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Habeas Corpus - Restraint in Violation of Federal Law - Federal Collateral Relief Not Available for State Prisoners Who Have Had an Opportunity for Full and Fair Litigation of Fourth Amendment Claims in State Courts

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RECENT CASES

HABEAS CORPUS—RESTRAINT IN VIOLATION OF FEDERAL LAW—FEDERAL COLLATERAL RELIEF NOT AVAILABLE FOR STATE PRISONERS WHO HAVE HAD AN OPPORTUNITY FOR FULL AND FAIR LITIGATION OF FOURTH AMENDMENT CLAIMS IN STATE COURTS.

Two state prisoners, Lloyd Powell in California,[1] and David Rice in Nebraska,[2] had been convicted of criminal offenses and their convictions had been affirmed in their respective state appellate courts.[3] Both prisoners sought federal habeas corpus relief[4] contending that their convictions were based, at least in part, upon the introduction of evidence at their trials which had been obtained in violation of their rights under the fourth amendment[5] to the United States Con-

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1. Lloyd Powell was arrested in Henderson, Nevada, for violation of a municipal vagrancy ordinance. The arresting officer had discovered, in a search of Powell, a .38 caliber revolver with six expended cartridges in the cylinder. Powell was extradited to California to stand trial for the murder of a liquor store manager's wife that had occurred during an altercation with the store manager over the theft of a bottle of wine. Powell contended that his arrest was illegal, since the vagrancy ordinance was unconstitutionally vague according to the decision in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), and therefore the testimony of the arresting officer regarding the search and discovery of the revolver should have been excluded because it was obtained in violation of his rights under the fourth amendment. The trial court rejected Powell's contention and convicted Powell of murder. The California District Court of Appeal affirmed the conviction and found it necessary to pass on the legality of the arrest and search because it concluded that the error, if any, in admitting the testimony was "harmless beyond a reasonable doubt", citing the decision in Chapman v. California, 386 U.S. 18 (1967). The Supreme Court of California denied Powell's petition for habeas corpus relief. Stone v. Powell, 96 S. Ct. 3037, 3039-40 (1976).

2. David Rice and an accomplice had been involved in a bombing plot in which a police officer was killed. A warrant was obtained to search Rice's apartment. The police discovered dynamite and other explosive materials in the search. A chemical analysis of Rice's clothing also disclosed dynamite particles. Rice contended that the evidence obtained had been discovered as the result of an illegal search of his home. He alleged that the search warrant was invalid because the supporting affidavit was defective. The trial court rejected Rice's contention and convicted Rice of murder. The Nebraska Supreme Court affirmed the conviction, holding that the search warrant was valid. *Id.* at 3040-41.

3. *Id.* at 3039.

4. The federal habeas corpus statute for state prisoners, 28 U.S.C. § 2254 (1970), provides, in part:

> (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 on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
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> (b) An application for a writ of habeas corpus is 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.

5. U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

stitution.[6] In Powell's case, a California federal district court denied habeas corpus relief but was reversed by the Ninth Circuit Court of Appeals.[7] In Rice's case, a Nebraska federal district court order which had granted habeas corpus relief was affirmed by the Eighth Circuit Court of Appeals.[8] The wardens of the penal institutions in which the prisoners were incarcerated were granted certiorari by the United States Supreme Court.[9] The Supreme Court reversed the decisions of both circuit courts and *held* that a state prisoner would not be granted federal habeas corpus relief where the state had provided for full and fair litigation of his fourth amendment claim that evidence obtained through an unconstitutional search and seizure was introduced at his trial.[10] The Court further found that the exclusionary rule, which prohibits the admission of evidence obtained through an unconstitutional search and seizure,[11] contributes only minimally to the effectuation of fourth amendment guarantees when applied in a collateral habeas corpus proceeding.[12] *Stone v. Powell,* ——U.S.——, 96 S.Ct. 3037 (1976).

The federal courts were given the authority to issue the writ of habeas corpus[13] in the initial grant of jurisdiction to the federal

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6. Stone v. Powell, 96 S. Ct. 3037, 3039 (1976).

7. *Id.* Powell v. Stone, 507 F.2d 93, 99 (9th Cir. 1974).

8. Rice v. Wolff, 388 F. Supp. 185 (D. Neb.), *aff'd,* 513 F.2d 1280 (8th Cir. 1974). The Nebraska federal district court had concluded that the search warrant was invalid because the supporting affidavit did not contain sufficient facts to give the magistrate probable cause to issue the warrant under the tests set out in Spinelli v. United States, 393 U.S. 410 (1969), and Aguilar v. Texas, 378 U.S. 108 (1964). 388 F. Supp. 185, 190-94 (1974). The court also found that the evidence of dynamite particles found on Rice's clothing should have been suppressed, since it was the tainted fruit of an arrest warrant that would have not been issued but for the prior unlawful search of his home. 388 F. Supp. 185, 202-07. *See* Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co., Inc. v. United States, 251 U.S. 385 (1920).

9. Stone v. Powell, 422 U.S. 1055 (1975). The Court requested, in addition to the questions presented by the petition for certiorari, that counsel for Powell brief and argue the following question:

> Whether, in light of the fact that the District Court found that the Henderson, Nev., police officer had probable cause to arrest respondent for violation of an ordinance which at the time of the arrest had not been authoritatively determined to be unconstitutional, respondent's claim that the gun discovered as a result of a search incident in that arrest violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution is one cognizable under 28 U.S.C. § 2254.

Id. at 1055.

As Justice Brennan pointed out in his dissent in Stone v. Powell, the question of the unconstitutional vagueness of the Henderson, Nevada ordinance was not discussed in the opinion of the Court. 96 S. Ct. 3037, 3069 (1976).

In Wolff v. Rice, 422 U.S. 1055 (1975), the Court requested that this additional question be briefed:

> Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case is a question properly cognizable under 28 U.S.C. § 2254.

Id. at 1055-56.

10. 96 S.Ct. 3037, 3052 (1976).

11. The exclusionary rule was first enunciated in Weeks v. United States, 232 U.S. 383 (1914). *See* text accompanying notes 41-42 *infra.*

12. 96 S.Ct. 3037, 3052 (1976). Justice Brennan, in a strong dissent, argued that the Court had reached its conclusion without expressly overruling any of its prior decisions regarding the scope and function of habeas corpus relief, *id.* at 3058, and further, that the Court had rewritten jurisdictional statutes, a power committed solely to Congress. *Id.* at 3065.

13. "[T]he phrase 'habeas corpus' used alone refers to the common law writ of *habeas*

courts.[14] The writ originally extended only to prisoners held in custody by the federal government.[15] In 1867, the writ was extended to state prisoners.[16]

The substantive scope of the writ of habeas corpus was not defined in the First Judiciary Act,[17] but the Court has gradually expanded it since 1867.[18] In *Frank v. Magnum*,[19] the Court held that a federal court upon a habeas corpus application could inquire into the merits of a federal claim if a state failed to provide adequate "corrective process," and that the inquiry need not be limited to the jurisdiction of the sentencing court.[20] The Court found, however, that the state involved had provided for adequate "corrective process," following trial in the state court, by adopting the

> procedure of a motion for a new trial followed by an appeal to its Supreme Court, not confined to the mere record of conviction but going at large, . . . into the question whether the processes of justice have been interfered with in the trial court.[21]

The Court held in *Brown v. Allen*[22] that a prisoner could be entitled to full reconsideration of his federal claims, which had been rejected in the state court, despite adequate state corrective process. This could include, when appropriate, a hearing in federal district court.[23] However, habeas corpus review would be denied where the

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corpus ad subjiciendum, known as the 'Great Writ'." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807).

Habeas corpus ad subjiciendum is defined as:

> A writ directed to the person detaining another, and commanding him to produce the body of the prisoner, (or person detained,) with the day and cause of his caption and detention . . . to do, submit to, and receive whatsoever the judge or court awarding the writ shall consider in that behalf.

BLACK'S LAW DICTIONARY 837 (4th ed. 1968).

14. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82.

15. *Id.*

16. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

17. In Stone v. Powell the majority found that the scope of federal habeas corpus jurisdiction for both state and federal applicants, as initially defined by the courts, was limited to consideration of the jurisdiction of the sentencing court. 96 S.Ct. 3037, 3042 (1976). Justice Brennan, in dissent, termed the majority's interpretation a "revisionist history." *Id.* at 3062. In Fay v. Noia, 372 U.S. 391 (1963), Justice Brennan, writing for the majority, had attempted to refute this narrow view of the scope of habeas corpus. In *Fay* he asserted that the scope of habeas corpus has remained constant, although standards of due process have evolved, and that, "History refutes the notion that until recently the writ was available only in a very narrow class of lawless imprisonments." *Id.* at 402-03.

18. *See* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Comment, *Availability of Federal Post-Conviction Relief in Light of a Subsequent Change in Law*, 66 J. CRIM. L. 117 (1975).

For an analysis of Bator's article, *see* Carroll, *Habeas Corpus Reform: Can Habeas Corpus Survive the Flood?* 6 CUM. L. REV. 363, 376-80 (1975).

19. 237 U.S. 309 (1915).

20. *Id.* at 333-35.

21. *Id.* at 335.

22. 344 U.S. 443 (1953).

23. *Id.* at 463-64. The Court stated that, "a trial may be had in the discretion of the Federal court or judge. . . ." *Id.* at 463. However, no trial would be required where the federal court could adequately weigh the sufficiency of the evidence from the record. *Id.*

prisoner had failed to comply with legitimate state procedural rules for appeal of a conviction.[24]

This procedural barrier was removed in *Fay v. Noia*,[25] where the prisoner was granted federal habeas corpus review despite his failure to appeal the state conviction.[26] The Court held:

> [F]ederal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this overriding federal policy.[27]

In *Kaufman v. United States*,[28] the Court held that federal collateral review was available to federal prisoners who alleged that unconstitutionally obtained evidence had been admitted against them at trial.[29] Although the issue was the scope of the post-conviction relief statute for federal prisoners,[30] the discussion centered on the requirement of granting habeas corpus relief when a defendant has been convicted in a state court on the basis of evidence obtained in an illegal search or seizure, contrary to the exclusionary rule.[31] The Court reasoned that since state prisoners had been accorded federal habeas corpus relief under these circumstances, federal prisoners should have the same relief.[32] The substantive scope of the writ of habeas corpus had thus grown to allow broad collateral re-examination of both state and federal convictions.

The need for broad habeas corpus relief has been recognized by the Court as an additional safeguard against "intolerable restraints" of those who have been "grievously wronged" by society.[33] However, the availability of broad habeas corpus review for purposes other than to protect the innocent has been criticized.[34] In particular, the irrelevance of the exclusion of evidence obtained in violation of the fourth amendment to the reliability of trial as a truth-finding process[35] has been noted as a reason for withdrawing claims based on the exclusionary rule from broad collateral habeas corpus relief.[36]

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24. *Id.* at 486.
25. 372 U.S. 391 (1963).
26. *Id.* at 391.
27. *Id.* at 426-27.
28. 394 U.S. 217 (1969). Justice Brennan delivered the opinion for the Court.
29. *Id.* at 231.
30. 28 U.S.C. § 2255 (1970).
31. 394 U.S. 217, 225-26 (1969).
32. *Id.* at 226.
33. Fay v. Noia, 372 U.S. 391, 401 (1963).
34. Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring); Kaufman v. United States, 394 U.S. 217, 231 (1969) (Black, J., dissenting).
35. Bivens v. Six Unknown Named Federal Agents, 403 U.S. 399, 414 (1971) (Burger, C.J., dissenting).
36. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring); Kaufman v. United States, 394 U.S. 217, 231 (1969) (Black, J., dissenting).

The exclusionary rule of evidence was created by the judiciary to effectuate the fundamental constitutional guarantees of the fourth amendment.[37] The common law rule had been that the admissibility of evidence was not affected by the means in which it had been obtained.[38]

The Supreme Court first suggested in *Boyd v. United States*[39] that evidence obtained in violation of the fourth amendment should be inadmissible at trial.[40] In *Weeks v. United States*[41] the Court enunciated the exclusionary rule by holding that evidence seized during an unlawful search could not constitute proof against the defendant in a federal criminal prosecution.[42]

The exclusionary rule was extended to state criminal prosecutions in *Mapp v. Ohio*.[43] The Court held that the fourth amendment was applicable to the states through the fourteenth amendment, and therefore all state courts were required to exclude any evidence obtained in violation of the fourth amendment.[44]

The justification primarily advanced for application of the exclusionary rule has been the presumed deterrence of future unlawful police conduct.[45] This justification was recognized in *Elkins v. United States*,[46] where the Court stated:

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.[47]

The substantive scope of habeas corpus and the scope of the exclusionary rule were reconsidered and discussed in *Stone v. Powell*.[48] First, the Court recognized the deterrent purpose of the exclusionary

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37. Stone v. Powell, 96 S.Ct. 3037, 3046 (1976).
38. 8 WIGMORE EVIDENCE § 2183 (McNaughton rev. 1961).
39. 116 U.S. 616 (1886).
40. *Id.* at 616. The Court held that the compulsory production of private books and papers by the owner of goods in a customs revenue suit, to be used as evidence against him at trial, was, in effect, compelling the owner to be a witness against himself, contrary to the fifth amendment to the Constitution. The Court equated this compulsory production of evidence with an unreasonable search and seizure under the fourth amendment. *Id.* at 635.
41. 232 U.S. 383 (1914).
42. *Id.* at 398.
43. 367 U.S. 643 (1961).
44. *Id.* at 654-55. *Mapp* overruled Wolf v. Colorado, 338 U.S. 25 (1949), where the Court had concluded that although the fourth amendment was incorporated by the fourteenth amendment, state courts were not required to exclude any evidence that may have been obtained in violation of the fourth amendment. *Id.* at 27-28.
45. *See* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U. L.Q. 621. *But see* Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. (1964); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).
46. 364 U.S. 206 (1960).
47. *Id.* at 217. This rationale has been repeated by the Court in several decisions subsequent to *Elkins*. *See, e.g.*, Stone v. Powell, 96 S.Ct. 3037, 3048, 3051 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974); Mapp v. Ohio, 367 U.S. 643, 656 (1961).
48. 96 S.Ct. 3037 (1976).

rule, but stated: "[D]espite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons."[49]

The Court then turned to the central question of whether a state prisoner, who has had an opportunity to litigate his fourth amendment claim in the state courts, could invoke this claim again on federal habeas corpus review.[50] The Court engaged in an interest balancing process and stated: "The answer 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."[51] The Court endorsed the exclusionary rule in its existing form[52] but reasoned that while there might be an incremental increase in the furtherance of the deterrent effect of the exclusionary rule in collateral habeas corpus proceedings, the "costs" to society of its application outweighed this small gain in deterrence.[53]

The Court in *Stone* then held that the Constitution does not require that a state prisoner be granted federal habeas corpus relief when he has been convicted in a state court on the basis of evidence obtained in an illegal search or seizure, contrary to the exclusionary rule, when the state has provided an opportunity for full and fair litigation of his fourth amendment claim[54] in compliance with the standards enunciated in *Townsend v. Sain*.[55]

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49. *Id.* at 3038.

50. *Id.* at 3039.

51. *Id.* The judicial costs of the exclusionary rule were found to include the diversion of the participants at the trial from the question of guilt or innocence; the exclusion of reliable evidence bearing on the guilt or innocence of the defendant; the "windfall" afforded a guilty defendant who is allowed to go unpunished as the result of a technicality; and the resultant generation of disrespect for the law and for the administration of justice. *Id.* at 3050.

See, Oaks, *Ethics, Morality and Professional Responsibility*, 3 B.Y.U. L. REV. 591 (1975); Wright, *Must the Criminal Go Free if the Constable Blunders?* 50 TEX. L. REV. 736 (1972).

52. Chief Justice Burger, in a concurring opinion, argued that the reach of the exclusionary rule itself should be modified, stating:

> [I]t now appears that the continued existence of the rule, as presently implemented, inhibits the development of rational alternatives. The reason is quite simple: incentives for developing new procedures or remedies will remain minimal or nonexistent so long as the exclusionary rule is retained in its present form.

96 S.Ct. 3037, 3054-55 (1976).

53. *Id.* at 3051-52.

54. *Id.* at 3052. Justice Powell who wrote the opinion for the Court in *Stone* had earlier expressed substantially the same view in his concurring opinion in Schneckloth v. Bustamonte, 412 U.S. 218 (1973):

> I would hold that federal collateral review of a state prisoner's Fourth Amendment claims—claims which rarely bear on innocence—should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts.

Id. at 250. For an analysis of *Schneckloth* and of Justice Powell's concurring opinion, *see* Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte*, 1975 WIS. L. REV. 484; Note, *Criminal Procedure—Federal Habeas Corpus for State Prisoners and the Fourth Amendment*, 52 N.C. L. REV. 633 (1974); Note, *The Threatened Future of State Prisoners' Fourth Amendment Rights Exercised Through Federal Habeas Corpus*, 9 NEW ENG. L. REV. 433 (1974).

55. 372 U.S. 293, 313 (1963).

Although the Court did not expressly overrule *Kaufman*,[56] it certainly appears to have done so by implication. *Kaufman* was premised on the view that the fourth amendment requires consideration of search and seizure claims upon collateral review of state convictions.[57] The Court in *Stone* held that this was not a constitutional requirement, but simply a "view" that was unjustified.[58]

Justice Brennan, in dissent, asserted that the Court's holding "portends substantial evisceration of federal habeas corpus jurisdiction,"[59] and could not be justified on constitutional grounds.[60] Justice Brennan argued that the language used in the federal habeas corpus statute for state prisoners is explicit,[61] and that Congress had legislatively acquiesced in the previous interpretations of the Court concerning the scope and function of habeas corpus by not amending the statute to restrict those interpretations.[62]

The Court, according to Justice Brennan, has interpreted the availability of collateral habeas relief to be a matter of judicial discretion, contrary to the express statutory language.[63] A federal habeas court apparently must now first determine whether a state prisoner has had a "full and fair opportunity" to litigate his fourth amendment claim in the state courts before a ruling on an application for a writ of habeas corpus can be made. If he has had that "full and fair opportunity," then the application must be denied. Only if he has not had a "full and fair opportunity" can a writ of habeas corpus be issued. Justice Brennan questioned whether there was any real content to this "no full and fair opportunity" exception, since the Court apparently found that the "opportunity" given to Powell and Rice was adequate.[64] According to Justice Brennan, Powell "was arrested pursuant to a statute which obviously is unconstitutional"[65] and Rice's apartment was searched with a warrant that was "clearly deficient."[66]

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56. 394 U.S. 217 (1969). For a discussion of *Kaufman*, *see* text accompanying notes 28-32 *supra*.
57. *Id.* at 225.
58. 96 S.Ct. 3037, 3045 (1976).
59. *Id.* at 3056.
60. *Id.* at 3057. Justice Brennan also pointed out that the Court's decision would necessarily have to be applied to federal prisoners, as well as state prisoners. *Id.* at 3058n.5.
61. *Id.* at 3056-57.
62. *Id.* at 3058.
63. *Id.* at 3062. Justice Brennan found Mapp v. Ohio, 367 U.S. 643 (1961), to be controlling precedent. Under *Mapp*, a state court that admits evidence obtained in violation of the fourth amendment has committed a constitutional error. *Id.* at 655. Justice Brennan argued that it would therefore follow that the defendant has been placed "in custody in violation of the Constitution" within the meaning of 28 U.S.C. § 2254, the federal habeas corpus statute for state prisoners. 96 S.Ct. 3037, 3059 (1976). Justice Brennan stated: "[O]nce the Constitution was interpreted by *Mapp* to require exclusion of certain evidence at trial, the Constitution became irrelevant to the manner in which that constitutional right was to be enforced in the federal courts. . . ." *Id.* at 3061.
64. *Id.* at 3069.
65. Justice Brennan stated that only one state judge had ever considered the validity of the ordinance and that there was no evidence in the record to indicate why the judge in Powell's case had rejected the defendant's claim of unconstitutional vagueness. *Id.*
66. *Id.* Justice Brennan felt that the Nebraska courts had dealt with Rice's case in a

Justice Brennan further asserted that "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 rectified by way of federal habeas. . . ."[67]

Justice Brennan concluded by stating:

> 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 content just to restrict forthrightly the constitutional rights of the citizenry, has embarked on a campaign to water down even such constitutional rights as it purports to acknowledge by the device of foreclosing resort to the federal habeas remedy for their redress.[68]

Justice White also dissented from the Court's opinion and offered probably the most reasonable solution to the application of fourth amendment claims in collateral federal habeas corpus proceedings. Justice White argued that the writ of habeas corpus should be as available for fourth amendment violations as for any other constitutional claim.[69] However, Justice White asserted that the reach of the exclusionary rule should be limited.[70] He reasoned that in many of its applications, the deterrent effect of the exclusionary rule is not advanced at all, and thus becomes only "a senseless obstacle to arriving at the truth in many criminal trials."[71] Justice White stated:

> [T]he rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief. These are recurring situations; and recurringly evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be seriously affected or the indictment dismissed.[72]

Justice White asserted that the exclusionary rule can have no de-

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manner even more violative of constitutional safeguards than that of Powell's case in the California courts. *Id.* Justice Brennan found that

> the Nebraska Supreme Court upheld the search on the alternative and patently 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.

Id. (emphasis in original).

67. *Id.* at 3068.
68. *Id.* at 3071.
69. *Id.*
70. *Id.* at 3072.
71. *Id.*
72. *Id.*

terrent effect when law enforcement officials have acted reasonably and with good faith, although mistakenly.[73] If the officials do their duty, they will continue to act reasonably and in good faith, even if they are again proven to be mistaken.[74] All that the exclusionary rule can do under such circumstances is to impair or abort the truth-finding process.[75]

Justice White therefore seems to believe that the Court should modify a judge-made rule before changing established statutory interpretations.

By its decision in *Stone v. Powell,* the Court has relegated fourth amendment claims to second class status. The Court has denied collateral relief for search and seizure claims, without denying it for other constitutional claims, although this too may eventually happen if Justice Brennan's prognostication is correct. The only avenue now available for relief when fourth amendment rights have been violated in state courts is certiorari, the grant of which is an uncertain prospect.

The heart of the problem seems to lie with the exclusionary rule, and not with the habeas corpus provisions. The exclusionary rule could be modified, in the manner suggested by Justice White, to avoid unjust results.[76] Defendants who are obviously guilty should not be allowed to go free, to the detriment of innocent victims and society, due to some judicially created technicality or to mistakes made in good faith by conscientious law enforcement officials. However, the writ of habeas corpus should not be denied to those criminal defendants who do have legitimate grievances under the fourth amendment, particularly when the "full and fair opportunity" afforded them in the state courts to litigate their fourth amendment claims may be less than meaningful.

LAWRENCE R. KLEMIN

CONSTITUTIONAL LAW—DUE PROCESS—MUNICIPAL ORDINANCE THAT AUTHORIZES ASSESSMENT OF TOWING AND STORAGE FEES AGAINST IMPOUNDED VEHICLE WITHOUT PRIOR NOTICE OR OPPORTUNITY FOR HEARING DENIES VEHICLE OWNER DUE PROCESS OF LAW.

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73. *Id.* at 3072-73.
74. *Id.* at 3073.
75. *Id.*
76. *Id.* at 3072. For proposed modifications of the exclusionary rule, *see* Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN. L. REV. 1027, 1041-55 (1974). For arguments against modifying the reach of the exclusionary rule, *see* Note, *The Impending Limitation of the Scope of the Exclusionary Rule—Will the Supreme Court Vandalize the Constitution?* 5 N.C. CENT. L.J. 91 (1973); Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule,* 20 U.C.L.A. L. REV. 1129 (1973).