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NOTES

Criminal Procedure—Federal Habeas Corpus For State Prisoners and the Fourth Amendment

Collateral attack on state criminal convictions in federal courts has long been a controversial subject. Those who favor limited collateral review are concerned with the need for finality in criminal proceedings, the burden placed on federal courts by the number of petitions, and the diminution of state responsibility and independence within the federal system. Those who advocate broad collateral review believe that these concerns are outweighed by the need for a procedure through which uniform enforcement of federal law is maintained and the need for a method of redressing incarcerations obtained in violation of the prisoner's rights. Since the early 1950's the number of grounds available to a petitioner seeking a writ of habeas corpus has increased. Indications are, however, that this trend is reversing.

In *Schneckloth v. Bustamonte*,¹ Justice Powell, in a concurring opinion, joined by two other Justices² and supported by a third,³ wrote: "I would hold that federal collateral review of a state prisoner's Fourth Amendment claims . . . should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts."⁴ The case involved the habeas corpus petition of a state prisoner who asserted that he was being held in violation of his fourth amendment rights. The state argued first that petitioner's rights had not been violated, and secondly, that the Court should reconsider its holding in *Kaufman v. United States*⁵ and

1. 412 U.S. 218 (1973).

2. Chief Justice Burger and Justice Rehnquist joined with Justice Powell in his concurring opinion. *Id.* at 250.

3. Justice Blackmun in a separate concurring opinion wrote: "Although I agree with nearly all that Mr. Justice Powell has to say in his detailed and persuasive concurring opinion, *post*, p. 250, I refrain from joining it at this time because, as Mr. Justice Stewart's opinion reveals, it is not necessary to reconsider *Kaufman* in order to decide the present case." *Id.* at 249.

4. *Id.* at 250 (Powell, J., concurring). Justice Stewart joined in a dissenting opinion written by Justice Harlan in *Kaufman v. United States*, 394 U.S. 217, 242-43 (1969), in which he stated that fourth amendment claims should be heard in collateral proceedings for federal prisoners only under limited circumstances. Thus it would appear that at least five members of the Court favor limiting review of fourth amendment claims to some extent.

5. 394 U.S. 217 (1969).

no longer allow fourth amendment claims to be asserted as a ground for federal habeas corpus relief.⁶ The Court rejected petitioner's fourth amendment claims and declined to consider whether *Kaufman* should be overruled.⁷ However, Mr. Justice Powell used this opportunity to express his views on the continued validity of *Kaufman*.⁸

BACKGROUND

The present rule is that fourth amendment claims, whether filed by state or federal prisoners, are cognizable in federal habeas corpus proceedings, and the trial court's application of the exclusionary rule must be examined as it would be on direct review.⁹ The federal court is not bound by the state determination of the petitioner's claims and must hold its own evidentiary hearing if no adequate hearing on the issue was provided in the state courts. This rule has been codified,¹⁰ but it is basically the product of three major cases.¹¹

6. Brief for Petitioner at 7-8, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

7. 412 U.S. at 249 n.38.

8. *Id.* at 250-51. It is necessary to point out at the outset that this is not the only attack on the scope of federal habeas corpus. Proposed Senate Bill 567, now in Senate committee, would restrict the grounds for federal habeas corpus to constitutional violations of only those rights which have as their primary purpose the protection of either the fact-finding process at the trial or the appellate process on appeal. S. 567, 93d Cong., 1st Sess. (1973). Thus, not only would fourth amendment violations no longer be cognizable, but also claims of violations of *Miranda* rights and *Wade* violations would be unreviewable in habeas proceedings. For an extensive treatment of this proposed bill see Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation*, 61 GEO. L.J. 1221 (1973).

9. *Kaufman v. United States*, 394 U.S. 217 (1969).

10. 28 U.S.C. § 2254(d) (1970). That subsection provides that the state determination of the facts is presumed to be correct unless it appears:

- (1) that the merits of the factual dispute were not resolved in the State court hearing;
- (2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;
- (3) that the material facts were not adequately developed at the State court hearing;
- (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
- (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
- (6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or
- (7) that the applicant was otherwise denied due process of law in the State court proceeding;
- (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fully supported by the record. . . .

11. See *Kaufman v. United States*, 394 U.S. 217 (1969); *Fay v. Noia*, 372 U.S.

In the landmark case of *Brown v. Allen*,¹² the Supreme Court held that claims of constitutional violations would present valid grounds for federal habeas corpus even if the state courts had fairly and fully adjudicated them. Mr. Justice Frankfurter, in a concurring opinion wrote, "The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right."¹³ Implicit in the opinion is a recognition that habeas corpus provides a procedural device through which federal rights are vindicated and state enforcement of those rights is supervised.¹⁴

In *Fay v. Noia*¹⁵ this recognition was more formally expressed. Justice Brennan, writing for the Court, saw as the basic purpose of habeas corpus the vindication of due process rights.¹⁶ To the Court "[i]ts root principle is that . . . government must always be accountable to the judiciary for a man's imprisonment . . ."¹⁷ Federal habeas corpus was seen as an established procedure which provides a remedy for any restraint considered to be contrary to fundamental rights. Thus as due process rights evolve and expand, the writ becomes available as a remedy for the violation of those rights.

In *Fay* the Court did not expressly rule that claims of fourth amendment violations would be cognizable in federal habeas corpus proceedings. The underlying rationale, however, was that habeas corpus was

391 (1963); *Brown v. Allen*, 344 U.S. 443 (1953). The rule could possibly be considered to be the outgrowth of four major cases with the inclusion of *Townsend v. Sain*, 372 U.S. 293 (1969), discussed *infra* note 17.

12. 344 U.S. 443 (1953).

13. *Id.* at 508.

14. See *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1061-62 (1970) [hereinafter cited as *Developments*]. At the time of the *Brown* decision the exclusionary rule was not applicable to the states and thus was not a part of the due process rights to be protected. However at the time of the *Fay* decision *Mapp v. Ohio* had been decided.

15. 372 U.S. 391 (1963). In this habeas corpus proceeding the Court considered a state prisoner's claim that his confession was coerced, even though the prisoner had not directly appealed to the state appellate court within the applicable time period. The Court held that the requirement that a state prisoner must exhaust his state remedies before applying for a writ meant only that the prisoner must exhaust the state remedies remaining available to him at the time of the filing of the habeas petition.

16. *Id.* at 402.

17. *Id.* In *Townsend v. Sain*, 372 U.S. 293, 312-19 (1963), decided the same day as *Fay*, the Court set down guidelines that the district courts should follow in deciding whether to grant an evidentiary hearing in a habeas corpus proceeding. It was made clear that the court could not automatically accept the state determination of facts and that in all situations it was the duty of the federal judge to apply independently the federal law. Such a holding has added significance in the fourth amendment area because in such claims the law and fact are often intertwined.

available as a remedy for any violation of due process. At the time of the decision, the fourth amendment and its exclusionary rule had been applied to the states through the due process clause of the fourteenth amendment.¹⁸ Several later cases made it clear that a state prisoner's fourth amendment claims could properly be heard in federal habeas corpus proceedings.¹⁹

A conflict developed in the circuits, however, with regard to whether a federal²⁰ prisoner could raise such claims collaterally.²¹ A majority of the circuits held that they could not because collateral relief was not meant to take the place of direct appeal.²² The rationale for this holding was best expressed in *Thornton v. United States*.²³ In that case the District of Columbia Circuit reasoned that, unlike other constitutional violations, the claims of illegal search and seizure do not impugn the integrity of the fact-finding process, nor do they challenge the evidence as being inherently unreliable.²⁴ Thus, the court reasoned, the enforcement of the exclusionary rule is meant solely as a deterrent device.²⁵ The court felt that since deterrence is not furthered by enforcement of the rule in post-conviction proceedings, fourth amendment claims should not be available to a federal prisoner seeking collateral relief.²⁶ To distinguish this position from that of the state prisoners,

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

19. *Carafas v. Lavalley*, 391 U.S. 234 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967). In these cases state prisoners raised fourth amendment claims through habeas corpus, and the Court decided those claims on the merits without a full discussion of the appropriateness of habeas corpus for raising them.

20. It is the purpose of this note to analyze the issues involved when a state prisoner asserts fourth amendment violations in a federal court. This is a separate problem from that of a federal prisoner who collaterally attacks his conviction on the same grounds, and different considerations are involved. The discussion of the cases involving the availability of collateral attack for federal prisoners asserting fourth amendment violations is helpful however, because those cases reveal the reasoning behind the Court's holdings in the cases which do involve state prisoners. In *Schnecko* Justice Powell, in his concurring opinion, was primarily concerned with the availability of the writ for state prisoners asserting fourth amendment claims, however he recognized that *Kaufman* dealt mainly with federal prisoners. 412 U.S. at 250-51.

21. The existence of this conflict was recognized in *Kaufman v. United States*, 394 U.S. 217, 219-21 (1969).

22. *E.g.*, *United States v. Re*, 372 F.2d 641, 644 (2d Cir. 1967); *Springer v. United States*, 340 F.2d 950 (8th Cir. 1965) (per curiam).

23. 368 F.2d 822 (D.C. Cir. 1966). The *Thornton* case did not rule out fourth amendment claims completely but said they could be heard only in exceptional circumstances. *Id.* at 826-29. In *Kaufman* the government adopted the reasoning of this opinion and pressed its arguments before the Supreme Court. *Kaufman v. United States*, 394 U.S. 217, 224-25 (1969).

24. 368 F.2d at 827-28.

25. *Id.* at 826-28.

26. *Id.*

who were allowed to raise fourth amendment claims, the court pointed to the necessity for adjudication of the state prisoner's claims in a federal forum.²⁷

In *Kaufman v. United States*²⁸ the Supreme Court held that federal prisoners could assert fourth amendment violations collaterally and reaffirmed the availability of federal habeas corpus to state prisoners who assert fourth amendment claims. The Court rejected the argument that such relief was available to state prisoners solely because of the need for a federal determination of their claims. The Court stated that the availability of federal habeas corpus to state prisoners who assert fourth amendment violations was premised largely "on a recognition that the availability of collateral remedies is necessary to ensure the integrity of the proceedings at and before trial where constitutional rights are at stake."²⁹ The Court argued that collateral relief "contributes to the present vitality of constitutional rights whether or not they bear on the integrity of the fact-finding process."³⁰ The argument that the scope of federal habeas corpus should be curtailed by the need for finality was rejected.³¹

THE OPINION

Justice Powell begins his opinion by briefly reviewing the history of habeas corpus. He concludes that recent decisions have transcended the traditional purpose of habeas corpus and have diminished the importance of finality in state criminal judgments.³² He identifies the purpose of the writ as the prevention and redress of "unjust" incarcerations.³³ To him "unjust" incarceration refers to the imprisonment of innocent people,³⁴ not to the imprisonment of those people who are in fact guilty but whose convictions were obtained in violation of their constitutional rights. Since many prisoners who assert fourth amendment violations are not innocent in fact,³⁵ Justice Powell concludes that they

27. *Id.* at 828-29.

28. 394 U.S. 217 (1969).

29. *Id.* at 225.

30. *Id.* at 229.

31. *Id.* at 228. The Court also had occasion to mention the exclusionary rule, saying that its enforcement could not depend upon the guilt or innocence of the person on trial. The exclusionary rule was seen rather as necessary to the protection of all citizens from unreasonable searches and seizures. *Id.* at 229.

32. 412 U.S. at 256.

33. *Id.* at 257-58.

34. *Id.*

35. *Id.* Arguments could possibly be made against Justice Powell's assertion that prisoners who assert fourth amendment claims are rarely innocent. However, it is the

are not unjustly incarcerated and, federal habeas corpus should not be available to them.³⁶

Justice Powell then examines the societal costs of collateral review of fourth amendment claims.³⁷ He argues that collateral attacks constitute an unwise allocation of judicial resources.³⁸ When such reviews are made, federal courts needlessly duplicate the efforts of the state judiciary. Also habeas corpus petitions place a time consuming burden on the federal courts that deprives civil litigants of prompt adjudication of their claims. A second cost he identifies is the near total defeat of society's interest in a rational point of termination for criminal litigation.³⁹ Society, he argues, can no longer afford to constantly re-examine every conviction to insure the absence of constitutional error. This practice defeats the deterrent effect of the criminal law by making slow and uncertain the prospect of punishment for the convicted defendant. In Justice Powell's view, the present scope of collateral review also prevents effective rehabilitation by encouraging the prisoner to try to overturn his conviction rather than to admit his guilt. A third cost Justice Powell identifies is the imbalance within the federal system created by the present scope of habeas corpus, which places upon the federal courts a disproportionate share of the responsibility for adjudicating federal claims.⁴⁰ This imbalance works to decrease the respect accorded the state courts and leads to tension between state and federal judicial systems.

Having assessed the societal costs of extending federal habeas corpus to include fourth amendment claims, Justice Powell then examines the societal benefits it provides.⁴¹ He frames his analysis in terms of the exclusionary rule, which, he asserts, has deterrence as its sole purpose.⁴² He feels that this purpose is not significantly furthered by collateral enforcement of the exclusionary rule because such enforcement is too far removed from the everyday activities of law enforcement officers. At this point Justice Powell feels that the evils of the exclusionary rule

purpose of this note to explore the question of whether collateral review of fourth amendment claims is justified even if we assume the petitioner is guilty. As will be discussed later, habeas corpus procedure has come to serve functions which are independent of the question of guilt or innocence.

36. *Id.*

37. *Id.* at 259-66.

38. *Id.* at 260-61.

39. *Id.* at 261.

40. *Id.* at 263.

41. *Id.* at 266-67.

42. *Id.* at 266-68.

more than outweigh its benefits.⁴³ He also argues that since the habeas proceedings generally involve close and intricate problems that pose difficulties for the courts and that are beyond the understanding of many policemen, the deterrent aspect of the rule is not furthered by adjudication of these issues.⁴⁴

AN ANALYSIS

These arguments, though convincing, do not present an impregnable attack on the scope of federal habeas corpus. The major weakness of the opinion lies in the assertion that the purpose of the writ is to prevent incarceration of innocent people. Historically, the writ involved more than the question of innocence.⁴⁵ Justice Powell's assertion ignores the role federal habeas corpus has played in vindicating due process rights and ensuring that the states adequately enforce them.⁴⁶ In a slight and inadequate concession to this role, he reserves to the federal courts the power to examine the record in order to determine whether the prisoner has been given a fair opportunity to raise his claims.⁴⁷ This concession may in one sense prevent the incarceration of innocent people by ensuring that the opportunity to raise fourth amendment claims is available. However, if one assumes, as Justice Powell does, that those who assert such claims are usually guilty, then the concession is inconsistent with the purpose he proposes for the writ. The adjudication of claims asserted by guilty persons would do nothing to prevent the incarceration of the innocent.

By proposing that the federal courts be removed from the consideration of the merits of state prisoners' fourth amendment claims, Justice Powell fails to acknowledge the important functions those courts perform. First, the federal courts provide a separate and a federal

43. *Id.* at 269.

44. *Id.*

45. *Id.* at 257. Justice Powell is aware of this fact but feels that in light of present demands on the judicial system, tying the writ to guilt or innocence is justified.

46. Vindication of due process rights is a recognized purpose of federal habeas corpus. See, e.g., *Fay v. Noia*, 372 U.S. 391, 402 (1963); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 *YALE L.J.* 895, 895-96, 958-85 (1966); Note, 61 *Geo. L.J.*, *supra* note 8, at 1229-30; *Developments, supra* note 14, at 1060-63. Respondent Bustamonte pressed these arguments in his brief arguing that historically the expansion of grounds for federal habeas corpus has corresponded to the evolving standards of due process. He also urged that there is a great need for uniform application of federal law. Brief for Respondent at 22-35, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) [hereinafter cited as Respondent's Brief].

47. 412 U.S. at 250.

forum, isolated from the question of guilt, in which the sole issue is whether the prisoner's rights were violated.⁴⁸ Such a forum is necessary because the closeness of state judges to the enforcement of state substantive law may unconsciously affect their disposition of the constitutional claims.⁴⁹ Another major advantage of federal courts is their capacity to supervise state court determinations to ensure uniform enforcement of federal law.⁵⁰ Access to federal adjudication would otherwise not be possible in many cases on direct review because of the small number of writs of certiorari granted by the Supreme Court.⁵¹ The federal courts relieve the Supreme Court's caseload in this regard, and the habeas cases that do eventually reach the high court usually contain evidence not found in the often incomplete records available to the Supreme Court on direct review.⁵² Such functions are important in fourth amendment claims because the factual findings are often determinative of the legal question presented in the case.

Justice Powell's argument that the present scope of federal habeas corpus places an unduly heavy burden on the federal courts and is an unwise allocation of judicial resources is also unconvincing. Federal courts allocate relatively little time to habeas corpus petitions⁵³ and rarely require extensive evidentiary hearings since most of the petitions are decided at the pleading stage.⁵⁴ The prisoner is seldom successful, and only a small number of state retrials are required.⁵⁵ Also, in recent years the number of petitions filed has begun to decrease.⁵⁶ Assuming

48. *Developments, supra* note 14, at 1057-61.

49. Respondent's Brief at 29-30; Note, 61 GEO. L.J., *supra* note 8, at 1251; *Developments, supra* note 14, at 1057-61.

50. Wright & Sofaer, *supra* note 46, at 897-98; Note, 61 GEO. L.J., *supra* note 8, at 1226; *see Developments, supra* note 14, at 1061-62.

51. *See Fay v. Noia*, 372 U.S. 391, 437 (1963); Wright & Sofaer, *supra* note 46, at 897 n.11; Note, 61 GEO. L.J., *supra* note 8, at 1251.

52. *Fay v. Noia*, 372 U.S. 391, 438 (1963); Wright and Sofaer, *supra* note 46, at 897.

53. Note, 61 GEO. L.J., *supra* note 8, at 1246.

54. LaFrance, *Federal Habeas Corpus and State Prisoners: Who's Responsible?* 58 A.B.A.J. 610, 612 (1972).

55. *Id.* 1971 DIRECTOR OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANNUAL REPORT 132 shows that in about ninety-six percent of the prisoner petition cases the relief prayed for was not granted. This does not mean that the remedy is unnecessary, however. The value of habeas corpus is that it is a procedural device which insures state compliance with due process rights. Its value can not be assessed in terms of the number of state retrials granted for that would assume that if habeas corpus were removed the state would be as careful as they now are in enforcing federal rights.

56. In fiscal 1970 state prisoners filed 9,063 petitions for writs of habeas corpus in federal district courts. In fiscal 1971 the number was 8,372 and in fiscal 1972, 7,949. 1972 DIRECTOR OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

however that habeas petitions do constitute a heavy burden on the courts, there are alternative means to relieve the burden that do not remove the protection provided to the fourth amendment by habeas corpus. These include using standardized forms, referring the petitions to federal magistrates, and, more importantly, providing the state prisoner with counsel to aid him in presenting his claim in a more efficient manner.⁵⁷ The ultimate solution is for the states themselves to provide post-conviction proceedings that emphasize adjudication on the merits.⁵⁸ Justice Powell's solution would create an even greater misallocation of judicial resources, for if federal courts are precluded from examining the merits of fourth amendment claims, the Supreme Court may be pressured into granting more writs of certiorari in order to ensure state compliance with and uniform enforcement of federal law.

Contrary views also exist on Justice Powell's contention that the present scope of federal habeas corpus significantly diminishes the value of the finality of state convictions.⁵⁹ The present habeas procedure makes several concessions to that interest in its operation and practical effect. First, section 2254 establishes the presumption that the state hearings have been adequate and casts the burden of proving deficiencies upon the petitioner.⁶⁰ Second, except for sufficiency of evidence claims, federal habeas corpus does not purport to relitigate the question of guilt or innocence, but is restricted to constitutional claims and violations of federal laws.⁶¹ Third, state convictions are rarely overturned.⁶² Finally, district courts may refuse to hear the petition if the petitioner has voluntarily waived his claim in the state proceeding.⁶³

Arguments that habeas corpus does not create undue friction between state and federal courts have been made. The habeas procedure presently reduces this tension since the prisoner must exhaust his state

ANNUAL REPORT Table 19, at 117. The report suggests that the reasons for the decline are improvements in state post conviction remedies and the availability of counsel for the indigent defendant. The decline is expected to continue. *Id.* at 116. Justice Powell notes this decrease but does not consider it significant enough to relieve the burden.

57. *United States v. Simpson*, 436 F.2d 162, 166-70 (D.C. Cir. 1970); Shapiro, *Where Have All the Lawyers Gone?*, 9 TRIAL No. 3, 41 at 42 (1973).

58. See LaFrance, *supra* note 54, at 613.

59. The Court in *Fay* and in *Kaufman* felt that the traditional concerns for finality should not be allowed to outweigh the federal policy behind vindicating constitutional rights. The argument concerning finality is not a new one, but it has increased importance because of the value placed upon it by several members of the present Court.

60. 28 U.S.C. § 2254(d) (1970), *quoted in* note 10 *supra*.

61. LaFrance, *supra* note 54, at 612.

62. See notes 55-56 *supra*.

63. *Fay v. Noia*, 372 U.S. 391, 438-40 (1963).

remedies prior to application for a writ, thereby giving the state courts an opportunity to correct their mistakes.⁶⁴ Further, friction between the two systems may not be inevitable.⁶⁵ Friction may be primarily a function of the individual judge's psychology, and thus to a large extent could be overcome subjectively.⁶⁶ There are, in addition, institutional alternatives for relieving friction that do not require the limitation of the scope of federal habeas corpus.⁶⁷ These alternatives seek to relieve friction by reducing the total number of petitions and by improving the co-operation and communication between the federal and state judges.

Also, it must be noted that the solution proposed by the opinion has the potential to create even more friction. By asking whether the state has provided an adequate opportunity to have the claim heard, friction is not alleviated, rather it is created at a different point in the system. For example, when a federal judge is presented with a claim that he feels the state court has wrongly decided, but he is convinced that the court provided an adequate hearing, he would face a problem the solution of which would necessarily create tension. If he denies the writ, his own decision is in conflict with his perception of the federal right. If the federal judge grants the petition, his decision informs state judges that not only have they misconceived a federal right, but they have also failed to provide an adequate opportunity for the right to be heard. This solution would seemingly create more tension than the mere reversal of the state court's decision. Also, much of the friction, which Justice Powell feels habeas corpus creates, is not caused by habeas corpus but rather by disagreement with the federal right asserted by the petitioner.

Arguments may also be presented against the position that there is little value in enforcing fourth amendment claims in a federal habeas

64. Wright & Sofaer, *supra* note 46, at 902-03. The authors also suggest that the requirements that the petitioner assert a non-frivolous claim, the petitioner be in custody, and the petitioner not be detained on other adequate grounds, all work to relieve the tension between the systems. *Id.*

65. Hopkins, *Federal Habeas Corpus: Easing the Tension Between State and Federal Courts*, 44 ST. JOHN'S L. REV. 660, 670 (1970).

66. Freund, *Remarks at Symposium of Federal Habeas Corpus*, 9 UTAH L. REV. 27, 30 (1964).

67. These alternatives include: (1) having the state courts briefly state the claims of the prisoner and the reasons for their denial; (2) establishing a data bank which would contain the record of all applications of each prisoner in each system; (3) giving recognition to the state courts' function as factfinders by holding evidentiary hearings in state courts; (4) reducing the number of petitions by denying retroactive effect to newly evolved standards of due process; (5) having an open system of communication between the two systems. Hopkins, *supra* note 65, at 670-75.

corpus proceeding. First, it cannot be so readily assumed that the exclusionary rule's sole function is to deter.⁶⁸ One of the reasons the Court gave for its application to the states was to ensure the integrity of the judicial process.⁶⁹ There was a desire to ensure that the courts would not sanction illegal government activity by admitting illegally seized evidence. Secondly, enforcement of the exclusionary rule in habeas corpus proceedings does provide additional support for the rule's deterrent effect.⁷⁰ By keeping in the minds of the attorneys and state judges that what they are doing is subject to a likelihood of federal court review, they will be more likely to handle those claims with added care and respect. Thus by inducing the attorneys and trial judges to maintain high standards in dealing with police conduct and fourth amendment claims, the deterrent aspect of the rule is strengthened.

CONCLUSION

The concurring opinion in *Schneckloth v. Bustamonte* is a covert attack on the exclusionary rule. If the views expressed in the opinion are carried to their logical conclusion and habeas corpus is restricted to only those constitutional claims that affect the determination of guilt and the reliability of the fact-finding process, habeas corpus will have lost its place as the procedural device for the vindication of due process rights. Uniform enforcement of constitutional rights will be hampered while no significant improvement in federal and state relations will occur. Though the opinion does not reflect present law, it does indicate that the Supreme Court, as currently composed, is dangerously close to curtailing the scope of federal habeas corpus.

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68. The Court in *Kaufman* recognized that collateral review serves to secure the integrity of the proceeding whether or not the constitutional right bears on the reliability of the factfinding process. 394 U.S. at 229. It has been suggested too that the rule gives opportunities for judicial review demonstrating the importance of the constitutional right it protects. See Note, 61 GEO. L.J., *supra* note 8, at 1232.

69. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

70. The *Kaufman* Court found it necessary to enforce the exclusionary rule collaterally saying that the rule was necessary to protect all citizens from unreasonable searches and seizures. The Court also distinguished enforcement of the rule collaterally from the denial of retroactive effect to the rule, finding that collateral enforcement added to the integrity of the proceedings at and before trial while retroactive effect did not. 394 U.S. at 229; see Freund, *supra* note 66, at 30; Note, 61 GEO. L.J., *supra* note 8, at 1251-52.