The Scope of Federal Habeas Corpus Relief for State Prisoners

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After reviewing the historical expansion of the writ of habeas corpus to allow broader federal relief for state prisoners, the author examines the more recent trend of limiting the bounds of habeas corpus, especially as a result of the Stone v. Powell decision. Based on an examination of the evolution of the modern-day writ, the author predicts future developments.

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I. INTRODUCTION

Habeas corpus is a collateral attack1 on a proceeding, usually criminal, which results in some type of confinement. It is not a substitute for an appeal;2 rather it is a civil3 remedy for testing the legality of the petitioner's detention.

The "Great Writ," as it is often called,4 has undergone much change in the history of American jurisprudence. As a result of judicial interpretation of the Constitution, congressional enactments, and the common law, the availability of federal habeas relief

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for state prisoners has been expanded in some respects and limited in others. The purpose of this article is to trace those expansions and limitations and to attempt to predict future change in light of recent judicial trends.

II. History

Habeas corpus, like much of American law, was inherited from England. The Constitution, however, does not expressly provide for the writ. It merely provides that "the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Federal habeas relief was provided for in fact by the Judiciary Act of 1789. Although the Act vested federal courts with habeas jurisdiction, it failed to define clearly its applicability. The Act merely provided for such relief "agreeable to the principles and usages of law." Therefore, courts looked to the English common law to ascertain the bounds of federal habeas jurisdiction. As a result, habeas relief was limited "to an inquiry as to the jurisdiction of the sentencing tribunal."

The first major extension of federal habeas relief was made by the Judiciary Act of 1867 which expanded it to include state prisoners. Although the Act has had a great impact in light of subsequent developments, it is arguable that the Act had little effect at the time. In 1867, habeas was limited to jurisdictional attacks; thus, the inclusion of state prisoners within the scope of habeas relief afforded little added protection because state jurisdictional issues would rarely present a federal question. With the expansion of habeas relief beyond jurisdictional attacks, however, protections afforded to state prisoners have become significant.

At first, the substantive scope of the "Great Writ" was expanded by broadly construing the term "jurisdiction." In Ex parte Lange, for example, the Court granted a writ of habeas corpus where the sentencing tribunal imposed a sentence which it was without power to impose. In Ex parte Siebold, the concept of juris-

5. D. Meador, supra note 4, at 61.
8. Id. at 82.
10. Id.
12. D. Meador, supra note 4, at 62.
13. Id. at 55-70.
14. 85 U.S. 163 (1873).
15. 100 U.S. 371 (1879).
diction was expanded even further. The conviction rested on an unconstitutional statute, and the Court granted the writ on the theory that a court has no jurisdiction to try a person on a charge which may not constitutionally be made a criminal act. The broad interpretations of "jurisdiction" eventually led to a recognition that all detentions which violate the Constitution, laws, or treaties of the United States are cognizable by a habeas corpus petition.

The case of Frank v. Magnum provided the first indication that nonjurisdictional attacks would be within the scope of habeas review. Although the Court denied habeas, it did recognize that violations of due process are reviewable by a federal habeas court. The petition was denied solely because the state procedures employed were found to have complied with the requirements of due process. A few years later, a writ of habeas corpus was granted on the grounds of a due process violation in Moore v. Dempsey.

If the break with the common law limitation of habeas to jurisdictional attacks was not complete after Frank and Moore, it was certainly complete after Brown v. Allen and Fay v. Noia. As the Court stated in Fay: "The course of decisions of this Court from Lange and Siebold to the present makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction."

After Fay, there was no longer any question about the right to attack a state court conviction by seeking federal habeas relief whenever a federal question was presented. Literally read, the current version of the United States Code supports the decision in Fay. Enacted in 1948, it provides that a "[federal] court shall entertain an application for a writ of habeas corpus . . . only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." Despite the apparent literal meaning of this provision, it was not comprehended as alter-

16. *Id.* at 376-77.
19. *Id.* at 332 (petition alleged that mob domination of the trial infringed the right to due process of law under the fourteenth amendment).
20. *Id.* at 338.
24. *Id.* at 409.
ing the common law rule which limited habeas relief to jurisdictional attacks. Otherwise, Brown and Fay—decided five and fifteen years respectively after the enactment of the statute—would have been much easier cases.

III. Requirements

A. Federal Questions

As previously noted, a federal court has jurisdiction to grant a writ of habeas corpus only when a federal question is presented by the petitioner. A mere allegation of error will not confer jurisdiction in the absence of a federal question. "[A federal] court should not provide collateral relief simply because the state court's challenged conduct would have led to reversal if the defendant had been tried in the federal system; nor is relief authorized even if state evidentiary rules appear to have been violated." A constitutional violation may be raised either through a specific provision or by factors which render the conviction so unfair as to be violative of due process. One of the major reasons that the scope of federal habeas relief has been greatly expanded is that the Court has broadly construed many of the constitutional protections, including due process and equal protection.

In addition to presenting a federal question, the petitioner must establish that the assigned error was reversible error. When the error assigned is harmless, the writ will not be granted.

B. In Custody

The petition for a writ of habeas corpus can only be used to test the validity of a conviction when the petitioner is "in custody." Courts traditionally have interpreted this requirement broadly: "Custody does not necessarily mean actual physical detention in a jail or prison. Rather the term is synonymous with restraint of liberty."
In Jones v. Cunningham and Hensley v. Municipal Court, the Supreme Court reviewed the problem and proceeded to enumerate the relevant factors in determining whether the petitioner is "in custody." These factors are: (1) whether the petitioner is subject to restraints not shared by the general public; (2) whether the petitioner is free to travel from the jurisdiction; (3) whether failure to abide by the restraints imposed constitutes a criminal offense; and (4) whether the petitioner is free from actual physical custody merely by the grace of the state.

Judicial interpretations of "in custody," prompted perhaps by Jones and Hensley, have been far reaching. Habeas jurisdiction has been recognized in the following situations: (1) where the petitioner is free on his own recognizance; (2) where the petitioner is on probation; (3) where the petitioner is on parole; (4) where the petitioner is a military draftee; and (5) where the petitioner is serving the first of two consecutive sentences where he seeks to challenge only the second. On the other hand, jurisdiction has been found wanting where the petitioner is merely subject to a fine which, even if it remained unpaid, could not result in imprisonment.

In Carafas v. La Vallee, one of the more controversial decisions in the area, the Court granted habeas relief to a petitioner who had completed his sentence and had been unconditionally released from prison. The Court concluded that even though the petitioner was no longer in actual physical custody, his liberty had been restricted as a direct result of the conviction, since he was neither eligible to vote nor to serve as a union official. Thus, the petitioner was "in custody" under the meaning of section 2254(a).

It appears that the Court may have overlooked the nature of the writ. The purpose of habeas relief should be to provide a remedy for detention in violation of federal law. Where, as in Carafas, the petitioner has finished serving his sentence, it is no longer the detention

35. Id. at 351-52; 371 U.S. at 239-42.
42. 391 U.S. 234 (1968).
43. Id. at 237.
that is being attacked by the writ. In such a case the writ is actually aimed at the conviction.

Of course, the Carafas decision may be supported by a liberal application of the restraint of liberty theory espoused in Jones and Hensley. Loss of civil rights certainly restricts one’s liberty to an extent, but it remains to be determined just how far the concept of restricted liberty can be extended in the context of federal habeas relief. Under Carafas, it may be that any loss of a constitutional right would satisfy the “in custody” requirement. Such an interpretation would serve to extend significantly the availability of habeas relief.44

C. Exhaustion of State Remedies

A precondition to the availability of federal habeas relief to state prisoners is that state remedies must be exhausted before application for a writ is instituted.45 This requirement reflects both the common law46 and federal-state comity principles.47 The underlying theory is that a federal court should not release a state prisoner until the state has had every available opportunity to correct errors committed in the proceedings which resulted in the allegedly illegal confinement.48 Once the requirement of exhaustion is met, however, a strong constitutional interest exists in vesting federal courts with habeas jurisdiction over state prisoners: “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.”49

Section 2254(b) provides two exceptions to the exhaustion requirement. Exhaustion of state remedies is not required where there “is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.”50 A third exception may be discerned from the decision in Mucie v. Missouri State Dept. of Corrections.51

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44. The “in custody” requirement applies to federal prisoners as well as it does to state prisoners. 28 U.S.C. § 2255 (1970).
47. Mucie v. Missouri State Dep’t of Corrections, 543 F.2d 633, 636 (8th Cir. 1976).
51. 543 F.2d 633 (8th Cir. 1976).
The court in *Mucie* held that a prisoner will not be denied habeas relief if the "failure" to exhaust state remedies resulted from intentional and unnecessary delay by prosecuting state attorneys. Such an exception is supportable on grounds of public policy; otherwise, state officials may render habeas relief inadequate by merely delaying court procedures. The reasoning is also supported by the second exception of section 2254(b), since such a delay would certainly render the available state corrective process ineffective. Additionally, it may well be mandated by the due process clause. Where the action of state attorneys effectively frustrates relief, it would appear that a prisoner is being deprived of his liberty by persons acting under color of state law contrary to the dictates of the fourteenth amendment.

Whenever a state corrective process is not utilized by the petitioner, the exhaustion requirement is implicated. In *Pitchess v. Davis*, the Supreme Court held that the petitioner had not yet exhausted state remedies after seeking writs of habeas corpus and mandamus at the state level. Denial of the writs was not considered an adjudication on the merits and there remained other normal channels for review. In *Ballard v. Maggio*, the fifth circuit held that a failure to appeal the denial of a petition for habeas corpus to the state supreme court was not a failure to exhaust state remedies where the state court had decided those issues against the petitioner on direct review. The import of these two decisions is that where a remedy exists, exhaustion will not be recognized unless the court which has jurisdiction over the remaining corrective process has decided the particular issue against the petitioner at some prior stage of the proceeding.

Two interesting problems in the application of the exhaustion requirement are: (1) where a subsequent court decision clearly indicates the illegality of the petitioner's detention; and (2) where several grounds for relief are asserted in the habeas petition, but state remedies have not been exhausted on all those grounds. In *Francisco v. Gathright*, the Supreme Court held that where a subsequent state court decision indicates the invalidity of a conviction, a federal court may grant habeas without sending the issue back to the state courts; no further exhaustion is required. This result may be questioned in light of the purposes of the exhaustion requirement. It

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52. U.S. CONST. amend. XIV.
53. 421 U.S. 482 (1975).
54. 544 F.2d 1247 (5th Cir. 1977).
would seem that principles of comity would require the case to be sent back to the state court system, where the errors could be corrected without federal interference. The result is sound, however, in view of the fact that the petitioner had fully exhausted state remedies prior to the subsequent state court decision. Thus, the state court had been afforded a full and complete opportunity to correct errors, and strict adherence to the letter and spirit of the exhaustion requirement had been achieved.

Two recent circuit court cases, St. Pierre v. Helgemoe and Franklin v. Conway, have held that a subsequent decision of the United States Supreme Court on an issue presented by a habeas petition precludes federal relief until the state courts have had an opportunity to reconsider the case. Although these decisions may seem in conflict with the decision of the Supreme Court in Francisco, a rational distinction exists. Francisco involved a subsequent state court decision while St. Pierre and Franklin involved subsequent Supreme Court decisions. A state court should be given an opportunity to reevaluate state law in light of new Supreme Court guidelines. If the subsequent decision is rendered by the state's own court, however, there has been no intervening change except that which was effectuated by the state court itself. In such circumstances, the state court has already been afforded a full opportunity to correct the errors. Francisco merely denies the state courts a second chance to correct error. Therefore, these cases are not only reconcilable, but they are also strongly supported by the policy considerations of complete and efficient state adjudication.

There is a substantial split among the federal circuits as to the effect of a failure to exhaust available remedies for all of the grounds asserted in a habeas petition. The fifth and ninth circuits require exhaustion of all issues before entertaining a habeas petition. On the other hand, the second, third, fourth, and eighth circuits will

56. 545 F.2d 1306 (1st Cir. 1976).
57. 546 F.2d 579 (4th Cir. 1976).
58. In Francisco the state had conceded that the petitioner had exhausted available state remedies. 419 U.S. at 60.
59. Galtieri v. Wainwright, 545 F.2d 942 (5th Cir. 1977); West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973), modified on rehearing en banc, 510 F.2d 363 (1975).
60. James v. Reese, 546 F.2d 325 (9th Cir. 1976); Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976).
61. Cameron v. Fastoff, 543 F.2d 971 (2d Cir. 1976); United States ex rel. Levy v. McMann, 394 F.2d 402 (2d Cir. 1968).
64. Johnson v. United States District Court, 519 F.2d 738 (8th Cir. 1975).
review any ground that has been exhausted even though there exists an adequate remedy for other asserted grounds.

A literal reading of the exhaustion requirement seems to indicate that all grounds must be exhausted before a federal court may entertain a habeas petition. Furthermore, it is possible that, given the additional opportunity to review one of the unexhausted grounds, the state court may grant the writ, thus avoiding the necessity of federal intervention. In practice, however, this view is unrealistic. The requirement that all asserted grounds be exhausted may easily be circumvented. The petitioner may choose to assert only those grounds which have been exhausted. Then, if he does not prevail on any of those grounds, he may proceed to exhaust state remedies on the other grounds. If he is unsuccessful in utilizing the available state corrective processes, he may file another petition asserting the remaining grounds on which state remedies have since been exhausted. In this manner, the prisoner is able to circumvent the requirement that all asserted grounds be exhausted, without forfeiting the right to assert any other ground in a subsequent proceeding. Thus, the sounder view is to allow review on any issue which has been exhausted at the state level.

IV. THE EFFECT OF PROCEDURAL WAIVERS ON FEDERAL HABEAS RELIEF

Prior to Fay v. Noia, it was held that a procedural waiver would preclude the availability of federal habeas relief. The rationale for such a decision is that where the prisoner has waived his right to object on appeal, there is an "adequate and independent state ground" to support the conviction. In a sense, this can be viewed as a failure to exhaust state remedies. Although no remedy existed at the time the habeas petition was filed, it was the petitioner's own fault that an otherwise available state remedy had been foreclosed.

The theory that a procedural waiver would automatically bar habeas relief was categorically rejected in Fay v. Noia. Writing for the majority, Justice Brennan noted that the purpose of habeas corpus is to protect against illegal detention and that "a forfeiture of remedies does not legitimize the unconstitutional conduct by which [a] conviction was procured." In defense of the broad hold-

66. See notes 58-61, supra.
69. Id.
70. 372 U.S. at 428.
ing, Justice Brennan wrote: "Our decision today swings open no prison gates. Today as always few indeed is the number of state prisoners who eventually win their freedom by means of federal habeas corpus." 71

Not surprisingly, the Burger Court severely limited Fay by creating exceptions which virtually swallowed the rule that procedural waivers would not bar federal habeas relief. 72 The first exception, however, came from Justice Brennan in the course of his opinion in Fay: "We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." 73

This exception was the basis for Justice Brennan's majority opinion in Henry v. Mississippi, 74 which remanded the cause for a determination of whether or not the failure to raise a fourth amendment objection was deliberate. Although Henry is in concert with Fay, later decisions are not so easy to reconcile. Justice Brennan was to dissent often in response to the Burger Court's limitations on the rule of Fay.

In McMann v. Richardson 75 and Tollet v. Henderson, 76 the Court held that a guilty plea entered on the competent advice of counsel waives the right to attack a confession on the ground that it was coerced. On its face, the rule of McMann and Tollet seems to follow the Fay exception for deliberate waivers; however, the petitions in McMann alleged physical violence by the police, threats of false charges, threats that counsel would not be provided, and ineffective counsel. 77 These allegations, if proven, would clearly have established that the waivers were not made deliberately. Under Townsend v. Sain, 78 which is still good law after Stone v. Powell, 79 an evidentiary hearing should have been conducted to examine the petitioner's allegations. 80 If the allegations were substantiated at such a hearing, habeas relief would then be available.

The decision in Fay was again seemingly ignored in Francis v. 71

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71. Id. at 440.
72. See notes 75-86 and accompanying text infra.
73. 372 U.S. at 438 (emphasis added).
74. 379 U.S. 443 (1965).
77. 397 U.S. 762-64.
79. 428 U.S. at 494 n.36.
80. 372 U.S. at 312.
Henderson$^{81}$ and Davis v. United States.$^{82}$ In these cases, habeas relief was denied on the ground that the defendants had, under applicable rules of criminal procedure, waived their right to object to certain allegedly unconstitutional procedures which led to their conviction. Fay, however, not only held that the exhaustion requirement pertained exclusively to remedies still open at the time the application for habeas was filed,$^{83}$ but also held that habeas would only be denied on the grounds that the applicant “has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.”$^{84}$ Thus, Francis and Davis should not have been denied habeas solely because they had committed a procedural waiver at trial. Under Fay, such a waiver should serve as a bar to federal habeas relief only if it is found to be deliberate.

The real question before the court is: How far should the rule of Fay extend? If a procedural waiver or forfeiture precludes habeas relief only when it is deliberate, then it is arguable that criminal rules of procedure pertaining to waiver and forfeiture of rights are rendered nugatory:

If defendants were allowed to flout [procedural rules], there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to the trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim would be used to upset an otherwise valid conviction at a time when prosecution might well be difficult.$^{85}$

It is submitted, however, that this problem was not unresolved by Fay. Where a defendant properly fails to raise an objection for strategic reasons, he may be denied habeas relief under the deliberate waiver exception of Fay. Thus, Francis and Davis could have been disposed of on the basis of Fay.

The key difference between Fay, and the Francis and Davis decisions lies in the burden of proof. Under Fay, it would appear that the burden of establishing a deliberate waiver is on the prosecution.$^{86}$ On the other hand, Francis and Davis place the burden on

$^{82}$ 411 U.S. 233 (1973).
$^{83}$ 312 U.S. at 435.
$^{84}$ Id. at 438 (emphasis added).
$^{85}$ 411 U.S. at 241. See also 425 U.S. at 540.
$^{86}$ Since the petitioner has the benefit of the general rule of Fay, it would seem that the prosecution has the burden of bringing any particular case within the exception by affirmatively establishing that the waiver was deliberate.
the petitioner to show "actual prejudice." By shifting the burden, the court has significantly limited the effect of Fay.

In Estelle v. Williams, the Court, by means of a broad holding, effectively ignored Fay even though it could have reached the same result under the deliberate waiver exception of Fay. The question presented by Estelle was whether the failure of the defendant to object to being tried in prison clothes would bar habeas relief on a claim that he was denied the right to a fair trial. Although the Court could have rested its decision on the ground that the waiver was deliberate, it instead chose a rather broad holding:

[Although the state cannot, consistent with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.]

Surprisingly, the reason for the waiver was not deemed important. In Fay, a waiver was held to foreclose habeas relief only when it was made deliberately, while in Estelle the waiver was held to foreclose habeas relief for whatever reason it was made. Thus, Estelle can be read as overruling Fay, sub silentio. Justice Brennan vehemently dissented.

In Lefkowitz v. Newsome, the Court held that where state law allows judicial review of constitutional claims after a plea of guilty is entered, habeas relief may be granted even after the petitioner had pled guilty. The Court refused to find a waiver where state law specifically provided for the "preservation" of constitutional attacks notwithstanding a plea of guilty. This time it was Justice White, the author of the McMann opinion, who dissented.

The vitality of Fay has been severely limited. As it now stands, a procedural waiver bars habeas relief in at least the following situations: (1) where the waiver was deliberately made; (2) where there is no showing of actual prejudice; (3) where the waiver was made

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87. 425 U.S. at 542; 411 U.S. at 1584.
89. See generally 425 U.S. at 513-15 (Powell, J., concurring).
90. Id. at 512-13 (emphasis added).
91. Id. at 515.
93. Id. at 294.
on the basis of reasonable advice of competent counsel;\(^{96}\) and (4) where there is an absence of compulsion by the state.\(^{97}\) Additionally, it is possible to argue that \textit{Estelle} overruled \textit{Fay} \textit{sub silentio}. If that be the case, habeas relief would be unavailable to any petitioner who has committed a procedural forfeiture or waiver.

\section*{V. Fourth Amendment Claims}

Federal habeas relief is only available where the petitioner is in state custody in violation of the Constitution, laws or treaties of the United States.\(^{98}\) Therefore, it has been suggested that claims arising from the exclusionary rule should not be cognizable by a habeas petition because the exclusionary rule is judicially rather than constitutionally or statutorily created.\(^{99}\) This view was rejected by the Court in \textit{Kaufman v. United States},\(^{100}\) but was adopted recently in the landmark case of \textit{Stone v. Powell}.\(^{101}\) The precise holding of \textit{Stone} is that, \textit{"where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."}\(^{102}\)

The \textit{Stone} decision has prompted much criticism. Justice Brennan, joined by Justice Marshall, questioned the idea that the exclusionary rule was not constitutionally required.\(^{103}\) He argued that the exclusionary rule could not have been applied to the states in \textit{Mapp v. Ohio}\(^{104}\) unless it was constitutionally required.\(^{105}\) Assuming arguendo that the exclusionary rule is not constitutionally required, the question arises as to why \textit{Stone} was limited to cases where an opportunity for a full and fair hearing was provided. Presumably, this limitation is commanded by the due process clause of the fourteenth amendment. Due process, however, requires more than an \textit{opportunity} for a full and fair hearing. Unfortunately, no criteria were set forth to delineate what would constitute an \textit{"opportunity"}

\begin{footnotes}
\item 100. 394 U.S. 217 (1969).
\item 102. \textit{id. at 494} (footnotes omitted).
\item 103. \textit{See id. at 507-15}.
\item 104. 367 U.S. 643 (1961).
\item 105. 428 U.S. at 507-15.
\end{footnotes}
for a full and fair hearing. It is interesting to note, however, that the Court specifically left Townsend v. Sain\(^{106}\) intact.\(^{107}\) Thus, an evidentiary hearing will be required when there is a dispute as to whether or not an opportunity for a full and fair hearing was afforded by the state courts.

The second circuit addressed the full and fair hearing exception in Gates v. Henderson.\(^{108}\) In that case, Stone was held not to require dismissal of a habeas petition where two of the Townsend categories\(^{109}\) for holding an evidentiary hearing were satisfied. In dissent, Judge Timbers called the opinion "an artful effort to circumvent Stone."\(^{110}\)

Notwithstanding Gates' reliance on the Stone exception, other federal circuits have followed the general rule of Stone.\(^{111}\) Clearly, the granted habeas petition grounded on violations of the exclusiory rule will be the exception and not the rule in the aftermath of Stone v. Powell.

VI. THE FUTURE SCOPE OF FEDERAL HABEAS RELIEF FOR STATE PRISONERS

A. General Analysis

The direction of the Burger Court is toward a narrow construction of federal habeas jurisdiction. Stone v. Powell is illustrative. It reflects the concern of the Burger Court with the following factors: (1) the tremendous expansion of federal habeas relief in light of its historically limited purposes;\(^{112}\) (2) principles of comity;\(^{113}\) (3) the

106. 372 U.S. 293 (1963). Townsend listed the circumstances under which a federal court must grant an evidentiary hearing to a habeas applicant:
   If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

107. 428 U.S. at 494 n.36.
109. 372 U.S. at 313.
110. 45 U.S.L.W. at 2376.
111. Nordakog v. Wainwright, 546 F.2d 69 (5th Cir. 1977); Stinson v. Alabama, 545 F.2d 485 (5th Cir. 1977); Flood v. Louisiana, 545 F.2d 460 (5th Cir. 1977); United States ex rel. Placek v. Illinois, 546 F.2d 1298 (7th Cir. 1976); Rigbee v. Parkinson, 545 F.2d 56 (8th Cir. 1976); Corley v. Cardwell, 544 F.2d 349 (9th Cir. 1976), cert. denied, 429 U.S. 1048 (1977); Redford v. Smith, 543 F.2d 726 (10th Cir. 1976); Roach v. Parrett, 541 F.2d 772 (8th Cir. 1976).
112. See 428 U.S. 465, 478-79, 487, 491 n.31; The Supreme Court, 1975 Term, 90 Harv.
extent to which the petitioner asserts a colorable claim of innocence; the reliability of the evidence involved; and the heavy case load of the federal courts.

B. Federal Questions

An analysis of the factors which motivated the Stone Court tends to support the proposition that habeas relief will be denied in cases other than exclusionary rule violations, provided that an opportunity for a full and fair hearing was afforded at the state level. In his dissent in Stone, Justice Brennan espoused this view:

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

But in Greene v. Massey the fifth circuit refused to extend Stone to double jeopardy claims. Stone was distinguished on the ground that the ban on double jeopardy is specifically enumerated in the Constitution, while the exclusionary rule is judicially created. This reasoning seems persuasive and, contrary to the fears expressed by Justice Brennan, it appears that Stone will not be extended to cases involving a specifically enumerated right.

Thus, where a claim is based on a violation of a judicially created rule, Stone would appear to be directly controlling. Read literally, section 2254 habeas relief does not extend to custody in violation of judicially created rules. This would seem to include claims of entrapment, Miranda violations, and invalid pretrial identification procedures.

In this light, Brewer v. Williams, a recent Supreme Court

L. Rev. 58, 221 (1976).

113. 428 U.S. at 478 n.11, 491 n.31, 493 n.35; The Supreme Court, 1975 Term, supra note 112, at 221.
114. See 428 U.S. at 489-91; The Supreme Court, 1975 Term, supra note 112, at 219.
115. See 428 U.S. at 497 (Burger, J., concurring); The Supreme Court, 1975 Term, supra note 112, at 219.
116. See 428 U.S. at 491 n.31; The Supreme Court, 1975 Term, supra note 112, at 221.
117. 428 U.S. at 517-18 (footnote omitted).
118. 546 F.2d 51 (5th Cir. 1977).
119. Id. at nn.4 & 6.
120. See id.
decision, is somewhat surprising. It was thought that the Court would have taken the opportunity—as was suggested by twenty-two states which filed amicus briefs—to extend \textit{Stone} to \textit{Miranda} violations.\textsuperscript{123} While it is conceded that the Court could have taken the opportunity to extend \textit{Stone}, strong reasons existed for not doing so in the \textit{Brewer} case. The significant facts of \textit{Brewer} are: (1) the police had broken a promise made to two attorneys not to interrogate the defendant in their absence; (2) in the course of their interrogations the police had preyed upon the religious convictions of the defendant whom they knew to have been a mental patient; (3) the defendant's fifth and sixth amendment rights had been violated; and (4) the state had failed to establish that the defendant made a knowing and intelligent waiver of his constitutional rights.\textsuperscript{124} Given these facts, \textit{Brewer} did not present the proper setting upon which to rest an extension of \textit{Stone}. Additionally, the Court rested its decision on sixth amendment grounds\textsuperscript{125} so that it was not a \textit{Miranda} case.

When the proper case is before the Court, however, it is likely that the rule of \textit{Stone} will be extended to \textit{Miranda} violations, the \textit{Brewer} decision notwithstanding. It is suggested that should the Court extend \textit{Stone}, the four \textit{Miranda} rights should be analyzed separately since one or more of them may be found to be constitutionally required and, therefore, not within the rule of \textit{Stone}.

C. \textit{In Custody}

In its narrow perception of the purpose of federal habeas relief, its concern with the federal caseload, and its strict adherence to the principles of comity, it is reasonable to expect that the Burger Court will interpret the in custody requirement of section 2254\textsuperscript{126} more narrowly than did the Warren Court. Perhaps the broadest reading of the requirement was made in \textit{Carafas v. La Vallee}\textsuperscript{127} where the Court held that the petitioner who had finished serving his sentence was “in custody” because as an ex-convict he was deprived of certain civil rights.\textsuperscript{128} The Burger Court may wish to review \textit{Carafas}. If certiorari is granted in \textit{Kravitz v. Pennsylvania},\textsuperscript{129} the Court will have an opportunity to overrule \textit{Carafas}. \textit{Kravitz} is so close to \textit{Carafas} on its facts that it could have been disposed of on the basis

\textsuperscript{123} N.Y. Times, Mar. 24, 1977, at 1, col. 2.
\textsuperscript{124} 97 S. Ct. 1235-37.
\textsuperscript{125} Id. at 1239.
\textsuperscript{126} This requirement also applies to federal prisoners. 28 U.S.C. § 2255 (1970).
\textsuperscript{127} 391 U.S. 234 (1968).
\textsuperscript{128} Id. at 237.
\textsuperscript{129} 546 F.2d 1100 (3d Cir. 1977).
of Carafas. Perhaps the reason that the third circuit did not choose to do so is an indication that they believe, as does the author of this article, that Carafas will be overruled as soon as the Court is presented with the proper case.

If Carafas is overruled, questions would arise as to how much further the in custody requirement will be narrowed. It is fairly certain, however, that the Court would stop short of overruling cases which have held that parolees and probationers are "in custody" under the meaning of section 2254(a).  

D. Exhaustion

Exhaustion of state remedies is the area least likely to be limited by the Burger Court. The reason is that there is very little room for change.

Limitations on the exhaustion requirement are most likely to occur in two areas. First, the Court may seek to define narrowly the circumstances which render available state corrective processes ineffective in order to limit the utility of that built-in exception to section 2254(b). Second, the Court may hold that all grounds asserted in a petition must be exhausted before any grounds will be addressed by a federal habeas court. Such a holding would be superflous, however, as it could readily be circumvented.

E. The Effect of Procedural Waivers

As previously noted, the Burger Court has placed significant limitations on the Warren Court's decision in Fay v. Noia. Fay held that a procedural waiver would preclude federal habeas relief only where the waiver was made deliberately. In light of cases such as Francis v. Henderson, the extent to which Fay remains good law is questionable. In either event, it seems that Fay is doomed, assuming it is not already dead. The final blow may come on certiorari to the Supreme Court in the case of O'Berry v. Wainwright.

In O'Berry, the fifth circuit held that the petitioner received an opportunity for a full and fair hearing even though a procedural

130. See notes 37-38 and accompanying text, supra.
131. See note 50 and accompanying text, supra.
132. See notes 61-64 and accompanying text, supra.
133. See note 65 and accompanying text, supra.
134. See notes 67-97 and accompanying text, supra.
138. Id.
waiver had been committed by appointed counsel. There was no finding that the waiver was made deliberately by the petitioner. The dissenting judge concluded that Fay was treated as though it was overruled even though Stone presumably left Fay intact.¹³⁹

Should the Court grant certiorari on O'Berry, it is likely that it will affirm the fifth circuit decision. In fact, it is indeed possible that the Court will replace the Fay test (whether or not the waiver was deliberate) with the Stone test (whether or not there was an opportunity for a full and fair hearing at the state level) for all cases involving procedural waivers.

F. Fourth Amendment Claims

In the aftermath of Stone, the most significant problem in the fourth amendment area is what is meant by an “opportunity for [a] full and fair”¹⁴⁰ hearing. Carried to its furthest extreme, one has an opportunity for a full and fair hearing as long as state law provides for a hearing which met rigid due process standards. The Burger Court is more inclined to the former extreme than the latter.

If “opportunity” is interpreted narrowly, then it may well be that Stone will be construed as having overruled Fay. Under the narrow view, one who has committed a procedural error may still have been afforded an opportunity for a full and fair hearing. Furthermore, it is submitted that the Court is prepared to accept this view, and O'Berry may present that opportunity.

G. Conclusion

The Burger Court has embarked on a course which has severely limited the availability of federal habeas corpus relief for state prisoners. By so doing, the Court has attempted to serve the following goals: (1) to decrease the heavy caseload of the federal courts; (2) to limit the exclusionary rule, which often requires the exclusion of otherwise reliable evidence;¹⁴¹ and (3) to reaffirm the principles of comity by returning the final word to the state courts in most instances.¹⁴² In this manner, the Court has begun to shift the emphasis of habeas relief from the validity of the conviction to the reliability of the petitioner’s claim of innocence. Thus, a colorable claim of innocence may emerge as the backbone of federal habeas corpus relief.¹⁴³

¹³９. Id. at 1219 (dissenting opinion).
¹⁴⁰. 428 U.S. at 494.
¹⁴¹. Id. at 489-90.
¹⁴². Id. at 478 n.11.
¹⁴³. See generally Is Innocence Irrelevant?, supra note 1.