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# Criminal Law-Habeas Corpus-Fourth Amendment Exclusionary Rule Claims Need not be Reviewed in Federal Habeas Corpus where Fully and Fairly Litigated in State Courts

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# CRIMINAL LAW—HABEAS CORPUS—FOURTH AMENDMENT EXCLUSIONARY RULE CLAIMS NEED NOT BE REVIEWED IN FEDERAL HABEAS CORPUS WHERE FULLY AND FAIRLY LITIGATED IN STATE COURTS

*Stone v. Powell*[1]

Respondent Powell was convicted of murder in a California state court. Part of the evidence against him was a revolver discovered on his person in a search incident to arrest for vagrancy by a Henderson, Nevada, police officer. The officer testified as to the discovery of the revolver, and a criminologist testified the revolver was the one used in the murder. Powell contended the revolver and the police officer's testimony should have been excluded because the vagrancy ordinance was unconstitutional. The trial court rejected this contention. The conviction was upheld by California courts and on habeas corpus review in United States district court.[2] The Ninth Circuit reversed, concluding the vagrancy ordinance was unconstitutionally vague and that admission of the evidence was not harmless error.[3] The state appealed.

In *Wolff v. Rice*,[4] decided with *Stone v. Powell*, Rice had been convicted of murder in a Nebraska state court. A police officer answering a distress call at an Omaha street address was killed by a bomb explosion while examining a suitcase in the doorway. Rice's conviction as a participant in the bombing plot was based in part on evidence obtained from his home pursuant to a search warrant. Rice contended the search was illegal and the evidence should have been excluded because the affidavit supporting issuance of the search warrant was defective.[5] His conviction was affirmed by the Nebraska Supreme Court[6] but was reversed on habeas corpus review by the United States district court which agreed the warrant affidavit was defective.[7] The Eighth Circuit affirmed.[8] The state appealed.

1. 96 S. Ct. 3037 (1976).
2. *Id.* at 3039-40.
3. Powell v. Stone, 507 F.2d 93, 95-97, 99 (9th Cir. 1974).
4. 96 S. Ct. 3037 (1976).
5. *Id.* at 3040-41.
6. State v. Rice, 188 Neb. 728, 199 N.W.2d 480 (1972).
7. Rice v. Wolff, 388 F. Supp. 185, 190-94 (D.C. Neb. 1974). The district court relied on Spinelli v. United States, 393 U.S. 410 (1969), and Aguilar v. Texas, 378 U.S. 108 (1964), in examining the affidavit on its face and concluding probable cause was lacking. The United States Supreme Court noted that the Nebraska Supreme Court had found probable cause by relying in part on additional information brought out at a suppression hearing and that such a means of finding probable cause previously had been rejected. 96 S. Ct. at 3041 n.3.
8. Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975).

The United States Supreme Court, in an opinion by Justice Powell supported by six of the nine justices, held that

> . . . where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.[9]

The rationale for the holding was that the exclusionary rule is not a constitutional right but rather a judge-made remedy designed to deter police misconduct; in this context, allowing exclusionary rule claims to be considered in habeas corpus proceedings does not serve a meaningful deterrent function.[10] Thus Powell's and Rice's convictions were allowed to stand.[11] The Court stated there still would be habeas corpus jurisdiction over fourth amendment claims as distinguished from the exclusionary rule.[12] Though the holding applies to state prisoners seeking federal habeas corpus under 28 U.S.C. § 2254 (1971), dictum in the case indicated the same result will obtain where federal prisoners attempt to invoke the exclusionary rule in collateral proceedings under 28 U.S.C. § 2255 (1971).[13]

A brief history of federal habeas corpus will help put *Stone v. Powell* in perspective. The landmark case of *Brown v. Allen* in 1953 held that federal courts have the power to review all federal constitutional issues in habeas corpus proceedings, even where a state court has ruled against the petitioner on the federal claim.[14] Ten years later *Fay v. Noia* established that protection of due process rights is a basic function of habeas corpus and that a procedural default by the petitioner in state courts will not preclude habeas corpus review unless the petitioner "deliberately by-passed" the state procedure.[15] At the same time *Townsend v. Sain* made it clear that a federal habeas court is not bound to accept the state determination of facts and in any event must always apply federal law independently of the state determination.[16]

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9. 96 S. Ct. at 3046.

10. *Id.* at 3048-51.

11. The Court rejected respondents' contention that since the time for applying for certiorari had passed in their cases, restriction of the ability to obtain habeas corpus review of search and seizure claims should be prospective. The Court noted that while not required to do so under Fay v. Noia, 372 U.S. 391 (1963), the respondents were free to file a timely application for certiorari before seeking habeas corpus review. 96 S. Ct. at 3052 n.38.

12. *Id.* at 3052 n.37. This might be interpreted as meaning fourth amendment claims may be raised on habeas review not only where the issue was not fully and fairly litigated in the state courts, but also in other unspecified situations. One possibility might be that where police activities "shock the conscience" of civilized society, evidence must be excluded under the due process clause of the fourteenth amendment. Rochin v. California, 342 U.S. 165 (1952).

13. 96 S. Ct. at 3045 n.16.

14. 344 U.S. 443, 463-64, 478, 508 (1953).

15. 372 U.S. 391, 426-27, 438 (1963).

16. 372 U.S. 293, 312, 318 (1963).

*Townsend* also laid down standards for determining when the federal habeas court should grant an evidentiary hearing.[17] After *Fay* and *Townsend* the Court did not expressly approve review of fourth amendment claims by state prisoners in federal habeas corpus; however, several cases made it clear such claims would be heard.[18] In 1969 *Kaufman v. United States* held federal prisoners could assert fourth amendment and exlcusionary rule claims in habeas corpus proceedings and reaffirmed that state prisoners could do so.[19]

The steady expansion in the scope of federal habeas corpus review has not gone unopposed. There have been numerous proposals in Congress to curtail the availability of the writ.[20] A strong hint that the Supreme Court itself might cut back the scope of habeas review, at least in search and seizure cases, came in the 1973 case of *Schneckloth v. Bustamonte.*[21] There Justice Powell in a concurring opinion presaged his majority opinion in *Stone v. Powell* by saying he would hold ". . . [F]ederal collateral review of a state prisoner's Fourth Amendment claims . . . 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." This concurring opinion was joined by Chief Justice Burger and Justice Rehnquist and was supported by Justice Blackmun in a separate concurring opinion.[22]

A brief history of the fourth amendment exclusionary rule also is helpful in understanding *Stone v. Powell.* In the 1914 case of *Weeks v. United States* the Court held evidence obtained by federal officers in violation of the

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17. The Court held that an evidentiary hearing must be granted to a habeas applicant if:

> . . . (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the records as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

*Id.* at 313. It would appear that the holding in *Fay v. Noia,* text accompanying note 15 *supra,* is one example of the "full and fair" hearing principle set forth in *Townsend.*

The *Townsend* holding has additional significance in the fourth amendment search and seizure area because so many search and seizure claims involve mixed questions of law and fact, and the federal court must always decide questions of federal law in habeas proceedings. *See* text accompanying note 16 *supra.*

18. *E.g.,* Mancusi v. DeForte, 392 U.S. 364 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); Warden v. Hayden, 387 U.S. 294 (1967).

19. 394 U.S. 217, 225-27 (1969).

20. 61 GEO. L.J. 1221 (1973). Assuming the exclusionary rule is not a constitutional right, a statute proposed in 1973 would have had the same result as *Stone v. Powell* by requiring habeas review to be based on rights whose purpose is to protect the reliability of the state fact-finding process. S. 567, 93d Cong., 1st Sess. (1973).

21. 412 U.S. 218 (1973).

22. *Id.* at 249-50.

fourth amendment ban on "unreasonable" searches would be excluded in federal prosecutions.[23] Thirty-five years later *Wolf v. Colorado* held that while the fourth amendment applied to the states through the fourteenth amendment, the states were not required to exclude evidence obtained in violation of the fourth amendment.[24] A few years later *Rochin v. California* edged a bit closer to applying the exclusionary rule to the states in holding that where police conduct in obtaining evidence in violation of the fourth amendment "shocks the conscience," such evidence must be excluded at trial under a due process concept.[25] Finally, 47 years after *Weeks*, the Court held in *Mapp v. Ohio*[26] that the exclusionary rule is binding on the states. The rule was described as of "constitutional origin" on the ground that without it the fourth amendment would be reduced to a "form of words." The rule also was justified as a deterrent to violations of the fourth amendment by government officials and on the ground that exclusion of unlawfully seized evidence is required by the "imperative of judicial integrity."[27]

Since *Mapp* the exclusionary rule has come under increasing criticism on the grounds that it does not in fact deter police misconduct and that it often results in releasing guilty persons.[28] A growing list of cases has limited the application of the rule.[29] Indeed, a new exception to the rule was announced in *United States v. Janis*,[30] decided the same day as *Stone v. Powell*. The exclusionary rule also has been limited, in effect, by exceptions to the general requirement for a warrant.[31]

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23. 232 U.S. 383 (1914).
24. 338 U.S. 25 (1949).
25. 342 U.S. 165, 172-73 (1952).
26. 367 U.S. 643 (1961).
27. *Id.* at 648-49, 656, 659.
28. *See, e.g.*, Chief Justice Burger's dissent in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 412-24 (1971). A 1974 study of the critical commentary on the exclusionary rule concluded, "A decision by the Supreme Court narrowing or abolishing the exclusionary rule would not be surprising in view of the recent legal commentary trend." 65 J. CRIM. L. & C. 373, 384 (1974).
29. *E.g.*, United States v. Calandra, 414 U.S. 338 (1974) (witness before grand jury may not refuse to answer questions that are based on unlawfully obtained evidence); Brown v. United States, 411 U.S. 223 (1973) (defendant without proper "standing" may not invoke exclusionary rule); Walder v. United States, 347 U.S. 62 (1954) (illegally obtained evidence may be used to impeach defendant).

One commentator has described *Calandra* as a "watershed" case because of its emphasis on the exclusionary rule as a remedy rather than a constitutional right, ". . . thereby removing the clearest authority for imposing the rule on the states." Monaghan, *The Supreme Court—1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 4 (1975).
30. 96 S. Ct. 3021 (1976). The Court held that the exclusionary rule would not exclude from a federal civil tax proceeding evidence obtained by state criminal law enforcement officers relying in good faith on a warrant that later proved defective, at least in the absence of proof of federal participation in illegality.
31. *E.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent searches are permissible without warrant, but burden is on state to prove consent); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (police may seize without warrant evidence in

The majority opinion in *Stone v. Powell* asserted that the exclusionary rule is merely a judge-made remedy and that the *Mapp* holding was based primarily on the belief that unlawful police conduct would be deterred.[32] The Court dismissed the judicial integrity argument, noting that it has not been thought to prevent the use of unlawfully obtained evidence in some circumstances.[33] After asserting that the rule is "not a personal constitutional right," the Court observed that because of the rule's deterrent purpose it has not been extended to situations where the deterrence is attenuated or non-existent.[34] The Court concluded that the costs of entertaining exclusionary rule claims in habeas corpus proceedings outweigh the deterrent effect; however, it adhered to the view that deterrent ". . . considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state court convictions."[35] The Court stated in a footnote that it was unwilling to assume that state court judges are hostile to constitutional rights and that they are not as capable as federal judges in applying constitutional law.[36] Thus, where the state has provided a full and fair review of an exclusionary rule issue, the issue may not be raised in federal habeas corpus proceedings.[37]

Chief Justice Burger concurred. In the earlier case of *Bivens v. Six Unknown Named Agents* he had proposed that Congress enact an administrative remedy to compensate victims of fourth amendment violations and had

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plain view that was inadvertently observed in course of authorized intrusion); Chimel v. California, 395 U.S. 752 (1969) (limited search of area within arrestee's immediate control may be made incident to arrest even if police had time to obtain warrant); Terry v. Ohio, 392 U.S. 1 (1968) ("stop and frisk" searches for weapons are permitted where police officer reasonably concludes the subject may be armed and dangerous and that preventive action to protect himself or others is necessary); Warden v. Hayden, 387 U.S. 294 (1967) (police in "hot pursuit" of armed, fleeing felon may search for weapons without warrant); Carroll v. United States, 267 U.S. 132 (1925) (warrant is unnecessary to search for contraband in vehicle that has been stopped).

32. 96 S. Ct. at 3046-47. However, substantial space was devoted in *Mapp* to the argument that the exclusionary rule is constitutionally required. *See, e.g.*, 367 U.S. at 648-49, 655-57.

33. 96 S. Ct. at 3047. The Court cited, *inter alia*, United States v. Calandra, 414 U.S. 338 (1974); Brown v. United States, 411 U.S. 223 (1973); and Walder v. United States, 347 U.S. 62 (1954).

34. 96 S. Ct. at 3048-49. The Court cited United States v. Calandra, 414 U.S. 338 (1974), and Walder v. United States, 347 U.S. 62 (1954). *See* note 29 *supra.*

35. 96 S. Ct. at 3049-51. Among the costs cited by the court in ". . . weighing the utility of the exclusionary rule against the costs of extending it to collateral review. . ." were that the rule diverts attention from the main issue of guilt or innocence, that the excluded evidence is usually reliable and often highly probative, and that application of the rule often results in freeing the guilty. *Id.* at 3049-50.

36. *Id.* at 3051 n.35.

37. *Id.* at 3052. In authorizing habeas review where the state did not provide a full and fair hearing of a search and seizure claim, the Court seemed to follow the principle in Fay v. Noia, 372 U.S. 391, 426-27 (1963), that a basic function of habeas corpus review is to protect due process rights. Full and fair hearing would seem to be a fundamental due process right. *Cf.* Townsend v. Sain, 372 U.S. 293, 313 (1963).

suggested the courts should not modify the exclusionary rule until Congress acted.[38] In *Stone v. Powell*, however, Chief Justice Burger stated it was clear that alternative remedies would not be developed as long as the exclusionary rule is enforced by the courts, so he favored judicially overruling or limiting the scope of the rule to prod legislative action.[39]

Justice White stated in a dissenting opinion he did not agree with barring exclusionary rule claims from habeas corpus proceedings. However, he added he would join other justices in modifying the exclusionary rule to prevent its application in cases where law enforcement personnel mistakenly conduct an illegal search in good faith and on reasonable grounds.[40]

Justice Brennan, joined by Justice Marshall, wrote a strong dissent. Noting that the majority did not specifically overrule *Mapp*, Justice Brennan asserted the exclusionary rule is a constitutional right and that, as a result, the majority's holding as to habeas corpus review effectively rewrote the jurisdictional statute enacted by Congress.[41] That statute provides for habeas review ". . . on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States."[42] Justice Brennan noted the Court's opinion seemed to say some constitutional rights are more worthy of protection than others and that less worthy rights will be denied habeas corpus protection.[43] He added that there is a need for a federal forum to protect federal rights, at least partly because state judges are under popular pressure to uphold convictions of the "morally unworthy" even if the fourth amendment rights of those convicted have been violated.[44]

The Court did not define "full and fair litigation" in reference to state-court adjudication of search and seizure claims, but it referred in a footnote[45] to *Townsend v. Sain*. *Townsend* used the same "full and fair" language and discussed in some detail the factors to be used in deciding whether to grant an evidentiary hearing in a habeas corpus proceeding.[46]

38. 403 U.S. 388, 420-22 (1971).
39. 96 S. Ct. at 3055.
40. *Id.* at 3071-73. Justice White stated:

> When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted.

*Id.* at 3073.
41. *Id.* at 3056-59.
42. 28 U.S.C. § 2254(a) (1971).
43. 96 S. Ct. at 3061, 3065.
44. *Id.* at 3064-66.
45. *Id.* at 3052 n.36.
46. 372 U.S. 293, 313-18 (1963). *See* notes 16-17 and accompanying text *supra*.

Presumably, similar standards now are to be used in deciding whether to entertain a claim of unlawful search or seizure in a federal habeas proceeding.

The full-and-fair-litigation exception in *Stone v. Powell* may have a special impact in Missouri. Missouri's strict "waiver" or "procedural default" rule in search and seizure cases could result in Missouri prisoners obtaining federal habeas review on the ground they did not receive a full and fair hearing. In *State v. Fields*[47] division two of the Missouri Supreme Court stated the rule that search and seizure claims must be made by suppression motion before trial and must be kept alive by timely objection at trial and by inclusion in a motion for a new trial; otherwise direct appeal will not be entertained on fourth amendment grounds. The only exception to this procedural rule is where the defendant was surprised by the introduction of the disputed evidence. Since the defendant in *Fields* did not file a suppression motion or preserve the issue by timely objection or in a motion for a new trial, the court refused to consider the issue on direct appeal.[48] In a later state collateral proceeding under Missouri Supreme Court Rule 27.26, the court held the defendant in *Fields* was precluded from collateral attack on the basis of the search and seizure issue because of his procedural defaults.[49]

In *Fields v. Swenson*,[50] a habeas corpus proceeding, the Eighth Circuit upheld the conviction, but it did consider the search and seizure claim on the merits. In holding that a procedural default in state courts would not preclude federal habeas corpus review, the court relied on its earlier holding in *Frazier v. Roberts*.[51] *Frazier* in turn had relied on *Fay v. Noia*[52] and *Townsend v. Sain*.[53]

Notwithstanding the federal position in the *Fields* case, the Missouri Supreme Court en banc endorsed its divisional position and adhered to the restrictive procedural default rule in the 1972 case of *Schleicher v. State*.[54]

The 1974 case of *State v. Yowell*[55] confirms that Missouri and federal courts still disagree on the issue. In *Yowell* the defendant raised his search and seizure claim in a pre-trial suppression motion and in a motion for a new trial, but failed to object at trial. The Missouri Supreme Court refused to

47. 442 S.W.2d 30, 33 (Mo. 1969).
48. *Id.* at 33.
49. Fields v. State, 468 S.W.2d 31, 32 (Mo. 1971).
50. 459 F.2d 1064 (8th Cir. 1972).
51. 441 F.2d 1224 (8th Cir. 1971).
52. 372 U.S. 391 (1963).
53. 372 U.S. 293 (1963).
54. 483 S.W.2d 393 (Mo. En Banc 1972). The rule continues to be applied. *See, e.g.*, State v. Dayton, 535 S.W.2d 469 (Mo. App., D.K.C. 1976); State v. Hall, 534 S.W.2d 508 (Mo. App., D. St. L. 1976); State v. Hunter, 530 S.W.2d 432 (Mo. App., D.K.C. 1975).

For a full discussion of Missouri's procedural default rules as they operate to bar direct appeal and collateral review, see Anderson, *Post-Conviction Relief in Missouri—Five Years Under Amended Rule 27.26*, 38 MO. L. REV. 1 (1973).

55. 513 S.W.2d 397 (Mo. En Banc 1974).

consider the claim on direct appeal. In *Yowell v. Wyrick*,[56] a habeas corpus proceeding, the United States district court found there was no deliberate bypass of state procedures, considered the search and seizure claim on the merits and held the disputed evidence should have been excluded.

It thus seems clear that unless the Missouri Supreme Court relaxes the strict procedural default rule, a number of exclusionary rule claims rejected by Missouri courts will continue to be heard in federal habeas corpus proceedings under the full-and-fair-litigation exception in *Stone v. Powell*.[57]

Besides this obvious effect in Missouri, another clear result of *Powell* would seem to be that far fewer search and seizure claims will reach the federal courts, thus increasing the finality of convictions.[58] Supreme Court review still will be available through writ of certiorari from state supreme courts, but in practical terms the chances of review are much smaller.[59] The result, according to Justice Brennan, is that denials of rights at the state level will go unreviewed.[60] Even assuming the exclusionary rule is not a constitutional right, it would seem that its enforcement needs to be monitored by federal courts;[61] unless enforcement is made uniform through the federal courts, the effect may be to give the fourth amendment different meanings in different jurisdictions. The Court, however, seems to be giving state courts a green light to apply search and seizure law as they see fit.[62]

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56. 387 F. Supp. 421 (W.D. Mo. 1975).

57. Judge Seiler commented in his dissent in Schleicher v. State, 483 S.W.2d 393, 395 (Mo. En Banc 1972):

> The basic question is, who is going to hear federal constitutional search and seizure questions arising from Missouri state convictions? Our divisional position is that it is to be done by the federal courts, Fields v. State, 468 S.W.2d 31 (Mo. 1971). This leads to conflicts and does not promote finality. If there is a defect in our state proceedings, it seems to me we should handle it, rather than turning it over to the federal courts. A defendant cannot constitutionally be convicted on evidence obtained in violation of the Fourth Amendment, and we accomplish little by declining to meet the issue, particularly in a case where there is no evidence of an abuse of process by the defendant.

(citations omitted).

58. For discussion of the issues involved, see Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

59. In 1974, 7,843 habeas corpus petitions were filed in the federal courts. DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1975 ANNUAL REPORT 207 Table 24. In contrast, during its 1974 term, the United States Supreme Court rendered 159 written opinions and 177 per curiam decisions but denied or dismissed appeals or petitions for certiorari in 3,508 cases. These figures include dispositions of other applications for review such as habeas corpus or mandamus. *The Supreme Court—1974 Term*, 89 HARV. L. REV. 1, 278 Table II (1975).

60. 96 S. Ct. at 3071.

61. There are substantial arguments concerning the desirability of a federal forum to enforce federal law. *See, e.g.*, Justice Brennan's dissent, *id.* at 3064-66; 52 N.C.L. REV. 633, 649-51 (1974); Comment, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1060-62 (1970).

62. In *Wolff* the Supreme Court allowed a clearly erroneous state interpretation of search and seizure law to stand without a remedy for the respondent. Notes 7,

Beyond immediate effects, it is quite possible, as argued by Justice Brennan, that *Powell* ". . . portends substantial evisceration of federal habeas corpus jurisdiction . . . ."[63] If, as Justice Brennan suggested, the Court has decided that some constitutional rights are not as deserving of protection as others,[64] it follows that the lesser rights are not worthy of habeas corpus protection. The exclusionary rule, as a remedy for fourth amendment violations, arguably is just such a lesser right and thus does not merit habeas review in most cases. Such reasoning might be applied, for instance, to the *Miranda* rule requiring law enforcement officers to warn suspects of their rights to remain silent and to have an attorney present during questioning.[65] The *Miranda* rule specifically was stated to be a judge-made remedy and not a constitutional right per se—the same status accorded the exclusionary rule in *Stone v. Powell.*

Further limitation or perhaps even abolition of the exclusionary rule may be presaged in *Stone v. Powell.* Six of the nine justices concurred in the opinion and a seventh, Justice White, said he would go along with modifying the rule. Justice White's proposal to modify the exclusionary rule by preventing its application where law enforcement officers mistakenly engage in an illegal search and seizure in good faith and on reasonable grounds[66] may indicate the direction the Court is headed. Chief Justice Burger hinted in *Powell* that he would go along with this proposal.[67] The same day *Powell* was decided the Court seemed to take a step in this direction in *United States v. Janis*; there the Court spoke of "good faith reliance" by state officers on a warrant that later proved defective.[68]

A major shortcoming of *Stone v. Powell* is the Court's downgrading of the exclusionary rule in seeming reliance on the proposition that the rule does not, in fact, deter police misconduct.[69] While two earlier studies[70] supported that proposition, a more recent study[71] raises serious questions about the validity of the earlier studies.

While the Court dismissed the "judicial integrity" argument for the exclusionary rule, part of the rationale in *Mapp v. Ohio* should give pause to persons who conceive the United States to be a nation of laws, not men:

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11 *supra.* It seems the Court is saying that because the exclusionary rule is not a right but rather a remedy, more flexibility may be allowed in its enforcement.

63. 96 S. Ct. at 3056.

64. *Id.* at 3061, 3065.

65. Miranda v. Arizona, 384 U.S. 436 (1966).

66. 96 S. Ct. at 3073.

67. *Id.* at 3055.

68. 96 S. Ct. 3021 (1976). *See* note 30 *supra.*

69. 96 S. Ct. at 3051.

70. Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives,* 2 J. LEG. STUD. 243 (1973).

71. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion,* 62 KY. L.J. 681 (1974).