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The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment

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THE INEVITABLE DISCOVERY EXCEPTION, PRIMARY EVIDENCE, AND THE EMASCULATION OF THE FOURTH AMENDMENT

INTRODUCTION

The exclusionary rule ordinarily bars the admission of evidence obtained by the government in violation of the Constitution.[1] The rule extends beyond the direct products of illegal government conduct to evidence derived from illegal conduct,[2] or "fruit of the poisonous tree."[3]

1. The Supreme Court first adopted the exclusionary rule in 1886 in Boyd v. United States, 116 U.S. 616 (1886), a case involving self-incrimination. *See* B. Wilson, Enforcing the Fourth Amendment 48 (1986). The rule applies to violations of the fourth amendment, *see* Weeks v. United States, 232 U.S. 383, 388 (1914), fifth amendment, *see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964), and sixth amendment. *See* Nix v. Williams, 467 U.S. 431, 442 (1984); United States v. Wade, 388 U.S. 218, 239-40 (1967). The exclusionary rule also has been applied to statutory violations. *See, e.g.*, Nardone v. United States, 308 U.S. 338, 339-40 (1939) (excluding evidence obtained in violation of wiretapping statute).

Although for many years the exclusionary rule only applied in federal court proceedings, *see* Weeks v. United States, 232 U.S. 383, 398 (1914), the Court has extended the exclusionary rule, through the fourteenth amendment, to prohibit the introduction of unlawfully obtained evidence in state courts. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961). Although the Court has held that the exclusionary rule is constitutionally required, *see id.* at 648-49, recently the Court has indicated otherwise. *See* United States v. Leon, 468 U.S. 897, 906 (1984) (the rule is a " 'judicially created remedy . . . rather than a personal constitutional right of the party aggrieved' ") (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). *But see* Leon, 468 U.S. at 931-38 (Brennan, J., dissenting) (arguing that exclusionary rule is constitutionally required). If the exclusionary rule is not constitutionally required, then it cannot be imposed on state courts via the fourteenth amendment. *See id.* at 940 (Brennan, J., dissenting). Because the Court has not expressly overruled *Mapp*, confusion exists whether the rule is required.

There is a strong argument that, unlike fourth amendment violations in which the constitutional violation is the unreasonable search and not the admission of the evidence, a sixth amendment violation occurs when the evidence is admitted at trial. *See* United States v. Brown, 699 F.2d 585, 590 (2d Cir. 1983) (balancing approach impermissible to determine admissibility of statement obtained in violation of sixth amendment); Bishop v. Rose, 701 F.2d 1150, 1157 (6th Cir. 1983) (admission of evidence is separate and additional violation of sixth amendment); Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 889 (1981) (sixth amendment violation occurs when evidence is admitted at trial). If the admission of the evidence is a constitutional violation in itself, the exclusionary rule is constitutionally required for sixth amendment violations. *But see* Maine v. Molton, 106 S. Ct. 477, 495-96 (1985) (Burger, C.J., dissenting) (advocating balancing approach to determine admissibility, thereby rejecting any contention that exclusion is constitutionally required).

2. *See* Nardone v. United States, 308 U.S. 338, 340 (1939) (to forbid direct use of illegal conduct without curbing indirect use of illegal conduct, would invite illegal activity); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."); *see also* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (in deciding whether evidence has been derived from illegal conduct, question is not whether evidence would have come to light "but for" illegal conduct, but rather whether evidence has been obtained by exploitation of illegality).

3. Nardone v. United States, 308 U.S. 338, 341 (1939). Justice Frankfurter's termi-

Although the rule originally was established to deter official misconduct[4] and preserve the integrity of the judicial system,[5] the judicial integrity rationale has lost favor in recent years[6] leading the courts to invoke the exclusionary rule primarily to deter illegal conduct.[7] Recognizing the cost imposed on society by the exclusionary rule,[8] the Supreme Court has

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nology gave rise to the "fruit of the poisonous tree" doctrine, which has been used extensively in exclusionary rule cases. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 442 (1984); Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); J. Hall, Search and Seizure § 22 (1982 & Supp. 1986); Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 Calif. L. Rev. 579 (1968). The term fruit of the poisonous tree is synonymous with "derivative" evidence, "secondary" evidence, *see* 4 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 11.4, at 370 (2d ed. 1987), and "indirect product" of illegal activity. *See Wong Sun*, 371 U.S. at 484.

The fruit of the poisonous tree doctrine excludes evidence that is the indirect result of illegal police activity. In *Nardone*, the fruit of the poisonous tree was evidence that had become accessible to the police by use of unlawful wiretaps. *Nardone*, 308 U.S. at 339. The illegally intercepted telephone conversations clearly were inadmissible. *See id.* The defendant was given an opportunity to prove that other testimony that had been admitted against him had been derived from the telephone conversations. *See id.* at 341. All evidence that the defendant could prove had been derived from the illegal conduct also would be admissible. *See id.*

4. Mapp v. Ohio, 367 U.S. 643, 648 (1961) (exclusionary rule is constitutionally required "deterrent safeguard"); Elkins v. United States, 364 U.S. 206, 217 (1960) (purpose of exclusionary rule is "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").

5. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 12-13 (1968) (quoting *Elkins*, 364 U.S. at 222); Mapp v. Ohio, 367 U.S. 643, 649 (1961) (same); *see also* J. Hall, *supra* note 3, § 20:6, at 584-85 (1982) (discussing deterrence and judicial integrity rationales for exclusionary rule).

6. *See, e.g.*, United States v. Janis, 428 U.S. 433, 446 (1976) (" 'prime purpose' of the rule, if not the sole one," is deterrence) (quoting United States v. Calandra, 414 U.S. 338, 347 (1974)); Stone v. Powell, 428 U.S. 465, 485-86 (1976) (judicial integrity rationale has limited justification for exclusion of probative evidence); *see also* Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 Harv. L. Rev. 1, 4-6 (1975) (discussing Court's recent disfavor of integrity rationale); Wasserstorm & Mertens, *The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?*, 22 Am. Crim. L. Rev. 85, 87 (1984) (same).

The Supreme Court recently has suggested that the deterrence and judicial integrity rationales are the same. *See* United States v. Leon, 468 U.S. 897, 921 n.22 (1984) (whether admission of illegally obtained evidence "offends the integrity of the court 'is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose' ") (quoting United States v. Janis, 428 U.S. 433, 459 n.35 (1976)).

7. *See* Nix v. Williams, 467 U.S. 431, 442-43 (1984); Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Janis, 428 U.S. 433, 446 (1976); United States v. Peltier, 422 U.S. 531, 536-39 (1975); United States v. Calandra, 414 U.S. 338, 347-48 (1974); Mapp v. Ohio, 367 U.S. 643, 656 (1961); Elkins v. United States, 364 U.S. 206, 217 (1960).

8. *See* United States v. Leon, 468 U.S. 897, 907-08 (1984) (exclusion interferes with truth-finding process and may " 'generat[e] disrespect for the law and the administration of justice' ") (quoting Stone v. Powell, 428 U.S. 465, 491 (1976)); Nix v. Williams, 467 U.S. 431, 442-43 (1984) (exclusion of probative evidence is "drastic and socially costly course"; high social cost is letting obviously guilty people go free); State v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (exclusion of relevant evidence often harms society by permitting criminal "to go free because the constable has blundered"), *cert. denied*, 270 U.S. 657 (1926); *see also* J. Hirschel, Fourth Amendment Rights 13-15 (1979) (discussing alleged ineffectiveness of rule, cost to administration of justice and alleged hampering of legitimate police activity); Wingo, *Growing Disillusionment with the Exclusionary Rule*,

developed exceptions[9] that apply when the deterrent purpose would not

25 Sw. L.J. 573 (1971) (criticizing rule and proposing alternatives to protect individual rights).

9. The Court announced the first exception to the exclusionary rule in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The "independent source" exception allows the admission of illegally discovered evidence if it was also discovered by an independent legal source. *See id.* at 392. The independent legal source for the evidence removes the taint from the poisonous fruit by providing a "clean path" to the evidence. *See The Supreme Court, 1983 Term—Leading Cases*, 98 Harv. L. Rev. 87, 123 (1984) [hereinafter *Supreme Court*]; *see also* Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 Colum. L. Rev. 88, 89 n.13 (1974) [hereinafter *Inevitable Discovery*] (independent source for evidence breaks causal link between illegal conduct and acquisition of evidence).

The Court established a second exception, "attenuation," in Nardone v. United States, 308 U.S. 338 (1939). Although "sophisticated argument" could prove a causal relationship between illegal conduct and challenged evidence, the Court stated that "such connection may have become so attenuated as to dissipate the taint." *Id.* at 341. In effect, the attenuation exception places a limit on the fruit of the poisonous tree doctrine. In Wong Sun v. United States, 371 U.S. 471 (1963), the Court further clarified the attenuation doctrine stating that the question to be answered as to derivative evidence is " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " *Id.* at 488 (quoting J. Maguire, Evidence of Guilt 221 (1959)).

Recently, the Court recognized a third exception, the inevitable discovery rule. Nix v. Williams, 467 U.S. 431 (1984). This rule admits illegally obtained evidence that inevitably would have been discovered by legal means. *Id.* at 444. In essence, it is a "hypothetical independent source" exception. The term "hypothetical independent source" more accurately describes the exception than does the common appellation "inevitable discovery." *See* State v. Williams, 285 N.W.2d 248, 256 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980). The court, however, used the latter in light of its "overwhelming use" by other courts and commentators. *Id.* at 256 n.3.

Finally, the Court has recognized a "good faith" exception to the exclusionary rule. *See* United States v. Leon, 468 U.S. 897 (1984). This exception allows the admission of evidence obtained in a search pursuant to an invalid warrant if the police were objectively reasonable in relying on the validity of the warrant. *See id.* at 913. The good faith exception is the only exception that clearly applies to primary evidence. *See* J. Hall, *supra* note 3, §§ 22:5-22:7, 22:11-22:15, 23:3 (discussing independent source, attenuation, and inevitable discovery exceptions in chapter on fruit of the poisonous tree doctrine, and discussing good faith exception in separate chapter on exclusionary rule); Project, *Fourteenth Annual Review of Criminal Procedure*, 73 Geo. L.J. 243, 388, 392 (1984) [hereinafter *Criminal Procedure*] (discussing good faith exception as exception to exclusionary rule in general, and discussing independent source, attenuation and inevitable discovery exceptions as exceptions to fruit of the poisonous tree doctrine only).

The good faith exception recently has been extended to admit evidence obtained under objectively reasonable reliance on an unconstitutional statute. *See* Illinois v. Krull, 107 S. Ct. 1160, 1167-68 (1987).

In addition to the four exceptions, the scope of the exclusionary rule has been limited "to those areas where its remedial objectives are thought most efficaciously served." United States v. Calandra, 414 U.S. 338, 348 (1974). On this reasoning, the Court has held that the exclusionary rule does not apply in grand jury proceedings, *see id.* at 351-52, in civil proceedings, *see* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1051 (1984); United States v. Janis, 428 U.S. 433, 454 (1976), for impeachment purposes in criminal trials, *see* United States v. Havens, 446 U.S. 620, 627-28 (1980), or to challenge a state conviction in a federal habeas corpus proceeding, when the state provided "an opportunity for full and fair litigation of a Fourth Amendment claim." Stone v. Powell, 428 U.S. 465, 494-95 (1976).

be achieved.[10]

One such exception, the inevitable discovery rule, admits illegally obtained evidence that the court finds ultimately would have been obtained by legal means.[11] Recently, confusion has arisen as to the scope of this exception. The exception clearly applies to the fruit of the poisonous tree, or derivative evidence,[12] but the courts are divided as to whether the exception also should apply to primary evidence.[13] Although the Supreme Court has suggested that the exception is limited to derivative evidence,[14] the Court has not clarified whether primary evidence ever is

10. The deterrence rationale does not apply to illegally obtained evidence that is also obtained through an independent legal source, because the government is not put in a better position as a result of the illegal conduct. *See* Nix v. Williams, 467 U.S. 431, 443 (1984). Rather, the police are put in the same position they would have been in if no illegal conduct had occurred. *See id.*

Nor does the deterrence rationale apply to attenuated evidence. *See* United States v. Ceccolini, 435 U.S. 268, 280 (1978) ("Application of the exclusionary rule in [an attenuation] situation could not have the slightest deterrent effect on the behavior of [a police] officer . . . ."); United States v. Brookins, 614 F.2d 1037, 1047 (5th Cir. 1980) (attenuation exception is justified because it is unlikely that suppression of attenuated derivative evidence would deter police misconduct).

The inevitable discovery exception similarly is justified because excluding evidence that inevitably would have been discovered through legal means would not deter police misconduct. *See* Nix v. Williams, 467 U.S. 431, 443-44 (1984).

Finally, the good faith exception is based on the reasoning that, "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." United States v. Leon, 468 U.S. 897, 921 (1984).

11. *See* Nix v. Williams, 467 U.S. 431, 443-44 (1984). For a general discussion of the inevitable discovery exception, see Note, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 Hofstra L. Rev. 137, 154-64 (1976).

12. *See* Nix v. Williams, 467 U.S. 431, 443-44 (1984) (applying inevitable discovery exception to derivative evidence—testimony concerning condition and location of victim's body).

13. *Compare* United States v. Pimentel, 810 F.2d 366, 368 (2d Cir. 1987) (holding that inevitable discovery exception applies to primary as well as derivative evidence); United States v. Apker, 705 F.2d 293, 307 (8th Cir.) (admitting primary evidence although court acknowledged that inevitable discovery exception is usually applied to derivative evidence), *cert. denied*, 466 U.S. 950 (1984) *with* People v. Stith, 69 N.Y.2d 313, 319, 506 N.E.2d 911, 914, 514 N.Y.S.2d 201, 204 (1987) (refusing to apply inevitable discovery exception to primary evidence); State v. Schoondermark, 717 P.2d 504, 506 (Colo. Ct. App. 1985) (inevitable discovery exception most frequently is applied to derivative evidence and it is inapplicable to primary evidence), *cert. granted*, 717 P.2d 504 (1986); People v. Young, 159 Cal. App. 3d 138, 205 Cal. Rptr. 402, 409 (1984) (inevitable discovery exception applies only to evidence obtained as indirect product of other evidence illegally seized); Hernandez v. Superior Court, 110 Cal. App. 3d 355, 361, 185 Cal. Rptr. 127, 130 (1980) (same); State v. Crossen, 21 Or. App. 835, 838, 536 P.2d 1263, 1264 (1975) ("The inevitable discovery rule has been applied only to purge the taint from derivative, not primary, evidence and we see no reason . . . to extend it to the latter."). *See also* Stokes v. State, 289 Md. 155, 165 n.4, 423 A.2d 552, 557 n.4 (1980) (discussing split in authority over applying inevitable discovery exception to primary evidence).

14. In Brewer v. Williams, 430 U.S. 387 (1977), the Court noted:

> While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body [primary evidence] can constitutionally be admitted into evidence, evidence of where the body was

admissible under the inevitable discovery exception.[15]

This Note argues that permitting the prosecution to use the direct products of official misconduct at trial substantially weakens the protections afforded by the fourth amendment.[16] Part I of this Note discusses the Supreme Court's adoption of the inevitable discovery exception. Part II discusses the distinction between primary and derivative evidence and the implications of applying the inevitable discovery exception to primary evidence. Part III argues that in light of the Supreme Court's refusal to apply the independent source exception to primary evidence, it is inconsistent with Supreme Court precedent to apply the inevitable discovery exception to primary evidence, and therefore primary evidence should not be admissible under the inevitable discovery exception.

I. THE SUPREME COURT'S ADOPTION OF THE INEVITABLE DISCOVERY RULE

In *Nix v. Williams* (*Williams II*)[17] the Supreme Court adopted the inevitable discovery rule,[18] forty years after it was first applied by lower courts as an exception to the exclusionary rule.[19] *Williams II* arose from

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found and of its condition [derivative evidence] might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams.

Id. at 407 n.12.

15. In Nix v. Williams, 467 U.S. 431 (1984), the admissibility of the primary evidence was not at issue, because the government did not seek to admit the primary evidence at trial. *See id.* at 437. The Court earlier had noted in dictum, however, that it would be unconstitutional to admit primary evidence on grounds of inevitable discovery. *See* Brewer v. Williams, 430 U.S. 387, 407 n.12 (1977) (quoted *supra* note 14).

The Court may take the opportunity to resolve the issue in a case in which the Court of Appeals for the First Circuit applied the inevitable discovery exception to primary evidence. *See* United States v. Moscatiello, 771 F.2d 589 (1st Cir. 1985), *cert. granted*, 107 S. Ct. 1368 (1987).

16. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV.

The direct product of a fifth or sixth amendment violation is testimony. It is difficult for the prosecution to prove that testimony inevitably would have been discovered. Thus, extending the inevitable discovery exception to primary evidence is less likely to diminish fifth and sixth amendment protections than fourth amendment protections. In light of the low standard of proof required by the Supreme Court, however, *see* Nix v. Williams, 467 U.S. 431, 444 (1984) (requiring proof of inevitable discovery by preponderance of evidence), it is possible that the prosecution could prove inevitable discovery of testimony and that fifth and sixth amendment rights will be impinged if the inevitable discovery exception is applied to primary evidence.

17. 467 U.S. 431 (1984).

18. *See id.* at 444.

19. The first clear application of the inevitable discovery rule occurred in Somer v. United States, 138 F.2d 790 (2d Cir. 1943). *See* 4 W. LaFave, *supra* note 3, § 11.4, at 379. In *Somer*, federal agents illegally searched the defendant's apartment. *Somer*, 138

an earlier case, *Brewer v. Williams (Williams I)*[20] in which the Court had affirmed a grant of habeas corpus relief to the defendant.[21]

In *Williams I*, the defendant had been convicted for the murder of a ten-year-old girl.[22] At trial, certain incriminating statements made by the defendant, and testimony concerning the condition and location of the victim's body, had been admitted into evidence over the defendant's objections.[23] The Supreme Court affirmed the reversal of the defendant's conviction because the evidence admitted against him had been obtained in violation of his sixth amendment right to counsel.[24] The Court held that, by subjecting the defendant to a manipulative "Christian burial speech,"[25] the police had deliberately elicited the defendant's incriminat-

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F.2d at 791. While the police were in the defendant's home, the defendant's wife told them that the defendant would be returning shortly. *See id.* The agents arrested the defendant upon his return and then found illicit liquor in his car. *See id.* The evidence discovered in the car was admissible upon a showing that the agents would have waited for the defendant independently of what the defendant's wife had told them. *See id.*

Before the Supreme Court adopted the inevitable discovery exception, every circuit having jurisdiction over criminal matters had endorsed the exception. *See* Wayne v. United States, 318 F.2d 205, 209 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); United States v. Bienvenue, 632 F.2d 910, 914 (1st Cir. 1980); United States v. Fisher, 700 F.2d 780, 784 (2d Cir. 1983); Virgin Islands v. Gereau, 502 F.2d 914, 927-28 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970); United States v. Brookins, 614 F.2d 1037, 1042, 1044 (5th Cir. 1980); Papp v. Jago, 656 F.2d 221, 222 (6th Cir.), *cert. denied*, 454 U.S. 1035 (1981); United States v. Hill, 447 F.2d 817, 819 (7th Cir. 1971); United States v. Apker, 705 F.2d 293, 306-07 (8th Cir.), *cert. denied*, 466 U.S. 950 (1984); United States v. Schmidt, 573 F.2d 1057, 1065-66 n.9 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978); United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982); United States v. Wilson, 671 F.2d 1291, 1293-94 (11th Cir.), *cert. denied*, 459 U.S. 844 (1982).

The courts of appeals differed on the burden of proof necessary to determine the inevitability of legal discovery. *Compare Gereau*, 502 F.2d at 927 (requiring clear and convincing evidence) *with* United States v. Schipani, 289 F. Supp. 43, 64 (E.D.N.Y. 1968) (requiring proof by preponderance of evidence), *aff'd*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). *See also* J. Hall, *supra* note 3, § 22:13, at 637 & n.19 (courts differ on burden of proof); *Supreme Court*, *supra* note 9, at 123 n.45 (noting that lower courts had more stringent versions of exception than that adopted by Supreme Court). The Supreme Court has since held that the appropriate standard of proof is a preponderance of the evidence. *See* Nix v. Williams, 467 U.S. 431, 444 (1984).

20. 430 U.S. 387 (1977).

21. *See id.* at 406.

22. *See id.* at 389-90.

23. *See id.* at 393-94.

24. *See id.* at 406.

25. *See id.* at 392. The defendant was arrested for the abduction of a young girl who was missing and was last seen in Des Moines, Iowa. *See Williams I*, 430 U.S. at 390. Unaccompanied by his lawyer, he was transported by the police from Davenport to Des Moines. *See id.* at 390-91. The police had agreed with the defendant's counsel not to question the defendant during the journey. *See id.* One of the police officers, Detective Leaming, knew that the defendant was a former mental patient and that he was deeply religious. *See id.* at 392. During the journey, Detective Leaming, addressing the defendant as "Reverend," said that they were predicting several inches of snow overnight and that probably nobody would be able to find the body once it was covered with snow, and he felt they should stop and locate the body because "the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on

ing statements which led them to the body.

The State of Iowa retried the defendant.[26] In the second trial, the defendant's incriminating statements were not admitted into evidence, but testimony relating to the condition and location of the body was admitted.[27] The Supreme Court approved the second murder conviction[28] in *Williams II* by adopting the inevitable discovery exception to the exclusionary rule.[29] The Court held that illegally obtained evidence is admissible if the prosecution can show by a preponderance of the evidence that the information "ultimately or inevitably would have been discovered by lawful means."[30] Although the evidence admitted at trial concerning the location and condition of the victim's body was obtained in violation of the sixth amendment,[31] at the time the police illegally interrogated the defendant approximately 200 volunteers were searching for the body.[32] The Court held that the evidence respecting the body was admissible because it inevitably would have been discovered by the search party.[33]

The Court justified the inevitable discovery exception by stating that the exclusionary rule seeks to restore the police to the same position they would have been in absent the illegality.[34] The Court reasoned that excluding evidence that inevitably would have been discovered puts the police in a *worse* position than they would have occupied.[35] Admitting the evidence does not put them in a *better* position because they would have discovered the evidence even absent the illegal conduct.[36] Thus, the admission of evidence under the inevitable discovery exception restores the "status quo ante."[37]

Christmas Eve and murdered." *Id.* at 392-93. The defendant then directed the police to the body. *See id.* at 393. *See generally*, Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is "Interrogation"? When Does it Matter?*, 67 Geo. L.J. 1, 1-24 (1978) (discussing "Christian burial speech").

26. *See* Nix v. Williams, 467 U.S. 431, 437 (1984).

27. *See id.*

28. *See id.* at 450. The Iowa court convicted the defendant of first-degree murder and sentenced him to life imprisonment. *See id.* at 438. The conviction was affirmed by the Supreme Court of Iowa, State v. Williams, 285 N.W.2d 248 (Iowa 1979), and the District Court for the Southern District of Iowa denied the defendant's petition for a writ of habeas corpus. *See* Williams v. Nix, 528 F. Supp. 664, 675 (S.D. Iowa 1981), *rev'd*, 700 F.2d 1164 (1983), *rev'd*, 467 U.S. 431 (1984). The Court of Appeals for the Eighth Circuit reversed the denial of habeas corpus relief, *see* Williams v. Nix, 700 F.2d 1164, 1173 (1983), *rev'd*, 467 U.S. 431 (1984), and the Supreme Court reversed the Eighth Circuit's issuance of a writ of habeas corpus. *See* Nix v. Williams, 467 U.S. 431, 450 (1984).

29. *Williams II*, 467 U.S. at 444.

30. *Id.*

31. *See id.* at 437.

32. *See id.* at 448. Teams of volunteers were assigned to systematically search different areas. *See id.* at 449. The body was discovered two and one-half miles from where the volunteers had been searching, in a culvert that was one of the kinds of places the teams had been directed to search. *See id.*

33. *Id.* at 449-50.

34. *See id.* at 443.

35. *See id.* at 443-44.

36. *See id.*

37. *See Supreme Court*, *supra* note 9, at 122.

Although in *Williams II*, the inevitable discovery rule was used to admit derivative evidence obtained in violation of the defendant's sixth amendment rights,[38] lower courts have extended the holding to apply to fourth and fifth amendment violations.[39]

II. *PRIMARY V. DERIVATIVE EVIDENCE*

Primary evidence is evidence obtained directly from the illegal conduct.[40] Derivative evidence is evidence derived from or "come at by exploitation of"[41] the illegal activity.[42] For example, in *Williams II*, the defendant's incriminating statements were primary evidence and the body was derivative evidence.[43] An illegal search may result in the police obtaining a confession,[44] or discovering a witness who is willing to testify against the defendant,[45] or uncovering facts that lead to another search.[46] Any evidence discovered in the illegal search is primary evidence. The confession, the witness's testimony, or the evidence found in the second search is derivative evidence.

Although the Supreme Court has applied the inevitable discovery exception only to derivative evidence,[47] some lower courts have extended the exception to primary evidence.[48] Other courts have expressly refused

38. *Williams I*, 467 U.S. at 437.

39. *See, e.g.*, United States v. Martinez-Gallegos, 807 F.2d 868, 870 (9th Cir. 1987) (fifth amendment); United States v. Cherry, 759 F.2d 1196, 1206-07 (5th Cir. 1985) (fourth amendment), *cert. denied*, 107 S. Ct. 932 (1987).

40. *See* 4 W. LaFave, *supra* note 3, § 11.4, at 369; LaCount & Girese, *The "Inevitable Discovery" Rule, an Evolving Exception to the Constitutional Exclusionary Rule*, 40 Albany L. Rev. 438, 507 (1976).

41. Wong Sun v. United States, 371 U.S. 471, 488 (1963) (quoting J. Maguire, Evidence of Guilt 221 (1959)).

42. *See* 4.W. LaFave, *supra* note 3, at 369-70; LaCount & Girese, *supra* note 40, at 507; *see also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 361 (1974) (discussing difficulties in determining whether evidence is derivative).

43. 467 U.S. 431 (1984); *see infra* note 47.

44. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 484-85 (1963) (illegal entry and unauthorized arrest resulted in defendant's confession, which was a "fruit" of the illegality); People v. Milaski, 62 N.Y.2d 147, 156-57, 464 N.E.2d 472, 477, 476 N.Y.S.2d 104, 109 (1984) (confession, obtained four days after unlawful seizure of weapons, should have been suppressed).

45. *See, e.g.*, United States v. Ceccolini, 435 U.S. 268, 272-73 (1978); United States v. White, 746 F.2d 426, 428 (8th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985)

46. *See* J. Hall, *supra* note 3, § 22:8.

47. In Nix v. Williams, 467 U.S. 431 (1984), the Court held that testimony concerning the location and condition of the victim's body, which was derivative evidence, was admissible. *See id.* at 437. The primary evidence, the defendant's incriminating statements and testimony that he had led the police to the body, had not been admitted into evidence. *See id.* The admissibility of the primary evidence therefore was not at issue. The Court earlier had indicated, however, that the primary evidence constitutionally could not be admitted under the inevitable discovery exception. *See* Brewer v. Williams, 430 U.S. 387, 407 n.12 (1977).

48. The Court of Appeals for the Second Circuit expressly held that the inevitable discovery exception applies to primary evidence. *See* United States v. Pimentel, 810 F.2d 366, 368 (2d Cir. 1987). This decision seems inconsistent with the Second Circuit's earlier holding that primary evidence is not admissible under the independent source excep-

to apply the inevitable discovery exception to primary evidence.[49]

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tion, *see* United States v. Segura, 663 F.2d 411, 417 (2d Cir. 1981), *aff'd without opinion*, 697 F.2d 300 (2d Cir. 1982), *aff'd on other grounds*, 468 U.S. 796 (1984), but the court did not discuss the inconsistency. It is inconsistent to admit primary evidence under the inevitable discovery exception but refuse to admit primary evidence under the independent source exception because the inevitable discovery exception is merely a "hypothetical independent source" exception. *See infra* note 81 and accompanying text. The Eighth Circuit has admitted primary evidence under the inevitable discovery exception, despite acknowledging that the rule usually is applied to derivative evidence. *See* United States v. Apker, 705 F.2d 293, 307 (8th Cir.), *cert. denied*, 466 U.S. 950 (1984). Other courts have admitted primary evidence under the inevitable discovery exception without distinguishing between primary and derivative evidence. *See, e.g.*, United States v. Whitehorn, 813 F.2d 646, 650 (4th Cir. 1987) (admitting evidence discovered in illegal search that subsequently was discovered in warranted search); United States v. Silvestri, 787 F.2d 736, 746 (1st Cir. 1986) (same), *petition for cert. filed*, 55 U.S.L.W. 3337 (U.S. June 2, 1986) (No. 86-678); United States v. Andrade, 784 F.2d 1431, 1433 (9th Cir. 1986) (admitting evidence found in illegal search and subsequently discovered in valid inventory search), *aff'd on other grounds*, 816 F.2d 37 (2d Cir. 1987); United States v. Moscatiello, 771 F.2d 589, 604 (1st Cir. 1985) (admitting evidence discovered in illegal search that was subsequently discovered in warranted search), *cert. granted*, 107 S. Ct. 1368 (1987); United States v. Merriweather, 777 F.2d 503, 506 (9th Cir. 1985) (same), *cert. denied*, 106 S. Ct. 1497 (1986); United States v. Woolbright, 641 F. Supp. 1570, 1577-78 (E.D. Mo. 1986) (admitting evidence obtained in illegal search because it inevitably would have been discovered in inventory search); United States v. Martinez, 625 F. Supp. 384, 392-93 (D. Del. 1985) (same); United States v. Levasseur, 620 F. Supp. 624, 631-32 (E.D.N.Y. 1985) (admitting evidence discovered in illegal search because police would have discovered evidence in subsequent warranted search); State v. Nelson, 127 Misc. 2d 583, 587, 486 N.Y.S.2d 979, 984-85 (1985) (admitting evidence discovered in illegal search because it would have been discovered in inventory search); State v. Ferguson, 678 S.W.2d 873, 877 (Mo. Ct. App. 1984) (same).

49. *See* People v. Stith, 69 N.Y.2d 313, 319, 506 N.E.2d 911, 914, 514 N.Y.S.2d 201, 204 (1987) (refusing to apply inevitable discovery exception to primary evidence because it "would be an unacceptable dilution of the exclusionary rule"); United States v. Massey, 437 F. Supp. 843, 853 n.3 (M.D. Fla. 1977) (inevitable discovery exception allows admission of derivative evidence only); People v. Young, 205 Cal. Rptr. 402, 409 (1984) (same); Hernandez v. Superior Court, 110 Cal. App. 3d 355, 361, 185 Cal. Rptr. 127, 130 (1980) (same); State v. Schoondermark, 717 P.2d 504, 506 (Colo. Ct. App. 1985) (The inevitable discovery exception, "is most frequently applied to purge the taint from derivative evidence, not primary evidence which is the direct product of the illegal search. . . . [Therefore] the inevitable discovery rule is inapplicable to rehabilitate evidence which has been seized during a search conducted in violation of a defendant's Fourth Amendment rights.") (citations omitted), *cert. granted*, 717 P.2d 504 (1986); State v. Crossen, 21 Or. App. 835, 838, 536 P.2d 1263, 1264 (1975) ("The inevitable discovery rule has been applied only to purge the taint from derivative, not primary, evidence and [there is] no reason in this case to extend it to the latter.").

Other courts, while not expressly rejecting the application of the inevitable discovery exception to primary evidence, nevertheless have refused to apply it to primary evidence. *See* United States v. Satterfield, 743 F.2d 827, 846-47 (11th Cir. 1984) (refusing to admit evidence obtained in illegal search when warrant could have been obtained but police had not initiated process of obtaining warrant at time of misconduct), *cert. denied*, 471 U.S. 1117 (1985); United States v. Griffin, 502 F.2d 959, 961 (6th Cir.) (per curiam) (refusing to apply inevitable discovery rule on grounds that police could have obtained warrant, because "[a]ny other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment"), *cert. denied*, 419 U.S. 1050 (1974); Commonwealth v. Benoit, 382 Mass. 210, 218-19, 415 N.E.2d 818, 823 (1981) ("[W]e decline to apply the [inevitable discovery] rule in a situation where its effect would be to read out of the Constitution the requirement that the police follow certain protective procedures—in

The inevitable discovery exception, even as applied to derivative evidence, has been criticized as colliding with the fundamental purpose of the exclusionary rule.[50] Critics contend that the exception "encourage[s] police shortcuts whenever evidence can be more readily obtained by illegal than by legal means."[51] Moreover, there is concern that " 'sophisticated argument' aided by hindsight can be used to show what the police would have done in a given situation,"[52] to the extent that illegally discovered evidence will be admitted based on imagined investigations, hypothetical search warrants, and unjustified assumptions about the likelihood that evidence would not have been removed, altered, or destroyed.

In attempting to limit the inevitable discovery exception,[53] courts have required such safeguards as proof of inevitable discovery by clear and convincing evidence,[54] proof of the absence of bad faith of the

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this case, the warrant requirement of the Fourth Amendment."); People v. Knapp, 52 N.Y.2d 689, 698, 422 N.E.2d 531, 536, 439 N.Y.S.2d 871, 876 (1981) (warrantless nonexigent seizure cannot be legitimized by assuming hypothetical alternative that warrant had been obtained); State v. Johnson, 301 N.W.2d 625, 629 (N.D. 1981) ("If the inevitable discovery theory applied when a short cut [failure to obtain a warrant], was taken, . . . the net result would be that the magistrate's determination of probable cause as required by the fourth amendment would be eliminated for all practical purposes.").

50. *See* United States v. Alvarez-Porras, 643 F.2d 54, 63-65 (2d Cir.), *cert. denied*, 454 U.S. 839 (1981); United States v. Griffin, 502 F.2d 959, 961 (6th Cir.) (per curiam), *cert. denied*, 419 U.S. 1050 (1974); United States v. Castellana, 488 F.2d 65, 68 (5th Cir.), *modified*, 500 F.2d 325 (5th Cir. 1974); United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962); People v. Ramsey, 272 Cal. App. 2d 302, 313-14, 77 Cal. Rptr. 249, 256 (1969); State v. Phelps, 297 N.W.2d 769, 775 (N.D. 1980); *see also* Pitler, *supra* note 3, at 630 ("The preservation of the exclusionary rule as a viable deterrent to illicit police activity requires the spotlight to focus 'on actualities not probabilities.' ") (quoting United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962).

51. *Inevitable Discovery*, *supra* note 9, at 99; *see* United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962); People v. Superior Court, 80 Cal. App. 3d 665, 681, 145 Cal. Rptr. 795, 804 (1978); Comment, *Fruit of the Poisonous Tree — A Plea for Relevant Criteria*, 115 U. Pa. L. Rev. 1136, 1143 (1967); Note, *supra* note 11, at 159.

Because the police are "engaged in the often competitive enterprise of ferreting out crime," Johnson v. United States, 333 U.S. 10, 14 (1948), they seek incriminating evidence in the most efficient way. When illegally obtained evidence is admissible, the illegal route may be the most efficient.

52. *Inevitable Discovery*, *supra* note 9, at 155 (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)). The Supreme Court has expressed concern that sophisticated argument could prove a connection between illegal conduct and evidence sought to be admitted at trial, *see* Nardone v. United States, 308 U.S. 338, 341 (1939). Where the connection is highly attenuated, the evidence is not excluded. *See id.*

53. Most of the criticism of the inevitable discovery rule is aimed "not so much to the rule itself as to its application in a loose and unthinking fashion." 4 W. LaFave, *supra* note 3, § 11.4(a), at 381. "In carving out the 'inevitable discovery' exception to the taint doctrine, courts must use a surgeon's scalpel and not a meat axe." *Id.*; *see also* J. Hall, *supra* note 3, § 22:14, at 640 & nn.11-12 (criticizing courts for inadequately explaining their use of inevitable discovery exception).

54. *See* Virgin Islands v. Gereau, 502 F.2d 914, 927 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *see also* Nix v. Williams, 467 U.S. 431, 459 (1984) (Brennan, J., dissenting) (arguing that clear and convincing evidence standard should be required); J. Hall,

police,[55] and proof that at the time of the misconduct, the police possessed and actively were pursuing the leads that would have resulted in discovery.[56] The Supreme Court, however, has since required proof of inevitable discovery by a mere preponderence of the evidence,[57] and has rejected an absence of bad faith requirement.[58] The third safeguard, that the police must have been engaged in an ongoing investigation at the time of the misconduct, remains a matter of controversy.[59] Given that the Supreme Court has loosened the reins on the application of the inevitable discovery exception, extending the exception to primary evidence will seriously diminish fourth amendment rights.

The exclusionary rule is the primary safeguard of fourth amendment

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supra note 3, § 22:13, at 637 n.19 (citing cases that apply different burdens of proof for inevitable discovery).

55. *See* State v. Williams, 285 N.W.2d 248, 258 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980); State v. Phelps, 297 N.W.2d 769, 775 (N.D. 1980).

56. *See* United States v. Cherry, 759 F.2d 1196, 1204 (5th Cir. 1985) (citing United States v. Brookins, 614 F.2d 1037, 1042 n.2 (5th Cir. 1980)), *cert. denied*, 107 S. Ct. 932 (1987); United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982).

57. *See* Nix v. Williams, 467 U.S. 431, 444. *But see* State v. Sugar, 100 N.J. 214, 240, 495 A.2d 90, 103-04 (N.J. 1985) (rejecting *Williams II*, preponderance standard and applying clear and convincing standard as matter of state law).

58. *See Williams II*, 467 U.S. at 445.

59. The Court of Appeals for the Fifth Circuit required an ongoing investigation as a prerequisite to the application of the inevitable discovery doctrine before *Williams II* was decided. *See* United States v. Brookins, 614 F.2d 1037, 1048 (5th Cir. 1980) ("the police must show that when the illegality occurred they possessed and were actively pursuing the evidence or leads that would have led to the discovery of the challenged [evidence]"). The Fifth Circuit has reaffirmed that requirement since the Supreme Court's adoption of the inevitable discovery rule in *Williams II*. *See* United States v. Cherry, 759 F.2d 1196, 1204-05 (5th Cir. 1985), *cert. denied*, 107 S. Ct. 932 (1987). The Courts of Appeals for the Tenth and Eleventh Circuits follow the Fifth Circuit and also require an ongoing investigation at the time of the misconduct. *See* United States v. Owens, 782 F.2d 146, 152 (10th Cir. 1986); United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985). The Eleventh Circuit recently held that the inevitable discovery exception applies when the evidence inevitably would have been discovered by a private party. *See* United States v. Hernandez-Cano, 808 F.2d 779, 783 (11th Cir.), *cert. denied*, 107 S. Ct. 3194 (1987). This holding seemingly contradicts the ongoing legal investigation requirement, at least as formulated by the Fifth Circuit, because the Fifth Circuit requires that the *police* were actively pursuing the alternative source for the evidence. *See* United States v. Cherry, 759 F.2d 1196, 1204 (5th Cir. 1985), *cert. denied*, 107 S. Ct. 932 (1987). The court stated, however, that because the private party had begun the search at the time of the illegal conduct, the ongoing investigation requirement was met. *See Hernandez-Cano*, 808 F.2d at 784.

Conversely, the Court of Appeals for the First Circuit has rejected an ongoing investigation requirement, *see* United States v. Silvestri, 787 F.2d 736, 746 (1st Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3337 (U.S. June 2, 1986) (No. 86-678) and suggests a flexible approach to determining admissibility. *See id.*

The Court of Appeals for the Ninth Circuit has applied the inevitable discovery rule without concern for the presence of an ongoing legal investigation. *See* United States v. Merriweather, 777 F.2d 503, 506 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1497 (1986).

In Nix v. Williams, 467 U.S. 431 (1984) there was an ongoing investigation, *see id.* at 448-49, but the majority opinion did not state that such an investigation is necessary for the exception to apply.

rights.[60] Applying the inevitable discovery rule to primary evidence substantially weakens the deterrent effect of the exclusionary rule, and may render fourth amendment rights meaningless. If the police possess the means to acquire evidence legally, but the illegal route is faster and easier, they are not deterred from obtaining the evidence illegally because the prosecution can argue that the evidence is admissible under the inevitable discovery exception. Two examples illustrate the problem.

The clearest illustration occurs when evidence seized in a warrantless search is admitted because the police could have obtained a warrant. Some courts have admitted illegally obtained evidence on the basis that a warrant inevitably would have issued.[61] Other courts, however, have re-

60. The Constitution does not expressly provide a remedy for fourth amendment violations. *See* U.S. Const. amend. IV. Thus, the exclusionary rule was created to deter fourth amendment violations. *See supra* note 7 and accompanying text. Although some states enacted criminal sanctions for violations of the fourth amendment, *see* Mapp v. Ohio, 367 U.S. 643, 652 n.7 (1961) (citing statutes), experience demonstrated that these remedies were futile. *See id.* at 652-53. Civil remedies such as a cause of action under 42 U.S.C. § 1983 and internal police discipline also have proved inadequate to prevent unconstitutional conduct. *See* Amsterdam, *supra* note 42, at 360 & nn.137-38; Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition?"*, 16 Creighton L. Rev. 565, 617-20 (1983); Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1386-89 (1983).

61. *See* United States v. Levasseur, 620 F. Supp. 624, 631-32 (E.D.N.Y. 1985) (evidence discovered in illegal search admissible because at time it was discovered application for warrant was being prepared and evidence would have been discovered when warrant was issued), *aff'd on other grounds*, 816 F.2d 37 (2d Cir. 1987); State v. Butler, 676 S.W.2d 809, 813 (Mo. 1984) (en banc) (illegal warrantless search of premises does not require exclusion in view of *Williams II* inevitable discovery doctrine, for "a search warrant could have been obtainable").

Some courts have invoked the inevitable discovery exception to admit evidence that had been discovered during an illegal search and subsequently was seized pursuant to a valid warrant. *See, e.g.*, United States v. Whitehorn, 813 F.2d 646, 650 (4th Cir. 1987); United States v. Silvestri, 787 F.2d 736, 746 (1st Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3337 (U.S. June 2, 1986) (No. 86-678); United States v. Moscatiello, 771 F.2d 589, 603-04 (1st Cir. 1985), *cert. granted*, 107 S. Ct. 1368 (1987); United States v. Merriweather, 777 F.2d 503, 505 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1497 (1986); United States v. Levasseur, 620 F. Supp. 624, 631 (E.D.N.Y. 1985), *aff'd on other grounds*, 816 F.2d 37 (2d Cir. 1987).

These courts confuse the distinction between the two exceptions and applied the inevitable discovery exception when the evidence had an actual independent source. If the evidence is not seized in the illegal search, but seized pursuant to a later-issued warrant, the independent source exception is the applicable rule of law. *See* Nix v. Williams, 467 U.S. 431, 459 (1984) (Brennan, J., dissenting) (under independent source exception evidence "was, in fact, obtained by fully lawful means"); *see also supra* note 9 (discussing independent source exception). When, however, the evidence is seized illegally the subsequent issuance of a warrant merely provides a "hypothetical independent source" or inevitable discovery theory of admissibility. *See* Nix v. Williams, 467 U.S. 431, 459 (1984) (Brennan, J., dissenting) (under inevitable discovery exception evidence "has not actually been obtained from an independent source").

Perhaps, these courts have invoked the inevitable discovery exception because the evidence would be inadmissible under the independent source exception. *See* Segura v. United States, 468 U.S. 796, 813-14 (1984) (evidence viewed in illegal search and subse-

fused to apply the inevitable discovery exception on these grounds.[62] They reason that admitting the evidence would emasculate the warrant requirement of the fourth amendment.[63] If the police have probable cause[64] sufficient to obtain a warrant, they can bypass the requirement of submitting an affidavit to a neutral magistrate[65] and conduct a warrantless search and seizure. The evidence would be admissible upon a showing that a warrant inevitably would have issued. Moreover, when a warrant actually issues subsequent to the illegal search,[66] the government's argument of inevitability is airtight, and the police receive the

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quently seized pursuant to valid warrant is inadmissible); *infra* notes 89 & 101 and accompanying text (independent source exception does not apply to primary evidence).

62. *See* United States v. Echegoyen, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986); United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); United States v. Griffin, 502 F.2d 959, 961 (6th Cir.) (per curiam), *cert. denied*, 419 U.S. 1050 (1974); State v. Schoondermark, 717 P.2d 504, 506 (Colo. Ct. App. 1985), *cert. granted*, 717 P.2d 504 (1986); Commonwealth v. Benoit, 382 Mass. 210, 218-19, 415 N.E.2d 818, 822-23 (1981); State v. Hatton, 389 N.W.2d 229, 234 (Minn. Ct. App. 1986); People v. Knapp, 52 N.Y.2d 689, 697-98, 422 N.E.2d 531, 536, 439 N.Y.S.2d 871, 876 (1981); State v. Johnson, 301 N.W.2d 625, 629 (N.D. 1981); State v. Crossen, 21 Or. App. 835, 838, 536 P.2d 1263, 1264 (1975).

63. *See, e.g.*, United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984) (admitting evidence because warrant was later obtained, "would practically destroy the requirement that a warrant for the search of a home be obtained *before* the search takes place") (emphasis in original), *cert. denied*, 471 U.S. 1117 (1985); United States v. Griffin, 502 F.2d 959, 961 (6th Cir.) (per curiam) (admitting evidence found in illegal search "because [the police] planned to get a search warrant and had sent an officer on such a mission, would . . . tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment"), *cert. denied*, 419 U.S. 1050 (1974); State v. Hatton, 389 N.W.2d 229, 234 (Minn. Ct. App. 1986) (refusing to admit evidence on basis that police could have obtained a search warrant because "[i]f police are allowed to search when they possess no lawful means and are only required to show that lawful means could have been available even though not pursued, the narrow 'inevitable discovery' exception would 'swallow' the entire Fourth Amendment protection.").

64. Probable cause exists when a reasonable person would "conclude from the facts and circumstances that a crime occurred or that evidence of a crime is located in the place to be searched." J. Hall, *supra* note 3, § 5:8, at 148. *See* Illinois v. Gates, 462 U.S. 213, 238 (1983); Beck v. Ohio, 379 U.S. 89, 91 (1964); Wong Sun v. United States, 371 U.S. 471, 479 (1963) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

65. The essence of the warrant requirement of the fourth amendment is that, whenever possible, a neutral and detached magistrate must issue a warrant before the government substantially invades an individual's right to privacy. *See* Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971); Katz v. United States, 389 U.S. 347, 357 (1967); United States v. Ventresca, 380 U.S. 102, 106 (1965); Beck v. Ohio, 379 U.S. 89, 96-97 (1964); Aguilar v. Texas, 378 U.S. 108, 110-11 (1964). This requirement seeks to assure the "detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" United States v. Chadwick, 433 U.S. 1, 9 (1977) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

66. *See, e.g.*, United States v. Whitehorn, 813 F.2d 646, 650 (4th Cir. 1987); United States v. Silvestri, 787 F.2d 736, 746 (1st Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3337 (U.S. June 2, 1986) (No. 86-678); United States v. Moscatiello, 771 F.2d 589, 603-04 (1st Cir. 1985), *cert. granted*, 107 S. Ct. 1368 (1987); United States v. Merriweather, 777 F.2d 503, 505 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1497 (1986); United States v. Apker, 705 F.2d 293, 306 (8th Cir.), *cert. denied*, 466 U.S. 950 (1984); United States v. Levasseur, 620 F. Supp. 624, 631 (E.D.N.Y. 1985), *aff'd on other grounds*, 816 F.2d 37

benefit of acquiring the evidence earlier than they legally could have and without complying with the warrant requirement of the fourth amendment.

Admitting primary evidence on the basis of an inevitable inventory search similarly undermines the deterrent effect of the exclusionary rule. Many courts recently have admitted evidence seized in an illegal search because the police inevitably would have discovered the evidence in an inventory search.[67] An inventory search is a search conducted for administrative purposes[68] rather than a criminal investigative purpose.[69] Because of the administrative purpose, inventory searches may be conducted without a warrant or probable cause,[70] but they must be conducted in accordance with established inventory procedures,[71] and the police cannot have discretion in deciding whether to conduct such searches.[72] Police routinely conduct inventory searches of vehicles that have been impounded.[73] It is also normal police practice to conduct an inventory search at the station-house of any container in the possession of an arrestee.[74] The inevitability of an inventory search is irrefutable because, to be non-discretionary, police regulations must require the police to conduct the search.[75] As a result, if the inevitable discovery rule is applied to primary evidence, whenever the police are required to conduct an inventory search, they need not conduct it at the station-house.[76]

(2d Cir. 1987). *See supra* note 61 (explaining that eventual issuance of warrant does not necessarily mean independent source exception applies).

67. *See, e.g.*, United States v. Andrade, 784 F.2d 1431, 1433 (9th Cir. 1986); United States v. Woolbright, 641 F. Supp. 1570, 1577-78 (E.D. Mo. 1986); District of Columbia v. M.M., 407 A.2d 698, 702 (D.C. 1979); State v. Ferguson, 678 S.W.2d 873, 877 (Mo. Ct. App. 1984); Carlisle v. State, 98 Nev. 128, 129-30, 642 P.2d 596, 597-98 (1982) (per curiam); Clough v. State, 92 Nev. 603, 604-05, 555 P.2d 840, 841 (1976) (per curiam); State v. Turner, 91 A.D.2d 646, 646-47, 456 N.Y.S.2d 831, 831-32 (2d Dep't 1982); State v. Pollaci, 68 A.D.2d 71, 79-80, 416 N.Y.S.2d 34, 40-41 (2d Dep't 1979); State v. Nelson, 127 Misc. 2d 583, 587, 486 N.Y.S.2d 979, 984-85 (Sup. Ct. 1985).

68. *See* Illinois v. Lafayette, 462 U.S. 640, 644 (1983); South Dakota v. Opperman, 428 U.S. 364, 373 (1976). The administrative purpose that justifies inventory searches is threefold: the protection of the owner's property while it remains in police custody; the protection of the police against claims of lost or stolen property; and the protection of the police from potential danger. *See* Colorado v. Bertine, 107 S. Ct. 738, 741 (1987); Illinois v. Lafayette, 462 U.S. 640, 646 (1983); South Dakota v. Opperman, 428 U.S. 364, 369 (1976).

69. *See Bertine*, 107 S. Ct. at 742, 743 (1987); *Opperman*, 428 U.S. at 376 (1976); *id.* at 383 (Powell, J., concurring).

70. *See Bertine*, 107 S. Ct. at 740, 741; *Lafayette*, 462 U.S. at 643; *Opperman*, 428 U.S. at 373.

71. *See Lafayette*, 462 U.S. at 646, 647, 648; *Opperman*, 428 U.S. at 372.

72. *See Bertine*, 107 S. Ct. at 743; *Lafayette*, 462 U.S. at 648; *Opperman*, 428 U.S. at 383 (Powell, J., concurring); Cady v. Dombrowski, 413 U.S. 433, 443 (1973).

73. *See* South Dakota v. Opperman, 428 U.S. 364, 369, 376 (1976).

74. *See* Illinois v. Lafayette, 462 U.S. 640, 642 (1983).

75. *See* Colorado v. Bertine, 107 S. Ct. 738, 742 n.6, 743 (1987).

76. An inventory search of a container in the possession of an arrestee is reasonable, in part, because it is conducted at the station-house. *See Lafayette*, 462 U.S. at 645-46. A search that would be considered reasonable at the station-house might be considered unreasonable if conducted in a public place. *See id.*

They can conduct a search immediately upon arrest in violation of the constitutional limitations on the scope of a search incident to arrest.[77] Moreover, the search need not be conducted in accordance with the legally required procedures that justify the inventory search.[78]

Thus, the application of the inevitable discovery exception to primary evidence permits the exception to swallow the exclusionary rule and eviscerates the fourth amendment.

III. ADMISSIBILITY OF PRIMARY EVIDENCE UNDER THE INDEPENDENT SOURCE EXCEPTION

Supreme Court decisions suggest that the inevitable discovery exception should not apply to primary evidence. The Court has held that the closely related independent source exception cannot be invoked to admit primary evidence.[79]

The independent source exception admits illegally obtained evidence if the same evidence was also discovered through an independent legal source.[80] It is well established that the inevitable discovery exception is merely a "hypothetical independent source" exception.[81] If any distinction is to be made between the two doctrines, the inevitable discovery exception should be more limited because it is based in many cases on speculation.[82]

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77. *See id. See generally*, J. Hall, *supra* note 3, §§ 8:13-8:25 (discussing limitations on scope and timing of legitimate search incident to arrest).

78. The essential purpose of an inventory search is safekeeping of the property. *See supra* note 68.

If the search is not conducted in accordance with required procedures, which usually include preparing a detailed list of the items, *see, e.g.*, Colorado v. Bertine, 107 S. Ct. 738, 740, 742 n.6 (1987), then the safekeeping purpose that justifies the inventory search has not been achieved.

79. *See* Gilbert v. California, 388 U.S. 263, 273 (1967); Segura v. United States, 468 U.S. 796, 813-14 (1984) (direct product of illegal conduct is inadmissible despite independent source exception) (dictum); *see also In re* Javier, 159 Cal. App. 3d 913, 926, 206 Cal. Rptr. 386, 394 (1984) (independent source rule is exception to "fruit of the poisonous tree" doctrine).

Commentators treat the independent source exception as an exception to the fruit of the poisonous tree doctrine. *See* J. Hall, *supra* note 3, § 22:5, at 629; 4 W. LaFave, *supra* note 3, § 11.4, at 374; Pitler, *supra* note 3, at 624-25; Wasserstrom & Mertens, *supra* note 6, at 159 n.477; *Criminal Procedure*, *supra* note 9, at 392.

80. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); *see also* J. Hall, *supra* note 3, § 22:5, at 630 n.17 (citing cases that have applied independent source exception).

81. *See* Nix v. Williams, 467 U.S. 431, 438 (1984); Note, Nix v. Williams: *The Supreme Court's Inevitable Discovery of the Inevitable Discovery Rule*, 1985 Det. C. L. Rev. 137, 142 n.39; *Supreme Court*, *supra* note 9, at 121 n.25; Note, *supra* note 11; *see also In re* Javier, 159 Cal. App. 3d 913, 926, 206 Cal. Rptr. 386, 394 (1984) (inevitable discovery exception is variation of independent source exception); *supra* note 9 (more descriptive appellation of inevitable discovery exception is "hypothetical independent source" exception).

82. *See Williams II*, 467 U.S. 431, 458-59 (1984) (Brennan, J., dissenting) (arguing that because inevitable discovery exception requires hypothetical finding, burden of proof should be greater than for independent source exception); *Supreme Court*, *supra* note 9, at

In *Gilbert v. California*,[83] the Court held that the independent source exception cannot be used to admit primary evidence.[84] In *Gilbert*, the defendant was identified in a police line-up in violation of his sixth amendment right to counsel.[85] He was identified subsequently in court by the same witnesses who had identified him at the line-up.[86] The Court held that it was constitutional error to admit the in-court identifications without first determining that they were not tainted by the illegal line-up.[87] The Court remanded the case to afford the state an opportunity to establish that the derivative evidence — the in-court identifications — had an independent source.[88] The primary evidence — the testimony that the witnesses had identified the defendant at the line-up — was excluded automatically.[89] Because the line-up testimony was the direct product of the illegal conduct, or primary evidence, the state was not entitled to an opportunity to show that the testimony had an independent source.[90] The Court concluded that "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right . . . ."[91]

Later, in *Segura v. United States*,[92] the Court reiterated the distinction between primary and derivative evidence.[93] In *Segura*, the police illegally entered the defendant's apartment while they waited for a search warrant to issue.[94] During the illegal occupation of the premises, the officers observed certain incriminating items in plain view.[95] In the

129; Comment, *Fruit of the Poisonous Tree: Recent Developments as Viewed Through Its Exceptions*, 31 U. Miami L. Rev. 615, 627 (1977); Note, *supra* note 11, at 155 (inevitable discovery exception requires "speculative method of analysis").

83. 388 U.S. 263 (1967).

84. *See id.* at 273.

85. *See id.* at 269-70.

86. *See id.* at 271.

87. *See id.* at 272.

88. *See id.*; *see also* United States v. Wade, 388 U.S. 218, 242 (1967) (giving state opportunity to prove that in-court identifications—derivative evidence—had independent source).

89. *See Gilbert*, 388 U.S. at 273; *see also Wade*, 388 U.S. at 240 & n.32 (noting that earlier, in *Gilbert*, the Court required *per se* exclusion of witness' testimony concerning line-up identification, which was primary evidence).

90. *See Gilbert*, 388 U.S. at 273.

91. *Id.* (emphasis in original).

92. 468 U.S. 796 (1984).

93. Although the admissibility of the primary evidence was not an issue before the Court, the majority opinion stated that the primary evidence would not be admissible. *See id.* at 804.

94. *See id.* at 802.

95. *See id.* at 800-01. The mere observance of evidence in "plain view" does not constitute a search for the purposes of the fourth amendment. *See* Arizona v. Hicks, 107 S. Ct. 1149, 1152 (1987); J. Hall, *supra* note 3, § 3:10, at 63. The plain view doctrine requires, among other things, a prior valid intrusion into the suspect's privacy. *See* Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). Although the Court in *Segura* referred to the evidence observed in the illegal entry as being in "plain view," *Segura*, 468 U.S. at 801, the evidence was not admissible under the plain view doctrine because the intrusion had not been valid. *See id.* at 804.

search pursuant to the warrant, the agents seized both the plain view evidence and evidence that had not been discovered during the illegal entry.[96] Although the evidence that had not been observed during the illegal entry was tainted by the illegality, it was held admissible under the independent source exception.[97] The plain view evidence was not admitted and the Court stated in dictum that primary evidence is "plainly subject to exclusion."[98]

The justification for the inevitable discovery exception is based on the rationale of the independent source exception.[99] Both the independent source exception and the inevitable discovery exception seek to put the police in the position they would have occupied if the illegal conduct had not occurred.[100] Admittedly, excluding primary evidence from the scope of the inevitable discovery exception would put the police in a worse position. The exclusion of independently discovered, primary evidence, however, also puts the police in a worse position. Since the Supreme Court has not invoked the status quo ante rationale to admit primary evidence under the independent source exception,[101] it is consistent with the Court's precedent to refuse to extend the inevitable discovery exception to primary evidence. It is illogical to admit primary evidence under either of these exceptions because the status quo ante rationale is based on deterrance, and there is no deterrence if the evidence is not excluded.[102] Moreover, it is necessary to put the police in a worse position to deter illegal searches and seizures,[103] given the potential for using the inevitable discovery exception to obviate the warrant requirement of the fourth amendment, limitations on searches incident to arrest, and inventory search procedures.

Due to the relationship between the independent source and inevitable discovery exceptions, it should not be permissible to admit primary evi-

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96. *Segura*, 468 U.S. at 801.

97. *See id.* at 814 ("The valid warrant search was a 'means sufficiently distiguishable' to purge the evidence of any 'taint' arising from the entry.") (quoting Wong Sun v. United States, 371 U.S. 471, 488 1963)).

98. *Id.* at 804.

The Court's statement was dictum because the admissibility of the plain view evidence was not challenged by the government. *See id.*

Despite the dictum in *Segura* that plain view evidence is inadmissible even if it has an independent source, a number of courts have reached the opposite result. *See supra* note 61 (citing cases and suggesting that these courts evade dictum in *Segura* by applying inevitable discovery exception rather than independent source exception).

99. *See* Nix v. Williams, 467 U.S. 431, 444 (1984) rationale of independent source exception "is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule").

100. *See id.* at 442-43.

101. *See* United States v. Segura, 468 U.S. 796, 804 (1984); Gilbert v. California, 388 U.S. 263, 273 (1967); *see also* Wasserstrom & Mertens, *supra* note 6, at 159 n.477 & 160 n.478 (independent source exception only applies to derivative evidence).

102. *See* Wasserstrom & Mertens, *supra* note 6, at 160.

103. *See* 4 W. LaFave, *supra* note 3, § 11.4(a), at 383; Wasserstrom & Mertens, *supra* note 6, at 160.

dence under the inevitable discovery exception when it would be impermissible to admit the same evidence under the independent source exception.

CONCLUSION

The inevitable discovery rule already is overboard. Applying it to primary evidence completely undermines the deterrent effect of the exclusionary rule. Although the Supreme Court has not specifically limited the inevitable discovery exception to derivative evidence, the Court has limited the closely related independent source exception to derivative evidence. It is illogical to extend the "hypothetical independent source" exception to evidence that would be inadmissible under the independent source exception. The Supreme Court should clarify that the inevitable discovery exception does not apply to the direct products of illegal conduct.

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