June 23, 1976

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

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference
Dear Bill:

Please join me in your dissent.

Sincerely,

T. M.

Mr. Justice Brennan

c: The Conference
MEMORANDUM TO THE CONFERENCE:

Holds for Stone v. Powell, No. 74-1055 and Wolff v. Ric, No. 74-1222

Two cases are being held for Powell & Rice.


The issue in this case is whether the exclusionary rule should be applied in circumstances where the federal officers executed a search warrant not in compliance with **Aguilar-Spinelli**. Federal agents obtained a warrant to search a restaurant basement for illegal aliens. The warrant was based on an affidavit of a federal investigator indicating:

(i) many aliens had been arrested at the restaurant in the past; 
(ii) a named informant, himself an illegal alien who had been employed by and resided in the restaurant basement for the previous year and a half, had informed the investigator that there were a number of illegal aliens living in the basement. The search revealed 7 aliens and respondents were indicted for harboring and concealing them.

The DC granted respondent's motion to suppress the evidence derived from the search on the ground the affidavit
failed to specify adequately the source of the informant's conclusion that the aliens were illegally in the country. CA 2 affirmed, rejecting the government's contention that the exclusionary rule should not be invoked where federal agents in good-faith attempt to comply with the Fourth Amendment.

The S.G. raises the good faith issue here, expressly declining to seek review of CA 2's conclusions regarding the sufficiency of the warrant. There was no finding below that government agents acted in good faith since in the DC the government litigated only the question of whether the affidavit established probable cause. I will vote to grant, however, as the good faith issue is otherwise squarely presented.

2. LaVallee v. Mungo, No. 75-696.

In this case CA 2 ordered the granting of a writ of habeas corpus upon the petition of a state prisoner who claimed that his arrest was without probable cause. I will
MEMORANDUM

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

DATE: June 24, 1976

Stone and Powell

Having made a preliminary review of Justice Brennan's dissent, I record some random thoughts and questions that we may, or may not, think important or relevant enough to justify changes in or additions to our opinion.

1. **Kaufman**. As we anticipated, the dissent states that the effect of our decision is to overrule **Kaufman**, and criticizes us for lacking the candor to concede this. In footnote 5, the dissent states that if our decision is a constitutional holding "there is obviously no distinction between claims brought by state prisoners until § 2254 and those brought by federal prisoners under § 2255. There is much to the view that **Kaufman** has been undercut. Subject to conferring with you, we might simply state in a note that although the holding in **Kaufman** under 2255 is not directly implicated in this case, our decision today necessarily undercuts the rationale of **Kaufman**.

2. Perhaps the most telling point in the dissent is the argument that, by enunciating a constitutional rule, we hold in effect that federal courts do not have jurisdiction on habeas corpus to review the action of state courts with respect to Fourth Amendment claims. I'm inclined to think
we should answer this argument. I do not view our decision as jurisdiction. It is clear, of course, that a federal court on habeas may decide whether there was a full and fair opportunity to present the claim in a state court.

This brings to mind Justice Stewart's inquiry whether there was room, under our rationale, for habeas review of some egregious blunder by a state court. I would like to try writing a note, as a reply to the dissent's assertion that we are denying habeas jurisdiction (denying the superior right of federal courts to review state judgments). We can say that the dissent apparently misconceives both the rationale and the scope of today's decision; that it is clear from the opinion that the fairness of the state courts' review of the Fourth Amendment claim is subject to federal scrutiny on habeas corpus.

The difficulty would be in attempting to articulate or elaborate on what we mean by a "full and fair" opportunity. This sounds "procedural", and I would so interpret it in most situations. But procedural and substantive matters frequently are blurred and indistinguishable in fact. If a trial court declined, on a motion to suppress, to hear evidence as to the Fourth Amendment violation, we would have a clear denial of a full and fair opportunity. Assume, however,
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MR. CHIEF JUSTICE BURGER, concurring.

I concur in the Court's opinion. By way of dictum, and somewhat hesitantly, the Court notes that the holding in this case leaves undisturbed the exclusionary rule as applied to criminal trials. 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. The time has come to modify its reach, even if it is retained for a small and limited category of cases.

Over the years, the strains imposed by reality, in terms of the costs to society and the bizarre miscarriages of justice that have been experienced because of the exclusion of reliable evidence when the "constable blunders", 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 the rule has become a doctrinaire result in search of validating reasons.

In evaluating the exclusionary rule, it is important to bear in mind exactly what the rule accomplishes. Its function is simple -- the exclusion of truth from the fact-finding process. Cf. Frankel, The Search for Truth -- An Umpireal View, 31st Annual Benjamin N. Cardozo Lecture, Assn. of the Bar of the City of New York, Dec. 16, 1974. The operation of the rule is therefore unlike that of the Fifth Amendment's protection against compelled self-incrimination. A confession produced after intimidating or coercive interrogation is inherently dubious. If a suspect's will has been overborne, a cloud hangs over his custodial admissions; the exclusion of such statements is based at least in part on their lack of reliability. This is not the case as to reliable evidence -- a pistol, a packet of heroin, counterfeit
money, or the body of a murder victim -- which may be judicially declared to be the result of an "unreasonable" search. The reliability of such evidence is beyond question; its probative value is certain.

This remarkable result, virtually unknown to the common-law tradition, had its genesis in a case calling for the protection of private papers against governmental intrusions. **Boyd v. United States**, 116 U.S. 616 (1886). See also **Weeks v. United States**, 232 U.S. 383 (1914). In **Boyd**, the Court held that private papers were inadmissible because of the Government's violation of the Fourth and Fifth Amendments. In **Weeks**, the Court excluded private letters seized from the accused's home by a federal official acting without a warrant. In both cases, the Court had a clear vision of what it was seeking to protect. What the Court said in **Boyd** shows how far we have strayed from the original path:

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ **toto coelo.**" 116 U.S., at 623. (Emphasis added).

In **Weeks**, the Court emphasized that the Government, under settled principles of common law, had no right to keep a person's private
papers. The Court noted that the case did not involve "burglar's tools or other proofs of guilt . . . ." 232 U.S., at 392 (Emphasis added).

From this origin, the exclusionary rule has been changed in focus entirely. It is now used almost exclusively to exclude from evidence articles which are unlawful to be possessed or tools and instruments of crime. Unless it can be rationally thought that the Framers considered it essential to protect the liberties of the people to hold that which is unlawful to possess, then our constitutional course has taken a most bizarre tack.

The drastically changed nature of judicial concern -- from the protection of personal papers or effects in one's private quarters to the exclusion of that which the accused had no right to possess -- is only one of the more recent anomalies of the rule. The original incongruity was the rule's inconsistency with the general proposition that "our legal system does not attempt to do justice incidentally and to enforce penalties by indirect means." 8 Wigmore, Evidence § 2181, at 6 (McNaughten rev. ed. 1961). The rule is based on the hope that events in the courtroom or appellate chambers, long after the crucial acts took place, will somehow modify the way in which policemen conduct themselves. A more clumsy, less direct means of imposing sanctions is difficult to imagine, particularly since the issue whether
the policeman did indeed run afoul of the Fourth Amendment is often not resolved until years after the event. The "sanction" is particularly indirect when, as in No. 74-1222, the police go before a magistrate, who issues a warrant. Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law. Imposing an admittedly indirect "sanction" on the police officer in that instance is nothing less than sophisticated nonsense.

Despite this anamoly, the exclusionary rule now rests solely upon its purported tendency to deter police misconduct. United States v. Janis, ___ U.S. ___ (1976); United States v. Calandra, 414 U.S. 338, 347 (1974), although, as we know, the rule has long been applied to wholly good-faith mistakes and to purely technical deficiencies in warrants. Other rhetorical generalizations, including the "imperative of judicial integrity", have not withstood analysis as more and more critical appraisals of the rule's operation have appeared. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970). Indeed, settled rules demonstrate that the "judicial integrity" rationalization is fatally flawed. First, the Court has refused to entertain claims that evidence was unlawfully seized unless the claimant could demonstrate that he had standing to press the contention.
Alderman v. United States, 394 U.S. 165 (1969). If he could not, the evidence, albeit secured in violation of the Fourth Amendment, is admissible. Second, as one scholar has correctly observed:

"[I]t is difficult to accept the proposition that the exclusion of improperly obtained evidence is necessary for 'judicial integrity' when no such rule is observed in other common law jurisdictions such as England and Canada, whose courts are otherwise regarded as models of judicial decorum and fairness." Oaks, supra, at 669.

Despite its avowed deterrent objective, proof is lacking that the exclusionary rule, a purely judge-created device based on "hard cases", serves the purpose of deterrence. Notwithstanding Herculean efforts, no empirical study has been able to demonstrate that the rule does in fact have any deterrent effect. In the face of dwindling support for the rule some would go so far as to extend it to civil cases. United States v. Janis, supra.

To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention -- and surely its extension, to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law. 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 obviously guilty criminals free to ply their trade.
In my view, it is an abdication of judicial responsibility to exact such exorbitant costs from society purely on the basis of speculative and 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, the rule perhaps need not be abandoned until some meaningful alternative could be developed to protect innocent persons aggrieved by police misconduct. 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 form.

It can no longer be assumed that other branches of government will act while judges cling to this draconian, discredited device in its present absolutist form. Legislatures are unlikely to create statutory alternatives or impose direct sanctions on errant police officers or on the public treasury by way of tort actions, so long as persons who commit
serious crimes continue to reap the enormous and undeserved benefits of the exclusionary rule. And of course, by definition the direct beneficiaries of this rule can be none but persons guilty of crimes. With this extraordinary "remedy" for Fourth Amendment violations, however slight, inadvertent or technical, legislatures might assume that nothing more should be done, even though a grave defect of the exclusionary rule is that it offers no relief whatever 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 abolished or even modified in response to such legislative innovations. 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 contrived doctrine -- or limiting its scope to egregious, bad faith conduct -- would inspire a surge of activity toward providing some kind of statutory remedy for persons injured by police mistakes or misconduct.

The Court's opinion today eloquently reflects something of the dismal social costs occasioned by the rule. Ante, at 21-23. As Mr. Justice White correctly observes today in his dissent, the
exclusionary rule constitutes a "senseless obstacle to arriving at the truth in many criminal trials." Post, at __. He also 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 __.

From its genesis in the desire to protect private papers, the exclusionary rule has now been carried to the point of potentially excluding from evidence the traditional corpus delicti in a murder or kidnapping case. See Mitchell v. New York, ___ N.Y. 2d ___ (1976), petition for cert. pending. Cf. Killough v. United States, supra. Expansion of the reach of the exclusionary rule has brought Cardozo's grim prophecy in People v. Defore, 242 N.Y. 12, 150 N.E. 585, 588 (1926), nearer and nearer to fulfillment:

"A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free, . . . We may not subject society to these dangers until the Legislature has spoken with a clearer voice."
Cassandra

In view of the Cassandra-like tone of the dissent, some comment is indicated. The dissent characterizes the Court's opinion as laying the groundwork for a "drastic withdrawal of federal habeas jurisdiction, if not for all grounds, then at least [for many] . . ." Infra, at __.

It refers variously to our opinion as a "novel reinterpretation of the habeas statute", infra at __; as a "harbinger of future eviscerations of the habeas statutes", infra at __; as "rewriting Congress' jurisdictional statutes . . . and [barring] access to federal courts by state prisoners with constitutional claims distasteful to a majority" of the Court, infra at __; as overruling some 10 or more prior decisions, infra at __; and as a "denigration of constitutional guarantees [that] must appall citizens taught to expect judicial respect" of constitutional rights. Infra at __.

Despite these modest assessments of the Court's opinion the Republic still stands. We have said only that the judicially created exclusionary rule is not a personal constitutional right; that there is a difference,
we think a critical one recognized for centuries, between the function of courts at trial and on habeas corpus review; that this difference has peculiar force, as Mr. Justice Black noted, with respect to Fourth Amendment claims where "ordinarily the evidence seized can in no way have been untrustworthy . . . and indeed often . . . alone establishes beyond virtually any shadow of a doubt that the defendant is guilty", infra at 22; and that § 2254 does not require a federal court to apply the exclusionary rule on habeas corpus review absent a showing that the state prisoner was denied an opportunity for full and fair litigation of the Fourth Amendment claim. We do not say that the federal court lacks jurisdiction; we do hold that its acknowledged jurisdiction should be exercised only upon this showing.

The dissent's perception of the violence we are asserted to have done to history and precedent applies a remarkably truncated view of both. If one looks to history and precedent, it would be difficult to find any support for the various charges made in the dissenting opinion. As scholars have observed (Bator, supra at __;
corpus - upon which the dissent relies as if it were written in the Magna Carta - dates primarily from Mr. Justice Brennan's decision in *Fay v. Noia*, supra, decided only 13 years ago. These scholars also noted that the operative language of § 2254, that the dissent asserts we ignore, dates back to the 1867 Act when it was transparently clear that Congress intended only "to incorporate the common law uses and functions" of habeas corpus. See *Oaks*, supra at __. The dissent now criticizes the "revision" of *Fay* without the slightest acknowledgment of that case's sweeping revision of the relevant history.

As to precedents, we have overruled none. It is fair to say that *Kaufman*, a decision under § 2255 that - only seven years ago - did overrule a number of decisions by Courts of Appeals, is now of limited applicability. At least the dictum therein with respect to the applicability of the exclusionary rule in § 2254 cases is indeed disapproved. To be sure, the language in some of our relevant cases over the past two decades has not always been consistent, but this is the first occasion on which the Court - after requested briefing and argument on the
issue - has specifically and carefully addressed the appropriate scope of federal habeas corpus review of Fourth Amendment claims.

Our system of criminal justice, even prior to Fay and Kaufman, afforded a broader spectrum of carefully articulated and applied rights of persons accused of crime than any other country in the world. This is conceded to be true even with respect to Great Britain, the country from whence we derived the common law, the writ of habeas corpus and most of the fundamental provisions of the Bill of Rights.

The facts of the two cases we here decide illustrate that no one fairly can say that they were deprived of their "day in court" with the full panoply of rights accorded under due process. Powell's claim of Fourth Amendment violation was reviewed before it reached us by no less five courts: the California trial court, the California Supreme Court (denying state habeas corpus), the United States District Court and the Court of Appeals. Rice's claim was considered by the trial and Supreme Courts of Nebraska, and - on habeas corpus - by the federal
District Court and Courts of Appeals. The evidence that each defendant was guilty of murder is overwhelming. No assertion is seriously made that the Fourth Amendment claims were not fully and fairly considered by the state courts. There must be some limit, even under our most generous system, to repetitive review of the issue presented by these cases.
In view of the Cassandra-like tone of the dissent, some comment is indicated. The dissent characterizes the Court's opinion as laying the groundwork for a "drastic withdrawal of federal habeas jurisdiction, if not for all grounds, then at least [for many] . . ." Infra, at ___. It refers to a "novel reinterpretation of the habeas statute", infra at ___. As a "harbinger of future eviscerations of the habeas statutes", infra at ___; "the Court today rewrites Congress' jurisdictional statutes . . . and bars access to federal courts by state prisoners with constitutional claims distasteful to a majority" of the Court, infra at ___; lists some 10 or more prior decisions which "must be deemed overruled by today's holding", infra at ___; and concludes that this "denigration of constitutional guarantees [are] . . . relegated by the Court to the status of mere utilitarian tools [and] must appall citizens taught to expect judicial respect" of constitutional rights. Infra at ___.

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history and precedent, it would be difficult to find any support for the various charges made in the dissenting opinion. As scholars have noted (Bator, supra at __; Oaks, supra at __) the expansion of the scope of habeas corpus - upon which the dissent relies as if it were written in the Bill of Rights - dates primarily from Mr. Justice Brennan's decision in Fay v. Noia, supra, decided only 13 years ago. These scholars noted that the operative language of § 2254, that the dissent asserts we ignore, dates back to the 1867 Act when it was transparently clear that Congress intended only "to incorporate the common law uses and functions" of habeas corpus. See Oaks, supra at ____. Despite this history, the dissent now criticizes the "revision" of Fay's sweeping revision of the relevant history. As to precedents, we have overruled none. It is fair to say that Kaufman, a decision under 2255 that - only seven years ago - did overrule a number of decisions by Courts of Appeals, is not of limited applicability. At least the dictum therein with respect to the applicability of the exclusionary rule in § 2254 cases, is indeed
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