MEMORANDUM

TO: Mr. J. Harvie Wilkinson, III
FROM: Lewis F. Powell, Jr.

DATE: February 2, 1973

No. 71-732 Bustamonte

Despite the distractions - delightful ones - of vacationing here at Delray, I have read carefully for the first time your draft of 12/14/72. Despite the "merciless excising" of beautiful prose in the first draft, I think you have understood admirably the type of opinion which I contemplate and have moved far toward a printable draft.

I have, as usual, done some revising of the language to conform it more to my own style, and have added - tentatively - a few additional paragraphs. To facilitate your further review, I have had Sally recopy your draft - embodying my changes. She will deliver this to you, together with your draft of 12/14 as I have "marked it up".

The draft still reflects a bit of the drastic surgery which you performed on the longer article. It does not flow, and hang together, quite as smoothly as it will when you have re-edited it.

In the re-editing process, consider the following:

1. History. I am not sure that, from the viewpoint of organization and logical presentation, we have the "history" quite right. In Part I, you make the point - clearly and briefly - that the historical purpose of
the writ was to safeguard against the injustice of incarcerating innocent people. You then move on, still in Part I, to discuss the exclusionary rule and to show that its purpose in Fourth Amendment cases is unrelated to innocence. Thus, the point you are making is that where the writ is being used only as a means of invoking the exclusionary rule, without regard to guilt or innocence, its use is contrary to its historic purpose. In Part II you address the consequences or the results of this abuse of habeas corpus, namely: (i) as to finality, (ii) impact on limited judicial resources; (iii) friction between federal and state systems; and (iv) federalism.

In footnote 12 (first paragraph of Part II) you quote from Chief Justice Marshall in _Ex parte Watkins_ to show that in the early years of our country - and indeed until fairly recently - the writ was not available at all on collateral attack. It is not clear to me why you use the Marshall quotation at this point; nor whether you have made the most effective use of it.

Without having the briefs before me, my recollection is that the act of 1867 was construed to extend the writ to collateral attack under certain circumstances.

In any event, I do not think all of the relevant history comes through quite sharply enough in the present draft. I believe that both Bator and Oaks - among others - have accused the Court of ignoring
- if not distorting - the history of the writ and the early decisions of the Court. Perhaps it is not advisable to rub this in, but at least our opinion - quite generally in the text and supported in the notes - should identify the mainstream of relevant history.

2. Part II. This is the section which most needs your artistic touch. First, do you think a sentence or two in transition - tying Part I. into Part II - is desirable.

Next, Part II will be more effective if the first paragraph gives the reader an idea of what is to follow. My principal difficulty with Part II, as now drafted, is that it does not tell me where I am going, and does not lead me "there" in a logical manner.

I have written a Rider A, p. 10 as a possible lead paragraph, identifying the specific points to be developed. Perhaps you could restructure Part II by a sequential elaboration of these points. You make the points already, and nothing additional need be said. The need, as I see it, is for rearranging so that the entire Part II hangs together logically and persuasively.

3. Part III. This is excellent as written, and - with my few suggested changes is ready to do.

The only exception is the concluding paragraph - which is confused and unclear.
4. **A Concluding Part.** Perhaps we should have a final Part IV which summarizes in a paragraph or two (no more) my position. In this connection, my affirmative position is now stated only in one place, namely, on the last page (14) of Part II. This might be restated in the summary, after tying the essence of the entire opinion together in summary form.

5. **Things to Check.** Before printing, I suggest that you reread Judge Friendly’s article in the Chicago Law Review, and skim through the principal briefs in this case. This will enable you to check whether we have (i) made all of the basic arguments, (ii) fully documented them in the notes, and (iii) dealt fairly and honestly with the arguments on the other side.

I think you have done a great job of converting a law review article into an opinion. Another couple of days of careful editing, should put this in form to print.

L. F. P., Jr.
MEMORANDUM

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L. F. P., Jr.
MEMORANDUM

TO: Mr. J. Harvie Wilkinson, III       DATE: February 24, 1973
FROM: Lewis F. Powell, Jr.

Bustamonte

This will confirm our conversation in which I mentioned the desirability of your reading carefully Justice Stewart's opinion in 71-1369 Oswald v. Rodriguez, in which he contains a fairly full discussion of the history and purpose of habeas corpus. See particularly pages 3-12.

He also deals at some length with the question of federal/state comity. See page 15.

The Stewart opinion is well written and well documented. As I have previously commented, Part I of our Bustamonte draft - as revised and shortened by you in response to my request - now has a treatment of the history of habeas corpus which may be a bit truncated. When we get back to Bustamonte, we can take a closer look at this.

L. F. P., Jr.
Memo to: Jay Wilkinson
From: Lewis F. Powell, Jr. February 28, 1973

Re: Bustamonte

When you get back to Bustamonte, take a look at the pending cert petition in 72-936 United States v. Robinson.

Larry's cert note of February 24, 1973, indicates that one of the two major points urged by the SG is that the Court adopt the American Law Institute case-by-case approach to the exclusionary rule, throwing out the evidence only when the facts are outrageous. As Larry notes, this is the English rule.

I was unaware that the ALI had taken this position. It is obviously important for us to look into this.

My guess is that we will grant cert in 72-936. This means that the SG may make a broad attack on the exclusionary rule when the case is argued next Term. Do you think this makes any difference as to my position in Bustamonte?

One further point: If a majority of the Court in Bustamonte sustains the application of the exclusionary rule, this will make it more
difficult for the Court in Robinson to accept the SG's position.

At the moment, I do not know whether I will go as far as Larry's note indicates the SG wants to go. But I would like to keep the matter open. Do you have any advice as to the proper strategy here?

L. F. P., Jr.

LFP, Jr.: psf
March 1, 1973

No. 71-732 Schneckloth v. Bustamonte

Dear Potter:

This refers to our several conversations as to whether the Court should reconsider in this case the applicability of the exclusionary rule in a state prisoner's Fourth Amendment claim in a federal habeas case. You are leaning toward the view which I strongly hold, namely, that Kaufman went too far and that the Court should move back towards a posture more in accord with the history and purpose of habeas corpus. You were reluctant, however, and for quite understandable reasons, to make this move unless Byron was willing to join us.

My recollection is that Byron would go further and reconsider the full sweep of Mapp but is hesitant about what he regards as a "piecemeal" approach. I have thought that Mapp opened new frontiers not required by the Constitution or the habeas corpus statute. But there may be some merit in taking one step at a time, and I still would prefer that we take the first one in Bustamonte. Accordingly, I have prepared a rough draft of an opinion which I plan to file as a concurrence in the event you confine the Court's opinion to the "consent search" issue.

This brings me to recent developments. United States v. Robinson is on the list for tomorrow, and in it the Government suggests a reconsideration of the exclusionary rule. We have been holding Gustafson v. Florida (No. 71-1669) for Robinson. We thus have a federal case (Robinson) and a state case (Gustafson) in which there could be a broad reconsideration of the scope of the rule.
But neither of these cases is a particularly attractive vehicle for a major review of the rule. In the federal case the seminal precedent, I believe, is Weeks v. United States, an older and arguably more solidly based precedent than Mapp. But Gustafson, which would involve Mapp, is not a strong case on its facts. The crime was simple possession of a couple of marijuana cigarettes, hardly the best type of offense to illustrate the societal disadvantages of applying the exclusionary rule to Fourth Amendment claims.

There is one other case, Cady v. Dombrowski, granted a month or so ago, which might be a more appropriate vehicle. That is a federal habeas application as to a state conviction for murder in which the police performed an inventory search of an automobile. Although the parties there did not raise the exclusionary rule issue, I suppose we could request them to brief that subject. One possibility would be, if five of us agreed, to carry all of these cases over to the next term for a full dress reconsideration of the scope and extent of the exclusionary rule.

These are tentative thoughts only. I share them with you at this time, rather than with the full Conference, because I have discussed this subject only in the most cursory manner with one or two other Justices. In short, what do you think?

Sincerely,

Mr. Justice Stewart

Isp/ss
MEMORANDUM

TO: Mr. J. Harvie Wilkinson, III  DATE: March 19, 1973
FROM: Lewis F. Powell, Jr.

Over the weekend, and when you were not here to restrain me,
I have made some major revisions in Bustamonte. They will be enough
to drive you right "up the wall".

For this, I would not in the least blame you. I have never been
able to give you a precise formulation of my own views in terms of
legal analysis and avoiding as much conflict as possible with existing
precedents. You and I both have been quite clear as to the unwisdom -
indeed almost irrationality - of the exclusionary rule as it is now
applied across the board and with total inflexibility. I have also long
been convinced that the scope of habeas corpus has been extended beyond
any rational purpose as well as its historic bounds. When dealing with
a Fourth Amendment case, the convergence of the exclusionary rule
and the extended scope of habeas corpus present the problem which is
so difficult to analyze and end up with a new formulation.

As we have gone along, my own understanding of the problems
involved has increased but without diminution of my basic conviction
as to what is right both as a matter of constitutional law and for society.
But I have still been unable to give you adequate guidelines.

The riders dictated over the weekend, and attached to the draft I will deliver to you Monday morning, are at least understandable to me and have enabled me to articulate what I think is a rational position. I will comment briefly on the principal riders and their purposes:

1. **Rider A, page 2.** A weakness in all prior drafts has been the failure to inform the reader, at the beginning of the opinion, where we were going and why. In its present form, one would have to be two-thirds of the way through our opinion before he really understood the nature and scope of my position. This rider undertakes to set the stage for the opinion which follows. It would precede the summary of the facts which begins on p. 2.

2. **Rider A, page 13.** I have always been concerned with the text of the draft now appearing on p. 12 and especially at the top of p. 13. We have been discussing up to that point the history of habeas corpus, and all of a sudden - at the top of p. 13 - we launch into an attack on the exclusionary rule. It is essential to have a rational transition, tying together the impact of habeas corpus as extended to collateral review of Fourth Amendment claims and the effect thereon of an inflexible exclusionary rule. This rider is an attempt to effect this transition in an understandable way, tying habeas and the rule together.
3. Rider A, p. 21 and Rider A, p. 22. These two riders deal with the other single most troublesome portion of the draft opinion. Here we are leading up to an affirmative formulation of my position. First (in the rider on page 21) I tried to make it clear that we are dealing in this case only with a relatively narrow question.

The rider on page 22 finally purports to state the rule that I would substitute for the Kaufman rule as applied to the review of state cases on habeas. Although in somewhat different terms, I have stated my rule in the same way that we have agreed upon in the past, namely:

"Where there is no colorable claim of innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim."

This formulation would not abolish habeas review of a state prisoner's Fourth Amendment claim. It would, however, substitute a measure of flexibility (one might even call it a defined discretion) for the total inflexibility now imposed upon the district court. First, the petitioner must make a colorable showing of doubt as to his guilt. This will involve the making of a judgment by the district court, and if he concludes there is no reason to doubt the guilt of the petitioner, this ends the matter. The writ should be dismissed out of hand and without further inquiry. If, however, there is doubt on the issue of guilt of innocence, and if the petitioner avers facts in support of a
claim that he had no fair opportunity to have his Fourth Amendment claim adjudicated, then the district court must consider the fairness of the state trial. But if he concluded this to have been fair, he still dismissed the writ without an independent inquiry into the facts.

* * * * *

There is undoubtedly some overlap between my riders and the contents of the present draft, especially your section analyzing 28 U.S.C. §2254(a).

After you have reviewed the riders, let us talk - possibly Monday afternoon.

I.F.P., Jr.
MEMORANDUM

TO: Mr. J. Harvie Wilkinson, III       DATE: April 15, 1973
FROM: Lewis F. Powell, Jr.

Bustamonte

My review of our chambers draft in this case over the weekend left me quite uneasy.

Our opinion still lacks a consistent and coherent theme because, as it seems to me, we are attacking both the exclusionary rule as applied on a per se basis, and the expansion of federal habeas jurisdiction. The opinion, at various places, intertwines these two issues in a way which I do not believe we could defend.

For example, the second sentence in the opinion states the question we address as follows:

"Whether the exclusionary rule applied to the states in Mapp . . . should be available to a state prisoner alleging a Fourth Amendment violation in a federal habeas corpus proceeding."

This framing of the issue is in terms of the applicability of the exclusionary rule. Yet, most of our argument - perhaps its central thrust - is directed against the extension of federal habeas corpus review of state cases involving Fourth Amendment claims. For example, the first sentence of Section 5 reads as follows:
"This Court should defer no longer a thoughtful reassessment of the scope of federal habeas review of state cases in light of the basic purpose of the writ and the other societal values that are implicated."

And in that same section (p. 21) we stated that:

"The specific issue before us . . ., and the only one that need be decided at this time is whether a state prisoner may invoke the exclusionary rule in a federal habeas corpus proceeding where the reliability and relevancy of the evidence with respect to the guilt of the defendant is not questioned."

In assessing our ambivalent position, it is important to focus on where we end up: We do not say there should never be federal habeas review of a state Fourth Amendment case. Perhaps the logic of our position with respect to finality of judgments should take us that far. This would be more consistent with the history of habeas corpus. Yet, the position I have taken - suggested by Black and Friendly - is summarized on p. 22 as follows:

"Where there is no colorable claim of innocence, the inquiry of the federal court on habeas review of a state prisoner’s Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim."

It is clear from the foregoing that we are not denying all federal court jurisdiction or right under the statute to review Fourth Amendment claims. Indeed, we are saying that if there is a colorable claim of innocence, a review is appropriate and I suppose the exclusionary rule would be applied
if it were found that the state court had afforded no fair opportunity to exclude the "fruit of the unlawful search."

* * * * *

I suggest that we rethink our position, try to define it in precise terms, and then revise the opinion accordingly. Perhaps a starting point would be to reread the federal court cases that were overruled by Kaufman. I have only read the District of Columbia case, and do not recall its exact rationale. I believe these cases declined to allow collateral attack of Fourth Amendment claims - regardless of any "colorable claim" of innocence. What were the reasons for this holding?

I relied on Black's dissent and Friendly's thesis for the "colorable claim" concept. Yet, it may have been this part of Black's opinion which drew the dissents (incomprehensible to Friendly) of Harlan and Stewart in Kaufman.

In any event, I continue to have the same difficulty which has puzzled me throughout: Whether we should question both the exclusionary rule and the expanded scope of federal habeas? I do question both, for the reasons stated in our opinion. Possibly we should focus on habeas corpus - which is the case before us and make no extended attack on the exclusionary rule.

When you have finished your McDonnell Douglas opinion, we should do some serious thinking and talking about this.

L. F. P., Jr.
April 16, 1973

Re: No. 71-732 - Schneckloth v. Bustamonte

Dear Potter:

I agree with your very good opinion in this case. Please join me.

Sincerely,

[Signature]

Mr. Justice Stewart

Copies to Conference
April 16, 1973

Re: No. 71-732 Schneckloth v. Bustamonte

Dear Potter:

I like your opinion in this case, and will be happy to join it.

As I indicated at the Conference discussion, I would have preferred to dispose of the case on the broader ground (briefed and argued) that the exclusionary rule should not be available to a state prisoner alleging only a Fourth Amendment violation in a federal habeas corpus proceeding, in which the only claim for relief is the exclusion of evidence conceded to be highly relevant as to the prisoner's guilt.

I may file a concurring opinion addressing this issue. Although I have done some work on it, in view of the argued cases over the next 10 days I probably won't get back to Bustamonte until these arguments are behind us.

I will join your opinion in any event.

Sincerely,

Mr. Justice Stewart

cc: The Conference
Re: No. 71-732 - Schneckloth v. Bustamonte

Dear Potter:

In due course I plan to circulate a dissent in this case.

Sincerely,

T.M.

Mr. Justice Stewart

cc: Conference
Re: No. 71-732 - Schneckloth v. Bustamonte

Dear Potter:

I feel that this is a very significant case, and I am pleased to join the opinion you have prepared for it.

At conference I expressed general agreement with Lewis' view as set forth in his note of April 16 to you. If he writes in concurrence on the other issue, I may join him and, to that extent, unhook from your footnote 38.

Sincerely,

[Signature]

Mr. Justice Stewart

Copies to the Conference
April 19, 1973

Re: No. 71-732 - Schneckloth v. Bustamonte

Dear Potter:

Please join me in your opinion for the Court in this case. Should Lewis write as he has indicated in his memorandum, I may join him too.

Sincerely,

Mr. Justice Stewart

Copies to the Conference
MEMORANDUM

TO: Mr. J. Harvie Wilkinson, III  DATE: April 21, 1973
FROM: Lewis F. Powell, Jr.

Bustamonte

I will deliver to you herewith chambers draft of 4/3/73, together with a number of suggested riders. Also, I have made some changes in the text and notes.

This is now ready, I think, for your most careful review prior to reprinting a second chambers draft. The purpose of this memorandum is to give you a checklist of specific points - either relating to my changes or to things which require your special attention.

1. You have apparently seen my attached memorandum of April 15. In any event, we have discussed the substance of it. When I first reviewed our chambers draft (after being away from the case for two or three weeks), I was disturbed primarily by two problems: (a) what seemed to me to be the intertwining of habeas corpus and the exclusionary rule in a confusing and unclear manner; and (b) an impression that the various "Parts" of the opinion did not seem to combine into a logical unity (as distinguished from short essays on related but separate issues) in the way that has been characteristic of our former opinions.

Most of my riders and changes have been addressed to these problems. Please bear them in mind critically, as you review the draft.
I am not as uneasy about it now as I was on April 15, but this may have resulted from recent familiar.

2. We have not been consistent in framing the question or the issue. (See memo of April 15). Rider A, p. 1 picks up the language we use on p. 22. I believe this is the single most precise statement of our position. It is framed primarily in terms of habeas review rather than the exclusionary rule. This is certainly the central thrust of our draft. But I do want you to focus most carefully on whether Rider A (and p. 22) are a precise and sound statement of the question and our position.

Also, once we have agreed on the issue, bear in mind the importance of reasonably consistent language with respect to.

3. Although we have 29-page opinion, only in one paragraph (pp. 22-23) do we state affirmatively what we think the rule should be. Give some thought to whether we should restate this in the concluding part of the opinion.

4. The only major restructuring of the opinion is what I have done to Part IV. I just do not think pages 9-11 of Part IV add to the opinion. Indeed, they have always been a bit confusing to me. Part IV addresses the exclusionary rule, and it seems to me that we now back into it with some unclear and confusing (to me) discussion of Kaufman, Fay and finality.
I have tried, by Rider A, p. 9, to effect a smoother transition between Parts III and IV, and to move swiftly into the exclusionary rule discussion. I may have done this too abruptly, and you can undoubtedly improve the language. But I do think the substance of my approach is correct.

5. There are some points made in the deleted portion of Part IV which should be salvaged, and added - perhaps as footnotes - somewhere else. We should not ignore Brennan's justification of the Writ's present scope, now quoted on page 9. I suggest dealing with it in a long footnote which I have identified as Rider A, p. 16. This language, also, can be improved. But I do think we should meet the Brennan justification fairly, and make the best answer we can. I would leave it, however, it a note.

At least a part of the full paragraph on p. 11 should be included in our opinion somewhere, perhaps as a note. I would like to recognize that history does not reveal an exact tie between the Writ and a claim of innocence.

There may possibly be one or two other thoughts in my deleted language that you will wish to put into a note somewhere.

6. Note 23 on p. 16 is not convincing. The comparisons cover different time periods, which create suspicion in the average reader's mind. Pick a time span, say five or ten years, and present the figures
for it on a consistent basis. Perhaps the decrease in state habeas petitions from 70 to 72 was accompanied - as I think it was - by an increase in 1983 cases. If so, this should be included. In other words, note 23 is not strong advocacy. See what you can do with it.

7. We have never defined in any way what we mean by a "colorable claim of innocence". Judge Friendly undertook to define it in his article, although - as I recall - the definition was not too enlightening. Do you think we should try to address this? I am inclined not to, but would like your view.

8. Speaking of Judge Friendly, now that you have lived with Bustamonte for several months, I would appreciate your rereading Friendly's article carefully and critically. He has probably thought about this area of the law more carefully than any other experienced judge, and he is an exceptionally intelligent one. My first concern is that our opinion be analytically and doctrinally sound.

I am prepared for the predictable cries of outrage that I am trying to undermine the Great Writ, and that this is a reactionary step. But I would indeed be unhappy if responsible scholars discovered some conceptual or analytical defect. For example, I have raised with you the question whether it is logical for us to require a colorable claim of innocence. I personally feel more comfortable with that claim, as
conceivably there are Fourth Amendment cases in which the defendant is unjustly incarcerated and where the state courts simply decided the Fourth Amendment claim erroneously. I would not wish to exclude collateral review in such a situation, unless the logic of our position compels it. I take it that Henry Friendly's position is like ours. We are saying that under § 2254 a federal court has the authority to review a Fourth Amendment claim but may do so on a discretionary basis, rejecting the claim entirely if two conditions are met: (i) there is no colorable claim of innocence (e.g., no innocent person unjustly incarcerated); and (ii) the defendant was provided a fair opportunity in the state courts to have his claim adjudicated. Incidentally, what does Friendly say - if anything - about this second condition?

9. I am not sure that we have most of the ALI proposal with respect to the exclusionary rule. You now have it tucked away at the end of a long footnote. Consider the possibility of a more favorable location, possibly tied to a sentence to be added to the text generally to the effect that neither the common law nor criminal procedure in England today requires any per se application of an exclusionary rule. Without having looked into it at all, I suspect that the ALI formulation is pretty close to what the English actually do, namely, exercise judicial discretion as to whether in a particular case the cause of justice is
advanced by excluding highly relevant evidence illegally seized.

One of the great advantages of the ALI formulation is that it would avoid resort solely to the type of answer suggested by Dallin Oaks, namely, that we abandon the exclusionary rule and provide for the liability of policemen who violate the Fourth Amendment.

10. When you have completed your review and revisions, I would like to see any major changes that you make. Then, let's have a second chambers draft printed (having the printer mark it second chambers draft), and then have this reviewed promptly by Larry and Bill. I am sure they will have some helpful suggestions, and it is far better to have these come from friends than from other sources.

* * * * *

I am sure you are tired of Bustamonte by this time, as am I. Yet, for all of the obvious reasons, this must be as flawless a product as we can make it. This will be worth every effort.

L. F. P., Jr.
Comments on Bustamonte draft
WCK
April 27, 1973

As I mentioned yesterday, I have two fairly major suggestions, both of which you may already have considered and rejected in one or more of your drafts.

I.

The first relates to the general structure of the argument. I feel a tension throughout the draft between the position that state prisoners ought to be allowed to raise only claims relating to guilt or innocence on federal habeas corpus and the position that whatever the arguable virtues of the exclusionary rule on direct appeal they are diminished on habeas corpus to the point that they are clearly outweighed by other policies. I think that the opinion would be stronger if it settled on one or the other position.

The arguments in favor of arguing the exclusionary rule position are, as I see them; 1) the position is narrower; 2) exclusionary rule claims were the last to be allowed to be raised on habeas corpus (Kaufman); and 3) the Court is generally out of sympathy with the exclusionary rule. The arguments against taking the exclusionary rule approach are; 1) the opinion lacks balance because you are unwilling to embrace the exclusionary rule on direct appeal, and indeed fn 15 casts explicit doubt on the rule; 2) Justice White simply does not buy the argument that the deterrent
effect of the exclusionary rule is less on habeas than on direct appeal; and 3) it is hard to see how federalism has anything to do with the exclusionary rule.

Furthermore, if the guilt/innocence line is your ultimate position, it will surely look bad for you to make an elaborate exclusionary rule argument here and then treat it as being irrelevant in a subsequent case. A positive advantage of the guilt/innocence approach is that you can lend balance to the opinion by giving a warm endorsement to the writ and its use where a state prisoner raises a claim relating to guilt or innocence, and federalism would be relevant.

If you concluded to write with primary focus on guilt/innocence, my inclination would be to restructure the opinion as follows: I would discuss the history of habeas corpus with reference to the constitution and the statute, demonstrating that the statute has never meant anything in particular, that the Court has been substantially free to define the scope of the writ, and that the Court has been all over the lot; I would then conclude that the common law version of the writ was too niggardly, but that the Court's present version is too expansive, with the result that the Court now has the duty and the opportunity to consider explicitly the policies implicated by the writ and to give it an appropriate contemporary meaning;
I would then argue that guilt/innocence provides the proper guidance for when the use of this extraordinary writ is appropriate, emphasizing that all defendants are entitled to a fair hearing on direct appeal of all constitutional claims but that there is an overriding interest in insuring that innocent persons are not kept in prison; and, finally, applying the test, I would conclude that Fourth Amendment claims have no bearing on guilt or innocence. I would greatly abbreviate the facts of this case, since I do not think that they are particularly striking in light of the fact that this case raises a tough constitutional question of first impression in this court—namely, the meaning of consent under the Fourth Amendment; and I would drop all but incidental mention of the exclusionary rule.

II.

My other general point, or really question, concerns the exact meaning of the guilt/innocence line. There are several possibilities: 1) a petitioner who claims or who "makes a colorable claim" that he is innocent may then raise any constitutional claim regardless of whether that claim bears on guilt or innocence; 2) a petitioner who establishes his innocence by showing that there was not enough evidence to go to the jury may then raise any claim regardless
of whether the claim itself bears on guilt or innocence; 3) a petitioner who claims or "makes a colorable claim" of innocence may raise any claim which bears on guilt or innocence; 4) a petitioner who establishes his innocence may raise any claim which bears on guilt or innocence; and 5) a petitioner may raise any claim which bears on guilt or innocence.

Possibilities 2 and 4 seem to me to be nonsensical—if the petitioner has established that he is innocent or, more accurately, that there was not enough evidence to go to the jury, has already prevailed, and there is no need for him to raise other claims.

The present draft seems to oscillate among possibilities 1, 2, and 5. I do not think that the policy arguments you advance for restricting habeas support position 1. If a petitioner contends that he is innocent as a matter of the adequacy of the evidence, he should certainly be allowed to raise that claim, but if that claim is rejected I see no reason, given your general approach, to allow him to raise other unrelated claims—for example, that his automobile was searched without probable cause. There is no nexus between the legality of the search and the fact of his claimed innocence.

The choice, then, seems to me to be between number 3 and number 5. The difficulty with number 3 seems to me to be that if a petitioner need simply claim innocence, the requirement is meaningless, while if he
must make a colorable showing, the district judge is put in the unreasonable position of having to read the transcript of the trial to ascertain whether the claim was in fact colorable. This will result either in a waste of time or in the ignoring of legitimate claims. Moreover, the appellate court's task will be fully as onerous.

In sum, I suggest that you adopt position 5. Under position 5, a petitioner could raise those claims which may bear, for example, on the probative value of evidence. He may claim, for example, that his confession was coerced, because coerced confessions may be unreliable, but he may not claim that evidence was illegally seized in the sense of seized without a warrant, because such evidence is as reliable as any other evidence. The petitioner would not need to make a boilerplate claim of innocence or a colorable claim of innocence, but he would need to raise a claim which, if vindicated, would cast some doubt on the conviction.

III.

I have made a number of minor suggestions on the draft in the margins, but a couple of them perhaps bear mention here. I would use "habeas corpus" rather than the informal "habeas". Finally, I do not think that footnote 19 is persuasive. That note
states: "Much is made of the limitations of this Court's certiorari jurisdiction. Yet it has been noted that "Almost all the Court's most important decisions on criminal procedure . . . have been made on direct review of state judgments," Friendly, supra, n. 12, at 165." It does not strike me that Judge Friendly's comment is responsive to the central point of the conclusion that the Court's certiorari jurisdiction is limited, which is that the Court cannot itself effectively police the rules it enunciates--it is simply very difficult for this Court to screen cases so carefully as to be able to identify meritorious search and seizure claims or ineffective assistance of counsel claims or speedy trial claims etc. I do not think that the fact that most of this Court's landmark criminal procedure decisions have been made on direct appeal has any real bearing on the problem of policing violations of the constitutional rules laid down by this Court.
April 30

Anne Jary

1. Why drop ref. to prevent 1933
   perjury? See Friendly, Text, pp. 43, 44

2. Do we use the Baker quote
   on "friendly" – p. 146 (Friendly)? We don't
   want to overuse Baker lest this is
   a strong statement.

3. Friendly recognizes that even where
   there is no of guilt or innocence,
   there are some cases where the attack
   concerns the very basis of the criminal
   process where collateral review should
   be allowed (e.g., denial of counsel, record
   does not show basis of a ground for
   denial of an alleged court, etc.)
   (7:152). Do we make this sufficiently
   clear?

Perhaps we should add a note
- keyed to last ¶ on 22 of our
- opinion – which summarizes the
- Friendly view expressed by him on
- 7:152, 153. Our ¶ is terse &
- its full import is not self-evident.
- A note might help.

See also 7:170 (2nd full ¶ for a summary
of what his rule would still allow).
4. Friend is not meant here for there to alleged constitutional claims. See last sentence in Part III, see p. 160. What about these?

5. What is meant by "colloquial showing of innocence" - 7. 160

Jay, I find, it's formulation difficult to understand. Can you write it out more clearly.

On p. 161, it says his rule would exclude virtually all 4th Amendment claims. I suppose this follows because T's rule would allow the jury (or judge) to consider - in determining reasonable doubt as to guilt - the evidence alleged to have been illegally seized.

6. I use an excellent quote from Amsterdam as to the only justification for "collateral enforcement" of a 4th Amendment claim is to deter police conduct that "at some point" becomes so incriminating as to be a "public nuisance".

This is similar to the translation in our opinion into a discussion of Ex/Rule which we have talked about.

Note: The handwriting is slightly slanted and difficult to read in some areas, but the text is legible overall.
May 2, 1973

TO: J. Harvie Wilkinson

RE: BUSTAMONTE

In talking to Potter today about the problem we discussed this morning, two points were clarified:

1. He sees no reason, off hand, why we couldn't do our concurrence in Cupp v. Murphy; OK.

2. File the concurrence in Cady, with Bill Rehnquist still being entirely free -- if he should be so disposed -- to join the concurrence.

On this latter procedure, Justice Stewart says that Brennan filed a concurring opinion in a case in which he wrote the majority opinion for the Court. Justice Stewart could not recall the name of the case, but it involved the question of double jeopardy where there is dual sovereignty. He is reasonably sure the case came down during the 1958 Term. You might take a look at this.

L.F.P.
MEMORANDUM

TO:         Mr. J. Harvie Wilkinson, III       DATE: May 5, 1973
FROM:       Lewis F. Powell, Jr.

Bustamonte

One conceptual point which I would appreciate your thinking about, and discussing with me is this:

At some points in our draft we talk as if we are saying that no Fourth Amendment claim by a state prisoner should be reviewed on federal habeas in the absence of a constitutional claim bearing on innocence. I think some of our language may suggest that in the absence of a claim of innocence, there is simply no review whatever of a Fourth Amendment claim. Yet, on p. 22, we state what is my view: that even where there is no claim of innocence, it is proper for the federal court to determine whether the defendant was provided with a fair opportunity to have his Fourth Amendment claim adjudicated.

Do you see any conceptual inconsistency? In any event, I think you should take a look at the language used throughout the opinion with this thought in mind.

L. F. P., Jr.
May 8, 1973


Dear Potter:

Please join me.

I will await Lewis Powell's concurrence with interest.

If I grasp fully what Lewis has in mind regarding the exclusionary rule, I would very likely join him.

Regards,

[Signature]

Mr. Justice Stewart

Copies to the Conference
MEMORANDUM

TO:        Jay Wilkinson
FROM:      Lewis F. Powell, Jr.

Date: May 16, 1973

Before Bustamonte comes down one thing that I know that I
would like to add is to put back into the footnote on the number of
habeas corpus petitions filed over the last ten years, a reference to
the increase in 1983 petitions filed by prisoners.

These may not be directly relevant, but as we know from the
Court's recent decision in the New York Rodriguez case, petitioners
have begun to file 1983 cases - rather than habeas cases - because they
do not have to exhaust state remedies. But in light of the Court's
decision in Rodriguez, they will have to go back to filing habeas
petitions. Thus, the sentence or two you can add in the note will show
the sharp increase in prisoner petitions under 1983 and state that
under the recent Rodriguez decision, the upward trend of habeas
petitions may be resumed.

Now that Harry Blackmun has filed an opinion in Bustamonte,
I believe everybody is in except the Chief and Rehnquist. They could
very well come in any day.

'Accordingly, we should be thinking in terms of bringing Bustamonte
down on Monday week. Thus, after you have delivered the Dublino draft to me on Friday, you might sit down quietly and give Bustamonte a fine tooth comb final review.

In this connection, has either Larry or Bill read - in flyspeck - our last printing? If not, pick out one of them and ask him if he would read it for editing comments. I guess Bill Kelly would be best.

L.F.P., Jr.

Ifp/gg
May 17, 1973

71-732 Schneckloth v. Bustamonte
72-212 Cupp v. Murphy

Dear Potter:

This refers to our conversation at the Conference on Thursday, in which you suggested that we might bring down Bustamonte and Cupp without awaiting the opinion in Cady.

This is satisfactory with me, and I have asked Jay Wilkinson to work out - with your clerks or with Mike Rodak (or both) - the appropriate language to be added in Cupp to reflect my concurrence and to incorporate my Bustamonte opinion.

I would indeed appreciate any comments you may have with respect to the latter, as I hope that it will serve the basis - at some appropriate time in the future - for the Court to reconsider the issue which I addressed.

Sincerely,

Mr. Justice Stewart

Ifp/gg
MEMORANDUM

TO:        Jay Wilkinson                Date: May 17, 1973
FROM:      Lewis F. Powell, III

No. 71-732 Schneckloth v. Bustamonte

Justice Stewart suggested that we might prepare to bring
down Bustamonte and Cupp on the next opinion day at Monday -
which will be Tuesday, May 29 (May 28 being a holiday). Justice
Stewart knows of my wish to rely on Bustamonte in Cady, but as
that opinion has not been circulated and there will be dissents, it
may not come down until toward the end of June. Whenever Cady
is ready, we can append a concurrence which simply incorporates
by reference my Bustamonte concurrence.

Will you please get with Justice Stewart's clerks, and perhaps
with Mike Rodak, and work out appropriate language to be added on
my behalf in Cupp. Justice Stewart can then recirculate Cupp and
the Conference next Friday can authorize both cases to come down.

L. F. P., Jr.

lfp/gg
May 23, 1973

Re: No. 71-732, Schneckloth v. Bustamonte
   No. 72-212, Cupp v. Murphy

Dear Lewis,

Now that you have revised the mechanics of your concurrences in these two cases, I hope they can both come down next week.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference
May 24, 1973

Re: No. 71-732 - Schneckloth v. Bustamonte

Dear Lewis:

Please join me in your concurring opinion in this case.

Sincerely,

[Signature]

Mr. Justice Powell

Copies to the Conference
Supreme Court of the United States
Washington, D.C. 20543

May 24, 1973

Re: No. 71-732 - Schneckloth v. Bustamonte

Dear Lewis:

Please join me in your concurring opinion.

Regards,

[Signature]

Mr. Justice Powell

Copies to the Conference