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An End Run Around the Exclusionary Rule: The Use of Illegally Seized Evidence Under the Federal Sentencing Guidelines

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The prosecution readily agreed not to use this evidence at trial . . . . The illegally-seized evidence, however, was introduced at the sentencing phase as ‘relevant conduct’ under the sentencing guidelines, and [the defendant] predictably received almost the precise sentence he would have gotten had he been indicted, tried, and convicted for possession of all the drugs and guns in the apartment . . . . [A] more patent end-run around the exclusionary rule is hard to imagine.¹

In 1987, the United States Sentencing Commission,² acting pursuant to the congressional mandate of the Sentencing Reform Act of 1984,³ promulgated a comprehensive set of Federal Sentencing Guidelines⁴ (Guidelines) to govern the imposition of criminal sentences under federal law. These Guidelines represented a dramatic departure from the existing sentencing system for federal crimes.⁵ At the heart of the Guidelines is the computation of the base offense level.⁶ The Guidelines have prompted concern among

1. United States v. McCrory, 930 F.2d 63, 70-71 (D.C. Cir. 1991) (Silberman, J., concurring) (footnote omitted), cert. denied, 112 S. Ct. 885 (1992); see also United States v. Jewel, 947 F.2d 224, 238-40 (7th Cir. 1991) (Easterbrook, J., concurring) (arguing that under the Federal Sentencing Guidelines, illegally seized evidence often plays a “central role” and therefore should be excluded from sentencing determinations).


6. The base offense level represents the numerical weight that Congress has attached to a specific violation committed by the offender. In combination with other factors, discussed infra text accompanying notes 156-77, the base offense level determines the sentence the offender receives under the Guidelines. See generally Corrothers, supra note 5, at 40-41

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observers regarding the long-term impact of their adoption upon the criminal justice system.\textsuperscript{7} Having survived detailed constitutional scrutiny,\textsuperscript{8} the Guidelines likely will remain a permanent fixture in the criminal justice system.

One area deserving careful attention involves the effect given to illegally seized evidence\textsuperscript{9} under the Guidelines. The drafters of the Guidelines did not address explicitly whether illegally seized evidence should play a role in the determination of sentences under

\begin{itemize}
\item 7. See, e.g., MARCIA G. SHEIN & JANA L. JOPSON, SENTENCING DEFENSE MANUAL 2-9 (1991) ("The long term effects of [sentencing reform] in the criminal justice arena cannot be judged for several decades."). Concern appears well placed. In the 1991 Crime Bill, S. 1241, 102d Cong., 1st Sess. (1991), the Senate proposed increasing the scope of federal jurisdiction to include murders committed with guns that have travelled across state lines, as well as expanding jurisdiction to include a larger number of drug crimes and crimes of violence. See id. §§ 1201-1242; see also Michael Hedges & Jerry Seper, Rehnquist Rips Bills on Federal Crimes, WASH. TIMES, Jan. 1, 1992, at A4 (discussing proposed expansion of federal jurisdiction in the Crime Bill). As a result, the application of the sentencing guidelines would increase dramatically. Although the 1991 legislation ultimately excluded these provisions, they are likely to reemerge in the future. See William Rehnquist, The Supreme Court and Society; Rehnquist's Reducing Plan, RECORDER, Jan. 21, 1992, at 9. As the role of the federal government in criminal cases increases, the Guidelines are likely to become a central tool in the punishment of felons in this country.
\item 8. See, e.g., Mistretta v. United States, 488 U.S. 361 (1989) (holding that the Sentencing Reform Act does not violate the principles of separation of powers and excessive delegation); United States v. Santos, 932 F.2d 244 (3d Cir.), cert. denied, 112 S. Ct. 592 (1991) (holding that the Guidelines do not violate due process by transferring authority to the prosecutor); United States v. Zapata-Alvarez, 911 F.2d 1025 (5th Cir. 1990) (holding that enactment of the Guidelines does not violate the Presentment Clause); United States v. Litteral, 910 F.2d 547 (9th Cir. 1990) (holding that consideration of a defendant's criminal history in setting the sentence under the Guidelines does not violate due process or equal protection); United States v. Woods, 907 F.2d 1540 (5th Cir. 1990) (holding that the Guidelines do not violate the separation of powers doctrine by providing the probation officer with a significant fact-finding role), cert. denied, 111 S. Ct. 792 (1991); United States v. Rivera, 898 F.2d 442 (5th Cir. 1990) (holding that the Guidelines do not violate the Sixth Amendment right to effective assistance of counsel).
\item 9. Several bases exist for finding that the police have obtained evidence improperly. For instance, if the police obtain evidence after the initiation of an adversarial proceeding without providing the defendant with counsel, subsequent evidence they gain may be tainted and therefore inadmissible. See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966). The largest category of illegally seized evidence involves items gathered in searches and seizures violating a defendant's Fourth Amendment rights. See, e.g., Ybarra v. Illinois, 444 U.S. 85 (1979). In this Note, all references to "illegally seized evidence" refer only to evidence seized in violation of the Fourth Amendment.
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the new sentencing structure. This omission has created the anomalous scenario wherein courts exclude illegally seized evidence at trial yet take it into consideration when computing sentences under the Federal Sentencing Guidelines.

This Note first will examine the development of the exclusionary rule and the rationales that justify its application. Next, it will analyze pre-Guidelines sentencing practices, including the treatment of illegally seized evidence at sentencing. The Note then will discuss the promulgation of the Federal Sentencing Guidelines and outline the reasons behind their adoption.

This Note argues that the use of illegally seized evidence in sentencing violates the rationales justifying the exclusionary rule because the Guidelines create a unique incentive for the illegal seizure of evidence. Namely, the greater the amount of evidence discovered, the more severe the sentence generally will be under the Guidelines, regardless of whether that evidence was the product of an illegal search. To deter unconstitutional searches resulting from this new incentive, courts should apply the exclusionary rule to sentencing proceedings, thereby protecting both the goals of the Federal Sentencing Guidelines and the purposes of the exclusionary rule.

**THE DEVELOPMENT OF THE EXCLUSIONARY RULE**

**Historical Background**

The Fourth Amendment to the United States Constitution declares "[t]he right of the people to be secure in their persons,

10. See, e.g., Cheryl G. Bader & David S. Douglas, Where to Draw the Guideline: Factoring the Fruits of Illegal Searches into the Sentencing Guidelines Calculations, 7 Touro L. Rev. 1, 32 (1990) ("The Sentencing Reform Act, its legislative history, and the Guidelines themselves are each completely devoid of any mention of the effect that illegally obtained evidence should, or should not, have on sentencing.").

11. The exclusion of evidence at a trial because the government acquired it through illegal means rests upon the principles of the "exclusionary rule." See 1 Wayne R. LaFave, Search and Seizure § 1.1 (1978).


houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."14 At the time of the adoption of the Fourth Amendment, the authors of the Constitution gave little thought to the appropriate remedy for a violation of the provision.15 In fact, no clear position regarding the impact of a Fourth Amendment violation on the admission of evidence at trial emerged until over 100 years after the adoption of the Constitution.16

In Weeks v. United States,17 the Supreme Court firmly settled upon the exclusion of illegally seized evidence as the remedy for violations stemming from improper searches.18 The Court found the use of evidence seized in violation of the Fourth Amendment to be a serious intrusion on the constitutional rights of the accused.19 According to the Court,

[i]f letters and private documents can thus be . . . used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.20

The Supreme Court extended the Weeks doctrine to derivative uses21 of illegally obtained evidence in Silverthorne Lumber Co. v. United States,22 and in doing so, greatly enhanced the applicability of the exclusionary rule. In an opinion by Justice Oliver Wen-

14. U.S. CONST. amend. IV.
15. See Stewart, supra note 13, at 1371-72.
16. See LAFAVE, supra note 11, § 1.1, at 1-6.
18. Id. at 398. In Weeks, federal marshals searched Weeks' home without any warrant, thereby uncovering incriminating evidence. Id. at 386.
19. Id. at 393.
20. Id.
21. Derivative evidence is the "product of the primary evidence, [illegally obtained] or . . . otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes 'so attenuated as to dissipate the taint.' " Murray v. United States, 487 U.S. 533, 537 (1988) (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)).
22. 251 U.S. 385 (1920), overruled by United States v. Havens, 446 U.S. 620 (1980) (holding that illegally seized evidence may be used to impeach a defendant's statements made during direct examination).
dell Holmes, the Court sharply chastised the government for its attempt to evade the requirements of the Fourth Amendment:

The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.

... The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.\(^{23}\)

The exclusionary rule thus became the established mechanism for remedying Fourth Amendment violations by federal officials. The Court, however, did not extend the same requirements to state proceedings until forty years later in *Mapp v. Ohio*.\(^{24}\) Departing from earlier precedent,\(^{25}\) the Court extended the remedy of the exclusionary rule to state criminal trials through the incorporation of the Fourth Amendment by way of the Due Process Clause of the Fourteenth Amendment.\(^{26}\) With the decision in *Mapp*, the exclu-

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23. *Id.* at 391-92. In both *Silverthorne* and *Weeks*, the Court enunciated a doctrine that mandated the exclusion of illegally seized papers from trial. *Id.* at 391-92; *Weeks*, 232 U.S. at 393. In *Agnello v. United States*, 269 U.S. 20 (1925), the Court extended this doctrine to cover the illegal seizure of other forms of the defendant's property. *Id.* at 33-34.


25. In *Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961), the Court determined that due process did not mandate the exclusion of illegally seized evidence at state trials. *Id.* at 33. Despite its refusal to extend the exclusionary rule to state trials, the Court noted its strong support for the use of the exclusionary rule in federal proceedings. *Id.* at 28.

26. According to the *Mapp* majority:

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

*Mapp*, 367 U.S. at 655.
sionary rule developed as the appropriate remedy for violations of the Fourth Amendment in both state and federal proceedings.27

**Purposes of the Exclusionary Rule**

Courts have advanced two main justifications for the use of the exclusionary rule as a remedy for Fourth Amendment violations. First, courts have argued that the exclusion of illegally seized evidence from judicial proceedings will deter future illegal searches.28 Second, supporters of the rule have pointed towards a need to protect the integrity of the judicial system by refusing to use tainted evidence.29

Courts have long recognized the deterrent effect of the exclusionary rule as a significant justification for the inadmissibility of illegally seized evidence in criminal proceedings. For example, in *Illinois v. Krull*,30 the Supreme Court stated that “the ‘prime purpose’ of the exclusionary rule ‘is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.’”31 The rule accomplishes deterrence by “‘compel[ling] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’”32

By extending the exclusionary rule to state trials, the Supreme Court increased the deterrent impact of the rule. In *Elkins v. United States*,33 the Court clearly denounced the practice of federal officials using evidence that state officers had illegally seized.34 By refusing to allow federal officials to benefit from the illegal ac-

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27. Justice Stewart observed that since the *Mapp* decision, states have dropped their challenges to the exclusionary rule's application to state proceedings: "'[I]t is interesting to note that since the *Mapp* case was decided, no state official has contended that the existence of these alternative remedies [to the exclusionary rule] . . . obviates the need for an exclusionary rule.'" Stewart, supra note 13, at 1395.
28. See infra notes 30-40 and accompanying text.
29. See infra notes 41-44 and accompanying text.
34. *Id.* at 221.
tions of a state officer, the Court further reduced the incentive for officials to act contrary to the requirements of the Constitution. 35

Proper application of the exclusionary rule is intended primarily to deter willful conduct of the police, 36 but does not necessarily extend to conduct by other officials. For example, the Supreme Court has held that the exclusionary rule is an inappropriate method of deterring magistrates from improperly issuing search warrants. 37 The Court has also determined that the exclusionary rule is an inappropriate means of guarding against improper legislative delegation of search authority. 38 Even when police misconduct is involved, if the search proceeded on a good faith reliance on a facially valid search warrant, the exclusionary rule is inapplicable. 39 The exclusionary rule properly focuses upon cases in which the exclusion may "alter the behavior of individual law enforcement officers or the policies of their departments." 40

Justification for the exclusionary rule rests not only upon deterrence, but also upon the rule's power to protect the judicial system from the taint of illegal evidence. Without the rule, use of illegally obtained evidence threatens the integrity of the judicial system. Justice Holmes argued powerfully that "no distinction can be

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35. Id. at 221-22. The Court in Elkins concluded that respect for the Fourth Amendment by federal and state officials
is hardly promoted by a rule that implicitly invites federal officers ... at least tacitly to encourage ... the disregard of constitutionally protected freedom[s].
If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.

Id.

36. See United States v. Peltier, 422 U.S. 531, 542 (1975) (stating that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge ... that the search was unconstitutional" (emphasis added)).

37. See United States v. Leon, 468 U.S. 897, 916 (1984) (creating a good faith exception to the exclusionary rule that allows the admission of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a magistrate that is ultimately found to be invalid).

38. See Illinois v. Krull, 480 U.S. 340, 350-52 (1987) (determining that because legislators are immune to the effects of exclusion, the extension of a good faith exception to officers' reasonable reliance on a properly promulgated but ultimately unconstitutional enactment is warranted).


40. Id. at 918.
taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed.141 Heeding Justice Holmes' warning, the Court later attempted to exclude evidence obtained by illicit means because it degraded the criminal judicial process.42

The Supreme Court, however, subsequently rejected the judicial integrity rationale as an independent basis for application of the exclusionary rule.43 The current Court, therefore, would justify any use of the exclusionary rule solely upon its deterrent effect.44

Extension of the Exclusionary Rule to Other Legal Proceedings

Mapp and its progeny firmly established that the exclusionary rule's deterrent effect justified exclusion of illegally seized evidence

42. E.g., Terry v. Ohio, 392 U.S. 1 (1968). In Terry, the Supreme Court offered one of the most vigorous defenses of the judicial integrity rationale for the exclusionary rule:
   Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Id. at 13.

43. See Stone v. Powell, 428 U.S. 465, 485 (1976). The Court stated that:
   Although our decisions often have alluded to the "imperative of judicial integrity," they demonstrate the limited role of this justification in the determination whether to apply the rule in a particular context. Logically extended this justification would require that courts exclude unconstitutionally seized evidence . . . . The teaching . . . is clear. While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence.

Id. (citation and footnote omitted).

44. A third rationale for the exclusionary rule is that a criminal defendant has a constitutional right not to have illegally seized information used against him in a subsequent proceeding. See Stewart, supra note 13, at 1380-81. The Supreme Court, however, has condemned this concept. See, e.g., Linkletter v. Walker, 381 U.S. 618, 637 (1965) (stating that post-Mapp decisions have established that the rule is not a personal constitutional right and is not calculated to redress the injury to the privacy of the victim of the illegal search, for any "[r]eparation comes too late").
from a prosecutor's case-in-chief. Debate arose, however, over the extent to which the goals of the exclusionary rule required the exclusion of evidence from other legal proceedings.

The Supreme Court tackled this issue in *United States v. Calandra*, which involved the admissibility of illegally seized evidence in federal grand jury proceedings. Initially, the Court noted the important role that the grand jury played in the investigation of criminal cases and that grand juries had "wide latitude to inquire into violations of criminal law," justified in part by the nonadversarial nature of the grand jury proceeding. Because of the investigative role that grand juries play, the subject of the grand jury proceeding cannot attack an indictment based upon consideration of incompetent evidence or information taken in violation of a witness' Fifth Amendment right against self-incrimination. The Court acknowledged, though, that limitations existed

45. See LaFave, supra note 11, § 1.4, at 58.
48. Id. at 339. The Fourth Amendment violation in Calandra stemmed from an overly broad search by police officers. Id. at 341. The police obtained a warrant to search Calandra's place of business for suspected gambling operations. Id. at 340. Upon conducting a detailed search, the police failed to discover any evidence of gambling activities. Instead, they uncovered evidence of the defendant's loan-sharking activities. Id. at 340-41. The government attempted to use the evidence in a grand jury proceeding, but both the district court and the Sixth Circuit refused to allow the use of the evidence in the grand jury proceeding. Id. at 342.
49. Id. at 342-44.
50. Id. at 343.
51. Id. at 343-44. This factor played a key role in the Court's analysis:

A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged.

Id.

52. Id. at 345 (citing Costello v. United States, 350 U.S. 359, 364 (1956)).
53. Id. (citing Lawn v. United States, 355 U.S. 339 (1958)).
upon the authority of the grand jury to compel information from a witness.\textsuperscript{54}

To determine whether to affirm the exclusion of illegally seized evidence from the grand jury, the Court propounded a balancing test: "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."\textsuperscript{55} Under this test, extension of the exclusionary rule threatened serious harm to the historic role of the grand jury.\textsuperscript{56} Weighed against this serious potential harm, the "incremental"\textsuperscript{57} benefit to the witness "is uncertain at best."\textsuperscript{58} Courts have applied the \textit{Calandra} test to determine the appropriateness of extending the exclusionary rule to other criminal proceedings. Some courts have found that the \textit{Calandra} test favored the exclusion of illegally seized evidence from other legal proceedings in addition to the exclusion from the prosecu-

\textsuperscript{54} Id. at 346-47. The grand jury cannot request information that would invade legitimate privacy interests protected by the Fourth Amendment. See Hale v. Henkel, 201 U.S. 43, 76 (1906).

\textsuperscript{55} \textit{Calandra}, 414 U.S. at 349 (emphasis added).

\textsuperscript{56} Id.

\textsuperscript{57} Id. at 349-50 (citation omitted).

\textsuperscript{58} Id. at 351.

\textsuperscript{58} Id. In fact, the Court concluded that extending the exclusionary rule to grand jury proceedings would result in no deterrent effect:

Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim. For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained.

\textit{Id.}
tation's case-in-chief. Others have used the Calandra formula to reject such extensions of the exclusionary rule.

The Supreme Court has used the balancing test announced in Calandra to extend the exclusionary rule to bar the use of illegally obtained evidence to impeach defense witnesses. In James v. Illinois, police gathered evidence against the defendant in violation of the Fourth Amendment. Historically, illegally seized evidence had been approved as a means of impeaching the testimony of a defendant, thereby deterring perjury by a defendant who knew that the prosecution could offer the evidence to contradict his false testimony.

In James, a majority refused to apply this exception to the exclusionary rule beyond the testifying defendant. The Court balanced the need for deterrence against the potential damage to the judicial process resulting from exclusion of the illegally seized evidence used to impeach a defense witness. The Court concluded that the judicial process gained little from allowing the use of illegally obtained evidence to impeach witnesses other than the defendant. In contrast, the refusal to apply the exclusionary rule

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60. See, e.g., Tirado v. Commissioner, 689 F.2d 307, 314 (2d Cir. 1982) (determining that evidence seized illegally in a criminal proceeding may be used in a civil tax proceeding); Morale v. Grigel, 422 F. Supp. 988, 1001 (D.N.H. 1976) (holding the exclusionary rule inapplicable to school disciplinary proceedings).
63. Id. at 309. In James, police officers lacked probable cause when they arrested the defendant and as a result, information they obtained from him subsequent to the initial detention was inadmissible as "fruit of a Fourth Amendment violation." Id. For a discussion of the "fruit of the poisonous tree" doctrine, see Wong Sun v. United States, 371 U.S. 471 (1963).
64. See, e.g., United States v. Havens, 446 U.S. 620 (1980). The Court found that any deterrence from the exclusion of impeachment evidence "was only a 'speculative possibility.'" Id. at 626 (quoting Harris v. New York, 401 U.S. 222, 225 (1971)). Against this minimal benefit, the use of evidence to avoid perjury furthered the truth-seeking goals of the court. Id.
65. James, 493 U.S. at 313.
66. Id. at 313-18.
67. Id. at 313. The Court offered three rationales for refusing to allow illegally obtained evidence for impeachment purposes. First, witnesses more readily perceive the gravamen of
would encourage future illegal searches by police. In addition, the Court specifically rejected the argument that limiting exclusion to the prosecution's case-in-chief provided an adequate deterrent to illegal searches.

**Sentencing Practices Prior to the Federal Sentencing Guidelines**

Early common law sentencing practices focused upon legislative attempts to set a specific punishment for each type of criminal offense. In response to the perceived flaws in this system, a flexible sentencing system developed, resting in judges and juries authority and discretion regarding the proper sentence for a particular offense. Where legislatures once had determined the ultimate

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68. Id. at 318-19. Because police officers often obtained enough evidence for satisfaction of the obligations of the prima facie case, [i]n these situations, a rule requiring exclusion of illegally obtained evidence from only the government's case in chief would leave officers with little to lose and much to gain by overstepping constitutional limits on evidence gathering. Narrowing the exclusionary rule in this manner, therefore, would significantly undermine the rule's ability "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

69. Id. at 318 (footnote omitted) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).


71. Critics argued that this system demonstrated "excessive rigidity." Grayson, 438 U.S. at 45-46; see also Campbell, supra note 70, § 1.2, at 6-8 (discussing the rigidity of the early common law system).

mate sentence, under "indeterminate sentences" they provided only broad ranges within which a judicially imposed sentence might fall. The indeterminate sentencing system relied upon judges to evaluate the potential for rehabilitation of each defendant. As a result, this system emphasized providing sentencing judges with as much information as possible to determine the appropriate disposition. In Williams v. New York, the Supreme Court elaborated on the need to provide sentencing judges with the widest possible range of information in an indeterminate system. Unlike a trial judge, a sentencing judge "is not confined to the narrow issue of guilt." Instead, in accordance with "modern concepts individualizing punishment," judges required access to "the fullest information possible concerning the defendant's life and characteristics." These modern punishment devices, including probation and parole, "ha[d] resulted in an increase in the discretionary powers exercised in fixing punishments." As a result, the Court held that a judge could consider any information in reaching its decision with regard to sentencing. 

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73. Campbell, supra note 70, §§ 4:1-4:3. According to Professor Campbell, indeterminate sentences rested upon a rationale that rehabilitation of incarcerated convicts occurred while those individuals remained in prison. Id. § 4:1, at 70. The rationale required flexibility in sentencing so that a sentence could be reduced to the point at which rehabilitation had been achieved; the prisoner received parole at that point. Id. §§ 4:1-4:2.

74. Id.
75. Mistretta, 488 U.S. at 363.
76. 337 U.S. 241 (1949).
77. Id. at 247.
78. Id.
79. Id. (footnote omitted). The Court pointed to the historic distinction between the roles of a judge at trial and at sentencing:

[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Id. at 246 (footnote omitted).

80. Id. at 249. The Court justified the use of information not admissible at trial, stating "a strong motivating force for the changes [in sentencing practices] has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship." Id.
81. Id. at 252.
Use of Illegally Seized Evidence in Pre-Guidelines Sentencing Decisions

Despite the wide grant of discretion in Williams, circuit courts confronting the realm of permissible information used in sentencing decisions split on the proper handling of information obtained in violation of a defendant’s Fourth Amendment rights. In Verdugo v. United States, the Ninth Circuit restricted the use of illegally seized evidence in setting an indeterminate sentence.

In considering the propriety of the use of the fruits of the illegal search in sentencing, the Ninth Circuit recognized the need for a wide range of information at sentencing as expressed in Williams. The court was unimpressed, however, by the public interest in imposing an individualized sentence, the basis of the Williams decision, at the cost of tolerating the outrageous police tactics exhibited in this case.

As a result, the court in Verdugo found the need for deterrence of police behavior “all too clear.” At the time the police executed their illegal search of Verdugo’s premises, they already had in their possession sufficient evidence to convict him of one offense of drug possession. The purpose of the additional, warrantless search, therefore, was solely to uncover Verdugo’s wholesale supply of drugs. In this situation the police had a powerful incentive to

82. 402 F.2d 599 (9th Cir. 1968), cert. denied, 402 U.S. 961 (1971).
83. Id. at 613. Police arrested Verdugo after a period of observation and charged him with sale of heroin. Id. at 609. Arriving at his house to issue the arrest warrant, the police participated in a comprehensive search of the entire house, although they lacked a warrant to perform such a procedure. Id. at 609-10. Verdugo’s conviction for selling heroin was based solely on lawfully seized evidence, but Verdugo’s sentence reflected consideration of the money and drugs taken in the illegal search and seizure. Id. at 613.
84. Id. at 616.
85. Id. at 611.
86. Id. at 612.
87. Id.
88. Id.
perform the illegal search. The court concluded that because the police undertook the illegal search in an effort to gather information after already obtaining evidence adequate to lead to a conviction, application of the exclusionary rule in such situations would have a necessary and deterrent effect.

Not all courts followed the rationale set forth in Verdugo. In United States v. Schipani, the court refused to exclude from its sentencing determination information gained through illegal wiretaps. Citing a strong need for all relevant information in sentencing, the Eastern District of New York limited information considered in sentencing only on the ground of "[f]airness, accuracy, and procedural due process." Regarding the deterrence rationale, the court determined that the threat of losing the evidence at trial served as a significant deterrent to illegal police searches. Finally,

89. According to the court,

The range of possible penalty was wide—five to twenty years. The length of Verdugo's sentence would be quite different if it could be shown that Verdugo was involved in the narcotics traffic on a large scale rather than merely as the seller in a single small transaction.

If the fruits of the search could be used to enhance the sentence, the possibility that the evidence might be excluded at trial would be of little importance in view of the untainted evidence available to establish the July 28 offense. Unless the evidence were unavailable for the sentence as well as conviction, the agents had nothing to lose by risking an unlawful search: if the motion to suppress were denied, Verdugo could be convicted of an additional offense; if it were granted, the sentence on the original charge could still be enhanced.

Id. (footnote omitted).

90. Id.


92. Id. at 260. The illegal evidence stemmed from improper wiretaps on the defendant's telephone. Id. at 255. The information obtained in those wiretaps indicated that the defendant was a career criminal and resulted in the defendant receiving a sentence near the highest permissible range allowed by law. Id.

93. Id. at 255-56.

94. Id. at 256. Under this standard, the only basis for challenging the use of particular information at sentencing is the determination that the evidence was "extensively and materially false." See Townsend v. Burke, 334 U.S. 736, 741 (1948).

95. Schipani, 315 F. Supp. at 258. The court observed:

On principle, exclusion of illegally seized evidence on sentencing would seem to be generally unwarranted. In unlawfully searching and seizing property or conversations the government runs the risk at trial that its entire case against the defendant will be found to have been irrevocably tainted and that the evidence obtained against him—as part of a general criminal investigation—will be held inadmissible. . . . Absent some specific situation, no appreciable increment in
the court distinguished Verdugo and limited that case to its particular facts.\textsuperscript{96} According to the court in Schipani, the unique role of a trial judge in sentencing decisions demanded unfettered access to all information regarding the defendant in order to reach the appropriate decision.\textsuperscript{97}

After the Supreme Court's ruling in Calandra, the Ninth Circuit again inquired into the continuing validity of the Verdugo rule.\textsuperscript{98} In United States v. Vandemark,\textsuperscript{99} the court examined the need to exclude illegally seized evidence at sentencing under the Calandra framework.\textsuperscript{100} Under Calandra, the court determined that the exclusion of the illegally obtained evidence forced a significant detrimental effect upon the sentencing court,\textsuperscript{101} especially in cases re-

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\textsuperscript{96} Id. (citations omitted).

\textsuperscript{97} Id. According to the court, "The case now before us differs substantially from Verdugo. The evidence excluded at trial was gathered in a basic investigation of the defendant and a number of suspected members of an organized crime syndicate. It was offered to support all of the counts of the indictment . . . ." Id. at 259.

\textsuperscript{98} Id. at 259-60. The court described at length the "practical considerations" affecting the decision to consider illegally seized evidence. Id. at 259. First, because of the discretion that a judge has in fixing the sentence, the reasons behind the decision "will rest on the application of unarticulated principles and factors lying at the threshold of the conscious." Id. Requiring a judge to exclude all illegally seized evidence from the sentencing procedure would call for a "judge to explain the basis of his decision." Id. Second, a required exclusion of illegally seized evidence would be impossible in practical terms.

It would be almost impossible for a district judge, who has screened proffered evidence on the motion to suppress, to banish it entirely from his mind at sentencing. . . . An impractical rule of total suppression would almost invite self-deception by a judge forced to deny that he had considered a factor that was strongly influencing [him].

Id. at 259-60.

\textsuperscript{99} Prior to Calandra, the Ninth Circuit had reaffirmed Verdugo. See United States v. Weston, 448 F.2d 626, 631-32 (9th Cir. 1971).

\textsuperscript{100} 522 F.2d 1019 (9th Cir. 1975). The facts in Vandemark provide a different setting than Verdugo. In this case, the defendant was on probation for a drug conviction when police arrested him for possession of marijuana. Id. at 1020. The police search that formed the basis of this arrest violated the requirements of the Fourth Amendment and, as a result, the government brought no charges against the defendant for this offense. Id. However, the probation officer assigned to Vandemark's case referred this information to the presiding judge who revoked probation and sentenced the defendant to incarceration. Id.

\textsuperscript{101} Id. at 1021.

\textsuperscript{101} Id. The description of the detriment focused on the sentencing judge's role in the indeterminate sentencing scheme. "It deprives the district judge of information necessary to effectuate the federal policy of individualized sentencing. . . . A sentence can be properly
garding the revocation of probation. The court deemed the concomitant gain in deterrence through the exclusion of evidence to be "slight." As a result, the court concluded that "if the additional evidence was not required for conviction, both the deterrent effect of the exclusion of illegally seized evidence of the same offense at sentencing and the incentive to conduct legal searches to obtain such evidence would appear to be minimal." The Court rejected a broad interpretation of the Verdugo rule for a narrower interpretation limiting exclusion of illegally seized evidence to cases in which exclusion would maximize the incremental deterrent effect.

Despite attempts to discard the doctrine, the Verdugo rule remained viable. Even under the indeterminate system that gave sentencing discretion to the judge, courts realized that illegal searches aimed at influencing sentencing decisions needed the deterrent imparted by the exclusionary rule. The incidents that tailored to fit an individual defendant only to the extent that the judge is aware of the major facts relevant to needed correction." Id. This broad statement directly conflicts with the rationale expressed in Verdugo that exclusion of illegally seized evidence did not violate the requirements of Williams v. New York, 337 U.S. 241 (1949). See supra notes 84-85 and accompanying text.

102. Vandemark, 522 F.2d at 1021-22.
103. Id. at 1022. The officers arresting Vandemark did not know of his status as a probationer; therefore, the exclusion of information at sentencing would have little effect upon police behavior because their primary focus would be upon trial and not sentencing. Id. Furthermore, unlike Verdugo, in which the search was "blatantly illegal," id. at 1023, the improper police search in Vandemark was "not intrusive." Id.

Other courts have concurred that excluding illegally seized evidence at sentencing under the pre-Guidelines system achieves no additional deterrent effect. See, e.g., United States v. Lee, 540 F.2d 1205, 1211 (4th Cir.), cert. denied, 429 U.S. 894 (1976).
104. Vandemark, 522 F.2d at 1024 (emphasis omitted) (quoting Verdugo v. United States, 402 F.2d 599, 612 n.21 (9th Cir. 1968), cert. denied, 402 U.S. 961 (1971)).
105. Id. at 1024-25. After Vandemark, courts expressed little reluctance in finding illegally seized evidence admissible at sentencing because refusing to admit it provided no deterrent impact upon police behavior. As a result, courts could not expect exclusion of information at sentencing to deter officers proceeding upon facially valid warrants from improper action. See United States v. Larios, 640 F.2d 938, 942 (9th Cir. 1981). The ruling in Leon solidified this trend in finding that technical violations of warrant requirements were not an appropriate basis for the application of the exclusionary rule. See supra note 37 and accompanying text.
106. See United States v. Graves, 785 F.2d 870, 873-76 (10th Cir. 1986) (recognizing a narrow interpretation of the Verdugo rule but distinguishing facts from Verdugo because no improper motive for the search was evidenced).
107. See id.
lowed for the application of the Verdugo rule, however, rarely arose because the indeterminate sentencing system, with its disparate results, did not lend itself to retrospective inquiry into the basis of the sentence imposed.  

**Congressional Approval: 18 U.S.C. § 3661**

In 1970, Congress codified the courts’ tolerance of the broad inclusion of all information in sentencing decisions. This section, entitled “Use of information for sentencing,” states that “[n]o 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.” Although lawmakers originally aimed specifically at organized crime activities in enacting the legislation, the legislative history indicates that Congress intended the statute to cover all sentencing deci-
sions.\textsuperscript{112} Courts examining this statute have agreed with the broad reading of the statute’s coverage.\textsuperscript{113}

In drafting this statute, Congress codified the authority the Court gave to sentencing judges in \textit{Williams v. New York}.\textsuperscript{114} The drafters explicitly referred to \textit{Williams} as the basis for 18 U.S.C. § 3661,\textsuperscript{115} and the Supreme Court has read the statute similarly.\textsuperscript{116} Therefore, the continued wisdom of this statute depends upon the enduring relevance of \textit{Williams}.

Section 3661, along with the judicial authority discussed above, has served as the basis for broad usage of illegally seized evidence in sentencing decisions.\textsuperscript{117}

\begin{itemize}
\item 112. In the debate over the adoption of this Act, Senator Kennedy, a sponsor of the legislation, introduced an amendment to “limit the sentencing provisions of title X to organized crime offenders.” 116 Cong. Rec. 845 (1970) (statement of Sen. Kennedy). Senator Kennedy observed:

The dangerous special offenders of title X are a dramatic new departure for Federal law. Yet they are not limited to the area which the Judiciary Committee studied for so long—organized crime. They can be applied to any major Federal crimes . . . . Now perhaps this is good. Perhaps the special sentencing procedure should apply to all major Federal crimes. But certainly this is not a question which has been studied by the committee.

\textit{Id.}

In response, some Senators expressed fear that omission of certain crimes from the statute would provide a loophole for organized crime to exploit. Senator McClellan stated: “We might be able to identify some of the areas in which organized crime is active today, but what it might be doing tomorrow may be something else.” \textit{Id.} (statement of Sen. McClellan). Senator McClellan’s comments clearly indicate that the presumed impact of the bill would fall on organized crime figures: “If there is any group, any category that we ought to deal with from a broad standpoint, it is those engaged in organized crime.” \textit{Id.} at 846.

The Senate, however, defeated the Kennedy amendment by a vote of 62-11, \textit{id.} at 849, thereby extending 18 U.S.C. § 3577 to all sentencing decisions.

\textsuperscript{113. See, e.g., United States v. Garcia, 544 F.2d 681, 684 (3d Cir. 1976) (noting that although § 3661 was a part of a package of special offender statutes, the text of the statute gives no indication that Congress intended to restrict § 3661 to special offender cases).}

\textsuperscript{114. 337 U.S. 241 (1949).}


\textsuperscript{116. See Roberts v. United States, 445 U.S. 552, 567 n.7 (1980) (Marshall, J., dissenting) ("[Section 3577], however, was merely a codification of the sentencing standards set forth in Williams v. New York.").}

\textsuperscript{117. See, e.g., United States v. Graves, 785 F.2d 870 (10th Cir. 1986) (upholding the use of illegally seized evidence for sentencing purposes under § 3661 and prior precedent).}
THE FEDERAL SENTENCING GUIDELINES

Promulgation of the Guidelines

In response to the longstanding criticisms of the indeterminate sentencing system,\(^\text{118}\) Congress enacted the Sentencing Reform Act of 1984.\(^\text{119}\) The legislation represented "the first comprehensive sentencing law for the Federal system"\(^\text{120}\) and was the culmination of over a decade of careful study by Congress.\(^\text{121}\)

The adoption of the Act represented a dramatic rejection of the previous sentencing system. Congress strongly criticized the goal of indeterminate sentencing,\(^\text{122}\) the unbridled discretion of judges,\(^\text{123}\) and the disparity in sentences that similarly situated defendants received.\(^\text{124}\) To remedy these deficiencies, Congress presented four well-defined goals for the new sentencing legislation. First, the legislation should contain a comprehensive, consistent statement of the federal law of sentencing, including the purposes of the sentencing system.\(^\text{125}\) Second, it should assure fair treatment in the sentencing process.\(^\text{126}\) Third, all participants in the system should know the reasons for the sentence, and they should know that the

\(^{118}\) For enunciation of these criticisms, see, e.g., Marvin E. Frankel, Lawlessness in Sentencing, 41 U. Cin. L. Rev. 1, 29-40 (1972).


\(^{121}\) See id.

\(^{122}\) Id. at 38, reprinted in 1984 U.S.C.C.A.N. at 3221. Rehabilitation as the purpose of sentencing received little praise. "Almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." Id.

\(^{123}\) This area formed one of the central themes of the new legislation. As the Senate Report succinctly stated:

[Under indeterminate sentencing], each judge is left to apply his own notions of the purposes of sentencing. . . . These [resulting] disparities [in sentencing], whether they occur at the time of the initial sentencing stage or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence.

Id. at 38, reprinted in 1984 U.S.C.C.A.N. at 3221 (footnote omitted).

\(^{124}\) Id.

\(^{125}\) Id. at 39, reprinted in 1984 U.S.C.C.A.N. at 3222.

\(^{126}\) Id.
imposition of that sentence is certain.\textsuperscript{127} Fourth, it should assure the full range of sentencing options.\textsuperscript{128}

The Sentencing Reform Act of 1984 represented the embodiment of these goals. In the Act, Congress clearly articulated the factors that judges must consider in rendering a sentencing decision.\textsuperscript{129} These factors govern the determination of sentences for a violation of any federal criminal statute.\textsuperscript{130} Unlike under the prior sentencing system, individual judges would not weigh these factors in an ad hoc fashion. Instead, the Act provided for the creation of a set of guidelines that would reflect the appropriate sentence for a particular crime.\textsuperscript{131} The guidelines would determine the appropriate sentence unless the sentencing court found that the formulation of the guidelines did not consider adequately the existence of aggravating or mitigating circumstances.\textsuperscript{132}

The Sentencing Reform Act of 1984 specifically adopted the language of 18 U.S.C. § 3661 into the new system, continuing to allow for the consideration of a broad range of information at sentenc-

\begin{itemize}
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} Id.
  \item \textsuperscript{129} 18 U.S.C. § 3553 (1988). Those factors were:
    \begin{enumerate}
      \item the nature and circumstances of the offense and the history and characteristics of the defendant;
      \item the need for the sentence imposed—
        \begin{enumerate}
          \item to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
          \item to afford adequate deterrence to the criminal conduct;
          \item to protect the public from further crimes of the defendant; and
          \item to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
        \end{enumerate}
      \item the kind of sentences available;
      \item the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ;
      \item any pertinent policy statement issued by the Sentencing Commission . . . ;
      \item the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
      \item the need to provide restitution to any victims of the offense.
    \end{enumerate}
  \item \textsuperscript{130} 18 U.S.C. § 3651 (1988).
  \item \textsuperscript{132} 18 U.S.C. § 3553(b).
\end{itemize}
The Guidelines identify three major goals of the determinate\textsuperscript{138} scheme: honesty, uniformity and proportionality.\textsuperscript{139} The Guidelines achieve honesty in sentencing by abolishing parole and requiring the Guideline sentence to be the actual sentence that a defendant serves.\textsuperscript{140} Uniformity was not an absolute goal of the sentencing

\textsuperscript{133} Section 3661 thus became part of the Sentencing Reform Act with no discussion of the continued need for the section appearing in either the congressional debate or the text of the statute.

The task of implementing these broad policy goals of the Sentencing Reform Act fell upon the newly created United States Sentencing Commission (Commission).\textsuperscript{134} The Commission received among its main responsibilities the task of promulgating the guidelines for use by the federal courts in the determination of criminal sentences\textsuperscript{135} and issuing general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation.\textsuperscript{136}

The Federal Sentencing Guidelines represent the completion of these responsibilities. Besides laying out a comprehensive plan for computing sentences for most major federal crimes,\textsuperscript{137} the Guidelines settle several key questions regarding the goals of the new sentencing scheme and the mechanism for achieving those ends.

The Guidelines identify three major goals of the determinate\textsuperscript{138} scheme: honesty, uniformity and proportionality.\textsuperscript{139} The Guidelines achieve honesty in sentencing by abolishing parole and requiring the Guideline sentence to be the actual sentence that a defendant serves.\textsuperscript{140} Uniformity was not an absolute goal of the sentencing


\textsuperscript{134} See 28 U.S.C. § 991(a). As one of its specific responsibilities, the Commission must provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

\textsuperscript{135} Id. § 991(b)(1)(B).

\textsuperscript{136} Id. § 994(a)(1).

\textsuperscript{137} See Corrothers, supra note 5, at 41.

\textsuperscript{138} The Guidelines adopt a determinate sentencing structure in that they assign a fixed sentencing range for each offense, as compared to an indeterminate scheme, in which only general statutory limits are fixed. Compare supra notes 73-81 and accompanying text (discussing indeterminate sentencing) with Campbell, supra note 70, § 4.4 (discussing determinate sentencing).


\textsuperscript{140} See id.
scheme; instead it mandated "narrowing the wide disparity in sentences imposed for similar criminal offenses." Proportionality required "a system that imposes appropriately different sentences for criminal conduct of differing severity." The Commission realized that a conflict existed between the goals of uniformity and proportionality. Congress, though, clearly required uniformity for similar offenses. An evaluation of the Guidelines must therefore consider their ability to achieve these competing aims.

The Guidelines also consider the type of behavior relevant in determining the appropriate sentence. Two options were available to the Commission. The first, a "real offense" sentencing scheme, based the sentence upon "actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted." The other, a "charge offense" system, relied "upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted."

The Commission considered the choice between the real and charge offense systems to be "[o]ne of the most important questions for the Commission to decide." Initially, the Commission proposed a pure real offense system. The Commission rejected this idea as unworkable for practical reasons, and because the system "risked return to wide disparity in sentencing practice."

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141. Id.
142. Id.
143. Id. "There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity . . . destroys proportionality." Id.
144. See 28 U.S.C. § 994(b)(2) (1988) (requiring that the maximum sentence in a particular range not exceed the minimum sentence of a range by more than the greater of 25% or six months).
146. See id. ch.1, pt. A4(a).
147. Id.
148. Id.
149. Id.
150. Id. In fact, the pre-Guidelines system "was, in a sense, this type of system." Id.
Due to these problems, when the Guidelines reached Congress, they contained a charge offense system with specific real offense exceptions. In adopting the basic charge offense scheme, the Commission readily acknowledged the drawbacks of that system as well.

A second important consideration by the Commission involved the grounds upon which a judge could justify a departure from the suggested guideline range. Congress expressed its intent by stating that the Guidelines generally govern criminal behavior unless aggravating or mitigating circumstances not adequately taken into consideration by the Commission are present. According to the Commission, “each guideline . . . carv[es] out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes.” In the Commission’s opinion, the use of this departure procedure will be infrequent and constitute the unusual case.

Application of the Guideline Requirements

The Guidelines provide a detailed process for computation of the sentence in a particular case. Examining the procedure for determining the sentence in a typical case is important in order to understand the impact of illegally seized evidence under the Guidelines.

The Guidelines provide a multistep process for computing a sentence. First, the court must determine the applicable offense guideline. The Guidelines require using the offense of the con-

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151. *Id.* Among these exceptions are the role the defendant played in the offense, the presence of a gun, and the amount of money taken by the defendant. *Id.*

152. *Id.* “One of the most important [drawbacks] is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment.” *Id.* One limitation on this power stemmed from the nature of the judicial process. “Of course, the defendant’s actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor’s ability to increase a defendant’s sentence.” *Id.*


154. U.S.S.G. ch. 1, pt. A4(b). The Commission further defines an atypical case as one “to which a particular guideline linguistically applies but where conduct significantly differs from the norm.” *Id.*

155. *Id.*

156. *See id.* § 1B1.1.

157. *Id.* § 1B1.1(a).
viction to determine the appropriate offense guideline. Next, the Guidelines require that the judge determine the particular guideline range, also referred to as the base offense level, using the relevant conduct of the defendant. Generally, application of the relevant conduct standard does not require the conviction of the defendant on a charge before the use of that information in calculating the appropriate sentencing range. However, the scope of information guiding the determination of the appropriate sentencing range is more narrow than that influencing the selection of a particular spot within that range. As a result, although the

158. *Id.* § 1B1.2(a). This section defines “offense” as “the offense conduct charged in the count of the indictment or information of which the defendant was convicted.” *Id.* However, if the defendant accepts a plea bargain or pleads nolo contendere, different rules may apply. See *id.* § 1B1.2(a)-(b).

To aid in the determination of the appropriate offense guideline, the Guidelines provide a table that identifies offenses in the United States Code with their appropriate guideline section. U.S.S.G. app. A.

159. *Id.* § 1B1.2(b).

160. The section of the Guidelines “Relevant Conduct (Factors that Determine the Guideline Range),” reads in part:

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

1. all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

2. solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction; . . .

*Id.* § 1B1.3.

When the Guidelines specify only one base offense level and require no specific offense adjustments, the court will determine the defendant's sentencing range by the base offense level for that offense, and will consider no other conduct. See Wilkins & Steer, *supra* note 5, at 503-21.

161. U.S.S.G. § 1B1.3 cmt. 5.

162. See *id.* § 1B1.3 cmt. (backg'd.). The commentary distinguishes between this section and § 1B1.4. “This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined.” *Id.* However, the background commentary clearly indicates that “[e]n conduct that is not formally charged or is not an element of the offense of
Guidelines initially focus on the offense of conviction for establishing the range of the defendant’s sentence, in cases in which the relevant conduct of the defendant affects the calculation of the base offense level, the determination of the defendant’s relevant conduct plays a key role in the sentence received.

After the initial determination of the base offense level, the court adjusts that level using any specific offense characteristics applicable to that offense. After the specific offense adjustments, other adjustments to the base offense level may be appropriate based upon the victim’s characteristics, the role of the defendant in the offense, any obstruction of justice, and the defendant's acceptance of responsibility. The final step in the computation of the base offense level requires repeating these steps for multiple counts and aggregating the total value. Next, the Guidelines require the determination of the defendant’s criminal history. The court must adjust the criminal history score as required for career offenders and defendants making their livelihood in criminal enterprises.

The key variable in the determination of a sentence under the Guidelines is, in most cases, the calculation of the base offense level. For most crimes, the statutory range within which a sentence must fall is wide, with few restrictions. The sentence range that a defendant will receive is determined by the intersection of conviction may enter into the determination of the applicable guideline sentencing range.”
his criminal history and base offense level on the sentencing table.\textsuperscript{173} The criminal history calculations involve little discretionary judgment.\textsuperscript{174} As a result, alterations in the base offense level dramatically affect the severity of a defendant's penalty under the Guidelines.\textsuperscript{175}

After determining both the offense level and criminal history level, the court locates the sentencing range on the sentencing table.\textsuperscript{176} The range identified on the sentencing table represents a span of months within which the judge properly may place the defendant's sentence.\textsuperscript{177}

The following examples illustrate the application of the Federal Sentencing Guidelines scheme. Defendant A is arrested and convicted for sexual abuse of a minor, in violation of 18 U.S.C. § 2243(a).\textsuperscript{178} Under section 2A3.2 of the Guidelines, a violation of
that statute carries a base offense level of fifteen.\textsuperscript{179} Assuming that Defendant A is a first-time offender and no other adjustments are appropriate,\textsuperscript{180} the appropriate sentence range is eighteen to twenty-four months in prison.\textsuperscript{181} A judge is free to select a point within that range at which to place the ultimate sentence.\textsuperscript{182} 

A more complicated application of the Guidelines involves drug offenses. Defendant B is arrested for the possession of drugs. At the time of the arrest, the police legally seize several plastic bags of powdered cocaine from Defendant B. During this lawful search, the police discover an unregistered firearm in Defendant B’s possession. The police determine that the plastic bags contain twenty-five grams of powdered cocaine. The government convicts Defendant B of violating 21 U.S.C. § 841(a).\textsuperscript{183} Defendant B has no prior criminal record.

The Guidelines provide a detailed scheme for calculating sentences involving drug offenses.\textsuperscript{184} To compute Defendant B’s base offense level, the Guidelines look to the amount of drugs the offense involved.\textsuperscript{185} If Defendant B’s relevant conduct involved no other drugs,\textsuperscript{186} the base offense for this crime is fourteen.\textsuperscript{187} This

\begin{quote}
Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who -
\begin{enumerate}
\item has attained the age of 12 years but has not attained the age of 16 years; and
\item is at least four years younger than the person so engaging;
\end{enumerate}

shall be fined under this title, imprisoned not more than five years, or both.

\end{quote}

\textsuperscript{179} See U.S.S.G. § 2A3.2(a).
\textsuperscript{180} See supra notes 160-68 and accompanying text. This example also assumes no mandatory minimum sentence applies. See supra note 172 and accompanying text.
\textsuperscript{182} See id. § 1B1.4.
\textsuperscript{183} That section states in part that “[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—\textsuperscript{(1)} to manufacture, distribute, or dispense . . . a controlled substance.” 21 U.S.C. § 841(a) (1988).
\textsuperscript{184} See U.S.S.G. § 2D1.1.
\textsuperscript{185} See id. § 2D1.1(c).
\textsuperscript{186} See id. § 1B1.3; see also supra note 160 and accompanying text. The defendant’s involvement with other drugs would be relevant conduct under the Guidelines under two theories. First, it is relevant if the drugs were involved in the “commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense.” U.S.S.G. § 1B1.3.
base offense level will increase to sixteen as a result of Defendant B's possession of a firearm, because the Guidelines designate a specific offense adjustment for this violation. Assuming no other adjustments are applicable, Defendant B's sentence will be between twenty-one and twenty-seven months in jail.

The typical scenario of a drug conviction, in which both the amount of contraband involved and the defendant's related conduct directly impact the sentence, illuminates the potential implications of allowing the consideration of illegally seized evidence in determining sentencing under the Guidelines.

Cases Involving the Use of Illegally Seized Evidence Under the Guidelines

United States v. Torres

In early 1991, the Third Circuit examined the use of illegally seized evidence under the Guidelines in United States v. Torres. The Guidelines give an example to clarify the application of the relevant conduct section involving the possession of drugs:

Defendants H and I engaged in an ongoing marijuana importation conspiracy in which Defendant J was hired only to off-load a single shipment. Defendants H, I and J are included in a single count charging conspiracy to import marijuana. For the purposes of determining the [base] offense level under this guideline, Defendant J is accountable for the entire single shipment of marijuana he conspired to help import and any acts or omissions in furtherance of the importation that were reasonably foreseeable. He is not accountable for prior or subsequent shipments of marijuana imported by Defendants H or I if those acts were beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he agreed to jointly undertake...

Id. § 1B1.3 cmt. 1e.

Conduct is also relevant under § 1B1.3 if it involves multiple offenses under § 3D1.2(d) and entails acts or omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. See id. § 1B1.3(a)(2). This section enjoys broad application in that the multiple offense involved in this section need not be for a conviction for a similar offense. See id. § 1B1.3 cmt. 2; see also United States v. Sleet, 893 F.2d 947 (8th Cir. 1990); United States v. Ykema, 887 F.2d 697 (6th Cir. 1989); United States v. Smith, 887 F.2d 104 (6th Cir. 1989).

188. Id. § 2D1.1(b)(1).
189. Other adjustments might include, for example, an increase to Defendant B's base offense level if he had been selling drugs near a "protected location," such as a school. See, e.g., id. § 2D1.2.
Based on an informer's tip, Drug Enforcement Agency officers performed a warrantless search of an apartment in Cliffside, New Jersey, uncovering 198 grams of cocaine. While they were performing that search, an automobile arrived in which the defendant was a passenger; an illegal search of the car revealed an additional kilogram of cocaine.

On pretrial motion, the court granted Torres' request to suppress the kilogram of cocaine found in the car. The defendant then entered into a plea bargain, with a stipulation that "the amount of cocaine involved in the offense for purposes of calculating the applicable sentencing guideline range is 100 to 200 grams." At sentencing, however, the district judge accepted the recommendation of the probation officer who had prepared the presentence report to base the sentence upon both the stipulated amount and the kilogram of illegally seized cocaine.

In upholding the sentence, the Third Circuit commented that evidence taken in violation of the Fourth Amendment often retained a high degree of reliability. The court concluded, therefore, that the primary basis for exclusion of the evidence must be its deterrent effect. In the context of sentencing decisions, the court found the incremental deterrence meaningless. The court balanced the limited deterrent of exclusion against the traditional liberality granted a sentencing court in receiving evidence to reach its decision. On appeal, the court gave no consideration to the

192. Id. at 322.
193. Id.
194. Id.
195. Id.
196. Id. The circuit court does not reveal how the judge calculated the sentence. The decision, though, clearly implies that the trial court included the seized evidence under the relevant conduct provision of the Guidelines. See id. at 324; see also supra note 160 and accompanying text.
197. Id. at 323.
198. Id.
199. Id.
200. Id. at 324-25. The court referred to the authority of both Williams v. New York, 337 U.S. 241 (1949), and 18 U.S.C. § 3661 (1988) to support its position. Torres, 926 F.2d at 324. According to the court, the only limitations on a court's receipt of evidence are that the information be reliable and that the court not consider impermissible factors such as race or religion. Id.
scenario raised in Verdugo. The court allowed the defendant to withdraw his plea, however, due to the unexpected result of the bargain.

United States v. Lynch

The Eleventh Circuit confronted similar issues in United States v. Lynch. In the course of a six-week undercover narcotics investigation, the Tampa Police Department gathered information indicating the defendant’s participation in a conspiracy to distribute cocaine. When a proposed undercover drug purchase fell through, the police arrested the individuals involved in the conspiracy. The police arrested Lynch while making a warrantless entry into his home, seizing two handguns upon entrance.

At trial, Lynch was convicted of conspiracy to possess with intent to distribute more than 500 grams of cocaine and possession with intent to distribute 500 or more grams of cocaine. In computing Lynch’s sentence under the Guidelines, the judge included a specific offense characteristic relying upon the illegally seized handguns.

In deciding whether to extend the exclusionary rule to sentencing proceedings, the court of appeals turned to Calandra for authority. The court concluded that the extension of the exclusionary rule would disrupt the historic role of the court in sen-

201. Torres, 926 F.2d at 325; see supra notes 82-90 and accompanying text.
202. Torres, 926 F.2d at 325-27.
204. Id. at 1228-29. Prior to the illegal search, the undercover officer knew that the defendant had allowed his co-conspirators to use the defendant's house to plan a drug sale, that he used drugs at this location, that he suggested the undercover agent wait at the defendant’s house for the arrival of the drugs to speed up the transaction, and that he had drug paraphernalia and firearm ammunition in the house. Id. at 1228.
205. Id. at 1229.
206. Id. The court concluded that this entry violated Lynch's Fourth Amendment rights because no exigent circumstances existed justifying the warrantless entry. Id. at 1232-33. In reaching this decision, the court overruled the finding of the trial court, which admitted the weapons into evidence. Id. at 1229. Because Lynch was acquitted of the firearms charge, however, the error proved harmless. Id. at 1233-34.
207. Id. at 1229.
208. Id. The increase stemmed from the application of U.S.S.G. § 2D1.1(b)(1). Lynch, 934 F.2d at 1229 n.3.
209. Id. at 1234.
Because "it is unrealistic to assume that the threat that a future sentence might be less severe would significantly deter such lawlessness," the increased deterrent effect of exclusion at sentencing was insignificant. As a result, the court refused to exclude the illegally seized evidence from sentencing.

United States v. McCrory

In United States v. McCrory, the Court of Appeals for the District of Columbia encountered the starkest disparity in sentencing alternatives resulting from the consideration of illegally seized evidence at sentencing. McCrory offered to sell several plastic bags of cocaine to undercover police officers. The officers purchased a bag of cocaine from the defendant and after determining the purity of the cocaine, radioed an arrest team to apprehend him. The arrest team approached the defendant’s reported location and, without a warrant, forcibly entered the apartment and detained and searched McCrory. The search uncovered a significant amount of crack cocaine at the apartment. Because the search was illegal, the government agreed not to introduce the evidence in the prosecution unless McCrory testified.

At trial, McCrory was found guilty on one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a). The presentence investigation report recommended a base offense level of eighteen. The sentencing judge, however, adjusted the base offense level after considering the illegally seized

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211. Id. at 1236-37.
212. Id.
214. Id. at 64-65.
215. Id. at 65.
216. Id.
217. Id. According to the court, the police uncovered one and one-half kilograms of crack cocaine at the location. Id. at 66.
218. Id. at 65. It is a well-recognized exception to the exclusionary rule that the prosecution may use evidence seized illegally to impeach a defendant who takes the stand and offers perjurious testimony. See Walder v. United States, 347 U.S. 62 (1954).
219. McCrory, 930 F.2d at 64.
220. Id. at 65.
cocaine, raising it to thirty-six.\textsuperscript{221} As a result of the sentencing judge’s adjustments, McCrory’s sentence increased from a range of 27-33 months to 235-293 months in jail.\textsuperscript{222}

In analyzing whether to extend the exclusionary rule to sentencing determinations, the appellate court emphasized the wide discretion vested in sentencing judges to conduct an inquiry broad enough in scope to accomplish the purposes of sentencing.\textsuperscript{223} Although this court acknowledged for the first time that the adoption of the Federal Sentencing Guidelines may have altered the need for information expressed in pre-Guidelines cases like Williams v. New York,\textsuperscript{224} it concluded that “the rationale remains applicable.”\textsuperscript{225} In addition, the court found that little deterrence would result from excluding evidence at sentencing.\textsuperscript{226} According to the D.C. Circuit, the only situation that might possibly require exclusion is one in which the police undertake an illegal search specifically to introduce the evidence at sentencing.\textsuperscript{227}

EXCLUDING EVIDENCE FROM BASE OFFENSE LEVEL DETERMINATION

The use of illegally seized evidence may dramatically alter the sentence that a defendant receives under the Federal Sentencing Guidelines. By excluding illegally seized evidence from consideration in determining the base offense level, courts would achieve the purposes that prompted the Sentencing Reform Act by encourag-

\textsuperscript{221} Id. at 66. In addition to the illegally seized drugs, the government introduced evidence indicating the depth of the defendant’s involvement in a major drug distribution scheme, including two statements by witnesses to his repeated criminal activity. Id. at 65-66. The court stated that “[t]his evidence supported a conclusion that appellant’s ‘relevant conduct’ included his possession with intent to distribute as much as ‘a kilo and a half’ seized from Apartment 204. The district court, therefore, set a base offense level of thirty-six in accordance with the requirements of §§ 2D1.1(a)(3) & (c)(3) . . . .” Id. at 66. The Guidelines authorized an additional increase based upon the presence of a weapon that was also seized illegally from the apartment. Id.

\textsuperscript{222} Id. If McCrory had been convicted of all counts for which illegally seized evidence was taken, his sentencing range would have been 248-295 months in jail. Id.

\textsuperscript{223} Id. at 68.

\textsuperscript{224} 337 U.S. 241 (1949).

\textsuperscript{225} McCrory, 930 F.2d at 68. To bolster this position, the court pointed to the adoption of 18 U.S.C. § 3661 (1988) to which the Federal Sentencing Guidelines refer. McCrory, 930 F.2d at 68.

\textsuperscript{226} McCrory, 930 F.2d at 68-69.

\textsuperscript{227} Id.
ing uniformity and honesty in sentencing decisions. Furthermore, by excluding such evidence from the base offense calculation, courts would deter law enforcement officials from performing illegal searches for the purpose of increasing sentences.

This proposal recognizes that courts rightfully can use illegally seized evidence in other distinct ways under the Federal Sentencing Guidelines without affecting the rationale behind the exclusionary rule. Illegally seized evidence could be used to set a point within a sentencing range once the base offense level has been determined. The evidence also may serve to trigger a departure when the information suggests that the sentence awarded would be inadequate.\(^{228}\)

**Application of the Exclusionary Rule Analysis**

Despite recent restrictions upon the reach of the exclusionary rule,\(^{229}\) courts still apply the remedy in cases in which the need for deterrence calls for exclusion of illegally seized evidence.\(^{230}\) To decide whether sentencing proceedings require such a remedy, courts have applied the test articulated in *United States v. Calandra*.\(^{231}\) Application of the *Calandra* balancing test dictates that the exclusionary rule should govern sentencing proceedings under the Federal Sentencing Guidelines.\(^{232}\)

Under the test that the Supreme Court articulated in *Calandra*, the extension of the exclusionary rule would be justified when the “potential benefits” of excluding illegally seized evidence outweigh the “potential injury to the historic role and functions”\(^{233}\) of the sentencing court. The adoption of the Federal Sentencing Guidelines dramatically altered the calculation of both the harms and

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228. See Bader & Douglas, *supra* note 10, at 47-56.
231. 414 U.S. 338 (1974); see *supra* notes 47-69 and accompanying text.
232. As noted, the Supreme Court has already ruled once on the use of illegally seized evidence at sentencing proceedings in Williams v. New York, 337 U.S. 241 (1949). See *supra* notes 76-81 and accompanying text. However, the court decided this case before both the implementation of the Federal Sentencing Guidelines and the decision in *Calandra*. As discussed *infra*, the result since these changes likely would differ.
benefits of extending the exclusionary rule to sentencing proceedings.

The historic role of sentencing courts emphasized that the ultimate decision regarding the sentence rested with the sentencing judge. Sentencing decisions were subject to few restrictions other than a broad range of permissible sentences enacted by the legislature. In reaching the sentencing decision, a judge freely considered all information regardless of its source. Under this indeterminate sentencing system, the exclusion of any source of information severely restricted the historical role of a sentencing judge to mete out a sentence freely and alter that sentence as the defendant's rehabilitation required.

The Federal Sentencing Guidelines explicitly rejected this vision of sentencing. The Guidelines reject discretionary sentencing whereby each judge must weigh cases individually. The refusal to adopt a pure real offense system under the Guidelines is evidence of this principle. Instead, judges operating under the Guidelines choose the appropriate sentence by referring to a range provided by the Guidelines, basing them upon the average sentence received by offenders of the same crime with similar characteristics.

Under the Guidelines, judges retain some discretion to set the appropriate sentence. This discretion manifests itself in two ways. First, under certain circumstances, a judge may depart from the

234. See supra notes 75-81 and accompanying text.
235. See supra notes 73-74 and accompanying text.
236. But see United States v. Tucker, 404 U.S. 443, 447 (1972) (stating that a sentence based upon "misinformation of constitutional magnitude" cannot form the basis of a sentencing decision); United States v. Baylin, 696 F.2d 1030, 1039 (3d Cir. 1982) (stating that information used in sentencing must be reliable).
237. See supra notes 122-24 and accompanying text.
238. See supra notes 148-52 and accompanying text.
239. See U.S.S.G. ch. 1, pt. A4(g) (1991). In addition, some categories reflected a departure from average sentences where Congress had determined that higher sentences reflected legislative goals. Id. For example, the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (1989)), imposed both increased and mandatory sentences for certain drug related offenses. U.S.S.G. ch. 1, pt. A4(g). In all cases, however, judges no longer determine the appropriate sentencing range for an offense; rather, Congress makes that selection for each individual offense.
sentence that the Guidelines impose. Second, a judge selects the appropriate sentence within the sentencing range allowable under the Guidelines. In both of these limited instances, a sentencing judge may find a broad range of information useful as an aid in properly exercising discretion.

The imposition of the Guidelines has reduced the need for the broad access to all information that characterized the pre-Guidelines sentencing practices. Federal judges need no longer assess a defendant's capacity for rehabilitation or gauge the defendant's impact on society from all the circumstances. The refusal to allow sentencing judges to consider illegally seized evidence in setting the base offense level therefore would not undermine the historic role of sentencing judges in the same way it limited the grand jury's investigative powers in Calandra.

The extension of the exclusionary rule to sentencing proceedings under the Guidelines would achieve a significant deterrent benefit for the judicial system. Under the pre-Guidelines sentencing scheme, the use of illegally seized evidence provided the judge with additional information to assess possibilities for rehabilitation and determine a sentence. However, because of the unpredictability of the pre-Guidelines sentencing scheme, the use of illegally seized evidence did not necessarily result in a higher sentence. As a result, no predictable correlation existed between the sentence im-

240. Under the Guidelines, a court may impose a sentence outside the range which the applicable guideline established, if there exists “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.” U.S.S.G. § 5K2.0 p.s. (quoting 18 U.S.C. § 3553(b) (1988)). See generally United States v. Lira-Barraza, 941 F.2d 745, 747-51 (9th Cir. 1991) (discussing limits that the Sentencing Reform Act and the Guidelines impose on judicial departures).

241. See U.S.S.G. § 1B1.4.

242. Judge Silberman recognized this fact as the basis of the conclusion that the indeterminate scheme provided little incentive for illegal searches. United States v. McCrory, 930 F.2d 63, 71 (D.C. Cir. 1991) (Silberman, J. concurring), cert. denied, 112 S. Ct. 885 (1992). Before promulgation of the sentencing guidelines, this balance tipped toward admissibility at sentencing of illegally-seized evidence. . . . There was thought to be little deterrent justification for excluding the evidence at the sentencing phase. In a sense the very arbitrariness in the sentencing process that led to the promulgation of the guidelines meant that law enforcement officials would not be likely to seize evidence illegally and then refrain from charging crimes based upon it and instead introduce that evidence only at sentencing.

Id.
posed and the amount of illegal contraband found in the accused's possession.

The Guidelines operate on a completely different premise. Rejecting rehabilitation as the goal of sentencing, the Guidelines aim to implement sentences reflecting punishment for the behavior at the heart of the offense.\textsuperscript{243} As the base offense levels that the Commission designed increase, they reflect higher sentences.\textsuperscript{244} As a result, the presentation of illegally seized evidence has a predictable impact under the Guidelines. The Guideline system creates a direct correlation between sentence length and the quantity of contraband seized by the police. As a result, a new incentive to conduct illegal searches exists.\textsuperscript{245}

Police officers will know that the production of more evidence after obtaining enough evidence for a conviction will lead to a greater sentence without risking the initial arrest. Judge Silberman has argued powerfully that the Guidelines create a new incentive to conduct illegal searches for purposes of sentencing:

In the post-guidelines world, however, the government's motivation might well be somewhat different, especially when . . . the prosecution has more than enough evidence to convict the defendant on a lesser charge before they conduct the illegal search. The prosecution will know, based upon the indictment it urges and the "extra" evidence it has, almost exactly what the sentence will be in the event of conviction because of the guidelines' mandate that the sentence be increased by a specific number of offense levels in light of other "relevant conduct" proven by a preponderance of the evidence. This means the police and prosecution now have something of an incentive to seize evidence illegally and then introduce that evidence only at the sentencing phase (unless the exclusionary rule applies at sentencing). If the police and prosecution know beforehand that they can get a con-

\textsuperscript{243} See supra notes 139-42 and accompanying text.
\textsuperscript{244} The most striking example of this phenomenon is in the sentencing for drug offenses. See U.S.S.G. § 2D1.1(c). The base offense level for trafficking drugs increases depending upon the quantity of drugs involved. For instance, for a conviction under 21 U.S.C. § 841(a) (1988) for trafficking marijuana, the range of base offense levels starts at a low of six for less than 250 grams of marijuana and reaches a high of 42 for 300,000 kilograms of marijuana. The resulting sentences range from zero to six months in jail to 360 months to life in jail, respectively (assuming no prior record).
\textsuperscript{245} See McCrory, 930 F.2d at 71 (Silberman, J., concurring).
viction on a relatively minor offense which has a broad statutory sentencing range and that they can guarantee a sentence near the maximum by seizing other evidence illegally... there is nothing to deter them from seizing the evidence immediately without obtaining a warrant, especially when a conviction on a "greater" crime would lead to a similar sentence.\textsuperscript{246}

In such a situation, the extension of the exclusionary rule has a deterrent effect upon police behavior by removing any gain that could possibly flow from the illegal search.\textsuperscript{247} Excluding illegally seized evidence from the calculation of the base offense level, therefore, achieves a significant benefit.\textsuperscript{248}

The incentive that the Guidelines sentencing scheme created highlights the concerns underlying the decision in \textit{Verdugo v. United States}.\textsuperscript{249} \textit{Verdugo} focused on the need to deter additional searches once the police establish the basis for a legal arrest.\textsuperscript{250} Over time, this concern has received less attention because courts have concluded that police, at the time they conducted searches, had no idea what impact additional information would have at sentencing.\textsuperscript{251}

By creating certainty in the sentencing process, the Guidelines have reintroduced a lawful and regular purpose for illegally seized evidence. Although \textit{Verdugo} has been limited over time, it remains valuable in confronting law enforcers' deliberate engagement in illegal searches for the purpose of sentence enhancement.\textsuperscript{252} Use of illegally seized evidence at sentencing clearly encourages searches geared toward sentence enhancement. Therefore, extending the ex-

\textsuperscript{246} Id. at 71.

\textsuperscript{247} Courts have recognized that the elimination of an incentive to engage in illegal searches constitutes a proper mechanism to achieve deterrence. See \textit{supra} notes 30-32 and accompanying text.

\textsuperscript{248} The facts of \textit{McCrory} verify this hypothesis. In that case, the inclusion of illegally seized evidence at sentencing in the calculation of the base offense level resulted in the defendant's receiving the exact sentence he would have received if he had been convicted of all the offenses not charged. See \textit{supra} notes 213-22 and accompanying text.

\textsuperscript{249} 402 F.2d 599 (9th Cir. 1968), \textit{cert. denied}, 397 U.S. 925 (1970); see \textit{supra} notes 82-90 and accompanying text. The Seventh Circuit recently indicated it might be sympathetic to the exclusionary rule in Guidelines sentencing under certain situations. See \textit{United States v. Jewel}, 947 F.2d 224, 232 n.11 (7th Cir. 1991).

\textsuperscript{250} See \textit{supra} notes 86-90 and accompanying text.

\textsuperscript{251} See, \textit{e.g.}, \textit{United States v. Vandemark}, 522 F.2d 1019, 1024-25 (9th Cir. 1975).

\textsuperscript{252} See \textit{supra} note 106 and accompanying text.
clusionary rule to sentencing proceedings under the Guidelines would be consistent with the pre-Guidelines treatment of evidence at sentencing. The extension of the exclusionary rule would result from the Guidelines’ alteration of the incentive structure of illegal police activity, not from any reworking of the exclusionary rule itself.

Similar benefit would not result from excluding illegally seized evidence from the sentencing decisions in which judges maintain discretion under the Guidelines. The predictability arising when judges use the illegally seized evidence to calculate the base offense level does not exist when they use evidence to determine the possibility of a departure. First, few instances warrant a departure.\(^2\) Furthermore, police cannot know in advance the instances that will lead to a departure because courts determine departure only on a case-by-case basis.\(^3\) Police officers cannot reasonably predict that evidence from illegal searches will result in a departure. As a result, this extension of the exclusionary rule will not have a deterrent effect on police action.\(^4\)

Likewise, use of illegally seized evidence to select the exact sentence within the appropriate range under the Guidelines presents less of a threat to the integrity of the sentencing system than use of the evidence to set the base offense level. The disparity between the highest and lowest sentences within a particular range can only be six months or twenty-five percent, whichever is less.\(^5\) As a re-

\(^{253}\) See U.S.S.G. ch. 1, pt. A4(b) (1991). For instance, the Commission believed that departures would be appropriate when a case combined unusual factors not generally associated with a particular offense. The Guidelines state that

\[\text{[o]f course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the court's departure powers were designed to cover—unusual cases outside the range of the more typical offenses for which the guidelines were designed.}\]

\(^{254}\) See U.S.S.G. § 5K2.0 p.s. (“Circumstances that may warrant departure from the guidelines . . . cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts.”).


\(^{256}\) See supra note 144 and accompanying text.
sult, police have little additional incentive to conduct illegal searches because the amount the sentence can increase is capped. Furthermore, a judge who fears that a search may be conducted illegally for the purpose of raising the sentence within the range maintains discretion to place the sentence at the low end of a particular range.\textsuperscript{257}

The application of the exclusionary rule to the determination of the base offense level avoids creating a situation in which illegally seized evidence would be valuable on a large number of occasions. If illegally seized evidence is admissible in the calculation of the base offense level, the evidence would be useful in almost every case in which the government has won a conviction despite the suppression of some evidence. In \textit{James v. Illinois},\textsuperscript{258} the Supreme Court warned that when the number of occasions allowing for the use of illegally seized evidence increases, the value of illegally seized evidence to the prosecution will rise.\textsuperscript{259} Extending the exclusionary rule to the calculation of the base offense level would significantly decrease the number of cases in which illegally seized evidence could be used, thereby decreasing the value of illegally obtained evidence.

\textit{Application of the Federal Sentencing Guidelines}

The consideration of illegally seized evidence under the Federal Sentencing Guidelines undermines the goals Congress established for the new sentencing scheme. Congress sought to promote honesty, uniformity, and proportionality in sentencing through the adoption of a determinate sentencing system.\textsuperscript{260} The consideration of illegally seized evidence in the determination of the base offense level frustrates the goals Congress established for the sentencing system under the new Guidelines.

The Guidelines attempt to reduce the level of dishonesty evident under the pre-Guidelines sentencing structure. "Honesty is easy to

\textsuperscript{257} \textit{See}, e.g., United States v. McCrory, 930 F.2d 63, 66 (D.C. Cir. 1991) (stating that the sentencing court has discretion to place a sentence at the low end of the range), \textit{cert. denied}, 112 S. Ct. 885 (1992).
\textsuperscript{258} 493 U.S. 307 (1990).
\textsuperscript{259} \textit{Id.} at 318.
achieve: the abolition of parole makes the sentence imposed by the
court the sentence the offender will serve . . . .”261 The requirement
that each sentence under the Guidelines include a full explanation
of its basis also advances honesty in sentencing.262
A new form of dishonesty arguably has emerged under the
Guidelines. The heart of each sentence under the Guidelines is the
base offense level.263 Although the Guidelines consider a broad ar-
ray of information as relevant conduct for determining the base
offense level in certain situations, the focus remains the conviction
offense.264 A sentence based upon the consideration of illegally
seized evidence fails to reflect only the offense for which a defend-
ant has been convicted.265 Although the Guidelines may achieve
the goal of eliminating dishonesty stemming from early release, a
whole new type of deception has emerged. The fundamental prin-
ciple upon which the legitimacy of sentences rests—that judges im-
pose sentences after convictions for certain offenses—has been
stood on its head by a system that allows illegally seized evidence
to form the basis of a defendant’s sentence.266 Such a system in
effect punishes behavior for which the defendant has never been
convicted, rather than increasing the sentence for a defendant as a
result of his prior bad actions.267
The second goal Congress sought in promulgating the Guidelines
was uniformity. Congress’ aim was providing similar sentences for

261. Id.
263. See supra note 175 and accompanying text.
F.2d 465 (6th Cir. 1990).
265. See supra notes 175, 219-22 and accompanying text.
266. See supra note 266, at 150.
267. Miller & Weich, supra note 266, at 150.
defendants convicted of similar crimes.\textsuperscript{268} Basing the range of sentences for a particular crime on the pre-Guidelines average for that offense achieved this purpose in part.\textsuperscript{269} By considering illegally seized evidence in the sentencing decision, courts introduce into the sentencing process a "wild card" that destroys the uniformity which the Guideline scheme attempted to create.

\textit{United States v. McCrory}\textsuperscript{270} illustrates this point. In \textit{McCrory}, the defendant was convicted of possession of cocaine with intent to distribute.\textsuperscript{271} The court based McCrory's conviction upon his sale of 792 milligrams of cocaine base to an undercover officer.\textsuperscript{272} The Guidelines recommend a base offense level of sixteen for such an offense.\textsuperscript{273} In sentencing the defendant, however, the court considered, as part of the defendant's relevant conduct, the illegal discovery of 1.5 kilograms of cocaine base.\textsuperscript{274} As a result, the defendant's sentence increased almost ten times.\textsuperscript{275}

Although \textit{McCrory} may be unusual in its severity,\textsuperscript{276} its introduction of disparity into the sentencing process is not unusual. The inevitable result of allowing illegally seized evidence into the calculation of the base offense level is to destroy consistency in the sentencing of defendants convicted of identical crimes, who differ only in that one has been the victim of an illegal search and seizure. Instead of the conviction offense, the key determinant in sentence length for many crimes becomes the amount of illegally seized contraband associated with the defendant. Greater amounts of illegally discovered contraband bring more severe sentences.

\textsuperscript{268} Congress attempted to remove disparity in sentencing decisions. See 18 U.S.C. § 3553(a)(6) (1988) (stating that one factor to consider in sentencing is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").


\textsuperscript{271} See supra notes 213-22 and accompanying text.

\textsuperscript{272} McCrory, 930 F.2d at 65.

\textsuperscript{273} See U.S.S.G. § 2D1.1(c)(14). Assuming no other adjustments to the sentence, that base offense level translates into a sentence ranging from 21 to 27 months in jail.

\textsuperscript{274} McCrory, 930 F.2d at 66.

\textsuperscript{275} Based upon this information, the court determined that it should sentence the defendant to between 235-293 months in jail, reflecting a base offense level of 38. \textit{Id.}

\textsuperscript{276} In \textit{McCrory}, the sentence increased from a relatively minor offense (the defendant whose sentence is 16 months or less may be awarded probation) to one within the sixth highest sentencing range available under the Guidelines.
This results in differing sentences for identical convictions, which is precisely the inconsistency that the Guidelines sought to curtail. Under the pre-Guidelines system, the chief variable was the sentencing judge's consideration of the defendant's chance at rehabilitation. Now, the chief variable is the sentencing judge's consideration of illegally seized evidence. Although the basis for the exercise of discretion has changed, sentence disparity among similarly situated defendants still remains.

Continued Application of 18 U.S.C. § 3661

Analysis of the rationales for the exclusionary rule and the Federal Sentencing Guidelines points toward the necessity of excluding illegally seized evidence from the determination of the base offense level. Courts ruling on this matter, nonetheless, have consistently upheld the consideration of illegally seized evidence. Part of the explanation for judicial uniformity rests upon the conclusion that 18 U.S.C. § 3661 represents a congressional mandate to consider this information. The adoption of the Federal Sentencing Guidelines, however, casts doubt on the continued viability of the statute.

Enacted in 1970, 18 U.S.C. § 3661 codified the sentencing practices existing at that time. The legislative history of the enactment specifically referred to Williams v. New York as a basis for understanding and interpreting this statute.

The Federal Sentencing Guidelines, however, represent a rejection of the Williams indeterminate approach to sentencing. The Guidelines specifically adopt a charge offense system of sentencing that restricts the information that may be considered at sentencing. Furthermore, the Guidelines specifically depart from rehabilitation as the goal of sentencing. As a result, the basis articul-
lated in *Williams* for considering a broad array of information has eroded.

The Guidelines expressly prohibit courts from using the broad grant of authority in 18 U.S.C. § 3661 to consider unlimited information in setting the base offense level. In failing to follow this instruction, courts have misinterpreted the incorporation of 18 U.S.C. § 3661 into the Guidelines. Under the pre-Guidelines sentencing system, the statute, in both its explicit language and interpretation by the courts, provided almost no restrictions on the use of information at sentencing. However, the Guidelines, while adopting the text of 18 U.S.C. § 3661 into the new scheme, provided clear limitations on the broad language of the statute. According to section 1B1.4 of the Guidelines, judges were to use the authority of 18 U.S.C. § 3661 for two specific purposes: first, as an aid in selecting a point within a specific guideline range, or, second, as the basis of a departure. This section of the Guidelines makes no attempt to apply the language of 18 U.S.C. § 3661 or the broad language of *Williams* to the determination of the base offense level. Thus, the Guidelines represent a scaling back of the sentencing court’s broad discretion to consider all information. As a result, 18 U.S.C. § 3661 cannot serve as a basis for considering illegally seized evidence in the determination of the base offense level.

**CONCLUSION**

The Federal Sentencing Guidelines represent an ambitious attempt to redefine the methods and goals of sentencing policy. Seeking to eliminate the unfettered discretion that characterized the prior indeterminate sentencing system, the Guidelines’ aim was the promotion of honesty and uniformity in sentencing. The mechanism for achieving these ends was the establishment of a base of-

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284. Section 1B1.4 of the Guidelines “distinguishes between factors that determine the applicable guideline sentencing range (§ 1B1.3) and information that a court may consider in imposing sentence within that range.” U.S.S.G. § 1B1.4 cmt. The commentary to this note serves as the basis of interpreting the guideline, and failure to follow it constitutes incorrect application of the Guidelines, subject to reversal. See id. § 1B1.7 cmt.


fense level that would, after consideration of other factors, convert into a sentencing range. Defendants with similar base offense levels would, under the Guidelines, receive sentences roughly within the same range.

The consideration of illegally seized evidence in determining a defendant’s base offense level threatens the goals established for the Guidelines system. The inclusion of illegally seized evidence undermines honesty in sentencing by severing the relationship between the offense of conviction and the sentence received. Uniformity is threatened because the illegally seized evidence, rather than the crime of conviction, becomes a vital component in deciding sentence length. As a result, offenders convicted of identical statutory crimes can receive remarkably different sentences depending upon the amount of illegally seized evidence involved.

The inclusion of illegally seized evidence also offends the principles underlying the exclusionary rule. The adoption of the Guidelines dramatically altered the role of judges in sentencing. Under the Guidelines, the exclusion of illegally seized evidence would not inhibit judges from functioning as they did under the pre-Guidelines sentencing scheme. Most importantly, the adoption of the Guidelines creates a new incentive for police to engage in illegal searches. Illegal seizures of evidence are rewarded with longer sentences, even if the evidence is inadmissible at trial. Excluding illegally seized evidence from the base offense level calculation prevents any gain from these searches and provides a necessary deterrent to illegal searches.

Even under the pre-Guidelines system, courts recognized a need to deter illegal searches aimed at increasing sentence length. Under the Guidelines, the impact of presenting illegally seized evidence to the sentencing court is more certain; therefore, the need for a deterrent is greater. Under the test outlined in Calandra, the need for a deterrent far outweighs any harm caused by the extension of the exclusionary rule to sentencing proceedings under the Federal Sentencing Guidelines.

Although commentators have both praised and criticized them, the Guidelines will remain a fixture in sentencing for the immediate future. To ensure that the Guidelines achieve the goals Congress has mandated, illegally seized evidence should be excluded
from the calculation of base offense levels under the Federal Sentencing Guidelines.

A combination of official immunity with official indifference to employees who violate the Constitution means that the exclusionary rule still has a vital role to play. . . . [I]f we do not apply the exclusionary rule in sentencing under the guidelines, the constitutional law on unreasonable searches and seizures will become a parchment barrier.287

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