No. 14-1373

IN THE

Supreme Court of the United States

STATE OF UTAH,

Petitioner,

vs.

EDWARD JOSEPH STRIEFF, JR.,

Respondent.

On Writ of Certiorari to the Supreme Court of Utah

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

QUESTION PRESENTED

Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

United States Statutes

Secondary Authorities

IN THE

Supreme Court of the United States

STATE OF UTAH,

Petitioner,

vs.

EDWARD JOSEPH STRIEFF, JR.,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In this case, the Utah Supreme Court has ordered the suppression of evidence in a criminal case even though there is no question of the validity or probative value of the evidence. Such a distortion of the truth-seeking function of criminal justice is contrary to the rights of victims of crime and law-abiding citizens that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts are stated in the Brief for Petitioner. We summarize them briefly here, based on the opinions in the state courts, to frame the issues in this brief. Based on an anonymous tip, South Salt Lake police conducted surveillance of a home to determine if drug selling activity was being conducted there. See Court of Appeals Opinion, App. to Pet. for Cert. 38. Officer Doug Fackrell observed a level of short-term activity that in his experience was consistent with drug activity. *Ibid*. He saw defendant Edward Strieff leave the house and believed he was a short-term visitor. He identified himself as a police officer and asked Strieff for identification. *Ibid*. A warrants check turned up an outstanding warrant for Strieff. A search incident to arrest found methamphetamine, a scale with powder residue, and a glass pipe. *Id*., at 39.

The district court "found Officer Fackrell credible when he testified that he believed that the information known to him at the time was sufficient to support a reasonable, articulable suspicion to detain Strieff, a belief that later turned out to be mistaken." *Id*., at 67. The District Court denied Strieff's suppression motion on an attenuation theory, App. to Pet. for Cert. 100, and a divided Court of Appeals affirmed on the same basis. *Id*., at 83-84. The Utah Supreme Court reversed,

while noting that the law in this area has gaps and is confused. See *id*., at 34-36.

The State of Utah petitioned for certiorari, stating the question as "Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?" While this question includes the attenuation analysis engaged in by the Utah courts, it also fairly includes the question of whether suppression of evidence should be the consequence of an investigatory stop that is later found to be unlawful but was not clearly so at the time.

SUMMARY OF ARGUMENT

This Court has looked to the original understanding of the Fourth Amendment to determine its substantive scope, and it should also consider the original understanding in determining the remedies to be apply when it is violated.

Most authorities agree that there was no rule of exclusion of evidence in criminal cases on the ground that it was obtained via an illegal search or search or seizure at the time the Fourth Amendment was adopted or in the years closely following. There is no evidence in the text or history of the Amendment that such a remedy was ever contemplated. Justice Story, in an opinion written within the lifetime of many of the Framers, tells us that otherwise competent evidence had never been excluded on the basis of having been illegally obtained.

There is one academic who claims an originalist basis for the exclusionary rule, but his articles are deeply flawed. The cases he cites fail to provide any such basis for the rule.

Because the Fourth Amendment applies to the States only through the Fourteenth, understanding at the time of the adoption of the latter is also important. The leading treatise on evidence of the day states that there was no such rule, and proponents of exclusion have not found a single reported case to contradict it.

In *Maryland* v. *King*, the Maryland Court of Appeals would have turned a rapist loose to terrorize women again if this Court had not chosen the case to be one of the very few it reviews on the merits. Such a horror is not a "more majestic conception" of this nation's fundamental law. Freeing known criminals despite clear, valid proof of guilt is a dirty business to be engaged in, if at all, only in the circumstances that most clearly demand it.

It is time to stop speaking of good-faith exceptions to a general rule of exclusion and instead require a clear violation of law that was clearly established at the time of the search as an element of the exclusionary rule. If existing limitations of civil remedies would thereby leave a gap that is deemed constitutionally intolerable, the answer is to reconsider those limitations. Civil remedies are the remedies contemplated at the founding and authorized by Congress under its power to enforce the Fourteenth Amendment, and that is the proper place to provide any remedy deemed essential.

The question of "reasonable suspicion" in this case was a close one, and the officer reasonably believed he had met the requirement. There is no violation of the Fourth Amendment in this case that rises to the level that warrants the extreme remedy of suppressing evidence.

ARGUMENT

I. Exclusion of evidence under the Fourth Amendment as incorporated in the Fourteenth has no basis in the original understanding.

A. Understanding at the Founding.

> "The Fourth Amendment protects 'against unreasonable searches and seizures' of (among other things) the person. In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia* v. *Moore*, 553 U. S. 164, 168 (2008).

If this Court looks to the original understanding to determine the substance of the Fourth Amendment, should it not also look to the original understanding to determine remedies? There is nearly unanimous agreement that the rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), has no basis in the original understanding.

> "Tort law remedies were thus clearly the ones presupposed by the Framers of the Fourth Amendment and counterpart state constitutional provisions. Supporters of the exclusionary rule cannot point to a single major statement from the Founding — or even the antebellum or Reconstruction eras — supporting Fourth Amendment exclusion of evidence in a criminal trial. Indeed, the idea of exclusion was so implausible that it seems almost never to have been urged by criminal defendants, despite the large incentive that they had to do so, in the vast number of criminal cases litigated in the century after Independence." Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 786

> (1994); see also Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 624 (1999) ("there was no exclusionary rule in the late eighteenth century").

The exclusionary rule's most prominent defenders therefore resort to other arguments for it, not even attempting to defend it on the basis of original understanding. See, *e.g.*, Kamisar, In Defense of the Search and Seizure Exclusionary Rule, 26 Harv. J. L. & Pub. Pol'y 119 (2003); 1 W. LaFave, Search and Seizure § 1.1, p. 8 (5th ed. 2012).

This view of the original understanding is nearly unanimous, but not quite. One exclusion advocate, Professor Roger Roots of Jarvis Christian College in Hawkins, Texas, has claimed to make an originalist case for the exclusionary rule. See Roots, The Originalist Case for the Fourth Amendment Exclusionary Rule, 45 Gonzaga L. Rev. 1 (2010) (cited below as "Roots"); Roots, The Framers' Fourth Amendment Exclusionary Rule: The Mounting Evidence, 15 Nev. L. J. 42 (2014) (cited below as "Roots, Mounting"). Roots's thesis has been widely dismissed, even by other advocates of exclusion. See, *e.g.*, Gray, A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence, 50 Am. Crim. L. Rev. 1, 14, n. 82 (2013). Even so, for the sake of completeness *amicus* will review here why a jurisprudence of original understanding has no room for a rule of exclusion of physical evidence from a criminal trial on the ground that it was obtained in violation of the Fourth Amendment.

Given the paucity of statements about exclusion of evidence in early cases and treatises, the first question is what conclusion we should draw from an absence of decisions. A scarcity of cases finding, applying, or even mentioning a rule or practice, combined with a

dismissive rejection when a party finally does attempt it, is strong evidence that no such rule or practice existed. A similar situation arises in the historical debates over the use of habeas corpus as a postconviction collateral attack. In federal criminal cases, this Court originally had no jurisdiction to hear appeals from convictions, but it did have habeas corpus jurisdiction, creating a powerful incentive to use habeas corpus as a postconviction remedy if such usage had been available. Yet the habeas jurisdiction was exercised entirely pretrial, see, *e.g.*, *Ex parte Bollman*, 4 Cranch (8 U. S.) 75 (1807), it was not until 1830 that any convicted defendant attempted to use the writ postconviction, see *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 199 (1830) (attorney general had not found a single case), and that attempt was unequivocally rejected. See *id*., at 207; see also Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 928-932 (1998). In this state of affairs, there is no originalist argument that the Suspension Clause requires postconviction review of judgments of courts of competent jurisdiction, and anyone claiming such a constitutional requirement must resort to nonoriginalist arguments. See *Felker* v. *Turpin*, 518 U. S. 651, 663-664 (1996).

So it is with the exclusionary rule. As Amar notes, *supra*, there is a complete absence of authority of a rule of exclusion from evidence in criminal trials on the basis of illegal search or seizure from the dawn of the common law through Reconstruction. From pre-Revolution England we have only one civil case on exclusion, *Jordan* v. *Lewis*, 104 Eng. Rep. 618 (K. B. 1740). *Jordan* was a malicious prosecution case in which the copy of the prior indictment had been obtained illegally, contrary to an order of the court. It was held that the illegal copy was nonetheless admissible. "[T]he Court could not refuse receiving it in

evidence; nor could the Court take notice in what manner it was obtained." *Id*., at 618. *Jordan* was followed in *Legatt* v. *Tollervey*, 14 East 302, 104 Eng. Rep. 617 (K. B. 1811). These cases are not squarely on point, to be sure, but they do indicate that a breach of the law in obtaining evidence was not a ground for excluding it as a general rule.

The famous pre-Revolution English cases of *Wilkes* v. *Wood*, Lofft 1, 98 Eng. Rep. 489 (C. P. 1763) and *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C. P. 1765)[2] are civil tort cases fully consistent with the thesis that civil remedies and not exclusion from evidence in criminal trials was originally understood to be the remedy for unreasonable searches and seizures. See A. Amar, The Law of the Land: A Grand Tour of Our Constitutional Republic 239-240 (2015). Roots puts great stock in dicta from Lord Camden in the Howell version of *Entick*:

> "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty." *Entick*, 19 How. St. Tr., at 1073.

---

2. The two versions of *Entick* are not the same, and there is some dispute as to which was known in America at the time of the founding. See Davies, 98 Mich. L. Rev., at 565-566, n. 25; Roots, 45 Gonzaga L. Rev., at 41, n. 260. It does not matter for the purpose of this point, as neither version remotely supports a constitutional rule of exclusion of physical evidence with no testimonial characteristics.

In context, this passage is part of a discourse on the special status of papers. Lord Camden denied that warrants could issue for papers. He expressly distinguished searches for stolen goods, a practice that was established by this time. See 19 How. St. Tr., at 1067. To the extent that this passage carries any implication for exclusion of evidence from a criminal trial, it is clearly based on a self-incrimination theory and limited by its rationale to evidence of a type that implicates that distinct right, *i.e.*, evidence with testimonial content.

Roots also cites a passage from *Wilkes*. "'Nothing can be more unjust in itself,' the *Wilkes* opinion proclaimed, 'than that the proof of a man's guilt shall be extracted from his own bosom,' in specific reference to the seizure of Wilkes' *papers*." Roots, *supra*, at 40 (quoting 98 Eng. Rep., at 490, emphasis in original). Again, this is about papers and implies a self-incrimination theory, and there is no basis for extrapolating it to evidence generally. The evidence in the present case is contraband, more like stolen goods, as the possessor has no right to possess it, and nothing at all like papers.

Whatever the rule may have been for papers, there were search warrants for stolen goods in the founding era, and there were established requirements for their validity. If there were a rule of suppression, either of the goods themselves or the "fruit" of the search in the form of testimony of the searchers, we would expect to find it stated in the search warrant sections of the treatises of that era.

The treatises available in the period shortly after the founding were largely English treatises, sometimes published with American notes. One of these is Joseph Chitty's treatise on criminal law, published in Philadelphia in 1819 with notes by Richard Peters, later a reporter of this Court. This treatise has a section on

search warrants, J. Chitty, Criminal Law 52-58 (Peters ed. 1819), and it is remarkable for what it says but even more for what it does not say.

Chitty confirms that, notwithstanding remarks by Coke, the legality of search warrants for stolen goods was clearly established. See *id*., at 52. Warrants for papers were distinguishable and not allowed. See Chitty, at 52-53. "If on return of the warrant . . . it appear [that the goods] were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, in order that the party robbed may proceed by indicting and convicting the offender, to have restitution." *Id*., at 54. Roots's assertion that search warrants for stolen goods were solely for the purpose of immediately restoring them to the rightful owner, Roots, *supra*, at 16, is thus mistaken.

Chitty addresses remedies as well, a discussion consisting entirely of the circumstances under which the executing officer or the issuing magistrate may be held liable in a civil action for damages. *Id*., at 55-58. In a treatise devoted to criminal law, the section on search warrants discusses remedies for invalid warrants or illegal execution entirely in terms of civil liability, with not a single word about the trial of the criminal case. This is truly a circumstance where silence speaks volumes.

Roots claims that the absence of any discussion of search and seizure issues in criminal cases can be explained by the lack of appellate jurisdiction in criminal cases in early America and the minimal reporting of cases in pre-Revolutionary America. See Roots, *supra*, at 15-16. This explanation does not fly. Case reports in England before the Revolution and in America in the years after the founding included trials, not just appeals. If there had been a practice of excluding evidence from criminal trials for any of the numerous defects

that Chitty notes in the civil remedy cases, that practice would appear in those reports and in the criminal law treatises based on them. The real reason for a lack of search and seizure issues in both pre-Revolution English cases and post-Revolution American cases is that the legality of search and seizure was generally irrelevant to the criminal case *because there was no rule of exclusion*.

The absence of any exclusionary rule at the time of the founding is further confirmed by the reaction of courts when such a rule was finally suggested. The clearest indication within the lifetime of many of the Framers comes from Justice Story in a famous slave ship seizure case, *United States* v. *La Jeune Eugenie*, 26 F. Cas. 832, No. 15,551 (C. C.D. Mass. 1822). The vessel was captured by the renowned Lt. Robert Stockton.[3] Evidence showed that the vessel was engaged in the slave trade and raised doubt as to whether a purported transfer from American to French ownership was a subterfuge to avoid the American confiscation penalty for slave trading. *Id.*, at 840-841. But was that evidence admissible? Justice Story responded to an argument it was not, and the response is worth quoting in full.

> "As to the other position, that if there exists no right of visitation and search, there cannot exist any right to use any evidence, which may be discovered by such search, I must be permitted to doubt, if that doctrine, in the full

3. Stockton was later promoted to commodore, became the military governor of California during the Mexican War, and was elected to the Senate from New Jersey. See Biographical Directory of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000942. The cities of Stockton, California and Fort Stockton, Texas are named in his honor.

> extent of its meaning, can be supported. In the ordinary administration of municipal law *the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained*. If it is competent or pertinent evidence, and *not in its own nature objectionable*, as having been created by constraint, or oppression, such as confessions extorted by threats or fraud, the evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the person, or by any other forcible and illegal means. The law deliberates not on the mode, by which it has come to the possession of the party, but on its value in establishing itself as satisfactory proof. In many instances, and especially on trials for crimes, evidence is often obtained from the possession of the offender by force or by contrivances, which one could not easily reconcile to a delicate sense of propriety, or support upon the foundations of municipal law. Yet I am not aware, that such evidence has upon that account *ever* been dismissed for incompetency." *Id*., at 843-844 (emphasis added).

Supporters of exclusion attempt to dismiss this sweeping language. Roots, *supra*, at 55-56, n. 345, relies on the discussion in Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 664-665, n. 320 (1999). It is true enough that Justice Story was not addressing a constitutional Fourth Amendment claim, see *ibid*., as that amendment has no application to a search outside the limits of the United States of a ship claimed to be foreign owned. See *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 267 (1990). However, Justice Story spoke in sweeping terms of competent

evidence that had been obtained by "illegal means," and there is no reason to believe that the law at this point in history distinguished remedies for Fourth Amendment violations from remedies for violations of other sources of search-and-seizure law. Given that the Fourth Amendment "codified a *pre-existing* right" rather than creating a new one, *District of Columbia* v. *Heller*, 554 U. S. 570, 592 (2008) (emphasis in original), one would not expect that it was thought to provide a unique remedy for constitutional violations as opposed to violations of the pre-existing statutory and common-law rules it was intended to protect from encroachment.

Davies further contends that the claimants made only an argument tying the right to seize to a right to search and that Justice Story's statement about exclusion from evidence is dictum. See 98 Mich. L. Rev., at 665, n. 320. That is simply not the case. Justice Story noted that two related objections have been made, one for jurisdiction over the case and one for use of evidence, *La Jeune Eugenie*, 26 F. Cas., at 842, and his statement about exclusion is clearly addressed to "the other position," *id*., at 843, *i.e.*, the evidence argument. This is holding, not dictum, and it is directly addressed to an exclusionary argument by the claimants.

In his final attempt to sink the schooner, Davies contends, "Story did not refer to a *government* arrest . . . . All Story's dictum stands for is the unexceptional proposition that exclusion is not appropriate when evidence has been obtained through an unlawful *private* arrest and search — a view which has never been seriously challenged." 98 Mich. L. Rev., at 665, n. 320 (emphasis in original). On the well-known facts of this famous case, this is an absurd statement. Of course this is government action. Lt. Stockton was an officer of the United States Navy commanding a Navy ship, and the search and seizure was in furtherance of the

mission to suppress the slave trade that the ship had been specifically built for and dispatched to perform. See U. S. Navy, Naval History and Heritage Command, USS Alligator (2014), http://www.history.navy.mil/research/underwater-archaeology/sites-and-projects/ship-wrecksites/uss-alligator.html; 25 F. Cas, at 833. There is no need to refer specifically to government action when the whole case is about government action. Justice Story's comparison to the "ordinary administration of municipal law" certainly includes searches by constables. If the law for searches by government officers differed from the law for searches by private parties, there would be no point in referring to the latter in the disposition of this case.

The attempt to dismiss *La Jeune Eugenie* fails. Justice Story's statement tells us just what it says on its face. Just 31 years after the ratification of the Fourth Amendment, a rule of evidence excluding "competent and pertinent evidence . . . not in its own nature objectionable" on the ground of it "hav[ing] been obtained . . . by . . . illegal means" was unknown to American law. There is no basis for believing that the law recognized distinctions between Fourth Amendment violations and other violations or between searches by government officers and those by private parties. The Fourth Amendment, as understood in the founding era, included no exclusionary rule.

B. Original Exclusion Fool's Gold.

To support his originalist case for a Fourth Amendment exclusionary rule, Roots sifts through the silt of old cases, panning for the gold nugget of a case that actually supports exclusion. Though he claims to find nuggets, on examination they all turn out to be fool's gold.

We should be clear what kind of precedent would actually support an originalist argument for the exclusionary rule. The central vice of the rule, in Judge Cardozo's famous denunciation of it, is that "[t]he criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926). A gold nugget would be a case from the founding era or earlier in which a person known to be guilty of a crime based on evidence "not in its own nature objectionable" escaped punishment because of a defect in the process by which that evidence was obtained.

Roots's Exhibit A is *Frisbie* v. *Butler*, 1 Kirby 213 (Conn. Sup. Ct. 1787). "In the plainest language imaginable," he says, "the Connecticut Superior Court concluded in 1787 that the use of an unlawful warrant 'vitiates' subsequent criminal proceedings. The only question was 'how far.' " Roots, Mounting, 15 Nev. L. J., at 46. The *Frisbie* court actually said there was no need to decide the effect of the invalidity of the warrant.

The opinion is only two paragraphs, and the first paragraph is the dispositive one. The conviction is reversed because the facts alleged and proved did not amount to theft, the crime Frisbie was convicted of, but only a trespass. *Frisbie*, 1 Kirby, at 215. In modern terms, this is a *Jackson* v. *Virginia*, 443 U. S. 307 (1979) reversal. "With regard to the warrant," it was "clearly illegal" because it was "general" rather than limited to particular places, "yet, how far this vitiates the proceedings upon the arraignment, may be a question, which is not necessary now to determine . . . ." 1 Kirby, at 215. No evidence is suppressed. No one known to be a criminal goes free. Frisbie goes free because all the evidence presented, regardless of how it was obtained, did not establish the elements of the

offense. Even the dictum about the warrant does not even hint that a person actually known to be guilty should be freed due to an invalid warrant. There is nothing here to give any support whatever to an originalist case for the exclusionary rule.

Roots also puts great stock in early habeas corpus cases. He seems puzzled that other Fourth Amendment scholars do not regard *Ex parte Burford*, 3 Cranch (7 U. S.) 448 (1806) and *Ex parte Bollman*, 4 Cranch (8 U. S.) 75 (1807) as significant Fourth Amendment cases. See Roots, 45 Gonzaga L. Rev., at 26, n. 166. That is because they are not.

Burford, like many early reports, is the reporter's summary of oral proceedings. Burford was committed by justices of the peace of Alexandria, then part of the District of Columbia, for failure to post security, 3 Cranch, at 449-450, after having been declared "an evil doer and disturber of the peace . . . ." *Id.*, at 450-451. This Court ordered Burford released because "the warrant of commitment was illegal, for want of stating some good cause certain, supported by oath." *Id.*, at 453. Roots calls this an exclusionary remedy and claims that it demonstrates "that jurists of the Founding Era . . . regarded Fourth Amendment violations . . . as meriting total exclusion from custody, regardless of the 'guilt' of suspects." Roots, *supra*, at 24-25. It is nothing of the sort. This is a straightforward, routine, pretrial habeas corpus case. Burford was released because no legal cause had been shown to detain him.[4]

The nonexclusionary nature of the remedy is made clear at the end of the case. "If the prisoner is

4. *Bollman* is like *Frisbie*. Once the elements of the charged offense are understood, the evidence did not support a charge of treason. See *Ex parte Bollman*, 4 Cranch, at 134-135. This is a substantive criminal law case.

really a person of ill fame, and ought to find sureties for his good behaviour, the justices [of the peace] may proceed *de novo*, and take care that their proceedings are regular." *Burford*, 3 Cranch, at 453. Roots quotes that sentence but gets its import completely backwards. See Roots, *supra*, at 25, n. 154. Release on habeas corpus due to a defective commitment was not an exclusionary remedy because it did not preclude a new arrest and prosecution for the same offense. Roots's habeas argument fails because a release on habeas corpus on these grounds was without prejudice. See Gray, A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence, 50 Am. Crim. L. Rev. 1, 14, n. 82 (2013).

Evidently at oral argument in *Burford* this Court was quickly satisfied that the original commitment by the justices of the peace had been illegal and directed counsel to address whether the circuit court had redetermined cause for commitment on habeas corpus. See 3 Cranch, at 453. The Court discharged Burford only after finding that no *de novo* determination had been made by the circuit court. This reflects the settled rule that if the totality of the evidence showed good cause to commit the prisoner the habeas court need not discharge him "however defective the warrant may be, but [it is the duty of the court] to remand him or commit him *de novo*." R. Hurd, Habeas Corpus 415 (2d ed. 1876). The established legality of such a procedure negates Roots's claim that "habeas corpus operated as an antebellum exclusionary rule . . . ." Roots, *supra*, at 21.

Reprosecution after discharge, noted as an alternative at the end of *Burford*, was upheld in *Ex parte Milburn*, 9 Pet. (34 U. S.) 704 (1835). Milburn had been discharged on habeas corpus due to a defective

process and claimed this as a bar to a subsequent arrest on new process. Justice Story, writing for the Court, made short work of the argument.

> "[This] ground is . . . unmaintainable. A discharge of a party under a writ of habeas corpus from the process under which he is imprisoned, discharges him from any further confinement under the process; but not under any other process which may be issued against him under the same indictment." *Id*., at 710.

The foundation of Roots's argument from the habeas corpus cases, that habeas is an exclusionary remedy, is "unmaintainable."

The search for founding era authority for a Fourth Amendment exclusionary rule comes up with nothing of value. Even though there are many cases about the legality of searches and seizures brought by aggrieved searchees seeking civil remedies, none have been found excluding otherwise admissible evidence from a criminal trial on the basis of how it was obtained or in any way mandating that a known criminal go free because a constable (or justice of the peace) blundered on a search or seizure. The cases claimed to grant exclusionary remedies do nothing of the sort.

C. Understanding in Reconstruction.

On one aspect of the Fourth Amendment, there is no doubt whatever of the original understanding – it was solely a limitation on the federal government and did not apply to the states. *Barron* v. *Mayor of Baltimore*, 7 Pet. (32 U. S.) 243, 250 (1833) (Bill of Rights generally); *Smith* v. *Maryland*, 59 U. S. 71, 76 (1855) (Fourth Amendment specifically). After passage of the Fourteenth Amendment, this Court held in the *Slaughter-House Cases*, 16 Wall. (83 U. S.) 36 (1873),

that the Privileges or Immunities Clause does not incorporate the Bill of Rights. See *McDonald* v. *City of Chicago*, 561 U. S. 742, 754-756 (2010). In the twentieth century and into the twenty-first, this Court has addressed "incorporation" questions under the Due Process Clause of the Fourteenth Amendment, see *id*., at 758, although the Privileges or Immunities Clause still has its supporters. See *id*., at 805-858 (Thomas, J., concurring in part and concurring in the judgment).

In a state case, then, original understanding should include not only the understanding at the founding but also the understanding during Reconstruction. Was the exclusion of evidence from a criminal trial on the ground that it was obtained in violation of the Fourth Amendment or a state's kindred constitutional provision generally understood to be an element of due process of law (or, alternatively, a privilege or immunity of citizens of the United States) in 1868? No.

If a Reconstruction legislator wanted to know the answer to the exclusionary rule question, where would he look? If he considered it a criminal procedure question, he would likely have looked to Joel Prentice Bishop. If he considered it an evidence question, he would likely have looked to Simon Greenleaf. We should look there as well.

At the beginning of Reconstruction, Bishop's discussion of evidence consists of a discussion of burden of proof, presumptions, some aspects of the law of witnesses, and considerations that relate to particular offenses. On other matters, and that would include physical evidence, he says the law of evidence is largely the same as in civil cases and is appropriately addressed in treatises on that subject. See J. Bishop, Criminal Procedure §§ 483, 529, pp. 336, 377 (1866). In the section on search warrants, he cites *Commonwealth* v. *Dana*, 43 Mass. (2 Met.) 329 (1841), discussed *infra*, for

its substantive holding but makes no mention of the exclusionary rule or any claim for such a rule. Bishop §§ 716-719, at 503-504. So let us turn to Greenleaf.

The first edition of Greenleaf's treatise on evidence contains a chapter on evidence excluded for reasons of public policy with no mention of exclusion on the ground of having been obtained in an illegal or unconstitutional search or seizure. See S. Greenleaf, Evidence §§ 236-254, pp. 272-290 (1st ed. 1842). This silence is fully consistent with the inference from *La Jeune Eugenie*, see *supra*, at 11, that such a ground of exclusion was unheard of and no one was even arguing for it.

In 1841, the operator of an illegal lottery in Massachusetts finally made the constitution-based evidence argument in a criminal case, *Commonwealth* v. *Dana*, *supra*, and the Massachusetts Supreme Court squarely rejected it. The defendant claimed the warrant, the statute authorizing it, and the manner of execution violated a section of the Massachusetts Bill of Rights that is nearly identical to the Fourth Amendment. See 43 Mass., at 334. The court rejected the argument on substantive grounds, see *id*., at 334-337, but the court also based its holding on an alternate ground.

> "There is another conclusive answer to all these objections. Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the

> issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. This point was decided in the cases of *Legatt* v. *Tollervey*, 14 East, 302, and *Jordan* v. *Lewis*, 14 East, 306, note; and we are entirely satisfied that the principle on which these cases were decided is sound and well established. On either of these grounds, therefore, we are of the opinion that the evidence on the part of the Commonwealth was rightfully admitted." *Id*., at 337-338.

This is an alternate holding, not obiter dicta. The question was squarely raised, and one of the most prestigious courts in the country at the time squarely held that the legality of the warrant was irrelevant to the admissibility of the evidence.[5]

In the third edition, Greenleaf added a new section to the public policy exclusion chapter stating the rule of *Dana*. See S. Greenleaf, Evidence § 254a, pp. 368-369 (3d ed. 1846). If other states had a contrary rule and decided the issue the other way, we would expect to see that noted in later editions, but we do not. This section remained substantially unchanged in nine subsequent editions, and our hypothetical Reconstruction legislator would have found this in the leading authority on evidence at the time:

> "§ 254*a*. It may be mentioned in this place, that though papers and other subjects of

5. "Admitting" in this passage clearly means "assuming for the sake of argument." Of course Justice Wilde did not "admit" that the evidence was illegally obtained in the sense of a concession, as he had just discussed at some length why it was not.

> evidence may have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The Court will not take notice of how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question.[2]
>
> [2] Commonwealth *v*. Dana, 2 Met. 329, 337; Leggett *v*. Tollervey, 14 East, 302; Jordan *v*. Lewis, Id. 306, note." S. Greenleaf, Evidence § 254a, p. 287 (Redfield 12th ed. 1866).

Roots notes that only two jurisdictions had precedents squarely rejecting exclusionary arguments, see Roots, at 54-55, but he fails to cite a single case *accepting* such an argument. The obvious implication seems to escape him. The other states had no precedents either way because it was so obvious to lawyers at the time that there was no rule of exclusion that none of them made that objection.

The federal question in this case is whether the Utah District Court violated the Fourteenth Amendment by admitting the evidence at issue. As that Amendment was understood at the time of its adoption, the answer is no beyond question.

II. Turning a known criminal loose to prey again is an abomination, not a "more majestic conception" of our fundamental law.

On September 21, 2003, a nightmare came true for Vonette W., a 53-year-old resident of Salisbury, Maryland. An unidentified man broke into her home. "The man, wearing a scarf over his face, a hat pulled over his head, and armed with a hand gun, entered

Vonette W.'s bedroom, and ordered her not to look at him. While holding the gun to her head, he raped Vonette W. After the rape, he left with Vonette W.'s purse." *King* v. *State*, 425 Md. 550, 557-558, 42 A. 3d 549, 553-554 (2012), rev'd *Maryland* v. *King*, 569 U. S. __, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

More nightmares were to follow. First, the case remained unsolved for six years until Alonzo King was arrested for another violent crime and DNA tested, at which point a hit in Maryland's DNA database identified him as the perpetrator. King's motion to suppress was denied, and he was convicted and sentenced to life in prison. See *id*., at 560, 42 A. 3d, at 555. Then came one more nightmare. The highest court of Maryland decided that the DNA collection violated the Fourth Amendment and that "the evidence presented at trial should have been suppressed . . . ." *Id*., at 561, 42 A. 3d, at 556.

Although nominally a remand for a new trial, see *ibid*., the Maryland high court's decision in reality was an order for King to go free of the rape charge, given that the critical evidence was suppressed. After whatever time he served for the subsequent assault, he would be free to prey upon new victims and seek revenge against prior ones. What must Vonette W. have thought upon hearing that news?[6]

Fortunately, this case was one of the handful out of thousands that this Court accepts for review on the merits. Fortunately, again, the state prevailed on the merits, but only by the narrowest of margins. It could easily have gone the other way. There is no exception

---

6. Of course, *amicus* has not intruded upon Ms. W.'s privacy by seeking her out and asking for her reaction, but it is not difficult to make a reasonable estimate of what she must have felt or what most people in that situation would feel.

to the exclusionary rule for crimes against individuals, as distinguished from so-called "victimless" crimes, or even for crimes of violence. See 1 LaFave § 1.2(e), at 61-65 (criticizing proposal for such an exception). A person candidly advising Ms. W. on the day the Maryland Court of Appeals' decision was rendered would have had to tell her there was a 99% probability that Alonzo King would be back on the street before long.

Could any person with a basic sense of decency have looked Vonette W. in the eye on that day and told her that this result reflects "a more majestic conception" of our fundamental law? That phrase has been used by those who maintain that the exclusionary rule is something more than a pragmatic tool for deterrence, something to be employed even where no deterrent function is served. See *Arizona* v. *Evans*, 514 U. S. 1, 18 (1995) (Stevens, J., dissenting); *Herring* v. *United States*, 555 U. S. 135, 151 (2009) (Ginsburg, J., dissenting). There is nothing remotely majestic about turning a known rapist loose to rape again. It is a vile, dirty deed. Reasonable people might argue that it is the lesser of two evils, but it is beyond the bounds of reason to contend it is not evil at all but rather "majestic."

Supporters of exclusion may argue that suppression in cases of violence is uncommon and that most suppressions occur in so-called "victimless" crimes like the present one. Numbers are irrelevant. If one rapist or one murderer goes back on the street because valid, probative evidence has been suppressed, that is one too many.

More than once in recent history, this Court has thrown decades of precedent on the scrap heap because it was found to be contrary to the Constitution as originally understood. See *Apprendi* v. *New Jersey*, 530 U. S. 466, 478-484 (2000) (originalist basis of *Apprendi* rule); *Ring* v. *Arizona*, 536 U. S. 584 (2002) (overruling

massively relied-on precedent squarely on point as inconsistent with *Apprendi*); *Crawford* v. *Washington*, 541 U. S. 36, 60 (2004) (overruling test that had governed Confrontation Clause questions for a quarter century "to reflect more accurately the original understanding").

The rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), is so clearly unsupportable under the original understanding of the Fourth and Fourteenth Amendments that *stare decisis* cannot save it. It involves the courts in the dirty business of putting certainly guilty criminals back on the street, a business far dirtier than that of accepting evidence obtained in searches conducted with a shade less evidence than what is required. "Extreme sanction" is indeed an entirely accurate characterization, cf. *Arizona* v. *Evans*, 514 U. S., at 19 (Stevens, J., dissenting), and such a sanction requires exceptionally compelling justification.

The simplest answer would be to acknowledge that this Court got it right the first time in *Wolf* v. *Colorado*, 338 U. S. 25, 33 (1949), and overrule *Mapp*. If this extreme sanction is not (or not yet) to be scrapped altogether, the long line of cases limiting that sanction to the circumstances in which it is most needed and effective should continue. See *Davis* v. *United States*, 564 U. S. __, 131 S. Ct. 2419, 2426-2427, 180 L. Ed. 2d 285, 293-294 (2011). At a minimum, the Court should make explicit what *Davis* and *Herring* imply. Because the extreme sanction is justified (if ever) only in cases of police culpability, such culpability should be an element of the defendant's case for exclusion rather than continuing to catalog various types of nonculpability as "good-faith exceptions" to a general rule of exclusion.

III. At a minimum, a clear violation of clearly established law should be an element of the defendant's case for suppression.

In a Fourth Amendment case, such as the present case, where a search or seizure is challenged on the basis of the quantum of evidence possessed by the officer, the standard is inherently vague, and it is judged by all the facts and circumstances, not rigid rules. See *Illinois* v. *Gates*, 462 U. S. 213, 238 (1983). Judging whether a given collection of evidence amounts to "reasonable suspicion" or "probable cause" is very often a "judgment call" on which reasonable people can differ. In the present case, the officer believed he had enough, but the prosecutor decided he was a tad short. The trial judge agreed that there was no flagrant violation, as did a majority of the intermediate appellate court. See Brief for Petitioner 3-5.

There are, of course, many areas of law where a person's conduct is judged according to general standards where application to a particular case is a matter of opinion. See *Johnson* v. *United States*, 576 U. S. __, 135 S. Ct. 2551, 2561, 192 L. Ed. 2d 569, 582-583 (2015). For most fuzzy lines in the law, though, the conduct close to the sanction line is conduct society wants to discourage. When a person injures another in an auto accident, for example, recklessness may be criminal, negligence may be actionable in tort, and something a bit short of actionable negligence is still poor driving. The lines between these stages are fuzzy, but there is not a fuzzy line between what a good driver should do and what you can go to jail for. That is a wide gulf. If the vague definition of recklessness and a severe sanction for it deters some conduct that is not reckless, that conduct is at least negligent, and the overdeterrence has no ill effect.

Not so with search and seizure. The line between reasonable suspicion and a tad less is the line between commendable performance of duty and violation of fundamental law. Once the quantum of evidence of criminal conduct reaches the threshold the Constitution requires, society's interest in enforcement of the law makes a search a desirable action and one we do not want to discourage. Overdeterrence effectively moves the constitutional line from where the Constitution places it, depriving the people of the ability to decide through the democratic process how they want their police to balance the interests of privacy and law enforcement.

Professor LaFave argues that a good-faith exception rewards police departments for poor training. See 1 LaFave § 1.2(d), pp. 58-59. His argument assumes that the line is knowable and that sufficient training will enable police to know and not guess where it is. Not so. The police department could buy every officer his own copy of Professor LaFave's six-volume treatise and give him six months off with pay to read it cover-to-cover, and the officer still could not predict how a court will rule on probable cause in a close case.

The exclusionary rule is a sanction that this Court, not the Constitution itself, has imposed on law enforcement when a search or seizure is determined to have exceeded the limits set by the Fourth Amendment. If this sanction were to be were judged by the same standards as the criminal sanctions society imposes on defendants, it would be unconstitutional. The sanction is, in many cases, grossly disproportionate to the offense. Cf. *Kennedy* v. *Louisiana*, 554 U. S. 407, 419 (2008). Briefly stopping a person on a sidewalk and asking for identification, in the good-faith and very nearly correct belief that one has the required reasonable suspicion that criminal activity is afoot, is a trivial

offense. Yet society as a whole, the officer's employer, is deprived of its ability to enforce the law as a sanction. While in this case the defendant's offense is also relatively minor, that is not always so, as noted in Part II, *supra*.

The exclusionary rule as it presently exists has no proportionality requirement, and as a result it can produce a grossly disproportionate sanction. It is one thing for a criminal to go free because a police officer willingly, recklessly, or ignorantly trampled on a constitutional right, and it is quite another to let him go free because he is determined after the fact to have transgressed a general standard in circumstances so close that the outcome may depend on which judge is assigned to the case. In such a case the injustice of letting the criminal go free may greatly exceed the injustice of letting a minor Fourth Amendment violation go unsanctioned. That is the truth behind Judge Cardozo's famous "constable blunders" statement. That is the truth that caused the people of California to abolish their state's exclusionary rule in 1982. See *California* v. *Greenwood*, 486 U. S. 35, 44-45 (1988).[7]

Overdeterrence and the disproportionate sanction of turning criminals loose for minor transgressions can largely be avoided by making the clarity of the violation an element of the defendant's suppression motion. That is, a defendant moving to suppress the product of a search or seizure must establish that the search or seizure was clearly a violation of the law as clearly established at the time. This is essentially the

---

7. In so doing, the people of California abrogated a decision heavily relied on by the *Mapp* Court as evidence of a movement in favor of exclusion. See *Mapp*, 367 U. S., at 651-653. When the people of California got to vote on exclusion directly, they rejected it.

same standard that applies at present in qualified immunity cases. See *Anderson* v. *Creighton*, 483 U. S. 635, 641 (1987).

The obvious counter-argument is that requiring clarity for suppression would result in underdeterrence on the other side of the gray zone. That is, police could "get away with" searches and seizures when their evidence is actually somewhat short of the constitutional standard of probable cause or reasonable suspicion. A necessary component of this argument is that other remedies are inadequate, at least as they presently exist.

One answer to this argument is that a lack of deterrence of minor violations just barely on the wrong side of the line, such as the stop in the present case, is the lesser evil. A second answer is that other remedies do not need to remain in their present state.

Congress has authorized federal courts to provide the same remedy that was understood to be the sole remedy in the Founding era — civil liability. See 42 U. S. C. § 1983. It has addressed the problem of the amounts in controversy being too small to make legal representation feasible by providing for awards of attorneys' fees. See 42 U. S. C. § 1988; *Hudson* v. *Michigan*, 547 U. S. 586, 597-598 (2006).

If the § 1983 civil remedy is inadequate, it is not because of anything in the text of the statute. The principal barriers to recovery are created in decisions of this Court denying respondeat superior liability for the employing agency, *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 691 (1978), and providing qualified immunity for the individual officer. *Anderson*, 483 U. S., at 638-639. *Amicus* would not suggest diminishing qualified immunity for officers. The officers who protect us are taking enough flak from

enough directions already without adding personal liability for good-faith searches. However, if a remedy gap exists, and if it is thought constitutionally necessary to fill it, further tweaking the *Monell* rule seems to be a better candidate than suppressing evidence in criminal cases.

If this Court must shape remedies to enforce search and seizure rights as incorporated in the Fourteenth Amendment, and if it must choose between civil liability and suppression of evidence in criminal cases, which should it choose? We should keep in mind that the Fourteenth Amendment itself expressly vests the power to enforce it in Congress. U. S. Const., Amdt. 14, § 5. On one hand we have the remedy that was understood to be the sole remedy in the founding era *and* has been expressly authorized by Congress. On the other hand we have a remedy that is neither. The choice is obvious.

In the present case, the standard of reasonable suspicion for a brief stop was clearly established law. See *Terry* v. *Ohio*, 392 U. S. 1 (1968). Detective Fackrell could reasonably believe that he had reasonable suspicion under that standard, and therefore the evidence should not be suppressed. Cf. *Anderson*, 483 U. S., at 641 (qualified immunity in similar circumstances).

CONCLUSION

The decision of the Supreme Court of Utah should be reversed.

December, 2015

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation