

The Burger Court Opinion Writing Database

Coolidge v. New Hampshire

403 U.S. 443 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 2, 1971

No. 323 - Coolidge v. New Hampshire

Dear Potter:

I am working on a dissent that will "connect"
by reference with my dissent in Whiteley.

Regards,

WB

Mr. Justice Stewart

cc: The Conference

70-323

CHAMBERS OF
THE CHIEF JUSTICE

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

U-21-71

Dear Harry I have been trying to
mention that I fear the "harmless"
error of moment weakens our position
somewhat in Coolidge. Hugo has
done a good job of undermining
Souter's opinion & I wonder if we
should not stand on that.

I intend to incorporate, by

reference, the Brinsford dissent
proposing we overrule
the suppression doctrine &
create a rule which
lets B

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

June 15, 1971

CHAMBERS OF
THE CHIEF JUSTICE

No. 323 - Coolidge v. New Hampshire

Dear Harry:

I wonder if you really want to join Part I of Hugo's dissenting opinion? This opinion "fudges" considerably but I think it must be read as embedding the 5th Amendment Exclusionary Rule via 4th Amendment.

By the "grapevine" I get it that Hugo views his opinion thus as to Part I.

Regards,

W.S.B

Mr. Justice Blackmun

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

June 15, 1971

CHAMBERS OF
THE CHIEF JUSTICE

No. 323 - Coolidge v. New Hampshire

Dear Hugo:

As of now I will join your dissent as to parts II and III. You may simply show in some form: "I am authorized to state that Mr. Chief Justice Burger joins in Parts II and III of this dissent."

I have an impression that Justice White is revising his dissent and I may be able to join in some part of his opinion.

Regards,

W.R.B.

Mr. Justice Black

cc: Conference

B

To: Mr. Justice Black
 Mr. Justice Douglas ✓
 Mr. Justice Harlan
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun

15
 3rd DRAFT

From: The Chief Justice
 JUN 17 1971

SUPREME COURT OF THE UNITED STATES

~~Circulated:~~

No. 323.—OCTOBER TERM, 1970 ~~Recirculated:~~

Edward H. Coolidge, Jr.,
 Petitioner, } On Writ of Certiorari to the
 v. } Supreme Court of New
 New Hampshire. } Hampshire.

[June —, 1971]

MR. CHIEF JUSTICE BURGER, dissenting in part and concurring in part.

I join the dissenting opinion of MR. JUSTICE WHITE and in Parts II and III of MR. JUSTICE BLACK's dissenting opinion. I also agree with most of what is said in Part I of MR. JUSTICE BLACK's opinion, but I am not prepared to accept the proposition that the Fifth Amendment requires the exclusion of evidence seized in violation of the Fourth Amendment. I join in Part III of MR. JUSTICE STEWART's opinion.

This case illustrates graphically the monstrous price we pay for the Exclusionary Rule in which we seem to have imprisoned ourselves. See my dissent in *Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau*.

On the merits of the case I find not the slightest basis in the record to reverse this conviction. Here again the Court reaches out, strains and distorts rules which were showing some signs of stabilizing, and directs a new trial which will be held more than seven years after the criminal acts charged.

Mr. Justice Stone, of the Minnesota Supreme Court, called the kind of judicial functioning in which the Court indulges today "bifurcating elements too infinitesimal to be split."

WJP

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

June 17, 1971

No. 323 - Coolidge v. New Hampshire

Dear Byron:

I agree with much of what you say in your June 17 memo on Coolidge and Bivens.

I have this suggestion however: that to accommodate varying views we pose the reargument questions along the following lines:

- (1)-Should Mapp v. Ohio be overruled.
- (2)-If Mapp v. Ohio is not overruled should the scope of the Exclusionary Rule be narrowed so as to relate its application to the nature of the violation.

I am not in any sense "wedded" to this formulation of question.

Regards,

WB

Mr. Justice White

cc: The Conference

CHAMBERS OF
THE CHIEF JUSTICE

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

June 17, 1971

No. 323 - Coolidge v. New Hampshire

Dear Hugo:

I have decided to express further thoughts of my own in the Coolidge case. I, of course, join your opinion in Parts II and III and what is said in Part I except that the Fifth Amendment requires exclusion of evidence seized in violation of the 4th Amendment. Your description of my position on Parts II and III can therefore be omitted since my statement will cover the matter.

Regards,

WB

Mr. Justice Black

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20530

CHAMBERS OF
JUSTICE HUGO L. BLACK

March 30, 1971

Dear Potter,

Re: No. 323 - Edward H. Coolidge, Jr. v. New Hampshire.

I agree with the conclusion you reach in Part III of your opinion in this case that the police did not violate the Constitution when they obtained Petitioner's rifle and articles of clothing from his home. I disagree with Parts I and II of your opinion and shall write and circulate a dissent in due course.

Sincerely,

Hugo
Hugo

Mr. Justice Stewart

cc: Members of the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Black, J.

No. 323.—OCTOBER TERM, 1970

Circulated: APR 1, 1971

Edward H. Coolidge, Jr., Petitioner, Recirculated:
v. On Writ of Certiorari to the
New Hampshire. Supreme Court of New
Hampshire.

[April —, 1971]

MR. JUSTICE BLACK, concurring and dissenting.

After a jury trial in a New Hampshire state court, petitioner was convicted of murder and sentenced to life imprisonment. Holding that certain evidence introduced by the State was seized during an "unreasonable" search and that the evidence was inadmissible under the judicially created exclusionary rule of the Fourth Amendment, the majority reverses that conviction. I believe that the search and seizure here was reasonable and that the Fourth Amendment properly construed contains no such exclusionary rule. I dissent.

The relevant facts are these. Pamela Mason, a 14-year-old school girl, lived with her mother and younger brother in Manchester, New Hampshire. She occasionally worked after school as a baby sitter and sought such work by posting a notice on a bulletin board in a local laundromat. On January 13, 1964, she arrived home from school about 4:15 p. m. Pamela's mother told her that a man had called seeking a baby sitter for that evening and said that he would call again later. About 4:30 p. m., after Pamela's mother had left for her job as a waitress at nearby restaurant, Pamela received a phone call which her younger brother answered but did not overhear. The caller was a man. After the call,

pp. 13-18
+ stylistic changes throughout

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 323.—OCTOBER TERM, 1970

From: Black, .

Circulated:

Recirculated air

Edward H. Coolidge, Jr., Petitioner, v. New Hampshire, On Writ of Certiorari to the Supreme Court of New Hampshire.

[May —, 1971]

MR. JUSTICE BLACK, concurring and dissenting.

After a jury trial in a New Hampshire state court, petitioner was convicted of murder and sentenced to life imprisonment. Holding that certain evidence introduced by the State was seized during an "unreasonable" search and that the evidence was inadmissible under the judicially created exclusionary rule of the Fourth Amendment, the majority reverses that conviction. I believe that the search and seizure here was reasonable and that the Fourth Amendment properly construed contains no such exclusionary rule. I dissent.

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WHY

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

From: Black, J.

Circulated: May 5 1971
Recirculated:

Edward H. Coolidge, Jr., Petitioner, *v.* New Hampshire. } On Writ of Certiorari to the Supreme Court of New Hampshire.

[May —, 1971]

MR. JUSTICE BLACK, with whom MR. JUSTICE BLACKMUN joins, concurring and dissenting.

After a jury trial in a New Hampshire state court, petitioner was convicted of murder and sentenced to life imprisonment. Holding that certain evidence introduced by the State was seized during an "unreasonable" search and that the evidence was inadmissible under the judicially created exclusionary rule of the Fourth Amendment, the majority reverses that conviction. I believe that the search and seizure here was reasonable and that the Fourth Amendment properly construed contains no such exclusionary rule. I dissent.

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June 12, 1917

4th DRAFT

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brandeis
Mr. Justice S. M. Tamm
Mr. Justice White
Mr. Justice McReynolds
Mr. Justice Black

SUPREME COURT OF THE UNITED STATES: BLACK, J.

No. 323.—OCTOBER TERM, 1970

Circulated:

MAY 1971

Edward H. Coolidge, Jr., Petitioner, v. New Hampshire. } On Writ of Certiorari to the Supreme Court of New Hampshire.

[May —, 1971]

MR. JUSTICE BLACK, with whom MR. JUSTICE BLACKMUN joins, concurring and dissenting.

After a jury trial in a New Hampshire state court, petitioner was convicted of murder and sentenced to life imprisonment. Holding that certain evidence introduced by the State was seized during an "unreasonable" search and that the evidence was inadmissible under the judicially created exclusionary rule of the Fourth Amendment, the majority reverses that conviction. Believing that the search and seizure here was reasonable and that the Fourth Amendment properly construed contains no such exclusionary rule, I dissent.

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7/13 + 18

To: The Chief Justice
 Mr. Justice ~~W. O. Douglas~~
 Mr. Justice Harlan
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Black, J.

No. 323.—OCTOBER TERM, 1970

Circulated:

Recirculated: JUN 10 1971

Edward H. Coolidge, Jr.,
 Petitioner,
 v.
 New Hampshire. } On Writ of Certiorari to the
 Supreme Court of New
 Hampshire.

[June —, 1971]

MR. JUSTICE BLACK, with whom MR. JUSTICE BLACKMUN joins, concurring and dissenting.

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603

18
p. 18

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

6th DRAFT

SUPREME COURT OF THE UNITED STATES

Com: Black, J.

No. 323.—OCTOBER TERM, 1970

Circulated: _____

Recirculated: _____

3/1

Edward H. Coolidge, Jr.,
Petitioner,
v.
New Hampshire.

On Writ of Certiorari to the
Supreme Court of New
Hampshire.

[June —, 1971]

MR. JUSTICE BLACK, with whom MR. JUSTICE BLACKMUN joins, concurring and dissenting.

After a jury trial in a New Hampshire state court, petitioner was convicted of murder and sentenced to life imprisonment. Holding that certain evidence introduced by the State was seized during an "unreasonable" search and that the evidence was inadmissible under the judicially created exclusionary rule of the Fourth Amendment, the majority reverses that conviction. Believing that the search and seizure here was reasonable and that the Fourth Amendment properly construed contains no such exclusionary rule, I dissent.

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Black
Mr. Justice Blackmun

7th DRAFT

SUPREME COURT OF THE UNITED STATES: Black, J.

No. 323.—OCTOBER TERM, 1970

Circulated: JUN 1 1971
Recirculated:

Edward H. Coolidge, Jr., Petitioner, v. New Hampshire. } On Writ of Certiorari to the Supreme Court of New Hampshire.

[June —, 1971]

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— (P)
JUN 19
8th DRAFT

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Moulton
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

No. 323.—OCTOBER TERM, 1970

From: Black, J.

Edward H. Coolidge, Jr.,
Petitioner,
v.
New Hampshire.

On Writ of Certiorari to the
Supreme Court of New
Hampshire.

Circulated:

JUN 19 1971

[June —, 1971]

MR. JUSTICE BLACK, concurring and dissenting.

After a jury trial in a New Hampshire state court, petitioner was convicted of murder and sentenced to life imprisonment. Holding that certain evidence introduced by the State was seized during an "unreasonable" search and that the evidence was inadmissible under the judicially created exclusionary rule of the Fourth Amendment, the majority reverses that conviction. Believing that the search and seizure here was reasonable and that the Fourth Amendment properly construed contains no such exclusionary rule, I dissent.

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March 23, 1971

Dear Potter:

In No. 323 - Coolidge v. New Hampshire, please note I join your opinion.

William O. Douglas

Mr. Justice Stewart

WD Adm
1677

April 21, 1971

Dear Potter:

I have your fifth draft
of No. 323 - Coolidge v. New Hampshire,
and I'm still with you.

W. O. D.

Mr. Justice Stewart

1
TB

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

No. 323.—OCTOBER TERM, 1970 Circulated JUN 14 1971

Edward H. Coolidge, Jr., Petitioner, v. New Hampshire. } Recirculated: _____
 } On Writ of Certiorari to the Supreme Court of New Hampshire.

[June —, 1971]

MR. JUSTICE HARLAN, concurring.

From the several opinions that have been filed in this case it is apparent that the law of search and seizure is due for an overhauling. State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends even to such an everyday question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of a crime.

I would begin this process of re-evaluation by overruling *Mapp v. Ohio*, 367 U. S. 643 (1961), and *Ker v. California*, 374 U. S. 23 (1963). The former of these cases made the federal "exclusionary rule" applicable to the States. The latter forced the States to follow all the ins and outs of this Court's Fourth Amendment decisions, handed down in federal cases.

In combination *Mapp* and *Ker* have been primarily responsible for bringing about serious distortions and incongruities in this field of constitutional law. Basically these have had two aspects, as I believe an examination of our more recent opinions and certiorari docket will show. First, the States have been put in a federal mold with respect to this aspect of criminal law enforcement, thus depriving the country of the opportunity to observe the effects of different procedures in similar settings. See,

5

2
1
3rd DRAFT

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES
From: Harlan, J.

No. 323.—OCTOBER TERM, 1970 Circulated:

Edward H. Coolidge, Jr., Petitioner, v. New Hampshire. Recirculated: JUN 18 1971
On Writ of Certiorari to the Supreme Court of New Hampshire.

[June —, 1971]

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 19, 1971

RE: No. 323 - Coolidge v. New Hampshire

Dear Potter:

This is just to confirm I am happy to
join you in the above.

Sincerely,

W. J. B. Jr.

Mr. Justice Stewart

cc: The Conference

B
/

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: MAR 20 1971

No. 323.—OCTOBER TERM, 1970

Recirculated: _____

Edward H. Coolidge, Jr.,
Petitioner, } On Writ of Certiorari to the
v. } Supreme Court of New
New Hampshire. } Hampshire.

[March —, 1971]

MR. JUSTICE STEWART delivered the opinion of the Court.

We are called upon in this case to decide issues under the Fourth and Fourteenth Amendments arising in the context of a state criminal trial for the commission of a particularly brutal murder. As in every case, our single duty is to determine the issues presented in accord with the Constitution and the law.

Pamela Mason, a 14-year-old girl, left her home in Manchester, New Hampshire on the evening of January 13, 1964, during a heavy snowstorm, apparently in response to a man's telephone call for a babysitter. Eight days later, after a thaw, her body was found by the side of a major north-south highway several miles away. She had been murdered. The event created great alarm in the area, and the police immediately began a massive investigation.

On January 28, having learned from a neighbor that the petitioner, Edward Coolidge, had been away from home on the evening of the girl's disappearance, the police went to his house to question him. They asked him, among other things, if he owned any guns, and he produced three, two shotguns and a rifle. They also asked whether he would take a lie detector test concern-

~D

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

4th DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES.

circulated:

No. 323.—OCTOBER TERM, 1970

Recirculated: MR 9-3-1971

Edward H. Coolidge, Jr., Petitioner,
v. New Hampshire. } On Writ of Certiorari to the
Supreme Court of New Hampshire.

[April —, 1971]

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4, 12, 13, 18-30

To: The Chief Justice
Mr. Justice Black
✓ Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

5th DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

No. 323.—OCTOBER TERM, 1970

Recirculated: APR 21 1971

Edward H. Coolidge, Jr.,
Petitioner,
v.
New Hampshire. } On Writ of Certiorari to the
Supreme Court of New
Hampshire.

[April —, 1971]

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47

25' and minor changes

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

6th DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

No. 323.—OCTOBER TERM, 1970

Recirculated: MAY 4 1971

Edward H. Coolidge, Jr., Petitioner,
v.
New Hampshire. } On Writ of Certiorari to the
Supreme Court of New
Hampshire.

[May —, 1971]

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LL
Jewell PS of
JL
June 2, 1971

MEMORANDUM TO: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Marshall

RE: No. 323 - Coolidge v. New Hampshire

It now seems clear that John Harlan will cast the dispositive vote in this case. The new material at pages 29-38 of the text of this circulation has been added in an effort to persuade him. If he ultimately remains unpersuaded, and I end up by converting this to a dissenting opinion, it is my thought that this new textual material would be dropped.

P.S.

4, 11, 16, 19, 21, 26, 27, 29-38°

The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

7th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

No. 323.—OCTOBER TERM, 1970

Circulated: _____

Recirculated: JUN 2 1971

Edward H. Coolidge, Jr.,
Petitioner,
v.
New Hampshire. } On Writ of Certiorari to the
Supreme Court of New
Hampshire.

[June —, 1971]

MR. JUSTICE STEWART delivered the opinion of the Court.

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Pamela Mason, a 14-year-old girl, left her home in Manchester, New Hampshire on the evening of January 13, 1964, during a heavy snowstorm, apparently in response to a man's telephone call for a babysitter. Eight days later, after a thaw, her body was found by the side of a major north-south highway several miles away. She had been murdered. The event created great alarm in the area, and the police immediately began a massive investigation.

On January 28, having learned from a neighbor that the petitioner, Edward Coolidge, had been away from home on the evening of the girl's disappearance, the police went to his house to question him. They asked him, among other things, if he owned any guns, and he produced three, two shotguns and a rifle. They also asked whether he would take a lie detector test concern-

610

11, 29, 38-39 and minor changes.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Stewart, J.

8th DRAFT

Circulated:

SUPREME COURT OF THE UNITED STATES

Recirculated: JUN 17 1971

No. 323.—OCTOBER TERM, 1970

Edward H. Coolidge, Jr.,
Petitioner,
v.
New Hampshire. } On Writ of Certiorari to the
Supreme Court of New
Hampshire.

[June —, 1971]

MR. JUSTICE STEWART delivered the opinion of the Court.*

We are called upon in this case to decide issues under the Fourth and Fourteenth Amendments arising in the context of a state criminal trial for the commission of a particularly brutal murder. As in every case, our single duty is to determine the issues presented in accord with the Constitution and the law.

Pamela Mason, a 14-year-old girl, left her home in Manchester, New Hampshire on the evening of January 13, 1964, during a heavy snowstorm, apparently in response to a man's telephone call for a babysitter. Eight days later, after a thaw, her body was found by the side of a major north-south highway several miles away. She had been murdered. The event created great alarm in the area, and the police immediately began a massive investigation.

On January 28, having learned from a neighbor that the petitioner, Edward Coolidge, had been away from home on the evening of the girl's disappearance, the police went to his house to question him. They asked

* [REDACTED] Parts II A, II B, and II C are joined only by MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL.

of this opinion

B

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Recirculated: ~~5-10-71~~

No. 323.—OCTOBER TERM, 1970

Recirculated:

Edward H. Coolidge, Jr.,
Petitioner, } On Writ of Certiorari to the
v. } Supreme Court of New
New Hampshire. } Hampshire.

[May —, 1971]

MR. JUSTICE WHITE, concurring and dissenting.

I would affirm the judgment. In my view, Coolidge's Pontiac was lawfully seized as evidence of the crime in plain sight and thereafter was lawfully searched under *Cooper v. California*, 386 U. S. 58 (1967). I am therefore in substantial disagreement with Part II-C of the Court's opinion. Neither do I agree with Part II-B, and I can concur only in the result as to Part III.

I

The Fourth Amendment commands that the public shall be secure in their "persons, houses, papers and effects" against unreasonable searches and seizures. As to persons, "the usual rule is a police officer may arrest without warrant one believed by the officer, upon reasonable cause, to be guilty of a felony . . ." *Carroll v. United States*, 267 U. S. 132, 156 (1925). When a person is so arrested, he and the area under his immediate control may also be searched and contraband or evidence seized without a warrant. *Chimel v. California*, 395 U. S. 752 (1969). The right "to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime . . . has been uniformly maintained in many cases." *Weeks v. United States*, 232 U. S. 383, 392 (1914). The arrest is valid without

Ja

pp 1-3, 6, 8-12, 17

✓ Mr. Justice Black
✓ Mr. Justice Douglas
✓ Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: White, J.

Circulated:

No. 323.—OCTOBER TERM, 1970

Recirculated: 6-15-71

Edward H. Coolidge, Jr.,
Petitioner, } On Writ of Certiorari to the
v. } Supreme Court of New
New Hampshire. } Hampshire.

[June —, 1971]

MR. JUSTICE WHITE, concurring and dissenting.

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I

The Fourth Amendment commands that the public shall be secure in their "persons, houses, papers and effects" against unreasonable searches and seizures. As to persons, the overwhelming weight of authority is that a police officer may make an arrest without a warrant when he has probable cause to believe the suspect has committed a felony.¹ The general rule also is that upon

¹ This was the common law rule. 1 J. Stephen, *A History of Criminal Law of England*, 193 (1883); 2 M. Hale, *Pleas of the Crown*, 71-104 (First American ed. 1849). It is also the constitutional rule. In *Carroll v. United States*, 267 U. S. 132 (1925), the Court said that "the usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony." *Id.*, at 156. There in September 1921, officers had obtained probable cause to believe the two defendants were unlawfully transporting bootleg liquor, but they had neither effected an immediate arrest nor sought a warrant. Several

66V

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 17, 1971

323

MEMORANDUM TO THE CONFERENCE

With the publication of Coolidge and Bivens, four Justices (CJ, JMH, HLB and HAB) will have stated for the record their dissatisfaction with Mapp v. Ohio insofar as the exclusionary rule is based on the Fourth Amendment. In addition, although I do not presume to indicate Potter's present views, I note that he did not join the Court in Mapp. For myself, our struggles of this term suggest at least a reexamination of the premise that gave rise to them. My present view is that the exclusionary rule should at least be narrowed.

Thus I suggest we consider whether we should call for reargument in Coolidge limited to the single question whether Mapp v. Ohio should be overruled.


BRW

3

p. 15

To: The Chief Justice
Mr. Justice Black
✓ Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

4th DRAFT

SUPREME COURT OF THE UNITED STATES: White, J.

TES: White, J.

No. 323.—OCTOBER TERM, 1970

Circulated:

Recirculated: 6-19-71

Edward H. Coolidge, Jr., Petitioner, v. New Hampshire. } On Writ of Certiorari to the Supreme Court of New Hampshire.

[June —, 1971]

MR. JUSTICE WHITE, concurring and dissenting.

I would affirm the judgment. In my view, Coolidge's Pontiac was lawfully seized as evidence of the crime in plain sight and thereafter was lawfully searched under *Cooper v. California*, 386 U. S. 58 (1967). I am therefore in substantial disagreement with Part II-C of the Court's opinion. Neither do I agree with Part II-B, and I can concur only in the result as to Part III.

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STYLISTIC CHANGES THROUGHOUT. SEE PAGES: 1, 2, 3, 18

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
✓ Mr. Justice Marshall
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES White, J.

No. 323.—OCTOBER TERM, 1970

Circulated:

Recirculated: 6-19-71

Edward H. Coolidge, Jr., Petitioner, v. New Hampshire. } On Writ of Certiorari to the Supreme Court of New Hampshire.

[June 21, 1971]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, concurring and dissenting.

I would affirm the judgment. In my view, Coolidge's Pontiac was lawfully seized as evidence of the crime in plain sight and thereafter was lawfully searched under *Cooper v. California*, 386 U. S. 58 (1967). I am therefore in substantial disagreement with Parts II-C and II-D of the Court's opinion. Neither do I agree with Part II-B, and I can concur only in the result as to Part III.

1

The Fourth Amendment commands that the public shall be secure in their "persons, houses, papers, and effects, against unreasonable searches and seizures" As to persons, the overwhelming weight of authority is that a police officer may make an arrest without a warrant when he has probable cause to believe the suspect has committed a felony.¹ The general rule also is that

¹ This was the common law rule. 1 J. Stephen, *A History of Criminal Law of England*, 193 (1883); 2 M. Hale, *Historia Placitorum Coronae* 72-104 (new ed. 1800). It is also the constitutional rule. In *Carroll v. United States*, 267 U. S. 132 (1925), the Court said that “[t]he usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony” *Id.*, at 156. There in September 1921, officers had obtained probable cause to believe the two defendants were unlawfully transporting bootleg liquor, but they had neither effected an immediate arrest nor sought a warrant. Several

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 21, 1971

Re: No. 323 - Coolidge v. New Hampshire

Dear Potter:

Please join me.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

You are
"waiting for
dissent."

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: **Big States**, J.

No. 323.—OCTOBER TERM, 1970

Recirculated:

Edward H. Coolidge, Jr.,
Petitioner,
v.
New Hampshire. } On Writ of Certiorari to the
Supreme Court of New
Hampshire.

[April —, 1971]

MR. JUSTICE BLACKMUN, dissenting,

I join Part III of the Court's opinion and its ruling upholding against constitutional challenge the acquisition by the police of the rifle and articles of clothing from the Coolidge home on February 2, 1964.

I see no need for the detailed analysis contained in Parts I and II of the Court's opinion. Even if one assumes that the search warrant was invalidly issued and that the facts of the case do not take it within any of the exceptions to the warrant requirement—conclusions I need not reach—then, in view of Part III, the result is that what should have been excluded are only the vacuum sweepings from the Pontiac. These sweepings, say the Court, were used "as part of an attempt . . . to show . . . that it was probable" the victim had been in Coolidge's car.

This is all that the Court's search and seizure analysis yields. It adds up, for me, in the light of the entire record, and despite the circumstantial evidence character of the case, to nothing more than harmless error. The Court's own description of the sweepings is indicative of their insignificant evidentiary weight.

I would affirm the conviction. *Chapman v. California*, 386 U. S. 18, 21-25 (1967); *Harrington v. California*, 395 U. S. 250 (1969); *Dutton v. Evans*, 400 U. S. 74, 90-93 (1970) (BLACKMUN, J., concurring).

May 4, 1971

Re: No. 323 - Coolidge v. New Hampshire

Dear Hugo:

I feel that you have written a strong dissent to the proposed majority opinion, and I would like to have you join me. Because of the strength of your opinion, I shall withdraw the short one I circulated on April 14.

Sincerely,

H. A. B.

Mr. Justice Block

cc: The Conference

May 4, 1971

Re: No. 323 - Coolidge v. New Hampshire

Dear Hugo:

I feel that you have written a strong dissent to the proposed majority opinion, and I would like to have you join me. Because of the strength of your opinion, I shall withdraw the short one I circulated on April 14.

Sincerely,

H. A. B.

Mr. Justice Black

cc: The Conference

P.S. Hugo:

The seizure of Coolidge's automobile reminded me of a case I had on the Court of Appeals. I looked this up and found the facts amazingly similar. There the arrest had taken place inside a restaurant. The automobile was on the parking lot outside. We observed that if the car had been searched forthwith, the search would have been incident to a lawful arrest, and would have been a reasonable search. The case is Drummond v. United States, 350 F.2d 983, 987 (CA 8, 1965), cert. denied, 384 U.S. 944.

H. A. B.

June 16, 1971

Re: No. 323 - Coolidge v. New Hampshire

Dear Hugo:

I have read and re-read the several opinions proposed for this case. They total 83 pages.

Because I am not now prepared to commit myself to the exclusionary rule, even by the Fifth Amendment, I must withdraw my earlier-indicated complete assent to your opinion. Will you, instead, please add a note at the end of your opinion essentially to the following effect:

"Mr. Justice Blackman joins Mr. Justice Black in Parts II and III of his opinion and in that portion of Part I thereof which is to the effect that the Fourth Amendment supports no exclusionary rule."

I could still be tempted to comment on the harmless error aspect of the evidence retrieved from the Pontiac. Upon a review of the entire record, it appears that this evidence consisted only of eight particles, vacuumed from the car and matched with particles from the victim's clothing, as contrasted with more than double that number of particles retrieved from Coolidge's clothing and matched with particles from Pamela's clothing. It is a small point, however; the other evidence speaks vividly for itself so I shall refrain from comment.

Sincerely,

H. A. B.

Mr. Justice Black

cc: The Conference