

5-1-1998

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Recommended Citation

Troy E. Golden, *The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment, Nix, and Murray, and the Disagreement Among the Federal Circuits*, 13 BYU J. Pub. L. 97 (2013).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol13/iss1/6>

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The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment, *Nix*, and *Murray*, and the Disagreement Among the Federal Circuits *

I. INTRODUCTION: THE EXCLUSIONARY RULE AND ITS EXCEPTIONS

This comment explores the most recently developed exception to the exclusionary rule—the inevitable discovery doctrine. Before discussing this exception, it will be helpful to briefly explain the exclusionary rule. The judiciary created exclusionary rule prohibits the state from using evidence obtained through police misconduct. Police misconduct includes the violation of a criminal defendant's Fourth, Fifth, or Sixth Amendment rights. Generally, the exclusionary rule operates by excluding all illegally obtained evidence from being introduced in a criminal trial, whether obtained directly (primary evidence) or indirectly (derivative evidence) from the police misconduct. The distinction between primary and derivative evidence can be dispositive in determining whether an exception to the exclusionary rule will be applied, depending on the jurisdiction and the situation presented.¹

The rationale behind the exclusionary rule is deterrence: if the government knows it will not be able to use evidence gained in violation of a defendant's rights, it will be less likely to violate those rights. But while the rule is quite effective in punishing police misconduct, it has a high cost to society. It lets the guilty go unpunished merely because the police blundered. For nearly seventy-five years the Supreme Court did not apply the exclusionary rule to the states. In 1961, however, the Supreme Court, under the theory of incorporation by the Fourteenth Amendment, did just that.² Since then the rule has been subject to a great deal of criticism. Much of the criticism comes from state law enforcement; however, some of the most disparaging attacks on this judge-made doctrine have come from newer members of the Supreme Court. As more justices have recognized the rule's unpopularity and its "high social costs of letting persons obviously guilty go unpunished for their crimes,"³ the Supreme Court has carved out some exceptions to the exclusionary rule. These ex-

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1. See *infra* Part III.

2. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

3. *Nix v. Williams*, 467 U.S. 431, 443 (1984).

ceptions are generally appropriate in situations where application of the exclusionary rule would fail to achieve its deterrence purpose.

The first exception the Court developed is the independent source doctrine. This exception permits the introduction of evidence in a criminal prosecution, despite the fact it was initially discovered during or as a consequence of police misconduct, provided the state can prove that the evidence was later obtained from independent lawful activities untainted by the initial illegality. For example, where an unlawful warrantless search has given the police knowledge of facts A, B, and C, but fact C has also been learned by other means, fact C can be admissible at trial because it was derived from an independent source. Suppressing fact C under the exclusionary rule would be unfair to the state because that would go beyond the rule's deterrent purpose: "When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been absent any error or violation."⁴

Attenuation of the taint is a second exception to the exclusionary rule. This exception keeps certain evidence from being suppressed if the state can prove that the tainted quality of the evidence was sufficiently purged by attenuation, or distance, between the evidence and the misconduct from which it was derived. In a sense, this exception is the criminal procedure version of the tort doctrine of proximate cause. The Court in *Wong Sun v. United States*⁵ established this exception's test to be "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 primary taint."⁶ An intervening act of free will is a good example of attenuation sufficient to break the causal chain between the evidence and police misconduct. In *Wong Sun*, the Court found that the fact that the defendant was released on his own recognizance after an illegal arrest, but later returned to the station to confess, removed any taint from the confession.

The third and most recent exception to the exclusionary rule--the inevitable discovery doctrine--is best understood as "an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered."⁷ Thus, the inevi-

4. *Murray v. United States*, 487 U.S. 533, 537 (1987) (quoting *Nix*, 467 U.S. at 443).

5. 371 U.S. 471 (1963).

6. *Id.* at 488.

7. *Murray*, 487 U.S. at 539 (italics removed).

table discovery doctrine is like a speculative or hypothetical version of the independent source doctrine.

This comment begins its analysis of the inevitable discovery doctrine by reviewing the Robert Anthony Williams cases, where the Supreme Court suggested and then adopted the doctrine. The comment then explains two interrelated areas in which lower courts have conflicted with each other and, arguably, interpreted the doctrine beyond the original intention of the Court. This split in the lower courts includes decisions which expanded, as well as refused to expand, the doctrine's application to: (1) admit primary evidence, and (2) avoid the warrant requirement of the Fourth Amendment. The comment reviews each of these two expansions separately and stresses their erosive effects on the exclusionary rule and the Fourth Amendment. A brief explanation of the active pursuit doctrine, a requirement which attempts to solve the erosion problem caused by the aforementioned expansions, follows. Lastly, the comment concludes with an examination of the need for the Supreme Court to unify the lower courts and expressly adopt certain limitations to the inevitable discovery doctrine.

II. ADOPTION OF THE INEVITABLE DISCOVERY DOCTRINE: THE WILLIAMS CASES

The Supreme Court adopted the inevitable discovery exception when dealing with the monstrous crime of Robert Anthony Williams, a supposedly religious man who had kidnapped and murdered a ten-year-old girl on Christmas Eve, 1968. The controversy of the Williams cases stems from the admission of certain incriminating statements, made as a result of police misconduct, in Williams' 1969 trial. The misconduct consisted of an unlawful conversation between a police officer, Detective Leaming, and Williams, during which Williams' attorney was not present even though Williams had been arraigned and had retained counsel by that time. In this conversation, popularly known as the "Christian burial speech," Detective Leaming played to Williams' religious sympathies by pleading with him to reveal the body's location, in light of an imminent snowstorm, so her parents could have closure and provide the girl a proper burial as soon as possible. Leaming was successful in obtaining the information he sought from Williams and subsequently found the victim's body because of that information.

At trial, Williams argued that the exclusionary rule should preclude the jury from learning of the incriminating statements obtained as a result of the Christian burial speech. Though the trial judge was not convinced of the need to suppress that evidence, Williams' argument eventually prevailed before the United States Supreme Court in his habeas corpus ap-

peal, *Brewer v. Williams*.⁸ In *Brewer*, the Court held that the evidence in question had been improperly admitted at trial because it had violated Williams' Sixth Amendment right to counsel. It is important to note that the Court was closely divided in its ruling and that the ruling was met with a great deal of unpopularity, many naturally believing that Robert Anthony Williams should be brought to justice. Not surprisingly, the holding in *Brewer* incited further debate and controversy over the societal cost and effectiveness of the exclusionary rule.

For those who demanded a conviction, if there was a saving grace to the *Brewer* Court's action, it was found in the opinion's twelfth footnote. The footnote indicated that although the exclusionary rule precluded Williams' incriminating statements from being introduced into evidence at a second trial, evidence of the body's location and condition "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."⁹ In fact, at the time Williams' unlawfully obtained statement led the police to the culvert ditch which contained the victim's body, there was an ongoing independent search (unaware of Williams assistance) no more than two and a half miles from the ditch. Arguably, this independent search party would have inevitably found the body without Williams' help. Thus, the footnote in *Brewer* paved the way for the adoption of the inevitable discovery exception; later, in *Nix v. Williams*,¹⁰ the Supreme Court affirmed the admission of evidence of the body's location and condition in Williams' second trial conviction. The *Nix* court found that there was sufficient evidence that the independent ongoing search would have inevitably discovered the body, regardless of the Christian burial speech. The *Nix* ruling marked the Supreme Court's official adoption of the inevitable discovery exception.

The Court's adoption of the inevitable discovery exception represents a recognition that society's interest in punishing criminals should not be less important than its interest in deterring police misconduct. The Court realized that without the inevitable discovery exception there would be certain situations (like the Robert Anthony Williams case) when the exclusionary rule would do society a disservice, unfairly tipping the balance of interests in favor of setting an acknowledged criminal free. Adoption of the inevitable discovery exception seeks to fairly balance the scales of justice. That is, "the interest of society in deterring police misconduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same,

8. 430 U.S. 387 (1977).

9. *Id.* at 407 n.12.

10. 467 U.S. 431 (1984).

not a worse, position than they would have been in if no police error or misconduct had occurred.”¹¹ The Court reasoned that since the rationale behind the exclusionary rule is that “the prosecution is not to be in a better position than it would have been in if no illegality had transpired,”¹² it follows that “if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.”¹³

During argument of the *Nix* case, the Court was asked to impose a requirement, in addition to the requirement of proving inevitability, that the state must also prove absence of bad faith before the inevitable discovery doctrine could be utilized. The reasoning behind this proposed limitation was “that if an absence-of-bad-faith requirement was not imposed, the temptation to risk deliberate violations of the [defendant’s constitutional rights] would be too great, and the deterrence effect of the Exclusionary Rule reduced too far.”¹⁴ However, the majority of the Court flatly rejected this good faith requirement, seeing it as unnecessary, and reasoned that “[a] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered;”¹⁵ and, even if an officer were in such a position, “he will try to avoid engaging in any questionable practice . . . [because i]n that situation there will be little to gain from any dubious ‘shortcuts’ to obtain the evidence.”¹⁶ Again, with the concern that society’s interest in justice not be given less weight than the rights of criminal defendants, something the inevitable discovery exception has come to stand for, the Court concluded that “the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce.”¹⁷

11. *Id.* at 443.

12. *Id.*

13. *Id.* at 444.

14. *Id.* at 445.

15. *Id.*

16. *Id.* at 445-446. The Court here was referring to the fact that “[s]ignificant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the . . . inevitable discovery exception will promote police misconduct.” *Id.* at 446.

It is interesting to note that in rejecting this call for a good faith limit on the newly adopted inevitable discovery exception, an exception that was certain to have a profound impact on limiting the exclusionary rule, the Court relies on the theory that civil liability and departmental discipline will serve as an effective deterrent against abusing this new exception. This is ironic in light of the fact that the ineffectiveness of civil liability and departmental discipline in curbing police misconduct was the primary reason for creation of the exclusionary rule in the first place.

17. *Id.* at 446

III. THE PRIMARY/DERIVATIVE EVIDENCE DISTINCTION

It is unclear if the *Nix* Court, in adopting the inevitable discovery doctrine, meant to restrict the application of that exception to derivative evidence only.¹⁸ Unfortunately, nowhere in the opinion does the Court speak to the issue of whether the exception's scope would allow the state to admit primary evidence in a criminal prosecution. Largely because of this omission, the lower courts have been split on the issue since *Nix*. The following discussion explores the split and compares the opposing views.

A. *The Minority View: Limiting the Exception to Derivative Evidence Only*

The District of Columbia Circuit is one of the lower courts that sees the *Nix* decision as explicitly limiting the inevitable discovery doctrine to derivative evidence only (recall that derivative evidence is obtained indirectly whereas primary evidence is obtained directly from police misconduct). The D.C. Circuit explained why it believes the exception should not include primary evidence in the case *United States v. \$639,558 in U.S. Currency*.¹⁹ In *U.S. Currency*, the bag of Christopher Todd Bleichfeld, a man suspected of being a drug courier, was searched illegally without a warrant. The bag was found to contain over \$600,000, thought to be traceable to an illegal drug exchange. This money was primary evidence as it was a direct result of the police misconduct. At trial, Bleichfeld was successful in arguing that the evidence should be suppressed under the exclusionary rule. On appeal, the government argued that the motion to suppress was incorrectly granted because, in Bleichfeld's situation, the government inevitably would have been legally empowered to search the bag without a warrant under authority of an administrative inventory search, and thus the inevitable discovery exception applied. The D.C. Circuit rejected the government's argument. The court held that the inevitable discovery exception allows introduction of deriva-

18. Certain facts in both of Williams' Supreme Court cases indicate that the Court probably did not mean for the exception's scope to go beyond derivative evidence. First, the only evidence covered by the newly adopted exception in *Nix* was the location and condition of the victim's body. That kind of evidence is derivative in nature, as it was a byproduct of the original incriminating statements obtained by police misconduct. Second, those incriminating statements, which constituted primary evidence since they were the direct result of the misconduct, were never suggested as potentially permissible under the exception that the *Brewer* footnote foresaw. The footnote only indicated that the derivative evidence, the body's location and condition, would have been admissible in Williams' second trial. See *Brewer v. Williams*, 430 U.S. 387, 407 n.12 (1977).

19. 955 F.2d 712 (D.C. Cir. 1992).

tive evidence only. The money found by the illegal search, being primary evidence, was thus not covered by the exception.

The D.C. Circuit in *U.S. Currency* argued that the Supreme Court never meant for primary evidence to be covered by the inevitable discovery doctrine. The Court stated that "[t]he reasoning of *Nix* in support of the inevitable discovery exception relied heavily on the derivative nature of evidence, and the Supreme Court's statement about not putting the government in a worse position because of police misconduct was limited to that subject."²⁰ To support this analysis, the D.C. Circuit focused on key language in *Nix* that was written primarily to calm fears that the inevitable discovery exception might be abused by clever, overzealous police. The court reasoned that this language, which states that there is little chance for abuse of the inevitable discovery doctrine because a police officer "will rarely if ever, be in a position to calculate whether the evidence sought would be inevitably discovered,"²¹ only makes sense if you assume the *Nix* Court was thinking of derivative evidence, and not primary evidence.

The following hypothetical illustrates the D.C. circuit's logic. Suppose a police officer is (1) knowledgeable about his department's inventory procedures, and (2) impatient to get his hands on some incriminating evidence. In this situation, the officer could easily calculate whether he could go ahead and obtain that evidence illegally without the risk of this primary evidence being inadmissible, because the officer would know if the evidence will be inevitably obtainable anyway under the inventory procedures. In this hypothetical, the calculation is easy because the officer is dealing with primary evidence, something immediately known and obtained directly after the misconduct. However, in dealing with derivative evidence, which is an unknown indirect future byproduct, it is nearly impossible to calculate its potential admissibility because the officer can neither know (1) to what end the derivative evidence will lead, nor (2) if there is already another line of investigation working towards that same end. This "impossibility of calculation" was certainly true in the Robert Anthony Williams cases. There, Detective Learning could not possibly have calculated that his Christian burial speech would obtain for him the condition and location of the body nor that searchers were coincidentally looking for the body in the same area, determinations which would both be necessary to conclude that the evidence would be inevitably discovered and thus admissible.

20. *Id.* at 720.

21. *Nix*, 467 U.S. at 445.

In *U.S. Currency*, not only was the calculation quite possible, because the evidence at issue was primary in nature and thus amenable to that sort of estimation, but the calculation was in fact made by the government. The D.C. circuit noted that Assistant U.S. Attorney Robert Andary, who was called on by the officers that wanted to get into Bleichfeld's bag, "told the officers that a warrant was not required . . . cit[ing] the eventual inventory of the luggage to explain why he so advised them."²² What better way to illustrate the D.C. Circuit's fear of the great potential for abuse of the inevitable discovery exception than the very facts in *U.S. Currency*, where clever and impatient officers calculated the admissibility of primary evidence to justify police misconduct. The court summed up its reasoning as follows:

If the evidence stemming from the violation is nevertheless admissible on the basis that the bags inevitably would have been opened when they were inventoried, the practical consequence is apparent. In the vast run of cases, there would be no incentive whatever for police to go to the trouble of seeking a warrant (or, should we add, of waiting for a lawful inventory to occur during normal processing). The police could readily make this assessment on their own. Contrary to what *Nix* supposed, they would almost invariably be in a position to calculate whether the evidence would inevitably have been discovered, because they would know that inventory procedures were in place.²³

The Ninth Circuit is another court which has read *Nix* as limiting the scope of the inevitable discovery doctrine to derivative evidence, and its recent opinion in *United States v. Polanco*²⁴ is illustrative. In that case, Miguel Polanco was arrested and questioned by a Los Angeles Police Drug Squad who had caught him selling controlled substances on a street corner. Polanco made certain inculpatory statements during the questioning; however, the drug squad had neglected to read him his Miranda rights first. The unconstitutional inculpatory statements led police to obtain Polanco's criminal record which helped them to prepare a stronger case against the defendant at trial. At trial the state sought to admit both the inculpatory statements and Polanco's criminal record. The trial judge allowed admission of this evidence under the inevitable discovery doctrine, despite Polanco's motion to suppress the evidence. On appeal, the Ninth Circuit held that the trial judge was in error for allowing primary evidence, the inculpatory statements, to be admitted in a criminal trial

22. *U.S. Currency*, 955 F.2d at 718.

23. *Id.* at 720-721.

24. 93 F.3d 555 (9th Cir. 1996).

under the inevitable discovery doctrine; but it was correct in admitting the criminal record, since that was derivative evidence. The Ninth Circuit made it clear that according to its understanding of *Nix*, the inevitable discovery exception only "allows for the admission of evidence derived from [the] defendant's unconstitutional inculpatory statement, provided that the evidence would inevitably have been discovered by independent means," but the "doctrine does not, however, allow admission of the unconstitutional inculpatory statement itself."²⁵

Though the Ninth and D.C. Circuits' reasoning in limiting the inevitable discovery doctrine to derivative evidence is consistent with what seems to be the Supreme Court's intent in *Nix*,²⁶ it does not represent the majority view among the circuits. The D.C. Circuit admitted in *U.S. Currency* that "[s]everal other courts of appeal, when faced with inevitable discovery claims . . . have either rejected or ignored any distinction between primary and derivative evidence."²⁷ In expressing its frustration with those other circuits, the D.C. Circuit concluded that "[w]hatever one may think of the distinction, the fact remains that *Nix* drew it, and did so for the purpose of demonstrating the deterrent effects of the exclusionary rule would not be lessened."²⁸

B. The Majority View: Applying the Exception to Both Primary and Derivative Evidence

"Most of the circuits have utilized the inevitable discovery exception to allow the introduction of primary evidence, and this has usually been done without any discussion The court[s] [do] not discuss the appropriateness of the use of inevitable discovery for primary evidence; [they] just automatically appl[y] it."²⁹ Additionally, "[f]ollowing the lead of the circuits, states have started to apply the inevitable discovery exception to primary as well as secondary evidence, and generally this has also been done without any discussion."³⁰

The Seventh Circuit, as demonstrated by its recent opinion in *United States v. Woody*,³¹ is a good example of a court routinely admitting primary evidence via the inevitable discovery exception without any discussion of the primary/derivative distinction often attributed to *Nix*. In *Woody*, Mr. Sebe Tron Woody's conviction for possessing 73 checks sto-

25. *Id.* at 561.

26. *See supra* note 18.

27. *U.S. Currency*, 955 F.2d at 720.

28. *Id.*

29. Robert M. Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AM. J. CRIM. L. 79, 87 (1992).

30. *Id.*

31. 55 F.3d 1257 (7th Cir. 1995).

len from U.S. mailboxes in the Chicago area was affirmed despite Woody's insistence that the trial court's refusal to suppress the checks, found in the glove compartment of his Datsun hatchback, was reversible error. Woody argued that the stolen checks were inadmissible because it resulted from an illegal roadside search. Note that since the checks were the very evidence immediately found by the alleged unlawful search, they were primary, rather than derivative, evidence. The Seventh Circuit pointed out that since Woody was driving on a suspended license and with no proof of insurance, the Datsun would have been inevitably impounded and searched as per the Naperville Police Department's policy.: "Thus, even if we were to conclude that the roadside search of the locked glove compartment was unlawful, the police, after impounding and in the performance of an inventory search of the vehicle, would have discovered the checks, which would have been admissible against Woody under the inevitable discovery exception . . ." ³² Here the Seventh Circuit used the inevitable discovery exception to admit primary evidence without regard to, or discussion of, the primary/derivative evidence distinction.

Though most examples of appellate decisions successfully applying the inevitable discovery exception are cases dealing with inventory searches, the Eighth Circuit's *United States v. Martin* ³³ opinion shows how the exception can be used to admit evidence which would have inevitably been found under the plain view doctrine. Gary Martin was the subject of a "Terry stop" because he suspiciously ducked behind his Oldsmobile after he realized police were watching him conversing with two occupants of a car parked next to his car. After a brief pat down which revealed nothing incriminating on Martin's person, the police gave him permission to make a phone call in the bar with the implicit understanding that he would return to the parking lot after the call to talk further with them. While the officers stood by Martin's Oldsmobile awaiting his return, they used their flashlights to peer into the windows of the car and spotted a cellophane package of crack cocaine in the front passenger seat. This crack cocaine was instrumental as evidence in Martin's conviction for possession of drugs.

On appeal, Martin asserted that the trial court erred in not suppressing evidence of the crack cocaine lying on the car seat. Martin argued that the police conduct was an unlawful premature inventory and, further, that the circumstances of his Terry stop, which failed to find anything incriminating on his person, could not have justified any notion that his Oldsmo-

32. *Id.* at 1270.

33. 982 F.2d 1236 (8th Cir. 1993).

bile would have been inevitably impounded and inventoried. The Eighth Circuit was unpersuaded and held that:

“[t]here is no legitimate expectation of privacy shielding that portion of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers Thus, even if officer Persing’s inventory inspection was premature, the contraband was in plain view to Officer Blades from outside the car, so that seizure by him was inevitable and constitutionally permissible.”³⁴

Note that this opinion, though out of the ordinary in its application of the inevitable discovery exception to a “plain view” set of circumstances, is still quite typical of the majority of courts in its routine application of the inevitable discovery doctrine to primary evidence without discussion of the *Nix* Court’s intent to limit that exception to derivative evidence.

In the Fifth Circuit’s *United States v. Seals*³⁵ opinion, the inevitable discovery exception was again applied to admit primary evidence. In that case, Joseph Noel Seals argued that his 1978 Buick was unlawfully searched and that therefore the fourteen plastic bags of crack cocaine found as a direct result should have been suppressed. The Fifth Circuit affirmed Seals’ conviction, finding that he had been properly arrested due to his driving on an expired license and thus that the Buick would have been impounded and inventoried anyway. The circuit held that the inevitable discovery doctrine allowed the evidence to be used at Seals’ trial without expressly discussing the fact that this evidence was primary evidence nor expressly recognizing the primary/derivative evidence distinction. However, in *Seals*, the Fifth Circuit implicitly acknowledged the split among the circuits regarding the primary/derivative distinction when it stated “[t]his circuit and several other circuits recognize that evidence which was originally obtained improperly should not be suppressed, provided that it would have been legitimately uncovered pursuant to normal police practices.”³⁶ The use of the word “originally” is most appropriate when defining the key difference between primary and derivative evidence. Evidence that is obtained originally or immediately from police misconduct is always primary. Evidence that is found later, thanks to the original evidence, is always derivative. By using the word “originally,” the Eighth Circuit almost surely meant to denote evidence which is primary in nature.

34. *Id.* at 1240 (quoting *Texas v. Brown*, 460 U.S. 730, 740 (1983)).

35. 987 F.2d 1102 (5th Cir. 1993).

36. *Id.* at 1108.

The First Circuit is another circuit in the majority view. However, the First Circuit differs from other circuits in that it has expressly discussed the primary/derivative distinction and formally rejected it before applying the inevitable discovery doctrine to primary evidence. In *United States v. Zapata*,³⁷ the First Circuit, in rejecting the primary/derivative evidence distinction, spoke directly to the D.C. Circuit's *U.S. Currency* opinion, expressly rejecting its reasoning. In *Zapata*, the defendant contended that he had not given voluntary consent for officers to search the trunk of his car, which was unregistered and uninsured. Zapata argued that the evidence of cocaine found in his duffel bag, in the trunk of his car, should have been suppressed at trial as fruit of an illegal search. Zapata further contended that the cocaine found could not be admitted by the inevitable discovery exception because the drugs were primary evidence. The prosecution countered that the exception should apply because Zapata's car was both unregistered and uninsured, inevitably subjecting it to a routine inventory search which would have surely discovered the duffel bag.

In affirming Zapata's conviction, the First Circuit accepted the prosecution's inevitable discovery argument despite the fact that the cocaine was primary evidence. In speaking to the issue of the primary/derivative evidence distinction, the court noted that "[w]e decline to embrace the suggestion that courts should confine the inevitable discovery rule to cases in which the disputed evidence comprises a derivative, rather than primary, fruit of unlawful conduct."³⁸ Although the *Zapata* court conceded the fact that *Nix* involved only derivative evidence, it reasoned that the rationale behind adoption of the inevitable discovery exception, "that the exclusion of inevitably discovered evidence would 'put the government in a worse position' than if no illegality had occurred, [is] fully applicable to cases involving primary evidence."³⁹

The First Circuit justified its rejection of the primary/derivative distinction on three main premises. First, most of the other circuits have also rejected the distinction. Second, the Supreme Court has had the opportunity to reverse at least three of the circuits on this issue but has failed to do so. And finally, certain language in the Supreme Court's opinion *United States v. Murray*,⁴⁰ written four years after *Nix*, can be interpreted as an endorsement of the proposition that distinguishing between primary and derivative evidence is irrelevant to the exclusionary rule exceptions.⁴¹

37. 18 F.3d 971 (1st Cir. 1994).

38. *Id.* at 979 n.7.

39. *Id.*

40. 487 U.S. 533 (1987).

41. *Zapata*, 18 F.3d at 979 n.7.

C. *The Murray Decision: Implied Supreme Court Confirmation of the Majority View?*

Before discussing *Murray*, it is important to point out that the decision did not deal with the inevitable discovery doctrine; it regarded only the independent source doctrine. However, "independent source" is very closely related to "inevitable discovery" because the independent source doctrine is the very fountain from which the inevitable discovery doctrine sprang. Thus, a better understanding of how to apply the independent source exception would arguably shed some light on how to apply the inevitable discovery exception.

In *Murray*, the Court was faced with deciding the scope of the independent source exception: specifically, whether it can be applied beyond derivative evidence to include primary evidence. Though dealing with a different exception, the Court was deciding the very same question of scope that the First and D.C. Circuits considered in their *Zapata* and *U.S. Currency* opinions respectively. Additionally, the forces for and against expanding the independent source doctrine to admit primary evidence raised virtually the same arguments in *Murray* as were advanced in the First and D.C. Circuits' respective debates over analogous expansion of the inevitable discovery doctrine. In the end, the *Murray* Court held in a plurality opinion written by Justice Scalia that applying the exception to include primary evidence "has better support in both precedent and policy."⁴²

The facts relied upon by the *Murray* Court and its reasoning in reaching this conclusion are worth repeating. In 1983, federal drug enforcement agents were watching Michael Murray and his cohorts near a Boston area warehouse with the suspicion that they were storing and distributing drugs. After they saw Murray and his associates leave the warehouse, the agents proceeded to legally seize two vehicles just outside the warehouse, both of which were full of marijuana. The agents next illegally entered the warehouse without a search warrant. In the warehouse they stumbled upon 270 burlap wrapped bales of marijuana. Recognizing the need for a search warrant, the officers left the warehouse and quickly applied for one with a local magistrate. The officers' search warrant affidavit did not disclose their prior illegal entry, nor did it rely on any of the observations the agents made during their misconduct. The warrant was issued some eight hours later, whereupon the officers immediately reentered the warehouse and confiscated the marijuana.

Mr. Murray contended that evidence of the 270 bales should have been suppressed because the bales were found as a result of police mis-

42. *Murray*, 487 U.S. at 537.

conduct. The government argued that since only the first entry was unlawful, and the second entry was legal, the independent source doctrine allows admission of the evidence gained during the second legal search regardless of the prior misconduct. Murray then countered that this exception, if applicable at all, could only apply to derivative evidence, and because the bales themselves were primary evidence, no exception to the exclusionary rule would work in the government's favor. The Supreme Court expressly rejected Murray's "position that the independent source doctrine does apply to independent acquisition of evidence previously derived indirectly from the unlawful search [derivative evidence], but does not apply to . . . 'primary evidence,' that is, evidence acquired during the search itself."⁴³ Justice Scalia, speaking for the Court, reasoned as follows:

In addition to finding no support in our precedent . . . , this strange distinction would produce results bearing no relation to the policies of the exclusionary rule. It would mean, for example, that the government's knowledge of the existence and condition of a dead body, knowledge lawfully acquired through independent sources, would have to be excluded if government agents had previously observed the body during an unlawful search of the defendant's apartment; but not if they had observed a notation that the body was buried in a certain location, producing consequential discovery of the corpse.⁴⁴

Further, Justice Scalia stated that the *Nix* Court's adoption of the inevitable discovery doctrine was premised on the assumption that the independent source doctrine's scope extends beyond derivative evidence to include primary evidence. In reexamining the facts that brought about adoption of the inevitable discovery exception in *Nix*, the *Murray* plurality opinion pointed out the following:

There, incriminating statements obtained in violation of the defendant's right to counsel had led police to the victim's body. The body had not in fact been found through an independent source as well, and so the independent source doctrine was not itself applicable. We held, however, that evidence concerning the body was nonetheless admissible because a search had been under way which would have discovered the body, had it not been called off because of the discovery produced by the unlawfully obtained statements. . . . This "inevitable discovery" doctrine obviously assumes the validity of the independent source doctrine as applied to *evidence initially acquired* unlawfully. It would make no sense to

43. *Id.* at 540-41.

44. *Id.* at 541 (citation omitted).

admit the evidence because the independent search, had it not been aborted, would have found the body, but to exclude the evidence if the search had continued and in fact found the body.⁴⁵

This above-quoted reasoning, "coupled with the . . . close relationship between the inevitable discovery doctrine and the independent source doctrine, has invited lower courts to utilize the *Murray* decision to support the use of 'inevitable discovery' to avoid exclusion of primary evidence."⁴⁶ The lower courts, like the First Circuit in *Zapata*, apply the reasoning of *Murray* by analogy to the debate over the inevitable discovery doctrine's primary/derivative evidence distinction.

Of course, whether it is appropriate to apply *Murray* by analogy to the inevitable discovery doctrine is still open to debate. On one hand, it is well-established that the two doctrines, "independent source" and "inevitable discovery," are very closely related. The *Nix* Court noted the "functional similarity between these two doctrines" and concluded that the independent source doctrine's "rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule."⁴⁷ The rationale for both doctrines is the same: to prevent the exclusionary rule from putting the government in a worse position, than it would have been had no police misconduct occurred. Thus, if the *Murray* Court sees no reason to limit one of the exclusionary rule's exceptions to derivative evidence only, why limit another exception that shares the same rationale?

Though *Nix* arguably set up the primary/derivative evidence distinction since its facts and analysis appear to be limited to derivative evidence only, many lower courts read *Murray* as justifying their rejection of that distinction. The First Circuit in *Zapata* pointed out an important fact bolstering this logic: if the Supreme Court truly believed that certain lower courts had erred in applying the inevitable discovery doctrine to primary evidence, the Court would have overturned those circuits when it got the chance.⁴⁸ Not only did *Nix* fail to correct the lower courts, but in citing cases for the proposition that a majority of circuits have already adopted the inevitable discovery exception, *Nix* noted three opinions that had actually applied that exception beyond derivative evidence to primary evidence.⁴⁹ These facts, coupled with the similarity in purpose between

45. *Id.* at 539 (emphasis added).

46. Bloom, *supra* note 29, at 92-93.

47. *Nix v. Williams*, 467 U.S. 431, 444 (1984).

48. *See* U.S. v. *Zapata*, 18 F.3d 971, 979 n.7. (1st Cir. 1994).

49. The First Circuit pointed out "the *Nix* Court's approving citation to cases that had applied the [inevitable discovery exception] in the context of primary evidence," among which were *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983), *United States v. Romero*, 692 F.2d 699

the inevitable discovery and independent source doctrines, present a formidable argument that the *Murray* holding for one exception could legitimately be likened to the other exception.

On the other hand, there are good arguments for the proposition that the two exceptions should be treated differently, regardless of the *Murray* decision, when it comes to their respective scopes. The fact remains that the Supreme Court has done nothing expressly to expand the inevitable discovery doctrine to primary evidence, whereas it has expressly expanded the independent source doctrine in *Murray*. This may suggest that the two doctrines have relevant differences which justify treating them differently. The two doctrines do seem materially different. Independent source situations deal with an established historical fact, an action that has actually occurred, whereas inevitable discovery situations deal with speculation, a hypothetical event, or the possibility that something would have occurred. Because a supposed "inevitability" is less tangible and consequently not as readily provable as an independent source discovery that has actually occurred, it would be quite appropriate to allow the inevitable discovery doctrine less leeway than one would allow the independent source doctrine. In other words, because it may be easier to abuse one exception due to factual uncertainty, it may be wise to more stringently limit the scope of that exception. In essence, this is the argument raised by the minority of lower courts who adhere to the primary/derivative distinction despite *Murray*.

IV. THE SEARCH WARRANT PROBLEM

If the inevitable discovery exception is to be applied to the very evidence obtained in an illegal search, as the previous analysis suggests that it might, there is a much larger problem presented in American criminal procedure law. Applying the inevitable discovery exception to primary evidence creates a great risk that the government might use the exception to wrongfully circumvent the Fourth Amendment's warrant requirement. The government could use the exception to get around the warrant requirement by arguing something similar to the following:

We realize that we did an illegal warrantless search. However, we had probable cause, and we would have obtained a warrant on that basis. Since the warrant would have inevitably issued, and we would have searched pursuant to it (if we had bothered to obtain it) then all the evi-

(10th Cir. 1982), and *United States v. Roper*, 681 F.2d 1354 (11th Cir. 1982). *Zapata*, 18 F.3d at 979 n.7 (citing *Nix*, 467 U.S. at 441 n.2).

dence we obtained is admissible under the inevitable discovery exception.⁵⁰

The *Murray* decision seems to suggest that the government can legitimately make this "we could have gotten a warrant" argument to circumvent the Fourth Amendment and take the last "logical step to eliminate the warrant requirement altogether."⁵¹ Whether there is merit in the "we could have gotten a warrant" excuse is an issue which again splits the courts, like the primary/derivative evidence distinction. Though some courts have read *Nix* and *Murray* to allow admission of evidence found in an illegal search, provided that the police simply *could* have gotten a warrant, most other circuits require the police to prove more before granting use of the inevitable discovery exception.

A. *The Pro-Prosecution View: Extreme Deference to the Police*

The Seventh Circuit, in *United States v. Buchanan*,⁵² demonstrated a relatively liberal deference to the notion that an illegal search should be excused because a warrant *could* have inevitably issued. Collin Buchanan, wanted for murder in Ohio, was arrested at his Wisconsin hotel room after informants had tipped off the local police concerning Buchanan's whereabouts and his illegal drug trade activities. Though Buchanan was arrested outside, his room was searched without a warrant. Further, Buchanan was not read his Miranda rights. As part of the search of his room, the police went through Buchanan's clothing and packed it away in a duffel bag. While packing the bag, the officers found small packets of cocaine in Buchanan's clothing.

At trial, Buchanan was unsuccessful in his motion to suppress the drugs and later appealed the judge's decision to admit the evidence. Before affirming Buchanan's conviction, the Seventh Circuit stated that "[t]he issue in this appeal is whether the cocaine discovered when Buchanan's clothes were being packed would inevitably have been discovered through a search pursuant to a proper warrant."⁵³ To resolve that is-

50. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 426 (1996).

51. Craig M. Bradley, *Murray v. United States: The Bell Tolls for the Search Warrant Requirement*, 64 IND. L. J. 907, 920. Specifically, Professor Bradley concludes that the current unfortunate state of the law, post *Murray*, is that if the police can show "they could have gotten the warrant and would have been able to [search] pursuant to that warrant, as *Murray* held, then it follows, ipso facto, that the evidence would have been inevitably discovered Consequently, it is not necessary to go through the empty formality of getting a warrant to search a place that has already been searched." *Id.*

52. 910 F.2d 1571 (7th Cir. 1990).

53. *Id.* at 1573.

sue, the court first asked itself "two subsidiary questions: first, would the police have inevitably sought a search warrant for the room, and second, would a neutral magistrate have issued such a warrant."⁵⁴

The *Buchanan* court answered its first subsidiary question in the affirmative by simply assuming that since Buchanan was wanted for murder, the police inevitably would have sought a search warrant in order to find the murder weapon (a gun). Though this assumption seems like the logical procedure police would follow, the facts of the case fail to support the court's assumption, instead showing that the police were more than willing to search Buchanan's room without a warrant. The court answered the second subsidiary question affirmatively as well, based on yet another assumption. This second assumption was that a neutral magistrate would have issued a warrant to search for a gun because Buchanan's fugitive status (running from murder charges in another state), coupled with his reputation for dealing drugs (the court noted "that guns are tools of the drug merchants trade"⁵⁵), indicate "a fair probability that [a] gun would be found in the hotel room."⁵⁶ Unfortunately, because the police never applied for the warrant before their illegal search, it remains unknown whether the magistrate truly would have deduced that fair probability and issued a warrant accordingly.

The assumptive hypothetical reasoning of the Seventh Circuit in *Buchanan* demonstrates the danger of applying the inevitable discovery exception to get around the need for a warrant. Arguably, the court may have done nothing more than attempt to insure that a guilty man not go unpunished merely because of police blundering. However, in a broader sense, the rights of innocent citizens everywhere are in greater danger of potential abuse by overzealous police when courts essentially emasculate the protections provided by the Fourth Amendment in holding the police merely to the extremely deferential standard of "we could have gotten a warrant." The Seventh Circuit is not the only court to apply the inevitable discovery doctrine in this frightening way; in fact, "[s]everal courts have relied on *Nix* to hold that evidence found in an illegal warrantless search was admissible because a warrant could and would have been obtained."⁵⁷

The First Circuit is another court which has allowed the inevitable discovery doctrine to be triggered by a mere showing that the police could and would have obtained a warrant. *United States v. Ford*⁵⁸ demon-

54. *Id.*

55. *Id.* at 1574.

56. *Id.* at 1573.

57. SALTZBURG & CAPRA, *supra* note 50, at 426.

58. 22 F.3d 374 (1st Cir. 1994).

strates this extremely deferential reasoning quite well. In *Ford*, the police conducted a warrantless search of the three-story home of a wealthy physician, Dr. Jeffrey Ford, who had obtained illegal drugs through the mail. The police knew that Dr. Ford had received a mailed package containing cocaine because the post office had intercepted the package and tested its contents before returning it to the mail stream. After the police learned this information from the post office, they saw Dr. Ford take the package into his home. Rather than obtaining a warrant to search Ford's home, the officers knocked on his door pretending to be from the water department and, based on that ruse, convinced Dr. Ford to exit his home at once.

After they got the barefoot and partially unclothed doctor outside his home, the police handcuffed him and informed him that he was under arrest. Dr. Ford was asked if he would consent to a search of his home, which he refused. He was then told that he would be brought before a magistrate but would be allowed to change his clothes first if the officers could accompany him to his bedroom on the middle level of his three-story home. Ford proceeded to reenter the house with three officers following him, but made it clear he did not want the police opening any closed doors. As Dr. Ford got dressed, the police made a quick search of each room including all areas behind every closed door on all floors of the house. As a result of this illegal search, the police found the mailed package of cocaine as well as marijuana plants and medical instruments used in the drug trade. At trial, Dr. Ford was unsuccessful in his motion to suppress the evidence.

On appeal, the First Circuit was presented with the issue of whether the trial court had been correct in admitting the evidence under the inevitable discovery doctrine. Dr. Ford argued that in order to use the inevitable discovery doctrine in a warrantless search situation, the state must establish "as at least a minimum requirement, [that] the decision to seek a warrant [was] made prior to the time that the illegal search took place and that the decision was in no way influenced or accelerated by information gained from the illegal search."⁵⁹ The circuit court flatly rejected Dr. Ford's argument and held that the only requirement for the government to use the exception to obviate the need for a warrant is that "probable cause be present prior to the illegal search to ensure both independence and inevitability for the prewarrant search situation."⁶⁰ In essence, this is the same "could have gotten a warrant" threshold that the Seventh Circuit applied in *Buchanan*. Not surprisingly, Dr. Ford's conviction was affirmed when the appellate court decreed, without any significant discus-

59. *Id.* at 378.

60. *Id.* (quoting *United States v. Silvestri*, 787 F.2d 736, 746 (1st Cir. 1986)).

sion, "The existence of independent probable cause to search Dr. Ford's home is undisputed. . . . It is also beyond dispute that the seized evidence would have been discovered following the authorized search. . . . [T]hus, it is inevitable that the existence of probable cause would find fruition in the issuance of a search warrant."⁶¹

Because the police in the two cases above never applied for a warrant before searching, it is difficult to call the reasoning of the First and Seventh Circuits in those cases anything but mere speculation. Any law enforcement officer experienced in dealing with magistrates will readily admit that what might be considered a sufficient showing of probable cause is not always easily predictable and can vary greatly from one magistrate to another. For the First and Seventh Circuits to affirm a conviction based on their guesses as to how a hypothetical magistrate may have reacted to a hypothetical search warrant affidavit frustrates the protections of the Fourth Amendment as well as the language in *Nix* which states that the "inevitable discovery [exception] involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment."⁶²

*B. The More Demanding View: Rejection of the
"We Could Have Gotten a Warrant" Argument*

Many of the other circuits have found the speculative reasoning demonstrated in *Buchanan* and *Ford* to be unacceptable in a warrantless search situation.⁶³ Accordingly, these circuits represent the view that the "we could have gotten a warrant" argument is not sufficient to allow the government to circumvent the Fourth Amendment's warrant requirement; "[m]oreover, to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment."⁶⁴ Two recent cases from the Second and Ninth Circuits are among the best examples of rejecting of the "we could have gotten a warrant" excuse.

In *United States v. Mejia*,⁶⁵ the Ninth Circuit was presented with facts that the defendant, Mr. Jario A. Mejia, while being interrogated in police custody, admitted to the existence of counterfeit currency in his home.

61. *Id.*

62. *Nix v. Williams*, 467 U.S. 431, 445 n.5 (1984).

63. In fact, in a recent opinion the Sixth Circuit rejected the reasoning in *Buchanan*, calling it "a radical departure from the Fourth Amendment requirement precedent." *United States v. Johnson*, 22 F.3d 674, 684 (6th Cir. 1994).

64. *United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986).

65. 69 F.3d 309 (9th Cir. 1995).

Armed with knowledge of that admission, but without a warrant, the police proceeded to search Mejia's home, finding and seizing the counterfeit money. This evidence was used in Mejia's trial in which he was charged with the crime of possession of counterfeit money. Mejia's motion to suppress the evidence was denied. Subsequently, he entered a conditional guilty plea. On appeal, the government argued that the motion to suppress was appropriately denied and the evidence admissible under the inevitable discovery exception. Specifically, "[t]he government contend[ed] that a failure to obtain a warrant should be excused, because Mejia's statements while in custody gave them probable cause to search his home. Thus, the government argue[d], a warrant would have issued if the detectives had sought one."⁶⁶ The court rejected the government's argument and stated, "This court has never applied the inevitable discovery exception so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant."⁶⁷ The court further explained why it refuses to accept the "we could have got a warrant" argument, concluding as follows:

If evidence were admitted notwithstanding the officers' unexcused failure to obtain a warrant, simply because probable cause existed, then there would never be any reason for officers to seek a warrant. To apply the inevitable discovery doctrine whenever the police could have obtained a warrant but chose not to would in effect eliminate the warrant requirement. We are neither free nor willing to read the warrant requirement out of the Constitution. Accordingly, even if we assume that the detectives were in possession of competent evidence showing probable cause at the time of the search, the inevitable discovery doctrine would not justify introduction of the evidence seized without a warrant.⁶⁸

In the case *United States v. Cabassa*,⁶⁹ the Second Circuit likewise rejected the "we could have gotten a warrant" argument. In *Cabassa*, the government had begun preparing an application for a warrant to search the home of Mr. Jose M. Cabassa, a man whom they suspected was distributing cocaine from his apartment. Special agents began preparing the warrant application at the U.S. Attorney's office around 12:30 p.m. About two hours later, a team of D.E.A. agents began surrounding Cabassa's building in a presurveillance fashion, preparing themselves to serve the warrant and search as soon as they received the magistrate's approval. Waiting for approval apparently proved too much for the agents

66. *Id.* at 319.

67. *Id.* at 320.

68. *Id.*

69. 62 F.3d 470 (2d Cir. 1995).

to bear, they decided to enter Cabassa's apartment without the warrant.⁷⁰ The agents then forced their way into Cabassa's apartment, handcuffed him, and searched the place, finding drugs and weapons. When the Assistant U.S. Attorneys learned of the search, they ceased working on the warrant application. Consequently, no warrant was ever presented to the magistrate. Cabassa moved to suppress the evidence obtained as a result of the warrantless search. However, the trial judge concluded that the evidence was admissible under the inevitable discovery exception.

On appeal, the Second Circuit reviewed the suppression motion. The government contended that the trial judge was correct in admitting the evidence because "it was in the 'final stages' of obtaining a warrant when the illegal search occurred and . . . a magistrate would certainly have issued a warrant based on the information that was to be included in the warrant application."⁷¹ In rejecting the government's assumption, the circuit court pointed out that because the government never actually received a warrant from the magistrate, it would be extremely difficult to overcome certain concerns which lie as obstacles to the proposition that the police had done enough to trigger the inevitable discovery exception. One such concern, specific to the scenario presented in *Cabassa*, was that "[i]f the process of obtaining a search warrant has barely begun, . . . the inevitability of discovery is lessened by the probability, under all the circumstances of the case, that the evidence in question would no longer have been at the location of the illegal search when the warrant actually issued."⁷² In fact, the reason why the police had jumped the gun and prematurely searched in this case stemmed from the concern that the evidence might be moved to another location if they waited any longer for the warrant to issue.

Perhaps the biggest concern the Second Circuit had about accepting the government's "we would have gotten a warrant" argument is the "residual possibility that a magistrate judge would have required a stronger showing of probable cause."⁷³ The court specifically explained what it meant by the "residual possibility" problem and concluded as follows:

At best, the government's showing in the instant matter would support separate findings that more probably than not a warrant would eventually have issued and that more probably than not the evidence would

70. Apparently the decision to jump the gun and enter the apartment early stemmed from a concern among the D.E.A. agents that Cabassa might become aware of their presence in his neighborhood "because the agents were 'white people' who might 'stick out like a sore thumb.'" *Id.* at 472.

71. *Id.* at 473.

72. *Id.*

73. *Id.* at 474.

have been in the apartment when a lawful search occurred. Either of these findings is susceptible to factual error—the magistrate judge might not be satisfied as to the showing of probable cause or, more likely, the evidence might disappear before issuance or execution of a warrant, or both—and the combined chance of error undermines the conclusion that discovery of the evidence pursuant to a lawful search was inevitable.

. . . [For example, t]o say that more probably than not event 'X' would have occurred is to say only that there is a 50%+ chance that 'X' would have occurred. Clearly, the doctrine of inevitable discovery requires something more where the discovery is based upon the expected issuance of a warrant. Otherwise, it would result in illegally seized evidence being received when there was a 49% chance that a warrant would not have issued or would not have issued in a timely fashion, hardly a showing of inevitability.⁷⁴

V. THE ACTIVE PURSUIT RULE

The biggest danger in applying the inevitable discovery doctrine to primary evidence⁷⁵ is the potential this has on emasculating the search warrant requirement of the Fourth Amendment.⁷⁶ In an attempt to solve this concern, some courts have imposed the following requirement: in order to invoke the inevitable discovery exception, "the prosecution must demonstrate that the lawful means which made discovery inevitable . . . were being actively pursued prior to the occurrence of the illegal conduct."⁷⁷ This requirement is called the active pursuit rule. The U.S. Supreme Court has never expressly decided whether or not to adopt an active pursuit rule. Accordingly, the lower courts, as with the primary evidence and search warrant issues discussed above, are split over whether to adopt an active pursuit rule. The following comments explore and analyze the opposing views on the issue.

A. *Circuits Adopting the Active Pursuit Rule*

The Eleventh Circuit is one of the lower courts which routinely requires that the active pursuit rule be satisfied before the government can use the inevitable discovery exception. The Eleventh Circuit demonstrated this requirement in *United States v. Satterfield*.⁷⁸ In that case, Mr. Edward Eugene Satterfield, a/k/a "Pig" Satterfield, appealed his conviction for kidnapping Mrs. Pauline Callaway. With the aid of his shotgun,

74. *Id.*

75. *See supra* Part III.

76. *See supra* Part IV.

77. *United States v. Brooking*, 614 F.2d 1037, 1042 n.2 (5th Cir. 1980).

78. 743 F.2d 827 (11th Cir. 1984).

"Pig" Satterfield had forcibly taken Mrs. Callaway from her home in Georgia, transported her across the state line, and held her against her will at his residence in Alabama. Mrs. Callaway managed to escape from Satterfield's house to a neighbor's house and called the local police for help. After seeing to Mrs. Callaway's health and safety, three Alabama police officers "[w]ithout an arrest warrant or search warrant . . . knocked on Satterfield's front door, announced their presence and receiving no response, entered the house using a flashlight for illumination."⁷⁹ Satterfield was found in the house, arrested, and taken to be secured in the back of a patrol car parked outside. "After the deputies took Satterfield to [the patrol car], they continued to search the [house] for nearly ten minutes and found the shotgun underneath the cushions of a sofa in the room adjoining the bedroom."⁸⁰

Before trial, Satterfield moved to suppress the shotgun, contending that the exclusionary rule precluded its admission because it was the fruit of an illegal search. The trial court denied the motion, and the Eleventh Circuit was presented with the issue of whether that denial was appropriate. The government asserted that the trial judge properly admitted the shotgun under the inevitable discovery exception. Specifically, the government explained "that the shotgun would have been found in any event because the police obtained a valid warrant for the search of Satterfield's residence several hours after the illegal search was made. . . . [and] the police undoubtedly would have uncovered the weapon during their search with the warrant."⁸¹

However, the circuit court held that before the inevitable discovery exception can be invoked, two elements must be met: "[First,] there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and [second,] the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct."⁸² This second element is the active pursuit rule. The court found that it was not satisfied because "the government had not yet initiated the lawful means that would have led to the discovery of the shotgun."⁸³ Accordingly, the court held that the inevitable discovery exception could not have been invoked and the shotgun should not have been admitted. Though the result of this decision clearly worked to the advantage of the criminal, "Pig" Satterfield, and certainly many other

79. *Id.* at 832.

80. *Id.*

81. *Id.* at 845.

82. *Id.* at 846.

83. *Id.*

less demanding circuits would not have found the district court in error, the Eleventh Circuit nevertheless vehemently defended the active pursuit rule and concluded its discussion on the matter as follows:

This is a sound rule, especially when applied to a case in which a search warrant was constitutionally required. Because a valid search warrant nearly always can be obtained after the search has occurred, a contrary holding would practically destroy the requirement that a warrant for the search of a home be obtained before the search takes place. [Were it otherwise, o]ur constitutionally-mandated preference for substituting the judgment of a detached magistrate for that of a searching officer would be greatly undermined.⁸⁴

The Fifth Circuit, likewise, applies the active pursuit rule. In its *United States v. Cherry*⁸⁵ opinion, it reviewed the conviction of U. S. Army Private James Thomas Cherry who was charged with murdering a taxicab driver. The conviction was attributable to the admission of Cherry's pistol and bullets which were found behind a removable ceiling panel in his barracks. Cherry had disclosed the location of this evidence in a confession to FBI agents on the afternoon of December 8, 1982, but moved before trial that it be suppressed because the confession had been obtained illegally in violation of his Miranda rights. Although the trial court agreed that the confession had been gained in violation of Miranda, it nevertheless denied the motion and allowed admission of the evidence under the inevitable discovery doctrine.

Specifically, the trial court reasoned that the inevitable discovery doctrine applied because by the afternoon of December 8, 1982, the FBI agents had already discovered by independent legal means the following relevant information: (1) Cherry's military identification and driver's license were left in the victim's taxicab; (2) the cab's final dispatch had been to Cherry's barracks; (3) the victim's wallet had been found in a trash can in Cherry's barracks' latrine; (4) members of Cherry's unit had seen him recently in possession of the same type of weapon which caused the victim's death; and (5) FBI agents had observed a dusty footprint on top of a dresser in Cherry's barracks which pointed towards the ceiling panel behind which the gun and bullets were hiding. The trial court believed that these five discoveries provided the FBI agents, as of the afternoon of December 8, "more than enough probable cause to obtain a search warrant for the Defendant's specific area of the barracks building, and they had good and sufficient reason to make a specific search of the

84. *Id.* (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 568 (1976)).

85. 759 F.2d 1196 (5th Cir. 1985).

false ceiling where the gun was found. [Thus, t]he ultimate discovery of the pistol was inevitable.”⁸⁶

The Fifth Circuit reversed the lower court on this issue and reprimanded it for failing to require proof of the active pursuit rule before invoking the inevitable discovery exception. The court reminded all concerned that in the Fifth Circuit the inevitable discovery exception requires not only a reasonable probability that the evidence would have been discovered by an independent means, but also proof that police were actively pursuing those means before any misconduct occurred. The court pointed out that in the case at bar, “[n]o finding was made . . . that the agents were actively pursuing a warranted means of searching the ceiling at the time” the *Miranda* violation occurred.⁸⁷ In fact, there was “uncontradicted testimony” that at time the FBI searched the location in the ceiling which Cherry divulged in his confession, “the agents had not even begun . . . drafting an affidavit [for] procurement of a warrant. Thus, because at the time of the warrantless search the agents could have obtained a warrant but made no effort to do so, . . . the district court erred in holding the evidence admissible under the inevitable discovery exception.”⁸⁸

The ruling in *Cherry* seems quite harsh to law enforcement, especially in light of the likelihood that the five discoveries found by legal, independent means would have been more than adequate for a showing of probable cause to issue a warrant. Nevertheless, the Fifth Circuit was more concerned with the danger of encouraging illegal conduct had it allowed the government to use evidence illegally obtained when it very easily could have secured a warrant. This danger was discussed in greater detail in *Cherry* as follows:

when the police have not been in active pursuit of an alternate line of investigation that is at a minimum supportable by leads, the general application of the inevitable discovery exception would greatly encourage the police to engage in illegal conduct because (1) the police would usually be less certain that the discovery of the evidence is “inevitable” in the absence of the illegal conduct and (2) the danger that the evidence illegally obtained may be inadmissible would be reduced. While suppression in such a case may put the prosecution in a worse position because of the police misconduct, a contrary result would cause the inevitable discovery exception to swallow the rule by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means. When the

86. *Id.* at 1202.

87. *Id.* at 1206.

88. *Id.*

police forego legal means of investigation simply in order to obtain evidence in violation of a suspect's constitutional rights, the need to deter is paramount and requires application of the exclusionary rule.⁸⁹

Finally, in order to put to rest any doubt whether the Supreme Court's decision *Nix v. Williams* (which at the time of the *Cherry* decision was a very recent opinion) was consistent with requiring a showing of active pursuit before allowing use of the inevitable discovery exception, the *Cherry* court made the following finding:

We find the [active pursuit rule] to be fully consistent with *Nix v. Williams*. In [*Nix*], the search was already underway in the general vicinity where the body was found when the police initiated the illegal interrogation. At the time of the police misconduct, therefore, the authorities were both actively pursuing the alternative line of investigation and in possession of a number of leads. As the Supreme Court noted, excluding the evidence under these circumstances would (1) put the prosecution in a worse position than it would have been in but for the police misconduct and (2) fail to be a significant deterrent since, if in the future the police are in a position to determine that the discovery of the evidence through independent means is imminent and inevitable, "there will be little to gain from taking any dubious 'shortcuts.'"⁹⁰

B. Circuits Rejecting the Active Pursuit Rule

In *United States v. Kennedy*,⁹¹ the first case in which the Sixth Circuit directly addressed the issue of whether to adopt an active pursuit prerequisite for application of the inevitable discovery doctrine,⁹² the court firmly decided against it. In that case, due to a simple clerical error, Mr. Arre Kennedy's black suitcase was misdirected to the Washington D.C. airport from its intended Miami destination. Because the suitcase went unclaimed and had a strong suspicious odor, the Washington police felt as though they should open it. The police found over seventeen kilograms of cocaine in the suitcase. However, because the bag was opened without a warrant, Mr. Kennedy moved at trial to suppress the cocaine as fruit of police misconduct. The district court denied the motion, and Kennedy appealed.

There were no facts to indicate that the police were actively pursuing an application for a warrant before the misconduct took place. Consequently, if the Sixth Circuit had decided to adopt the active pursuit rule,

89. *Id.* at 1204-1205.

90. *Id.* at 1204 (quoting *Nix*, 467 U.S. at 446).

91. 61 F.3d 494 (6th Cir. 1995).

92. See *id.* at 498. ("Although this court has considered this issue at least twice, it has never addressed it directly." *Id.*).

Kennedy's conviction would certainly have been overturned. However, the Sixth Circuit decided to be less demanding of the prosecution than some other circuits and held "that an alternate, independent line of investigation [active pursuit] is not required for the inevitable discovery exception to apply."⁹³

The court came to this conclusion based on its understanding of the Supreme Court's *Murray* decision. According to the *Kennedy* court, "Murray held that the Fourth Amendment does not require suppression of evidence initially discovered during a police officer's illegal search if that evidence is also discovered during a later search pursuant to a valid warrant that was obtained independently of the illegal search."⁹⁴ Recall that the officers in *Murray* did not begin working to obtain a search warrant until after the police misconduct in that case had already occurred. Thus, *Murray* seems to suggest that there is no active pursuit requirement. Though this may be a logical assumption to read into *Murray*, it is most important to point out, again, that *Murray* only dealt with the independent source doctrine; to read *Murray* as rejecting the active pursuit rule in the context of the inevitable discovery doctrine, as the Sixth Circuit did in *Kennedy*, one must apply its reasoning by analogy.⁹⁵

In *United States v. Ford*,⁹⁶ the First Circuit likewise rejected the active pursuit rule. The facts of *Ford* are explained in detail in Part IV.A. above, but an important detail to reexamine here is that the defendant, Dr. Jeffrey Ford, argued for a minimum prerequisite to application of the inevitable discovery exception--proof at least that "the decision to seek a warrant [was] made prior to the time that the illegal search took place and that the decision in no way [was] influenced or accelerated by information gained from the illegal search."⁹⁷ In effect, Dr. Ford argued for an active pursuit requirement. In fact, the First Circuit realized as much and likened his argument to that of a previously heard "defendant [who] cited for support a Fifth Circuit decision which held that the legal process of discovery be ongoing at the time of the illegal discovery in order for the inevitable discovery exception to be applicable."⁹⁸ The First Circuit expressly responded to Dr. Ford's call for the active pursuit rule as follows:

This court decline[s] to adopt such a strict approach. Rather than setting up an inflexible [sic] "ongoing" test such as the Fifth Circuit's, we suggest that the analysis focus on the questions of independence and inevi-

93. *Id.* at 499-500.

94. *Id.* at 499 n.2.

95. See *supra* Part III.C.

96. 22 F.3d 374 (1st Cir. 1994).

97. *Id.* at 378.

98. *Id.* at 377 (quoting *United States v. Cherry*, 759 F.2d 1196, 1196 (5th Cir. 1985)).

tability and remain flexible enough to handle many different fact patterns which will be presented. . . . In cases where a warrant is obtained, however, the active pursuit requirement is too rigid. On the other hand, a requirement that probable cause be present prior to the illegal search ensures both independence and inevitability for the prewarrant situation.⁹⁹

VI. CONCLUSION

The split in the circuits over (1) the primary/derivative evidence distinction, (2) the "we could have gotten a warrant" excuse, and (3) the active pursuit rule creates confusion and injustice in American criminal procedure law. Because the lower courts are divided on these issues, criminal defendants receive vastly different results in very similar trials depending on which circuit they are prosecuted in. Accordingly, there is a real need for the Supreme Court to establish uniformity among the lower courts regarding the application and scope of the inevitable discovery doctrine. The Supreme Court has heretofore failed to specifically delimit the scope of the inevitable discovery doctrine. As the *Satterfield* court stated, "Except for the application of its rule to the specific facts before the Court and its holding that the Government must establish the inevitability of discovery by a preponderance of the evidence, the Supreme Court was silent [in *Nix*] as to what constitutes an 'inevitable' discovery under the doctrine."¹⁰⁰

In order to overcome the ambiguity of *Nix* and establish much-needed uniformity among the lower courts, the Supreme Court has two options in light of its *Murray* decision. The first is to treat the scope of the inevitable discovery doctrine like it has the independent source doctrine. By analogy, then, the proper scope of one exception would define the proper scope of the other. As this comment has pointed out, many of the lower courts have already made this analogy, believing it to be what the dictum in *Murray* intended. The problem with this approach is that it does not take into account the relevant differences between an "inevitable discovery" and an "independent source." In fact, Justice Thurgood Marshall dissented in *Nix* because he realized just how very relevant those differences are. Marshall underscored this distinction when he stated:

The "inevitable discovery" exception . . . differs in one key respect from its next of kin: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather

99. *Id.* (quoting *United States v. Silvestri*, 787 F.2d 736, 746 (1st Cir. 1986) (second alteration in original).

100. *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984).

would have been discovered as a matter of course if independent investigations were allowed to proceed.

. . . The inevitable discovery exception necessarily implicates a *hypothetical* finding that differs in kind from the factual finding that precedes application of the independent source rule.¹⁰¹

Keeping Justice Marshall's concern in mind, the better option for the Court to follow entails true recognition of what makes the inevitable discovery doctrine different, its speculative or hypothetical nature. Because of this distinctive feature, applying the inevitable discovery doctrine without some specially tailored limitations creates the danger of encouraging police misconduct by allowing admission of illegally obtained evidence despite the fact that the police should have procured a search warrant. Countenancing such a danger violates the very principles that underlie the Fourth Amendment. In order to effectively mitigate against this danger, the Supreme Court should limit the inevitable discovery doctrine either by narrowing its scope to admit derivative evidence only or by requiring the active pursuit rule.

Based on the previous analysis in this comment, the best boundary is adoption of the D.C. and Ninth Circuits' reasoning which limits the doctrine to derivative evidence only. This approach is the most effective method of protecting against the danger of encouraging the government to violate principles of the Fourth Amendment. However, if the Supreme Court would be unwilling to adopt this minority position, the next best limit would be adoption of the active pursuit rule. Though a bit less effective in mitigating against the constitutional concerns, the active pursuit rule would at least provide greater protection than the injustice and confusion that results from the current split in the courts.

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101. *Nix v. Williams*, 467 U.S. 431, 459 (1984) (Marshall, J., dissenting) (emphasis added).