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## Fresh look at Fourth Amendment exclusionary rule eyes two wrongs

As a former public defender, I am a strong believer that the Fourth Amendment clearly provides that when police engage in an illegal search or seizure, any evidence they obtain must be excluded at a criminal trial.

And when it's pointed out that nowhere in the Fourth Amendment did James Madison ever use the words "police," "criminal," "trial," "evidence" or "exclude," hey, I just channel Joe E. Brown in "Some Like It Hot" and say, "Nobody's perfect."

It's no secret that the Fourth Amendment exclusionary rule is on shaky ground. It is true that a century ago the U.S. Supreme Court held that evidence seized in violation of the Fourth Amendment could not be used at a federal criminal trial. *Weeks v. U.S.*, 232 U.S. 383 (1914). And the Warren Court later extended it to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

But for the last few decades, the Supreme Court, led in turn by Chief Justices Warren E. Burger, William H. Rehnquist and John G. Roberts Jr., has repeatedly weakened the doctrine, so that today it is a mere shell of what it was.

*Mapp* indeed established a bright-line, categorical constitutional rule that illegally seized evidence must be excluded at a criminal trial.

But the Burger Court held that the exclusionary rule was no more than a "judicially created remedy," rather than a personal constitutional right. *U.S. v. Callandra*, 414 U.S. 338 (1974). Deterrence of bad police work then became the only reason for ever excluding illegally seized evidence.

Next, a series of cases beginning with *U.S. v. Leon*, 468 U.S. 897 (1984), established "good-faith exceptions" in which evidence

seized in violation of the Fourth Amendment could nonetheless be introduced at trial.

The Roberts Court followed by actually reversing the presumption of *Mapp* by holding that exclusion of illegally seized evidence was not the default rule, but rather only a "last resort." *Hudson v. Michigan*, 547 U.S. 586 (2006). And most recently, the court held that exclusion would be allowed only where the police conduct was "deliberate, reckless or grossly negligent" or where there was "systemic negligence." *Herring v. U.S.*, 129 S.Ct. 695 (2009).

The Fourth Amendment exclusionary rule is clearly on life support. And this is why you need to look at an article that develops a new constitutional theory for excluding illegally seized evidence at a criminal trial. The title of the article says it all: "The Due Process Exclusionary Rule." Richard M. Re, "The Due Process Exclusionary Rule," 127 *Harvard Law Review* 1885 (2014).

Richard M. Re, a professor at UCLA School of Law, confronts the fact I noted earlier: The problem of relying on the Fourth Amendment's language to support exclusion of illegally seized evidence is that the text simply does not support it. So what is the constitutional wrong in using illegally seized evidence?

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The wrong, according to Re, is that when a defendant is convicted based on unconstitutionally obtained evidence, that person's "liberty" has been "deprived" without "due process of law."

The violation of the Fourth Amendment does not per se re-

#### CRIMINAL PROCEDURE

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sult in the exclusion of evidence. Rather, the illegal search, in addition to the use of the evidence at trial, violates the lawful process that is guaranteed by the due process clause. Thus, the exclusionary rule is a product of the Fourth Amendment and the due process clause working together.

Viewing this issue through a due process lens solves what Re refers to as the "decades-old question of how there can be a justification for requiring the Fourth Amendment exclusionary rule if there is no violation of the Fourth Amendment in the criminal trial?"

Now the link is straightforward: The due process clause exclusionary rule is based on two separate constitutional violations.

First, the Fourth Amendment violation is complete at the time of the illegal seizure of evidence. Second, a due process clause violation occurs at trial because the use of unconstitutionally seized evidence violates the defendant's right to liberty under principles of due process.

But for this theory to work it has to be shown that the Fourth Amendment is a procedural constraint that specifically relates to evidence gathered for a criminal

trial. In Re's words, "[T]he Fourth Amendment must be a 'process' that criminal defendants are 'due' before they suffer a deprivation of 'liberty.'" And the problem is that when the Fourth Amendment was ratified in 1791, there was no government gathering of evidence prior to trial, because there were no police forces even in existence.

But Re notes that the Supreme Court has increasingly extended trial guarantees to include pre-trial police investigations.

For example, the Sixth Amendment right to counsel precludes police from certain types of evidence-gathering before trial. A person can invoke the Fifth Amendment right to remain silent long before a criminal prosecution is initiated.

By the same token, pretrial police investigation is now so ingrained that due process is implicated when the prosecution attempts to introduce evidence that has been obtained through a Fourth Amendment violation. In sum, the Fourth Amendment can now be seen as a source of "process" for the acquisition of a criminal verdict.

For years, critics of the Fourth Amendment exclusionary rule have complained that the use of illegally seized evidence at trial implicated no interest protected by the Fourth Amendment because its violation was complete at the time of the pretrial search.

Re responds with the intriguing suggestion that the legal wrong of the prosecution's use of illegally seized evidence against the defendant at trial should be viewed as a violation of due process that mandates suppression.

It may be late in the day to offer such a novel constitutional argument. But as the Fourth Amendment exclusionary rule continues to be dismantled, Re's due process clause exclusionary rule merits the serious attention of criminal defense attorneys.