Illegally Seized Evidence at Sentencing: How to Satisfy the Constitution and the Guidelines with an "Evidentiary" Limitation

Clinton R. Pinyan

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation
Available at: http://chicagounbound.uchicago.edu/uclf/vol1994/iss1/22
Illegally Seized Evidence at Sentencing: How to Satisfy the Constitution and the Guidelines with an "Evidentiary" Limitation

Clinton R. Pinyin†

The exclusionary rule provides that the government may not use evidence seized in violation of the Fourth Amendment against the victim of the seizure.1 The exclusionary rule, however, does not completely prohibit the use of such evidence in court.2 Instead, it applies only when exclusion is likely to deter law enforcement officers from engaging in similar illegal searches, and when the value of this deterrence justifies the costs of exclusion to the proceeding's accuracy.3

For years courts have considered whether the exclusionary rule applies at sentencing. Sentencing traditionally has been free from the evidentiary rules of trial,4 and federal courts have recognized that sentencing judges historically had discretion to consider illegally seized evidence.5 These courts have held that the exclusionary rule applies at sentencing only where searches are most easily deterrable: some courts have excluded the evidence where its admission would provide a "substantial incentive" for illegal searches,6 while others have done so where the government has seized the evidence "for the express purpose" of increasing the sentence.7 Most courts have favored the latter "purpose" limitation, which focuses on the subjective intent of the officers.

† B.A. 1991, Wake Forest University; J.D. Candidate 1995, University of Chicago.
1 See Weeks v United States, 232 US 383, 398 (1914), overruled on other grounds, Elkins v United States, 364 US 206 (1960). “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” US Const, Amend IV.
2 See United States v Calandra, 414 US 338, 348 (1974) (“Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons.”).
3 See id.
5 See, for example, United States v McCrory, 930 F2d 63, 71 (DC Cir 1991) (Silberman concurring).
6 See Verdugo v United States, 402 F2d 599, 613 (9th Cir 1968).
7 See United States v Schipani, 435 F2d 26, 28 (2d Cir 1970).
Because it is virtually impossible to demonstrate such intent,\(^8\) the exclusionary rule almost never applies at sentencing.\(^9\)

The adoption of the United States Sentencing Guidelines (the "Guidelines") in 1987 vastly changed the traditional sentencing regime.\(^10\) The Guidelines substituted a set of rules that strive to induce uniform treatment of similar defendants for a discretionary system of sentencing that sought to individualize sentences within a broad range.\(^11\)

Some judges and commentators have argued that the Guidelines have altered the balancing test that courts perform to determine whether the exclusionary rule applies at sentencing.\(^12\) They have argued that under the Guidelines’ mechanical sentencing system, which focuses on characteristics of the crime committed, such as the amount of drugs involved, police officers may easily correlate their searches with the sentences they want imposed.\(^13\) In order to deter such deliberate searches, some observers have favored a blanket exclusion of illegally seized evidence at sentencing.\(^14\) Nevertheless, most courts have continued to hold that the Guidelines reinforced, not reversed, the earlier rejection of the exclusionary rule at sentencing.\(^15\)

This Comment argues that the majority of courts have overly restricted the application of the exclusionary rule at sentencing. They have failed to consider that exclusion of evidence has a deterrent effect even in cases where the defendant cannot prove that police officers possessed an express "purpose" to increase his sentence. Therefore, this Comment argues that the exclusionary rule should apply more broadly at sentencing.

Those who argue in favor of blanket exclusion at sentencing, however, fail adequately to reconcile their beliefs with the Su-

---

\(^8\) See, for example, United States v Jewel, 947 F2d 224, 238 (7th Cir 1991) (Easterbrook concurring) ("It is inconceivable that any defendant will be able to show that the police had only one of these purposes in mind when making a seizure.").

\(^9\) See id.

\(^10\) See United States Sentencing Commission, Guidelines Manual, Ch 1, Pt A (1993) ("USSC").

\(^11\) Id.

\(^12\) See, for example, Jewel, 947 F2d at 239-40 (Easterbrook concurring); McCrory, 930 F2d at 71 (Silberman concurring).

\(^13\) See McCrory, 930 F2d at 71 (Silberman concurring).


\(^15\) See, for example, United States v Lynch, 934 F2d 1226, 1235-36 (11th Cir 1991); McCrory, 930 F2d at 68; United States v Torres, 926 F2d 321, 324-25 (3d Cir 1991).
preme Court's command that the exclusionary rule be narrowly construed. While the Guidelines do tilt the balance in favor of exclusion, they do not tip the scales so far as to require blanket exclusion. Instead, courts should adopt a strong, objective approach to the "substantial incentive" exception to the exclusionary rule—one which would require courts to exclude any evidence seized after the officers have sufficient physical evidence to secure a conviction for a related offense. This proposed exception distinguishes between deterrable and undeterrable searches and eliminates the fruits of many egregious searches without resorting to overbroad application of the exclusionary rule at sentencing.

Part I of this Comment outlines the pre-Guidelines history of the exclusionary rule at the sentencing phase. Part II explores the changes wrought by the Guidelines. Finally, Part III concludes by examining the facts of many leading cases and the incentive structure at work in them to demonstrate that an "evidentiary" limitation would achieve the appropriate level of deterrence of illegal searches while narrowly tailoring the exclusion.

I. THE EXCLUSIONARY RULE BEFORE THE GUIDELINES

Courts enforce the Fourth Amendment's prohibition against unreasonable searches and seizures through the exclusionary rule. The Supreme Court has held that the rule does not create a "personal constitutional right" to the exclusion of illegally seized evidence but applies mainly, and perhaps only, to deter

---

illegal searches.\textsuperscript{18} Courts therefore apply the rule exclusively where the objective of deterrence is "most efficaciously served."\textsuperscript{19}

While courts originally applied the exclusionary rule only to the case in chief against criminal defendants,\textsuperscript{20} they have subsequently employed the rule in other settings. In \textit{United States v Calandra},\textsuperscript{21} the Supreme Court held that in determining whether to apply the exclusionary rule to a particular stage of the trial, courts should weigh the effectiveness of achieving deterrence against the costs of withholding reliable physical evidence from the proceeding in question.\textsuperscript{22} Applying this balancing test, the Court held that the rule should not apply in a grand jury proceeding.\textsuperscript{23}

Historically, the exclusionary rule has not played an important role in sentencing.\textsuperscript{24} A sentencing judge traditionally "could

\textsuperscript{18} See \textit{Calandra}, 414 US at 347. The Court in \textit{Calandra} noted:

The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim. . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.

\textit{Id} (citations omitted). See also \textit{Krull}, 480 US at 347.

The Court has recognized, then repudiated, two competing rationales for the exclusionary rule. One was the need to maintain the integrity of the judiciary, see \textit{Terry v Ohio}, 392 US 1, 12-13 (1968), a rationale that the Court dramatically limited in \textit{Stone v Powell}, 428 US 465, 485 (1976). See also \textit{James v Illinois}, 493 US 307, 312 n 1 (1990) (conceding that only "[c]ertain Members of the Court" held this view). For a brief discussion, see \textit{Note, 34 Wm & Mary L Rev at 247-48} (cited in note 14). Also, the Court once alluded to a personal privacy right protected by the rule. See \textit{Weeks}, 232 US at 398; \textit{Mapp v Ohio}, 367 US 643, 649 (1961). That rationale, however, would not carry today's Court. See \textit{Calandra}, 414 US at 347; \textit{Kimmelman v Morrison}, 477 US 365, 375-76 (1986); \textit{United States v Leon}, 468 US 897, 906 (1984).

\textsuperscript{19} \textit{Calandra}, 414 US at 348. See also \textit{Krull}, 480 US at 347.

\textsuperscript{20} See \textit{Weeks}, 232 US at 398.


\textsuperscript{22} Id at 349.

\textsuperscript{23} \textit{Calandra}, 414 US at 354. The Court held that application of the exclusionary rule would endanger the role of the grand jury in investigating criminal activity "unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial," id at 349, while deterrence would be minimal because exclusion of evidence before the grand jury that is already excluded at trial "would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation," id at 351. The Court has determined the reach of the exclusionary rule by using this same balancing test in several contexts outside the trial on the merits. See, for example, \textit{James}, 493 US at 313-14 (defining the scope of use of illegally obtained evidence for impeachment); \textit{Immigration and Naturalization Service v Lopez-Mendoza}, 468 US 1032, 1041-46 (1984) (declining to employ the rule in civil deportation proceedings); \textit{United States v Janis}, 428 US 433, 454 (1976) (declining to employ the rule in civil tax proceedings).

\textsuperscript{24} In fact, only one pre-Guidelines circuit court, the Ninth Circuit in \textit{Verdugo v United States}, 402 F2d 599 (9th Cir 1968), excluded illegally seized evidence at sentencing. See \textit{United States v Graves}, 785 F2d 870, 873 (10th Cir 1986); \textit{United States v Jewel}, 947 F2d 224, 238 (7th Cir 1991) (Easterbrook concurring).
exercise a wide discretion in the sources and types of evidence used to assist him." In *Williams v New York*, for example, the Court held that evidence that was inadmissible at trial could be considered at sentencing. This discretion to consider illegally seized evidence at sentencing embodied the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."

This leeway led appellate courts to allow sentencing judges generally to consider illegally seized evidence. Two conflicting exceptions to this general rule, however, emerged in *Verdugo v United States* and *United States v Schipani*.

In *Verdugo*, the Ninth Circuit held that sentencing judges must exclude illegally seized evidence where its use "would provide a substantial incentive for unconstitutional searches and seizures." The court accepted the prevailing rationale that the goal of individualized sentences requires an open-ended sentencing inquiry. It also recognized, however, that the exclusionary rule's purpose of deterring illegal searches circumscribes sentencing judges' access to information. The court, in balancing these factors, discussed two approaches to determining when the exclusionary rule should apply.

The first approach, which this Comment labels the "evidentiary" limitation, states that the exclusionary rule should apply once officers have secured "sufficient evidence to convict" the defendant. This limitation would deter future illegal searches because if the exclusionary rule does not apply in such a case, officers have no incentive to refrain from subsequent unlawful searches:

---

27 See id at 251-52.
28 Id at 247.
29 402 F2d 599 (9th Cir 1968).
30 435 F2d 26 (2d Cir 1970).
31 *Verdugo*, 402 F2d at 613.
32 Id at 611.
33 Id.
34 *Verdugo* clearly does not support a blanket application of the exclusionary rule at sentencing. According to that court, "exclusion was required in the circumstances of the . . . case." *Verdugo*, 402 F2d at 611. Moreover, the *Verdugo* court ruled: "[W]here, as here, the use of illegally seized evidence at sentencing would provide a substantial incentive for unconstitutional searches and seizures, that evidence should be disregarded by the sentencing judge." Id at 613.
35 Id at 612.
Unless the evidence were unavailable for 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.36

In other words, Verdugo suggests that the exclusionary rule should apply at sentencing to prevent officers from seizing evidence illegally once they have some "untainted evidence" of an offense.37 This limitation applied to Verdugo because officers searched his home when they already had sufficient evidence to arrest him.38

The court also articulated a subjective "purpose" rationale for applying the exclusionary rule at sentencing. In response to the argument that the exclusionary rule would not have deterred the officers because they were not interested in the length of sentence,39 the court reasoned that these officers, members of a special drug unit, may have wanted to ensure a long sentence because their unit could fight drugs effectively only by imprisoning repeat offenders.40 The court implied that the exclusionary rule, therefore, should apply because the officers intended to increase Verdugo's sentence and were thus deterrable.41

Although the court discussed the officers' subjective motivation, it relied more heavily on the objective "evidentiary" test of deterrability.42 Indeed, Verdugo's holding that the exclusionary rule should apply where the use of illegally seized evidence "would provide a substantial incentive for unconstitutional searches"43 in the future is quite different from a holding that the rule should only apply where the defense can prove that officers in a particular case had a substantial incentive for unconstitutional searches and purposefully acted upon it. The former

---

36 Id.
37 See Verdugo, 402 F2d at 612.
38 Id. The judge in Verdugo imposed a fifteen-year sentence following Verdugo's conviction for selling less than three grams of heroin. Id at 608-09. The court considered that police had seized 371 grams of heroin from Verdugo's home when arresting him—two months after the three-gram sale—by searching the home without a warrant for four and one-half hours and using tactics that included dismantling electrical fixtures and punching holes in walls. Id at 609-10.
39 See Verdugo, 402 F2d at 612.
40 See id.
41 See id.
42 See id at 613.
43 Verdugo, 402 F2d at 613 (emphasis added).
determines when applying the exclusionary rule will provide adequate deterrence, as Calandra requires, while the latter encompasses only a small and hard-to-prove subsection of those cases.

Two years later, however, in United States v Schipani, the Second Circuit failed to adopt, or even to recognize, Verdugo's "evidentiary" limitation; instead, it held that only an officer's subjective intent to increase the accused's sentence would justify exclusion of illegally seized evidence at sentencing.44 The Schipani court ruled: "Where illegally seized evidence is reliable and it is clear, as here, that it was not gathered for the express purpose of improperly influencing the sentencing judge, there is no error in using it in connection with fixing sentence."45 In a precursor to the Calandra balancing test, the Schipani court recognized the great need for information in crafting sentences46 and noted the minimal countervailing deterrent potential of applying the exclusionary rule at sentencing.47 Significantly, the Schipani court regarded Verdugo as resting more on the officers' intent than on objective criteria.48

In United States v Vandemark,49 the Ninth Circuit itself further weakened Verdugo's "evidentiary" limitation. In finding the search at issue undeterrable,50 the court distinguished Vandemark from Verdugo on three grounds. First, it stated that the Verdugo search was "blatantly illegal," in contrast to an unintrusive search of Vandemark's car.51 Second, Vandemark accepted Verdugo's "purpose" language and stated that the offi-

44 See United States v Schipani, 435 F2d 26, 28 (2d Cir 1970).
45 Id (emphasis added).
46 Id at 27. See also Williams, 337 US at 247.
47 "[A]pplying the exclusionary rule for a second time at sentencing after having already applied it once at the trial itself would not add in any significant way to the deterrent effect of the rule." Schipani, 435 F2d at 28.
48 The Schipani court mischaracterized Verdugo as holding that the exclusionary rule applied "where evidence was illegally seized to enhance the possibility of a heavier sentence." Id at 28 n 1.
49 522 F2d 1019 (9th Cir 1975).
50 The trial court convicted Vandemark of possession of twenty-eight pounds of marijuana with intent to distribute and sentenced him to probation for two years. Three weeks later, Border Patrol agents found 284 pounds of marijuana in Vandemark's trunk during a routine search. The government declined to prosecute Vandemark for the second offense after he protested that the search was unfounded, but, nonetheless, it used the customs evidence to have a judge revoke Vandemark's probation and impose a two-year sentence for the first crime. Id at 1020.
51 Id at 1023. Although the Vandemark court properly distinguished the facts on this ground, the degree of illegality does not appear to have served as a part of Verdugo's holding. See Verdugo, 402 F2d at 613.
cers here had no desire to increase Vandemark's sentence.52 Third, the court recognized the reasoning of Verdugo's "evidentiary" limitation, but it distinguished this case because the officers did not know Vandemark had already been convicted of another crime; therefore, they had no incentive to search for evidence to enhance his initial sentence.53

By drawing these distinctions, the Vandemark court mischaracterized Verdugo as resting on all three of these grounds. By mentioning the search's intrusiveness and the officers' purpose as bases of the Verdugo holding, Vandemark allowed later courts to cite Verdugo but claim that it stands for the Schipani "purpose" test.54 The Ninth Circuit's failure to elucidate and reinforce Verdugo's "evidentiary" exception led to its virtual disappearance from exclusionary rule jurisprudence.55

II. THE GUIDELINES AND THEIR EFFECTS ON THE EXCLUSIONARY RULE

A. The Guidelines

The Sentencing Reform Act of 1984 (the "Act")56 reflected growing dissatisfaction with discretionary sentencing. Citing the "unjustifiably wide range of sentences [given] to offenders with similar histories, convicted of similar crimes, committed under similar circumstances,"57 Congress authorized the United States Sentencing Commission (the "Commission") to promulgate the Guidelines, a set of specific formulas and factors to control sentencing decisions.58 The formulas, effective as of 1987,59 serve Congress's goal of uniformity by requiring judges to sentence

---

52 Vandemark, 522 F2d at 1023-24.
53 Id.
55 Some circuits, particularly in older cases, accepted Verdugo as standing for an "evidentiary" limitation. See United States v Lee, 540 F2d 1205, 1212 (4th Cir 1976); Graves, 785 F2d at 873-74. The overwhelming majority of post-Guidelines courts, however, have destroyed any distinction between Verdugo and Schipani by finding that Verdugo established a "purpose" exception. See United States v Torres, 926 F2d 321, 325 (3d Cir 1991); United States v McCrory, 930 F2d 63, 69 (DC Cir 1991); United States v Lynch, 934 F2d 1226, 1237 n 15 (11th Cir 1991); United States v Montoya-Ortiz, 7 F3d 1171, 1181 n 10 (5th Cir 1993).
58 See 28 USC § 994(a) (1988); USSG Ch 1, Pt A (cited in note 10).
59 See USSG Ch 1, Pt A (cited in note 10).
from a table that determines a narrow basic sentencing range, the "base offense level," based on the type and gravity of the crime. For drug offenses, the base offense level is fixed by the amount and type of drug involved.

Although the Act authorized a seemingly strict and mathematical set of Guidelines, Congress voiced its continuing acceptance of the Williams doctrine by maintaining and recodifying Title 18, Section 3661 of the United States Code ("Section 3661"). This Section provides that a federal court must not be limited in the information it may consider in sentencing. Section 1B1.4 of the Guidelines reiterates this policy. While it may seem strange to couple a narrow set of inquiries with broad access to information, the Guidelines manifest both Congress's and the Commission's desire to promote inquiry into relevant conduct not specified in the Guidelines' tables. The base offense level must take into account "relevant conduct" other than the crime of conviction. "Relevant conduct" in drug offenses includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" that are "part of the same course of conduct or common scheme or plan as the offense of conviction." Therefore, evidence of acts that are "substantially connected by at least

---

60 Id.
61 See, for example, id at § 2D1.1.
62 Even though "no discussion of the continued need for the section appear[ed] in either the congressional debate or the text of the statute," Note, 34 Wm and Mary L Rev at 262 (cited in note 14), Section 3661 is still law.
64 USSG § 1B1.4 (cited in note 10). The Commission copied the language in USSG § 1B1.4 from Section 3661. See id at § 1B1.4, comment (background). "The recodification of this 1970 statute in 1984 with an effective date of 1987, makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system." Id (citation omitted).
65 "[T]he base offense level . . . shall be determined on the basis of" certain relevant conduct. Id at § 1B1.3 ("Relevant Conduct (Factors that Determine the Guidelines Range").
66 USSG § 1B1.3(a)(1)(A) (cited in note 10). See also id at § 1B1.3(a)(1)(B) (requiring courts to include all actions taken by joint venturers "in furtherance of the jointly undertaken criminal activity").
67 Id at § 1B1.3(a)(2) (subsection applying to drug offenses).
one common factor" are considered under the relevant conduct provision. In addition to relevant conduct, other acts may enter the sentencing decision either (1) as a basis for departure from the base level to a higher or lower range, or (2) in fixing a term within the base offense level range. The Guidelines thus walk a tightrope between a new proclivity toward mechanical uniformity in sentencing and the old sentiment that in order to mete out fair sentences, courts must consider information not easily quantifiable.

B. Post-Guidelines Cases on the Exclusionary Rule

Neither the Act, its legislative history, nor the Guidelines explicitly mention the proper treatment of illegally seized evidence under the Guidelines. Although most courts have declared that the exclusionary rule still does not apply at sentencing, some support has grown for the position that the Guidelines require restrictions on the use of illegally seized evidence at sentencing.

1. The majority rule: continued admissibility at sentencing.

After the Guidelines, most courts have emphasized the continuity between pre- and post-Guidelines treatment of illegally seized evidence at sentencing. They have found that the Guidelines continued, or even accentuated, the pre-Guidelines logic that illegally seized evidence should be considered.

Three cases, United States v Torres, United States v McCrory, and
United States v Lynch, 76 typify the standard post-Guidelines understanding that the exclusionary rule will apply at sentencing perhaps only when evidence is seized for the “purpose” of enhancing the defendant’s sentence. The existence of even this narrow “purpose” limitation, however, is unsettled.

These decisions typically have held that the Williams doctrine of affording “traditional liberality” to sentencing courts77 still applies in the post-Guidelines world.78 They have cited several congressional and Guidelines provisions in support of this position: (1) Section 3661's codification of Williams;79 (2) Guidelines Section 1B1.4’s reiteration of Section 3661;80 (3) the “relevant conduct” provision, which requires the court “to consider, to some degree, the actual conduct of the offense”;81 and (4) Guidelines Section 6A1.3, which provides that the court may consider relevant but inadmissible information in resolving disputes about sentencing factors.82 Most courts have read these provisions as placing congressional imprimatur on wide-ranging judicial discretion in sentencing despite the Guidelines’ overall mechanical structure.83

These courts have implicitly believed that the Guidelines do not create additional incentives for illegal searches.84 Indeed, some of these courts have not even recognized that the exclusionary rule should apply to searches for the “purpose” of increasing a sentence,85 implying that they might further re-

74 The McCrory court held that the prosecution could introduce evidence of a kilogram and a half of crack seized when officers reentered an apartment to search it after they had seen stashes of crack in the apartment during a warrantless prior drug purchase and arrest. United States v McCrory, 930 F2d 63, 69 (DC Cir 1991).

75 In Lynch, the Eleventh Circuit affirmed a lower court decision to include in the sentencing decision guns seized in plain view when officers arrested Lynch without a warrant. United States v Lynch, 934 F2d 1226, 1228 (11th Cir 1991).

76 Id at 1235.

77 See, for example, McCrory, 930 F2d at 68.

78 Torres, 926 F2d at 324; McCrory, 930 F2d at 68; Lynch, 934 F2d at 1235-36.

79 McCrory, 930 F2d at 68; Lynch, 934 F2d at 1236.

80 Torres, 926 F2d at 324. See McCrory, 930 F2d at 65.

81 Torres, 926 F2d at 324; Lynch, 934 F2d at 1236.

82 “[E]xcluding all illegally seized evidence would frustrate the federal policy, codified, in part, in the Act and the Sentencing Guidelines, that judges consider all relevant and reliable facts in order to assure that each defendant receives an individualized sentence.” Lynch, 934 F2d at 1236.

83 See Torres, 926 F2d at 325; McCrory, 930 F2d at 68-69.

84 Some courts have explicitly refused to reach the issue. See Torres, 926 F2d at 325; McCrory, 930 F2d at 69. But see United States v Montoya-Ortiz, 7 F3d 1171, 1181 n 10.
strict the exclusionary rule’s role in sentencing beyond even the Schipani test. Because these courts have believed that the Guidelines changed neither side of the Calandra equation—the value of open consideration of all relevant evidence compared to the ability to deter illegal searches—they have found no reason to change the outcome of that test.\(^\text{65}\)

2. Attempts to apply the exclusionary rule at sentencing.

The voices supporting application of the exclusionary rule at sentencing are faint but growing louder. They currently include one Sixth Circuit decision, which the circuit quickly repudiated, and two concurrences by circuit judges.

In 1992, the Sixth Circuit decided United States v Nichols,\(^\text{66}\) in which the sentencing judge relied on evidence that officers had seized illegally while investigating prior drug offenses.\(^\text{67}\) On review, the circuit court held that the exclusionary rule bars the introduction of evidence at sentencing that was illegally seized during an investigation or arrest for the crime of conviction.\(^\text{68}\)

\(^{65}\) The Second Circuit in Tejada went one step beyond Torres, McCrory, and Lynch by holding not only that the Guidelines allow admission of illegally seized evidence, but also that the Guidelines now require that, absent a showing of the officers’ “purpose” to enhance a sentence, a district court must consider relevant illegally seized evidence. United States v Tejada, 956 F2d 1256, 1263 (2d Cir 1991), cert denied, 113 S Ct 124 (1992) and as Cabrera v United States, 113 S Ct 334 (1992). The court read the Guidelines as removing the sentencing judge’s discretion to disregard evidence of relevant conduct. Id. Finding that the Guidelines’ goal of uniformity prevents judges from engaging in “ad hoc determinations [that] would create disparities in sentences in the absence of differences in conduct,” the Tejada court held that such discretion in the face of the Guidelines’ system “would sidestep Congress and violate Separation of Powers principles.” Id.

The court cited Lynch, Torres, and McCrory as supporting the notion that sentencing judges “should” consider illegally seized evidence. Id. While this reading of these cases may be correct, it is not clearly correct because at least two of the cases employ language plainly indicating that consideration of the evidence is not mandatory. See Torres, 926 F2d at 325; McCrory, 930 F2d at 68. The Tejada court’s reasoning, however, is supported by the absolute language of the relevant conduct provision, which permits no discretion in ordering that judges “shall” determine the base offense level by considering all acts in “the same course of conduct or common scheme or plan,” even if these acts are demonstrated by illegally seized evidence. USSG § 1B1.3 (cited in note 10). See also id at § 1B3, comment (describing application of the relevant conduct provision). Furthermore, mandatory consideration of evidence that passes constitutional muster furthers the purpose of the Guidelines to bring predictability and uniformity to sentencing decisions. See id at Ch 1, Pt A.

\(^{66}\) 979 F2d 402 (6th Cir 1992), aff’d on other grounds, 114 S Ct 1921 (1994).

\(^{67}\) Id at 405. The sentencing judge relied on this earlier illegally seized evidence merely to fix the defendant within the base offense range. Id at 408.

\(^{68}\) Id at 410-11.
The court reassessed the Calandra balancing test under the “momentous changes” wrought by the rigid, predictable Guidelines system. In the arbitrary pre-Guidelines world, the court stated, officers could never be sure that the judge would sentence more harshly based upon evidence admitted solely at sentencing, and thus officers “had little incentive to seize evidence illegally and thereby forfeit its use at trial.” Under the Guidelines, however, the court concluded that officers could secure a conviction on a minor offense supported by legally seized evidence and then create a much higher sentence through an illegal search geared toward sentencing.

The Nichols rule was very short-lived, if it indeed ever amounted to anything but dicta. In Nichols itself, the court declined to apply the exclusionary rule on the facts before it, and nine months later in United States v Jenkins, the circuit dismissed the Nichols rule as mere dicta and adopted the majority position.

Nichols followed the logic of two previous concurrences that had expressed concern about the continued post-Guidelines rejection of the exclusionary rule at sentencing. Judge Silberman, concurring in McCrory, stated, as the Nichols court would later

---

89 Nichols, 979 F2d at 411.
90 Id.
91 “[S]tate officers now have the somewhat perverse incentive to rely more heavily on sentencing than trial to establish facts that may be of overriding importance in determining a defendant’s length of imprisonment—for example, the total amount of drugs involved in a criminal scheme.” Id.
92 Notably, Judge Nelson refused to join the court’s pronouncement on the exclusionary rule, calling it “dicta.” Id at 418 (Nelson concurring in the judgment).
93 The court proffered two reasons for not applying the exclusionary rule. First, officers seized the evidence at issue during an arrest two years earlier on unrelated charges. Nichols, 979 F2d at 405. Therefore, to deter the police from making the search, the court would have had to infer that “absent the [exclusionary] rule, police would have an incentive to seize evidence illegally solely on the expectation that the evidence might be used in sentencing the defendant for a subsequent crime.” Id at 412 (emphasis in original). The court concluded that “such an inference is simply too frail to support application of the exclusionary rule in this instance.” Id. Second, the Nichols court concluded that courts could consider illegally seized evidence if deciding merely where to sentence a defendant within the base offense range, as the sentencing court had done here. Id. In clear contradiction of its broad and bold application of the exclusionary rule, the court concluded its discussion of the issue by stating: “[W]here evidence is illegally seized in relation to conduct that does not fall within the relevant conduct provisions of the sentencing guidelines, and the district court does not otherwise rely on the evidence in determining the defendant’s sentence, the court may consider such evidence in determining where to sentence the defendant within the recommended guideline range.” Nichols, 979 F2d at 412.
94 4 F3d 1338 (6th Cir 1993), cert. denied, 114 S Ct 1547 (1994).
95 The rule in Nichols was just “two members of this court express[ing] their view] in dicta.” Id at 1345 n 8.
state, that under the Guidelines, a shift in incentives occurs when the officers obtain enough evidence to convict the defendant on a lesser charge.96 Once that initial evidence is gathered, officers know that regardless of whether any additional evidence they seize is legally obtained, it will effectively count against the defendant: it will serve as either evidence of an additional crime or of "relevant conduct" which increases the length of the sentence for the initial crime.97 The result is that "there is nothing to deter them from seizing the evidence immediately without obtaining a warrant." Judge Silberman concluded: "I doubt whether we will ever see a stronger case for application of the exclusionary rule to the sentencing proceedings than here, where the break-in occurred after the police had already obtained sufficient evidence to convict the defendant."98

In focusing on the amount of evidence already obtained by the officers, Judge Silberman hinted at the "evidentiary" distinction that had disappeared since Verdugo. Moreover, he expressed dissatisfaction with the "purpose" inquiry into whether the officers subjectively obtained the evidence for sentencing.100 Judge Silberman, however, merely recognized the nature of the incentive structure and did not specifically endorse the Verdugo "evidentiary" limitation.101

In United States v Jewel,102 Judge Easterbrook suggested that the exclusionary rule should apply uniformly at sentencing.103 He agreed with Judge Silberman's criticism of the "purpose" limitation on the exclusionary rule104 and instead asserted

96 McCrory, 930 F2d at 71 (Silberman concurring). Judge Silberman contrasted McCrory with Torres because in Torres, the officers had seized all the evidence in the same warrantless search; therefore, there was no independent search geared only to increase the sentence. "The police could not have known before the search that they had sufficient evidence to convict, and the possibility of suppression of the seized evidence at trial would thus have constituted deterrence enough." Id at 71 n 2 (Silberman concurring).
97 Id at 71 (Silberman concurring).
98 Id.
99 McCrory, 930 F2d at 72 (Silberman concurring) (emphasis added).
100 Judge Silberman saw the "purpose" test as hard to prove and as ineffective deterrence. See id.
101 Judge Silberman declined to dissent because he anticipated that the Supreme Court would agree with his panel. Id.
102 947 F2d 224 (7th Cir 1991).
103 See id at 240 (Easterbrook concurring). Although the court did not need to resolve the issue of whether the exclusionary rule applied at sentencing, id at 232 n 11, Judge Easterbrook addressed the issue in depth.
104 See Jewel, 947 F2d at 238 (Easterbrook concurring). Judge Easterbrook maintained the test is impractical because police will never have just one motive. Moreover, the test is illogical because the purpose behind a seizure does not determine its offensiveness. See
that an "objective" standard was more appropriate: the exclusionary rule should categorically apply or not apply to entire junctures of a proceeding.\textsuperscript{105}

Like the Nichols court and Judge Silberman in his concurrence in McCrory, Judge Easterbrook based his concurrence on the post-Guidelines change in the Calandra balancing test.\textsuperscript{106} Judge Easterbrook, however, went even further: his desire for a bright-line, categorical rule led him to imply that the exclusionary rule should always apply at the sentencing phase.\textsuperscript{107}

\textbf{III. A Solution That Can Both Punish Offenders and Deter Officers}

Although some observers have advocated blanket application of the exclusionary rule at sentencing,\textsuperscript{108} the typical court allows for blanket admission of such evidence, with a possible stringent "purpose" exception that most defendants find impossible to meet.\textsuperscript{109} Neither avenue, however, leads to satisfactory results or to an approach consistent with the purposes of both the exclusionary rule and the Guidelines.

In order to reach a result logically consistent with the exclusionary rule and the Guidelines, courts must answer two different questions: (1) whether sentencing judges should ever admit illegally seized evidence; and (2) if they do, when they should admit it. This Comment argues that illegally seized evidence should be admissible at sentencing, subject to a strong "evidentiary" limitation.

\textbf{A. Blanket Application of the Exclusionary Rule at Sentencing Is Not Justified}

Most courts admittedly have ignored the changes that have occurred in the Calandra balancing test under the Guidelines system. While the balance has shifted somewhat, it is necessary

\textsuperscript{105} Id at 239 (Easterbrook concurring).
\textsuperscript{106} Id at 239-40 (Easterbrook concurring).
\textsuperscript{107} See Jewel, 947 F2d at 240 (Easterbrook concurring).
\textsuperscript{108} See Comment, 59 U Chi L Rev at 1211 (cited in note 14); Note, 34 Wm & Mary L Rev at 243 (cited in note 14). See also United States v Jewel, 947 F2d 224, 240 (7th Cir 1991) (Easterbrook concurring) (suggesting application of the rule but stopping short of endorsing it).
\textsuperscript{109} See, for example, United States v McCrory, 930 F2d 63, 69 (DC Cir 1991).
to ask whether it has tilted to such an extent to justify blanket application of the exclusionary rule at sentencing. Under *Calandra*, the exclusionary rule should apply only where its deterrent purpose is "most efficaciously served." Blanket application of the exclusionary rule at sentencing would not narrowly serve this purpose.

Pre-Guidelines cases clearly stated that illegally seized evidence was admissible at sentencing because it was highly relevant and helpful to the sentencing system, while the rule's deterrent effect would be minimal. Therefore, the test tilted toward admission of the evidence in most, if not all, cases.

Since adoption of the Guidelines, commentators have argued that the *Calandra* test has shifted on both sides of the balance: exclusion is now less costly to the proceeding, and the need for deterrence is greater under the Guidelines system. Given this alleged shift, some observers have claimed that *Calandra* now demands absolute exclusion. This Comment addresses each side of the balance and shows that blanket exclusion is not justified.

1. **Exclusion of the evidence would pose a substantial cost to the sentencing proceedings, even under the Guidelines.**

   Some observers have argued that the Guidelines changed the role of the sentencing judge by "now preclud[ing] the judge from looking at the whole picture," thus limiting his view to a few specific factors. These observers have argued that because the judge both at trial and at sentencing examines only elements of the crime rather than elements of character, no additional cost of excluding evidence at sentencing exists beyond the cost of excluding evidence at trial. This argument hinges on the assumption that, under the Guidelines, the sentencing judge is no longer expected to examine conduct other than that defining the crime.

   It would be wrong, however, to view the Guidelines as a shackle on the judge's ability to individualize sentences. The

---

11. See, for example, United States v *Vandemark*, 522 F2d 1019, 1021-22 (9th Cir 1975).
12. See *Jewel*, 947 F2d at 238 (Easterbrook concurring) (stating that no court since *Verdugo* had excluded illegally seized evidence at sentencing).
14. Id at 1232.
15. Id.
16. See id at 1230-1232. See also Note, 32 Wm & Mary L Rev at 276-279 (cited in note 14).
Guidelines evidence a concern for *ad hoc* differences between "sentences imposed for similar criminal offenses committed by similar offenders." Such a policy does not necessarily remove the power of judges to decide which offenses and offenders are similar. The Guidelines' relevant conduct provision and Section 3661 of the Act support the idea that judges can individualize sentences by looking outside the elements of the specific crime charged to formulate sentences according to both the crime and the criminal.

First, the Guidelines' relevant conduct provision supports the use of relevant information not included in the charge, as long as the information is "part of the same . . . common scheme or plan as the offense of conviction." The Guidelines' Commentary indicates that courts should read "common scheme or plan" broadly; in particular, it provides that, in a series of distinct drug sales, the judge should aggregate the total amounts involved to determine the sentence for conviction on just one of the sales. Indeed, even if the defendant is convicted of only one sale and acquitted of several others, the amounts included in the acquitted charges should be added into the sentence through the relevant conduct provision.

Thus the Guidelines did not adopt a pure "charge offense" system, which would examine "the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted." Instead, a sentencing judge continues to scrutinize conduct that was not charged in the crime of conviction. Exclusion of evidence at sentencing, therefore, would impose a cost above that of exclusion at trial; it would

---

117 USSG Ch 1, Pt A (cited in note 10).
118 Id at § 1B1.3(a)(2).
119 See id at § 1B1.3, comment.
120 The Commentary states:
   [W]here the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales.
USSG § 1B1.3, comment (n 3) (cited in note 10). The Guidelines give another example:
   "[I]n a pattern of small thefts . . . it is important to take into account the full range of related conduct." Id at § 1B1.3, comment (background).
121 The Commentary states: "Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained appears to be the most reasonable approach to writing workable guidelines for these offenses." Id.
122 See id at Ch 1, Pt A.
prevent the judge from considering relevant conduct evidence not at issue during the trial on the merits.

Additionally, Section 3661 prohibits any "limitation . . . on the information concerning the background, character, and conduct" of the defendant that a sentencing judge may "receive and consider for the purpose of imposing an appropriate sentence".\(^1\) \(^2\) Section 1B1.4 of the Guidelines contains the same requirement.\(^3\) Commentators and judges arguing in favor of blanket application of the exclusionary rule at sentencing based on changes wrought by the Guidelines system should not ignore such a strong statement of congressional intent to the contrary.\(^4\)

One response to this argument is that Congress cannot mandate the outcome of a constitutional question. Certainly, if the Fourth Amendment requires application of the exclusionary rule at sentencing, then Congress cannot prevent its application.\(^5\)

However, the majority of courts have not argued that Congress has mandated a particular outcome. Instead, they have suggested that the outcome of the constitutional \textit{Calandra} balance is determined by its two inputs—the cost to the system and the ability to deter.\(^6\) In turn, these determinations depend upon the type of sentencing system used. The courts have suggested that Congress did not change the cost side of the equation under the Guidelines because the Guidelines maintain a system that values evidence of relevant conduct.\(^7\)

Thus, Section 3661's requirement that judges consider a wide range of evidence has a place in such a system. The Guidelines merely set forth certain factors—such as relevant conduct—that judges must include in computing a base offense level; they do not consider how the government obtains the evidence supporting those factors.

---

\(^1\) 18 USC § 3661.
\(^2\) USSG § 1B1.4 (cited in note 10).
\(^3\) See Comment, 59 U Chi L Rev at 1218-19 (cited in note 14) (arguing, in effect, that the Guidelines system can trump statutory language, but not attempting to reconcile the Guidelines with the statutory language); Note, 34 Wm & Mary L Rev at 275-76 (cited in note 14) (offering the same argument).
\(^4\) See Comment, 59 U Chi L Rev at 1233-34 (cited in note 14). See also \textit{Jewel}, 947 F2d at 238 (Easterbrook concurring) (posing the dilemma).
\(^6\) \textit{Tejada}, 956 F2d at 1262; \textit{Lynch}, 934 F2d at 1235-36.
2. Application of the exclusionary rule at sentencing will supply some deterrence, but the need for deterrence does not justify blanket application.

A second and more compelling argument for exclusion focuses on the deterrence side of the Calandra equation. This argument, adopted by the Nichols court and by Judges Silberman and Easterbrook, contends that after the Guidelines, officers are no longer deterred from conducting illegal searches for sentencing because they know that courts will admit the evidence and enter it into the sentencing formula.129 Under this line of reasoning, officers do not worry if courts exclude the bulk of their evidence at trial because they know that they can obtain large sentences for a conviction on the smallest sample of evidence.130

The proponents of this argument have contrasted this state of affairs with the pre-Guidelines scheme under which a sentencing judge was free to consider evidence at his discretion and give it whatever weight he chose—indeed, even no weight at all.131 Under this system, an officer was faced with two options: he could either ensure that his search was legal so that the proceeds could support a second conviction which carried certain punishment, or he could risk an illegal search whose proceeds the sentencing judge might choose to ignore.132 Faced with these choices, an officer most likely would not have risked losing a second conviction by seizing additional evidence illegally.133 Because the Guidelines do not similarly deter officers from seizing illegal evidence, some have argued that exclusion is necessary to provide adequate deterrence under the Guidelines system.

Even if this argument is accurate in principle, it does not mandate blanket application of the exclusionary rule at sentencing. The Supreme Court has determined that the exclusionary rule should be narrowly drawn,134 applying only if the additional deterrence the rule provides outweighs the costs of exclusion.135 Blanket application of the exclusionary rule at sentencing would not be narrowly drawn because it would encompass in-

129 McCrory, 930 F2d at 71 (Silberman concurring); Jewel, 947 F2d at 239 (Easterbrook concurring); United States v Nichols, 979 F2d 402, 411 (6th Cir 1992), aff'd on other grounds, 114 S Ct 1921 (1994).
130 McCrory, 930 F2d at 71 (Silberman concurring); Jewel, 947 F2d at 239-40 (Easterbrook concurring); Nichols, 979 F2d at 411.
131 McCrory, 930 F2d at 71 (Silberman concurring). See also Nichols, 979 F2d at 411.
132 See McCrory, 930 F2d at 71 (Silberman concurring); Nichols, 979 F2d at 411.
133 McCrory, 930 F2d at 71 (Silberman concurring); Nichols, 979 F2d at 411.
134 See Calandra, 414 US at 348.
135 See id at 347-48.
stances where the costs of exclusion would outweigh any deter-
rence. The next subsection of this Comment attempts to prove
the overbreadth of this blanket rule by examining the facts of
two of the previously discussed cases to see how courts could
more closely tailor the rule while still deterring illegal searches.

B. An Evidentiary Limitation Would Satisfy the Purposes of the
Exclusionary Rule

Consider two paradigm scenarios, based roughly on the facts
of actual cases, in which police illegally seized evidence that the
trial judge excluded and that the prosecution then sought to in-
troduce at sentencing:

(a) Tejada: Police buy two kilograms of cocaine from the
defendant on the street and immediately arrest him.
Following the arrest, officers go to the defendant’s unoc-
cupied apartment, use a battering ram to enter without
a warrant, and find cocaine and a weapon.136
(b) Lynch: Officers undertake a major drug investiga-
tion. Before they complete a transaction, they arrest the
defendant because they fear he will flee or harm others.
When they enter his home without a warrant to arrest
him, they seize two guns in plain view on the dining ta-
ble.137

The exclusionary rule would provide vastly different levels of
deterrence in these two cases. In Tejada, the illegal search was
imminently deterrable. The officers had already bought two kilo-
grams of cocaine from the defendant, an amount sufficient to
send him to prison for several years.138 If the exclusionary rule
had prohibited consideration at sentencing of the evidence seized
from the apartment, reasonable officers would likely have waited
until they obtained a warrant to search the house, ensuring that
the evidence would be admissible in the case-in-chief and would
result in a successful second conviction.

The fears of the current approach’s critics are justified here.
Because the exclusionary rule does not currently exclude this
evidence at sentencing, officers can perform the search confident

136 Tejada, 956 F2d at 1258-59.
137 Lynch, 934 F2d at 1228-29.
138 See USSG Ch 5, Pt A (cited in note 10). Two kilograms of cocaine carry a base
offense level of 28. Id at § 2D1.1(c)(8). This offense level carries a prison term of at least
78 months. Id at Ch 5, Pt A.
that the evidence will be considered as relevant conduct during sentencing on a conviction for the sale. Therefore, the officers can accurately predict the dramatic increase in sentence severity that will occur due to the seizure.

In *Lynch*, however, the officers felt that they needed to arrest the defendant immediately to avoid flight or danger. They chose this course of action despite the lack of physical evidence to support their accusations. By bursting into the defendant's home, they risked having all physical evidence they found excluded at trial. Because it is unlikely that the police would have been deterred from arresting the defendants if they had known that these guns would not have been admitted at sentencing, the exclusionary rule should not apply here.

Thus, because the level of deterrence achieved in these two cases differs greatly, the exclusionary rule should apply in *Tejada* but not in *Lynch*. The courts, however, must find a principled way to distinguish between these two scenarios. This Comment argues that the best way to distinguish between these situations is through an "evidentiary" limitation, suggested in *Verdugo*, which would exclude evidence acquired in illegal searches only if the officers already have secured "sufficient evidence to convict" the defendant of a related offense. Such a limitation would provide, by reference to objective criteria, the deterrence against illegal seizure of evidence that commentators fear is now lacking in the post-Guidelines world. Such a limitation would best approximate, in an objective manner, those cases in which "substantial incentives" exist for illegal searches. This test would

---

139 The defendants in *Lynch* were convicted on the basis of drugs and a weapon uncovered in a search performed later pursuant to a warrant. *Lynch*, 934 F2d at 1229.

140 *United States v Verdugo*, 402 F2d 599, 612 (9th Cir 1968). While police may not know in every case exactly how much drugs they have legally seized or whether the quantity seized is sufficient to gain a conviction, they surely will have a sense of it in most cases. Moreover, because a constitutional right is at issue, we may prefer a rule making officers wary of illegal searches after they have any physical evidence.

141 In *Jewel*, Judge Easterbrook stressed the need for a categorical rule. He believed that objectivity should be attained by a categorical application of the exclusionary rule during the entire sentencing phase—the distinct "juncture of litigation." He did not fully explore the possibility that courts could attain a measure of objectivity without a blanket rule, even though he noted that *Leon* was an example of such an objective rule at the trial stage. See *Jewel*, 947 F2d at 239 (Easterbrook concurring), citing *United States v Leon*, 468 US 897, 922-23 (1984) (holding that evidence seized under a technically invalid warrant is admissible unless the warrant was so obviously invalid that the officer's reliance on it was objectively unreasonable).

142 See *Verdugo*, 402 F2d at 613. An "evidentiary" rule would allay the root concern of the growing body of dissenters. Judge Silberman was especially concerned in *McCory* because "the prosecution ha[d] more than enough evidence to convict the defendant on a
not only deter searches but would also be relatively easy to administer: judges would only need to examine the amount of physical evidence the officers had in hand at the time of the search in question to determine whether the illegally seized evidence should be excluded.

A properly applied "evidentiary" limitation would exclude illegally seized evidence in many of the cases that are most troublesome and in which the searches seem most deterrable—Verdugo, Tejada, and possibly McCrory. In Verdugo, the classic example, the illegally seized evidence would unquestionably have been excluded because a warrantless search continued for four and one-half hours after officers made the initial arrest. ¹⁴³ Likewise, the illegally seized evidence would have been inadmissible in Tejada, where the government conducted a second search after it already had bought two kilograms of cocaine from the defendant. ¹⁴⁴ Because the court could have convicted the defendant of this offense, the fruits of the later search would have been inadmissible. In McCrory, the government had already bought fifty dollars worth of crack, enough for a conviction, from the defendant; ¹⁴⁵ thus, the later search would have been inadmissible if the search were illegal. ¹⁴⁶

This proposed "evidentiary" exception would not upset the Calandra balance by admitting evidence from searches that are not cheaply deterred. In other cases such as Lynch, Vandemark,

---

¹⁴³ Verdugo, 402 F2d at 610.
¹⁴⁴ Tejada, 956 F2d at 1259.
¹⁴⁵ In McCrory, undercover officers saw bags of crack in an apartment while the defendant was selling the officers $50 worth of crack. McCrory, 930 F2d at 64-65. After the officers confirmed that the substance was cocaine, a team entered the apartment without a warrant and arrested McCrory. A later search, for which the government had a warrant, revealed a large cache of weapons, drug paraphernalia, and a kilogram and a half of crack. Id at 65. While the government agreed not to introduce the hoard of contraband found in this search at trial, it requested that the judge consider it as evidence of "relevant conduct" at sentencing. Id at 65-66. The corresponding increase in the base offense level multiplied McCrory's sentence approximately 900 percent. See id at 66.
¹⁴⁶ McCrory, 930 F2d at 64-65. The officers possessed a warrant for this search; however, the defendant still contested its legality because the officers had entered the apartment earlier without a warrant in order to arrest the defendant. Id at 65.
and possibly Torres, the evidence would remain admissible at sentencing. In Lynch, the evidence would have been admissible because the government had no physical evidence to use against the defendant before a search incidental to his arrest. In Vandemark, border patrol agents, unaware that Vandemark was already on probation for possession of marijuana with intent to distribute, found 284 pounds of marijuana in his trunk during a routine search. The government declined to prosecute Vandemark for the second offense because he protested the reasonableness of the search. The prosecution, however, used the evidence to persuade a judge to revoke Vandemark's probation and impose a two-year sentence for the first crime. The "evidentiary" limitation would not have excluded the evidence from the border patrol search. The agents were searching only for evidence of an initial crime when they looked into Vandemark's trunk; they did not know that prior evidence existed supporting a sentence for drug possession.

Some courts have not asked the right questions to determine whether the seizure would meet the "evidentiary" limitation. In Torres, for example, the police simultaneously searched an apartment and a car. The court did not recount whether the police found drugs first in the apartment, which they had a warrant to search, or in the car, which they did not have a warrant to search. The court also failed to state whether the owners of the car were the residents of the apartment, or whether the officers knew these facts at the time. These inquiries would have been crucial to determining whether the officers illegally seized drugs after they already had sufficient physical evidence to convict the defendants.

While Schipani's "purpose" limitation has carried the day as the only potential application of the exclusionary rule at sentencing, it does not best serve the goal of deterrence. The "purpose" exception only excludes evidence where the defendant can show that the officers conducting the search had a subjective

147 See Lynch, 934 F2d at 1228-29.
148 See Vandemark, 522 F2d at 1020.
149 Id.
150 Id.
151 See id.
153 See id.
154 See id.
155 See, for example, McCrory, 930 F2d at 69; Tejada, 956 F2d at 1263.
intent to increase the defendant’s sentence. Even in the most egregious cases, the courts have found no such purpose,\textsuperscript{156} demonstrating that the current approach neither protects defendants nor deters illegal searches.

CONCLUSION

The current mechanical Guidelines system, in which officers can accurately predict the effect that illegally seized evidence will have on the defendants’ sentences, insufficiently deters illegal seizures. Categorically applying the exclusionary rule at sentencing to deter illegal searches, however, is too extreme of a solution. Instituting a Verdugo-like “evidentiary” limitation would allow the exclusionary rule to act as a deterrent where deterrence would be effective—where the police already possess sufficient legally seized evidence to convict the defendant of a related offense but continue to conduct a search in order to enhance the sentence.

\textsuperscript{156} See Tejada, 956 F2d at 1263.