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Stone v. Powell and the Effective Assistance of Counsel

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Since *Stone v. Powell*,[1] state prisoners who have been afforded "an opportunity for full and fair litigation of a fourth amendment claim" may not obtain federal habeas corpus relief on the basis of that claim.[2] Courts[3] and commentators[4] have frequently speculated about the applicability of *Stone* to other constitutional claims, but most courts have rejected proposals to extend its holding to cases not involving the fourth amendment exclusionary rule.[5] Disagreements have arisen, however, among courts that have considered sixth

1. 428 U.S. 465 (1976).

2. 428 U.S. at 494. Authority to review petitions for habeas corpus in federal court was expressly granted by Congress. 28 U.S.C. § 2254 (1976). Section 2254(a) provides:

> 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.

In *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202-03 (1830), the Supreme Court held that the scope of § 2254's predecessor statute was limited to attacks on the jurisdiction of the court that confined the habeas petitioner. For a variety of perspectives on the writ's subsequent expansion, see Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 463-99 (1963); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 151-57 (1970); Hart, *Foreword: The Time Chart of the Justices The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 101-22 (1959); Oaks, *Legal History in the High Court — Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1354-57 (1961); *Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042-72 (1970).

Stone provoked an extensive and generally critical reaction in the literature. *See, e.g.*, Boyte, *Federal Habeas Corpus After* Stone v. Powell: *A Remedy Only For The Arguably Innocent?*, 11 U. RICH. L. REV. 291 (1977); Green, Stone v. Powell: *The Hermeneutics of the Burger Court*, 10 CREIGHTON L. REV. 655 (1977); Robbins & Sanders, *Judicial Integrity, the Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) With One* Stone, 15 AM. CRIM. L. REV. 63 (1977).

3. *See* Browder v. Department of Corrections, 434 U.S. 257, 258-59 n.1 (1978); Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977); Brewer v. Williams, 430 U.S. 387, 414 (1977) (Powell, J., concurring); Stone v. Powell, 428 U.S. 465, 506-15 (1976) (Brennan, J., dissenting).

4. *See, e.g.*, Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1086-100 (1977); Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 887-91 (1981); Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1, 29 n.141 (1978).

5. *See* Rose v. Mitchell, 443 U.S. 545 (1979); Jackson v. Virginia, 443 U.S. 307 (1979); Sallie v. North Carolina, 587 F.2d 636 (4th Cir. 1978); Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978); United States *ex rel.* Henne v. Fike, 563 F.2d 809 (7th Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); Greene v. Massey, 546 F.2d 51 (5th Cir. 1977); United States *ex rel.* Hudson v. Warden, No. 74-C-2392 (N.D. Ill. June 30, 1981); Toliver v. Wyrick, 469 F. Supp. 583 (W.D. Mo. 1979) (dictum); Sedgewick v. Superior Court, 417 F. Supp. 386 (D.D.C. 1978), *cert. denied*, 439 U.S. 1075 (1979); *cf.* Hussong v. Warden, 623 F.2d 1185 (7th Cir. 1980) (*Stone* inapplicable to exclusionary rule imposed by federal wiretapping statute). *But see* Richardson v. Stone, 421 F. Supp. 577 (N.D. Cal. 1976) (*Stone* applies to *Miranda* claims).

amendment claims of ineffective assistance of counsel[6] based on an attorney's failure to raise or incompetent presentation of a fourth amendment issue in pretrial proceedings or at trial. Although ineffective assistance claims are generally cognizable in habeas corpus proceedings,[7] at least one court has applied *Stone* and denied relief when the alleged incompetence involved a fourth amendment issue.[8] Other courts have distinguished these sixth amendment claims from the fourth amendment issue presented in *Stone* and thus have sanctioned habeas corpus relief.[9]

This Note supports the latter view: Courts should not invoke

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6. *See* note 62 *infra*.

7. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335 (1980); Barnes v. Jones, 665 F.2d 427 (2d Cir. 1981); Eldridge v. Atkins, 665 F.2d 228 (8th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3780 (Mar. 30, 1982); Perez v. Wainwright, 640 F.2d 596 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3780 (Mar. 30, 1982). *But cf.* Bines, *Remedying Ineffective Representation In Criminal Cases: Departures From Habeas Corpus*, 59 VA. L. REV. 927, 970-83 (1973) (proposing alternative remedies for ineffective counsel, obviating justification for habeas corpus).

8. *See* Sallie v. North Carolina, 587 F.2d 636, 641 (4th Cir. 1978) (Chapman, J., concurring in result) (dictum); LiPuma v. Commissioner, Dept. of Corrections, New York, 560 F.2d 84, 93 n.6 (2d Cir. 1977), *cert. denied*, 434 U.S. 861 (1978); Allah v. Henderson, 526 F. Supp. 282 (S.D.N.Y. 1981). *See generally* Bines, *supra* note 7, at 976. In addition, the Ninth Circuit recently indicated that it considers the issue open and may soon resolve it. *See* Moran v. Morris, 665 F.2d 900 (9th Cir. 1981).

9. *See* Sallie v. North Carolina, 587 F.2d 636, 640-41 (4th Cir. 1978); Moran v. Morris, 478 F. Supp. 145, 151 (C.D. Cal. 1979), *vacated on other grounds*, 665 F.2d 900 (9th Cir. 1981).

The failure of a prisoner's attorney to raise a fourth amendment claim in a manner prescribed by state procedural rules imposes an additional obstacle to federal habeas review on that ground. In Wainwright v. Sykes, 433 U.S. 72 (1977), the Supreme Court held that a state procedural default bars federal habeas corpus absent a showing of "cause" for the violation and resulting prejudice to the defendant. 433 U.S. at 90-91. The Supreme Court has offered little guidance as to what "cause" will entitle a defendant to federal collateral review, *see* Engle v. Isaac, 50 U.S.L.W. 4376, 4386 (U.S. Apr. 5, 1982) (Brennan, J., dissenting); Wainwright v. Sykes, 433 U.S. at 91, and the lower federal courts have struggled with the issue. *See generally* Goodman & Sallett, Wainwright v. Sykes: *The Lower Federal Courts Respond,* 30 HAST. L.J. 1683 (1979).

Several habeas petitioners have argued that attorney ineffectiveness should constitute "cause." While the Fifth Circuit has held that unsubstantiated allegations of counsel incompetence are insufficient, *see* Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981); Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981), other courts have found that "cause exists when the record reveals attorney error affecting substantial constitutional rights of the defendant." United States v. Brown, No. 77-2106, slip op. at 11 (D.C. Cir. March 21, 1980). *See* Boyer v. Patton, 579 F.2d 284, 288 (3d Cir. 1978); Sincox v. United States, 571 F.2d 876, 880 (5th Cir. 1978); Rinehart v. Brewer, 561 F.2d 126, 130 n.6 (8th Cir. 1977); Tolliver v. Wyrick, 469 F. Supp. 583, 602 (W.D. Mo. 1979) (alternative holding); *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 70, 214 (1977); *cf.* Note, *Attorney Error as "Cause" Under* Wainwright v. Sykes: *The Case for a Reasonableness Standard after* Washington v. Downes, 67 VA. L. REV. 415 (1981) (attorney error need not breach constitutional standard to constitute "cause"); *see also* Fay v. Noia, 372 U.S. 391, 470-71 (1963) (Harlan, J., dissenting) (acknowledging importance of competent counsel to adequacy of state procedural ground). *But see* Gates v. Henderson, 568 F.2d 830, 843 n.6 (2d Cir. 1977) (en banc) (Oakes, J., concurring). This view finds apparent support in the Supreme Court's recent application of *Wainwright* in Engle v. Isaac, 50 U.S.L.W. 4376 (U.S. Apr. 5, 1982). Justice O'Connor, writing for the majority, noted that while alleged unawareness of a constitutional objection is not excusable cause for a procedural default, the Constitution guarantees "a fair trial *and* a competent attorney." 50 U.S.L.W. at 4383 (emphasis added). Moreover, the *Engle* court asserted that victims of a "fundamental miscarriage of justice" would be able to meet the cause and prejudice standard, citing Justice Stevens' concur-

Stone's bar of habeas corpus relief against a prisoner whose ineffective assistance of counsel claim is evidenced by his attorney's mishandling of a fourth amendment issue. Part I briefly identifies the considerations underlying the *Stone* Court's decision to limit habeas corpus review of fourth amendment claims. Part II then argues against applying *Stone* to the sixth amendment claim. After establishing the analytic difference between the two constitutional claims and examining *Stone*'s "opportunity for full and fair litigation" standard, it concludes that *Stone* is fully consistent with free review of habeas corpus petitions alleging incompetent handling of fourth amendment questions. Finally, responding to a popular interpretation of *Stone*, Part II demonstrates that the possibility that ineffectiveness claims may not further the determination of a defendant's factual guilt or innocence should not preclude their review in habeas corpus proceedings.

I. THE UNDERPINNINGS OF *STONE V. POWELL*

Lloyd Powell was convicted of murder after the California courts denied his motion to suppress evidence obtained in an allegedly unconstitutional search.[10] In his petition for a federal writ of habeas corpus, Powell argued that the evidence should have been excluded.[11] The district court denied the writ, but the Ninth Circuit disagreed, holding that because the statute under which Powell was arrested and searched was unconstitutionally vague, the evidence obtained was inadmissible.[12] In *Stone v. Powell*,[13] the Supreme Court reversed. It held that habeas corpus relief was not available since the state had given the defendant an "opportunity for full and fair litigation" of his fourth amendment claims.[14]

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ring opinion in *Wainwright*, 50 U.S.L.W. at 4383. Justice Stevens, in several passages, recognized the importance of counsel competence. 433 U.S. at 94-97 (Stevens, J., concurring).

This Note contends that fourth amendment claims and sixth amendment claims evidenced by fourth amendment errors are distinct; the *Wainwright* issue is separate and beyond the scope of this Note. Indeed, one commentator has concluded that *Wainwright* is likely to lead habeas petitioners to challenge counsel competence on sixth amendment grounds rather than raise other substantive claims now barred. *See* Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do,* 31 STAN. L. REV. 1 (1978).

10. Stone v. Powell, 428 U.S. 465, 470 (1976).

11. *See* 428 U.S. at 470.

12. *See* 428 U.S. at 470-71. The Ninth Circuit's opinion is reported at 507 F.2d 93 (1974).

13. 428 U.S. 465 (1976). *Stone* was decided together with *Wolff v. Rice*. Rice was convicted of murder in a Nebraska state court after his motion to suppress certain evidence was denied. *See* 428 U.S. at 471-72. Rice filed for federal habeas corpus relief, alleging that the search that uncovered the disputed evidence was illegal. Both the district court and the Eighth Circuit agreed with Rice, holding the search invalid because the search warrant failed to establish probable cause. 513 F.2d 1280 (8th Cir. 1975); 388 F.Supp. 185, 190-94 (D. Neb. 1974) (citing Spinelli v. United States, 393 U.S. 410 (1969), and Aguilar v. Texas, 378 U.S. 108 (1964)). The Supreme Court held that Rice, like Powell, had been afforded an opportunity for full and fair litigation and reinstated his conviction. 428 U.S. at 496.

14. 428 U.S. at 494.

Justice Powell, writing for the majority in *Stone*, initially posited that criminal defendants have no constitutional right to the exclusion of evidence acquired in violation of the fourth amendment.[15] The exclusionary rule, he argued, is a judicial "remedy" for illegal searches and seizures[16] that exists primarily to deter violations of the fourth amendment.[17] In contrast to the rule's effectiveness when invoked at trial and on direct review,[18] excluding evidence on federal collateral attack is far less likely to deter illegal police activity.[19] The Court rejected 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."[20]

After questioning the utility of applying the exclusionary rule in habeas corpus proceedings, Justice Powell argued that the rule imposes significant societal costs.[21] He observed that excluded evi-

15. 428 U.S. at 482-89; *see* United States v. Calandra, 414 U.S. 338, 348 (1974); Bivens v. Six Unknown Named Agents, 403 U.S. 399, 411 (1971) (Burger, C.J., dissenting); Mapp v. Ohio, 367 U.S. 643, 661-62 (1961) (Black, J., concurring); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978). *But see* Terry v. Ohio, 392 U.S. 1, 12-13 (1967) ("Courts which sit under our Constitution cannot and will not be made party to lawless invasion of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."); Mapp v. Ohio, 367 U.S. 643, 651, 657 (1961); Elkins v. United States, 364 U.S. 206, 222 (1960) ("the imperative of judicial integrity"); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66 (1978); Schrock & Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974). *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE § 1.1 (1978).

16. 428 U.S. at 486. The victim of the illegal search is not the remedy's beneficiary. The exclusionary rule "is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.' " 428 U.S. at 486 (quoting Linkletter v. Walker, 381 U.S. 618, 637 (1965)).

17. 428 U.S. at 486. *But see* United States v. Peltier, 422 U.S. 531, 557-58 (1975) (Brennan, J., dissenting).

18. The effect of the exclusionary rule on illegal police activity is a disputed question. *Compare* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) *and* Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243 (1973), *with* Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974), *and* Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 NW. U.L. REV. 740 (1974).

19. *See* 428 U.S. at 494-95. *But see* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 453 n.104 (1980).

20. 428 U.S. at 493 (footnote omitted). Ignored in the Court's discussion and by many commentators is the exclusionary rule's symbolic value. *See* Tiffany, *Judicial Attempts to Control the Police*, 61 CURRENT HIST. 13, 52 (1971) (In considering whether the Court should scrap the exclusionary rule "it may be important to distinguish between the functional and symbolic impact of a rule designed to control behavior. From a functional perspective, the *Mapp* rule may be a failure. It need not follow that the rule should be changed if one can find in it sufficient symbolic worth.").

21. 428 U.S. at 490. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926) (Cardozo, J.); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 161 (1970); Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEXAS L. REV. 736 (1972). *But see* K. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESS-

dence is generally reliable and often the most probative of a defendant's guilt or innocence.[22] When evidence is excluded, guilty defendants may go free. The exclusionary rule thus distracts from the "ultimate question of guilt or innocence that should be the central concern in a criminal proceeding."[23] In light of these costs, the Court has applied the rule only "where its remedial objectives are thought most efficaciously served."[24] Balancing the costs of imposing the rule against the small increase in deterrence that might result, the *Stone* Court limited the power of federal courts to consider fourth amendment claims on habeas corpus review.

Justice Powell also objected to the breadth of federal habeas corpus itself.[25] Before *Stone*, state prisoners could obtain full review of their federal statutory and constitutional claims in a habeas corpus proceeding.[26] *Stone* created an exception to this broad power of review; federal habeas courts can reexamine the merits of a fourth amendment claim only if the state did not afford the defendant an opportunity for full and fair litigation of that claim.[27]

The majority grounded its concern with the scope of federal habeas corpus on four specific policy interests. First, federal habeas review exacerbates federal-state tension by giving a single federal judge broad authority to invalidate decisions of state courts.[28] Second, federal habeas review undermines finality in state criminal trials by prolonging the pursuit of absolute truth.[29] Third, *Stone* may

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ING 18-19 (1979) (cited in Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 221-22 (5th ed. 1980)); U.S. GAO, REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (1979).

22. 428 U.S. at 490. *But see* Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on* Schneckloth v. Bustamonte, 1975 WIS. L. REV. 484, 496-500.

23. 428 U.S. at 490 (footnote omitted).

24. United States v. Calandra, 414 U.S. 338, 348 (1974) (holding that the government may use illegally seized evidence in grand jury proceedings). *See* Walder v. United States, 347 U.S. 62 (1954) (illegally seized evidence admissible at subsequent trial to impeach defendant's testimony).

25. *See* 428 U.S. at 491 n.31. Justice O'Connor recently articulated many of the arguments against broad access to federal habeas corpus for state prisoners. *See* Engle v. Isaac, 50 U.S.L.W. 4376, 4381-82 (U.S. Apr. 5, 1982).

26. *See* Stone v. Powell, 428 U.S. 465, 515-33 (1976) (Brennan, J., dissenting); Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953); 28 U.S.C. § 2254 (1976); Bator, *supra* note 2, at 444; Friendly, *supra* note 2, at 155; Hart, *supra* note 2, at 106. *See generally* Developments, *supra* note 2, at 1042-62.

27. 428 U.S. at 494 & n.37.

28. 428 U.S. at 491 n.31. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 263-65 (1973) (Powell, J., concurring); *cf.* Wainwright v. Skyes, 433 U.S. 72, 90 (1977) (asserting the need to make state trials the "main event" in the criminal justice system). *But see* Chisum, *In Defense of Modern Federal Habeas Corpus for State Prisoners*, 21 DE PAUL L. REV. 682, 693 (1972); *but cf.* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977) (describing "dialogue" between utopian federal courts and practical state courts defining individual rights).

29. 428 U.S. at 491 n.31. *See* Schneckloth v. Bustamonte, 412 U.S. at 261-63 (Powell, J.,

have suggested a narrower purpose for habeas corpus: Justice Powell's opinion indicates that its primary goal may be "to assure that no *innocent* person suffers an unconstitutional loss of liberty."[30] Finally, the Court was concerned that the prisoner petitions generated by the availability of full habeas review contributed significantly to the overcrowding of federal court dockets.[31]

Stone, then, rests on two ideas that intersect when a state prisoner seeks federal habeas corpus relief on fourth amendment grounds — a balancing of the costs and benefits of applying the exclusionary rule in federal habeas proceedings and a concern for the breadth of federal habeas review generally. Part II addresses whether these considerations justify extending *Stone*'s rule to sixth amendment claims.

II. The Difference Between Fourth and Sixth Amendment Claims

Habeas corpus petitions alleging that an attorney mishandled a fourth amendment claim involve two distinct constitutional violations. The first, an illegal search or seizure, was committed by the police before the defendant's trial. The second violation, however, occurred during the trial, when the attorney's incompetence denied the defendant his sixth amendment right to the effective assistance of counsel.[32] This Part of the Note argues that while the first violation is covered by *Stone*, the second is not.

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concurring); Bator, *supra* note 2, at 452-53. *But see* Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved*, 21 De Paul L. Rev. 701, 709-10 (1972):

> Sober reflection upon why we have devised a system which allows a continual questioning of its processes discloses that our purpose is not so much to remove the discomforting doubt or to achieve the ultimate assurance, as it is to give safeguard to rights not readily visible or easily acknowledged. . . . We would not send two astronauts to the moon without providing them with at least three or four back-up systems. Should we send literally thousands of men to prison with even less reserves? . . . [W]ith knowledge of our fallibility and a realization of past errors, we can hardly insure our confidence by creating an irrevocable end to the guilt-determining process.

On the effect of a lack of finality on prisoners' efforts toward rehabilitation, see remarks by Freund in *Symposium: Habeas Corpus — Proposals for Reform*, 9 Utah L. Rev. 27, 30 (1964); Schwartz, *Retroactivity, Reliability and Due Process: A Response to Professor Mishkin*, 33 U. Chi. L. Rev. 719, 744 (1966).

30. 428 U.S. at 491 n.31. (emphasis added) *See generally* Part II C *infra*.

31. 428 U.S. at 491 n.31. *See* Schneckloth v. Bustamonte, 412 U.S. at 260-61 (Powell, J., concurring); Friendly, *supra* note 2, at 143-44, 148-51. *See generally* H. Friendly, Federal Jurisdiction 15-54 (1973); Burger, *Annual Report on the State of the Judiciary*, 66 A.B.A.J. 295, 297 (1980); Burger, *Agenda for 2000 A.D. — A Need for Systematic Anticipation*, 70 F.R.D. 83 (1976); Commission on Revision of the Federal Court Appellate System (Hruska Commission), *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 394-409 (1975); Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev. 321 (1973).

32. *See* notes 38-39 *infra*.

A. *The Evidentiary Role of Fourth Amendment Violations*

At least one court has expressed its unwillingness to find a significant difference beween fourth amendment claims and the sixth amendment claim that this Note considers. In *LiPuma v. Commissioner*,[33] trial counsel neglected to make a pretrial motion to suppress evidence seized during an allegedly illegal search. When the motion was made at trial, the state court held it untimely. At his sentencing, the defendant, represented by different counsel, requested a new trial on the ground that his previous attorney had acted incompetently. The court denied the motion, and the appellate court affirmed the conviction without an opinion.[34] In federal habeas corpus proceedings, the prisoner alleged ineffective assistance of counsel and was granted relief.[35] The Second Circuit applied *Stone* and reversed, finding that the state courts' full and fair consideration of the petitioner's sixth amendment claim barred federal collateral relief.[36] Despite the ostensible difference in the claims, *Stone* applied because "at the heart of [the] case lies an alleged fourth amendment violation . . . [to which] a sixth amendment claim has been added for good measure."[37]

On close examination, however, the two claims differ significantly. The relevant considerations in ineffectiveness claims are the seriousness of the attorney's error and the resulting prejudice to the defendant.[38] Courts generally assess these claims by measuring the attorney's performance against community norms or a standard of reasonable competence.[39] When the allegation of incompetence

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33. 560 F.2d 84 (2d Cir. 1977), *cert. denied,* 434 U.S. 861 (1978).

34. *See* 560 F.2d at 88.

35. *See* United States *ex rel.* Rosner v. Commissioner, New York State Dept. of Corrections, 421 F.Supp. 781 (S.D.N.Y. 1976), *revd. sub nom.* LiPuma v. Commissioner, Dept. of Corrections, New York, 560 F.2d 84 (2d Cir. 1977), *cert. denied,* 434 U.S. 861 (1978).

36. 560 F.2d at 93 n.6.

37. 560 F.2d at 93 n.6. A district court in the Second Circuit has since rejected the argument that *LiPuma* should "be limited either to the situation of a less than egregious sixth amendment violation or a blatant attempt to evade *Stone*." Allah v. Henderson, 526 F. Supp. 282, 286 (S.D.N.Y. 1981).

38. *See* United States v. Hinton, 631 F.2d 769 (D.C. Cir. 1980); United States v. Decoster, 624 F.2d 196 (D.C. Cir.) (plurality) (en banc), *cert. denied,* 444 U.S. 944 (1979); Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979), *vacated as moot*, 446 U.S. 903 (1980); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 974 (1979); United States v. Williams, 575 F.2d 388, 393 (2d Cir.), *cert. denied*, 439 U.S. 842 (1978); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); Commonwealth v. Saferian, 366 Mass. 89, 315 N.E.2d 878 (1974). *See generally* Note, *A Functional Analysis of the Effective Assistance of Counsel,* 80 COLUM. L. REV. 1053 (1980) [hereinafter cited as Columbia Note]; Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. Decoster, 93 HARV. L. REV. 752 (1980).

39. *See* Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (en banc) ("the skill, judgment and diligence of a reasonably competent defense attorney"), *cert. denied*, 445 U.S. 945 (1980); United States v. Decoster, 624 F.2d 196, 208 (D.C. Cir.) (en banc) (Leventhal, J.) ("the performance ordinarily expected of fallible lawyers"), *cert. denied*, 444 U.S. 944 (1979); Cooper v.

rests on the failure to assert a right or defense, courts apply the standard to determine whether the attorney should reasonably have been aware of the right or defense and, if so, whether his omission was justified.[40] Failure on either count indicates that the attorney did not satisfy the constitutional standard of effectiveness.

By relying on *Stone* and failing to consider the sixth amendment violation, the *LiPuma* court mischaracterized the relevance of the fourth amendment violation. The search and seizure question should be relevant only as evidence of incompetence, not as an independent basis for habeas relief.[41] The question in assessing the attorney's performance should be whether, according to the relevant standard, a competent lawyer would have made a timely objection.[42] Despite several restrictions, the exclusionary rule is undeniably available at trial and in pretrial proceedings.[43] Indeed, *Mapp v.*

Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc) ("reasonably competent and effective assistance of counsel"), *cert. denied*, 440 U.S. 974 (1979); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978) ("within the range of competence expected of attorneys in criminal cases"); United States v. Gray, 565 F.2d 881, 887 (5th Cir.) ("reasonably likely to render and did render reasonably effective counsel"), *cert. denied*, 435 U.S. 955 (1978); Marzullo v. Maryland, 561 F.2d 540, 544-45 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); United States *ex rel.* Ortiz v. Sielaff, 542 F.2d 377, 379 (7th Cir. 1976) ("the minimum standard of professional representation"); Unted States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976) ("the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances"), *cert. denied*, 434 U.S. 844 (1977); United States v. Toney, 527 F.2d 716, 720 (6th Cir. 1975) ("reasonably likely to render and does render reasonably effective assistance"), *cert. denied*, 429 U.S. 838 (1976); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) ("exercise of the customary skill and knowledge which normally prevails at the time and place"). Despite a barrage of scholarly criticism, *see, e.g.*, Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811 (1976); Erickson, *Standards of Competency for Defense Counsel in a Criminal Case,* 17 AM. CRIM. L. REV. 233, 237-39 (1979); Finer, *Ineffective Assistance of Counsel,* 58 CORNELL L. REV. 1077 (1973), the Second Circuit requires an attorney's incompetence to make the trial a "farce and mockery of justice" to establish a sixth amendment violation. *See* United States v. Alessi, 638 F.2d 466, 477 (2d Cir. 1980).

40. Irrespective of the particular governing standards, courts refuse to second guess tactical decisions. *See* United States v. Miller, 643 F.2d 713, 714 (10th Cir. 1981); United States v. Alvarez, 626 F.2d 208, 211 (1st Cir. 1980); Rutledge v. Wainwright, 625 F.2d 1200, 1204-05 (5th Cir. 1980), *cert. denied,* 450 U.S. 1033 (1981).

41. *See* Chambers v. Maroney, 399 U.S. 42, 55-60 (1970) (Harlan, J., concurring); United States v. Easter, 539 F.2d 663, 665-66 (8th Cir. 1976), *cert. denied,* 434 U.S. 844 (1977); Kinnel v. Kansas, 509 F. Supp. 1248, 1253 (D. Kan. 1981); United States *ex rel.* Watson v. Mazurkiewicz, 326 F. Supp. 622 (E.D. Pa. 1971), *aff'd. sub nom.* United States *ex rel.* Watson v. Lindsey, 461 F.2d 922 (3d Cir. 1972); People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

42. *See* Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976); Finer, *supra* note 39, at 1098-100; Columbia Note, *supra* note 38, at 1079-83.

43. *See* Franks v. Delaware, 438 U.S. 154, 171 (1978); Stone v. Powell, 428 U.S. 465, 493 (1976) ("We adhere to the view that [deterrence of unconstitutional police conduct and inculcation of fourth amendment ideals] support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions."); Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1404-15 (1977); Seidman, *supra* note 19, at 452-53.

Nevertheless, there has been movement toward adopting a "good faith" exception to the exclusionary rule. In United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied,* 449 U.S. 1127 (1981), the Fifth Circuit held that evidence acquired through police

Ohio[44] requires exclusion of illegally seized evidence at these stages of the criminal justice process. Courts must look to the strength of a fourth amendment argument in these contexts when evaluating ineffectiveness claims. Whether a petitioner may raise the search and seizure issue in habeas corpus proceedings is irrelevant; that question depends not on the merits of his fourth amendment claim, but on whether he had an opportunity for full and fair litigation in state court. The *LiPuma* approach, by failing to distinguish the two claims, extends *Stone* without considering whether that extension effectuates the goals of the Supreme Court.

A practical distinction between fourth and sixth amendment claims militates against extending *Stone*. Justice Powell argued that the remoteness of collateral proceedings from police activity diminished the exclusionary rule's deterrent effect; the rule's functional justification suffered accordingly.[45] In the sixth amendment context, however, remoteness may have beneficial rather than detrimental ramifications. State trial judges may be reluctant to "soil the reputations" of attorneys who practice before them frequently by branding their work "ineffective."[46] Subsequent review in a separate federal

conduct taken with a "reasonable, good-faith belief that it was proper" is admissible notwithstanding its illegality. 622 F.2d at 846-47. *See generally* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule,* 69 J. CRIM. L. & CRIMINOLOGY 635 (1978). Several other courts have indicated their approval of the *Williams* rule or some variation on it. *See, e.g.*, Virgin Islands v. Rasool, 657 F.2d 582, 593-96 (3d Cir. 1981) (Adams, J., concurring); United States v. Nolan, 530 F. Supp. 386, 398 (W.D. Pa. 1981); State v. Mincey, 636 P.2d 637, 648-51 (Ariz. 1981) (en banc); People v. Pierce, 88 Ill. App. 3d 1095, 1102, 1110, 411 N.E.2d 295, 301, 307 (1980); Richmond v. Commonwealth, No. 80-Ca-1366-MR (Ky. Ct. App. July 31, 1981); State v. Lehnen, 403 So. 2d 683 (La. 1981) (dictum); People v. Adams, 53 N.Y.2d 1, 10, 422 N.E.2d 537, 541, 439 N.Y.S.2d 877, 881 (1981); Green v. State, 615 S.W.2d 700, 709-13 (Tex. Crim. App. 1981) (McCormick, J., dissenting); Holloman v. Commonwealth, 221 Va. 947, 949, 275 S.E.2d 620, 622 (1981) (by implication); Jessee v. State, 640 P.2d 56, 66-67 (Wyo. 1982) (Thomas, J., concurring). Moreover, in an article severely critical of *Williams*, two commentators concluded that a majority of the Supreme Court, including Justice O'Connor, favor some form of a good faith exception. *See* Mertens & Wasserstrom, *Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law,* 70 GEO. L.J. 365, 370-71 & n.32 (1981).

In addition to these judicial developments, several legislative efforts seek the same result. One bill, currently pending in Congress, includes a provision that would prohibit suppression of evidence in federal criminal proceedings unless the law enforcement official intentionally or substantially violated the fourth amendment. *See* S. 101, 97th Cong., 1st Sess., § 3505(a), 127 CONG. REC. S154 (daily ed. Jan. 15, 1981). Courts will determine if violations are "substantial" by considering the deterrent effect of suppression, the extent of the invasion of privacy, whether the violation was reckless, and whether, but for the violation, the evidence would have been discovered. S. 101, § 3505(b). In addition, the Colorado legislature has enacted a form of the good faith exception while similar bills are pending in Montana and California. *See* Mertens & Wasserstrom, *supra*, at 369-70 n.29.

44. 367 U.S. 643 (1961).

45. *See* Stone v. Powell, 428 U.S. 465, 493-94 (1976).

46. *See* Bazelon, *supra* note 39, at 822. The more general question of the relative competence of state and federal courts in adjudicating federal constitutional claims is a matter of dispute among commentators. *Compare* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload,* 1972 LAW & SOC. ORD. 557, 559, *and* Lay, *supra* note 29, at 716, *with* Brennan, *Some Aspects of Federalism,* 39

forum may thus offer *more* effective implementation of the right to adequate counsel.[47]

Nevertheless, several judges[48] and commentators[49] have expressed concern for the breadth of habeas review and have suggested that *Stone* might appropriately be extended to other constitutional claims.[50] One judge has expressed fear that *Stone* will be "swept aside" if federal courts freely review the sixth amendment claims that this Note considers.[51] The next section examines *Stone* more closely and concludes that, rather than undermining the decision, federal habeas review of the sixth amendment claims is fully consistent with its rationale.

B. *The Importance of Effective Assistance of Counsel*

The *Stone* Court limited the availability of habeas corpus relief for fourth amendment violations because it believed that the social costs of excluding reliable evidence outweighed any additional deterrence that might be gained[52] and because it was concerned that the federal collateral review of state criminal trials was overbroad.[53] But the Court did sanction *de novo* review when the petitioner had no opportunity for full and fair litigation in the state courts.[54] "On

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N.Y.U. L. REV. 945, 948 (1964), *and* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). The Supreme Court has refused to recognize a distinction between the competence of state and federal courts. *See* Allen v. McCurry, 449 U.S. 90, 105 (1980); Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976). *See generally* Note, *Beyond Custody: Expanding Collateral Review of State Convictions*, 14 U. MICH. J. L. REF. 465, 470-72 (1981).

47. *Cf.* Rose v. Mitchell, 443 U.S. 545, 563 (1979) ("Federal habeas review is necessary to ensure that constitutional defects in the state judiciary's grand jury selection procedure are not overlooked by the very state judges who operated that system. There is strong reason to believe that federal review would indeed reveal flaws not appreciated by state judges perhaps too close to the day-to-day operation of their system to be able properly to evaluate claims that the system is defective.").

48. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 259-61 (1973) (Powell, J., concurring); Kaufman v. United States, 394 U.S. 217, 232-42 (1969) (Black, J., dissenting); Brown v. Allen, 344 U.S. 443, 536-37 & n.8 (1953) (Jackson, J., concurring); Sallie v. North Carolina, 587 F.2d 636, 641-42 (4th Cir. 1978) (Chapman, J., concurring); Friendly, *supra* note 2, at 143-44; Lay, *supra* note 29, at 704.

49. *See, e.g.*, Bator, *supra* note 2, at 441-62; Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A.J. 323 (1971); Miller & Shepherd, *New Looks at an Ancient Writ: Habeas Corpus Reexamined* 9 U. RICH. L. REV. 49, 79-86 (1974); Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus be Eliminated?*, 21 DE PAUL L. REV. 740 (1942); Note, *Relieving the Habeas Corpus Burden: A Jurisdictional Remedy*, 63 IOWA L. REV. 392 (1977).

50. *See* Rose v. Mitchell, 443 U.S. 545, 587-88 n.10 (1979) (Powell, J., concurring in judgment); Jackson v. Virginia, 443 U.S. 307, 336-37 n.9 (1979) (Stevens, J., concurring in judgment); Brewer v. Williams, 430 U.S. 387, 414 (1977) (Powell, J., concurring); *Brewer*, 430 U.S. at 426-29 (Burger, C.J., dissenting).

51. Sallie v. North Carolina, 587 F.2d 636, 641 (4th Cir. 1978) (Chapman, J., concurring).

52. *See* notes 15-24 *supra* and accompanying text.

53. *See* notes 28-31 *supra* and accompanying text.

54. *See* notes 26-27 *supra* and accompanying text.

its face," one commentator has observed, "this qualification is puzzling."[55] The costs of excluding reliable and probative evidence are the same regardless of whether the petitioner had a full and fair opportunity to litigate his claim. And "[s]ince the state court's putative denial of an opportunity for a fair hearing occurs after the fourth amendment violation has taken place, it is hard to see how that denial has any impact at all on the deterrent efficacy of the rule."[56] To the extent that a complete prohibition on review of fourth amendment claims would have further limited the availability of federal habeas corpus, the full and fair hearing qualification ensures that *Stone* incompletely safeguards the Court's expressed concerns for finality in criminal trials, comity, and manageable federal caseloads.

The qualification is not, however, wholly inexplicable. *Stone* reaffirmed the availability of the exclusionary rule at trial and required states to provide an opportunity to litigate fourth amendment claims. To guarantee defendants this minimum level of procedural fairness, the Court authorized federal habeas courts to review these claims when the state procedures were inadequate.[57] The "opportunity for

55. Seidman, *supra* note 19, at 456. Professor Seidman continues:

> Surely [the full and fair hearing qualification] makes little sense if one reads *Stone* as establishing the discernment of factual guilt or innocence as a core value. The exclusionary rule is quite obviously equally truth-denying whether or not the defendant has had an opportunity to litigate his fourth amendment claim in state court. But the qualification is not easily comprehensible even if one reads *Stone* . . . as resting on a judgment regarding the utility of the exclusionary rule in different contexts.

Id. But cf. Boyte, *Federal Habeas Corpus After* Stone v. Powell: *A Remedy Only for the Arguably Innocent?*, 11 U. RICH. L. REV. 291, 316 (1977) (*Stone* standard "necessary to avoid total frustration of even the minimal deterrent purpose of the exclusionary rule").

56. Seidman, *supra* note 19, at 456.

> To be sure, if a state had a consistent *policy* of declining to enforce the rule on direct review, that policy might seriously detract from the rule's deterrent impact and so necessitate federal intervention. But the *Stone* Court nowhere suggests that a defendant must demonstrate such a policy to justify habeas review. Taken at face value, the Court seems to be saying that the mere isolated failure of the state court to provide an opportunity for a hearing in the defendant's case is sufficient to support federal habeas intervention.

Id. (emphasis in original).

57. The Court failed to explain fully the meaning of "opportunity for full and fair litigation," providing instead a *"cf"* reference to Townsend v. Sain, 372 U.S. 293 (1963). Stone v. Powell, 428 U.S. 465, 494 n.36 (1976). *Townsend* established criteria for determining when federal courts should hold evidentiary hearings in habeas corpus proceedings. *See* 372 U.S. at 313. Most lower federal courts, however, have declined to make *Townsend* the "sole measure" of *Stone*'s standard. *See, e.g.,* Palmigiano v. Houle, 618 F.2d 877, 881 (1st Cir.), *cert. denied,* 449 U.S. 901 (1980); Sanders v. Oliver, 611 F.2d 804, 807 (10th Cir. 1979), *cert. denied,* 449 U.S. 827 (1980); Mack v. Cupp, 564 F.2d 898, 901 (9th Cir. 1977); O'Berry v. Wainwright, 546 F.2d 1204, 1211-12 (5th Cir.), *cert. denied,* 433 U.S. 911 (1977). Nevertheless, although factual and procedural variations make generalizations difficult, the contours of "opportunity for full and fair litigation" have become more apparent in several respects. First, habeas petitioners are not entitled to "correct" resolutions of constitutional issues as determined by federal courts. *See* Palmigiano v. Houle, 618 F.2d at 882-83; United States *ex rel.* Maxey v. Morris, 591 F.2d 386, 389 (7th Cir.), *cert. denied,* 442 U.S. 912 (1979); Swicegood v. Alabama, 577 F.2d 1322, 1334 (5th Cir. 1978). *But cf.* Gamble v. Oklahoma, 583 F.2d 1161, 1164-65 (10th Cir. 1978) ("fair" opportunity includes "recognition and at least colorable application of the correct Fourth Amendment constitutional standards."). Indeed, in *Stone* itself, and in *Wolff v. Rice*, its companion case, Federal Courts of Appeals had found constitutional violations. *See* notes

full and fair litigation" standard is thus best explained as reflecting the Court's traditional insistence on a minimum core of procedural rights without which defendants cannot be fairly tried.[58]

10-14 *supra* and accompanying text. Second, courts generally find that an accused's failure to pursue state review or comply with state procedural prerequisites to such review does not establish the absence of an "opportunity for full and fair litigation." *See, e.g.,* United States *ex rel.* Maxey v. Morris, 591 F.2d at 389-91; Doleman v. Muncy, 579 F.2d 1258, 1265 (4th Cir. 1978); Caver v. Alabama, 577 F.2d 1188, 1191-92 (5th Cir. 1978); Gates v. Henderson, 568 F.2d 830, 837 (2d Cir. 1977) (en banc), *cert. denied,* 434 U.S. 1038 (1978). *But see* Sanders v. Oliver, 611 F.2d 804, 808 (10th Cir. 1979), *cert. denied,* 449 U.S. 827 (1980) *(Stone* "opportunity" includes procedural opportunity to raise claim and a "full and fair" hearing); Dunn v. Rose, 504 F. Supp. 1333, 1335-38 (M.D. Tenn. 1981). *See generally* Comment, *Habeas Corpus After* Stone v. Powell: *The "Opportunity for Full and Fair Litigation" Standard,* 13 HARV. C.R.-C.L. L. REV. 521 (1978); Note, *The "Opportunity" Test of* Stone v. Powell: *Toward a Redefinition of Federal Habeas Corpus,* 23 VILL. L. REV. 1095 (1978); Comment, *Development of Federal Habeas Corpus Since* Stone v. Powell, 1979 WIS. L. REV. 1145.

Courts have provided differing signals regarding the role of counsel error and post-*Stone* review of fourth amendment claims. In *Gates* the court held that a mere procedural opportunity would not invoke the *Stone* bar where an "unconscionable breakdown" in the state's processes had occurred. 568 F.2d at 840. The Third Circuit, applying the caveat, has indicated that an inadvertent but justifiable error by an apparently competent attorney that time-barred a suppression hearing denies a defendant an "opportunity for full and fair litigation." Boyd v. Mintz, 631 F.2d 247 (3d Cir. 1980). Counsel error rising to constitutional proportion would seem *a fortiori* to entitle a habeas petitioner to federal collateral review. *See generally* Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems,* 19 ARIZ. L. REV. 433, 480-82 (1977). On the other hand, the principles illuminating *Stone* adopted by the Fifth Circuit suggest a contrary inclination. In Caver v. Alabama, 577 F.2d 1188, 1192-93 (5th Cir. 1978), the court asserted that it is "the existence of state processes allowing an opportunity for full and fair litigation of fourth amendment claims, rather than a defendant's use of those processes, that serves the policies underlying the exclusionary rule" and justifies *Stone*. Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980). The *Williams* court went further, holding that a state court's refusal to hear the defendant's argument on the erroneous belief that it had already been litigated in prior state proceedings did not allow federal habeas review. 609 F.2d at 220. "[I]n the absence of allegations that the processes provided by a state to fully and fairly litigate fourth amendment claims are *routinely or systematically* applied in such a way as to *prevent* the actual litigation of fourth amendment claims," *Stone* requires foreclosure of federal habeas corpus. 609 F.2d at 220 (emphasis added). Under the *Williams* analysis, specific instances of attorney error seem no more likely to warrant habeas review than an error by a state court. While this Note contends that sixth amendment claims evidenced by fourth amendment errors are beyond *Stone*'s reach, the arguments leading to that conclusion, *see* notes 54-58 and accompanying text, also suggest that a defendant has not received an "opportunity for full and fair litigation" when represented by counsel whose performance falls below constitutional standards.

58. *Cf.* Seidman, *supra* note 19, at 456-59 (concluding that "[t]he 'full and fair hearing' qualification is a direct outgrowth of Professor Bator's insistence that the central role for habeas corpus is not to assure that federal questions are correctly decided, but to assure that they are decided by procedures calculated to reach a correct decision."). The Court has explicitly distinguished "those rights that protect a fair criminal trial [from] the right guaranteed under the Fourth Amendment." Schneckloth v. Bustamonte, 412 U.S. 218, 241 (1973). A fair trial includes the right to a lawyer, *see* Gideon v. Wainwright, 372 U.S. 335 (1963), who furnishes "adequate legal assistance," Cuyler v. Sullivan, 446 U.S. 335, 344 (1980); *see* Engle v. Isaac, 50 U.S.L.W. 4376, 4383 (U.S. Apr. 5, 1982), the right to a speedy trial, *see* Barker v. Wingo, 407 U.S. 514 (1972); the right to a jury trial, *see* Duncan v. Louisiana, 391 U.S. 145 (1968), the right to confront hostile witnesses, *see* Barber v. Page, 390 U.S. 719 (1968), and the right to be free from double jeopardy, *see* Green v. United States, 355 U.S. 184 (1957). *See* Schneckloth v. Bustamonte, 412 U.S. at 237-38.

Professor Bator has characterized federal habeas corpus as a vehicle for policing "the integrity of the processes" by which state courts convict defendants to ensure "full and fair litigation." Bator, *supra* note 2, at 458-59. Admittedly, Professor Bator qualified this proposition by

The Court has always recognized that "the Constitution guarantees [certain rights] to a criminal defendant in order to preserve a fair trial."[59] The sixth amendment right to counsel occupies a prominent position among those basic rights.[60] "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[61] The right to counsel, moreover, includes the right to effective legal assistance.[62] Writing for the majority in *Cuyler v. Sullivan*,[63] Justice Powell unequivocally asserted that states may not conduct "trials at which persons who face incarceration must defend themselves without adequate legal assistance."[64]

Justice Powell's majority opinions in *Stone* and *Cuyler* contain complementary themes. Notwithstanding its limit on a defendant's procedural arsenal, *Stone* mandates concern for the fairness of state trials. *Cuyler* indicates that effective legal representation is essential to that end. Accordingly, any sixth amendment claim, including one arising from incompetent handling of a fourth amendment issue, implicates the fairness of state proceedings — an interest entirely consistent with *Stone* and one that the federal courts should continue to review. Indeed, *because* federal courts can no longer fully review the merits of state court rulings, a habeas court should be especially concerned with the quality of a defendant's representation during the

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recognizing that state courts and the Supreme Court on direct review could perform the same function. Yet this assertion seems to ignore the Court's inability to review adequately federal claims denied in state proceedings, *see* Hart, *supra* note 2, at 96; Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity,* 64 CAL. L. REV. 943, 950-59 (1976); Tushnet, *supra* note 22, at 492-96; *Developments, supra* note 2, at 1061; *cf.* Boag v. MacDougall, 50 U.S.L.W. 3539, 3539 (Jan. 12, 1982) (O'Connor, J., concurring) (Supreme Court's decisions to accept cases should not be influenced by the merits of particular cases); 50 U.S.L.W. at 3539 (Rehnquist, J., dissenting) (the Supreme Court is not a forum for the correction of error), a problem which federal habeas corpus ameliorates. *See* Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, The Supreme Court, 1964 Term,* 79 HARV. L. REV. 56, 86-87 (1965); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 897 (1966).

59. Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973). In *Schneckloth*, the Court distinguished the strict "knowing and intelligent waiver" standard required for these fundamental trial rights, such as the right to counsel, from the lesser "consent" standard required to authorize a police search.

60. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

61. Schaefer, *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1, 8 (1956). *See* Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on The Most Pervasive Right of an Accused*, 30 U. CHI. L. REV. 1 (1962). The adversary system is premised on the availability of competent defense counsel. *See* Schwarzer, *Dealing with Incompetent Counsel — The Trial Judge's Role*, 93 HARV. L. REV. 633, 636-38 (1980).

62. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) ("inadequate assistance does not satisfy the Sixth Amendment right to counsel"); McMann v. Richardson, 397 U.S. 759, 770-71 & n.14 (1970); Powell v. Alabama, 287 U.S. 45, 67-73 (1932).

63. 446 U.S. 335 (1980).

64. 446 U.S. at 344.

"main event" — the state trial.[65]

C. *The Relevance of Guilt or Innocence*

Because evidence excluded from a criminal trial on fourth amendment grounds is "typically reliable," the *Stone* Court argued, "[a]pplication of the [exclusionary] rule . . . often frees the guilty."[66] The Court's opinion in *Stone* was based, in part, on its reluctance to use habeas corpus relief to intrude on the guilt determination process in pursuit of fourth amendment values.[67] Some commentators have interpreted *Stone* to mean that only claims alleging constitutional violations that affect the determination of a defendant's factual guilt or innocence should be fully cognizable in federal habeas corpus proceedings.[68] If a habeas challenge alleges a claim that does not go to the defendant's underlying guilt or innocence, habeas corpus would be unavailable unless there had been no opportunity for full and fair litigation in the state courts.[69] But a majority of the Court has rejected this reading of *Stone*, and application of the "guilt-related" model of habeas corpus is inconsistent with the Court's opinions in the effectiveness of counsel area.

Although one can find support for a guilt-innocence distinction in Justice Brennan's dissent in *Stone*,[70] Professor Seidman has demonstrated persuasively that "Justice Brennan mischaracterizes the majority approach when he accuses it of reducing constitutional requirements to 'mere utilitarian tools,' designed solely to separate guilty from innocent defendants."[71] The Court, moreover, appears to have rejected the guilt-innocence distinction originally drawn by Justice Powell in *Schneckloth v. Bustamonte*.[72] In *Rose v. Mitchell*,[73] the habeas petitioner alleged racial discrimination in the selection of the grand jury that had indicted him. Since the petitioner had been

65. *See* Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

66. Stone v. Powell, 428 U.S. 465, 490 (1976).

67. 428 U.S. at 489-96.

68. *See* Stone v. Powell, 428 U.S. 467, 515-33 (Brennan, J., dissenting); Cover & Aleinikoff, *supra* note 4, at 1086-100; Robbins & Sanders, *supra* note 2, 69-71; Rosenberg, *Jettisoning* Fay v. Noia*: Procedural Defaults by Reasonably Incompetent Counsel,* 62 MINN. L. REV. 341, 383 & n.186 (1978); Tague, *supra* note 4, at 49-52. *But see* Boyte, *supra* note 55, at 297-306; Seidman, *supra* note 19, at 449-59. *See generally* Note, *Guilt, Innocence and Federalism in Habeas Corpus,* 65 CORNELL L. REV. 1123 (1980).

69. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 266 (1973) (Powell, J., concurring).

70. 428 U.S. at 515-24 (Brennan, J., dissenting).

71. Seidman, *supra* note 19, at 453. *See* note 55 *supra*.

72. 412 U.S. 218, 266 (1973) (Powell, J., concurring):

> Where there is no constitutional claim bearing on innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim.

73. 443 U.S. 545 (1979).

found guilty by a properly chosen petit jury and had been afforded a full opportunity to litigate his discrimination claim in state court, Justice Powell believed that *Stone* barred collateral review.[74] Although the petitioner's claim "had nothing to do with his innocence,"[75] a majority of the Court disagreed with Justice Powell's reading of *Stone* and held that equal protection challenges remained fully cognizable in federal habeas proceedings.[76] The Court believed that federal review was necessary because the state trial system itself, rather than the police department, was alleged to have violated the defendant's rights.[77]

Rose stressed the special nature of equal protection claims, but its rationale also applies to ineffectiveness claims. In *Cuyler v. Sullivan*,[78] the Court permitted full habeas review of the sixth amendment claim and never mentioned *Stone* as a possible limitation. The Court held that:

> [u]nless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice *infects the trial itself.* When a State obtains a criminal conviction through such a trial, *it is the State that unconstitutionally deprives the defendant of his liberty.*[79]

Because allegations of ineffective assistance of counsel implicate the fairness of the state trial proceedings, *Rose* suggests that full federal habeas review of these claims should remain available.[80]

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74. 443 U.S. at 579, 587 n.10 (Powell, J., concurring in judgment).

75. Seidman, *supra* note 19, at 454.

76. 443 U. S. at 559-64.

77. 443 U.S. at 561-64.

78. 446 U.S. 335 (1980).

79. 446 U.S. at 343 (citations omitted) (emphasis added).

80. The Supreme Court's concern that ineffective counsel might also undermine the guilt-determining process predates its opinion in *Stone v. Powell.* In *McMann v. Richardson*, 397 U.S. 759 (1970), decided six years before *Stone*, the Court held that a defendant could not attack the constitutionality of his own guilty plea in federal habeas proceedings by asserting that the plea was induced by a prior coerced confession. 397 U.S. at 771. But it added a significant caveat. After noting the role of counsel's advice in pleading decisions, the Court indicated that the guilty pleas would have been reviewable if the petitioner had alleged that his lawyer's advice fell outside of "the range of competence demanded of attorneys in criminal cases." 397 U.S. at 771. *See* Tollett v. Henderson, 411 U.S. 258, 266-69 (1973). *McMann* thus premised its restriction of a state prisoner's access to collateral review on the assumption that he had received the assistance of reasonably competent counsel. *McMann* provides important guidance for courts considering ineffectiveness allegations grounded on mishandled fourth amendment claims. *Cf.* Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1235-36 (1977) (state has greater interest in finality of convictions in guilty plea cases than those secured by trial). Like *Stone v. Powell*, it significantly impaired access to federal habeas relief. *Stone*, like *McMann*, should be interpreted to rest on an assumption of legal representation consonant with constitutional standards.

CONCLUSION

In *Stone v. Powell*, the Supreme Court identified the substantial societal costs and diminished benefits that result when federal courts impose the exclusionary rule in habeas corpus proceedings. Consequently, the Court restricted habeas relief in the fourth amendment area to cases where a state had failed to provide the defendant an "opportunity for full and fair litigation." At least one federal court has applied *Stone* when a habeas petitioner alleged a denial of his sixth amendment right to effective assistance of counsel because his attorney did not competently object to introduction of illegally acquired evidence.

This extention of *Stone* is unwarranted. Courts should not confuse evidence of an attorney's incompetence — the fourth amendment error — with the underlying claim. The limit on collateral review of exclusionary rule claims is irrelevant in assessing the conduct of an attorney who failed to assert competently the search and seizure issue at trial. Free review of this sixth amendment claim, moreover, will not create a loophole in *Stone*. Instead of precluding all review of fourth amendment claims, the *Stone* Court preserved the right to habeas corpus when necessary to protect the defendant's opportunity to litigate his claims fully and fairly in the state courts. The *Stone* majority thus evinced its fundamental concern for a core of procedural rights that ultimately defines a fair trial. Effective assistance of counsel is essential to that end.[81] Review of sixth amendment claims, rather than undermining *Stone*, is fully consistent with the values that generated its rule.

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81. The right to effective assistance of counsel could be termed a "truth-furthering right" — one "that foster[s] sound guilt/innocence determinations with the requisite degree of certainty," Cover & Aleinikoff, *supra* note 28, at 1092 (distinguishing such rights from truth-obstructing and truth-neutral rights), and thus deserving of greater protection than the fourth amendment right at issue in *Stone*.