Leeq -
I approve Option 2.
Whatever route we follow, we may have some trouble - as our 6 votes were not all predicated on the same line of reasoning.
ZFP.
To: Justice Powell  
March 11, 1976

From: Greg Palm

Re: No. 74-1055  Stone v. Powell
No. 74-1222  Wolff v. Rice

This memorandum summarizes my thoughts as to how we should proceed in these cases. In my view we have two basic options: (1) interpret the habeas statute to not include 4th Am. claims, or (2) re-cast the scope of the exclusionary rule not to be cognizable in habeas proceedings since the "right of exclusion" is limited to areas where the general deterrence value exceeds the costs.

I. Option I:

There are two sub-options within this option. The first is to simply re-cast your Bustamonte opinion into a majority opinion. The advantages of this approach are two: (1) consistent with your expressed views and (2) "innocence" is a sound touchstone upon which to differentiate 4th Am. claims (there obviously is some runover to Miranda). The disadvantages of this approach are: (1) unless one wanted to continue to allow habeas claims by federal prisoners (a silly result) we will have to overrule a statutory construction only 6 years old, (2) Stevens and Stewart refuse to accept an approach focusing on "innocence", (3) the roots of the Kaufman holding run directly back to Brown v. Allen, a 1953 Frankfurter opinion, and make it very difficult to argue that Congress has not accepted this Court's expansive view of the habeas statute (the § 2255 argument in Bustamonte that a majority of the CAs did not permit habeas claims by federal prisoners at the time of the last revisions is not very helpful since in fact a majority of those same courts allowed state prisoners to bring such claims.

A second approach would basically follow the first except that innocence would not be emphasized. Instead, we would have to rely on the notions of comity, federalism, and equity that recently surfaced in Stewart's opinion in Francis v.
Henderson. The problem with applying *Francis* here is that it dealt with a procedural matter, while we are here dealing with a constitutional right (unless Option II is adopted). Moreover, *Francis* in fact creates the equity-comity notion almost out of thin air. That is, although there is language in *Fay* and some prior opinions to the effect that the writ is equitable, until *Francis* all that has meant is that requirements such as exhaustion could be created. Of course, if *Francis* issues first, once the great leap has been made there is no reason for us not to rely on it.

In any event, under either of these options the opinion would proceed in the following way:

1. **Issue**

2. **Facts of Each Case:** useful in showing: a. review of 2 state court decisions by a federal district court; b. reliability of evidence seized.

3. **History of Writ:** A combination of the views expressed by you in *Bustamonte*, Harlan and Black in their dissents (respectively in *Fay* and *Kaufman*), Bator, Oaks, and a couple other sources I have discovered. All this would lead to the conclusion that the Court arguably has expanded the writ greatly. There is, however, no strong historical support for any differentiation out of 4th Am. Claims.

4. The *Francis* Equitable Notion: At this point the notion of permitting the courts to flexibly apply the writ comes in. There isn't much direct support for the notion, but it could be done. ((But if we can't rely much on the innocence notion it is still hard to say why 4th Am. claims are different from others)).

5. **Balance All the Reasons for not Permitting Such claims:** Federalism, finality, etc. The arguments are in *Bustamonte*, Batar's and Friendly's articles, and elsewhere.

II. **Option II:**

Option II involves a re-focusing of the exclusionary rule: That is, as our recent cases have demonstrated the exclusionary rule is based on the
principle of deterrence. The question to be asked is thus whether the incremental value of permitting 4th Am. claims in habeas outweighs the cost. This balancing would be very similar to the approach you adopted in *Calandra*. The argument would be that the contribution to deterrence from the application of the rule in habeas is minimal in comparison with its costs((the costs cited would be the same as those discussed in §5. of Option I)). The advantages of this approach are obvious: (1) we avoid re-interpreting a statute (2) the analytic approach applied--deterrence v. cost-- is one which the Court has recently opted for in several cases and one which the Court will certainly argue from in a later case adopting the "good faith" exception((This analysis will set the stage for that opinion)). The only problems in this approach are the tension between this view and the view of the 4th Am. advanced in certain past cases--This is not really a significant problem, however, since I think that it is quite clear after *Calandra* and other recent opinions that general deterrence is the moving force behind the rule.

In choosing between these options some other factors should be considered: (1) Option I clearly gives Congress the option to amend the statute and overrule the Court if it is unhappy (2) Under Option II, it is not clear that there would be any way Congress could force an exclusionary rule in habeas for State prisoners (3) Under either approach there are implications for other types of Constitutional claims. Option II, for example, the rationale might be extended to Miranda warnings.

As to the mechanics of Option II the prime difference is that it would contain a brief history of the exclusionary rule to demonstrate that deterrence is the basis. Also, the history of habeas would be very brief since our conclusion would be even accepting the Fay - Kaufman view of history, 4th Am. exclusionary rule claims are not cognizable. As I indicated above, I lean strongly in favor of Option II since I think its the most defensible of the two((the dissent will have far less to complain about)).
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MEMORANDUM

TO: Mr. Justice Powell

FR: Russell R. Wheeler

RE: Your Request for Research on Habeas Corpus Petitions

DT: March 18, 1976

This responds to your March 18 letter asking if I would be able to undertake some research for you on federal habeas corpus review of state decisions. I would be pleased to do what I can for you but would appreciate clarification on two points:

I. Is there a deadline and if so, what?

I am rather heavily involved in work for the forthcoming "Pound Conference" (April 7-9), but the demands are somewhat episodic and I could perhaps complete your project, if not by April 7, then closely thereafter. If I could not, I would be quite happy to take the assignment with me when I begin working at the National Center for State Courts on April 16. I know that there—as here—the work is such that I could find time to complete your project relatively soon. I am relatively sure that I could complete it by May, if you want these data for your address to the Fifth Circuit.

If, on the other hand, the information must be in by April 1, or April 15, I perhaps should decline the invitation.

II. I know that you are suggesting reference to published data rather than original research. However, at least some of this information may well be readily available albeit in unpublished form either at the Administrative Office or at the Federal Judicial Center.
If you want me to undertake the inquiry, may I have your permission, when asking if such unpublished data exist, to say that "I am making this inquiry for Justice Powell" (or, alternatively, for a "member of the Court," or for "a judge")?

Such an inquiry sometimes tends naturally and I think understandably to provoke a faster response than a simple request for information—but you may wish that I not refer to you directly, or indirectly.

Again, I would be pleased to find out what I can for you on these matters, and I hope that your deadline is not so immediate as to preclude me doing so.

RRW/bb

cc: Mark W. Cannon

March 18, 1976

Dear Russell:

I wonder if you would be willing to help me with some statistics if they are available.

In my concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218, at 260, note 14, I included some figures - obtained from the 1972 report of the Administrative Office on petitions for federal habeas corpus filed by state prisoners. I am now interested in some refinements of similar statistics if the data is available.

It is believed by some that the two cases that did most to stimulate petitions under § 2254 were Fay v. Noia, 372 U.S. 391, 426, decided March 18, 1963, and Mapp v. Ohio, 367 U.S. 643, decided June 19, 1961. Fay (at least as I view it) took a more expansive view of habeas corpus than the history of the writ warranted. Mapp extended the exclusionary rule to the states as a means of effectuating the Fourth Amendment.

As my note in Bustamonte indicates, federal habeas petitions increased from 1,020 in 1961 to 7,949 in 1972, tapering down from 9,063 in 1970. I would like to have these figures brought down to the latest year available. They are readily obtainable, I believe, from the Administrative Office in the tables it publishes annually.

The refinements which interest me include the following:

(i) Is there statistical support for the view expressed above as to the effect of Fay and Mapp? Or, putting it differently, is there a probable correlation between these cases, or either of them, and the sharp rise in habeas corpus petitions.
(ii) Does the available data identify the federal habeas corpus petitions according to the ground asserted for relief? My impression is that a large majority of these cases that ultimately reach us assert Fourth Amendment claims, invoking the exclusionary rule.

(iii) As indicated in my Bustamonte note, all filings in United States District Courts have been increasing substantially, although at a far less rapid rate than the habeas corpus increase. Again, if the data is available I would be interested in comparative percentage rates of increase in (a) civil filings (which in gross would include habeas corpus), (b) habeas corpus filings under § 2254, and (c) criminal filings. You would have to select a base year. I suppose it would be desirable to go back earlier than 1961 for a comparison reflecting the possible effect of the cases mentioned.

(iv) If the habeas corpus cases can be identified as such, does the available information indicate (by gross numbers or percentages) the success of state prisoners who have invoked federal habeas successfully. In Fay, the Court opinion stated (372 U.S., at 440) that: "Our decision today swings open no prison gates."* In note 45, on the same page, it is stated that a study in 1958 covering a nine-year period indicated that a total of only 24 federal habeas petitioners had won release from state penitentiaries. If there are any similar subsequent studies, I would be most interested in seeing the result.

There also has been an upsurge in the filing of § 1983 civil actions in the federal courts. If the tables available afford a convenient comparison with the increase in habeas corpus petitions, over the past two decades, this also would be interesting.

You may well be overcommitted already in the process of moving to the Administrative Office. Accordingly, I will quite understand if you are not in a position to undertake this inquiry. In any event, I emphasize that I am not suggesting original research as distinguished from using what is available and relevant to the above inquiries.

*I cannot resist commenting that Fay, at least, swung open the "gates" to the federal courts.
If the foregoing is not clear, I will be happy to discuss it with you.

Sincerely,

Russell R. Wheeler, Esquire

lfp/ss
cc: Dr. Mark W. Cannon
MEMORANDUM

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

DATE: April 2, 1976

No. 74-1055 Stone v. Powell
No. 74-1222 Wolff v. Rice

You may find it of interest to look at the SG's brief in MacCollom No. 74-1487, and particularly the discussion emphasizing the extraordinary nature of collateral review and contrasted with review on direct appeal.

I may have mentioned this to you before. I was impressed by the SG's MacCollom brief which was written by Frank Easterbrook, one of ablest lawyers of any age in the office of the Solicitor General.

L.F.P., Jr.
MEMORANDUM

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

DATE: April 12, 1976

No. 74-1222 Wolff v. Rice
No. 74-1055 Stone v. Powell

As a result of spending most of Saturday reviewing the latest draft, I have come to the conclusion that we are trying to "overwrite" this case.

I think we have a strong, lawyer-like opinion through Parts I, II and III.

Part I is fairly routine, although the statement of the facts and issues always is important. I do think we have stated the facts in too much detail, and suggest that you summarize them in more conclusory fashion. You can see how this was done in the California Court of Appeals and also in the federal courts. As we do not come back to the facts, in any significant way, I see no useful purpose in detailing facts that may be relevant to such issues as probable cause, and who did what and when.

Parts II and III of the draft are excellent in every respect. I have done some editing, and have a couple of riders, but I believe we have these just about right.

In Part II the draft reviews, constructively and accurately (I believe) the development of federal habeas corpus.
Part III deals with the Fourth Amendment, and the exclusionary rule. The discussion of the purpose and justifications of the exclusionary rule is quite good. We show that the rule is not a personal constitutional right, and that its primary purpose is deterrence of future police misconduct. You effectively dispose of the "judicial integrity" argument. Perhaps we should say, in a note, that the rule also has some educational value that we do not minimize.

There is a key sentence at the bottom of page 22B reading as follows:

"But despite the broad deterrent purpose of the rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons."

Calandra is a key decision, as Professor Monaghan has pointed out. You use Calandra effectively on page 23, and then move on to say that its pragmatic approach not only is not new (Walder) but also points the way for a proper analysis of the issue whether the rule should apply to Fourth Amendment habeas corpus cases.

This brings us to Part IV. The first page and a half (26, 27) summarizes briefly the negative consequences of the rule as applied at trial and on direct review. This is a proper introduction to the "balancing process" that Part III has shown to be the proper basis of analysis. We get into trouble on page 27 by moving into a consideration of general
societal interests, namely, those that I relied upon rather heavily in Bustamante. In that case, however, I was addressing the use of habeas corpus jurisdiction itself, rather than whether the exclusionary rule properly may be extended to a Fourth Amendment habeas claim. In practical consequences, the difference may not be too important. In terms of analysis, however, it seems to me that there is a considerable difference.

Rather than devote a half a dozen or more pages of our opinion to the interest identified on page 27, I suggest that we rewrite the opinion from this point on with the focus on the exclusionary rule itself. That is, applying the type of analysis indicated by Calandra - and explicated in the balancing approach mentioned in Part III - we should emphasize the reasons why the deterrent effect of the rule is minimal on collateral review of Fourth Amendment claims.

This approach would require a discarding of page 27 (beginning with "in addition to these costs"), and of virtually all of pages 28, 29, 29a, 30, 31 and 33 (I don't find any page 32).

You return to consider specifically the efficaciousness of the exclusionary rule, commencing at the bottom of page 33 and continuing the end on page 36.

My suggestion is that you redraft Part IV, condensing it essentially to a balancing or weighing of the merits and demerits
of the exclusionary rule when applied to collateral review of a Fourth Amendment claim. Such a reduction, to perhaps three or four pages, would mean the elimination of the interesting and generally supportive material from the middle of page 27 through most of page 33. There are two possible ways in which we might utilize some of the points made in these pages (e.g., use of resources of the legal system, merit of finality, minimization of friction). It may be possible, in a single paragraph, to summarize in highly conclusory fashion these important societal interests. Such a paragraph could be included in the text, at some appropriate place in Part IV, as policy considerations supportive of our basic position on the exclusionary rule. We must bear in mind, however, that these same policy considerations apply rather generally to all habeas corpus review. This is a rather compelling reason why we should not overemphasize them in this opinion.

An alternative to including such a paragraph in the text, would be to place it in a footnote. A general reference could be made to my opinion in Bustamonte.

A point of some delicacy is how we conclude that the exclusionary rule does not apply on collateral review of a Fourth Amendment claim without the same reasoning being applicable, say, to Fifth Amendment claims. As you know, Judge Friendly would apply the same analysis to both. I
do not want to foreclose this possibility, and yet I do have a rather strong feeling - for the reasons stated by Justice Black in Kaufman - that Fourth Amendment claims are different. As we have pointed out, and may need to reiterate, there is far less likelihood of uncertainty as to the facts, or of an innocent person being denied the benefit of habeas corpus relief, where the issue is simply whether the rule should be applied to exclude specific, incriminatory fruits of a search. I hope that you and Chris will do some careful thinking about this, and also some artful drafting.

***

Still lurking in my mind is the desire to accommodate Justice Stewart's wish that we leave the way open for application of the rule in what he might characterize as an outrageous violation by police resulting, at least arguably, in the conviction of an innocent defendant. I was going to try a footnote on this point, but my time has run out this (Saturday) afternoon. I would think we might say that, in a case such as Stewart would describe, that considerations of fundamental fairness implicit in due process would always justify habeas review and the application of an exclusionary rule where justice requires. There is a good deal of language in some of the cases (alluded to at one point in your draft) to the effect
that habeas itself is appropriate only to remedy serious errors. Also, there is the theory that habeas relief has some of the flexibility of equity. If we include such a note, we must make clear that application of the rule, in light of the conclusion of the Court in this case, would rarely be appropriate, and only to prevent a miscarriage of justice.

Somewhere in the opinion, perhaps as a concluding paragraph, we should pay our respects generally to the values of the Fourth Amendment, the utility of habeas review to correct grievous error (see some of my good language in Bustamonte), and emphasize that the effect of our decision should have affirmative effects - rather than negative ones - on the fair and effective administration of the criminal justice system. It will be somewhat easier to write such a concluding paragraph if we have left room for a "fundamental fairness" exception. In this connection, take a look at the concurring and dissenting opinion that Carl and I have circulated in Hampton.

L.F.P., Jr.
MEMORANDUM

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

DATE: April 15, 1976

Justice Stewart called and suggested that we take a look at two cases: Sunal v. Large and Chestman v. California.

Justice Stewart did not have the citations. He thinks both of the cases were decided in the late 1950's, that Douglas wrote for the Court in Sunal and wrote a dissent in Chestman.

Justice Stewart's recollection, without having verified it, is that in both cases Douglas emphasized that habeas corpus is not a substitute for appeal and that the writ should not be abused.

Justice Stewart recognizes that neither of these cases is "on point", but he thinks there may be some opportunity - if his recollection is correct for supportive use of the cases.

L.F.P., Jr.
MEMORANDUM

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

Powell and Rice

When you reach the point of "going to the press" for a Chambers Draft, I suggest that you make a xerox copy of the opinion and notes. We would be here until August if, by some back luck, the printers lost or destroyed our only copy of this opinion with its multitude of changes.

* * * *

We should discuss, perhaps on Thursday, whether our opinion need recognize specifically that Kaufman is overruled. In a technical sense, of course, it is not overruled as that involved collateral review of federal court action. But, as we have agreed, there is even less reason for such review. My preference is to state, with candor, that our holding rejects the reasoning of Kaufman. Perhaps we could say this in a note which also reemphasized that Kaufman, as Justice Black noted, did not consider whether the purpose of the exclusionary rule would be served by its holding. It merely assumed that the rule applied on collateral review, a conclusion supported neither by reason nor authority.

L.F.P., Jr.