June 21, 1976

PERSONAL

Re: (74-1055 - Stone v. Powell  
     (74-1222 - Wolff v. Rice

Dear Lewis:

Confirming our telephone conversation:

1. I find the previous (print) version on p. 24 more tolerable than your proposed typed version.

2. With some slight changes I will let my concurring opinion stand.

Regards,

Mr. Justice Powell
June 21, 1976

Re: (74-1055 - Stone v. Powell
(74-1222 - Wolff v. Rice

Dear Lewis:

I have concluded to join your opinion in the above

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Regards,

Mr. Justice Powell

Copies to the Conference
MR. JUSTICE BRENNAN, dissenting.

Ask Grey about Note 6 saying J. Black's dissent in Karpman applied only to 2255 - not to H/C. In Note 5, Brennan says our holding applies to both!
MR. JUSTICE BRENNAN, dissenting.

The Court today holds "that 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." Ante, at 26. To be sure, my brethren are hostile to the continued vitality of the exclusionary rule as part and parcel of the Fourth Amendment's prohibition of unreasonable searches and seizures, as today's decision in United States v. Janis, post, at __, confirms. But this case, despite the veil of Fourth Amendment terminology employed by the Court, does not involve any question of the right of a defendant to have evidence excluded from use against him in his criminal trial when that evidence was seized in contravention of
rights ostensibly secured by the Fourth and Fourteenth Amendments. Rather, it involves the question of the availability of a federal forum for vindicating those federally guaranteed rights. Today's holding portends substantial evisceration of federal habeas corpus jurisdiction, and I dissent.

The Court's opinion does not specify the particular basis on which it denies federal habeas jurisdiction over claims of Fourth Amendment violations brought by state prisoners. In light of the explicit language of 28 U.S.C. § 2254, significantly not even mentioned by the Court, I can only presume that the Court intends to be understood to hold either that respondents are not "in custody in violation of the Constitution or laws of the United States," or that "considerations of comity and concerns for the orderly administration of justice," ante, at n. 11, are sufficient to allow this Court to rewrite jurisdictional statutes enacted by Congress. Neither ground of decision is tenable; the former is simply illogical, and the latter is an arrogation of power committed solely to the Congress.

I

Much of the Court's analysis implies that respondents are not entitled to habeas relief because they are not being unconstitutionally detained. Although purportedly adhering to the principle that the
Fourth and Fourteenth Amendments "require exclusion" of evidence seized in violation of their commands, ante, at 13, we are told that there has merely been an "assumption" in our cases that "the effectuation of the Fourth Amendment . . . requires the granting of habeas relief when a prisoner has been convicted in state court on the basis of evidence obtained in an illegal search and seizure . . . ." Ante, at 13. Applying a "balancing test," see, e.g., ante, at 19, 20, 21, 26, the Court then concludes that the "assumption" is unfounded and that the policies of the Fourth Amendment would not be implemented if claims to the benefits of the exclusionary rule were cognizable in collateral attacks on state court convictions.

Understandably the Court must purport to cast its holding in constitutional terms, because that avoids a direct confrontation with the incontrovertible facts that (a) the habeas statutes have heretofore always been construed to grant jurisdiction to entertain Fourth Amendment claims of both state and federal prisoners, that (b) Fourth Amendment principles have been enforced in numerous cases on collateral review of final convictions, and that (c) Congress has legislatively accepted our interpretation of congressional intent as to the necessary scope and function of habeas relief. Indeed, the Court reaches its result without explicitly overruling any of our plethora of precedents inconsistent with that result or even discussing
principles of stare decisis. Rather, the Court simply asserts, in essence, that the Justices joining those prior decisions or reaching the merits of Fourth Amendment claims overlooked the obvious constitutional dimension to the problem in merely "assuming" that granting collateral relief when state courts erroneously decide Fourth Amendment issues would effectuate the principles underlying that Amendment. But shorn of the rhetoric of "interest balancing" used to obscure what is at stake in this case, today's attempt to rest the decision on the Constitution must fail so long as Mapp v. Ohio, 367 U.S. 643 (1961), remains undisturbed.

Under Mapp, as a matter of federal constitutional law, a state court must exclude unconstitutionally obtained evidence from the trial of an individual whose Fourth and Fourteenth Amendment rights were violated by a search or seizure that directly or indirectly resulted in the acquisition of that evidence. As Calandra v. United States, 414 U.S. 338, 347 (1974), said, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." When a state court admits such evidence, it has committed a constitutional error, and unless that error is harmless under federal standards, see, e.g., Chapman v. California, 386 U.S. 18 (1967), it follows ineluctably that the defendant has been placed "in custody in violation of the Constitution" within the
comprehension of 28 U.S.C. § 2254. In short, it escapes me as to what logic can support the assertion that the defendant's unconstitutional confinement obtains during the process of direct review, no matter how long that process takes, but that the unconstitutionality then suddenly dissipates at the moment the claim is asserted in a collateral attack on the conviction.

The only conceivable rationale upon which the Court's "constitutional" thesis might rest is the statement that "the [exclusionary] rule is not a personal constitutional right . . . . Instead, 'the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.'" Ante, at 18, quoting United States v. Calandra, 414 U.S., at 348. Although my dissent in Calandra rejected, in light of contrary decisions establishing the role of the exclusionary rule, the premise that an individual has no constitutional right to have unconstitutionally seized evidence excluded from all use by the government, I need not dispute that point here.

For today's holding is not supportable in logic even under Calandra. However the Court reinterprets Mapp, and whatever the rationale now attributed to Mapp's holding or the purpose of the exclusionary rule, the prevailing constitutional rule is that unconstitutionally seized evidence cannot be admitted in the criminal trial of a person whose federal constitutional rights were violated by the search or seizure. The
erroneous admission of such evidence is a violation of the Constitution (Mapp inexorably means this at least, or there would be no basis for applying the exclusionary rule in state criminal proceedings), and an accused against whom such evidence is admitted has been convicted in derogation of rights mandated by, and is "in custody in violation of," the Constitution of the United States. Indeed, since state courts violate the strictures of the federal Constitution by admitting such evidence, then even if federal habeas review did not directly effectuate Fourth Amendment values, a proposition I deny, that review would nevertheless serve to effectuate what is concededly a constitutional principle concerning admissibility of evidence at trial.

The Court, assuming without deciding that respondents were convicted on the basis of unconstitutionally obtained evidence erroneously admitted against them by the state trial courts, acknowledges that respondents had the right to obtain a reversal of their convictions on appeal in the state courts or on certiorari to this Court. Indeed, since our rules relating to the time limits for applying for certiorari in criminal cases are non-jurisdictional, certiorari could be granted respondents even today and their convictions be reversed, despite today's decision. See also infra. And the basis for reversing that conviction would of course have to be that the State, in rejecting respondents' Fourth Amendment claims, had deprived them
of a right in derogation of the Federal Constitution. It is simply inconceivable therefore that that constitutional deprivation suddenly vanishes after the appellate process has been exhausted. And as between this Court on certiorari, and federal district courts on habeas, it is for Congress to decide what the most efficacious method is for enforcing federal constitutional rights and asserting the primacy of federal law. See infra. The Court, however, simply ignores the settled principle that for purposes of adjudicating constitutional claims Congress, which has the power to do so under Article III of the Constitution, has effectively cast the district courts sitting in habeas in the role of surrogate Supreme Courts.

Today's opinion itself starkly exposes the illogic of the Court's seeming premise that the rights recognized in Mapp somehow suddenly evaporate after all direct appeals are exhausted. For the Court would not bar assertion of Fourth Amendment claims on habeas if the defendant was not accorded "an opportunity for full and fair litigation of his claim in the state courts." Ante, at 1. See also id., at 12, quoting Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring); ante, at 18, 21, 23, 26 & n. 16. But this "exception" is impossible if the Court really means that the "rule" that Fourth Amendment claims are not cognizable on habeas is constitutionally based.
For if the Constitution mandates that "rule" because it is a "dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial or on appeal," ante, at 25, it is not equally a "dubious assumption" that those same police officials would fear that federal habeas review might reveal that the state courts had denied the defendant an opportunity to have a full and fair hearing on his claim that went undetected at trial or on appeal. And to the extent the Court is making the unjustifiable assumption that our certiorari jurisdiction is adequate to correct "routine" condonation of Fourth Amendment violations by state courts, surely it follows a fortiori that our jurisdiction is adequate to redress the "egregious" situation in which the state courts did not even accord a fair hearing on the Fourth Amendment claim. The "exception" thus may appear to make the holding more palatable, but it merely highlights the lack of a "constitutional" rationale for today's constriction of habeas jurisdiction.

Thus, the constitutional "interest balancing" approach to this case is untenable, and I can only view the constitutional garb in which the Court dresses its result as a disguise for rejection of the long-standing principle that there are no "second class" constitutional rights for purposes of federal habeas jurisdiction.
Another and even more troubling ground of today's decision -- in light of its portent for habeas jurisdiction generally -- may be the Court's novel reinterpretation of the habeas statute: this would read the statute as requiring the District Courts routinely to deny prisoners "in custody in violation of the Constitution or laws of the United States" habeas relief as a matter of judicial "discretion" -- a "discretion" created today contrary to the express statutory language -- because such claims are "different in kind" from other constitutional violations in that they "do not impugn the integrity of the fact-finding process," ante, at 12, and because application of such constitutional strictures "often frees the guilty." Ante, at 22. Much in the Court's opinion suggests that a construction of the habeas statutes to deny relief for non-"guilt-related" constitutional violations, based on vague notions of comity and federalism, see, e.g., ante, at n. 11, is the actual premise for today's decision. This is a harbinger of future eviscerations of the habeas statutes that plainly does violence to Congressional power to frame the statutory contours of habeas

jurisdiction. If today's decision were only that erroneous state court resolutions of Fourth Amendment claims did not render the defendant's resultant confinement "in violation of the Constitution" its premise of comity and federalism, even though exposed primarily in footnotes, would have been unnecessary, I am justified therefore
in apprehending that the groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction, if not for all grounds, then at least for claims -- for example, of claims of unconstitutional detention, of double jeopardy, self-incrimination, 

Miranda, invalid identification procedure, or entrapment -- which this Court later decides are not "guilt-related." For we are told that "[r]esort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government," including waste of judicial resources, lack of finality of criminal convictions, friction between the federal and state judiciaries, and incursions on "federalism." Ante, at n. 30. We are told that federal determination of Fourth Amendment claims merely involves "an issue that has no bearing on the basic justice of [the defendant's] incarceration," ibid., and that "the ultimate question [in the criminal process should invariably be] guilt or innocence." Ante, at 22; see also id., at n. 29; id., at 22, quoting Kaufman v. United States, 394 U.S. 217, 237 (1969) (Black, J., dissenting). We are told that the "policy arguments" of respondents to the effect that federal courts must be the ultimate arbiters of federal constitutional rights, and that our certiorari jurisdiction is inadequate to perform this task, "stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of
federal constitutional rights"; the Court, however, finds itself "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", and asserts that it is "unpersuaded" by "the argument that federal judges are more expert in applying federal constitutional law" because "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 application of federal law than his neighbor in the state courthouse."  

Ante, at n. 34. Finally, a revisionist history of the genesis and growth of federal habeas corpus jurisdiction is attempted, something wholly irrelevant, if today's decision were actually constitutionally rather than statutorily based.  

Ante, Part II.

To the extent the Court is actually premising its holding on an interpretation of 28 U.S.C. § 2243 or § 2254, it is overruling the heretofore settled principle that federal habeas relief is available to redress any denial of asserted constitutional rights, whether or not denial of the right affected the truth or fairness of the fact-finding process. As MR. JUSTICE POWELL recognized in proposing that the Court reevaluate the scope of habeas relief as a statutory matter in Schneckloth v. Bustamonte, 412 U.S. 218, 251 (1973) (concurring opinion), "on petition for habeas corpus on collateral review filed in
a federal district court, whether by state prisoners under 28 U.S.C. § 2254 or federal prisoners under § 2255, the present rule is that Fourth Amendment claims may be asserted and the exclusionary rule must be applied in precisely the same manner as on direct review."

This Court has on numerous occasions accepted jurisdiction over collateral attacks by state prisoners premised on Fourth Amendment violations, often over dissents that as a statutory matter such claims should not be cognizable. See, e.g., Lefkowitz v. Newsome, 420 U.S. 283, 292-293 & nn. 3, 9 (1975); Cardwell v. Lewis, 417 U.S. 583 (1974); Cady v. Dombrowski, 413 U.S. 433 (1973); Adams v. Williams, 407 U.S. 143 (1972); Whiteley v. Warden, 401 U.S. 560 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Harris v. Nelson, 394 U.S. 286 (1969); Mancusi v. DeForte, 392 U.S. 364 (1968); Carafas v. Lavallee, 391 U.S. 234 (1968); Warden v. Hayden, 387 U.S. 294 (1967). Consideration of the merits in each of these decisions reaffirmed the unrestricted scope of habeas jurisdiction, but each decision must be deemed overruled by today's holding.

Federal habeas corpus review of Fourth Amendment claims of state prisoners was merely one manifestation of the principle that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional
rights of personal liberty shall not be denied without the fullest
opportunity for plenary federal review. " Fay v. Noia, 372 U.S. 301,
424 (1963). This Court's precedents have been "premised in large
part on a recognition that the availability of collateral remedies is
necessary to insure the integrity of proceedings at and before trial
where constitutional rights are at stake. Our decisions leave no doubt
that the federal habeas remedy extends to state prisoners alleging that
unconstitutionally seized evidence was admitted against them." Kaufman
v. United States, supra, at 225. Some of those decisions explicitly
considered and rejected the "policies" referred to by the Court in
footnote 30 ante. E.g., Brown v. Allen, supra; Fay v. Noia, supra;
Kaufman v. United States, supra. There were no "assumptions" with
respect to the construction of the habeas statutes, but reasoned decisions
that those policies were an insufficient justification for shutting the
federal habeas door to litigants with federal constitutional claims in
light of such countervailing considerations as "the necessity that federal
courts have the 'last say' with respect to questions of federal law, the
inadequacy of state procedures to raise and preserve federal claims,
the concern that state judges may be unsympathetic to federally created
rights, [and] the institutional constraints on the exercise of this Court's
certiorari jurisdiction to review state convictions," id., at 225-226, as
well as the fundamental belief "that adequate protection of constitutional

As Mr. Justice Harlan, who had dissented from many of the cases initially construing the habeas statutes, readily recognized, habeas jurisdiction as heretofore accepted by this Court was "not only concerned with those rules which substantially affect the fact-finding apparatus of the original trial. Under the prevailing notions, Kaufman v. United States, supra, at 224-226, the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." Desist v. United States, 394 U.S. 244, 263-264 (1969) (dissenting opinion) (emphasis supplied). The availability of collateral review assures "that the lower federal and state courts toe the constitutional line." Id., at 264. "[H]abeas lies to inquire into every constitutional defect in any criminal trial, where the petitioner remains 'in custody' because of the judgment in that trial, unless the error committed was knowingly and deliberately waived or constitutes mere harmless error. That seems to be the implicit premise of Brown v. Allen, supra, and the clear purport of Kaufman v. United States, supra . . . . The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that
it provides a quasi-appellate review function, forcing trial and appellate courts in both the federal and state system to toe the constitutional mark." Mackey v. United States, 401 U.S. 667, 685-687 (1971) (opinion of Harlan, J.). See also Brown v. Allen, supra, at 508 ("[N]o binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration of what procedurally may be deemed fairness, may have misconceived a federal constitutional right.'); Fay v. Noia, supra, at 422. In effect, habeas jurisdiction is a deterrent to unconstitutional actions by trial and appellate judges, and a safeguard to ensure that rights secured under the Constitution and federal laws are not merely honored in the breach. ","Id., at 401-402. "[T]he historical role of the writ of habeas corpus [is that of] an effective and imperative remedy for detentions contrary to fundamental law." Id., at 438.

At least since Brown v. Allen, supra, detention emanating from judicial proceedings in which constitutional rights were denied has been deemed "contrary to fundamental law," and all constitutional claims have thus been cognizable on federal habeas corpus. There is no foundation in the language or history of the habeas statutes for discriminating between types of constitutional transgressions, and efforts
to relegate certain categories of claims to the status of "second-class rights" by excluding them from that jurisdiction have been repulsed.

Today's opinion, however, marks the triumph of those who have sought to establish a hierarchy of constitutional rights, and to deny for all practical purposes a federal forum for review of those rights considered less worthy or important. Without even the slightest deference to principles of stare decisis or acknowledging Congress' failure for two decades to alter the habeas statutes in light of our interpretation of congressional intent to render all federal constitutional contentions cognizable on habeas, the Court today rewrites Congress' jurisdictional statutes as heretofore construed and bars access to federal courts by state prisoners with constitutional claims distasteful to a majority of my Brethren. But even ignoring principles of stare decisis dictating that Congress is the appropriate branch for embarking on such a fundamental shift in the jurisdiction of the federal courts, I can find no adequate justification elucidated by the Court for concluding that habeas relief for all federal constitutional claims is no longer compelled under the reasoning of Brown, Fay, and Kaufman.

I would address the Court's concerns for effective utilization of scarce judicial resources, finality principles, federal-state friction, and notions of "federalism" only long enough to note that such concerns carry no more force with respect to non-"guilt-related" constitutional claims than they do with respect to claims that affect the accuracy of
the fact-finding process. Congressional conferral of federal habeas jurisdiction for the purpose of entertaining petitions from state prisoners necessarily manifested a conclusion that such concerns could not be controlling, and any argument for discriminating among constitutional rights must therefore depend on the nature of the constitutional right involved.

The Court, as it must to justify such discrimination, focusing on Fourth Amendment rights, argues that habeas relief for non-"guilt-related" constitutional claims is not mandated because such claims do not affect the "basic justice" of a defendant's detention, see ante, at n. 30; this is presumably because the "ultimate goal" of the criminal justice system is "truth and justice." E.g., ante, at 22-23 & n. 29.

This denigration of constitutional guarantees and constitutionally mandated procedures, relegated by the Court to the status of mere utilitarian tools, must appall citizens taught to expect judicial respect and support for their constitutional rights. Even if punishment of the "guilty" were society's highest value -- and procedural safeguards denigrated to this end -- in a constitution that a majority of the members of this Court would prefer, that is not the ordering of priorities under the Constitution forged by the Framers, and this Court's sworn duty is to uphold that Constitution and not to frame our own. The procedural safeguards mandated in the Framers' Constitution are not admonitions
to be tolerated to the extent they serve functional purposes that ensure that the "guilty" are punished and the "innocent" freed; rather, every guarantee enshrined in the Constitution, our basic charter and the guarantor of our most precious liberties, is by it endowed with an independent vitality and value, and this Court is not free to curtail those constitutional guarantees even to punish the most obviously guilty. Particular constitutional rights that do not affect the fairness of fact-finding procedures cannot for that reason be denied at the trial itself. What possible justification then can there be for denying vindication of such rights on federal habeas when state courts do deny those rights at trial? To sanction disrespect and disregard for the Constitution in the name of protecting society from lawbreakers is to make the government itself lawless and to subvert those values upon which our ultimate freedom and liberty depends. "The history of American freedom is, in no small measure, the history of procedure," Malinski v. New York, 324 U.S. 401, 414 (1945) (opinion of Frankfurter, J.), and as Mr. Justice Holmes so succinctly reminded us, it is "a less evil that some criminals should escape than that the Government should play an ignoble part." Olmstead v. United States, 277 U.S. 438, 470 (1927) (dissenting opinion). "[I]t is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon State power and may be invoked by those morally
unworthy. " Brown v. Allen, supra, at 498. Enforcement of federal constitutional rights that redress constitutional violations directed against the "guilty" is a particular function of federal habeas review, lest judges trying the "morally unworthy" be tempted not to execute the supreme law of the land. State judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given tenure designed to immunize them from such influences. The federal habeas statutes reflect the Congressional judgment that such detached federal review is a salutary safeguard against any detention of an individual "in violation of the Constitution or laws of the United States."

Federal courts have the duty to carry out the congressionally assigned responsibility to shoulder the ultimate burden finally to adjudge whether detentions violate federal law, and today's decision substantially denies that duty. The Court does not, because it cannot, dispute that institutional constraints totally preclude any possibility that this Court can adequately oversee whether state determinations properly apply to federal law. However, although I fully agree that state courts "have a constitutional obligation to safeguard personal liberties and to uphold federal law," and that there is no "general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states," and further may assume that
federal judges are not "more expert in applying federal constitutional law;" ante, at n. 34, I cannot agree that it follows that, as the Court today holds, federal court determination of almost all Fourth Amendment claims of state prisoners should be barred, and state court resolution be insulated from the federal review Congress intended. For as Mr. Justice Frankfurter so aptly framed the issue in rejecting similar contentions in construing the habeas statutes in Brown v. Allen, supra:

"Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution. . . . It is not for us to determine whether this power should have been vested in the federal courts. . . . [T]he wisdom of such a modification in the law is for Congress to consider, particularly in view of the effect of the expanding concept of due process upon enforcement by the States of their criminal laws. It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress. By giving the federal courts that jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims."

". . . But the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have." Id., at 499-500.

"State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide." Id., at 506.
"Congress has the power to distribute among the courts of the States and of the United States jurisdiction to determine federal claims. It has seen fit to give this Court power to review errors of federal law in State determinations, and in addition to give to the lower federal courts power to inquire into federal claims, by way of habeas corpus. . . . But it would be in disregard of what Congress has expressly required to deny State prisoners access to the federal courts.

". . . Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this Court, does not mean that it allows a lower court to overrule a higher court. It merely expresses the choice of Congress how the superior authority of federal law should be asserted." 11 Id., at 508-510 (emphasis supplied).

Congress' action following Townsend v. Sain, supra, and Fay v. Noia, supra, emphasized "the choice of Congress how the superior authority of federal law should be asserted" in federal courts. Townsend v. Sain outlined the duty of federal habeas courts to conduct fact-finding hearings with respect to petitions brought by state prisoners, and Fay v. Noia defined the contours of the "exhaustion of state remedies" prerequisite in § 2254 in light of its purpose of according state courts the first opportunity to correct their own constitutional errors. Congress
expressly modified the habeas statutes to incorporate the Townsend standards so as to accord a limited and carefully circumscribed res judicata effect to the factual determinations of state judges. But Congress did not alter the principle of Brown, Fay, and Kaufman that collateral relief is to be available with respect to any constitutional claim and that federal district judges, subject to review in the Courts of Appeals and this Court, are to be the spokesmen of the supremacy of federal law. Indeed, subsequent congressional efforts to amend those jurisdictional statutes to effectuate the result that my Brethren accomplish by judicial fiat have consistently proved unsuccessful.

There remains, as noted before, no basis whatsoever in the language or legislative history of the habeas statutes for establishing such a hierarchy of federal rights; certainly there is no constitutional warrant in this Court to override a Congressional determination respecting federal court review of decisions of state judges determining constitutional claims of state prisoners.

In any event, respondents' contention that Fourth Amendment claims, like all other constitutional claims, must be cognizable on habeas, does not rest on the ground attributed to them by the Court -- that the state courts are rife with animosity to the constitutional mandates of this Court. It is one thing to assert that state courts, as a
general matter, accurately decide federal constitutional claims; it is quite another to generalize from that limited proposition to the conclusion that, despite congressional intent that federal courts sitting in habeas must stand ready to rectify any constitutional errors that are nevertheless committed, federal courts are to be judicially precluded from ever considering the merits of whole categories of rights which are to be accorded less procedural protection merely because the Court says they do not affect the accuracy or fairness of the fact-finding process. "Under the guise of fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts. Rules which in effect treat all these cases indiscriminately as frivolous do not fall far short of abolishing this head of jurisdiction." *Brown v. Allen*, supra, at 498-499. To the extent state trial appellate judges faithfully, accurately, and assiduously apply federal law and the constitutional principles enunciated by the federal courts, such determinations will be vindicated on the merits when collaterally attacked. But to the extent federal law is erroneously applied by the state courts, there is no authority in this Court to deny defendants the right to have those errors ameliorated by way of federal habeas. Furthermore, some might be expected to dispute the academic's dictum seemingly accepted by the Court that a federal judge is not necessarily more skilled
than a state judge in applying federal law. See ante, at n. 34. For it may well be argued that the Supremacy Clause of the Constitution proceeds on a different premise.

If proof of the necessity of the federal habeas jurisdiction were required, the disposition by the state courts of the underlying Fourth Amendment issues presented by these cases supplies it. In No. 74-1055, respondent was arrested pursuant to a statute which obviously is unconstitutional under *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Even apart from its vagueness and concomitant potential for arbitrary and discriminatory enforcement, the statute purports to criminalize the presence of one unable to account for his presence in a situation where a reasonable person might believe that public safety demands identification. See ante, at n. 1. It is no crime in this country not to have "identification papers" on one's person, and the statute is a palpable effort to enable police to arrest individuals on the basis of mere suspicion, and to facilitate detention even when there is no probable cause to believe a crime has been or is likely to be committed. See 405 U.S., at 168-170. Without elaborating on the various arguments buttressing this result, including the self-incrimination aspects of the ordinance and its attempt to circumvent Fourth Amendment safeguards in a situation that, under *Terry v. Ohio*, 392 U.S. 1 (1968), would at most permit law enforcement officials to conduct a protective search
for weapons, I would note only that the ordinance, due to the Court's failure to address its constitutionality today, remains in full force and effect, thereby affirmatively encouraging further Fourth Amendment violations. Moreover, the fact that only a single state judge ever addressed the validity of the ordinance, and the lack of record evidence as to why or how he rejected respondent's claim, gives me pause as to whether there is any real content to the Court's "exception" for bringing Fourth Amendment claims on habeas in situations in which state prisoners were not accorded an opportunity for a full and fair state court resolution of those claims; that fact also makes irrelevant the Court's presumption that deterrence is not furthered when there is federal habeas review of a search-and-seizure claim that was erroneously rejected by "two or more tiers of state courts." Ante, at 23.

Even more violative of constitutional safeguards is the manner in which the Nebraska courts dealt with the merits in respondent Rice's case. Indeed, the method in which Fourth Amendment principles were applied in the Nebraska Supreme Court is paradigmatic of Congress' concern respecting attempts by state courts to structure Fourth Amendment jurisprudence so as not to upset convictions of the "guilty" or the "unworthy." As Judge Urbom fully detailed in two thorough and thoughtful opinions in the District Court on Rice's petition for habeas, the affidavit upon which the Omaha police obtained a warrant and thereby searched
Rice's apartment was clearly deficient under prevailing constitutional standards, and no extant exception to the warrant requirement justified the search absent a valid warrant. Yet the Nebraska Supreme Court upheld the search on the alternative and obviously untenable ground that there is no Fourth Amendment violation if a defective warrant is supplemented at a suppression hearing by facts that theoretically could have been, but were not, presented to the issuing magistrate. Such a construction of the Fourth Amendment would obviously abrogate the warrant requirement of the Fourth Amendment and the principle that its "protection consists in requiring that those inferences [as to whether the data available justify an intrusion into a person's privacy] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948). Yet the Court today even casts doubt on that heretofore unquestioned precept of Fourth Amendment jurisprudence by reserving the question whether such supplementation can retrieve official action from the realm of unconstitutionality. See ante, at n. 3. Particularly in an area such as the Fourth Amendment, where principles guiding police behavior should be as simple and unambiguous as possible, this novel suggestion is totally unacceptable. Indeed, it would even permit police officials to escape liability in such situations when damage actions are brought by innocent
victims of a search, since the officers could claim they believed in reasonable good faith that all evidence need no longer be presented to a neutral magistrate. It is disturbing that the Court simply ignores the statement of Mr. Justice Harlan, speaking for the Court in rejecting a similar contention in Whiteley v. Warden, 401 U.S. 560, 565 n. 8: "Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. See Aguilar v. Texas, 378 U.S. 108, 109 n. 1. A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless.

III

Other aspects of today's decision are deserving of comment but one particularly merits special attention. Respondents, relying on the explicit holding of Fay v. Noia, supra, that a petition for a writ of certiorari is not a necessary predicate for federal habeas relief, and accepting at face value the clear import of our prior habeas cases that all unconstitutional confinement may be challenged on federal habeas, contend that any new restriction on state prisoners' ability to obtain habeas relief should be held to be prospective only. The Court, however, dismisses respondents' effective inability to have a single federal court pass on their federal constitutional claims with the remark that
"respondents were, of course, free to file a timely petition for certiorari prior to seeking federal habeas relief." Ante, at 36. Of course, federal review in this Court is a matter of grace and is grace seldom bestowed? The failure to limit today's ruling to prospective application stands in sharp contrast to recent cases that have so limited decisions expanding or affirming constitutional rights. To be sure, the fact that the time limits to seeking relief under our certiorari jurisdiction with respect to criminal cases emanating from state courts are non-jurisdictional would dictate that respondents are at least free to file out-of-time certiorari petitions; under the Court's "direct review" distinction delineated today, we would still have authority to address the substance of respondents' eminently meritorious Fourth Amendment claims. But I have little confidence that four Justices would agree which only underscores Congress' wisdom in mandating a broad federal habeas jurisdiction for the District Courts. These respondents are owed at least review in this Court since it shuts the doors of the District Courts in decisions which mark such a stark break with our precedents on the scope of habeas relief.

IV

In summary, while unlike the Court, I consider that the exclusionary rule is a constitutional ingredient of the Fourth Amendment, any modification of it requires a justification not provided today. The Court
does not disturb the holding of Mapp v. Ohio that, as a matter of federal constitutional law, illegally obtained evidence must be excluded from the trial of a criminal defendant whose rights were transgressed during the search that resulted in acquisition of the evidence. In light of that constitutional rule it is a matter for Congress, not this Court, to prescribe what federal courts are to review claims of state prisoners of error by state courts. Until this decision, our cases have never departed from the construction of the habeas statutes as embodying a congressional intent that, however substantive constitutional rights are delineated or expanded, those rights may be asserted as a procedural matter under federal habeas jurisdiction. Employing the transparent tactic that today's is a decision construing the Constitution, the Court usurps an authority vested by the Constitution in the Congress to reassign federal judicial responsibility to review state prisoners' claims of failure of state courts to redress violations of their Fourth Amendment rights. Our jurisdiction is eminently unsuited for that task, and as a practical matter the only result of today's holding will be that denials by state courts of claims by state prisoners of violations of their Fourth Amendment rights will go unreviewed by a federal tribunal. I fear that the same treatment ultimately will be accorded state prisoners' claims of violations of other constitutional rights; thus the potential ramifications of this case for
federal habeas jurisdiction generally are ominous. The Court no
longer is content just to restrict the constitutional rights of the
citizenry, it now is embarked on a campaign to water down all such
rights by the device of foreclosing resort to the federal habeas remedy
for their redress.

I would affirm the judgments of the Courts of Appeals.
FOOTNOTES

1/
I say "ostensibly" secured both because it is clear that the Court has yet to make its final frontal assault on the exclusionary rule, and because the Court has recently moved in the direction of holding that the Fourth Amendment has no substantive content whatsoever, See, e.g., United States v. Martinez-Fuerte, ___ U.S. ___ (1976) (Brennan, J., dissenting), and cases cited therein.

2/
28 U.S.C. § 2254 provides:

§ 2254. State custody; remedies in State courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that 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.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;
(2) that the factfinding 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 fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more
of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

§ 2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it
appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

4/

See also, e.g., ante, at 18 ("the Court [in Kaufman v. United States, 394 U.S. 217 (1969)] assumed that implementation of the Fourth Amendment also requires the consideration of search-and-seizure claims upon collateral review of state convictions"); id. at 21 ("[t]he answer [to the question whether Fourth Amendment claims may be raised by state prisoners in federal habeas corpus proceedings] is to be found by weighing the utility of the exclusionary rule against
the costs of extending it to collateral review of Fourth Amendment
claims); id., at 25 ("the additional contribution, if any, of the
consideration of search-and-seizure claims of state prisoners on
review is small in relation to the costs . . . . The view that the
deterrence of Fourth Amendment violations would be furthered rests
on the dubious assumption that law enforcement authorities would
fear that federal habeas review might reveal flaws in a search or
seizure that went undetected at trial and on appeal."); id., at 26 ("in
this context the contribution of the exclusionary rule, if any, to the
effectuation of the Fourth Amendment is minimal and the substantial
societal costs of application of the rule persis with special force").

5/
To the extent the Court is rendering a constitutional
holding, there is obviously no distinction between claims brought by
state prisoners under 28 U.S.C. § 2254 and those brought by federal
prisoners under 28 U.S.C. § 2255. Thus, the Court overrules not
only a long line of cases concerning availability of habeas relief to
state prisoners, but also a similarly long line of cases concerning
availability of counterpart § 2255 relief for federal prisoners.

6/
Mr. Justice Black, dissenting in Kaufman v. United States,
394 U.S. 217 (1969), argued that in light of his view of the purposes
of the exclusionary rule Fourth Amendment claims should not, as a matter of statutory construction, be cognizable on federal habeas. However, he never made the suggestion, apparently embraced by the Court today, that such claims cannot as a constitutional matter be entertained on habeas jurisdiction, even though Congress fashioned that jurisdiction at least in part to compensate for the inadequacies inherent in our certiorari jurisdiction on direct review. Cf. ante, at 22 & n. 15. Indeed, Kaufman did not ignore the dissenting Justices' arguments; rather, it noted that habeas jurisdiction, apart from any effect on police behavior, serves the independent function of "insur[ing] the integrity of proceedings at and before trial where constitutional rights are at stake." 394 U.S., at 225. See also infra.

As to the argument that our prior cases do not resolve the issue decided today because "only in the most exceptional cases will we consider issues not raised in the petition," see ante, at n. 15, that claim is only valid to the extent the issue is one of construing congressional intent as to when with respect to cases properly within the district court's power to grant relief, habeas relief should nevertheless be denied as a matter of discretion. But the extent a person against whom unconstitutionally seized evidence was admitted at trial after a full and fair hearing is not "in custody in violation of the Constitution," there would be no jurisdiction even to entertain a habeas petition, see note 2, supra, and such subject matter questions are always open -- and must
be resolved -- at any stage of federal litigation. See, e.g., Louisville & Nashville R. R. v. Mottley, 211 U.S. 149 (1908); Fed. R. Civ. P. 12(h). It borders on the incredible to suggest that so many Justice for so long merely "assumed" to answer to such a basic jurisdictional question.

7/ See also id., at 351, noting "inadmissibility of the illegally seized evidence in a subsequent prosecution of the search victim."

8/ Only once does the Court advert to any temporal distinction between direct review and collateral review as a possible reason for precluding the raising of Fourth Amendment claims during the former and not during the latter proceedings. See ante, at 25 (arguing that deterrence would not be "enhanced" by the risk "that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings years after the incarceration of the defendant"). Of course, it is difficult to see how the Court could constitutionalize any such asserted temporal distinctions, particularly in light of the differential speed with which criminal cases proceed even on direct appeal.

9/ It is unnecessary here to expand upon my reasons for

10/ The failure to forthrightly to confront this fact is obviously a core defect in the Court's analysis. For to the extent Congress has accorded the federal district courts a role in our constitutional scheme functionally equivalent to that of the Supreme Court with respect to review of state court resolutions of federal constitutional claims, it is evident that the Court's direct/collateral review distinction for constitutional purposes simply collapses. Indeed, logically extended, the Court's analysis, which basically turns on the fact that law enforcement officials cannot anticipate a second court finding constitutional errors after one court has fully and fairly adjudicated the claim and found it to be meritless, would preclude any Supreme Court review on direct appeal or even state appellate review if the trial court fairly addressed the Fourth Amendment claim on the merits. The proposition is certainly frivolous if *Mapp* is constitutionally grounded. Yet such is the essential thrust of the Court's view that the unconstitutional admission of evidence is tolerable merely because police officials cannot be deterred from unconstitutional conduct by the possibility that a favorable "admission"
decision would be followed by a later unfavorable "exclusion" decision.

The Court's arguments respecting the cost/benefit analysis of applying the exclusionary rule on collateral attack also have no merit. For all of the "costs" of applying the exclusionary rule on habeas should already have been incurred at the trial or on direct review if the state court had not misapplied federal constitutional principles. As such, these "costs" were deemed to be outweighed when the exclusionary rule was fashioned. The only proper question on habeas is whether federal courts, acting under congressional directive to have the last say as to enforcement of federal constitutional principles, are to permit the states free enjoyment of the fruits of a conviction which by definition were only obtained through violations of the constitution as interpreted in Mapp. Whether any "educative" function is served by such habeas review, see ante, at 25, is a lesson that, tragically for an individual's constitutional rights, will not be lost on state courts after today's decision. See infra.

Another line of analysis exposes the fallacy of treating today's holding as a constitutional decision. Constitutionally, no barrier bars a state defendant from immediately seeking a federal court's injunction against any state use of unconstitutionally seized evidence against him at trial. However, equitable principles have operated to foreclose cutting short the normal initial adjudication of such constitutional defenses in the course of a criminal prosecution, Dombrowski v.
Pfister, 380 U. S. 479, 485 n. 3 (1965), subject to ultimate federal review either on direct review or collaterally through habeas. See, also, Younger v. Harris, 401 U. S. 37 (1971). Moreover, considerations of comity, now statutorily codified as the exhaustion requirement of § 2254, and not lack of power, dictate that federal review by delayed pending the initial state court determination. But delay only was the price, "else a rule of timing would become a rule circumscribing the power of the federal courts on habeas, in defiance of unmistakable congressional intent." Fay v. Noia, 372 U. S. 391, 420 (1963); see id., at 417-426. The Court today, however, converts this doctrine dictating the timing of federal review in a doctrine precluding federal review; such action is in keeping with the regrettable recent trend of barring the federal courthouse door to individuals with meritorious claims. See, e. g., Warth Rizzo, E. Ky., Francis. Although the federal courts could have been the forum for the initial "opportunity for a full and fair hearing" of Fourth Amendment claims of state prisoners that the Court finds sufficient, non-constitutional concerns dictated temporary absten­tion; but have so abstained, federal courts are, as a constitutional matter, now ousted from ever determining the claims, since the courts to which they initially deferred are all that this Court deems necessary for protecting rights essential to preservation of the Fourth Amendment. Such hostility to federal jurisdiction to redress violations of rights secured by the federal Constitution is profoundly disturbing.
In arguing in the Court's "deterrence" idiom, I emphasize that I am accepting the Court's assumptions concerning the purposes of the exclusionary rule, only to demonstrate that on its own premises, today's decision is insupportable.

Today's decision is only another that overrides decisions construing the habeas statutes in order to cabin the scope of habeas relief for criminal defendants. See, e.g., Francis v. Henderson, ___ U.S. ___; Estelle v. Williams, ___ U.S. ___.

Others might be claims of official surveillance of attorney-client communications, government acquisition of evidence through unconscionable means, see, e.g., Rochin v. California, 342 U.S. 165 (1952), denial of the right to a speedy trial, government administration of a "truth serum, see Townsend v. Sain, 372 U.S. 293 (1963), or the obtaining of convictions under statutes that contravene First Amendment rights when a properly drawn statute could have been applied to the particular defendant's conduct.

The overruling of Lefkowitz v. Newsome, decided only last Term, is particularly ironic. That case held that a state defendant
could file a federal habeas corpus petition asserting Fourth Amendment claims, despite a subsequent guilty plea, when the state provided for appellate review of those claims. Three Justices dissented and would have held, as a statutory matter, that Fourth Amendment claims are not cognizable on federal habeas, but none suggested the "constitutional" thesis suggested by the Court as the ostensible ration decided for today's cases.

Although not expressly overruling Kaufman v. United States, 394 U.S. 217 (1969) and its progeny involving collateral review of Fourth Amendment claims of federal prisoners (indeed, the Court accomplishes today's results without expressly overruling or distinguishing any of our diametrically opposed precedents), Kaufman obviously does not survive. This tactic has become familiar in earlier decisions this Term. Cf. also, Hudgens v. NLRB, ___ U.S. ___; Francis v. Henderson, ___ U.S. ___; Greer v. Spock, ___ U.S. ___.

15/ My Brother White's hypothetical of two confederates in crime, see post at , fully demonstrates the type of discrimination that Congress clearly sought to avoid if, out of the full universe of constitutional rights, certain rights could be vindicated only by resort to this Court's certiorari jurisdiction; indeed the anomaly of today's holding would be even more clear if, in that hypothetical situation,
the first defendant had sought, and we had denied, certiorari.

The Court also notes that "attention... is diverted" when trial courts address exclusionary rule issues, ante, at 22, and with the result that application of the rule "often frees the guilty." 

Ibid. Of course, those "arguments" are true with respect to every constitutional guarantee governing administration of the criminal justice system.

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. 

Olmstead v. United States, 277 U.S. 438, 479 (1928). See also id., at 483, 485.

"We are mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness." Miller v. United States, 357 U.S. 301, 313 (1958). See also Boyd v. United States, 116 U.S. 616, 635 (1886); Weeks v. United States, 232 U.S. 383, 392-394 (1914).

See *Brown v. Allen*, supra, at 497-499. "The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities." *Id.*, at 498.

And, the Nebraska Supreme Court fell into patent error in citing *Whiteley* for the proposition that "the affidavit may be supplemented by testimony of additional evidence known to the police." 199 N.W. 2d 480, 488.