Mercer Law Review

Volume 28
Number 2 *Brainerd Currie Memorial Edition*

Article 15

3-1977

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Exclusionary Rule Need Not Be Applied In Federal Habeas Reviews of State Convictions

In *Stone v. Powell,*[1] the U.S. Supreme Court held that if a state "has provided an opportunity for full and fair litigation of a Fourth-Amendment claim, a state prisoner may not be granted federal habeas-corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial."[2]

Respondent Powell was convicted of second-degree murder in a California state court.[3] A police officer had found the murder weapon on Powell during a search incident to his arrest for violation of a vagrancy ordinance, and the officer's testimony was admitted at trial over Powell's objection. Powell contended that the vagrancy ordinance was unconstitutionally vague; the arrest therefore was invalid, he contended, and so was the search incident to it. The California District Court of Appeal affirmed Powell's conviction,[4] and the Supreme Court of California denied Powell's habeas-corpus petition. Powell then petitioned for a writ of habeas corpus under 28 U.S.C.A. §2254 and added to his state court objections the contention that the arresting officer lacked probable cause to believe he was violating the ordinance. The U.S. District Court for the Northern District of California denied Powell's petition.[5] The Court of Appeals for the Ninth Circuit reversed.[6]

Respondent Rice was also convicted of murder. Rice and Duane Peak were suspects in the bombing death of a policeman. An arrest warrant was issued for Peak, and a warrant to search for explosives and illegal weapons believed to be in Rice's possession was obtained. In executing both warrants, police entered Rice's home after repeatedly knocking on the door.

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1. ___ U.S. ___, 96 S. Ct. 3037 (1976).
2. 96 S. Ct. at 3052 (footnotes omitted).
3. All facts are from the Supreme Court's opinion, *id.* at 3039-3042.
4. The appeal court concluded that the error, if any, was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967).
5. The District Court found that the arresting officer had probable cause. The court held that the exclusionary rule does not bar the fruits of a search incident to an otherwise valid arrest even if the vagrancy ordinance was unconstitutionally vague. Alternatively, the court concluded that the error, if any, was harmless beyond a reasonable doubt.
6. Powell v. Stone, 507 F.2d 93 (9th Cir. 1974). The court held that the vagrancy ordinance was unconstitutionally vague; that Powell's arrest was therefore illegal; that exclusion would deter legislators from enacting unconstitutional statutes; and that the admission of the officer's testimony was not harmless error.

Neither Peak nor Rice was there, but police found, in plain view, materials used in the construction of explosive devices. Rice's motion to suppress the evidence seized was denied by the trial court, and the Supreme Court of Nebraska affirmed.[7] Contending that the evidence admitted at trial had been discovered during an illegal search of his home, Rice filed a petition for a writ of habeas corpus in the U.S. District Court for Nebraska. The District Court granted the writ,[8] and the Court of Appeals for the Eighth Circuit affirmed.[9] The Supreme Court granted petitions for certiorari in both cases.[10]

Originally the right to file a writ of habeas corpus was granted only to prisoners held in the custody of the United States,[11] and the scope of the writ was limited to consideration of whether the sentencing court had jurisdiction over the subject.[12] The writ was later extended to "all cases where any person may be restrained of his or her liberty in violation of the constitution . . . of the United States,"[13] thereby including state prisoners, but the scope of the writ was not expanded beyond an inquiry into the sentencing court's jurisdiction.[14] The Supreme Court, through dictum in *Frank v. Mangum,*[15] relaxed the jurisdictional limitation by saying that a federal court could inquire into the merits of a case brought before it on habeas corpus if the state court had failed to provide adequate "corrective process;"[16] but even adequate state corrective process did not bar the federal-courthouse door after *Brown v. Allen.*[17] Finally, in *Fay v. Noia,*[18] the Court held that the requirement in 28 U.S.C.A. §2254, that a state prisoner exhaust all state remedies before his application for federal habeas relief would be granted, refers only to failure to exhaust remedies still

7. State v. Rice, 188 Neb. 728, 199 N.W.2d 480 (1972). The court found the affidavit in support of the warrant application sufficient and the search warrant valid.

8. Rice v. Wolff, 388 F. Supp. 185 (D. Neb. 1974). The court concluded that the affidavit was defective under Spinelli v. United States, 393 U.S. 410 (1969) and Aguilar v. Texas, 378 U.S. 108 (1964), and that the warrant was therefore invalid. Rejecting the state's contention that the search was justified because of a valid arrest warrant for Peak and the exigent circumstances, the court found that the police lacked probable cause to believe Peak was in the house and that the circumstances were not sufficiently exigent to justify an immediate warrantless search.

9. Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975).

10. 422 U.S. 1055 (1975).

11. *See* Judiciary Act of 1789, c. 20, §14, 1 Stat. 81.

12. *Ex parte* Watkins, 28 U.S. 193 (1830). This was true even if the imprisonment was clearly unlawful.

13. Act of Feb. 5, 1867, c. 28, §1, 14 Stat. 385. This is still the only ground on which the federal courts will entertain a habeas corpus petition. *See* 28 U.S.C.A. §2254 (1971), the modern statute used by state prisoners wishing to file federal habeas-corpus petitions.

14. *In re* Wood, 140 U.S. 278 (1891); Pettibone v. Nichols, 203 U.S. 192 (1906).

15. 237 U.S. 309 (1915).

16. *Id.* at 334-335.

17. 344 U.S. 443 (1953) (opinion of Frankfurter, J.).

18. 372 U.S. 391 (1963).

open to the applicant at the time of the application.

Federal habeas-corpus petitions flourished under the liberalized scope of the writ.[19] Although the Supreme Court had often entertained allegations of illegal search and seizure in cases coming before it via federal habeas-corpus proceedings,[20] it had never reached the question presented in *Stone* "concerning the scope of federal habeas corpus and the role of the exclusionary rule upon collateral review of cases involving Fourth Amendment claims."[21] In *Kaufman v. United States,*[22] which held that search-and-seizure claims made by federal prisoners are cognizable under 28 U.S.C.A. §2255,[23] the Court addressed the question in dictum: "Our decisions leave no doubt that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial."[24]

The foundation for the exclusionary rule[25] was laid in *Boyd v. United States,*[26] when the Fourth and Fifth Amendments "almost [ran] into each other"[27] and thereby prevented federal authorities from forcing the production of private books and papers.[28] *Weeks v. United States*[29] held that a defendant could recover property held by federal authorities if that property was obtained through an illegal search and seizure, but not until *Gouled v. United States*[30] was illegally seized evidence actually barred

19. In 1969, state prisoners filed 7,359 habeas corpus petitions in federal courts. "[W]ell over ninety percent" of collateral attacks filed by state and federal prisoners produce no result. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 CHI. L. REV. 142, 148 (1970).

20. *See, e.g.,* Lefkowitz v. Newsome, 420 U.S. 283 (1975); Cardwell v. Lewis, 417 U.S. 583 (1974); Cady v. Dombrowski, 413 U.S. 433 (1973); Whiteley v. Warden, 401 U.S. 560 (1971); Carafas v. LaVallee, 391 U.S. 234 (1968); Warden v. Hayden, 387 U.S. 294 (1976). *Whiteley* is the only federal habeas corpus case in which the Supreme Court has specifically granted relief on the basis that evidence used against the defendant at trial was illegally seized and therefore should have been excluded.

21. 96 S. Ct. at 3042.

22. 394 U.S. 217 (1969).

23. This is the statutory remedy for a *federal* prisoner alleging that he is in custody in violation of the U.S. Constitution.

24. 394 U.S. at 225.

25. "The debate within the Court on the exclusionary rule has always been a warm one." United States v. Janis, ___ U.S. ___, 96 S. Ct. 3021, 3029 (1976). For a list of articles discussing alternatives to the exclusionary rule, see *id.* at 3030 n. 21. For a list of empirical studies attempting to determine whether the rule does in fact have any deterrent effect, see *id.* at 3030 n. 22.

26. 116 U.S. 616 (1886).

27. This is a paraphrase of the Court's familiar language, *id.* at 630.

28. For an interesting discussion of the history of the general warrant and writs of assistance and their influence on the development of the Fourth Amendment, see Stanford v. Texas, 379 U.S. 476, 481-485 (1965); Frank v. Maryland, 359 U.S. 360, 363-365 (1959).

29. 232 U.S. 383 (1914).

30. 255 U.S. 298 (1921). *Gouled* arose from an illegal search and seizure of private papers. The Court reasoned that admission of private papers obtained in violation of the Fourth

from federal courts. In *Wolf v. Colorado*,[31] the Court held that the Fourth Amendment's protection against arbitrary intrusions was enforceable against the states through the Due Process Clause of the Fourteenth Amendment, but not until *Mapp v. Ohio*[32] was the exclusionary rule held applicable to the states.

Although *Mapp* emphasized that the exclusionary rule was "constitutional in origin,"[33] other decisions, especially those since *Mapp*, have relied more heavily on a need to deter unlawful police conduct[34] and "the imperative of judicial integrity"[35] as justifications for the rule.[36] The Court's deemphasis of the constitutional aspects of the rule can be most clearly seen in *United States v. Calandra*.[37] The exclusionary rule "is a *judicially created remedy* designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a *personal constitutional right* of the party aggrieved,"[38] the Court said. "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served; . . . it does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct."[39] The Court's reasoning in *Calandra* clearly paved the way for its decision in *Stone*.[40]

Amendment would be a violation of the Fifth-Amendment privilege against self-incrimination. *Id.* at 306, 312.

31. 338 U.S. 25 (1949).

32. 367 U.S. 643 (1961).

33. *Id.* at 660. Several phrases from the *Mapp* opinion discussing the exclusionary rule illustrate the Court's emphasis on the constitutional origin of the rule: "the Fourth Amendment . . . really *forbade* [the] introduction [of illegally seized evidence]," *id.* at 649 (emphasis supplied); "constitutionally required," *id.* at 648; "constitutional privilege," *id.* at 656; "the [constitutional] right to privacy," *id.* at 656; "a denial of the constitutional rights of the accused," *id.* at 648.

34. Terry v. Ohio, 392 U.S. 1, 28, 29 (1968); Desist v. United States, 394 U.S. 244, 254 n. 24 (1969); Linkletter v. Walker, 381 U.S. 638, 639 (1964); Elkins v. United States, 364 U.S. 206, 217 (1960). The deterrence value of the rule did not escape the *Mapp* Court either. *See* 367 U.S. at 648, 656.

35. 364 U.S. at 208; Lee v. Florida, 392 U.S. 378, 385-386 (1968).

36. Chief Justice Burger, in his concurring opinion in *Stone*, observed, "The rhetoric has varied with the rationale to the point where the rule has become a doctrinaire result in search of validating reasons." 96 S. Ct. at 3053.

37. 414 U.S. 338 (1974).

38. *Id.* at 348 (emphasis supplied).

39. *Id.* at 348-350. The Court has found that the "remedial objectives" of the exclusionary rule were not "most efficaciously served" in several fact situations. *See, e.g.*, United States v. Janis, ___ U.S. ___, 96 S. Ct. 3021 (1976) (illegally seized evidence not barred from a civil proceeding); United States v. Calandra, 414 U.S. 338 (1974) (illegally seized evidence may be used in a grand jury proceeding); Alderman v. United States, 394 U.S. 165 (1969) (standing to invoke the rule limited to the victim of an illegal search); Walder v. United States, 347 U.S. 62 (1952) (illegally seized evidence may be used to impeach a defendant's testimony).

40. Justice Brennan, joined in his dissent in *Calandra* by Justice Douglas and Justice Marshall, wrote, "I thus fear that when next we confront a case of a conviction rested on

Stone[41] did not deny that federal courts have jurisdiction over an illegal search-and-seizure claim made by a state prisoner. The Court said, "In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review."[42]

The Court rejected the *Kaufman* dictum, that federal habeas review must be granted prisoners convicted in state court on the basis of illegally seized evidence; that view was said to be "unjustified" "in light of the nature and purpose of the . . . exclusionary rule."[43] *Calandra* was cited for the proposition that the purpose of the rule is to deter police conduct that violates Fourth-Amendment rights; exclusion itself is not a personal constitutional right.[44] The question then became whether the costs of applying the rule outweighed the benefits of deterring illegal police activity. The costs included: (1) "focus of the trial . . . is diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding;" (2) "evidence sought to be excluded is typically reliable and often the most probative information bearing on guilt or innocence of the defendant;" and (3) "if applied indiscriminately . . . [the rule] may well have the . . . effect of generating disrespect for the law and administratration of justice."[45] The only benefit of applying the rule, according to the Court, "rest[ed] on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal."[46] Judicial integrity was dismissed as playing a "limited role," especially when a search-and-seizure claim had been litigated at trial and on direct review.[47]

Justice Brennan, joined in his dissent by Justice Marshall, found the issue in *Stone* to be not a defendant's right to have illegally seized evidence excluded at trial, but rather "the availability of a *federal forum* for vindicating those federally guaranteed rights." He saw the majority's holding as "portend[ing] substantial evisceration of federal habeas corpus jurisdiction . . . ."[48] Apparently having misinterpreted the majority's hold-

illegally seized evidence, today's decision will be invoked to sustain the conclusion in that case also, that 'it is unrealistic to assume' that application of the rule at trial would 'significantly further' the goal of deterrence. . . ." *Id.* at 366.

41. Justice Powell delivered the opinion of the Court, in which Chief Justice Burger and Justices Stewart, Blackmun, Rehnquist and Stevens joined. Chief Justice Burger filed a separate concurring opinion.

42. 96 S. Ct. at 3052 n. 37.

43. *Id.* at 3045.

44. *Id.* at 3048.

45. *Id.* at 3049-3050.

46. *Id.* at 3051.

47. *Id.* at 3047.

48. *Id.* at 3056 (emphasis in original).

ing,[49] the dissent reasoned that, under *Mapp*, admission of illegally seized evidence is constitutional error and a state prisoner convicted on the basis of illegally seized evidence is therefore "in custody in violation of the Constitution" within the meaning of 28 U.S.C.A. §2254.[50]

The Supreme Court missed the proverbial "golden opportunity" in *Stone* to set beyond the reach of the exclusionary rule good-faith violations of the Fourth Amendment's prohibition against unreasonable search and seizure. Support for such a limitation on the rule came from the bench itself in *Stone*. Although Justice White, dissenting, agreed with Justice Brennan "that the writ of habeas corpus should [not] be any less available to those convicted of state crimes where they allege Fourth Amendment violations than where other constitutional issues are presented to the federal court," Justice White added that he "would join four or more other Justices in substantially limiting the reach of the exclusionary rule as presently administered . . . in federal and state criminal trials."[51]

Chief Justice Burger's concurrence, in essence a rewrite of his dissent in *Bivins v. Six Unknown Named Federal Agents*,[52] made the strongest argument for further restraints on the rule when he said that "rational alternatives" to the exclusionary rule were being inhibited by its "continued existence."[53] "By way of dictum," he lamented, "and somewhat hesitantly, the Court notes that the holding in this case leaves undisturbed the exclusionary rule as applied to criminal trials."[54]

The time has come to "disturb" the rule. "[T]he same authority that empowered the Court to supplement the [Fourth] Amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to modify that rule as the 'lessons of experience' may teach."[55] Simple logic should "teach" that the application of the exclusionary rule to good-faith violations of the Fourth Amendment rests on the untenable thesis that the police will be deterred from violating the Fourth Amendment when they have absolutely no alternative but to act in accordance with the law. Once the ordinance is enacted,[56] once the warrant is issued, there is nothing more an officer can do. Policemen are not in a

49. The majority never said that federal courts do not have jurisdiction over a state prisoner's Fourth-Amendment claim, or that the prisoner would not be "in custody in violation of the Constitution" within the meaning of 28 U.S.C.A. §2254. The majority said only that federal courts need not apply the exclusionary rule as a remedy for violation of the Fourth Amendment when the claim has been "fully and fairly litigated" at state trial and on direct review. 96 S. Ct. at 3052 n. 37.

50. *Id.* at 3059.

51. *Id.* at 3071-3072.

52. 403 U.S. 388, 411 (1971).

53. 96 S. Ct. at 3054.

54. *Id.* at 3052.

55. *Id.* at 3054 (Burger, C.J., concurring), *quoting* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 952-953 (1965).

56. This argument assumes that the police officer has probable cause to arrest.

position to make their own determinations about the constitutionality of laws they are sworn to uphold or to make their own evaluations about whether supporting affidavits pass *Spinelli*[57] and *Aguilar*[58] standards.

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57. Spinelli v. United States, 393 U.S. 410 (1969).
58. Aguilar v. Texas, 378 U.S. 108 (1964).