Mistaking a Backdoor for No Door at All: Sentencing and the Exclusionary Rule

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"So the victim anticipates no compensation, the offender no deterrence. Serious inroads on the exclusionary rule mean, as a practical matter, serious inroads on the fourth amendment." United States v. Jewel, 947 F.2d 224, 239 (7th Cir. 1991) (Easterbrook, J., concurring).

INTRODUCTION

Since *Williams v. New York*,[1] and its corresponding expansion and codification in 18 U.S.C. § 3661,[2] federal courts have been free to consider any evidence at sentencing without reference to rules of evidence, constitutional trial principles (e.g. the Due Process Clause), or other relevant constraints. This Article seeks to explore one aspect of evidentiary rules at sentencing: the admissibility of evidence seized in violation of the Fourth Amendment, an issue which has remained contentious in the courts across time and space. I will trace courts' treatment of the exclusionary rule—the primary remedy for Fourth Amendment violations—at sentencing, ultimately arguing that under traditional exclusionary rule principles the rule will serve its deterrent function even after trial. As a result, I will argue, it should be generally ap-

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[1] 337 U.S. 241 (1949).

[2] "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

plied. While many avenues exist for further argument—including questioning courts' assumption that police are not interested in increasing defendants' sentences, contesting the notion that deterrence is the proper way to assess the exclusionary rule at sentencing, and contesting general principles within the exclusionary rule jurisprudence—this Article will take the exclusionary rule's deterrence rationale as given and also accept the general contention that police seek evidence for the purpose of conviction, not with an eye toward increasing a defendant's sentence. This Article argues that under that logic precisely, exclusion at sentencing will generally be appropriate.

The Article proceeds in three Parts. From the outset, I presume that the reader has a working knowledge of the exclusionary rule and Fourth Amendment law generally.[3] Part I traces courts' consideration of the question of exclusion of unconstitutionally seized evidence at sentencing. This Part covers numerous courts' treatment of the exclusionary rule at sentencing across time and statutory change. Prior to the imposition of mandatory Federal Sentencing Guidelines, some courts found reason to exclude illegally obtained evidence at sentencing. But the majority did not. Similarly, under the mandatory Guidelines system that existed prior to *United States v. Booker*,[4] the question of exclusion received some academic attention. However, in the years since *Booker*, a dearth of scholarship has left unchallenged the assumptions underlying courts' decisions not to apply the exclusionary rule to illegally obtained evidence at sentencing.

Part II argues that under the logic expounded by courts regarding police motivations, exclusion is a proper remedy for illegally obtained evidence at sentencing. This Part offers two theoretical bases for why exclusion is proper: a broad theory focused on the fact that the difference between an "increase in sentence" and "conviction" is merely semantic, and a narrow theory focused on the effects of illegally obtained evidence on plea-bargaining.

Finally, Part III offers thoughts for courts and legislatures to implement the exclusionary rule at sentencing.

I. A History of the Exclusionary Rule at Sentencing: from *Verdugo* to *Jewel* to *Booker*

The question of applicability of the exclusionary rule at sentencing has existed for as long as the rule itself. The Supreme Court has never spoken to the issue, leaving lower federal courts to consider the question. Today, most circuit courts agree that the exclusionary rule is generally inapplicable at sen-

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[3] For background, *see, e.g.*, Todd Flaming, *Laundering Illegally Seized Evidence Through the Federal Sentencing Guidelines*, 59 U. Chi. L. Rev. 1209, 1225 (1992); Victor Jay Miller, *An End Run Around the Exclusionary Rule: The Use of Illegally Seized Evidence Under the Federal Sentencing Guidelines*, 34 Wm. & Mary L. Rev. 241, 274 (1992). *See generally* Clinton R. Pinyan, *Illegally Seized Evidence at Sentencing: How to Satisfy the Constitution and the Guidelines with an "Evidentiary" Limitation*, 1994 U. Chi. L. F. 523 (1994).

[4] 543 U.S. 220, 261 (2005).

tencing.[5] But the process for arriving at this general consensus was not straightforward; disagreement has existed within the federal courts, due to both factual differences in cases and changing statutory regimes. While this history of disagreement is legally insignificant today, the lessons to be drawn from it remain noteworthy.

The use of the exclusionary rule at sentencing begins where any evidentiary question at sentencing must: *Williams v. New York*. *Williams* held that the Fourteenth Amendment's Due Process Clause does not bar a sentencing judge from considering extra-record evidence when imposing a sentence, including possible crimes committed by the defendant for which he was not actually charged.[6] In reaching this decision, the Supreme Court relied on the general rehabilitative function that a sentence is intended to achieve; once a guilty verdict is rendered, the judge is "not confined to the narrow issue of guilt," but instead must consider a holistic view of a defendant to craft an appropriate sentence.[7] Taking account of the fullest information available about a defendant necessarily means eschewing "rigid adherence to restrictive rules of evidence properly applicable to the trial."[8] Notably, the Supreme Court did not *compel* courts to take account of all available information nor entirely disregard traditional evidentiary constraints. Rather, courts simply were not barred from considering such information where appropriate.[9]

The seed that the *Williams* court planted blossomed into an entire sentencing regime mandating the use of full information about a defendant with the Organized Crime Act of 1970.[10] Most clearly, one particular provision of the Act, codified as 18 U.S.C. § 3577[11] as general requirements for sentencing, simply reads: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[12] If there was any doubt in *Williams* as to what information judges were to consider at sentencing, congressional intervention ostensibly put that doubt to rest.

The expansion of *Williams*'s holding was not an accident according to the legislative history of the Organized Crime Act of 1970. Part of the end

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[5] *See, e.g.*, United States v. McCrory, 930 F.2d 63, 69 (D.C. Cir. 1991); United States v. Torres, 926 F.2d 321, 325 (3d Cir. 1991); United States v. Graves, 785 F.2d 870, 873 (10th Cir. 1986); United States v. Butler, 680 F.2d 1055, 1056 (5th Cir. 1982); United States v. Schipani, 435 F.2d 26, 28 (2d Cir. 1970); Del Vecchio v. Illinois Dep't of Corr., 31 F.3d 1363, 1388 (7th Cir. 1994).

[6] *Williams*, 337 U.S. at 245.

[7] *Id.* at 247.

[8] *Id.*

[9] *See* Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 ST. JOHN'S L. REV. 1415, 1447 (2010) ("*Williams's* minimalist holding . . . required judges to reason through the logic underlying prior acquittal sentencing.").

[10] *See id.* at 1444–47.

[11] Later renumbered 18 U.S.C. § 3661.

[12] 18 U.S.C. § 3661.

goal of the Organized Crime Act—per Representative Richard Poff of Virginia, the bill's architect—was delivering harsh sentences to "dangerous special offender[s]": members of organized crime, like La Cosa Nostra.[13] But this goal was complicated by developments in the preceding decade. The Warren Court's Criminal Procedure Revolution had created new evidentiary rules—most notably, the exclusionary rule—that often kept evidence out of court. Poff was concerned about the ability of sophisticated criminals to avoid lengthy sentences through gaming these rules.[14] He justified § 3577, in part, on a commitment to delivering justice to these offenders by separating sentencing entirely from any evidentiary constraints.[15]

Section 3577 is not limited to particular crimes or affiliations. The broad coverage of the section reflects Poff's intent to overrule completely the exclusionary rule within the context of sentencing. Poff's rationale for so doing was multifaceted, according to one commentator:

> Poff worried that the need to deter police abuse, a rationale underlying the Exclusionary Rule, would be allowed to limit sentencing judges in the information available to them at sentencing just as juries were limited. The Exclusionary Rule introduced into trials a significant non-truth-seeking aim. In so doing, it widened the gap between the aims of trial and the aims of sentencing—and, concomitantly, the gap between acquittal and innocence—even more. Representative Poff, and ultimately Congress, reacted to the specter of an extension of the Exclusionary Rule's non-truth-seeking principle into sentencing in part by passing § 3577. This statute embodied a novel approach to the use of out-of-court evidence at sentencing—one whose categorical, affirmative language contrasted sharply with the previously regnant holding of the Williams Court.[16]

Representative Poff had a particular target case in mind when drafting the broad language of the Organized Crime Act of 1970[17]: *Verdugo v. United States*.[18] Written only two years before the passage of the Act, *Verdugo* held that the exclusionary rule was an appropriate remedy for unconstitutionally seized evidence at sentencing in certain circumstances.[19] In that case, officers obtained an arrest warrant after the defendant dealt approximately three

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[13] Murray, *supra* note 9, at 1435.
[14] *See id.*
[15] *See id.* at 1437–41.
[16] *Id.* at 1443.
[17] Murray, *supra* note 9, at 1441 ("Poff's citation to *Verdugo* and *Armpriester* sheds significant light on his reasons for expanding *Williams*'s holding into the text of § 3577. The portions of the two cases he cites are parallel in their reasoning. Both hold that evidence obtained illegally and suppressed at trial under the Exclusionary Rule should also be excluded from sentencing.").
[18] 402 F.2d 599 (9th Cir. 1968).
[19] *Id.* at 613; *see also* Murray, *supra* note 9, at 1441.

grams of heroin to an undercover officer.[20] Officers waited for Verdugo to arrive at his home the next day to execute the warrant.[21] Once Verdugo arrived, officers placed him under arrest.[22] To this point, the officers had acted in accord with the Constitution. But the same could not be said of what followed. Verdugo was handcuffed to a chair while the officers searched the entirety of his home for two and a half hours.[23] He was then taken to the police station, although the searching did not stop. A team of five to seven officers ransacked the Verdugo home, searching drawers, cabinets, and luggage, overturning furniture, removing covers from all of the house light switches, and punching holes in the wallboard.[24] The government did not argue that the search was constitutional nor that it fell within an exception to the exclusionary rule. In fact, it admitted that Verdugo had been under investigation for months prior to the arrest and that the warrantless "siege of his home. . .in search of [a] 'stash'" was consciously planned.[25] As such, the evidence obtained from this search was suppressed before trial, leaving Verdugo charged with only the three grams of heroin.[26]

Sentencing proved a different story. The government re-introduced the unconstitutionally seized evidence with the goal of drastically increasing Verdugo's sentence from a minimum of five years to a maximum of 20.[27] And the district court followed the government's lead, taking full account of the increased amount of heroin in giving the Verdugo a higher sentence.[28] However, the Ninth Circuit found the exclusionary rule applicable, reversing Verdugo's sentence and requiring sentencing to proceed without the unconstitutionally seized evidence.[29] Although by the court's own words, police are generally motivated by seeking convictions, not with increasing the sentences imposed on defendants, that was not the case here.[30] A specialized police narcotics unit conducted much of the search after Verdugo's arrest with the specific goal of obtaining a lengthy sentence for a repeat offender.[31] Still, the court fashioned a narrow holding, taking into account the "public interest in the imposition of a proper sentence"[32] based on a holistic account of the defendant.[33] Exclusion was only proper where police acted with the specific intent to increase the defendant's sentence and the use of the evi-

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[20] *See Verdugo*, 402 F.2d at 609.
[21] *Id.* at 610.
[22] *Id.*
[23] *Id.*
[24] United States v. Verdugo, 240 F.Supp. 497, 499 (N.D. Cal. 1965).
[25] *Id.* at 500.
[26] *Id.* at 501.
[27] Verdugo, 402 F.2d at 612.
[28] *Id.* at 613.
[29] *Id.* at 610–11 (citing Mapp v. Ohio, 367 U.S. 643 (1961)).
[30] *See id.* at 612.
[31] *Id.*; *see also* Lloyd E. Ohlin & Frank J. Remington, *Sentencing Structure: Its Effect upon Systems for the Administration of Criminal Justice*, 23 L. & CONTEMP. PROBS. 494, 501 (1958).
[32] *Verdugo*, 402 F.2d at 611.
[33] *Id.*

dence at sentencing created a "substantial incentive for unconstitutional searches and seizures."[34]

The passage of § 3577 would seem to have ended the *Verdugo* rule and anything more expansive. Despite the section's seemingly decisive language, however, courts have nonetheless grappled with applying the exclusionary rule at sentencing. This is likely compelled by the fact that the exclusionary rule is a *constitutional* principle; it cannot be overruled by statutory enactments.[35] Thus, courts have engaged in the same analysis they always must when deciding whether exclusion of evidence is an appropriate remedy: whether the benefits of exclusion—deterrence of the police from engaging in unconstitutional searches and seizures—outweigh the costs.[36]

The majority of federal courts have answered the question of exclusion clearly: the exclusionary rule does not apply at sentencing. This has been the case for as long as the rule has existed through the present, other than *Verdugo*. The facts of the cases reaching this decision of course vary. For instance, in *United States v. Lee*,[37] the Fourth Circuit found that a sentencing judge did not impermissibly rely on unconstitutionally seized evidence from a prior conviction four years before the instant case when sentencing the defendant. In *United States v. Schipani*,[38] decided the same year of the passage of Section 3577, the Second Circuit allowed the consideration of evidence from a wiretap which was excluded at trial but relied on by the sentencing judge. In *United States v. Vandemark*,[39] the Ninth Circuit allowed drugs seized in the course of an unlawful *Terry* stop to be considered in a defendant's revocation of probation and consequent sentencing for a prior conviction. In so doing, the court noted that *Verdugo* created a narrow rule essentially triggered only by "searchers whose sole object is to obtain evidence of a single offense with which the defendant is charged."[40]

Despite these factual differences, the rationale for not applying the rule is substantially the same across circuits. In determining whether the exclusionary rule should apply, courts invoke the deterrence-based rationale of the exclusionary rule and engage in a balancing analysis.[41] On the costs side of

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[34] *Id.* at 613.

[35] *See* United States v. Jewel, 947 F.2d 224, 239 (7th Cir. 1991) (Easterbrook, J., concurring) ("Congress answered it in favor of using the evidence, but that cannot be dispositive, else Congress could abolish the exclusionary rule without putting anything in its place.").

[36] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 349 (1974) ("In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context.").

[37] 540 F.2d 1205, 1211 (4th Cir. 1976).

[38] 435 F.2d 26, 28 (2d Cir. 1970).

[39] 522 F.2d 1019, 1025 (9th Cir. 1975).

[40] *Id.* at 1024. Other examples of cases applying this principle include United States v. Graves, 785 F.2d 870, 873 (10th Cir. 1986), and United States v. Butler, 680 F.2d 1055, 1056 (5th Cir. 1982).

[41] *See, e.g.*, United States v. Lee, 540 F.2d 1205, 1210 (4th Cir. 1976); *Schipani*, 435 F.2d at 28 ("It is quite unlikely that law enforcement officials conduct illegal electronic auditing to build up an inventory of information for sentencing purposes, although the evidence would be inadmissible on the issue of guilt.").

the equation, the language of *Williams* reigns supreme: "exclusion of reliable evidence hampers the ability of sentencing courts to consider all relevant information about the defendant in selecting an appropriate sentence."[42] Unlike coerced confessions (in the Due Process sense),[43] there is nothing fundamentally unreliable about unconstitutionally seized evidence. This is partially why courts resist application of the exclusionary rule as a general matter.[44] And while the costs of exclusion may be higher as it pertains to trial—given the defendant may walk as a result[45]—depriving courts of such evidence at sentencing contravenes the ability of courts to render a sentence in line with the principles of retribution, deterrence, and rehabilitation. The ability to render such a sentence was the motivation behind Section 3577,[46] and courts frequently invoke the statute, providing additional cover to allow consideration of unconstitutionally seized evidence.

As to benefits, *Calandra* almost exclusively suggests that courts only consider the deterrent effect exclusion would have on the police from committing unconstitutional searches and seizures.[47] Subsequent cases have clarified that the relevant metric for assessing deterrence is not whether exclusion will deter in an absolute sense, but rather whether meaningful *marginal deterrence* of the police will be achieved. Courts determine the potential deterrent effect by considering the police actions implicated in the illegal seizure, other potential sanctions, and the stage of the proceeding.[48] It is here where federal circuit courts developed the doctrine of the exclusionary rule within the context of sentencing. In nearly every decision affirming the use of unconstitutionally seized evidence, courts have invoked the same general principle to explain why meaningful deterrence of the police through exclusion at sentencing would not be accomplished. That principle holds that "law enforcement officers conduct searches and seize evidence for purposes of prosecution and conviction—not for the purpose of increasing a sentence in a prosecution already pending or one not yet begun."[49] As a result, exclusion

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[42] *See, e.g.*, United States v. Nichols, 438 F.3d 437, 444 (4th Cir. 2006).

[43] *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 287 (1936) ("In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner.").

[44] *See, e.g.*, Davis v. United States, 564 U.S. 229, 237 (2011) ("It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence.").

[45] *See, e.g.*, *id.* ("[I]ts bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment."); *see also* Herring v. United States, 555 U.S. 135, 141 (2009).

[46] *See* Murray, *supra* note 9, at 1441.

[47] *See* United States v. Calandra, 414 U.S. 338, 348 (1974).

[48] *See, e.g.*, Alderman v. United States, 394 U.S. 165, 174 (1969); New York v. Harris, 495 U.S. 14, 21 (1990); Illinois v. Krull, 480 U.S. 340, 347 (1987); United States v. Leon, 468 U.S. 897, 910 (1984); United States v. Hunt, 505 F.2d 931, 935 (5th Cir. 1974); *see also Calandra*, 414 U.S. at 347–48.

[49] United States v. Lynch, 934 F.2d 1226, 1236 (11th Cir. 1991) (citing United States v. Vandemark, 522 F.2d 1019, 1022 (9th Cir. 1975)).

would not deter officers above and beyond its typical application at trial. By the 1970s and 1980s—following *Verdugo* and the passage of Section 3577—nearly all circuits were in agreement about this costs-benefits balancing and the general inapplicability of the exclusionary rule at sentencing.[50]

Despite this unanimity across the circuits, the enactment of the Federal Sentencing Guidelines in 1987 revamped judicial discussion of applying the exclusionary rule at sentencing. The passage of the Guidelines in 1987 caused a seismic change in the world of sentencing. Whereas federal judges once sentenced within broad ranges of years prescribed by statute,[51] federal law now mandated[52] that judges sentence within a narrow range under Guidelines crafted by the newly-created United States Sentencing Commission.[53] The Guidelines mandated that judges sentence based on any fact—about both the offender himself (e.g. criminal history) and the offense—proven beyond a preponderance of the evidence at sentencing.[54] This was required regardless of the conduct for which the defendant was convicted.[55] For example, if proven by a preponderance of the evidence that a firearm was used in the commission of a drug trafficking offense, the Guidelines required that judges impose an "enhancement" which directly translated to a higher sentence.[56] Notably, for certain offenses like drug crimes, judges were mandated to sentence according to the total amount of drugs connected to the defendant, notwithstanding what was actually charged.[57] Though the intricacies of the Guidelines are complicated, the fact that judges were to sentence according to a predetermined range based on a sentencing table[58]—taking into account all information proven beyond a preponderance at sentencing—

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[50] *See* Miller, *supra* note 3, at 274.

[51] *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1974).

[52] *See* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1939 (1988).

[53] 28 U.S.C. § 994.

[54] *See, e.g.*, United States v. Booker, 543 U.S. 220, 227 (2005).

[55] *See id.*

[56] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(b)(1) (U.S. SENT'G COMM'N 2018).

[57] *See Id.* § 1B1.3(a)(2) cmt. background ("Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of § 3D1.2(d), which provides for grouping together (i.e., treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would not be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.).")

[58] U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2018).

meant that every new piece of evidence at sentencing had the potential to increase the defendant's ultimate sentence.

Some judges began taking notice of the fact that mandatory sentencing under this scheme presented new problems. Two concurrences—from Judge Silberman on the D.C. Circuit in *United States v. McCrory*, and from Judge Easterbrook on the Seventh Circuit in *United States v. Jewel*[59]—vociferously argued that not applying the exclusionary rule at sentencing under the mandatory Guidelines regime constituted a "patent end-run around the exclusionary rule."[60] Prior to the mandatory regime, the effect of unconstitutionally seized evidence on sentences was uncertain.[61] While judges may have taken it into consideration, there was no direct causation between the evidence and a possible increase in sentence.[62] The Guidelines changed everything, particularly in the drug context. The Guidelines prescribed that courts sentence according to any conduct, like possession of additional drugs, that was "part of the same course of conduct or common scheme or plan as the offense of conviction."[63] Additionally, sentencing enhancements gave direct sentencing consequences to other facts, like possession of a firearm.[64] So long as such facts were proven by a preponderance of the evidence, the judge had to increase the defendant's sentence in line with pre-determined Guidelines.

What this meant was that sentencing became a new trial itself. And not one subject to any of the typical constraints, like the exclusionary rule.[65] Police and prosecutors alike now had a fool-proof mechanism for curing unconstitutionally seized evidence through a sentencing backdoor. In a case where at least one count already rested on constitutionally obtained evidence, prosecutors would charge based only on that evidence.[66] They would then introduce the unconstitutionally seized evidence at sentencing, which created

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[59] *See* United States v. McCrory, 930 F.2d 63, 70 (D.C. Cir. 1991) (Silberman, J., concurring); United States v. Jewel, 947 F.2d 224, 227 (7th Cir. 1991) (Easterbrook, J., concurring). Judge Easterbrook concurred in the judgment given the sentences were vacated on other grounds. Judge Silberman, though making his own view clear that "we are taking a big bite out of the exclusionary rule," concurred with the majority's opinion not applying the exclusionary rule, given Congress' apparent intent and the Supreme Court's hesitancy to extend the exclusionary rule.

[60] *McCrory*, 930 F.2d at 70 (Silberman, J., concurring). The conduct of the police and the unconstitutionally seized evidence implicated in the two cases are substantially different. In *Jewel*, the district court relied on a seized—likely unconstitutionally—videotape implicating the defendants. The majority did not reach the merits of exclusion because it vacated the sentences on other grounds. In *McCrory*, the police executed a controlled buy from the defendant and then called on a full SWAT team to search the defendant's home without a warrant, where large amounts of drugs and guns were discovered. The district court enhanced the defendant's sentence in line with the unconstitutionally seized evidence from this search.

[61] *See id.* at 71.

[62] *See id.*

[63] U.S. SENT'G GUIDELINES MANUAL § 1B1.3(a)(2) (U.S. SENT'G COMM'N 2018).

[64] *See id.* § 2D1.1(b)(1).

[65] *See* Cheryl G. Bader David, *Where to Draw the Guideline: Factoring the Fruits of Illegal Searches into Sentencing Guidelines Calculations*, 7 TOURO L. REV. 1, 35 (1990).

[66] *See* United States v. Jewel, 947 F.2d 224, 239 (7th Cir. 1991) (Easterbrook, J., concurring).

the same sentencing effect *as if it were charged*.[67] Functionally, there was no sentencing penalty for the unconstitutional seizure. Judge Easterbrook succinctly characterized the problem:

> So if the police seize a smidgen of cocaine legally, the suspect can be locked up for 20 years if the police seize another 1500 grams of rock cocaine, or 150 kilograms of powdered cocaine, in violation of the fourth amendment. By any account that would be a serious inroad on the exclusionary rule.[68]

In order to protect the Fourth Amendment ban on unreasonable searches and seizures from becoming a "parchment barrier" under this regime, some judges began suggesting exclusion at sentencing be considered.[69] But despite these protestations, no circuit court actually went so far as to exclude unconstitutionally obtained evidence at sentencing under the mandatory Guidelines. And with the Supreme Court's decision in *United States v. Booker* in 2005 striking down the mandatory implementation of the Guidelines—but still maintaining the Guidelines' hegemony in sentencing[70]—circuits have abandoned the exclusionary rule at sentencing altogether.

A trilogy of cases in the Seventh Circuit—often with the same judges sitting on the panels—demonstrates an evolution common across circuits.[71] In *United States v. Brimah*[72]—a pre-*Booker*, mandatory Guidelines case—the Seventh Circuit held that exclusion of unconstitutionally seized evidence was not required at sentencing. In *Brimah,* the police executed a controlled purchase of heroin from the defendant.[73] They then obtained a warrant specifying the scope of a subsequent search of his home, but disregarded its limits en route to securing 443 additional grams of heroin.[74] The defendant was only charged with the 100 grams implicated in the controlled buy, but the illegally-seized drugs still directly factored into his sentence.[75] Invoking the fact that by 2000 nine circuits had held the rule was generally inapplicable at

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[67] *See id.*
[68] *Id.* at 240.
[69] *See id.*
[70] *See generally* Judge Nancy Gertner, *Rita Needs Gall – How to Make the Guidelines Advisory*, 85 DENV. U. L. REV. 63 (2007).
[71] To see further examples of this evolution across circuits, *compare* the limited holding in United States v. Acosta, 303 F.3d 78, 86 (1st Cir. 2002) ("Given the great weight of the precedent and following the unanimous, reasoned approach of our sister circuits, we hold that the exclusionary rule does not bar the use of evidence seized in violation of a defendant's Fourth Amendment rights in sentencing. We leave open the question of whether the exclusionary rule would bar the use of evidence when police intentionally act in violation of the Fourth Amendment in order to increase a defendant's sentence."), *with* the absolute holding in United States v. Larios, 593 F.3d 82, 87 (1st Cir. 2010) ("The [district] court overruled his objection, correctly concluding that the exclusionary rule ordinarily does not bar the use of evidence obtained in violation of a defendant's Fourth Amendment rights in sentencing.").
[72] 214 F.3d 854, 859 (7th Cir. 2000).
[73] *See id.* at 855.
[74] *See id.*
[75] *See id.*

sentencing[76] and that there is only "a small risk that . . . law enforcement officials will intentionally violate a defendant's Fourth Amendment rights in order to increase a sentence,"[77] the court blessed the district court's use of the evidence. But the court caveated its decision. Tucked away in a footnote, the court noted that it may have reached a different decision if "it is shown that the police acted egregiously"—that is, if they intentionally violated the Constitution with an eye toward increasing the defendant's sentence.[78] Evidently cognizant of the concern expressed in *Jewel*—that allowing this evidence under mandatory Guidelines was an end-run around the exclusionary rule—the Seventh Circuit appeared to keep the door open to future applications of the exclusionary rule at sentencing.

The *Booker* decision making Guidelines non-mandatory ostensibly allayed the concerns identified in *Jewel.* So it is not surprising that in 2009, four years after the *Booker* decision, the Seventh Circuit in *United States v. Perez* similarly held that the exclusionary rule was not required.[79] Perez pleaded guilty to possession with intent to distribute in excess of 500 grams of cocaine.[80] The count stemmed from a valid search of the defendant's car.[81] After the defendant's arrest, police searched the defendant's home and exceeded the limited consent given by his wife.[82] In so doing, the police found more drugs, trafficking equipment, and illegally possessed firearms.[83] None of this evidence was charged in the indictment—likely to avoid a constitutional challenge—but the judge nonetheless chose to rely on all of the information in sentencing the defendant.[84] The Seventh Circuit affirmed, in spite of the conscious decisions of law enforcement to search the home *after* the discovery of drugs in Perez's car and his arrest. Applying the *Brimah* framework, the court found that the record was "devoid of any evidence that the police deliberately violated Perez's Fourth Amendment rights in seizing the drugs from his home with the intent to gather evidence to increase his sentence."[85] While nominally adhering to the safety valve in footnote four of *Brimah*, the court's logic was already unraveling.

By 2014—years after being fully freed from mandatory Guidelines—the Seventh Circuit arrived at its ultimate conclusion: the exclusionary rule

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[76] *See, e.g.*, United States v. Tauil-Hernandez, 88 F.3d 576, 580–81 (8th Cir. 1996); United States v. Montoya-Ortiz, 7 F.3d 1171, 1181 (5th Cir. 1993); United States v. Jenkins, 4 F.3d 1338, 1345 (6th Cir. 1993); United States v. Tejada, 956 F.2d 1256, 1263 (2d Cir. 1992); United States v. Jessup, 966 F.2d 1354, 1356–57 (10th Cir. 1992); United States v. McCrory, 930 F.2d 63, 70 (D.C. Cir. 1991) (Silberman, J., concurring); United States v. Torres, 926 F.2d 321, 325 (3d Cir. 1991); United States v. Lynch, 934 F.2d 1226, 1234–37 (11th Cir. 1991).

[77] *Brimah*, 214 F.3d at 859.

[78] *Id.* at 858 n.4.

[79] 581 F.3d 539, 544–45 (7th Cir. 2009).

[80] *Id.* at 543.

[81] *See id.* at 542.

[82] *Id.* at 543.

[83] *Id.*

[84] *Id.* at 543–44.

[85] *Id.* at 544.

simply does not apply at sentencing in any circumstance.[86] In *United States v. Sanders*,[87] Judge Easterbrook—once on the forefront of judicial opposition to allowing consideration of unconstitutionally seized evidence—put the discussion to rest. While the evidence seized illegally in *Sanders* was pursuant to a defective warrant, thus falling within an established good-faith exception to the exclusionary rule, the panel did not limit its holding to such facts.[88] Instead, it reached the conclusion that the exclusionary rule could never be applied at sentencing for three reasons. First, application of the exclusionary rule is an absolute question: it either applies at a certain stage of a proceeding always, or never at all.[89] Second, attempting to parse when a violation is "egregious" per the *Brimah* dicta is not judicially administrable.[90] Third, an egregious violation is not necessary to achieve deterrence where other remedies, like damages, would be appropriate.[91] The court remarked that to suppress evidence at sentencing—no matter how egregious the violation—would mean deeming Section 3661 (formerly Section 3577) unconstitutional as applied, an action no circuit could had taken.[92]

Decades after Representative Poff made his intent clear, he finally achieved his goal: the exclusionary rule would never apply at sentencing, in any circumstance.

II. Two Theories of Deterrence Justifying Exclusion at Sentencing in the Post-*Booker* Era

A fleeting period of judicial reconsideration of applying the exclusionary rule at sentencing ended with the Supreme Court's *Booker* decision.[93] As the evolution of cases in the Seventh Circuit demonstrates, we now find ourselves essentially back where the rule started in the sentencing context, if not worse. Although *Booker* may have facially fixed the problem identified by Judge Easterbrook brought on by mandatory sentencing guidelines, because

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[86] United States v. Sanders, 743 F.3d 471, 475 (7th Cir. 2014).
[87] *Id.*
[88] *See id.*
[89] *Id.* at 473.
[90] *Id.*
[91] *Id.* at 474.
[92] *Id.* at 473.
[93] The only scholarly discussion of applying the rule at sentencing—mostly inspired by Judge Easterbrook's *Jewel* opinion—also ended with *Booker*. *See, e.g.*, Pinyan, *supra* note 3, at 543–44 ("This Comment argues that the best way to distinguish between these situations is through an 'evidentiary' limitation, suggested in *Verdugo*, which would exclude evidence acquired in illegal searches only if the officers already have secured 'sufficient evidence to convict' the defendant of a related offense. Such a limitation would provide, by reference to objective criteria, the deterrence against illegal seizure of evidence that commentators fear is now lacking in the post-Guidelines world. Such a limitation would best approximate, in an objective manner, those cases in which 'substantial incentives' exist for illegal searches. This test would not only deter searches but would also be relatively easy to administer: judges would only need to examine the amount of physical evidence the officers had in hand at the time of the search in question to determine whether the illegally seized evidence should be excluded.").

courts can and do still consider unconstitutionally seized evidence, the sentencing backdoor continues to exist in practice.

Courts argue that there is no meaningful deterrence from the exclusionary rule at sentencing. But this Article argues that these courts are wrong: under their own logic that police do not fixate on increasing defendants' sentences, but rather on securing convictions,[94] meaningful deterrence will likely still be achieved by applying the exclusionary rule at sentencing in the post-*Booker* era. This section offers two theoretical justifications for why, under the theory of policing relied on by federal circuit courts, meaningful deterrence will come about through exclusion at sentencing.

A. The Broad Theory: There is No Difference Between an Increase in Sentence and Securing an Additional Conviction

When sentencing under the Federal Sentencing Guidelines—even after they became advisory—there is no meaningful difference between factoring in an additional conviction or just an increase in a defendant's sentence, such that an increase in sentence can be seen as a *de facto* conviction. Because this is the case, courts' own logic for not applying the exclusionary rule at sentencing—that police are concerned only with convictions, not increasing sentences—should in fact encourage the use of the rule to deter police from violating the Fourth Amendment.

The structure of the Guidelines makes this self-evident. As noted above, the Guidelines' structure for considering evidence introduced at sentencing either makes such evidence as relevant *as if the defendant were charged with it*[95] or directly factors such evidence into an enhancement.[96] For most crimes, then, unconstitutionally seized evidence need not support an additional charge pre-conviction to get the exact same result post-conviction at sentencing.[97] An average police officer cannot care at what stage evidence is considered as part of a defendant's conviction. As Judge Easterbrook pointed out, the sentencing backdoor allows police and prosecutors alike to obtain *de facto* convictions for additional crimes based on illegal evidence. And "[i]n proving such additional crimes, illegally seized evidence may play a central role—the same sort of role it used to play in supporting convictions on addi-

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[94] As a general matter, this conclusion is, of course, a shaky one. The question of what police are concerned with in seeking out evidence is an empirical one, and no court has offered any sort of statistical backing for this assertion. As Judge Easterbrook noted in *Jewel*, "[p]olice do not mull over the potential uses of evidence, fix on *a* use, and then seize the evidence for that purpose. Officers have multiple purposes—they want to close down drug operations (even if no prosecution ensues), they want to get the goods that will help turn a dope peddler against his supplier, they want to facilitate convictions, they want to maximize sentences when convictions occur. It is inconceivable that any defendant will be able to show that the police had only one of these purposes in mind when making a seizure." United States v. Jewel, 947 F.2d 224, 238 (7th Cir. 1991) (Easterbrook, J., concurring). This Paper, though, accepts the premise that police are only concerned with seeking convictions.

[95] *See* U.S. Sent'g Guidelines Manual § 1B1.3(a)(2) (U.S. Sent'g Comm'n 2018).

[96] *See Id.* § 2D1.1.

[97] *Jewel*, 947 F.2d at 240.

tional counts."[98] The difference between an increase in sentence and a conviction on an additional count thus becomes semantic; without the exclusionary rule playing a role in sentencing, the Fourth Amendment offers no protection for a defendant already implicated in any crime.

Further, if under courts' logic, police are only concerned with getting convictions, then they should be equally concerned with *losing convictions*—that is, losing the *de facto* convictions that are obtained at sentencing through admission of illegally obtained evidence. The entire logic of the exclusionary rule since *Calandra*[99] has counted lost convictions as the chief "cost" of the rule, cautioning against wider application. But this is precisely how police officers are deterred from making unconstitutional searches and seizures, insofar as cases resting on illegal evidence are likely to be dismissed.[100] The inapplicability of the rule at sentencing functions as a type of judicial conviction-laundering—illegal evidence is cleaned by marshalling it through a sentencing process that counts it as perfectly legal, allowing these "convictions" to stand. This will not work when all evidence in a case was unconstitutionally seized, given the traditional exclusionary rule will bar a conviction.[101] But as soon as any minimal hook exists—any single potential conviction resting on good evidence—the mechanism for cleaning bad evidence at sentencing is available, and additional *de facto* convictions become available to the government.

The availability of these *de facto* convictions has two major effects. First, a "big bite" is taken out of the exclusionary rule as traditionally understood.[102] When police are able to obtain *de facto* convictions from illegal evidence, the exclusionary rule does less work. Prosecutors simply structure their indictments to obfuscate the constitutional violation by charging the bare minimum.[103] The only way an officer could potentially lose a conviction is if the prosecutor errs in charging *too much*, thus subjecting the unconstitutional evidence to the exclusionary rule at trial.[104] Even then, the prosecutor can just dismiss the count and reintroduce the evidence at sentencing.[105] If courts still believe in the efficacy of the exclusionary rule as a deterrent in the traditional sense, they must also guard against the complete vitiation of the rule through the sentencing backdoor.

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[98] *Id.*

[99] *See, e.g.*, Herring v. United States, 555 U.S. 135, 141–42 (2009) ("The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system.") (citation omitted); Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998); United States v. Havens, 446 U.S. 620, 626–627 (1980); United States v. Payner, 447 U.S. 727, 734 (1980).

[100] Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1018 (1987).

[101] See, e.g., Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[102] United States v. McCrory, 930 F.2d 63, 72 (D.C. Cir. 1991) (Silberman, J., concurring).

[103] *Jewel*, 947 F.2d at 240 (Easterbrook, J., concurring).

[104] *See id.*

[105] *See, e.g.*, Verdugo v. United States, 402 F.2d 599, 610 (9th Cir. 1968)

Second, police are actively incentivized to exceed the bounds of the Constitution once any minimal hook exists. And the egregiousness of the violation committed by the police is irrelevant under the current doctrine.[106] Deterrence of the police fundamentally works through police—as institutional actors—internalizing the rules that courts impose on them.[107] As officers over time lose convictions, the exclusionary rule works by teaching them that their actions will be for naught when they violate the Fourth Amendment.[108] Concomitantly, police offices design protocols to ensure compliance with constitutional rules and to sanction officers when the exclusionary rule has applied to an officer's violation. Where an exception to exclusion has been created, officers and offices alike should be expected to internalize such exceptions and shift their operations to be more in line with the exception.[109]

These two effects go hand-in-hand, and they are precisely what contributed to the police conduct in both *Verdugo* and *McCrory*. In both cases, the police had ample evidence to convict the defendant prior to Fourth Amendment violations. Knowing full-well that any additional evidence would support a *de facto* conviction not subject to the exclusionary rule at sentencing, they then go further. Consider the facts from *McCrory*, after evidence supporting the defendant's arrest and subsequent conviction had already been discovered:

> Outside, the officers field-tested the contents of the plastic bag and determined that the substance was 792 milligrams of 70 percent pure cocaine base. Then, the officers broadcast McCrory's description and precise location to an awaiting arrest team. Sergeant James Vucci, a member of the responding arrest team, forcibly entered Apartment 204 and detained McCrory, who matched the broadcast description. Vucci searched appellant's person, removing a gold nugget ring inscribed with the name "Keith" in diamonds, a Seiko watch with a gold leather band, and several gold chains. After Rollins and Jones identified McCrory as the person from whom they had purchased the crack cocaine ten minutes earlier, Vucci arrested him and charged him with cocaine distribution.[110]

This was no accident, but instead a conscious decision by the police to seek further evidence—without a warrant—knowing, regardless of its constitutionality, that it would support what is the equivalent of a conviction. In this circumstance, traditional Fourth Amendment protections are meaningless.

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[106] United States v. Sanders, 743 F.3d 471, 472 (7th Cir. 2014).

[107] *See, e.g.*, Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1082 (2011).

[108] Orfield, *supra* note 100, at 1052.

[109] The examples of this are myriad. For one particularly notable example, *see F.B.I, Memorandum,* N.Y. TIMES (Mar. 25, 2011), https://www.nytimes.com/2011/03/25/us/25miranda-text.html [https://perma.cc/J2Q6-MMAU].

[110] United States v. McCrory, 930 F.2d 63, 65 (D.C. Cir. 1991).

There is no warrant requirement once a good conviction exists.[111] There is no limited scope prescribed by a warrant.[112] And there is nothing constraining the police from, for instance, fully searching down a defendant,[113] ransacking his bedroom,[114] and tracking his every movement.[115]

Despite these institutional incentives, this strong-form of the consequences of non-application of the exclusionary rule at sentencing need not be dispositive of why exclusion is generally warranted. It should be generally applied—regardless of officer intent[116] or institutional policy—simply due to the nature that *de facto* convictions at sentencing are functionally the same as *de jure* convictions. Absent a good faith exception[117] to exclusion, the courts do not bless the admission of unconstitutionally seized evidence by police.

Some courts appear to believe that *Booker* fixed this fundamental flaw.[118] But even post-*Booker* police and prosecutors have good reason to think that unconstitutionally seized evidence will still be treated like a *de facto* additional conviction. Empirical research from the United States Sentencing Commission demonstrates the limits of *Booker* in reshaping the federal sentencing landscape. Fifteen years after the end of mandatory Guidelines, federal courts continue to sentence in line with the sentences that would have prevailed under the pre-*Booker* regime.[119] While within-range sentencing has fallen since 2005, federal courts continue to impose the Guidelines sentence at least fifty percent of the time.[120] And even where courts depart to impose a lower-than-Guidelines sentence today, approximately forty percent of the time they depart according to factors identified by the Sentencing Commission, which do not take into account constitutional violations.[121] This leaves thirty percent of cases overall in which courts vary from the Guidelines not according to factors identified by the Commission. Cases falling into this category *might be* taking into account unconstitutionally seized evidence. But this is unlikely to be the norm, given the Guidelines continue to be "the lodestone of sentencing" in federal court.[122]

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[111] *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967).
[112] *Id.*
[113] *See* Chimel v. California, 395 U.S. 752, 763 (1969).
[114] *See* Maryland v. Buie, 494 U.S. 325, 334 (1990).
[115] *See* Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).
[116] Administration of the exclusionary rule is based on an objective test, not subjective intent. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 397 (1989); Maryland v. Macon, 472 U.S. 463, 470–71 (1985); Scott v. United States, 436 U.S. 128, 136–38 (1978).
[117] *See, e.g.*, United States v. Leon, 468 U.S. 897, 920–21 (1984).
[118] *Compare* United States v. Jewel, 947 F.2d 224 (7th Cir. 1991) (Easterbrook, J., concurring), *with* United States v. Sanders, 743 F.3d 471, 472 (7th Cir. 2014). Judge Easterbrook wrote both opinions.
[119] United States Sent'g Comm'n, Federal Sentencing: The Basics 1, 3, (Aug. 2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf [https://perma.cc/9DU7-YD5Q].
[120] *Id.*
[121] *Id.*
[122] *Id.*

Moreover, the *Booker* decision was limited by its own terms. The Supreme Court struck down the mandatory imposition of the Federal Sentencing Guidelines on a jury trial right theory, rather than on grounds attacking the Guidelines' efficacy and logic.[123] And Justice Breyer's remedial opinion in the case—proposing that courts use "a practical standard of review already familiar to [them]: review for unreasonableness"[124]—has all but ensured that the Guidelines maintain their hegemony in federal sentencing. Federal appellate courts, aided by some limited guidance from the Supreme Court, have effectively interpreted *Booker* to mean that within Guidelines sentences are presumptively reasonable. In the words of a former federal judge:

> Recent appellate court decisions announcing that a Guideline sentence is presumptively reasonable bear an uncanny resemblance to pre-*Booker* decisions. They hold that deviation from Guideline ranges is rarely appropriate and only for reasons that are based on the same faulty premises that undergirded the mandatory regime. Appellate courts have insisted that district court judges begin with—effectively, "anchor" their decisions—in the Guidelines before considering anything else. After years of pointed criticism by scholars and some judges, the Sentencing Commission has suddenly become the fount of all sentencing wisdom, subject to a deference far beyond that given to any other administrative agency. Even the appellate courts that have not labeled the Guidelines presumptively reasonable have acted no differently from those that have. With one exception, no within-Guideline sentence has ever been reversed. Only departures, or the new "variances" under *Booker*, are.[125]

Further, recent studies of the federal courts suggest that judges experience significant "anchoring bias" under the Guidelines.[126] That is, the Guidelines range calculated by the presentence report and argued for by the prosecutor likely prevails; at a minimum it constrains the exercise of judicial discretion.[127] Accordingly, judges may still be disinclined to depart even when they consider whether unconstitutionally seized evidence should factor into a defendant's sentence.

One need not look beyond post-*Booker* case law to realize this remains a problem that could be deterred. Across the circuits and federal district

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[123] *See* Apprendi v. New Jersey, 530 U.S. 466, 492 (2000).

[124] United States v. Booker, 543 U.S. 220, 261 (2005) (citation omitted).

[125] Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 140 (2006).

[126] *See, e.g.*, Mark W. Bennett, *A Judge's Attempt at Sentencing Inconsistency After Booker: Judge (Ret.) Mark W. Bennett's Guidelines for Sentencing*, 41 CARDOZO L. REV. 243, 254 (2019); *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489 (2014); Sarah M. R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. MIAMI L. REV. 947, 962 (2010).

[127] *Id.*

courts, prosecutors continue to successfully marshal illegally seized evidence through the sentencing backdoor.[128] And police continue executing illegal searches and seizures after securing enough evidence to convict defendants on a minimum charge in order to secure additional *de facto* convictions at sentencing.[129] What the multitude of federal circuit court appeals grappling with the effect unconstitutionally seized evidence ought to have at sentencing represent is that trial court judges frequently rely on such evidence for sentencing. Where that remains the case, police will continue to engage in behavior that could be deterred.

This problem would likely still persist even if, in the future, the Guidelines lose their salience. Under today's doctrine, the exclusionary rule does not apply at sentencing as an absolute matter.[130] Again, the police as institutional actors are thus likely to structure their operations in line with such a broad exception to Fourth Amendment protections. Even in a non-Guidelines world, the effect of using unconstitutionally seized evidence at sentencing is a *de facto* additional conviction, just a less visibly apparent, less predetermined, and less direct one. Which is to say, the early circuit cases—those prior to the Guidelines—not applying the exclusionary rule at sentencing[131] should have suppressed unconstitutionally seized evidence, too. Federal sentencing ranges are notoriously broad. For instance, the sentence for a person convicted of possession of at least 100 grams of heroin ranges from a minimum of five years to a maximum of forty.[132] Police cannot be sure *exactly* what sentence a defendant will receive when faced with such ranges.

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[128] *See, e.g.*, United States v. Perez, 581 F.3d 539, 543 (7th Cir. 2009) ("The Lake County officers then notified the Illinois State Police Narcotics Unit of the arrest. The ISP officers subsequently went to Perez's home in Cicero, Illinois and received consent to search the home from Perez's wife, Ana Perez. Once inside, the officers retrieved a variety of narcotics including 425.1 net grams of heroin, 985.9 net grams of powder cocaine, 930.0 net grams of marijuana, and 227.7 net grams of methamphetamine. The drugs were mostly found in an east storage room but some were found in the garage. Also in the garage, the officers retrieved two large hydraulic presses suitable for packaging kilograms of cocaine. One of the presses was equipped with a wooden plate with the silhouette of a lizard on it—the exact lizard design pressed onto the brick of cocaine retrieved from Perez's vehicle earlier that day."); United States v. Warwick, No. 16-CR-4572-WJ, 2018 WL 3056049, at *10 (D.N.M. June 20, 2018) ("Defendant argues that he should not receive the sentencing enhancement pursuant to USSG § 2K2.1(b)(1)(A), which provides for a two-point increase if the offense involved three to seven firearms. Defendant asserts that under United States v. Jessup, 966 F.2d 1354 (10th Cir. 1992), the exclusionary rule may be applied at sentencing in an effort to deter Fourth Amendment violations by law enforcement. Doc. 138 at 2. The Government and the Probation Officer contend that although the two firearms recovered on November 7 were suppressed for the purposes of trial, the relevant conduct standards provide that the firearms should be considered for sentencing . . . The Court agrees with the Government . . ."); United States v. Hoang, 285 F. App'x 133, 137 (5th Cir. 2008) ("Tinh next argues that the district court erroneously enhanced his offense level based on two firearms that had been suppressed, and he urges us to follow a Sixth Circuit case to find reversible error. We have previously held, however, that the exclusionary rule does not apply to the district court's consideration of evidence at sentencing. . . . We are bound by our precedent."). United States v. Sanders, 743 F.3d 471, 475 (7th Cir. 2014).

[129] *Id.*

[130] *Sanders*, 743 F.3d at 475.

[131] *See supra* Part I.

[132] 21 U.S.C. § 841.

Charging decisions are outside their control. So is plea-bargaining. And so are myriad other intervening decisions and events, including the exercise of judicial discretion in imposing the ultimate sentence. If some additional, unconstitutionally seized evidence is considered at all and has a tangible effect—as is particularly the case where the judge articulates reliance on the additional evidence—it still functions as an additional *de facto* conviction. The distinction between an increase in sentence and a *de facto* conviction remains thin.

The uncertainty of sentences in such a regime certainly affects the analysis. Yet, if non-application of the exclusionary rule at sentencing means unconstitutionally seized evidence will at least *sometimes* be considered to increase the defendant's sentence, police should be expected to violate the Constitution once any facts supporting a conviction have been discovered if they consider the possibility of additional *de facto* convictions higher than potential loss of *de facto* convictions. How often this would actually be the case is an empirical question beyond the scope of this Article. Under the balancing test proposed by the Supreme Court in *Calandra*[133] and its progeny, the deterrence achieved via exclusion must be meaningful marginal deterrence. As such, if such occurrences were infrequent, perhaps exclusion at sentencing would be an inappropriate remedy under current Supreme Court law.

But the sorry state of ancillary Fourth Amendment remedies suggests that there would be instances in which such a situation would arise. Beyond the exclusionary rule, the greatest potential deterrent to police is § 1983 actions for damages.[134] However, the actual effect of § 1983 in deterring the police specifically from violating the Constitution is limited at best.[135] This is due in large part to the doctrine of qualified immunity, which "provides ample protection [from civil liability under § 1983] to all but the plainly incompetent or those who knowingly violate the law."[136] As a general matter, then, the only cost to the police of introduction of unconstitutional evidence at sentencing is the potential loss of a *de facto* conviction, whereas the potential windfall—additional, though uncertain, *de facto* convictions—may be

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[133] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 350 (1974) ("[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.").

[134] 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.").

[135] *See, e.g.*, Matthew V. Hess, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 158 (1993).

[136] Malley v. Briggs, 475 U.S. 335, 341 (1986).

potentially large. How many officers would engage in such behavior in a non-Guidelines system must necessarily remain unanswered for now.

B. The Narrow Theory: Lack of Exclusion Secures Easier Convictions at the Plea-Bargaining Stage

An additional *de facto* conviction—a pre-determined increase in sentence, in other words—is the most visible, but not necessarily the most consequential, result of the use of illegally obtained evidence during sentencing. By allowing prosecutors to marshal illegal evidence through the sentencing backdoor, courts enable prosecutors to secure easier convictions through plea deals. If the oft-invoked purpose of searches and seizures by police is to secure convictions, then this too justifies exclusion at sentencing.

Today, over ninety-seven percent of federal criminal cases are settled through guilty pleas.[137] The proliferation of guilty pleas in the federal system is caused by many factors. Prosecutors seek convictions as a foremost goal on the path toward trial. But, securing it at the lowest possible cost to the state—in terms of time, resources, and possible risk of losing at trial— is similarly important.[138] This latter point underlies the benefits of plea-bargaining from the prosecutor's perspective; he or she can minimize all of the costs of potentially taking a case to trial by inducing a defendant to plea.[139] In some circumstances, prosecutors may simply deem getting a conviction—even if not the highest possible sentence—at little cost to the office a sufficient goal, particularly if the conduct pled to carries with it a lengthy mandatory minimum sentence.[140]

From the defendant's perspective, pleading guilty may come with some benefit, too. The most obvious benefit is avoiding the so-called "trial penalty" that occurs from refusing to plead guilty.[141] Where a defendant does not plead, prosecutors may issue a superseding indictment charging the defendant with more counts based on his actual conduct.[142] With this comes greater exposure to criminal liability and a potentially higher sentence.[143] Moreover, under the Sentencing Guidelines especially, defendants may receive a tangible benefit—in the form of a offense level reduction—by appearing to "accept responsibility."[144] in the form of a guilty plea or by offering

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[137] Nat'l Ass'n of Crim. Def. Laws., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 31 FED. SENT. REP. 331, 333 (2019),

[138] *See, e.g.*, Inga Ivsan, *To Plea or Not to Plea: How Plea Bargains Criminalize the Right to Trial and Undermine Our Adversarial System of Justice*, 39 N.C. CENT. L. REV. 135, 148 (2017) (footnote omitted).

[139] *Id.*

[140] *See, e.g.*, H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 82 (2011).

[141] Nat'l Ass'n of Crim. Def. Laws., *supra* note 137, at 331.

[142] *See id.* at 341.

[143] *See id.*

[144] *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) (U.S. SENT'G COMM'N 2018) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.").

"substantial assistance" to another law-enforcement investigation.[145] Of course, the Guidelines did not invent this benefit to the defendant, but instead made it more tangible. Because judges have traditionally been called on to exercise broad discretion in assessing the totality of the defendant's character at sentencing, pleading guilty has often been associated with a reduction in sentence due to the apparent "repentance" shown by the defendant.[146]

Plea bargaining is necessarily contextualized and driven by the leverage both sides have and the benefits that each side seeks. For the prosecutor, a charging decision is the quintessential form of leverage. This is just the other side of the coin of the benefit of avoidance of the trial penalty sought by the defendant.[147] Prosecutors may "stack" charges—multiple counts associated with the same underlying conduct—to induce defendants to plea in exchange for dropping counts.[148]

The sentencing backdoor only adds to prosecutors' leverage, creating a simple and effective means to secure a guilty plea in a minimum amount of time. The threat of the use of unconstitutionally seized evidence is an impactful form of prosecutorial leverage. The mechanism is straightforward. Because unconstitutionally seized evidence faces the prospect of exclusion pre-trial, but no prospect of exclusion at sentencing generally, the prosecutor only brings charges based on the good evidence—a "smidgen" of the total evidence seized by the police, in Judge Easterbrook's words.[149] The prosecutor can now plea bargain in the shadow of this illegally seized evidence,[150]

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[145] *Id.* § 5K1.1.

[146] *See, e.g.*, Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 209–10 (1956) ("The predominant basis for a court's considering a defendant pleading guilty less culpable than one denying guilt is the belief that a guilty plea demonstrates the readiness of the accused to accept responsibility for his criminal acts. Judges feel that such a confession of wrongdoing evinces a repentant attitude, and thus represents an important step toward rehabilitation of the accused. A few judges added the qualification that a guilty plea would not be considered evidence of reformation unless the accused had no prior criminal record.").

[147] *See* Caldwell, *supra* note 140, at 83.

[148] *See id.*

[149] United States v. Jewel, 947 F.2d 224, 240 (7th Cir. 1991) (Easterbrook, J., concurring).

[150] In the absence of the exclusionary rule, defendants need to consider more than the *possibility* of admission of illegally seized evidence at sentencing; indeed, they should prepare for the admission of such evidence. For context on plea-bargaining in the context of Fourth Amendment violations, see Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 937 (1980) ("In a plea bargaining situation, the bargaining advantage enjoyed by the prosecution as a result of an illegal search is the risk to the defendant that the fruits of the search will be admissible at trial. The defendant bases his estimation of chances of acquittal at trial, and thus the attractiveness of the proffered plea bargain, upon the state's evidence. If some of that evidence appears to have been illegally seized, the defendant will discount its value because it might be inadmissible at trial. However, he will never be completely certain that a motion to suppress would succeed; he must, therefore, give some weight to the illegally obtained evidence. Hence, the defendant will be choosing his plea based in part upon evidence that might have been found inadmissible at trial. The prosecution, therefore, profits from the violation of the fourth amendment by procuring a guilty plea from a defendant who might have demanded either a trial or a greater sentencing concession had he been certain that the evidence was inadmissible. These advantages gained by the prosecution from violating the fourth amendment would seem sufficient to encourage future violations.").

given the looming prospect of a *de facto* additional conviction—equally as impactful as a charged count—at sentencing.[151] Just like charges that were stacked, then, prosecutors can effectively "drop" the *de facto* count from their indictment. They might offer to refrain from arguing that unconstitutionally seized evidence factor into the defendant's sentence or refrain from seeking a sentence enhancement under the Guidelines. And the defendant may swiftly plead to avoid a lengthy sentence. The result of all of this is that allowing evidence in at sentencing provides further leverage to prosecutors, and easier convictions—an incentive to police to continue violating the Fourth Amendment, in other words.

For the exclusionary rule to apply, the actors whose conduct is subject to judicial regulation must be impacted. In other words, the police must be affected.[152] Once established that illegally seized evidence provides for easier convictions for prosecutors, tying the operation of this dynamic back to the police is simple. As an initial matter, police may be aware of the fact that prosecutors can bargain in the shadow of illegally seized evidence. This might incentivize them to execute unlawful searches and seizures to ensure that the defendant pleads to the charged conduct. And this alone creates the possibility that police can be deterred from violating the Fourth Amendment, given that the prospect of a concrete conviction is on the line.

There is no need to speculate, however. Police and prosecutors often work hand-in-hand to tackle crime.[153] For example, since at least the mid-1980s, many police and prosecutors' offices have moved toward a "community prosecution model" whereby the two offices intimately cooperate with one another within a jurisdiction as a means of efficaciously obtaining convictions.[154] Where this is the case, the "prosecutor assumes a leadership role in working closely with . . . other criminal justice agencies in the community," and "boundaries demarcating the prosecutor's office from other justice, public/governmental and private agencies are increasingly permeated as they become partners."[155] The nature of these relationships has generated much scholarly work on the inherent conflict of interest that exists when prosecutors are tasked with seeking convictions of police officers.[156] In the case of using unconstitutionally seized evidence to obtain convictions against ordinary defendants, however, there is a harmony of interests between police and

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[151] This situation is closely analogous to the pattern of overcharging that occurs during plea bargaining. *See* Caldwell, *supra* note 140, at 83.

[152] *See, e.g.*, United States v. Leon, 468 U.S. 897, 926 (1984).

[153] *See, e.g.*, Alexandra Hodson, *The American Injustice System: The Inherent Conflict of Interest in Police-Prosecutor Relationships & How Immunity Lets Them 'Get Away with Murder'*, 54 IDAHO L. REV. 563, 586 (2018).

[154] *Id.* at 585–86.

[155] Catherine M. Coles, *Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor* 26 (Harv. Univ. Malcolm Wiener Ctr. For Soc. Pol'y Program in Crim. J. Pol'y & Mgmt., Working Paper No. 00-02-04, 2000), https://www.innovations.harvard.edu/sites/default/files/community_prosecution.pdf [https://perma.cc/X3NE-ZRYD].

[156] *See, e.g.*, Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1489 (2016).

prosecutors. Both offices can count a conviction as a win. The result? Allowing the evidence in benefits police officers in that their illegally seized evidence allows easier convictions. And vice versa: not allowing the evidence in at sentencing would remove that "benefit" and further deter police from violating the Fourth Amendment.

If the analysis ended here, there would still likely be meaningful deterrence from applying the exclusionary rule at sentencing. But it does not end here: this process does not capture all of the benefits to prosecutors and police alike from the existence of the sentencing backdoor. Prosecutors may also be motivated to secure a minimum desired sentence.[157] And this goal may complicate securing an initial conviction in the first place. If prosecutors must offer a defendant a deal to induce his plea—such as agreeing not to argue for the highest sentence or dropping a charge—then they necessarily cannot seek the highest available sentence. If prosecutors want to capture the "actual conduct" of the defendant and seek a sentence commensurate with such conduct, then they may charge more from the outset. This in turn will either force the prosecutor to bargain more or force him to forego the benefits of plea bargaining altogether. Indeed, a defendant may seek further concessions from the prosecutor in light of the higher potential criminal liability or just test his case at trial knowing the severe sentence he may receive.

In many cases, the mechanism through which unconstitutionally seized evidence becomes a *de facto* conviction at sentencing offers prosecutors a panacea to securing both a quick guilty plea and the highest possible sentence. Again, because prosecutors cannot generally successfully charge unconstitutionally seized evidence in an indictment, their charging decisions are simplified. Indictments become inherently lighter and less contentious where only a count resting on a solid evidentiary ground is charged—the minimum "hook" to get prosecutors to sentencing.[158] So while in some instances the prosecutor may have to forego seeking the highest possible sentence for the defendant in order to induce the defendant to plea—perhaps by promising not to introduce the illegally obtained evidence at sentencing or argue it to the judge[159]—this will not always be the case. Often, there may be simply nothing left to dispute from the perspective of the defendant. And he may just plead to show that he accepts his punishment in order to salvage *some* benefit, like a potential reduction in sentence.[160] In this scenario, too, the effect of unconstitutionally seized evidence in securing an easier conviction—this time with an eye toward a higher sentence—is manifest. And so exclusion promises deterrence of the police.

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[157] *See, e.g.*, Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 86 (1995).

[158] *See, e.g.*, United States v. Jewel, 947 F.2d 224, 240 (7th Cir. 1991) (Easterbrook, J., concurring).

[159] *See, e.g.*, Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 802 (2003).

[160] *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) (U.S. SENT'G COMM'N 2018) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.").

III. Moving Forward: Possible Approaches from the Courts, the Sentencing Commission, and Congress

Since the Supreme Court's decision in *Booker*, federal sentencing has been in a place of purgatory: Guidelines have lost their mandatory thrust, but the sentences calculated under them affect each sentencing decision and often prevail without question.[161] In light of this state of flux, judges do have options, although legislative—or quasi-legislative, from the perspective of the Sentencing Commission—action is sorely needed.

Foremost, federal district court judges hold more power today post-*Booker* and should exercise it in excluding unconstitutionally seized evidence where appropriate. Although not "free at last" from the Sentencing Guidelines[162] and constrained for all of the aforementioned reasons, federal district courts now have the power to issue "variances" from the Guidelines when they disagree with the Guidelines sentence.[163] In order to exclude unconstitutionally seized evidence from factoring into the defendant's Guidelines calculation, courts must "vary," rather than depart, given that the Sentencing commission has not issued a valid departure in this case.[164] When courts issue variances, they generally look to the sentencing factors elaborated in 18 U.S.C. § 3553(a)[165] to explain how the sentence calculated by the Guidelines is inapposite in the case at hand. In theory, then, district courts could

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[161] *See supra* Part II.

[162] United States v. Jaber, 362 F.Supp.2d 365, 370 (D. Mass. 2005).

[163] *See* U.S. Sent'g Comm'n, Primer: Departures and Variances 1 (2020), https://www.ussc.gov/sites/default/files/pdf/training/primers/2020_Primer_Departure_Variance.pdf [https://perma.cc/GZC8-PVVA].

[164] *Id.*

[165] Factors to Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—
  (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  (B) to afford adequate deterrence to criminal conduct;
  (C) to protect the public from further crimes of the defendant; and
  (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—
  (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
    (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
    (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

apply sentencing variances under the Guidelines as a means of applying the exclusionary rule.

This approach has its problems. Federal sentencing decisions still remain subject to appeal. With its decision in *Gall v. United States*, the Supreme Court clarified that out-of-Guidelines sentences may not be subjected to a standard of review of presumptive unreasonableness, but nonetheless remain subject to abuse-of-discretion review.[166] Given how strongly circuit courts have disagreed with application of the exclusionary rule at sentencing, the possibility that a district court could be reversed for varying downwards from a Guidelines-based sentence is high. And based on the Supreme Court's reluctance to speak to the issue of exclusion at sentencing, let alone expand the exclusionary rule, the chance that a circuit court's reversal would be reviewed is low.[167]

Operating under this framework, district courts seeking to exclude unconstitutionally seized evidence introduced at sentencing would need to do so inconspicuously. 18 U.S.C. § 3553(a) provides broad cover for courts to explain why they are varying.[168] In the same way that district courts cannot simply eschew the Guidelines calculation as a general matter,[169] appellate courts might reverse on account of legal error where a district court explicitly applies the exclusionary rule under the Guidelines. What's left is a narrow space for judicial maneuvering—apply the exclusionary rule to unconstitutionally seized evidence at sentencing but justify the variance on other grounds.

While the defendant in any case would be pleased with such a result, it provides little to no systemic value. Again, exclusion—as currently formu-

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(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—
(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

[166] 552 U.S. 38, 51 (2007).

[167] *See, e.g.*, United States v. McCrory, 930 F.2d 63, 72 (D.C. Cir. 1991) (Silberman, J., concurring in part and concurring in the judgment) ("Nevertheless, I do not dissent. The Supreme Court in recent years has been extremely hesitant to extend the exclusionary rule . . . , and particularly to extend it to non-trial proceedings.").

[168] *See, e.g.*, U.S. SENT'G COMM'N, *supra* 163, at 1.

[169] *See, e.g.*, United States v. Jaber, 362 F.Supp.2d 365, 370 (D. Mass. 2005); United States v. Bruce, 413 F.3d 784, 785 (8th Cir. 2005) ("[I]t is clear that the district court erred by not consulting the guidelines and taking them into account during Bruce's sentencing.").

lated—is a means to an end, not an end itself. That end goal is deterrence of the police,[170] which is unlikely to be meaningfully achieved with one-off judicial decisions obscuring the true rationale for non-reliance on the Guidelines.[171] Further, judicial invention of this sort requires extensive motivation and judicial will. Adhering to the Guidelines is still overwhelmingly the norm, and courts may tread lightly where reversal looms large. And the Guidelines have been the dominant sentencing paradigm for years. As a federal judge, Judge Nancy Gertner once wondered: "What does it take to restore judicial sentencing authority after nearly twenty years of passivity, after the judicial culture has fundamentally changed, not to mention the political atmosphere, and after judicial sentencing expertise, to the extent it existed at all, has become vestigial?"[172]

The most obvious remedy—if the Guidelines are to endure—is promulgation of a departure by the Sentencing Commission related to exclusion of unconstitutionally seized evidence at sentencing.[173] This approach comes with its benefits, namely that a clear message is sent to police officers and prosecutors alike regarding the availability of *de facto* convictions based on unconstitutionally seized evidence introduced at sentencing. Such a quasi-statutory provision may well achieve some level of deterrence of the police, much like a Supreme Court case holding exclusion a proper remedy for a constitutional violation.[174]

What form such a departure would take is left open. Pre-*Booker*, some scholars suggested that the Sentencing Commission promulgate a departure to implement the exclusionary rule in a limited fashion, only excluding unconstitutionally seized evidence where the police had violated the Constitution following obtaining enough evidence to convict, or acted with the specific intent of increasing the defendant's sentence.[175] But this approach runs directly counter to the doctrine of the exclusionary rule generally, insofar as courts are commanded not to examine the subjective intent of officers.[176] Moreover, it may be "inconceivable" that defendants could make the required showing about the inner mind of a police officer under such a rule.[177] Because this Paper has argued that unconstitutionally seized evidence introduced at sentencing is both a *de facto* conviction and has a tangible effect on obtaining concrete convictions during plea bargaining from an ob-

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[170] *See supra* Part II.

[171] Again, for exclusion to achieve deterrence, police officers and offices must internalize the rules. Although officers may be able to deduce why a district court judge varied where unconstitutionally seized evidence is implicated, we are left to speculate if that would have any true effect on police practices. See *supra* Part II.

[172] Judge Nancy Gertner, *Thoughts on Reasonableness*, 19 FED. SENT. R. 165, 165 (2007).

[173] *See, e.g.*, U.S. SENT'G COMM'N, *supra* 163, at 1.

[174] It would be part of the Guidelines, not the Federal Code.

[175] Pinyan, *supra* note 3, at 524–25.

[176] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 587 (2006); United States v. Leon, 468 U.S. 897, 919–20 (1984).

[177] United States v. Jewel, 947 F.2d 224, 238 (7th Cir. 1991) (Easterbrook, J., concurring).

jective point of view, action by the Sentencing Commission would need to be absolute. Objective incentives demand objective deterrence. The exclusionary rule—perhaps subject to the usual good faith[178] and causation[179] exceptions—must apply to such evidence, or it must not.[180]

Beyond questions of implementation, this approach, too, is imperfect. Federal courts would remain free to apply variances—in this case, upwards—under today's sentencing regime, meaning compliance with such a rule would not be universal.[181]

So, we are left where we began: the Supreme Court and Congress. A Supreme Court rule barring the admission of unconstitutionally seized evidence at sentencing would undoubtedly deliver deterrence to police officers. Again, we are left with the same questions of form and scope noted above. And whether a Supreme Court that has incrementally chipped away at Fourth Amendment protections would render such a rule—especially in light of needing to declare a statute unconstitutional as applied—is a matter of speculation. Congress, too, could act to amend Section 3566 to reflect the need for an exclusionary rule at sentencing. Perhaps congressional sentiment toward the exclusionary rule has changed since 1970, though it is unlikely that is the case. There are likely myriad other areas the rule could be expanded to before sentencing which would have more impact.[182] Congress' failure to promulgate such rules—indeed its failure to ever expand the protections of the exclusionary rule—reflects legislative indifference at best, and animosity toward the exclusionary rule at worst.

The systemic problems associated with non-exclusion of evidence at sentencing will continue until there is a systemic solution. Until then, judges—acting in their individual capacities—should apply it as appropriate. A "spigot-like" approach may not deliver the meaningful deterrence warranted by this problem, but it may send a message.

Conclusion

This Paper has argued that the exclusionary rule is an appropriate remedy for unconstitutionally seized evidence at sentencing. The judicial assertion that police are primarily motivated by seeking convictions, not increasing defendants' sentences, does not undercut this conclusion. Because unconstitutionally seized evidence leads to convictions—both *de facto* in the

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[178] *See, e.g.*, *Leon*, 468 U.S. at 908.

[179] *See, e.g.*, *Hudson*, 547 U.S. at 594.

[180] *Jewel*, 947 F.2d at 239 (Easterbrook, J., concurring) ("In the end we will have a simple answer: the exclusionary rule applies to sentencing, or it does not.").

[181] *See, e.g.*, U.S. Sent'g Comm'n, *supra* 163, at 1.

[182] *See, e.g.*, Herring v. United States, 555 U.S. 135, 144 (2009) (holding that the exclusionary rule applies only to "deliberate, reckless, or grossly negligent conduct," not merely negligent conduct).

form of tangible increases in sentences and concretely through plea bargaining—meaningful deterrence of the police will be achieved through exclusion.

Lawyers and judges alike must often work within the current legal framework—no matter the issue—to achieve their goals. Where the goal is suppression of unconstitutionally seized evidence at sentencing to avoid a lengthy increase in sentence, they must speak in the language of deterrence. But the legal community would do well to remember that a "more majestic conception" of the Fourth Amendment and the exclusionary rule existed in the not-so-distant past.[183] A conception of the exclusionary rule that considered it "part and parcel" of the Fourth Amendment—a right, not a mere tool of regulation.

There is a special indignity imposed on a defendant where the police and prosecutor alike brazenly profit from their own constitutional violations. Sentences serve many functions. They punish. They deter. They incapacitate. But they also teach. They teach the offender that he must adhere to the rule of law. And they teach those looking on that there is a price to pay when one runs afoul of the law. When law enforcement violates these same rules, lessons are also drawn. Justice Brandeis took note of this nearly a century ago when he wrote:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution.[184]

We should not be left to wonder whether an offender can learn respect for the law while locked behind bars for an additional five, or ten, or twenty years as a direct consequence of government malfeasance. Judges at all levels of the federal system must remain vigilant in guarding the integrity of our system.

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[183] Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting).
[184] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).