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# FOURTH AMENDMENT

## FINALITY

by John R. Pagan



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For a variety of reasons, many people prefer to litigate issues arising under the United States Constitution in federal rather than state court.<sup>1</sup> When the state prosecutes someone, he seldom has access to a federal forum in the first instance. He must raise his constitutional claim in state court initially and then, if the state trial and appellate tribunals rule against him, try to re-litigate the question in U.S. district court through a habeas corpus action brought under 28 U.S.C. § 2254 or a civil rights suit filed pursuant to 42 U.S.C. § 1983. Due to the size of its caseload and other institutional constraints, the U.S. Supreme Court can review relatively few state convictions. Consequently, any diminution of the district courts' power to use §§ 2254 and 1983 as vehicles for re-examining issues previously adjudicated by state courts increases commensurately the extent to which state judges have the final say on matters of constitutional interpretation and application.

### Barriers to Relitigation

Culminating a process begun in *Stone v. Powell*,<sup>2</sup> the Supreme Court in *Allen v. McCurry*<sup>3</sup> virtually eliminated the district courts authority to re-determine questions involving defendants' rights under the Fourth Amendment (as applied to the states via the Fourteenth Amendment). The Court in *Allen* reversed a decision of the Eighth Circuit<sup>4</sup> holding that a state court's denial of a suppression motion should not be accorded collateral estoppel effect in a subsequent § 1983 action in federal court. McCurry was convicted of possession of heroin and assault with intent to kill after a Missouri judge admitted into evidence contraband seized during an allegedly illegal search. *Stone* barred McCurry from re-

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litigating the Fourth Amendment question on habeas corpus, so he tried another route into the federal forum: he filed a million-dollar damage suit against the policemen who searched him. The Court of Appeals permitted the action to go forward unencumbered by prior state-court rulings, reasoning that, given *Stone*, "if collateral estoppel is to apply in § 1983 actions raising search and seizure claims, there will be no federal forum for the victim of a search and seizure which allegedly violates the federal constitution."<sup>5</sup> Totally foreclosing access to a district court would be intolerable, the Eighth Circuit declared, "because of the special role of federal courts in protecting civil rights."<sup>6</sup>

The Supreme Court squarely rejected the Eighth Circuit's view that every person asserting a federal right is entitled to at least one opportunity to litigate in a district court. Construing § 1983's legislative history, the Court concluded that when Congress passed the Civil Rights Act of 1871, it meant to expand the federal courts' jurisdiction and remedial powers, not reduce state courts' authority to make binding interpretations of the U.S. Constitution, a right they have enjoyed since the founding of the Republic.<sup>7</sup> The Framers intended state courts to be, as Henry Hart put it, "the primary guarantors of constitutional rights."<sup>8</sup> *Allen* implicitly acknowledges that state courts can fulfill that responsibility effectively only if their judgments are granted a high degree of finality. Clearly the Court is convinced that state judges possess the ability and willingness to perform the tasks assigned them by the Framers, witness *Allen's* citation<sup>9</sup> to the following passage in *Stone*:

[W]e are unwilling to assume that there now exists a general lack of

appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. . . . Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems. In sum, there is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of

Fourth Amendment claims] than his neighbor in the state courthouse."<sup>10</sup>

Whatever may have been true in the past, presumptively parity now exists between state and federal courts, and **Allen** requires the latter to give preclusive effect to the former's Fourth Amendment decisions. Identical tests govern both modes of collateral review. 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 unless the state fails to provide him with "an opportunity for full and fair litigation" of his Fourth Amendment claim.<sup>11</sup> In the § 1983 context, collateral estoppel prohibits relitigation except "where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court."<sup>12</sup>

### Preclusion-Avoidance Devices

We must now consider the ways in which an artful advocate might be able to circumvent the barriers erected by **Stone** and **Allen**. If the state never actually presses charges against the search victim, he can sue for damages under § 1983 in either federal or state<sup>13</sup> court without worrying about preclusion. But if the prosecution commences or appears imminent, he has only a few exceedingly problematical alternatives. Right away he can rule out a damage suit in federal court because by the time the litigation reaches the judgment stage, a state judge probably will have long since denied his suppression motion, triggering collateral estoppel. Instead the victim must seek a speedier form of relief, namely an injunction or a declaratory judgment. Can he procure federal preemption of the Fourth Amendment issue by filing suit in U.S. district court **before** a state judge rules on the search's legality? In most situations the answer surely will be no. Although federal courts undoubtedly possess the power to interfere with constitutionally defective state prosecutions, the judicially created doctrine known as "Our Federalism" severely limits their ability to exercise that power.

If the state prosecution is already under way when the search victim files his federal complaint, he will find it almost impossible to get the district judge to hear his Fourth Amendment claim. Unless he can prove bad faith or other extraordinary circumstances, **Younger v. Harris**<sup>14</sup> will proscribe issuance of

an injunction, **Samuels v. Mackell**<sup>15</sup> will thwart declaratory relief, and **Perez v. Ledesma**<sup>16</sup> will prohibit a suppression order. If state criminal proceedings are threatened but have not yet begun, the victim can seek a federal declaratory judgment under **Steffel v. Thompson**.<sup>17</sup> A district-court ruling that the search violated the Fourth Amendment would have preclusive effect in a subsequent state prosecution. However, **Hicks v. Miranda** allows state officials to block **Steffel** relief by merely instituting charges "before any proceedings of substance on the merits have taken place in the federal court."<sup>18</sup> The only way to prevent them from trumping the federal suit between the filing of the complaint and trial on the merits is to persuade the U.S. district court to grant preliminary injunctive relief, a maneuver approved in **Doran v. Salem Inn**.<sup>19</sup> To qualify for such relief, the plaintiff must make a sufficient showing both of irreparable harm **pendente lite** and of likelihood of ultimate success on the merits. Where the challenged search has already occurred, the irreparable-harm requirement will doubtless prove extremely difficult to satisfy. At least in theory the opportunity to raise the Fourth Amendment issue as a defense to the state prosecution affords the victim a wholly adequate remedy. Perhaps a person who is engaged in a continuing course of conduct could qualify for preliminary federal relief by arguing that unless the district court halts the state prosecution and passes judgment on the search's validity, he will be forced to either surrender his freedom of action or run the risk of multiple prosecutions. The argument might succeed if the search implicated First Amendment values, but the federal judge could choose simply to restrain future searches while the question of the completed conduct's constitutionality is litigated in state court.<sup>20</sup> That result would, of course, leave **Allen's** force largely undiminished.

Where state-court proceedings are not yet pending, there exists another tactic the search victim might employ to bring his Fourth Amendment claim into federal court for trial **de novo**: **Pullman** abstention with an **England** reservation. This gambit's prospects for success are virtually nil, for it requires the prosecutors' active, albeit unwitting, cooperation. Nevertheless, it provides some intellectual interest and therefore merits our attention. The gambit presupposes this scenario: (1) for some

reason the prosecutors are not yet in a position to press formal charges (e.g. they need to investigate further), so they cannot take advantage of the **Hicks v. Miranda** 'trump'<sup>21</sup>; (2) the victim's federal complaint alleges a violation of state regulations as well as the Fourth Amendment; (3) the regulations' meaning is uncertain; and (4) an interpretation in the victim's favor would result in suppression of the evidence, mooting the federal constitutional question. This situation might tempt prosecutors to try to shunt the controversy into state court through **Railroad Commission of Texas v. Pullman**<sup>22</sup> abstention, thereby forestalling federal review of state or local policemen's investigatory methods and buying themselves some extra time. But if the prosecutors succeed, theirs will have been a Pyrrhic victory, at least from the standpoint of **Allen** issue preclusion. The reason is simple. Pursuant to **England v. Louisiana State Bd. of Medical Examiners**,<sup>23</sup> the search victim could expressly reserve the right to return to federal court for decision of the Fourth Amendment question if the state-law issue were resolved against him. In that event, any purported decision of federal law by the state court would not be given collateral estoppel effect in a subsequent federal action. This is a rather exotic end-run around **Allen**, to be sure, but footnote 17<sup>24</sup> of that opinion hints that it just might work.

### Conclusion

Notwithstanding the preclusion-avoidance devices canvassed above, the combined effect of **Allen v. McCurry**, **Stone v. Powell**, and the **Younger v. Harris** line of cases is to unify and streamline Fourth Amendment adjudication. Persons accused of violating state law are now entitled to no more than one full and fair hearing on search and seizure questions, subject only to review by higher state tribunals and, ultimately, the Supreme Court. The U.S. district court serves a procedural backstop function, its role limited to ensuring that the defendant received an adequate opportunity to litigate in state court.

I, for one, applaud these developments and would like to see the finality principle fully implemented in areas besides the Fourth Amendment.<sup>25</sup> Redundancy wastes scarce judicial resources and creates intergovernmental friction while yielding few, if any,

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benefits. The best way to minimize constitutional error is not for federal judges to second-guess their state counterparts, but rather for states to take the initiative and improve trial and appellate procedures so their courts can become more hospitable fora for adjudicating federal rights. Let us hope that **Allen's** reaffirmation and reinforcement of the state judiciaries' vital role in the federal system will spur further reform.

**NOTES**

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<sup>1</sup>See Neuborne, **The Myth of Parity**, 90 HARV. L. REV. 1105 (1977).

<sup>2</sup>428 U.S. 465 (1976).

<sup>3</sup>101 S.Ct. 411 (1980).

<sup>4</sup>McCurry v. Allen, 806 F.2d 795 (8th Cir. 1979).

<sup>5</sup>Id. at 798.

<sup>6</sup>Id. at 799.

<sup>7</sup>101 S.Ct. at 417-18.

<sup>8</sup>Hart, **The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic**, 66 HARV. L. REV. 1362, 1401 (1953).

<sup>9</sup>101 S.Ct. at 420.

<sup>10</sup>428 U.S. at 493-94, n.35 (citations omitted).

<sup>11</sup>Id. at 494.

<sup>12</sup>Allen v. McCurry, 101 S.Ct. at 418.

<sup>13</sup>See Maine v. Thiboutot, 100 S.Ct. 2502 (1980).

<sup>14</sup>401 U.S. 37 (1971).

<sup>15</sup>401 U.S. 66 (1971).

<sup>16</sup>401 U.S. 82 (1971).

<sup>17</sup>415 U.S. 452 (1974).

<sup>18</sup>422 U.S. 332, 349 (1975).

<sup>19</sup>422 U.S. 922 (1975).

<sup>20</sup>See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER THE FEDERAL COURTS AND THE FEDERAL SYSTEM 278-79 (2d ed. Supp. 1981).

<sup>21</sup>See text accompany note 18 *supra*.

<sup>22</sup>312 U.S. 496 (1941).

<sup>23</sup>375 U.S. 411 (1964).

<sup>24</sup>101 S.Ct. at 418-19, n. 17.

<sup>25</sup>The reasoning employed in *Allen* suggests that collateral estoppel is not limited to search and seizure issues. However, thus far the Supreme Court has not extended *Stone's* ban on habeas corpus relitigation beyond the confines of the Fourth Amendment. See *Jackson v. Virginia*, 443 U.S. 307 (1979) (due process-based challenge to sufficiency of evidence held relitigable on habeas corpus); and *Rose v. Mitchell*, 443 U.S. 545 (1979) (equal protection-based racial discrimination claim held relitigable on habeas corpus).

