MEMORANDUM

TO: Greg Palm
FROM: Lewis F. Powell, Jr.

DATE: June 2, 1976

Powell and Rice

Do you think there should be any cross reference in our cases to Justice Blackmun's opinion Janis?

L.F.P., Jr.
June 4, 1976

Re: Nos. 74-1055 & 74-1222 - Stone v. Powell

Dear Lewis:

I shall write separately in this case.

Sincerely,

Mr. Justice Powell

Copies to Conference
June 11, 1976

PERSONAL

Re: 74-1055 - Stone v. Powell

Dear Lewis:

I write you without copies to the Conference at this time because if you are not prepared to make the suggested change, there is no point in adding to the "paper flood."

Page 24 for me puts more "glue and gloss" on the exclusion rule. It is unnecessary dictum. At most, no one has a right to ask any more than something like: "This case does not present any question as to the validity of the exclusionary rule as applied at trial . . . ." in place of the first two lines, second paragraph, page 24.

Regards,

[Signature]

Mr. Justice Powell

We do not question the E/R in their case as applied at this trial, etc. Add note referring to Bryan.
MR. JUSTICE WHITE, dissenting.

For many of the reasons stated by MR. JUSTICE BRENNAN, I cannot agree that the writ of habeas corpus should be any less available to those convicted of state crimes where they allege Fourth Amendment violations than where other constitutional issues are presented to the federal court. Under the amendments to the habeas corpus statute, which were adopted after Fay v. Noia, 372 U.S. 391 (1963), and represented an effort by Congress to lend a modicum of finality to state criminal judgments, I cannot distinguish between Fourth Amendment and other constitutional issues.
Suppose, for example, that two confederates in crime, Smith and Jones, are tried separately for a state crime and convicted on the very same evidence, including evidence seized incident to their arrest allegedly made without probable cause. Their constitutional claims are fully aired, rejected and preserved on appeal. Their convictions are affirmed by the State's highest court. Smith, the first to be tried, does not petition for certiorari, or does so but his petition is denied. Jones, whose conviction was considerably later, is more successful. His petition for certiorari is granted and his conviction reversed because this Court, without making any new rule of law, simply concludes that on the undisputed facts the arrests were made without probable cause and the challenged evidence was therefore seized in violation of the Fourth Amendment. The State must either retry Jones or release him, necessarily because he is deemed in custody in violation of the Constitution. It turns out that without the evidence illegally seized, the State has no case; and Jones goes free. Smith then files his petition for habeas corpus. He makes no claim that he did not have a full and fair hearing in the state courts, but asserts that his
Fourth Amendment claim had been erroneously decided and that he is being held in violation of the federal Constitution. He cites this Court's decision in Jones' case to satisfy any burden placed on him by § 2254 to demonstrate that the state court was in error. Unless the Court's reservation, in its present opinion, of those situations where the defendant has not had a full and fair hearing in the state courts is intended to encompass all those circumstances under which a state criminal judgment may be reexamined under § 2254 -- in which event the opinion is essentially meaningless and the judgment erroneous -- Smith's petition would be dismissed, and he would spend his life in prison while his colleague is a free man. I cannot believe that Congress intended this result.

Under the present habeas corpus statute, neither Rice's nor Powell's applications for habeas corpus should be dismissed on the grounds now stated by the Court. I would affirm the judgments of the Courts of Appeals as being acceptable applications of the exclusionary rule applicable in state criminal trials by virtue of Mapp v. Ohio, 367 U.S. 643 (1961).
I feel constrained to say, however, that I would join four or more other Justices in substantially limiting the reach of the exclusionary rule as presently administered under the Fourth Amendment in federal and state courts.

Whether I would have joined the Court's opinion in Mapp v. Ohio, 367 U.S. 643 (1961), had I then been a member of the Court, I do not know. But as time went on after coming to this bench, I became convinced that both Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio had overshot their mark insofar as they aimed to deter lawless action by law enforcement personnel and that in many of its applications the exclusionary rule was not advancing that aim in the slightest and in this respect was a senseless obstacle to arriving at the truth in many criminal trials.

The rule has been much criticized and suggestions have been made that it should be wholly abolished, but I would overrule neither Weeks v. United States nor Mapp v. Ohio. I am nevertheless of the view that the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue
was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief. These are recurring situations; and recurringly evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be affected or the indictment dismissed.

An officer sworn to uphold the law and to apprehend those who break it inevitably must make judgments regarding probable cause to arrest: is there reasonable ground to believe that a crime has been committed and that a particular suspect has committed it? Sometimes the historical facts are disputed or are otherwise in doubt. In other situations the facts may be clear so far as they are known, yet the question of probable cause remain. In still others there are special worries about the reliability of secondhand information such as that coming from informants. In any of these situations, which occur repeatedly, when the officer is convinced that he has probable cause to arrest he will very likely make it. Except in emergencies, it is probable that his colleagues or superiors will participate
in the decision, and it may be that the officer will secure a warrant, although warrantless arrests on probable cause are not forbidden by the Constitution or by state law. Making the arrest in such circumstances is precisely what the community expects the police officer to do. Neither officers nor judges issuing arrest warrants need delay apprehension of the suspect until unquestioned proof against him has accumulated. The officer may be shirking his duty if he does so.

In most of these situations, hopefully the officer's judgment will be correct; but experience tells us that there will be those occasions where the trial or appellate court will disagree on the issue of probable cause, no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men could easily differ on the question. It also happens that after the events at issue have occurred, the law may change, dramatically or ever so slightly, but in any event sufficiently to require the trial judge to hold that there was not probable cause to make the arrest and to seize the evidence offered by the prosecution. It may also be, as in the Powell case now before us, that there
is probable cause to make an arrest under a particular criminal statute but when evidence seized incident to the arrest is offered in support of still another criminal charge, the statute under which the arrest and seizure were made is declared unconstitutional and the evidence ruled inadmissible under the exclusionary rule as presently administered.

In these situations, and perhaps many others, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that in each of them the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty. It is true that in such cases the courts have ultimately determined that in their view the officer was mistaken; but it is also true that in making constitutional judgments under the general language used in some parts of our Constitution, including the Fourth Amendment, there is much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men. Surely when this Court
Stone v. Powell

- 8 -

divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably in making the arrest.

When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted. This makes the law a fool.

Admitting the evidence in such circumstances does not render judges participants in Fourth Amendment violations. The violation, if there was one, has already occurred and the evidence is at hand. Furthermore, there has been only mistaken, but unintentional and faultless, conduct by enforcement officers. Exclusion of the evidence does not cure the invasion of the defendant's rights which he has already suffered. Where an arrest has
been made on probable cause but the defendant is acquitted, under federal law the defendant has no right to damages simply because his innocence has been proved. "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). The officer is also excused from liability for "acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied." *Id.* There is little doubt that as far as civil liability is concerned, the rule is the same under federal law where the officer mistakenly but reasonably believes he has probable cause for an arrest. In *Scheuer v. Rhodes*, the Court announced generally that officers of the Executive Branch of the Government should be immune from liability where their action is reasonable "in light of all the circumstances, coupled with good-faith belief." 416 U.S. 232, 247-248 (1974). The Court went on to say:
"Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." Id., at 241-242 (footnote omitted).

The Court has proceeded on this same basis in other contexts. O'Connor v. Donaldson, 422 U.S. 563 (1975); Wood v. Strickland, 420 U.S. 308 (1975).

If the defendant in criminal cases may not recover for a mistaken but good faith invasion of his privacy, it makes even less sense to exclude the
evidence solely on his behalf. He is not at all recompensed for the invasion by merely getting his property back. It is often contraband and stolen property to which he is not entitled to in any event. He has been charged with crime and is seeking to have probative evidence against him excluded, although often it is the instrumentality of the crime. There is very little equity in the defendant's side in these circumstances. The exclusionary rule, a judicial construct, seriously shortchanges the public interest as presently applied. I would modify it accordingly.
To: Mr. Justice Brennan, Mr. Justice Stewart, Mr. Justice White, Mr. Justice Marshall, Mr. Justice Blackmun, Mr. Justice Powell, Mr. Justice Rehnquist, and Mr. Justice Stevens.

I despaired that with C. J. immediately assigned case to me to write on H/Capers analysis, he would not assign case to me to write on H/Capers analysis.

Re: (74-1055 - Stone v. Powell) (74-1222 - Wolff v. Rice) and I think he should stay by the opinion.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment. For reasons stated in my dissent in Dwares v. Six Unknown Named Federal Agents, 403 U.S. 388, 441 (1971), it seems clear to me that the exclusionary rule has been operative long enough to demonstrate its futility and that the time has come to modify its reach if no more. Over the years, the strains imposed by reality have led the Court to vacillate as to the rationale for deliberate exclusion of truth from the fact-finding process. The rhetoric has varied with the rationale, to the point where it has now become a doctrinaire result in search of validating reasons.

Proof is lacking that the rule, a judge-created device, serves the purpose of deterrence and, of course, as to inadvertent conduct it is hardly relevant. Despite Herculean efforts, no empirical study has been able to demonstrate that the exclusionary rule does in fact have any deterrent effect. United States v. Janis, Slip opinion, at 16 and n. 22. To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention to demonstrate that it serves its avowed purpose, outweighing its heavy cost. See, e.g., Killough v. United States, 315 F. 2d 241 (1962). The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting the guilty free. It is, in my view, an abdication of our responsibility to exact such excessive costs from society if we do so on the basis of totally unsubstantiated assumptions. Judge Henry Friendly has observed:

"[T]he same authority that empowered the Court to supplement the [fourth] amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to modify that rule as the 'lessons of experience' may teach." Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 952-953 (1965).

In Bivens, I suggested that, despite its grave shortcomings, perhaps the rule need not be abandoned until some meaningful alternative could be developed to protect innocent persons damaged by police action. With the passage of time, it now appears that the continued existence of the rule,
as presently implemented, actually inhibits the development of any alterna-
tives. The reason is quite simple: incentives for developing new procedures
or remedies must remain minimal or nonexistent so long as the exclusionary
rule is retained in its present posture. It can no longer be assumed that
other branches of government will act while judges cling to this draconian,
discredited device. Legislatures are unlikely to act at all so long as persons
charged with serious crimes continue to reap the enormous benefits of the
exclusionary rule. With this extraordinary "remedy" for Fourth Amend-
ment violations, legislatures might assume that nothing more should be
done, even though a grave defect of the exclusionary rule is that it offers
nothing to victims of overzealous police work who never appear in court.
Schaefer, The Fourteenth Amendment and Sanctity of the Person, 64 Nw.U.L.
Rev. 1, 14 (1969). And even if legislatures were inclined to experiment
with alternative remedies, they have no assurance that the judicially created
rule will be modified or abolished in response to such legislative remedies.
The unhappy result, as I see it, is that alternatives will inevitably be stymied
by rigid adherence on our part to the exclusionary rule. I venture to predict
that overruling this judicially invented doctrine -- or limiting its scope to
egregious police conduct -- would inspire a surge of activity toward providing
statutory remedies for innocent victims.
The Court's opinion today eloquently recounts the dismal social costs occasioned by the rule. Ante, at 21-23. And Mr. Justice White observes today that, in many instances, the exclusionary rule constitutes a "senseless obstacle to arriving at the truth in many criminal trials." Post, at ___. He therefore suggests that the rule be substantially modified "so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief." Post, at ___. His view has much to commend it.

The exclusionary rule had its genesis in the natural desire to protect private papers. Boyd v. United States, 116 U.S. 616, 633 (1886) (dictum). From this origin, the rule has now been carried to the point of excluding from evidence the body of a homicide victim. See Mitchell v. New York, __N.Y.2d__ (1976), petition for cert. pending. Cf. Killough v. United States, 315 F.2d 241 (1962).

It is time to change.
Re: (74-1055 - Stone v. Powell)  
(74-1222 - Wolff v. Rice)

Dear Lewis:

In the rush of these days you may not get to my problems with the "endorsement" of the exclusionary rule at p. 24. If you find it possible to adopt something along the lines of my suggestion I can join the opinion.

Meanwhile I am circulating a concurring opinion calling for the end or modification of the exclusionary rule -- one of the great hoaxes on the public in its present form.

Regards,

Mr. Justice Powell
MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment. For reasons stated in my dissent in Bivens v. Six Unknown Named Federal Agents, 403 U.S. 388, 441 (1971), it seems clear to me that the exclusionary rule has been operative long enough to demonstrate its futility and that the time has come to modify its reach if no more. Over the years, the strains imposed by reality have led the Court to vacillate as to the rationale for deliberate exclusion of truth from the fact-finding process. The rhetoric has varied with the rationale, to the point where it has now become a doctrinaire result in search of validating reasons.

Proof is lacking that the rule, a judge-created device, serves the purpose of deterrence and, of course, as to inadvertent conduct it is hardly relevant. Despite Herculean efforts, no empirical study has been able to demonstrate that the exclusionary rule does in fact have any deterrent effect. United States v. Janis, Slip opinion, at 16 and n.22. To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention to demonstrate that it serves its avowed purpose, outweighing its heavy cost.

See, e.g., Killough v. United States, 315 F.2d 241 (1962). The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting the guilty free. It is, in my view, an abdication of our responsibility to exact such excessive costs from society if we do so on the basis of totally unsubstantiated assumptions. Judge Henry Friendly has observed:

"[T]he same authority that empowered the Court to supplement the [fourth] amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to modify that rule as the 'lessons of experience' may teach." Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L.Rev. 929, 952-953 (1965).

In Bivens, I suggested that, despite its grave shortcomings, perhaps the rule need not be abandoned until some meaningful alternative could be developed to protect innocent persons damaged by police action. With the passage of time, it now appears that the continued existence of the rule,
as presently implemented, actually inhibits the development of any alternatives. The reason is quite simple: incentives for developing new procedures or remedies must remain minimal or nonexistent so long as the exclusionary rule is retained in its present posture. It can no longer be assumed that other branches of government will act while judges cling to this draconian, discredited device. Legislatures are unlikely to act at all so long as persons charged with serious crimes continue to reap the enormous benefits of the exclusionary rule. With this extraordinary "remedy" for Fourth Amendment violations, legislatures might assume that nothing more should be done, even though a grave defect of the exclusionary rule is that it offers nothing to victims of overzealous police work who never appear in court.

Schaefer, The Fourteenth Amendment and Sanctity of the Person, 64 NW.U.L. Rev. 1, 14 (1969). And even if legislatures were inclined to experiment with alternative remedies, they have no assurance that the judicially created rule will be modified or abolished in response to such legislative remedies. The unhappy result, as I see it, is that alternatives will inevitably be stymied by rigid adherence on our part to the exclusionary rule. I venture to predict that overruling this judicially invented doctrine -- or limiting its scope to egregious police conduct -- would inspire a surge of activity toward providing statutory remedies for innocent victims.
Consider adding a footnote along the following lines (possibly note 32a)

32a. The Chief Justice, in his concurring opinion, addresses generally the application of the exclusionary rule. Ante at __. Mr. Justice White, although dissenting in this case, states that he would join four or more other Justices "in substantially limiting the reach of the Exclusionary Rule". Ante at __. We find no occasion in this habeas corpus case to question the application of the rule at trial and on direct appeal, as we think it unnecessary to reach the broader issues addressed by the Chief Justice and by Mr. Justice White.
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We assume that the continued vitality of these assumptions justifies the application of the Exclusionary Rule at trial and its enforcement on direct appeal of state court convictions, but they do not support its application on collateral review. The additional contribution, if any, of the
32a. The Chief Justice, in his concurring opinion, and Mr. Justice White in his dissent, address generally the application of the exclusionary rule. Ante at ___ and ___. But we find no occasion in this habeas corpus case to question the application of the rule at trial and on direct appeal, as we think it unnecessary to reach the broader issues addressed by the Chief Justice and by Mr. Justice White. See n. 16, supra.
NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

SYLLABUS

STONE, WARDEN v. POWELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1055. Argued February 24, 1976—Decided June —, 1976*

Respondent in No. 74-1055, was convicted of murder in state court, in part on the basis of testimony concerning a revolver found on his person when he was arrested for violating a vagrancy ordinance. The trial court rejected respondent's contention that the testimony should have been excluded because the ordinance was unconstitutional and the arrest therefore invalid. The appellate court affirmed, finding it unnecessary to pass upon the legality of the arrest and search because of the court's conclusion that the error, if any, in admitting the challenged testimony was harmless, beyond a reasonable doubt. Respondent then applied for habeas corpus relief in the Federal District Court, which concluded that the arresting officer had probable cause and that even if the vagrancy ordinance was unconstitutional the deterrent purpose of the exclusionary rule did not require that it be applied to bar admission of the fruits of a search incident to an otherwise valid arrest. The court held, alternatively, that any error in admission of the challenged evidence was harmless. The Court of Appeals reversed, concluding that the ordinance was unconstitutional; that respondent's arrest was therefore illegal; and that, although exclusion of the evidence would serve no deterrent purpose with regard to officers who were enforcing statutes in good faith, exclusion would deter legislators from enacting unconstitutional statutes. The court also held that admission of the evidence was not harmless error. In No. 74-1222, respondent was also convicted of murder in a state court, in part on the basis of evidence seized pursuant to a search warrant which respondent on a suppression

*Together with No. 74-1222, Wolff, Warden v. Rice, an appeal to the United States Court of Appeals for the Eighth Circuit.
motion claimed was invalid. The trial court denied respondent's motion to suppress, and was upheld on appeal. Respondent then filed a habeas corpus petition in Federal District Court. The court concluded that the warrant was invalid, and rejected the State's contention that in any event probable cause justified the search. The Court of Appeals affirmed. Held: Where the State, as in each of these cases, has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal as compared to the substantial societal costs of applying the rule. Pp. 7–26.

(a) Until these cases this Court has had no occasion fully to examine the validity of the assumption made in Kaufman v. United States, 394 U. S. 217, that the effectuation of the Fourth Amendment, as applied to the States through the Fourteenth, requires the granting of habeas corpus relief when a prisoner has been convicted in state court on the basis of evidence obtained in an illegal search or seizure since those Amendments were held in Mapp v. Ohio, 367 U. S. 643, to require exclusion of such evidence at trial and reversal of conviction upon direct review. P. 13.

(b) The Mapp majority justified application of the exclusionary rule chiefly upon the belief that exclusion would deter future unlawful police conduct, and though preserving the integrity of the judicial process has been alluded to as also justifying the rule, that concern is minimal where federal habeas corpus relief is sought by a prisoner who has already been given the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review. Pp. 16–18.

(c) Despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons; in various situations the Court has found the policies behind the rule outweighed by countervailing considerations. Pp. 18–21.

(d) The ultimate question of guilt or innocence should be the central concern in a criminal proceeding. Application of the exclusionary rule, however, deflects the truthfinding process and often frees the guilty. Though the rule is thought to deter unlawful police activity, in part through nurturing respect for Fourth Amend-
Syllabus

...ment values, indiscriminate application of the rule may well generate disrespect for the law and the administration of justice. Pp. 21-23.

(e) Despite the absence of supportive empirical evidence, the assumption has been that the exclusionary rule deters law enforcement officers from violating the Fourth Amendment by removing the incentives to disregard it. Though the Court adheres to that view as applied to the trial and direct-appeal stages, there is no reason to believe that the effect of applying the rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions. Even if some additional deterrent effect existed from application of the rule in isolated habeas corpus cases, the furtherance of Fourth Amendment goals would be outweighed by the detriment to the criminal justice system. Pp. 24-26.
No. 74–1055, 507 F. 2d 93; No. 74–1222, 513 F. 2d 1280, reversed.
June 18, 1976

No. 74-1055 and 74-1222 Stone and Rice

Dear Chief:

Here is a copy of my opinion (second draft) in the above cases, with riders attached which incorporate changes which I hope you will find satisfactory.

As you will recall, we took these cases because they clearly presented the issue whether the exclusionary rule should apply on a collateral attack based on the Fourth Amendment. This was the issue I addressed in my concurring opinion in Bustamonte, which you joined. At that time, Potter also was willing to join five other Justices, but was unwilling then to make the fifth vote. Prior to granting the above cases, Bill Rehnquist and I conferred with Potter to see whether he considered them appropriate vehicles to reconsider the issue. I think I kept you advised of this.

At our Conference, Byron expressed a willingness to adopt a "good faith" modification of the exclusionary rule even as applied to trial and appeal, a position which both Bill Rehnquist and I have expressed sympathy for in the past. But Potter and John flatly stated their unwillingness to join an opinion going so far, or expressing any dissatisfaction with the rule at trial and on direct appeal.

My distinct understanding at Conference, therefore, was that there were six firm votes to dispose of these cases solely on the applicability of the exclusionary rule to Fourth Amendment issues raised on habeas corpus. The opinion was written that way. Footnote 16 (p. 14) states that "we find it unnecessary to consider the other issues concerning the exclusionary rule raised by the parties".
It was against this background that I found your "concurring in result only" opinion so surprising. In any event, I have gone back to Potter and cleared with him the riders now attached to pages 24 and 25. They say two things: (i) that we merely assume the continued vitality of the assumptions that have been relied upon to support the rule; and (ii) in the new footnote on page 25, we make crystal clear that we need not and do not reach the question of the application of the rule at trial and on direct appeal.

The footnote, and the change in the text, allow you to join the opinion and also file your concurrence without substantial change of any kind. You will be perfectly free in the future, as will all of us, to advance the view you have advocated for some time.

I have not gone back to John Stevens, as I will be in a stronger position with him if I have prior approval by both you and Potter.

Sincerely,

The Chief Justice

lfp/ss