not preclude vindication of his federal rights "unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." 379 U.S. at 447. A procedural forfeiture should therefore only be allowed to bar vindication of federal rights when a strong state interest would be served. Id. No showing of such a state interest was advanced in support of the contemporaneous objection rule involved in O'Berry. Moreover, the O'Berry court ignored the fact that Fay v. Noia, 372 U.S. 391 (1963), held that the doctrine that the federal courts will not review state court judgments which rest on independent and adequate state grounds was not applicable in federal collateral proceedings. Id. at 399. Reflecting this
of the fourth amendment claims satisfied Stone's full and fair consideration requirement, notwithstanding the absence of an adjudication of those claims on the merits.\textsuperscript{82}

In reaching this result, the Fifth Circuit asserted that its reasoning and conclusions were entirely consistent with Stone.\textsuperscript{83} The court noted that the state court's resolution of a fourth amendment claim on an "adequate, independent, non-federal" state ground did not merit review on federal habeas corpus under Stone since this resolution: 1) was "perfectly consistent" with Stone's requirement that an opportunity be given for full and fair litigation in state court; 2) reinforced Stone's fundamental premise that the costs of the exclusionary rule often outweigh its benefits; and 3) furthered Stone's policy of permitting state courts to serve as final arbiters of federal constitutional rights.\textsuperscript{84}

Judge Goldberg filed a vigorous dissent in O'Berry,\textsuperscript{85} stating that the majority decision effectively overruled the Supreme Court's decision in Fay v. Noia,\textsuperscript{86} at least insofar as that decision applied to fourth amendment claims.\textsuperscript{87} In Fay, the Supreme Court held that the independent state procedural ground doctrine did not automatically bar review of a state prisoner's claims on federal habeas corpus.\textsuperscript{88} Noting that the Stone decision did not clearly evince an intention to overrule Fay, the dissent argued that

criticism of the majority's use of the Henry standards, the dissent in O'Berry contended that the court's discussion of Henry "unfortunately serves only to signify the degree to which it has missed the importance of Fay." \textsuperscript{546 F.2d} at 1222 (Goldberg, J., dissenting) See notes \textsuperscript{85-93} and accompanying text infra.

Although the Stone Court did not purport to address this question, the O'Berry court inexplicably relied on Henry as authority for its injection of the adequate state grounds theory into Stone's "opportunity" test. \textsuperscript{546 F.2d} at 1216 n.17. The fact is that Henry dealt with the implications of waiver, while Stone was limited to consideration of the preclusive consequences of actually raising constitutional claims in state court. See Cover & Aleinikoff, supra note 36, at 1076. Consequently, the O'Berry court's finding that the state contemporaneous objection rule served a legitimate state interest should not have been considered dispositive of the question of whether Stone's "opportunity" test was satisfied. \textsuperscript{546 F.2d} at 1217. Stone did not advance the novel theory that a particular state's interest in enforcement of its procedural rules is relevant to the proper limits of federal habeas jurisdiction, particularly where the availability of any judicial forum prepared to resolve a constitutional claim on its merits is brought into question.

It should be noted that the waiver approach has been recently adopted by the Supreme Court in the context of due process claims raised on habeas corpus. See Estelle v. Williams, 425 U.S. 501 (1976); Francis v. Henderson, 425 U.S. 536 (1976). Moreover, in Wainwright v. Sykes, 433 U.S. 72 (1977), the Court finally directly limited the scope of Fay by holding that a defendant failing to comply with a state's contemporaneous objection rule bears the burden of showing "cause" and "prejudice" in order to raise a fifth amendment claim in a federal habeas corpus proceeding. \textsuperscript{Id.} at 77-91. See generally Cover & Aleinikoff, supra note \textsuperscript{36}, at 1072-102. Unlike Stone, those cases dealt with the consequences of the failure to raise federal constitutional claims at the proper time in state proceedings. \textsuperscript{Id.} at 1076.
Stone, in which a state court had disposed of the petitioner's fourth amendment claims on the merits, only closed the federal forum for redetermination of the merits of such a claim.89

In contrast, the O'Berry decision precluded the petitioner from presenting the merits of his federal claim before any forum.90 Since Fay had earlier established that such a severe sanction was appropriate only when a petitioner had deliberately bypassed state procedures,91 the dissent chose to interpret Stone as consistent with Fay by reading the "opportunity" test to imply that "noncompliance with state procedural rules will preclude consideration of a fourth amendment claim on the merits in federal habeas proceedings only if that noncompliance was the product of a deliberate, knowing decision of defendant and his counsel."92 The dissent concluded that Stone was not directly applicable because the Court in that case "was

89. 546 F.2d at 1219 (Goldberg, J., dissenting).
90. Id. at 1220 (Goldberg, J., dissenting).
91. See 372 U.S. at 434-35. The Fay Court held that: 1) the adequate state ground theory "is not to be extended to limit the power granted the federal courts under the habeas statute"; 2) the exhaustion requirement applies only to remedies still available when the petitioner applies for habeas relief; and 3) the petitioner's waiver of his right to appeal was not "intelligent and understanding" because of the risk that a successful state appeal would result in a retrial in which the death penalty might be imposed. Id. at 398-400. See Note, Federal Habeas Corpus for State Prisoners: The Isolation Principle, 39 N.Y.U.L. Rev. 78, 83 (1964).

Professor Cover observed that the Fay decision serves to guarantee "independent federal adjudications free from the impact of structural deficiencies in state criminal processes" in three ways. Cover & Aleinikoff, supra note 36, at 1042. First, Fay "reaffirmed the doctrine of Brown v. Allen that state court adjudications could not estop federal court adjudication." Id. (footnote omitted). Second, it states that defendants could not forfeit their opportunity to raise federal claims in federal courts unless they had "deliberately bypassed" available state procedures. Id. See 372 U.S. at 438-40. Third, the presence of this waiver depends upon "the considered choice" of the defendant, not the acts of his counsel. Cover & Aleinikoff, supra note 36, at 1042. See 372 U.S. at 439.

92. 546 F.2d at 1221 (Goldberg, J., dissenting). Judge Goldberg did not find the Stone Court's refusal to label the exclusionary rule a "personal constitutional right" sufficient to explain the circumstances in which federal habeas review should remain unavailable. Id. See generally Monaghan, The Supreme Court 1974 Term, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975). Judge Goldberg contended that federal courts should not be allowed to refuse to apply the exclusionary rule remedy left intact by Stone simply through strict enforcement of state procedural rules. 546 F.2d at 1221 (Goldberg, J., dissenting).

It should be noted that the dissent in O'Berry specifically declined to endorse the view that a determination on the merits in state court was always a prerequisite to application of Stone. Id. at 1219-20 n.1 (Goldberg, J., dissenting). As support for this position, the dissent emphasized the significance of the use of the term "opportunity" by the Stone Court. Id. The dissent argued, however, that in light of the continued existence, if not vitality, of the exclusionary rule, it was consistent with the Stone Court's deterrence analysis for the federal courts to consider the merits of fourth amendment claims where states have not. Id. at 1221-22 (Goldberg, J., dissenting). Specifically, the dissent stated that federal habeas review in these circumstances "effectuates the Stone conclusion that this society shall maintain that 'visible expression' [of social disapproval for the violation of the guarantees of the fourth amendment] and provide at least one level of enforcement of the exclusionary rule." Id. at 1222 (Goldberg, J., dissenting). See generally Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 709-11 (1970).
not faced with, and did not allude to, the problem of determining whether or when a state’s withdrawal of that opportunity because of a procedural error would forfeit the right to federal collateral relief.”

B. The Gates Decision

The O’Berry opinion is not the only recent decision to apply Stone in derogation of a fourth amendment claimant’s opportunity to be heard on the merits. Faced with a comparable factual setting in Gates v. Henderson, the United States Court of Appeals for the Second Circuit affirmed the dismissal of a petition for a writ of habeas corpus based on a fourth amendment claim while espousing an interpretation of Stone similar to that set forth by the Fifth Circuit in O’Berry.

Petitioner Gates had been convicted of first-degree murder in state court primarily because his fingerprints and palmprints matched those found at the murder scene. After his direct and collateral appeals in the state courts were unsuccessful, Gates filed a federal habeas corpus petition alleging that the lack of probable cause for his arrest rendered the taking of his prints violative of the fourth amendment. Gates, however, had failed to raise this objection prior to or during his trial, as required by state statute.

In light of this procedural default, the United States District Court for the Southern District of New York dismissed the petition. On appeal, the Second Circuit, reversed the district court in the wake of the Supreme Court’s decision in Stone, remanding the petition to the district court for an evidentiary hearing on the merits. The court concluded that

93. 546 F.2d at 1219 (Goldberg, J., dissenting) (footnote omitted).
94. 568 F.2d 830 (2d Cir. 1977) (en banc), cert. denied, 434 U.S. 1038 (1978).
95. 568 F.2d at 840. Compare the Gates court’s analysis of Stone with that employed by the O’Berry court. See notes 70-84 and accompanying text supra; notes 96-116 and accompanying text infra.
96. 568 F.2d at 832.
97. Id. Gates’ conviction was affirmed by two state courts of appeals. Id. The Court of Appeals of New York held that the defendant’s failure to object to fingerprint evidence on the grounds that it was the fruit of an arrest without probable cause did not permit that objection to be cognizable on appeal. People v. Gates, 24 N.Y.2d 666, 670, 249 N.E.2d 450, 452, 301 N.Y.S.2d 597, 601 (1969).
99. In response to Mapp v. Ohio, 367 U.S. 643 (1961), New York law provided for a statutory mechanism for the suppression of evidence obtained through an unlawful search or seizure in violation of the defendant’s fourth amendment rights. See N.Y. CRIM. PROC. LAW § 710.20 (McKinney 1971).
100. Gates v. Henderson, Civ. No. 73-3865, slip op. at 7-8 (S.D.N.Y. May 27, 1976). The district court noted that “[t]he [state] Court of Appeals was merely enforcing procedural requirements under New York law and chose to follow its policy of ignoring claims judged not to have been adequately raised below.” Id.
101. The district court noted that “may be made during trial where the defendant was unaware of the seizure or did not have either material evidence or the opportunity to make a pretrial motion.” 568 F.2d at 837.
Gates had not been afforded an opportunity for full and fair litigation of his fourth amendment objection because his objection had never been considered on the merits by the state courts.\textsuperscript{102}

Seven months later, the Second Circuit granted a motion for a rehearing en banc of the \textit{Gates} case,\textsuperscript{103} and thereupon reversed itself, holding that the petitioner's failure to assert his fourth amendment challenge in accordance with the procedural devices afforded by the state precluded consideration of his claim on federal habeas corpus review under \textit{Stone}.\textsuperscript{104} Finding that the state statutory mechanisms relating to suppression of evidence provided a full and fair opportunity to litigate Gates' claim,\textsuperscript{105} the court refused to accept the argument that the absence of consideration on the merits in state court was dispositive of \textit{Stone}'s "opportunity" test.\textsuperscript{106} The Second Circuit applied the "opportunity" test literally, focusing strictly on the corrective procedures available in the state court system.\textsuperscript{107} Noting that those procedures were clearly available in the case at bar, the court stated that the \textit{Stone} decision established that "we have no authority to review the state record and grant the writ simply because we disagree with the result reached by the state courts."\textsuperscript{108} Accordingly, the court dismissed the habeas petition.\textsuperscript{109}

\begin{itemize}
\item \textsuperscript{102} \textit{Id.} at 851. The court relied on the second \textit{Townsend} category in its analysis. \textit{Id.} at 849. See text accompanying note 51 supra. That category under \textit{Townsend} is one in which "for any reason not attributable to the inexcusable neglect of petitioner . . . evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing." \textit{Townsend v. Sain}, 372 U.S. 293, 317 (1963) (citation omitted). See also \textit{Fay v. Noia}, 372 U.S. 391, 438 (1963). The Second Circuit found that the evidence relating to the circumstances surrounding Gates' arrest had not been developed at all in state court. 568 F.2d at 849. After reviewing the record and concluding that the petitioner's failure to timely raise his constitutional objection did not constitute "inexcusable neglect," the majority ruled that the state court's failure to develop evidence crucial to petitioner's claim in accordance with \textit{Townsend} deprived him of a state opportunity to fully and fairly litigate it. \textit{Id.} at 851. The court also determined that \textit{Townsend}'s first criterion had not been satisfied. \textit{Id.} at 848-49. See note 106 infra. For a discussion of the relationship between the \textit{Townsend} criteria and the \textit{Stone} test, see note 56 supra.
\item \textsuperscript{103} 568 F.2d at 832.
\item \textsuperscript{104} \textit{Id.} at 840.
\item \textsuperscript{105} \textit{Id.} at 837-38.
\item \textsuperscript{106} \textit{Id.} at 837. The panel majority which delivered the Second Circuit's first opinion in \textit{Gates} determined that federal habeas review was appropriate under the first criterion of the \textit{Townsend} standards because the merits of the factual dispute were not resolved in state court. \textit{Id.} at 848-49, 851. In response to this argument, the en banc \textit{Gates} court pointed out that \textit{Townsend} mandated a federal hearing where the state court failed to actually consider and decide issues of fact "tendered by the defendant." \textit{Id.} at 838, quoting \textit{Townsend v. Sain}, 372 U.S. 293, 313-14 (1963) (emphasis by the court). Since Gates never raised the issue of probable cause for his arrest in the state forum, the court concluded that \textit{Townsend} did not mandate a hearing in federal court. 568 F.2d at 838.
\item \textsuperscript{107} 568 F.2d at 836-37. The court noted that the petitioner did not even attempt to argue that the state procedural devices available to raise the issue of an unlawful arrest were deficient. \textit{Id.} at 837.
\item \textsuperscript{108} \textit{Id.} at 840. The majority opinion nevertheless did not intimate that the court would have granted habeas relief if in fact it were allowed to address the merits of the fourth amendment claim.
\item \textsuperscript{109} \textit{Id.}
\end{itemize}
As in O'Berry, the Gates court arrived at this resolution of Stone's ambiguous standard without reliance on two Supreme Court cases normally considered relevant by federal habeas courts. The court viewed the Townsend criteria\textsuperscript{10} as irrelevant since Gates never actually sought an evidentiary hearing.\textsuperscript{11} Furthermore, the Gates court rejected the contention that the Fay decision withdrew the power of federal courts to deny consideration of a habeas claim on the merits absent a finding of a deliberate bypass or knowing waiver of state procedures.\textsuperscript{12} Reading Stone "as effectively overruling Fay with respect to Fourth Amendment exclusionary rule claims,"\textsuperscript{13} the court emphasized that Stone "did not further indicate that [the] opportunity [for full and fair litigation of a fourth amendment claim], if not exercised in the state court, was only lost when the defendant or his counsel deliberately and intentionally sought to by-pass the state process."\textsuperscript{14}

The Gates court did acknowledge that Stone allowed federal habeas review of fourth amendment claims in situations where a state fails to

\textsuperscript{10} See text accompanying note 51 supra.
\textsuperscript{11} 568 F.2d at 837. The majority acknowledged that "[h]ad Gates requested and been given a hearing but it was deficient, an issue under the Townsend criteria might possibly surface." Id. Admitting that it was not "fully appreciative" of the significance of the footnoted reference to Townsend in the Stone opinion, the court was persuaded that this citation "cannot be reasonably interpreted to require a federal court to conduct a hearing on an issue where the state prisoner, having an opportunity to do so, never tendered the question to the state court." Id. at 838. In the Gates court's view, this would "totally undercut the thrust and rationale of Stone." Id.
\textsuperscript{12} Id. 838-39.
\textsuperscript{13} Id. at 838 (footnote omitted). The court emphasized that Stone had rejected the premise that the exclusionary rule was a "constitutional ingredient" of the fourth amendment. Id. at 839. Hence, Fay's presumption that plenary federal review was always available to redress constitutional wrongs had been destroyed with respect to search and seizure claims. Id. Cf. O'Berry v. Wainwright, 546 F.2d 1204, 1219 (5th Cir.) (Goldberg, J., dissenting), cert. denied, 433 U.S. 911 (1977) (Stone Court did not clearly indicate an intention to overrule Fay as far as fourth amendment rights were concerned).

The concurring opinion in Gates, however, argued that Stone did not overrule Fay with respect to the deliberate bypass standard because the Stone opinion contained, in the summary of its holding, a crucial citation to Townsend, which in turn contained a citation to Fay. 568 F.2d at 842 (Oakes, J., concurring). But see Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977) (rejecting the "sweeping language" of Fay).

\textsuperscript{14} 568 F.2d at 839. Judge Mulligan's majority opinion thus refrained from any attempt to reconcile Fay and Stone. On the contrary, the majority maintained that "[h]ad the Court intended to so drastically qualify its rule [by subjecting it to Fay's deliberate bypass standard], it certainly would have so stated." Id. The majority therefore found the kind of inquiry mandated by Fay to be inappropriate in the context of Stone analysis:

Requiring the federal court to make collateral investigations of the subjective motivation of the state prisoner which would involve the expenditure of sorely pressed federal judicial resources and exacerbate possible friction between the federal and state judiciary, is antithetical to the very factors which motivated the Stone majority to sharply limit the role of the federal court in Fourth Amendment state habeas procedures.

Id. (footnote omitted).
provide any corrective procedures at all sufficient to redress fourth amendment violations, or where a defendant is precluded from utilizing the state corrective process because of an “unconscionable breakdown” in that process.

The concurring opinion in Gates, written by Judge Oakes, objected to the majority's formulation of a stringent “opportunity” test under Stone. Judge Oakes argued that the Stone Court's use of general language demonstrated that each case should be examined on its particular facts in order to determine whether the “opportunity” test was satisfied. The concurrence also noted that the majority's view that federal habeas review of a fourth amendment claim was warranted in only two situations constituted a shortsighted view of Stone. Consistent with the approach taken by most federal courts faced with fourth amendment claims after Stone, Judge Oakes maintained that the inquiry should focus upon whether “in the individual case, the state courts had in fact meaningfully considered the defendant's claim.”

C. Analysis of O'Berry and Gates

In both O'Berry and Gates, the majority opinions interpreted Stone to require that access to federal habeas court be closed to a habeas petitioner who was deficient in presenting his fourth amendment claim in state courts.

115. Id. at 840.
116. Id. See generally Bator, supra note 3, at 456–57.
117. 568 F.2d at 843 (Oakes, J., concurring).
118. Id. at 843–44 (Oakes, J., concurring). Judge Oakes reasoned that the inclusion of the term “fair” as an element of Stone's “opportunity” test implied a case-by-case approach consistent with the exercise of equitable discretion. Id. at 844 (Oakes, J., concurring).
119. Id. at 843 (Oakes, J., concurring).
120. Id. at 844 (Oakes, J., concurring) (footnote omitted). Judge Oakes cited numerous cases in support of this proposition. Id. at 844 n.8 (Oakes, J., concurring). See e.g., O'Berry v. Wainwright, 546 F.2d 1204, 1215–16 (5th Cir.), cert. denied, 433 U.S. 911 (1977) (state appellate court “squarely faced” with fourth amendment claim but resolved that claim on nonfederal state grounds); Bracco v. Reed, 540 F.2d 1019, 1020 (9th Cir. 1976) (petitioner denied habeas relief where he had been given opportunity to present constitutional claim in state court and was only objecting to the state court disposition of that claim); Chavez v. Rodriguez, 537 F.2d 833, 834 (5th Cir. 1976) (per curiam) (state court hearing on fourth amendment claim held to be full and fair); Losinno v. Henderson, 420 F. Supp. 380, 382 (S.D.N.Y. 1976) (careful consideration of petitioners state court treatment); Pulver v. Cunningham, 419 F. Supp. 1221, 1224 (S.D.N.Y. 1976), aff'd, 562 F.2d 198 (2d Cir. 1977) (focus on corrective action available through appellate process on direct review of conviction). Cf. United States ex rel. Petillo v. New Jersey, 418 F. Supp. 686, 688–89 (D.N.J. 1976), rev'd, 562 F.2d 903 (3d Cir. 1977) (state procedures available to rectify fourth amendment claims deficient and thus no adequate opportunity).

Other courts, however, have applied a less stringent standard and found the “opportunity” test satisfied if the state courts considered the fourth amendment claim at all. See, e.g., Cole v. Estelle, 546 F.2d 1164 (5th Cir. 1977); Corley v. Cardwell, 544 F.2d 348 (6th Cir. 1976), cert. denied, 429 U.S. 1048 (1977); Roach v. Paratt, 541 F.2d 772 (8th Cir. 1976).
In effect, these decisions have established that a state court that refuses to adjudicate a fourth amendment claim because of a defendant’s noncompliance with a state procedural rule, irrespective of whether that noncompliance was occasioned by a deliberate bypass or knowing waiver, may be said to have afforded the defendant a full and fair opportunity to litigate such claim in state court, compelling withdrawal of federal habeas consideration under Stone. In contrast, the dissent in O’Berry argued that the Stone decision operated only to eliminate the federal habeas forum to individuals who had actually exercised their opportunity to litigate fourth amendment claims in a state forum. The concurrence in Gates suggested that the language of Stone’s “opportunity” test required federal courts to avoid rigid rules and to determine whether the state courts had in fact “meaningfully considered” the defendant’s claim.

The O’Berry decision appears to have established that a state court decision on the merits of a fourth amendment claim is not a prerequisite to application of the Stone rule. Federal courts following O’Berry are apparently free to reject habeas appeals filed by state prisoners alleging fourth amendment violations where those prisoners have failed to adhere to state procedures regarding the proper time to raise objections to these violations. Procedural defaults may thus have a preclusive effect on the availability of a federal forum to protect substantive constitutional rights. That this result is consistent with the procedural nature of Stone’s “opportunity” test cannot be denied; the language of the Stone test does suggest that a state court determination on the merits is not a necessary precondition to application of Stone’s estoppel rule. However, since protection of the innocent is the paramount purpose of federal habeas corpus review, it is submitted that a state court determination on the merits is an appropriate prerequisite to any application of Stone, absent a knowing waiver by a habeas applicant, particularly in light of the congressional

121. See text accompanying notes 70–120 supra.
122. See Fay v. Noia, 372 U.S. 391 (1963), in which the Court determined that a federal district court might deny federal habeas relief only where a petitioner had deliberately bypassed or knowingly waived his right to raise a federal constitutional claim in the state courts. Id. at 438. But see Wainwright v. Sykes, 433 U.S. 72 (1977) (“cause and prejudice” standard supplants the “deliberate bypass” test with respect to certain constitutional claims). See notes 132–48 and accompanying text infra.
124. 546 F.2d at 1219 (Goldberg, J., dissenting).
125. See 568 F.2d at 844 (Oakes, J., concurring).
126. See 546 F.2d at 1216–17.
127. The test is procedural in the sense that it requires only that an “opportunity” for full and fair litigation be required, not that the litigation in state court actually be full and fair. See Stone v. Powell, 428 U.S. 465, 494 (1976).
128. See text accompanying note 12 supra.
129. See Stone v. Powell, 428 U.S. 465, 491–92 n.31 (1976). Justice Brennan, however, rejected the idea that constitutionally mandated procedures are not always applicable to non-“guilt-related” constitutional claims. Id. at 523 (Brennan, J., dissenting). For an excellent analysis of the implications of the Stone court’s guilt/innocence distinction, see Cover & Aleinikoff, supra note 36, at 1086–100.
intent that habeas corpus review serve as the “primary federal remedy for
erss and deficiencies in the criminal process.”

It is arguable, though, that the O’Berry court’s construction of Stone
was reinforced by the Supreme Court’s recent decision in Wainwright v.
Sykes. In Wainwright, the defendant, convicted of murder in a Florida
state court, asserted a fifth amendment claim based upon the admission
into evidence of his confession, allegedly made without full understanding of the Miranda warnings. The defendant, having failed to raise this
objection either at trial, as required by Florida’s contemporaneous objection rule, or upon direct appeal of his conviction, sought federal habeas

corpus review.

Upon review of the lower federal court’s order that the State of Florida
hold a hearing to determine whether Sykes knowingly waived his Miranda
rights, the Supreme Court reversed and dismissed Sykes’ habeas corpus petition. Justice Rehnquist, writing for the majority, reaffirmed the


133. The fifth amendment to the United States Constitution provides in pertinent part that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

134. 433 U.S. at 74-75. See Miranda v. Arizona, 384 U.S. 436 (1966). In Miranda the Court established that a defendant’s statements stemming from custodial interrogation were admissible at trial only if certain procedural safeguards were employed to secure the privilege against self-incrimination. Id. at 444. Specifically, the Court determined that prior to any questioning, a person must be warned that he has a right to remain silent, that any statement he makes may be used against him, and that he has the right to the presence of an attorney. Id.

135. Rule 3.190(i)(2) of the Florida Rules of Criminal Procedure provides, in pertinent part, that a motion to suppress a confession “shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion of an appropriate objection at the trial.” FLA. R. CRIM. P. 3.190(i)(2) (1972).

136. 433 U.S. at 75. After Sykes’ direct appeal of his conviction was rejected, he filed in the trial court a motion to vacate the conviction and he also filed appropriate state petitions for habeas corpus. Id. He was unsuccessful in each of these efforts. Id.

137. Id.

138. Id. at 75-76. The district court ruled that the state court should hold a hearing on the “voluntariness” of Sykes’ incrimatory statement, as required by Jackson v. Denno, 378 U.S. 368 (1964). 433 U.S. at 75-76. On appeal, the Fifth Circuit affirmed, concluding that the failure to comply with the contemporaneous objection rule would only bar federal habeas review of the suppression claim “where the right to object was deliberately bypassed for reasons relating to trial tactics,” a condition that did not apply to this case. Id. at 76-77. See Wainwright v. Sykes, 528 F.2d 522 (5th Cir. 1976), rev’d, 433 U.S. 72 (1977).

139. 433 U.S. at 91.

140. Justice Rehnquist’s opinion was joined by Justices Blackmun, Powell, Stevens and Stewart, and by Chief Justice Burger. Justice White concurred in the judgment because he believed the facts warranted a conclusion of harmless error. Id. at 97-99 (White, J., concurring). Justice Stevens concurred, concluding that Sykes’ trial counsel “could well have made a deliberate decision not to object to the admission of the
values embraced by the Court in Stone while confronting the question, previously addressed by the Fifth Circuit in O'Berry in the context of fourth amendment claims, of when an adequate and independent state ground barred consideration of otherwise cognizable federal issues on federal habeas review. Maintaining that a contemporaneous objection rule imposed by a “coordinate jurisdiction” deserves “greater respect than Fay gives it,” the majority emphasized the rule’s contribution to finality in criminal litigation and its utility in making the state trial the “main event” rather than a “tryout on the road” to an eventual federal habeas hearing. The majority held that the rule barring federal habeas review absent a showing of “cause” for a procedural default, explaining why it occurred, and “prejudice” resulting therefrom, should be applied to a “waived objection” defendant’s in custody statement.” Id. at 96 (Stevens, J., concurring). Chief Justice Burger also concurred but argued in addition that Fay’s “deliberate bypass” standard was inapplicable to errors alleged to have been committed during trial. Id. at 91–92 (Burger, C. J., concurring).

In a forceful dissent, Justice Brennan, joined by Justice Marshall, examined the meaning and import of procedural default in the context of the availability of federal habeas relief. Id. at 101–05 (Brennan, J., dissenting). Justice Brennan argued persuasively that the treatment of simple mistakes of attorneys . . . as binding forfeitures . . . would serve to subordinate the fundamental rights contained in our constitutional charter to inadvertent defaults of rules promulgated by state agencies, and would essentially leave it to the States, through the enactment of procedure and the certification of the competence of local attorneys, to determine whether a habeas applicant will be permitted the access to the federal forum that is guaranteed him by Congress. Id. at 107 (Brennan, J., dissenting) (footnote omitted).

141. These values include the interests of comity and federalism and the encouragement of efficiency and finality in criminal proceedings. Id. at 81–90. See Spritzer, supra note 24, at 506. See also Francis v. Henderson, 425 U.S. 536 (1976).

142. 433 U.S. at 78–79.

143. Id. at 88.

144. Id. at 90. The majority also pointed out that the rule allowed decisions on constitutional claims to be made when the recollections of witnesses are freshest and by the judge who observed the demeanor of those witnesses. Id. at 88.

145. See Francis v. Henderson, 425 U.S. 536 (1976). In Francis, the Court held that a collateral attack upon an allegedly unconstitutional composition of an indicting grand jury required “not only a showing of ‘cause’ for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice.” Id. at 542 (footnote omitted).

The cause and prejudice standard was first articulated in the context of a federal prisoner's challenge on habeas corpus of the composition of the grand jury which indicted him. Davis v. United States, 411 U.S. 233 (1963). Relying on previous constructions of Federal Rule of Criminal Procedure 12(b)(2), the Davis Court ruled that no “cause” for relief had been shown in light of the facts, inter alia, that the same method of grand jury selection had been used for a number of years, that racial discrimination was not present, that the prosecution had presented a convincing case, and that the habeas challenge was initiated three years after the petitioner's conviction. Id. at 235–36, 243–44.

The prejudice requirement may necessitate a showing that the alleged constitutional defect influenced the ultimate decision regarding guilt or innocence. See Cover & Aleinikoff, supra note 36, at 1076 n.192. Apparently the Wainwright Court believed that the prejudice standard would not prevent a habeas court from correcting a “miscarriage of justice.” 433 U.S. at 91. See Spritzer, supra note 24, at 508 n.183.
to the admission of a confession at trial.\footnote{146} Despite the Court's failure to define the content of the "cause" and "prejudice" standard,\footnote{147} this holding furnishes support for the O'Berry court's view that procedural defaults may totally preclude the vindication of constitutional rights, at least where those rights do not bear upon the guilt or innocence of a defendant.\footnote{148}

It is submitted, nevertheless, that the Fifth Circuit decision in O'Berry has ignored the "full and fair" requirement contained within Stone's "opportunity" test.\footnote{149} As the dissenting opinion in O'Berry accurately noted, Stone was fundamentally concerned with the costs of permitting federal relitigation of state court evidentiary rulings.\footnote{150} The basic argument set forth in Stone that state courts are "fair and competent" forums for the adjudication of federal constitutional rights does not justify the result in O'Berry, where the petitioner's fourth amendment claims were never adjudicated in state court.\footnote{151} State court consideration on the merits can be advanced as an element of "full" consideration of a fourth amendment claim consistent with the Court's reliance on the fitness of state courts to protect federal constitutional rights,\footnote{152} but it is submitted that a state court should not be allowed to abdicate its responsibility by avoiding the merits of a federal constitutional claim on "non-federal" state grounds, particularly where the effect is to preclude consideration on the merits in any forum.\footnote{153}

Furthermore, the denial of a federal habeas forum to the petitioner in O'Berry can hardly be considered "fair" in light of the fact that the noncompliance with the contemporaneous objection rule was entirely the responsibility of petitioner's court appointed counsel.\footnote{154} Placing the burden

\footnote{146} 433 U.S. at 90-91.
\footnote{147} Id. at 87. The Court observed that "[w]e leave open for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard, and note here only that it is narrower than the standard set forth in dicta in Fay." Id.
\footnote{148} The fourth amendment claims raised by the habeas applicants in Stone and O'Berry and the fifth amendment claim asserted by the petitioner in Wainwright were not "guilt-related" in the sense that they had "no bearing on the basic justice of...[the claimants'] incarceration." Stone v. Powell, 428 U.S. 465, 491-92 n.31 (1976).
\footnote{149} Consequently, a habeas applicant asserting such claims would be unable to make the clear showing of "prejudice" mandated in Wainwright as necessary to gain access to the federal habeas forum. See Wainwright v. Sykes, 433 U.S. 72, 87-90 (1977).
\footnote{153} Apparently a habeas applicant must force the state courts to confront the merits of his fourth amendment claim by complying fully with state procedural rules governing evidentiary objections. It is submitted that this requirement, however, ignores the fact that a procedural default usually is not the product of a defendant's conscious, reasoned refusal to abide by the legitimate processes of state courts. See Wainwright v. Sykes, 433 U.S. 72, 101 (1977) (Brennan, J., dissenting). See also note 155 infra.
\footnote{154} See 546 F.2d at 1207. As Justice Brennan recognized in his dissent in Wainwright, Fay established that it cannot be assumed that a procedural default "more often than not is the product of a defendant's conscious refusal to abide by the duly constituted, legitimate processes of the state courts." Wainwright v. Sykes, 433 U.S. 72, 101 (1977) (Brennan, J., dissenting). As in Wainwright, there is no basis in the
of court appointed counsel’s negligence or ignorance in failing to comply
with state procedural rules upon the petitioner in O’Berry, it is submitted,
did not constitute “fair” treatment under any reasonable due process
conception of fairness. 155

It is submitted that the O’Berry court erroneously extended Stone by
disregarding the right, recognized in Stone, of a criminal defendant to have
a state court deny admission of unconstitutionally seized evidence. 156 By
withdrawing the federal habeas forum as a means of ensuring that such
evidence is excluded, the O’Berry court established that a fourth amendment
claimant’s “opportunity for full and fair litigation” under Stone may be
unknowingly forfeited even when a state court, in enforcing a procedural
rule, refuses to address the question of excluding unconstitutionally seized
evidence, a “remedy” left undisturbed by the Stone Court. 157

In Gates, the Second Circuit embraced an equally rigid interpretation of
Stone. The Gates court, consistent with the analysis employed by the Fifth
Circuit in O’Berry, 158 resolved that Stone had overruled Fay with respect to
the deliberate bypass standard. 159 Under this view, Stone only imposes upon
state courts the obligation to provide adequate corrective procedures to
redress fourth amendment grievances; 160 once the opportunity to litigate
such claims is furnished, it may be forfeited by a simple procedural default
rather than by a knowing waiver. Although the Court’s explicit limitation of
Fay in Wainwright perhaps supports this assessment of the conclusiveness
of procedural defaults, 161 this view is not necessarily dispositive of Stone’s
“opportunity” test. As the concurrence in Gates noted, the “full and fair”
element of the “opportunity” test clearly implies that the inquiry under
Stone should focus upon whether the state court “meaningfully considered”

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155. Justice Brennan, dissenting in Wainwright, argued that “any realistic theory
of federal habeas corpus jurisdiction must be premised on the reality that the ordinary
procedural default is borne of the inadvertence, negligence, inexperience, or
incompetence of trial counsel.” Wainwright v. Sykes, 433 U.S. 72, 104 (1977) (Brennan,
J., dissenting). These failures, according to Justice Brennan, are unfairly attributed to
a defendant since they “lie outside the power of the habeas petitioner to prevent or
deter and for which, under no view of morality or ethics, can he be held responsible.”
Id. at 116 (Brennan, J., dissenting). See generally Hill, The Inadequate State Ground,

156. See note 41 and accompanying text supra.

157. See O’Berry v. Wainwright, 546 F.2d 1204, 1221, 1223 (5th Cir.) (Goldberg, J.,

158. See text accompanying notes 70–84 supra.

159. 568 F.2d at 838. In his concurring opinion, Judge Oakes countered this
assertion by pointing out that the Stone court never stated that its decision was to
affect Fay in any way. Id. at 842 (Oakes, J., concurring).

160. Id. at 839.

161. 433 U.S. at 87–88. Noting that the cause and prejudice standard accepted by
the Court was narrower than Fay’s deliberate bypass test, the majority confirmed
that “[i]t is the sweeping language of Fay v. Noia going far beyond the facts of the
case eliciting it, which we today reject.” Id. (footnote omitted).
a fourth amendment claim.\textsuperscript{162} It is submitted that meaningful consideration of a constitutional claim cannot be afforded unless the merits of that claim are actually addressed in state court.

The decisions of the Gates and O'Berry courts had the unfortunate effect of ensuring that the petitioners’ respective fourth amendment claims would never be heard on the merits.\textsuperscript{163} The courts’ analyses eliminated equitable discretion as a factor in a judicial determination of the appropriateness of federal habeas relief and thereby rejected the idea that a “fair” opportunity to litigate includes an element of such discretion.\textsuperscript{164} That equitable discretion should play a role in determining fairness is supported by the fact that Stone’s limitation on the application of the exclusionary rule was effected not by prescribing jurisdictional rules but by assessing the proper functional relationship between a “judicially created remedy” and the statutory right to habeas corpus review.\textsuperscript{165} In both Stone and Wainwright, the Court refrained from attacking the foundation principle, established by Fay, “that in considering a petition for the writ of habeas corpus, federal courts possess the power to look beyond a state procedural forfeiture in order to entertain the contention that a defendant’s constitutional rights have been abridged.”\textsuperscript{166} The essential question, therefore, relates to the standards that should govern federal courts’ discretion in exercising this power to decide the constitutional claims of state prisoners. It is submitted that the standard enunciated in Stone, consisting of a bare formulation of an undefined “opportunity” test, has failed to provide such standards and has permitted federal courts, in cases such as Gates and O’Berry, to make an independent evaluation of the policies and values served by collateral review on habeas corpus.

IV. STATE COURT ADJUDICATION ON IMPROPER FOURTH AMENDMENT GROUNDS

Another area in which this independent evaluation has contributed to the apparent emasculation of fourth amendment rights involves the situation in which the defendant presents a fourth amendment claim in

\textsuperscript{162} See 568 F.2d at 844 (Oakes, J., concurring).

\textsuperscript{163} Compare text accompanying note 82 supra with text accompanying note 106 supra.

\textsuperscript{164} It is submitted that judicial determination of whether a “fair” opportunity to litigate has been afforded inevitably requires at least an implicit exercise of equitable discretion since fairness cannot be defined in absolute terms. An attempt to apply the “opportunity” test without regard to fairness considerations may result in the anomalous situation postulated by Justice White in Stone, in which the operation of the Stone test and the certiorari power of the Supreme Court would combine to produce a clearly inequitable result. See Stone v. Powell, 428 U.S. 465, 536-37 (1976) (White, J., dissenting).

\textsuperscript{165} See Stone v. Powell, 428 U.S. 465, 489-96 (1976). Justice Powell cautioned that “[o]ur decision does not mean that the federal court lacks jurisdiction over . . . [a fourth amendment] claim”. Id. at 495 n.37.

state court and subsequently obtains a disposition on the merits. Most federal courts construing Stone’s standard have held that federal habeas review is clearly inappropriate in these circumstances.167

Problems arise, however, in those situations in which the defendant presents his fourth amendment claim in state court and the state court resolves the merits of that claim on the basis of an allegedly erroneous fourth amendment standard. Here the availability of federal habeas relief is crucial, not only to the general protection of constitutional values, but also to the vindication of fourth amendment rights in specific circumstances evincing a clear violation of those rights. The question is whether the alleged application of an improper constitutional standard is sufficient to

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For example, in United States ex rel. Conroy v. Bombard, 426 F. Supp. 97 (S.D.N.Y. 1976), a federal district court rejected a habeas petitioner’s attempt to overturn a trial court’s allegedly incorrect conclusions regarding his fourth amendment claim challenging the validity of a wiretap order which led to the petitioner’s conviction for first-degree murder. Id. at 110. The one cognizable claim advanced by the petitioner consisted of the allegation that his post-trial hearing, addressing the issue of tainted evidence resulting from concededly illegal surveillance, did not constitute an opportunity for full and fair litigation of his fourth amendment claims under Stone. Id. at 103. To substantiate this claim, the petitioner presented three arguments designed to show that the hearing was procedurally defective. First, he contended that the state denied him the opportunity to examine relevant and necessary material in accordance with Alderman v. United States, 394 U.S. 165 (1965), and he was therefore prevented from demonstrating the existence of taint. 426 F. Supp. at 103. Second, the petitioner alleged that the wiretap tapes were unavailable because of bad faith on the part of law enforcement officials. Id. Third, he argued that the trial court’s curtailment of his right to cross-examination prevented him from showing bad faith, knowledge of the police of the illegality of the wiretaps at the time of their use, and a subsequent concealment of that bad faith. Id. The petitioner maintained that all of these circumstances combined to qualify him for federal habeas corpus relief under Stone. Id.

Emphasizing that the petitioner was afforded the opportunity to litigate his claim through three levels of state court, the Conroy court applied Stone and rejected the petition for habeas relief on the grounds that it “attacks the result of the state court hearing, not the process by which that result was achieved.” Id. at 110. The court noted that “[p]etitioner has not demonstrated that the available state procedures were inadequate or otherwise prevented him from presenting his claims, nor has he shown that the conduct of the hearing judge circumvented those procedures.” Id. at 109. Instead, he alleged that the hearing court’s conclusions were incorrect and that more favorable rulings be imposed on the state court by a federal court. Id. The court concluded that the policies set forth in Stone regarding the relationship between the exclusionary rule and habeas corpus clearly militated against such interference by a federal court. Id. See generally Bator, supra note 3, at 455–60.

It is interesting to note that in the same district court a habeas petitioner’s attack on the probable cause supporting issuance of an eavesdropping warrant was rejected notwithstanding the fact that the state appellate courts “remained silent” with respect to the fourth amendment claims. Losinno v. Henderson, 420 F. Supp. 380 (S.D.N.Y. 1976). In Losinno, the court held that as long as the state court had considered the merits of these claims, the full and fair opportunity test of Stone was satisfied without any requirement that the state court specifically address each claim in its opinion. Id. at 382. Significantly, the Losinno court evidenced a clear concern that the state courts actually resolve the merits of the constitutional claims before access to the federal forum should be foreclosed. Id.
show the “unfairness” of the state appellate process in order to illustrate that the litigant has not been afforded a “full and fair opportunity to litigate” under Stone.  

A. The Case Law

The most striking illustrations of the problems attendant to this situation are presented by the decisions of the United States Court of Appeals for the Eighth Circuit in Holmberg v. Parratt and Hines v. Auger. In Holmberg, a state prisoner was convicted of possession of narcotics with intent to distribute on the basis of evidence uncovered during an allegedly illegal random stop of his automobile. Upon his conviction, the petitioner appealed to the state’s highest appellate court on the grounds that the random stop, although authorized by state statute, was made without reasonable suspicion of criminal activity and therefore violated his fourth amendment rights. The state court rejected this argument and affirmed the conviction.

On the state’s appeal from the grant of habeas corpus relief by the district court, the Eighth Circuit reversed, holding that “[e]rroneous application of Fourth Amendment principles by a state court is no longer relevant to the question of whether the federal court may review the merits of the claim.” The Holmberg court read Stone as rendering state appellate misapplication of the fourth amendment immaterial in determining whether a petitioner was given an “opportunity” to litigate his claim. Although the Eighth Circuit implied that the petitioner’s fourth amendment rights had been violated, the court directed petitioner’s counsel to raise his constitutional argument in a petition for certiorari to the Supreme Court.

170. 550 F.2d 1094 (8th Cir. 1977).
171. 548 F.2d at 745–46.
172. Id. at 746. The parties stipulated that a Nebraska state trooper had stopped petitioner’s vehicle solely to check his driver’s license and registration. Id. This random stop procedure was authorized by state statute. Id. See NEB. REV. STAT. § 60-435 (1974).
173. 548 F.2d at 746. The Nebraska Supreme Court affirmed the conviction by declining to read a reasonable cause requirement into the law. State v. Holmberg, 194 Neb. 337, 231 N.W.2d 672 (1975).
174. 548 F.2d at 746, citing Holmberg v. Parratt, Civ. No. 76-L-4 (D. Neb. June 23, 1976). The district court found that the random stop of the defendant’s vehicle without reasonable suspicion violated his fourth amendment rights. 548 F.2d at 746 (citations omitted). If the district court was correct in its determination of the merits of the fourth amendment claim, it is apparent that the state court applied an erroneous fourth amendment standard in affirming the petitioner’s conviction.
175. 548 F.2d at 746 (footnote omitted).
176. Id.
177. Id. This presumption flows from the court’s discussion of the impact of erroneous state court adjudications of fourth amendment claims upon the application of the Stone standard.
178. Id. at 746–47. See note 241 infra. After exhausting the state appeal procedure, a defendant convicted in state court may seek review of his conviction through an
The Eighth Circuit reaffirmed its commitment to this interpretation of Stone in Hines v. Auger. In Hines, a district court's grant of habeas relief was reversed on the grounds that Stone's "opportunity" test had been satisfied, and therefore consideration on the merits was inappropriate. The petitioner and a codefendant had been convicted of possession of narcotics discovered during a warrantless search of his automobile. Rejecting Hines' argument that no probable cause ever existed for the stop, search, or seizure, the state courts ruled that the warrantless search and seizure were justified by probable cause and exigent circumstances. On federal habeas review, the district court held that Hines was effectively denied an adversary hearing in the highest state court on the issue of probable cause because that court had relied upon his codefendant's decision to "seemingly concede" the issue of probable cause. Although admitting that "we might disagree [with the state courts] as to the merits of the petitioner's claim were we sitting as an appellate court of first resort," the

application of certiorari to the Supreme Court. See C. Wright, LAW OF FEDERAL COURTS § 107 (3d ed. 1976). At the same time the defendant may file a habeas corpus petition, pursuant to § 2254 of the Judicial Code, 28 U.S.C. § 2254 (1970). See note 5 supra. The certiorari filing and the habeas corpus petition are entirely separate and are not mutually exclusive.

The Holmberg court cited the companion case decided with Stone, Wolff v. Rice, as support for its refusal to reach the merits of a valid fourth amendment claim. The court pointed out that the Supreme Court had refused to review the merits of the petitioner's claim in that case despite the clear violation of his fourth amendment rights occasioned by an illegal search. Id. In a vigorous dissenting opinion, however, Judge Bright distinguished the factual situation in Wolff from that in Holmberg and argued that federal habeas review in the case at bar was justified under Stone. Id. at 747-49 (Bright, J., dissenting). The dissent explained that the petitioner in Wolff had sought review of the actions of individual state officers to determine whether they had exceeded their authority in violation of petitioner's fourth amendment rights. Id. at 748 (Bright, J., dissenting). Where officers of the state act on the particular facts before them and that action is reviewed in state court, the dissent recognized that no purpose would be served by the exercise of federal habeas review. Id. In contrast, the police officer in Holmberg was authorized by state statute to stop any motorist at random to examine his license or registration. The officer was free to exercise his authority regardless of whether he had reason to suspect the motorist of illegal activity and thus the estoppel rule set forth in Stone was inapplicable to a situation in which a police officer has acted "pursuant to a general state policy enacted by statute." Id.

179. 550 F.2d 1094 (8th Cir. 1977).
180. Id. at 1097-98.
181. Id. at 1096.
182. Id. at 1096-97. The state trial and appellate courts determined that the information furnished to the police by a reliable informant coupled with the officers' observation of petitioner's conduct were sufficient to justify a warrantless arrest and incident search. Id. See State v. Hines, 223 N.W.2d 190 (Iowa 1974); State v. Shea, 218 N.W.2d 610 (Iowa 1974).

183. 550 F.2d at 1097. The basis for this ruling was the state appellate court's reliance on the earlier disposition of an appeal filed by the petitioner's companion on the night in question, who was also convicted for possession of narcotics and who "seemingly conced[ed]" the issue of probable cause. Id. See State v. Shea, 218 N.W.2d 610 (Iowa 1974).

Eighth Circuit reversed the district court's grant of habeas relief, citing Stone for its refusal to "second-guess our state brethren in cases such as this which present murky questions of fourth amendment probable cause."\footnote{185} Notwithstanding the petitioner's arguably legitimate claim, the Hines court maintained that a proper construction of the Stone test must construe the language used therein literally: "The emphasis of Stone is on the opportunity for full and fair litigation, not upon the fullness or fairness of the litigation."\footnote{186}

Consistent with its holding in Holmberg, the Eighth Circuit in Hines interpreted Stone to mandate the withdrawal of federal habeas review where the state court adjudicated the merits of a fourth amendment claim. According to these cases, the soundness of the state disposition is apparently immaterial to the question of whether Stone's opportunity to litigate has been provided. Unfortunately, the Eighth Circuit is not the only federal appellate court to adopt this rigid interpretation of Stone's "opportunity" test. In Graves v. Estelle,\footnote{187} the United States Court of Appeals for the Fifth Circuit held that Stone withdrew the discretion of a federal district court to review the correctness of state court decisions regarding the admissibility of evidence allegedly obtained in violation of the fourth amendment.\footnote{188}

In Graves, the habeas petitioner was convicted for possession of heroin, largely on the basis of evidence seized pursuant to a search of petitioner's automobile.\footnote{189} The petitioner objected to the use of this evidence on the grounds that the police had neither a warrant to stop and search the automobile nor probable cause to arrest its occupants.\footnote{190} The denial of the petitioner's motion to suppress the evidence at trial was affirmed on appeal, on the ground that exigent circumstances justified the warrantless stop of the automobile.\footnote{191} On habeas corpus review, the district court held that the petitioner was entitled to relief under Stone, finding that the state court ruling with respect to probable cause for the stop was not fairly supported by the record.\footnote{192} The Fifth Circuit disagreed, holding that the district court's reversal of the state court determination of probable cause violated Stone since the petitioner had not demonstrated that the state did not furnish him a full and fair opportunity to present his fourth amendment claim.\footnote{193}

\footnote{185. 550 F.2d at 1099.}
\footnote{186. Id. at 1097 (citation omitted). See also Denti v. Commissioner of Correctional Servs., 421 F. Supp. 557, 559 (S.D.N.Y. 1976).}
\footnote{187. 556 F.2d 743 (5th Cir. 1977).}
\footnote{188. Id. at 745.}
\footnote{189. Id. at 744.}
\footnote{190. Id. Thus this case does not involve a litigant who, as in O'Berry, failed to preserve a point of error at trial and therefore was unable to present his fourth amendment claim to the state appellate court. Id. at 744 n.4. See notes 70 & 71 and accompanying text supra.}
\footnote{191. 556 F.2d at 744-45.}
\footnote{192. Id. at 745.}
\footnote{193. Id. at 747. In light of the fact that a finding of probable cause required both factual and legal determinations, the court refused to apply the second category of Townsend by inquiring whether the state factual determination was fairly supported}
B. Analysis of Holmberg, Hines, and Graves

It is submitted that the Eighth Circuit's extension of Stone in Holmberg and Hines ignored the symbiotic relationship between a proper application of fourth amendment standards and the fundamental fairness of state litigation. A state court's erroneous interpretation of fourth amendment standards clearly affects the fairness of the state proceeding and violates the accused's constitutional rights. It is implausible to contend that a state prisoner has been afforded a "full and fair opportunity to litigate" under Stone when the state procedures available to protect constitutional rights fail to perform their function in accordance with constitutional principles.

Since the petitioner in Holmberg presented a claim involving an issue that had no bearing on the "basic justice" of his incarceration, the availability of federal collateral review might have impelled the state courts reviewing Holmberg's claims to "toe the constitutional line." Indeed, the result in Holmberg furnishes convincing support for the view espoused by Justice Harlan in his dissenting opinion in Desist v. United States: "The threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."

by the record as a whole. Id. at 745-46. See text accompanying note 51 supra. The court posited that its conclusion was consistent with the policies supporting Stone: To allow a federal district court to overrule a state court's resolution of whether there was or was not probable cause so as to admit or exclude evidence obtained by a particular search flies in the teeth of the Stone v. Powell declaration that henceforth we shall regard state judges to be as capable as federal judges to uphold the values of the fourth amendment.

556 F.2d at 746 (footnote omitted).

194. Cf. Rogers v. Richmond, 365 U.S. 534 (1961) (reference to incorrect fifth amendment standard violates due process). One commentator has advanced the argument that "egregious" fourth amendment violations which are not corrected on state review should be cognizable under Stone if the habeas petitioner can show: 1) that the constitutional standard is a "clear" one; 2) that it is "clearly" applicable to petitioner's case; and 3) that the state appellate court failed to apply it or applied it improperly. See Note, supra note 168, at 140.

195. One of the essential underpinnings of the Stone decision was the Court's assumption that state courts are capable of protecting federal constitutional rights. See Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976). It is submitted, however, that decisions such as Holmberg tend to discredit that presumption.

A recent law review note questioned whether the withdrawal of habeas review signified by Stone would result in decreased protection of constitutional rights: Whether or not those constitutional rights excluded from habeas corpus review are accorded the preeminent status that they clearly deserve will depend on the accuracy of the Court's assumption that state courts can and will recognize their duty to give vigorous protection to the constitutional rights of the accused. Indeed, only if this assumption proves correct can the construction of a balance which allows concerns with federalism and state autonomy to outweigh increased protection of constitutional rights be ultimately justified.

The Supreme Court, 1975 Term, supra note 30, at 221.


199. Id. at 262-63 (Harlan, J., dissenting).
inconsistent with the long established function of federal habeas corpus to permit a state court to "have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."200

Finally, the Holmberg decision is difficult to justify when examined in light of the federal habeas statute.201 Section 2241(c) of Title 28 of the United States Code provides in pertinent part that: "The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States."202 A state prisoner, such as the petitioner in Holmberg, is held in violation of federal law when the "state courts have erroneously decided a federal question bearing dispositively on the judgment authorizing the detention."203 It follows that the statute authorizes federal habeas review to test the merits of the dispositive federal question decided erroneously by a state court. It is submitted that by severing access to the federal forum in such circumstances, the Holmberg court contravenes this statutory authorization and overextends Stone's estoppel rule.

The particular difficulty presented by Hines and Graves arises out of the fact that the state court determinations at issue exclusively concerned the existence of probable cause.204 Although a probable cause determination necessitates conclusions of law, the presence of a fourth amendment violation in such a judgment is not as clear as that presented by the overbroad state statute involved in Holmberg.205 Moreover, the district court's examination of the record for purposes of evaluating the factual support for the state court's probable cause determination appears inappropriate under Stone.206 Hines and Graves, unlike Holmberg, do not

201. See note 5 supra.
203. Bator, supra note 3, at 445. Professor Bator observed that "[t]he conclusion that a federal court should, at some point, have the power to decide the merits of all federal constitutional questions arising in state criminal proceedings . . . may be a sound one, resting on the specific institutional and political premises of our constitutional federalism." Id. In light of Stone, this conclusion appears to have been rejected, particularly if the Stone rationale is extended to include constitutional rights other than those protected by the fourth amendment. See The Supreme Court, 1975 Term, supra note 30, at 217–21. See also Castaneda v. Partida, 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting); Brewer v. Williams, 430 U.S. 387, 426–29 (1977) (Burger, C. J., dissenting).
204. See text accompanying notes 182–85 & 190–93 supra.
205. See notes 171–78 and accompanying text supra.
206. Stone clearly does not authorize a federal court on habeas review to make an independent assessment of the factual support for a constitutional claim. See Stone v. Powell, 428 U.S. 465, 474–96 (1976). As the Graves court pointed out, the record in Stone did not even reveal the grounds upon which the state court rejected Powell's claim. 556 F.2d at 746 n.8. When the fact that only a single state judge ever addressed the validity of the vagrancy ordinance at issue in Stone is considered as well, Justice Brennan's doubt as to whether there is any real content to Stone's "exception" for allowing habeas review when an opportunity for a full and fair resolution of a fourth amendment claim has been denied seems warranted. See 428 U.S. at 531 (Brennan, J., dissenting).
clearly demonstrate how Stone’s estoppel rule can be used to deny a state prisoner due process of law. The trend of lower federal court decisions following Stone has been to adopt the Holmberg and Graves rationale.207 These decisions have insulated fourth amendment claims from federal habeas review where the defendant presented his claim in state court and the court resolved that claim by applying its conception of the proper fourth amendment standard, regardless of whether that standard is a constitutional one.208

Normally state court procedures are adequate to permit litigation of fourth amendment claims, and in the vast majority of cases such claims are in fact litigated in state court.209 As the recent decisions in Holmberg, Hines

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208. See, e.g., Hedden v. Wainwright, 558 F.2d 784 (5th Cir. 1977); Denti v. Commissioner of Correctional Servs., 421 F. Supp. 557 (S.D.N.Y. 1976). See also Dupont v. Hall, 555 F.2d 15 (1st Cir. 1977). In Dupont, the First Circuit held that federal court review of allegedly erroneous probable cause determinations by state courts would be violative of the whole rationale of the Stone decision. Id. at 17. The Dupont court never reached the question of the existence of probable cause under the standards imposed by the fourth amendment. Id.
209. Federal courts have nevertheless recognized that in some circumstances federal habeas review is clearly warranted even under the restrictive standard imposed by Stone. See Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977) (en banc), cert. denied, 434 U.S. 1038 (1978). For example, if a federal habeas petitioner were precluded from raising his fourth amendment claim in state court because of the lack of suitable procedures, then the state court’s failure to dispose of the claim on the merits requires the federal courts to perform that function of collateral review. See United States ex rel. Petillo v. New Jersey, 418 F. Supp. 686 (D.N.J. 1976), rev’d., 562 F.2d 903 (3d Cir. 1977). It is submitted that the Stone decision was not designed to eliminate federal habeas review when there has been a “failure of process” in the state court system; in other words, when “the conditions under which a question was litigated were not fairly and rationally adopted for the reaching of a correct solution of any issue of fact or law.” Bator, supra note 3, at 455. Professor Bator cites the following situations as examples of this “failure of process”: 1) the trial judge was bribed to convict; 2) a mob is alleged to have dominated the trial court and jury; 3) the defendant was forced to plead guilty through torture; or 4) there was knowing use of perjured testimony by the prosecution. Id. at 457.

Under Stone federal courts are free, indeed obligated, to inquire “whether the conditions and tools of inquiry [available in state court] were such as to assure a reasoned probability that the facts were correctly found and the law correctly applied.” Id. at 455. If the state has failed to provide this corrective process, Stone’s “opportunity” test cannot be satisfied. See Frank v. Magnum, 237 U.S. 309, 333–36 (1915). Of course the complete absence of state procedures available to litigate a claim would be an obvious basis for the exercise of federal habeas review under Stone.

Professor Bator states unequivocally that

if a state fails to give the defendant any opportunity at all to test federal defenses relevant to his case, the need for a collateral jurisdiction to afford this opportunity would seem to be plain, and federal habeas is clearly an appropriate remedy: the state has furnished no process, much less “due” process, for the vindication of an alleged federal right.

Bator, supra note 3, at 456–57.

Not surprisingly, however, a total lack of appropriate state procedural mechanisms is rare. In United States ex rel. Petillo v. New Jersey, 418 F. Supp. 686 (D.N.J. 1976), rev’d., 562 F.2d 903 (3d Cir. 1977), the district court ruled that the state of New Jersey failed to provide any opportunity at all for the subject of a search to litigate his fourth amendment claim in state court. 418 F. Supp. at 688–89. Under an unusual state procedural rule, the subject of a search was denied the right to a hearing
and Graves demonstrate, however, federal courts under the rubric of Stone have seemingly ignored erroneous determinations of fourth amendment claims by state courts.210 This development suggests that the fourth amendment exclusionary rule is no longer a "constitutional claim" within the scope of habeas corpus.211 If, as one commentator has warned, the Stone opinion is not logically limited to the fourth amendment context, Stone and its progeny may signify an ominous redefinition of the function of federal habeas corpus review — a redefinition that places a higher premium on federalism and the efficient use of judicial resources than on the protection of constitutional rights.212

V. Conclusion

It is submitted that the decisions which have considered the propriety of federal habeas corpus review of a state prisoner's fourth amendment claims under Stone v. Powell have confirmed Justice Brennan's fear that Stone laid the groundwork for a broad withdrawal of federal habeas jurisdiction.213 The need for a more precise articulation of the standards governing the proper exercise of federal habeas review, therefore, remains after Stone, since it is concerning the veracity of an affidavit supporting the issuance of a search warrant. Id. at 688. Consequently, the petitioner was never afforded an opportunity to protect his constitutional right to suppress the fruits of an allegedly illegal search. Id. at 688–89. According to the district court, these circumstances placed the petitioner "squarely within the remaining ambit of application of the exclusionary rule on collateral review" under Stone, and therefore entitled him to habeas relief. Id. This ruling, however, was later overturned on appeal on the grounds that the petitioner was not prejudiced by the operation of New Jersey's "Petillo" rule and was afforded a fair opportunity to litigate his claim at trial and on direct review. Petillo v. New Jersey, 562 F.2d 903 (3d Cir. 1977). Cf. United States ex rel. Conroy v. Bombard, 426 F. Supp. 97, 109 (S.D.N.Y. 1976) (Stone did not preclude consideration of habeas petitioner's claim that state court illegal wiretapping hearing was procedurally defective).

A similar approach was exhibited by the district court in Curry v. Garrison, 423 F. Supp. 109 (W.D.N.C. 1976), in which the court determined that the petitioners were denied an opportunity to litigate their fourth amendment claim because they were never allowed to develop the facts material to such a claim. Id. at 110. Since the essential factual background to the claim of illegal search and seizure was never established, the state courts refrained from making any finding of fact regarding the fourth amendment claim. Id.

The district court accordingly ordered that an evidentiary hearing be held in federal court so as to enable it to consider the merits of petitioner's claim. Id. Cf. Gates v. Henderson, 568 F.2d 844 (2d Cir.), rev'd, 568 F.2d 830 (2d Cir.) (en banc), cert. denied, 434 U.S. 1038 (1978) (court ruled that the trial court had failed to develop evidence crucial to determination of petitioner's constitutional claim as required by Townsend). For a discussion of the panel majority's opinion issued by the Second Circuit in Gates, which was later reversed, en banc, see Note, Constitutional Law — Criminal Procedure — Circuits Split Over Application of Stone v. Powell's "Opportunity for Full and Fair Litigation", 30 VAND. L. REV. 881, 884–86 (1977).

212. See The Supreme Court, 1975 Term, supra note 30, at 220–21.
submitted that the Court's vague formulation of an "opportunity" test has confused the relationship between procedural protections and substantive rights. Evidence of this confusion is found in lower federal court decisions such as O'Berry, Gates, and Holmberg in which the Court's failure to delimit the boundaries and purposes of the "opportunity" test has permitted the restriction of federal habeas review in situations in which habeas corpus has traditionally performed the most valuable service.

Specifically, it is submitted that these decisions have failed to recognize that the Supreme Court presupposed two basic conditions essential to the invocation of Stone-type estoppel: 1) that state courts would resolve fourth amendment claims in accordance with prevailing constitutional standards to ensure protection of fourth amendment rights; and 2) that state prisoners would raise these claims as prescribed by state statutory procedures, thereby ensuring that at least one forum resolves the merits of the claims.

The first presumption derives from the Stone Court's belief that state courts can be trusted to effectuate fourth amendment values through fair application of the exclusionary rule. However, the anomalous consequences of proposing a procedural test that presupposes a uniform result are revealed by decisions like Holmberg, in which the state courts apparently failed to apply a proper fourth amendment standard. Though it is difficult to believe that the Stone Court intended to sanction this refusal to accord proper respect to fourth amendment rights, the Holmberg court interpreted the "opportunity" test as authorizing federal courts to virtually ignore these errors. This reduction in the availability of federal habeas review places a heavy burden on state courts to provide guarantees heretofore afforded by federal courts. More importantly, it is submitted that the Holmberg extension of Stone violates the incarcerated individual's due process right to a fair trial by permitting state courts to admit unconstitutionally seized evidence and to thus act in flagrant disregard of the Constitution.

214. See text accompanying notes 70–93 supra.
215. See text accompanying notes 94–120 supra.
216. See text accompanying notes 169 & 171–78 supra.
217. Federal habeas review performs the most valuable service when it rectifies constitutional errors committed by state courts or addresses the merits of a constitutional claim theretofore ignored by state courts. See generally Comment, 23 N.Y.L.Sch. L. Rev. 119, 127–31 (1977). The fact that the federal habeas court is "lodged in a different institutional setting [than a state court], with different loyalties and assumptions which may foster greater hospitality to constitutional goals" supports the use of the federal forum as "the separate proceeding which tests the constitutional basis of the conviction, not the prisoner's guilt or innocence." Developments, supra note 1, at 1060–61.
219. See text accompanying notes 169 & 171–78 supra.
222. See Comment, supra note 217, at 130. Justice Brandeis warned of the danger to a free society caused by this disregard of law: In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omni-present
Yet the Holmberg rationale finds support in the argument that after Stone federal courts may not first look to see if a state court properly decided the merits of a fourth amendment claim before determining if the opportunity to raise that claim was "full and fair." Even if Stone's procedural standard cannot be defined in terms of protection of substantive rights, however, it is nonetheless submitted that the extent to which state processes actually protect substantive rights in a given case is not irrelevant to a serious examination of procedural fairness. A federal habeas court could thus review state court determinations of fourth amendment claims on the ground that the opportunity to litigate was undermined by the application of a clearly erroneous fourth amendment standard in state court.

With respect to the second presumption mentioned above, it is submitted that the Stone Court did not anticipate the use of the "opportunity" test to entirely preclude judicial review of fourth amendment claims. The Stone decision, when considered in light of its facts and the reasoning supporting its holding, sought to remove the federal habeas forum only from those defendants who properly raised and litigated constitutional claims in state courts. Federal court decisions such as O'Berry and Gates reveal, however, that the "opportunity" test may operate to permit the waiver of constitutional rights by defendants failing to comply, for whatever reason, with state procedural rules. The courts are seemingly construing Stone to mean that providing a defendant an opportunity to litigate his claim precludes habeas relief, regardless of whether or not the opportunity was exercised. This construction of the Stone test may have the unfortunate effect of ensuring that no court hears the merits of the respective constitutional claims, as happened in Gates and O'Berry. Furthermore,
this approach injects an element of waiver into the Stone test without a serious assessment of the implications of the waiver doctrine on the redundancy principles which have formed the foundation of habeas corpus by allowing two independent courts to address a defendant's claim of constitutional error, and without regard to the actual cause of the failure to exercise the opportunity to litigate.

It is arguable that the Gates and O'Berry courts appear to have anticipated the current trend of Supreme Court habeas jurisprudence. The most striking feature of this trend is the apparent convergence of the Stone-Wainwright analyses permitting the “binding forfeiture” of constitutional rights — which if allowed to continue might restrict federal habeas review of constitutional claims other than those derived from the fourth amendment. Several Supreme Court justices have proposed the extension of Stone to exclude federal habeas review of other non-“guilt-related” constitutional rights, and Wainwright has directly limited Fay by

230. The Warren Court's expansion of habeas corpus produced the active participation of federal courts in the protection and articulation of constitutional rights, thereby generating “a dialogue on the future of constitutional requirements in criminal law in which state and federal courts were required both to speak and listen as equals.” Cover & Aleinikoff, supra note 36, at 1036. The Warren Court chose redundancy as its remedial strategy to insure “the fullest opportunity for plenary federal judicial review” of federal constitutional claims. Fay v. Noia, 372 U.S. 391, 424 (1963) See Cover & Aleinikoff, supra note 36, at 1036. Professor Cover specified the following advantages of redundancy as the guiding principle of habeas corpus: 1) it encourages the “vindication of federal rights by isolating them from other elements in the criminal process and making them the special concern of a special forum;” 2) it increases the certainty that constitutional rights will not be erroneously denied by establishing “a biased decision rule against convictions with erroneous adjudications of constitutional rights;” 3) it encourages more solicitous treatment of federal constitutional claims by state courts; and 4) it stimulates the states “to develop and improve procedures for the adjudication and protection of constitutional rights.” Id. at 1045-46. See generally Wright & Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility, 75 YALE L. J. 895, 898 & n.14 (1966); Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 UTAH L. REV. 423, 442 (1961); Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 HARV. L. REV. 1315, 1352-54 (1961); Developments, supra note 1, at 1057. As recent habeas corpus decisions reveal, however, redundancy is no longer the guiding principle for the Burger Court in defining the function of federal habeas review. See Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976). See generally Cover & Aleinikoff, supra note 36, at 1072-78.

231. Justice Brennan has emphasized that the ordinary procedural default in state court, which in Gates and O'Berry led to the waiver of the defendant's opportunity to litigate their constitutional claims, is caused by the inadvertence, negligence, inexperience, or incompetence of trial counsel. Wainwright v. Sykes, 433 U.S. 72, 104 (1977) (Brennan, J., dissenting). He argues persuasively that a lawyer's mistake should not ipso facto forfeit a defendant's constitutional rights. Id. at 105 (Brennan, J., dissenting). This issue was inexplicably avoided by both the Gates and O'Berry courts.


234. In Brewer v. Williams, 430 U.S. 387 (1977), Chief Justice Burger urged that Stone be extended to exclude federal habeas review of Miranda violations. Id. at
implying waiver of a fifth amendment claim absent a showing of "cause" and "prejudice" for failure to raise an objection in accordance with state procedural rules. In addition, two recent Supreme Court decisions demonstrate that the failure to raise federal constitutional claims at the appropriate time in state court may bar federal habeas review. Significant

426-28 (Burger, C. J., dissenting). See Miranda v. Arizona, 384 U.S. 436 (1966). The Chief Justice criticized the majority for "mechanically applying the exclusionary rule" and granting habeas relief to a state prisoner on the ground that his inculpatory statements were involuntary and should have been excluded from trial. 430 U.S. at 420-25 (Burger, C.J., dissenting). The Chief Justice reasoned that the evidence obtained by virtue of police conduct such as that found to be unconstitutional by the majority was independently valid and probative of guilt and thus should not be excluded by operation of the exclusionary rule on collateral review. Id. at 418-20 (Burger, C.J., dissenting). Justice Powell, concurring specially, declined to apply Stone because it had been decided subsequent to the lower court decisions in the case and the Stone principle had not been briefed nor adequately argued. Id. at 413-14 (Powell, J., concurring). It should be noted, however, that Justice Powell implied skepticism as to the general applicability of the Stone rationale in the fifth and sixth amendment contexts:

Many Fifth and Sixth Amendment claims arise in the context of challenges to the fairness of a trial or to the integrity of the fact-finding process ... Whether the rationale of Stone should be applied to those Fifth and Sixth Amendment claims or classes of claims that more closely parallel claims under the Fourth Amendment is a question as to which I intimate no view, and which should be resolved only after the implications of such a ruling have been fully explored. Id. at 414 (Powell, J., concurring). See Cover & Aleinikoff, supra note 36, at 1088-89.

Justice Powell has nevertheless stated that Stone should be applied to claims of discrimination in grand jury matters since these claims may be "mooted" by a retrial. Castaneda v. Partida, 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting).

The Ninth Circuit has refused to extend the Stone rationale to bar federal habeas review of double jeopardy claims. Corley v. Cardwell, 544 F.2d 349 (9th Cir. 1976), cert. denied, 429 U.S. 1048 (1977). See also Tison v. United States, 547 F.2d 452 (9th Cir. 1976). A federal district court, however, applied Stone to preclude habeas review of a Miranda claim where the defendant had a full and fair opportunity to litigate his claim in state courts. Richardson v. Stone, 421 F. Supp. 577 (N.D. Cal. 1976).


In Francis, a black defendant convicted of felony murder filed for federal habeas relief on the basis of a claim, never raised in state court notwithstanding the requirement under state law that such claims be raised before trial, that the state's system of selecting a grand jury constituted racial discrimination. 425 U.S. at 538. After the district court granted relief, the Fifth Circuit vacated the ruling and remanded for a finding of whether the state's exclusion of a disproportionate number of blacks was prejudicial. Newman v. Henderson, 496 F.2d 896, 898 (5th Cir. 1974), aff'd sub nom. Francis v. Henderson, 425 U.S. 536 (1976).

Affirming the circuit court, the Supreme Court held that a collateral attack upon the conviction required "not only a showing of 'cause' for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice." 425 U.S. at 542 (footnote omitted). One commentator has pointed out that if this prejudice requirement required habeas applicants to show a causal relationship between the defect in composition of the grand jury and the decision to indict, grand jury challenges in habeas proceedings will be effectively barred. Cover & Aleinikoff, supra note 36, at 1076 & n.192.

In Estelle the habeas petitioner claimed that his trial was unconstitutional because he was forced to appear in prison clothes. 425 U.S. at 502. Although the
cantly, the objections raised after trial in these cases were deemed so unimportant that the defendants' unintentional waiver of their claims barred all state and federal review. This was the approach adopted by the Gates and O'Berry courts in injecting a waiver element into Stone's "opportunity" test in cases involving fourth amendment claims. It is submitted, however, that the application of the waiver doctrine to Stone's test is inappropriate since the Stone Court never confronted the prohibitive consequences of the failure to raise constitutional claims in state court.

If the convergence of the Stone and Wainwright tests is completed, the result would be an almost total evisceration of federal habeas corpus jurisdiction over claims unrelated to a defendant's guilt or innocence. In addition, if the "cause" and "prejudice" standard followed in Wainwright is included in Stone's "opportunity" test, a state prisoner will rarely, if ever, be

defendant had made a futile request to his jailer to permit him to wear civilian clothes at trial, no objection regarding the prison garb was raised at trial. Id. After his conviction for assault with intent to murder with malice, the defendant unsuccessfully sought habeas relief in federal district court on the ground that trial in prison clothes constituted a denial of due process. Id. at 503. On review the Fifth Circuit held that trial in prison garb was not harmless error. Williams v. Estelle, 500 F.2d 206, 210–12 (5th Cir. 1974), rev'd, 425 U.S. 501 (1976).

The Supreme Court disagreed, holding that compelling a defendant to attend trial in prison clothes was a denial of due process but that the defendant's failure to make a timely objection at trial in this case negates the inference of coercion. 425 U.S. at 508–10. Although Chief Justice Burger, writing for the majority, did not employ the language of waiver, it has been suggested that "his requirement of coercion together with his inference of noncoercion from the failure to object is the functional equivalent of a waiver rule in which a claim of right is deemed waived if not raised or invoked in timely fashion." Cover & Aleinikoff, supra note 36, at 1073–74.

237. See Cover & Aleinikoff, supra note 36, at 1076.

238. See text accompanying note 12 supra.

239. See notes 150–53 and accompanying text supra. See also Cover & Aleinikoff, supra note 36, at 1076.

240. It is not unreasonable to anticipate that this convergence will be consummated. In Wainwright, where the basis of the constitutional claim was so fundamental as the voluntariness of a confession, the Court denied habeas review on the basis of the operation of a state contemporaneous objection rule. 433 U.S. at 86–87. To enforce a similar contemporaneous objection rule in a case raising a fourth amendment claim, in which the reliability of evidence is not brought into question, would therefore be even more justifiable. In either case, federal habeas relief would seem to be barred absent a showing of "cause" and "prejudice" attendant to the procedural default. See id. at 87–90.

241. If federal habeas review were barred, as a practical matter no federal court would address the merits of a state prisoner's constitutional claim. Justice Brennan pointed out that "institutional constraints totally preclude any possibility that [the Supreme Court] can adequately oversee whether state courts have properly applied federal law." Stone v. Powell, 428 U.S. 465, 526 (1976) (Brennan, J., dissenting) (footnote omitted).

Another commentator has observed that the certiorari procedure of the Supreme Court is entirely inadequate to review most state court decisions: "[T]he ultimate right of a state criminal defendant to have a federal court and federal judges pass upon his federal contentions cannot be secured solely by the Supreme Court's power to review state judgments. The sheer volume of cases is enough to preclude it." Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. PA. L. REV. 461, 464 (1960).
able to secure federal habeas review, notwithstanding the merit of his constitutional claim.\textsuperscript{242}

In any event, the current trend of Supreme Court decisions regarding habeas corpus and the lower federal court response thereto appears to herald a significant restructuring of the function of federal habeas corpus review. The \textit{Stone} Court, however, suggested that one of the functions of habeas corpus is to provide a remedy for "whatever society deems to be intolerable restraints."\textsuperscript{243} It is submitted that the concept of "intolerable restraint" should not be limited exclusively to the incarceration of an innocent person.\textsuperscript{244} It should also extend to a concern for the fundamental fairness and justice of permitting state courts to adjudicate defendants' claims without regard to constitutional standards and to imply the waiver of constitutional rights without regard to the defendants' knowledge of or control over procedural defaults.

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\textsuperscript{242} Habeas review would be foreclosed because petitioners asserting non-"guilt-related" constitutional claims would be unable to demonstrate that the alleged constitutional error actually prejudiced their adjudication. By definition, constitutional claims unrelated to guilt or innocence are nonprejudicial. Significantly, however, the lower federal courts have had difficulty in determining precisely what constitutes "cause" and "prejudice." \textit{See, e.g.}, Crowell v. Zahradnick, 571 F.2d 1257 (4th Cir. 1977) (Winter, J., dissenting); Jiminez v. Estelle, 557 F.2d 506, 510-11 (5th Cir. 1977).


\textsuperscript{244} In other words, the concept of "intolerable restraint" may embrace concerns "not only with the accuracy of the fact-finding but also with the fairness and justice of the process itself." \textit{The Supreme Court, 1975 Term, supra} note 30, at 220.