REMEMBERING JUDGE TOWNSEND

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1984 is here. Criminal defense attorneys should pause to remember the admonitions of one of Georgia's most memorable judges and ardent defenders of individual rights. Judge J. M. C. "Red" Townsend was born in Wildwood, Dade County, in 1898 and died at Emory University Hospital on October 6, 1961. Judge Townsend, whose Memorial is at 105 Ga. App. XXIII (1962), served as a Superior Court Judge in the Cherokee Circuit from 1944 until 1947 and as a member of the Court of Appeals of Georgia from 1947 until his death in 1961.

Few men have been as beloved as Judge Townsend. People loved him because of his humanity and goodness. They also loved him because he constantly reminded them, lawyers as well as laymen, of the transcendent value of the principles underlying and protected by the Bill of Rights and by the notion of due process of law.

Take, for example, Judge Townsend's dissenting opinions in *Bacon v. State*, 85 Ga. App. 630, 70 S. E. 2d 54 (1952), and *Hodges v. State*, 85 Ga. App. 617, 70 S. E. 2d 48 (1952). In both these cases Judge Townsend resolutely opposed any inroads on the "other crimes rule" (which bars introduction of substantive evidence that the defendant has committed crimes other than those he is on trial for) and expressed deep concern that the various exceptions to the rule were swallowing up the rule. Shortly thereafter the Supreme Court of Georgia adopted Judge Townsend's views and cited his opinions approvingly. *Bacon v. State*, 209 Ga. 261, 71 S. E. 2d 615 (1952).

Judge Townsend's greatest opinion, however, was the one in *Winston v. State*, 79 Ga. App. 711, 54 S. E. 2d 354 (1949), where he eloquently urged adoption of the rule forbidding the use of illegally seized evidence in criminal trials. Judge Townsend wrote:

> Speaking for the writer alone, the decisions of our of our Supreme Court making admissible evidence obtained through the criminal acts of peace officers amounting to an unlawful, unwarranted, unreasonable, and reprehensible violation of our two most sacred documents aside from Holy Writ, present a most deplorable paradox. These decisions have had the effect of making but an empty shell of what was intended by the framers of these great guaranties of liberty to be the living seed of freedom. The Bills of Rights were ordained and established to protect the citizens against his public officers. A part of the first provision of the Constitution of the State of Georgia (article I, section 1, paragraph 1) provides as follows: "Public officers are the trustees and servants of the people, and at all times amenable to them."
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> The foregoing decisions of our Supreme Court, coupled with the law not in conflict therewith, say in effect to the peace officers of this State, "You shall not make an unreasonable search and seizure of the of the home of a citizen, because his home is his castle. The breaking down of his door is a trespass for which you

> are responsible both civilly and criminally. An unlawful search and seizure by you amounts to a violation of the most sacred rights under or organic law. However, if you do make such a search, bring the evidence thus obtained into a court of justice, and it will be given the sameconsideration as evidence honorably obtained. This does not make our peace officers the servants and trustees contemplated in the first provision of our Constitution, nor does it confine our courts to this category. It affords a poor protection to the citizen from the outlawry of his public servants.

Id. at 714-15, 54 S. E. 2d at 356. See also *Goodwin v. Allen*, 89 Ga. App. 187, 78 S. E. 2d 804 (1953) (Townsend, J.); Townsend, *Should the Law Suffer Itself to Become an Enemy to Its Own Reign?*, 12 Ga. B. J. 139 (1949); see generally Wilkes, *"A Most Deplorable Paradox": Admitting Illegally Obtained Evidence in Georgia-Past, Present, and Future*, 11 Ga. L. Rev. 105, 125-26 (1976).

The noble principles Judge Townsend advocated remain as valid and important as ever, but they have fallen on hard times. For example, Judge Townsend's concern about the exceptions to the other crimes rule would reduce the rule to a mere formality have been largely realized. See, e.g., *State v. Johnson*, 246 Ga. 654, 272 S. E. 2d 321 (1980) (evidence that defendant, charged with selling marijuana, sold marijuana to drug agents on two subsequent occasions is admissible to prove identity); *McCarty v. State*, 165 Ga. App. 241, 299 S. E. 2d 95 (1983) (evidence that defendant, charged with stealing from his employer, stole from another employer over 11 years previously is admissible to show pattern of conduct).

Moreover, the exclusionary rule in search and seizure, applied to Georgia just months before Judge Townsend's death, see *Mapp v. Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L.Ed. 2d 1081 (1961), is in grave danger of being destroyed or of being eviscerated even more than it has been during the last few years. See, e.g., *Illinois v. Gates*, 462 U. S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

If we re-read Judge Townsend's opinions, if we reconsider his philosophy, we may be able to restore balance to criminal procedure and thereby end the grotesque and dangerous advantage that now favors the state and its police, prosecutors, and agents. That is why remembering Judge Townsend is so important.