Pace Law Review

Volume 10
Issue 1 *Winter 1990*

Article 5

January 1990

Murray v. United States: The Emasculation of the Fourth Amendment Warrant Clause

John P. Eckberg

Recommended Citation
John P. Eckberg, *Murray v. United States: The Emasculation of the Fourth Amendment Warrant Clause*, 10 Pace L. Rev. 167 (1990)
DOI: https://doi.org/10.58948/2331-3528.1459
Available at: https://digitalcommons.pace.edu/plr/vol10/iss1/5

Notes and Comments

Murray v. United States: The Emasculation of the Fourth Amendment Warrant Clause†

I. Introduction

On April 6, 1983, a contingent of federal agents[1] broke into a warehouse in South Boston, Massachusetts and discovered 270 bales of marijuana.[2] No warrant authorized this search and no exigent circumstances justified this entry.[3] Immediately following the five-minute search of the warehouse, the same agents requested a search warrant.[4] The agent who prepared the application for the search warrant testified that he intentionally excluded from the affidavit any mention of the previous entry

---

† The author wishes to thank Professors Barbara C. Salken and Bennett C. Gershman for their encouragement and assistance in their review of earlier drafts of this Note. In addition, the author is deeply appreciative of the support of Maureen V. McDonnell. The author would like to dedicate this Note to my late mentor and friend, James B. Grant, Esq.

1. Ten agents of the Drug Enforcement Agency (DEA) and the Federal Bureau of Investigation (FBI) entered the warehouse after Ronald Garibotto, supervising DEA agent, forced open the warehouse door using a tire iron he obtained from his car. Joint Appendix to Brief for Petitioners and Respondent at 80, Murray v. United States, 108 S. Ct. 2529 (1988), (Nos. 86-995 & 86-1016) [hereinafter Joint Appendix] (excerpts from pretrial transcript — cross-examination of Ronald Garibotto).

2. *Id.* at 25 (search warrant return).

3. United States v. Moscatiello, 771 F.2d 589, 602 (1st Cir. 1985), *cert. granted and remanded sub nom.* Murray v. United States, 476 U.S. 1138, *aff'd on remand sub nom.* United States v. Carter, 803 F.2d 20 (1st Cir. 1986), *vacated and remanded sub nom.* Murray v. United States, 108 S. Ct. 2529 (1988).

4. Joint Appendix, *supra* note 1, at 69. The probable cause for the warrant was based on the pre-entry knowledge which was found to be substantial. This case did not question the strong basis for the belief prior to the illegal entry that a large quantity of illegal drugs was present in the warehouse.

into the warehouse.[5] Approximately eight hours after the initial entry at 2:45 p.m., a warrant was issued.[6] The same contingent of agents then reentered the warehouse and seized the marijuana.[7] As a result of this seizure of evidence, Michael Murray and James Carter, owners of the corporation which owned the warehouse where the marijuana was seized, were convicted of conspiracy to possess and distribute illegal drugs.[8] This conviction has been appealed and the United States Supreme Court has twice granted certiorari.[9] Although there has been no final disposition to date,[10] the Court indicated that it would have affirmed the conviction, even though the search was in violation of the fourth amendment, provided "the agents would have sought a [search] warrant if they had not earlier entered the warehouse."[11]

This case provided the Court with the opportunity to answer the question that had not been addressed in *Segura v. United States*:[12] whether the fourth amendment requires the suppression of evidence initially discovered in plain view during

---

5. *Id.* at 70 (excerpts from pretrial transcript — cross examination of Alan Keaney, DEA case agent in charge of the investigation: "Q. I just asked you, did you decide intentionally not to include in the affidavit that you and other agents had already been inside the warehouse? . . . A. [by agent Keaney] Yes, your Honor.").

6. *Id.* at 12 (search warrant issued by United States Magistrate Joyce London Alexander on Apr. 6, 1983 at 10:35 p.m.).

7. *Id.* at 36 (DEA report of investigation, dated May 11, 1983).

8. Murray v. United States, 108 S. Ct. 2529, 2532 (1988).

9. Murray v. United States, 480 U.S. 916 (1987); 476 U.S. 1138 (1986).

10. *Murray*, 108 S. Ct. at 2536. Judgment vacated and case remanded to Court of Appeals for the First Circuit with instructions to remand to district court for determination of "whether the warrant-authorized search of the warehouse was an independent source of the challenged evidence . . . ." *Id.*

11. *Id.*

12. 468 U.S. 796 (1984). *See infra* notes 238-64 and accompanying text. Chief Justice Burger noted that:

> Both the District Court and the Court of Appeals held that the initial entry into the apartment was not justified by exigent circumstances, and thus that the items discovered in plain view during the limited security check had to be suppressed to effect the purposes of the Fourth Amendment. The United States, although it does not concede the correctness of this holding, does not contest it in this Court. Because the Government has decided not to press its argument that exigent circumstances existed, we need not and do not address this aspect of the Court of Appeals decision. We are concerned only with whether the Court of Appeals properly determined that the Fourth Amendment did not require suppression of the evidence seized during execution of the valid warrant.

Id. at 802 n.4.

an illegal warrantless search when that same evidence is later seized pursuant to a search warrant requested by the same officers.[13] Justice Scalia, in his plurality opinion,[14] held that the fourth amendment does not require that this evidence be suppressed provided that the rediscovery of the evidence was pursuant to a valid search warrant wholly independent of the illegal search.[15] Justice Scalia based his holding in *Murray* on an analysis of the independent source doctrine[16] and its application to the *Murray* case.[17] Unfortunately, instead of providing guidance in the area of the independent source exception to the exclusionary rule,[18] the *Murray* case raises several questions. Specifically, Justice Scalia uses the concepts of the independent source doctrine,[19] attenuated connection,[20] and the inevitable discovery doctrine[21] without clearly distinguishing each doctrine from the

---

13. *Murray*, 108 S. Ct. at 2532.

14. *Murray* was a four-to-three decision with Justices Brennan and Kennedy not participating. *Id.* at 2531.

15. *Id.* at 2535.

16. *Id.* at 2533-35. *See infra* note 19.

17. *Murray*, 108 S. Ct. at 2535-36.

18. The exclusionary rule requires the suppression of evidence obtained by searches and seizures in violation of the Constitution. *See infra* notes 129-52 and accompanying text.

19. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Court held that government could not use knowledge of a document obtained as a result of an illegal search and seizure to subpoena the same document).

> 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. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

Id.

20. *See* Nardone v. United States, 308 U.S. 338, 341 (1939) (Court held that the defendant was entitled to examine the prosecution as to whether illegally obtained evidence was used in obtaining the conviction). The attenuated connection doctrine proposed by the Court is a revision of the independent source doctrine in that it allows use of evidence which may have been obtained as a result of a constitutional violation provided the causal relationship between the violation and the evidence is "so attenuated as to dissipate the taint." *Id.*

21. *See* Nix v. Williams, 467 U.S. 431, 444 (1984). The Court held that the body of the victim, discovered as a result of a violation of the defendant's sixth amendment rights, was admissible at trial since the body would have inevitably been discovered had no constitutional violation occurred. A search party of over 200 individuals was looking for the body in the same vicinity. *Id.* at 435-44. Under the inevitable discovery doctrine, the evidence is actually obtained as a result of unlawful police activity, but it is found to

other.[22] These doctrines are fact sensitive and have a different application and test to determine the appropriateness of their use. This absence of clarity will provide little guidance on remand to the district court in its assessment of whether "the warrant-authorized search of the warehouse was an independent source of the challenged evidence in the sense we [the Court] have described."[23]

This absence of guidance is further emphasized by the Court's remand to the district court for a determination of whether "the agents *would* have sought a warrant if they had not earlier entered the warehouse."[24] This focus on the intention of the agents in determining whether the search warrant was an independent source of the evidence is not consistent with past independent source doctrine cases.[25] The problem with relying on the intent of the agents is articulated in Justice Marshall's dissent: "I believe the Court's decision, by failing to provide sufficient guarantees that the subsequent search was, in fact, independent of the illegal search, emasculates the Warrant Clause and undermines the deterrence function of the exclusionary rule."[26]

Part II of this Note reviews the historical background of fourth amendment rights with particular attention to the role of the magistrate in issuing a search warrant, the traditional concept of the warrant preference requirement, and the exclusionary rule in insuring respect for these rights. In addition, Part II reviews the independent source doctrine and its corollary doctrines, inevitable discovery, and attenuated connection. Particular attention is also directed to a review of *Segura v. United*

---

be admissible if the police can demonstrate that they inevitably would have obtained it through legal means. *Id.* at 444. *See infra* notes 216-37 and accompanying text.

22. For example, Justice Scalia, though he found the independent source doctrine applicable to *Murray*, focused on whether the adoption of this exception would provide an incentive for police misconduct. This factor is only applicable to the inevitable discovery exception. *Murray*, 108 S. Ct. at 2533-36. *See infra* notes 384-89, 435-37 and accompanying text.

23. *Murray*, 108 S. Ct. at 2536.

24. *Id.* (emphasis added).

25. *See Nix*, 467 U.S. at 443, *infra* notes 216-37 and accompanying text; Brown v. Illinois, 422 U.S. 590 (1975), *infra* notes 207-15 and accompanying text; Wong Sun v. United States, 371 U.S. 471 (1963), *infra* notes 199-206 and accompanying text.

26. *Murray*, 108 S. Ct. at 2536 (Marshall, J., dissenting).

States[27] and *United States v. Silvestri*.[28] The facts of *Murray*, its procedural history, and the Supreme Court decision are discussed in Part III.

Part IV presents an analysis of the tests for application of independent source, attenuated connection, and inevitable discovery doctrines. This analysis reveals that these doctrines, though functionally related, are separate and distinct. Each doctrine is highly fact sensitive and the application of each to the same facts will result in a different conclusion in terms of whether the evidence in question is admitted. Although each doctrine should be applied separately, this Note asserts that the correct review of whether any evidence is the "fruit of the poisonous tree"[29] is through application of each doctrine in the following sequence: classical independent source, attenuated connection, and inevitable discovery.

Part V concludes that the correct analysis of the issue presented in *Murray* is through a systematic and separate application of each doctrine. This analysis will demonstrate that the evidence should be suppressed under the exclusionary rule because application of independent source, attenuated connection, and inevitable discovery doctrines will not support admission of the evidence.

II. Background

A. *General Concerns of the Fourth Amendment*

1. *Historical Perspective*

The historical context which gave rise to the fourth amendment[30] was the Framers' experience with the writs of assistance and their enforcement in pre-Revolutionary War days.[31] In

---

27. 468 U.S. 796 (1984). *See infra* notes 238-64 and accompanying text.

28. 787 F.2d 736 (1st Cir. 1986). *See infra* notes 265-93 and accompanying text.

29. Nardone v. United States, 308 U.S. 338, 341 (1939), *see infra* note 205.

30. U.S. CONST. amend IV.

> 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 persons or things to be seized.

Id.

31. *See* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO

America, the writs of assistance were primarily applied to combat smuggling by colonists who refused to fully comply with the various import taxes and restrictions.[32] In addition, these colonists were familiar with issues of search and seizure in English law.[33] The use of the Star Chamber,[34] the seditious libel and censorship laws,[35] and the powers granted to trade organizations and guilds to enforce these laws[36] caused special concern. These trade organizations, particularly in the publications area, were given broad search and seizure power.[37] This included the ability to enter private property to search for and seize items that were in violation of specific laws.[38] No prior warrant specifically describing the areas to be searched and the items to be seized was required.[39] The Framers found this power unacceptable in a democratic government, and to prevent this abuse of power they enacted the fourth amendment.[40]

During the first century of the Supreme Court's existence, the Court was rarely confronted with fourth amendment issues.[41] This was a result of two facts: First, the Court had found

---

THE UNITED STATES CONSTITUTION 51-78 (1937). The Molasses Act of 1733 and the Sugar Act of 1764 (restricting trade), and the Stamp Act of 1765 (requiring tax stamps for all legal documents), are several of the laws which were in extreme disfavor in America and which were enforced through the wide search and seizure powers of the writs of assistance. *Id.*

32. *Id.*

33. *See* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 13-50 (1966). Landynski noted that "[t]he antecedent history of the Fourth Amendment, therefore, has two principal sources: the English and American experiences of virtually unrestrained and judicially unsupervised searches . . . . From these tributaries flowed the Fourth Amendment." *Id.* at 20.

34. In 1566 the Court of the Star Chamber empowered the warden of the Stationers' Company with the authority to search any warehouse, shop, or other place and to seize books violating the laws on the licensing of books and the regulating of the printing industry. N. LASSON, *supra* note 31, at 24-25.

35. *Id.* at 26.

36. J. LANDYNSKI, *supra* note 33, at 21. As early as the reign of Henry VI (1422-1461) the Company of Dyers of London was granted the authority to search for and seize cloth dyed with logwood. N. LASSON, *supra* note 31, at 23-24.

37. J. LANDYNSKI, *supra* note 33, at 21.

38. *Id.*

39. *Id.*

40. *See* N. LASSON, *supra* note 31, at 51-78 and J. LANDYNSKI, *supra* note 33, at 19-48 for extensive background information on the origin of the fourth amendment.

41. J. LANDYNSKI, *supra* note 33, at 49 n.3 cited the following as the only Supreme Court cases presenting fourth amendment issues prior to Boyd v. United States, 116 U.S. 616 (1886); *In re* Jackson, 96 U.S. 727 (1878); Murray v. Hoboken Land Co., 59 U.S. (18

that the amendments to the Constitution were not binding on the states;[42] second, the right of appeal in criminal actions to the Supreme Court did not exist until 1891.[43] In 1886, Justice Bradley in *Boyd v. United States*[44] presented the first Supreme Court analysis of the history and protection provided by the fourth amendment.[45] This decision, which provided the framework and standard of review for analysis of fourth amendment issues,[46] has been regarded as a benchmark in constitutional interpretation of the fourth amendment.[47] *Boyd* involved a customs forfeiture case in which the United States government claimed fraud in connection with the importing of thirty-five cases of plate glass and sought to confiscate the plate glass.[48] This case did not actually involve a search but rather presented a demand by the government in a civil proceeding for the forced production of invoices for the plate glass.[49] Justice Bradley, having defined this forced production as a search,[50] embarked on an analysis of the fourth amendment through a review of the historical developments of the amendment and asserted:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense . . . .[51]

Justice Bradley provided further guidance regarding the proper standard of review for fourth amendment questions with the following comments:

How.) 272 (1855); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); *Ex parte* Buford, 7 U.S. (3 Cranch) 448 (1806).

42. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (amendments to Constitution were found not to be a limit on state action).

43. J. LANDYNSKI, *supra* note 33, at 49 n.1 (citing ch. 517, 26 Stat. 827 (1891)).

44. 116 U.S. 616 (1886).

45. *Id.* at 624-30.

46. *See* J. LANDYNSKI, *supra* note 33, at 49-61 for extensive analysis of *Boyd*.

47. *See* Mapp v. Ohio, 367 U.S. 643, 646 (1961); Weeks v. United States, 232 U.S. 383, 389-90 (1914). *See infra* notes 129-47 and accompanying text for extensive discussion of *Mapp* and *Weeks*.

48. *Boyd*, 116 U.S. at 617-18.

49. *Id.* at 618.

50. *Id.* at 622. "[C]ompulsory production of a man's private papers . . . is within the scope of the Fourth Amendment . . . ." *Id.*

51. *Id.* at 630.

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.[52]

This decision provided the Court with the framework for analysis of fourth amendment questions which was utilized by the Court in the early part of the twentieth century.[53]

2. *Relationship Between the First and the Second Clause of the Fourth Amendment*

The first clause of the fourth amendment guarantees the people to be free from "unreasonable" searches and seizures.[54] The second clause provides the conditions under which a search warrant can be issued.[55] A definition of unreasonable and a delineation of the relationship between the two clauses is not provided by the amendment and has been the focus of critical differences in interpretations regarding the protection provided by the amendment.[56]

Jacob Landynski, in *Search and Seizure and the Supreme Court*,[57] proposed three possible interpretations of the relationship between the two clauses:

(1) that the "reasonable" search is one which meets the warrant

---

52. *Id.* at 635.

53. *E.g.*, Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931); Gouled v. United States, 255 U.S. 298, 308-11 (1921); Weeks v. United States, 232 U.S. 383, 389-91 (1914).

54. U.S. CONST. amend. IV.

55. *Id.*

56. *See* United States v. Rabinowitz, 339 U.S. 56 (1950) (warrantless search of a small one-room office incident to arrest was reasonable under the fourth amendment). *But see* Johnson v. United States, 333 U.S. 10 (1948) (evidence seized by police who had traced the odor of burning opium to a hotel room and demanded entry was inadmissible even though the probable cause presented to the police may have been sufficient to have resulted in the issuance of a search warrant if presented to a magistrate).

57. J. LANDYNSKI, *supra* note 33. The Supreme Court has cited to this work with approval in a number of cases including: Payton v. New York, 445 U.S. 573, 584 n.21 (1980); Stone v. Powell, 428 U.S. 465, 482 n.18 (1976); Chimel v. California, 395 U.S. 752, 768 n.14 (1969); Warden v. Hayden, 387 U.S. 294, 301 n.9 (1967).

> requirements specified in the second clause; (2) that the first clause provides an additional restriction by implying that some searches may be "unreasonable" and therefore not permissible, even when made under warrant; or (3) that the first clause provides an additional search power, authorizing the judiciary to find some searches "reasonable" even when carried out *without* warrant.[58]

Landynski found that either of the first two interpretations is faithful to the intended meaning of the amendment.[59] He also found that the third interpretation is not faithful to the amendment as "[i]t would be strange, to say the least, for the amendment to specify stringent warrant requirements, after having in effect negated these by authorizing judicially unsupervised 'reasonable' searches without warrant. To detach the first clause from the second is to run the risk of making the second virtually useless."[60] Landynski's first interpretation represents the traditional understanding[61] of this relationship between the two clauses. Reflective of this understanding is Justice Powell's comment in *United States v. United States District Court Eastern District of Michigan*[62] that "[t]hough the Fourth Amendment speaks broadly of 'unreasonable searches and seizures,' the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause."[63]

---

58. J. LANDYNSKI, *supra* note 33, at 42-43.

59. *Id.* at 43.

60. *Id.* at 44.

61. *Id.* at 43. Landynski points out:

> In [the Supreme Court's] decisions [prior to the late 1940's,] it generally interpreted the Fourth Amendment to make the "unreasonable" search synonymous with the warrantless search. It held, moreover, that the search for a person's private papers was unreasonable, and therefore forbidden, even when made pursuant to a warrant.

Id.

62. 407 U.S. 297 (1972) (fourth amendment requires prior judicial approval for domestic wiretaps).

63. *Id.* at 315. Justice Powell further noted that "[s]ome have argued that '[t]he relevant test is not whether the search was reasonable.' This view, however, overlooks the second clause of the Amendment. The warrant clause of the Amendment is not dead language." *Id.* (citation omitted).

3. *The Warrant Requirement*

Harris v. United States[64] and *United States v. Rabinowitz*[65] illustrate the interpretation that searches, as long as they are reasonable, are within the fourth amendment. This interpretation of the relationship between the two clauses is based on an understanding that the warrant language of the second clause is a mere statement of the standards for the issuance of a search warrant, should the police seek one. In both cases the reasonableness of the search was examined in light of the circumstances, and the lack of a warrant was subordinate to the question of whether the conduct of the government was reasonable.[66] The present member of the Supreme Court who appears most closely allied with this position is Justice Scalia, the author of *Murray v. United States*. This assessment of Justice Scalia's position on the relationship between the two clauses of the fourth amendment is evidenced by his decisions for the Court in *Arizona v. Hicks*[67] and *Griffin v. Wisconsin*.[68]

The more traditional approach to the warrant requirement is exemplified by the line of cases beginning with *Johnson v. United States* in 1948.[69] The question asked under the tradi-

---

64. 331 U.S. 145 (1947) (warrantless search of an entire apartment incident to an arrest was reasonable under the fourth amendment).

65. 339 U.S. 56 (1950) (warrantless search of a small one-room office incident to arrest was reasonable under the fourth amendment). Both *Harris* and *Rabinowitz* were overruled by Chimel v. California, 395 U.S. 752, 768 (1969) (warrantless searches incident to arrest were limited to the grabbable area of the individual arrested).

66. *Harris*, 331 U.S. at 150. "[I]t is only unreasonable searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms." *Id.* "[S]uch searches turn upon the reasonableness under all circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required." *Rabinowitz*, 339 U.S. at 65-66.

67. 480 U.S. 1149 (1987) (officer who was legally on the premises violated the fourth amendment by moving stereo equipment to read the serial number). Justice Scalia indicated that the "moving of the equipment . . . did constitute a search" and that if the police had probable cause rather than reasonable suspicion, their warrantless search of the turntable would have been legitimate. *Id.* at 1152. Justice Scalia did not indicate that what was needed was both probable cause and a search warrant. Thus, probable cause may have made the search reasonable.

68. 483 U.S. 868 (1987). Warrantless search of probationer's home was found to have satisfied "the demands of the Fourth Amendment because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment reasonableness requirement under well established principles." *Id.* at 873.

69. 333 U.S. 10 (1948) (evidence seized by police who had traced the odor of burning

tional warrant approach is whether the government's failure to obtain a warrant prior to the search and seizure was reasonable under the circumstances presented.[70] In 1984, the Court, in *Thompson v. Louisiana*,[71] noted this preference for search warrants in the following:

> In a long line of cases, this Court has stressed that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions." This was not a principle freshly coined for the occasion in *Katz*, but rather represented this Court's longstanding understanding of the relationship between the two Clauses of the Fourth Amendment. Since the time of *Katz*, this Court has recognized the existence of additional exceptions. However, we have consistently reaffirmed our understanding that in all cases outside the exceptions to the warrant requirement the Fourth Amendment requires the interposition of a neutral and detached magistrate between the police and the "persons, house, papers, and effects" of citizens.[72]

The cases that follow this line of analysis regard all warrantless searches as *per se* unconstitutional unless one of the explicit exceptions[73] to the warrant requirements is fully satisfied.[74] These two approaches[75] to the relationship between the two clauses

---

opium to a hotel room and demanded entry was inadmissible even though the probable cause presented to the police may have been sufficient to have resulted in the issuance of a search warrant if presented to a magistrate).

70. *See* Trupiano v. United States, 334 U.S. 699 (1948). The Court held that search and seizures incident to arrest must be limited by the "cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable." *Id.* at 705.

71. 469 U.S. 17 (1984) (Court rejected the murder scene exception to the warrant requirement).

72. *Id.* at 19-20 (citations omitted).

73. *See infra* notes 100-28 and accompanying text for a discussion of exceptions to the warrant requirement.

74. *See* Vale v. Louisiana, 399 U.S. 30, 34-35 (1970), *infra* notes 116-19 and accompanying text; Katz v. United States, 389 U.S. 347, 357 (1967), *infra* notes 78-85 and accompanying text; *Thompson*, 469 U.S. at 19-20; *Trupiano*, 334 U.S. at 705.

75. *See* C. WHITEBREAD AND C. SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS (1986)[hereinafter C. WHITEBREAD]. This treatise provides guidance in terms of the underlying differences between these two lines of cases.

The differences between the two questions give rise to remarkably different answers. Seldom is the *conduct* of searches and seizures by governmental officials

continue to be in tension with the often drawn battle lines over whether to adopt a new exception to the preference of a search warrant[76] or expand an existing exception.[77]

B. *Scope of the Fourth Amendment*

1. *The Fourth Amendment Protects People not Places*

An understanding of what circumstances and events trigger fourth amendment protection is critical to an understanding of the amendment itself, its application, and its scope. Prior to *Katz v. United States*,[78] the concepts of property law and trespass defined when a fourth amendment event occurred.[79] In *Katz*, Justice Stewart dramatically altered the definition of a fourth amendment event in asserting that "the Fourth Amendment protects people, not places."[80] *Katz* involved a warrantless interception of defendant's telephone conversation from a public

---

unreasonable given the surrounding facts and circumstances. The same cannot be said, however, about the failure to obtain a warrant prior to conducting a search. The *Rabinowitz*/Rehnquist approach would make nearly every warrantless search acceptable, while the *Johnson*/Stewart approach would validate only those warrantless searches that fully satisfy at least one of the narrowly-defined exceptions to the warrant requirement.

Id. at 137. The *Johnson*/Stewart approach to the warrant requirement continues to be followed with the exception that in the area of administrative searches there has been some relaxation of a strict warrant requirement. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985) (authorizing school searches without probable cause or a warrant); Griffin v. Wisconsin, 483 U.S. 868 (1987) (authorizing searches of probationer's home without warrant).

76. *See* United States v. Leon, 468 U.S. 897 (1984) (Court adopted the good faith exception to a search conducted under a defective warrant); *see also* Terry v. Ohio, 392 U.S. 1 (1968) (Court approved of warrantless stop-and-frisk searches based on reasonable suspicion). Chief Justice Warren noted:

> If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. . . . Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

Id. at 20.

77. *See Griffin*, 483 U.S. 868 (Court expanded administrative searches to include warrantless search of probationer's home based on reasonable grounds).

78. 389 U.S. 347 (1967).

79. *See* Olmstead v. United States, 277 U.S. 438 (1928) (held that wiretapping did not violate the fourth amendment as no trespass occurred and as the words which were "seized" were not within the meaning of "things" seized within the fourth amendment).

80. *Katz*, 389 U.S. at 351.

telephone booth by FBI agents and thus did not present a trespass or violation of property rights.[81] Justice Stewart rejected the formulation of the issues presented by the parties since both had focused on whether the telephone booth was a "constitutionally protected area."[82] Having found the defendant protected by the fourth amendment, Stewart then assessed whether the warrantless search and seizure of Katz's telephone conversation complied with constitutional standards.[83] In finding that it did not, he asserted that "[s]earches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . .' "[84]

Justice Harlan in his concurring opinion provided a test to be applied in order to determine if fourth amendment protection is activated. He proposed that "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[85] Consequently, fourth amendment protection would extend to areas which an individual sought to preserve as private, even if the area is accessible to the public, provided this expectation of privacy is one that society finds reasonable.

2. *Fourth Amendment Protection Extends to Commercial Establishments*

The Court has defined in recent cases the extent of fourth amendment protection in relation to commercial establishments. *See v. City of Seattle*[86] recognized that fourth amendment pro-

---

81. *Id.* at 348-49. In comparison, under the *Olmstead* holding this event should not have presented a fourth amendment issue.

82. *Id.* at 351. "But this effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places." *Id.*

83. *Id.* at 354.

84. *Id.* at 357 (citations omitted).

85. *Id.* at 361 (Harlan, J., concurring). *See also* Illinois v. Andreas, 463 U.S. 765 (1983). "The Fourth Amendment protects legitimate expectations of privacy rather than simply places. If inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause." *Id.* at 771.

86. 387 U.S. 541 (1967).

tection extended to commercial establishments because "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."[87] Fourth amendment protection of commercial establishments is based on both the merchants' reasonable expectation of privacy in areas within their commercial establishments from which the public is excluded, and the Framers' intent that the fourth amendment provide this protection.[88] Thus, the Court asserted this protection through application of Justice Harlan's test from *Katz v. United States*[89] and through an assessment of the original intent of the Framers.

C. *Issuance of a Search Warrant Requires a Neutral and Detached Magistrate Presented with Affidavits not Based on False Statements*

The role of the magistrate in the issuance of a search warrant was defined by Justice Robert Jackson in *Johnson v. United States*[90] as requiring the magistrate to be both neutral

---

87. *Id.* at 543. The finding that the fourth amendment protection includes commercial establishments was reaffirmed in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), which held that:

> The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience . . . . The particular offensiveness [the general warrant] engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists . . . . Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.

Id. at 311-12.

88. *Cf.* Oliver v. United States, 466 U.S. 170, 177-79 (1984). The Court held that the open fields doctrine, which permits police officers to enter and search a field without a warrant, was consistent with explicit language of the fourth amendment and consistent with the concept of an individual's fourth amendment protection of reasonable expectations of privacy as expressed in Katz v. United States, 389 U.S. 347 (1967). The Court found that the open fields doctrine was consistent with the principles of *Katz* as the activities which occur in an open field are not the intimate sort of activities the amendment was designed to protect. *Oliver*, 466 U.S. at 179.

89. 389 U.S. at 361 (Harlan, J., concurring).

90. 333 U.S. 10 (1948). *See supra* note 69 for a brief statement of the holding in *Johnson*.

and detached.[91] Jackson, in writing for the Court, clearly identified the rationale behind this requirement in these oft-quoted words:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[92]

It is this magistrate who makes the determination of whether there is probable cause to issue a search warrant. Probable cause in the fourth amendment context has been defined to "mean more than bare suspicion. Probable cause exists where 'the facts and circumstances within . . . [the officers'] knowledge and of which . . . [the officers'] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[93]

The Court in a series of cases including *Coolidge v. New Hampshire*,[94] *Shadwick v. City of Tampa*,[95] and *Lo-Ji Sales, Inc. v. New York*,[96] provided further guidance in defining when a magistrate is properly neutral and detached. These cases, when

---

91. *Johnson*, 333 U.S. at 13-14.

92. *Id. See also* United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (limited searches incident to arrest).

93. Brinegar v. United States, 338 U.S. 160, 175 (1949). More recently, the Court has stated: "probable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232 (1983).

94. 403 U.S. 443 (1971). Search warrant was defective as it was issued by the Chief Prosecutor of the state who "simply cannot be asked to maintain the requisite neutrality with regard to [his] own investigations. . . ." *Id.* at 450.

95. 407 U.S. 345 (1972) (municipal court clerks found to be constitutionally acceptable to issue warrants). "Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." *Id.* at 350.

96. 442 U.S. 319 (1979). The magistrate, who had accompanied the police in a six-hour search of an "adult" bookstore in order to determine which items were to be seized, was found not to be neutral and detached as he had "allowed himself to become a member, if not the leader, of the search party which was essentially a police operation." *Id.* at 327.

viewed together, present the concept of the magistrate as being an independent entity who does not act as a "rubber stamp" to police requests, but rather as a critical intermediary in securing an individual's fourth amendment protection.

Given this concept of the independent role of the magistrate, it is critical that the affidavits presented to him not be based on false statements. This issue was addressed by the Court in *Franks v. Delaware*[97] when it held that searches based on warrants procured through false statements to the magistrate must be suppressed.[98] The Court found that if a defendant can establish by a preponderance of the evidence that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the warrant affidavit, and if the false statement is necessary to the finding of probable cause, then "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."[99]

D. *Exceptions to the Search Warrant Requirement*

As recognized by the Court, a search "without a warrant . . . 'can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant.' "[100] This Note will examine exceptions to the search warrant requirement that are presented in *Murray v. United States*.[101] Specifically, these will include the following: The automobile exception, the exigent circumstances exception, and the plain view exception.

---

97. 438 U.S. 154 (1978) (defendant was entitled to a hearing to determine if false statements included in the warrant affidavit were necessary to the finding of probable cause, and if they were necessary, then the evidence was subject to the exclusionary rule).

98. *Id.* at 155-56.

99. *Id.* at 156.

100. Stoner v. California, 376 U.S. 483, 486 (1964) (citations omitted).

101. 108 S. Ct. 2529 (1988).

1. *Automobile Exception*

In *United States v. Ross*,[102] the Supreme Court reaffirmed its 1925 holding in *Carroll v. United States*[103] which permitted a warrantless search of an automobile provided such search was based on the authorities' probable cause belief that the vehicle contained seizable evidence. The Court limited this exception to the warrant requirement of the fourth amendment to automobiles or other vehicles and did not extend this exception to any movable container found in a public place.[104] The scope of this exception "applies only to searches of vehicles that are supported by probable cause."[105] In addition, the Court found that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."[106] The essence of this exception is that the probable cause determination must be related to the *vehicle* as the object which contains the seizable evidence. The basis of this exception is both the reduced expectation of privacy which society has in its vehicles[107] and, more critically, the pragmatic problem of the easy mobility of vehicles, which would make it difficult for the police to return and execute a search warrant.[108]

2. *Exigent Circumstances*

The concept of searching without a warrant based on an emergency situation or exigent circumstances has a long com-

---

102. 456 U.S. 798 (1982) (warrantless search of vehicle based on probable cause that seizable evidence was present in the vehicle found not to be in violation of the fourth amendment as search is reasonable and as society has a diminished expectation of privacy in vehicles).

103. 267 U.S. 132 (1925) (vehicle may be searched without a warrant provided search is based on probable cause because this warrantless search is reasonable within the meaning of the fourth amendment).

104. *Ross*, 456 U.S. at 819. The argument that a warrantless search of an automobile believed to be transporting contraband justifies a warrantless search of any movable container believed to be carrying an illicit substance was squarely rejected in United States v. Chadwick, 433 U.S. 1, 14-15 (1977) (rejecting warrantless search of footlocker inside of vehicle).

105. *Ross*, 456 U.S. at 809.

106. *Id.* at 825.

107. *Chadwick*, 433 U.S. at 12.

108. *Carroll*, 267 U.S. at 153.

mon-law history and continues to be an exception to the warrant requirement. Examples would include entering a building or home to fight a fire,[109] chase a suspect,[110] or prevent the destruction of evidence.[111] The basic concept of exigent circumstances is described in *Warden v. Hayden*[112] in which Justice Brennan found hot pursuit to be an exigent circumstance that made entry and search for the robber imperative.[113] Brennan commented that the fourth amendment does not require the police to delay an investigation when presented with an emergency need,[114] since "[u]nder the circumstances of this case, 'the exigencies of the situation made that course imperative.' "[115]

In *Vale v. Louisiana*,[116] the Court indicated that the concern over the destruction of evidence should not automatically allow warrantless entry and searches.[117] Officers, when possible, should obtain a warrant or use less restrictive means such as securing the premises from outside.[118] The Court, in reversing the conviction, expressed the policy that police should not create their own exigent circumstances in order to justify a warrantless entry and search.[119] The Third Circuit in *United States v.*

---

109. Michigan v. Tyler, 436 U.S. 499 (1978). "A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.' . . . And once in a building for this purpose, firefighters may seize evidence of arson that is in plain view." *Id.* at 509.

110. Warden v. Hayden, 387 U.S. 294 (1967) (Court found the fourth amendment consistent with common-law rule which permits hot pursuit of suspect without warrant). *But cf.* Payton v. New York, 445 U.S. 573 (1980) (Court held that absent other exigent circumstances officers may not enter a home to make a routine felony arrest without a warrant).

111. Ker v. California, 374 U.S. 23 (1963) (warrantless and unannounced entry of dwelling by police to prevent imminent destruction of evidence found to be within exigent circumstances exception).

112. 387 U.S. 294 (1967).

113. *Id.* at 298.

114. *Id.* at 298-99.

115. *Id.* at 298 (quoting McDonald v. United States, 335 U.S. 451, 456 (1948)). *See* United States v. Santana, 427 U.S. 38 (1976), which answered the question of whether the defendant, by her act of retreating into her house, could thwart an otherwise proper arrest. The Court held that she could not and cited *Warden*. *Id.* at 42.

116. 399 U.S. 30 (1970). *Vale* presented a situation where the police, having observed a probable drug transaction, arrested the defendant outside his house and proceeded to enter and search the house. *Id.*

117. *Id.* at 33-34.

118. *Id.* at 34.

119. *Id.* at 35.

Rubin[120] analyzed the direction provided by the *Vale* Court on the exigent circumstances created by the threat of loss or destruction of evidence. The Third Circuit recognized that exigent circumstances are fact sensitive and that the necessities provided by the circumstances to the search must be scrutinized.[121] The court listed the following factors as relevant:

> (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to the police officers guarding the site of the contraband while a search warrant is sought; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic."[122]

This analysis of the exigent circumstances exception indicates a heavy burden on the government to justify a warrantless entry. This justification requires articulable facts to support the finding that there was a compelling necessity for immediate entry to prevent destruction of evidence.

3. *Plain View Doctrine*

The Court in *Coolidge v. New Hampshire*[123] recognized that under certain circumstances police may seize evidence in plain

---

120. 474 F.2d 262 (3d Cir. 1973).

121. *Id.* at 268.

122. *Id.* at 268-69 (quoting United States v. Manning, 448 F.2d 992, 998-99 (2d Cir. 1971) (other citations omitted)). *See* 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.5(b), at 656-71 (1987 & Supp. 1988) for detailed analysis of *Rubin* test and exigent circumstance based on destruction or removal of evidence.

123. 403 U.S. 443 (1971) (search invalidated because search warrant authorized by chief prosecutor who was, by definition, not neutral and detached). The government asserted that, if *arguendo* the search warrant was invalid, the evidence from the defendant's automobile seized by police should not be suppressed as the automobile was in "plain view." *Id.* at 457-64. The Court rejected this assertion because "the 'plain view' exception cannot justify the police seizure of the Pontiac car in this case. The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize it when they came upon Coolidge's property." *Id.* at 472. *See* Taylor v. United States, 236 U.S. 1 (1932) for an early example of the limits of the plain view doctrine. In *Taylor*, evidence of contraband whisky in defendant's garage procured by police's warrantless search was inadmissible even though police smelled whisky and saw through a small opening in cardboard cases

view without a warrant.[124] This seizure is consistent with the fourth amendment as long as "the initial intrusion that brings the police within plain view of such an article is supported . . . by one of the recognized exceptions to the warrant requirement. . . ."[125] The Court placed two limitations on the doctrine. The first limitation is that the mere fact that evidence is seen in plain view is not sufficient to justify a warrantless seizure.[126] The second limitation is that the discovery of evidence in plain view must be inadvertent.[127] Consequently, in *Coolidge* the seizure of the evidence in question was not covered by the plain view doctrine as police were not on the premises inadvertently.[128]

E. *The Exclusionary Rule*

1. *Origin from* Weeks v. United States *to* Mapp v. Ohio

The rule requiring the exclusion of evidence at trial which was procured as a result of a constitutional violation was established for the federal court system in *Weeks v. United States.*[129]

---

indications that the cases were likely to contain whisky bottles. *Id.* at 5. "Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guaranties against unreasonable search." *Id.* at 6 (citation omitted).

124. *Coolidge*, 403 U.S. at 465.

125. *Id. See* Texas v. Brown, 460 U.S. 730, 737 (1983) (Court indicated that officers must legally be in a place when they first observe the item and if they seize the item, they must have legal access to it).

126. *Coolidge*, 403 U.S. at 468. "This is simply a corollary of the familiar principle . . . that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' " *Id.*

127. *Id.* at 469.

128. *Coolidge*, 403 U.S. at 472. *Brown*, 460 U.S. at 730, further expanded the limitations of the plain view doctrine when the Court indicated that the officer must, when he first observes the item, be legally in the place from which he gains that observation, and if he seizes the item, he must have legal access to it. *Id.* at 737.

129. 232 U.S. 383 (1914), *rev'd in part*, Elkins v. United States, 364 U.S. 206 (1960) (*Elkins* rejected *Weeks*' "silver platter" doctrine, which had allowed the admissibility of evidence seized by state police and provided to federal authorities). Despite its partial reversal by *Elkins*, the *Weeks* decision effectively overruled Adams v. New York, 192 U.S. 585 (1904), which had adhered to the common-law rule that a court would not inquire as to the legality of how evidence was obtained, but to its relevance. " 'Evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular or even in an illegal manner . . . . For the trespass he [the trespasser] may be held responsible civilly, and perhaps criminally; but his testimony is not thereby rendered incompetent.' " *Adams*, 192 U.S. at 596 (quoting Commonwealth v. Acton, 165 Mass. 11, 42 N.E. 329 (1895)).

Justice Day reversed the trial court's denial of Weeks' petition for return of property removed from his room by United States marshals during an illegal search. The property items in question were to be entered as evidence in Weeks' trial for the sale of lottery tickets through the U.S. mail. Justice Day noted "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizure and enforced confessions . . . should find no sanction in the judgments of the courts. . . ."[130] He further maintained that "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[131] Thus, Justice Day indicated that the requirement of suppressing the evidence is both a personal right of the individual whose property was illegally seized and an act that is required to maintain the integrity of the court.[132] This recognition of the importance of the integrity of the judicial system was viewed by several Supreme Court justices in the early twentieth century as the prime basis of the exclusionary rule.[133]

---

130. *Weeks*, 232 U.S. at 392.

131. *Id.* at 394.

132. Over the next 11 years, the Court developed the exclusionary rule for federal courts to exclude all evidence from illegal searches. In *Weeks*, the Court ordered the documents suppressed since petitioner had requested their return prior to trial. *Id.* at 398. In Gouled v. United States, 255 U.S. 298 (1921), the Court ordered documents suppressed where the petitioner had not requested their return *prior* to trial as the petitioner was unaware of the government's possession of the documents until trial. The Court found that the rule of practice requiring prior request for return "must not be allowed for any technical reason to prevail over a *constitutional right*." *Id.* at 313 (emphasis added). Finally, in Agnello v. United States, 269 U.S. 20 (1925), the Court ordered the suppression of a can of cocaine illegally seized from petitioner's home without requiring petitioner to apply for return of the contraband item. The decisions prior to *Agnello* had not addressed the issue of contraband property, in the situation where to assert one's property right and request the return of the property would be inconsistent with the position maintained by the petitioner at trial, that he was not the possessor of the illegal substance. Thus, it was critical in *Agnello* for petitioner to be able to suppress the evidence directly. The Court in *Agnello* cited as authority Silverthorne Lumber Co. v. United States, 251 U.S. 385 (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." *Id.* at 392.

133. *See* Olmstead v. United States, 277 U.S. 438, 485 (1928) (majority held that wiretapping did not violate the fourth amendment as no trespass occurred and as the words which were "seized" were not within the meaning of "things" seized within the fourth amendment), *overruled by* Katz v. United States, 389 U.S. 347 (1967). Justice

In *Wolf v. Colorado*,[134] the exclusionary rule was initially held as not being "derived from the explicit requirement of the Fourth Amendment"[135] and, therefore, was a judicially created remedy.[136] Consequently, in *Wolf*, although the fourth amendment itself was held applicable to the states through the fourteenth amendment,[137] the exclusionary rule was not.[138] This denial of the application of the exclusionary rule to the states was overruled in 1961 in *Mapp v. Ohio*.[139] In this seminal case, Dolly Mapp was convicted in state court of possession of pornographic books[140] obtained through a particularly egregious warrantless search[141] of her boarding house.[142]

Justice Clark, in writing for the majority, rejected the *Wolf* contention that the exclusionary rule was not required by the fourth amendment.[143] Clark maintained that without the *Weeks* exclusionary rule, "the assurance against unreasonable federal searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties. . . ."[144] Consequently, he found that the exclusionary rule was enforceable against the states through the due

---

Brandeis maintained in his dissent that "[i]n a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting). *See also* Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931); Byars v. United States, 273 U.S. 28, 33 (1927).

134. 338 U.S. 25 (1949). Defendant's conviction of conspiring to commit abortions was affirmed even though the state had unlawfully obtained evidence in violation of the fourth amendment. The Court found that the exclusionary rule was "a matter of judicial implication." *Id.* at 25.

135. *Id.* at 28.

136. *Id.*

137. *Id.* at 27-28.

138. *Id.* at 33.

139. 367 U.S. 643 (1961).

140. *Id.* at 643.

141. *Id.* at 644-45. *Mapp* involved a forcible entry into the home, a denial of access to counsel, a bogus search warrant, and excessive physical confrontation and confinement. *Id.*

142. *See* 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 (1983) for an in-depth review of Mapp v. Ohio.

143. *Mapp*, 367 U.S. at 655-56.

144. *Id.* at 655.

process clause of the fourteenth amendment[145] and that the rule was "logically and constitutionally necessary. . . ."[146] Justice Clark in *Mapp* further echoed the *Weeks* decision by noting that the fourth amendment is an individual right and the exclusionary rule is necessary to maintain judicial integrity.[147]

Over the seventy-five years since *Weeks*, the Court has set forth three rationales for the exclusionary rule.[148] The first rationale was based on the personal right of the individual whose property was searched or seized in violation of the fourth amendment.[149] The second rationale was that the exclusionary rule was necessary to maintain the integrity of the Court.[150] The third rationale was based on the concept that the rule deters police from violating the commands of the Constitution.[151] More

---

145. *Id.*

> [W]ithout that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in 'the concept of ordered liberty.' "

Id. (citation omitted).

146. *Id.* at 656. *See* Stewart, *supra* note 142, at 1380-89 for review of the constitutional basis for the exclusionary rule. *See also* Cann & Egbert, *The Exclusionary Rule: Its Necessity in Constitutional Democracy*, 23 How. L.J. 299 (1980).

147. *Mapp*, 367 U.S. at 660.

148. The following articles provide an extensive treatment of the rationales behind the exclusionary rule issue which is beyond the scope of this Note: Cann & Egbert, *The Exclusionary Rule: Its Necessity in Constitutional Democracy*, 23 How. L.J. 299 (1980); Davies, *A Hard Look at What We Know (and Still Need to Learn) about the "Costs" of the Exclusionary Rule: the NIJ Study and Other Studies of "Lost" Arrests*, 1983 Am. B. Found. Res. J. 611; Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 Creighton L. Rev. 565 (1983); Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 Am. B. Found. Res. J. 585; Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361 (1981); Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But was it a Fair Trial?* 22 Am. Crim. L. Rev. 85 (1984); Comment, *Comparative Analysis of the Exclusionary Rule and Its Alternatives*, 57 Tul. L. Rev. 648 (1983).

149. *See* Boyd v. United States, 116 U.S. 616, 630 (1886).

150. *See Mapp*, 367 U.S. at 660; Elkins v. United States, 364 U.S. 206, 222 (1960); Byars v. United States, 273 U.S. 28, 33-34 (1927); *Weeks*, 232 U.S. at 392 (1914).

151. *See* Stone v. Powell, 428 U.S. 465, 486 (1976) (denying habeas corpus relief where the state had provided full and fair litigation of a fourth amendment claim); Linkletter v. Walker, 381 U.S. 618, 636-37 (1965) (denying retrospective effect of *Mapp* as it would not serve the deterrent purpose of the rule); *Elkins*, 364 U.S. at 217 (holding that evidence obtained by state officers in violation of the fourth amendment was inadmissible in federal court). "The rule is calculated to prevent, not to repair. Its purpose is to

recently, the Court has focused on the deterrence function of the exclusionary rule as the prime underlying basis of the rule.[152]

2. *Cost-Benefit Analysis of the Exclusionary Rule*

The Court, having focused on the deterrence function as the primary basis for the exclusionary rule, has reviewed the utilization of this rule through a cost-benefit analysis approach. This method of analysis was first proposed in *United States v. Calandra*[153] where Justice Powell found that a witness before a grand jury could not refuse to answer after immunity had been granted on the grounds that the questions were derived from evidence obtained in an unlawful search.[154] Powell, consequently, proposed a cost-benefit analysis approach based on the rationale that: one, the purpose of the exclusionary rule is not to redress the injury of the search victim;[155] two, the purpose is to deter future unlawful police conduct;[156] and three, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[157] Powell was, therefore, led to the position that the Court must "weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context."[158] Justice Powell found only incremental deterrence when the exclusionary rule is applied to grand jury proceedings.[159] Therefore, he found it insufficient to justify the cost of

---

deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it." *Id.*

152. *See* United States v. Leon, 468 U.S. 897 (1984) (adoption of the good faith exception to the exclusionary rule primarily based on the premise that suppressing evidence in question would not serve to deter illegal police conduct).

153. 414 U.S. 338 (1974).

154. *Id.* at 351-52.

155. *Id.* at 347.

156. *Id.*

157. *Id.* at 348.

158. *Id.* at 349.

159. *Id.* at 351. Justice Powell found that it was "unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal [of deterring police misconduct]. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation." *Id.*

excluding the evidence from these proceedings.[160]

3. *The Good Faith Exception to the Exclusionary Rule*

In *United States v. Leon*,[161] the Supreme Court adopted the good faith exception to the exclusionary rule.[162] This exception applies when officers act in reasonable reliance upon a search warrant issued by a detached and neutral magistrate even though the warrant is subsequently found to be invalid.[163] The holding essentially follows the logic of the *United States v. Calandra*[164] balancing approach.[165] The exclusionary rule was again found to be a judicially created remedy, and, as the wrong condemned by the amendment was fully accomplished by the original illegal search or seizure, no new violation occurs by virtue of the further use of the evidence.[166] Justice White commented that "[t]he substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern."[167] Having justified a cost-benefit anal-

---

160. *Id. See* Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974) for a discussion of *Calandra* which is beyond the scope of this Note.

161. 468 U.S. 897 (1984).

162. *Id.*

163. *Id.* at 914. The case involved a search and seizure of large quantities of drugs pursuant to a deficient search warrant which was not based on probable cause. The Court found that the police acted in good faith; the Court finding that the police had no reason to suspect that the warrant was deficient and they were not involved in misleading the magistrate in the issuance of the warrant. *Id.*

164. 414 U.S. 338 (1974).

165. *Leon*, 468 U.S. at 908-09. "Accordingly, '[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.' " *Id.* (quoting *Calandra*, 414 U.S. at 348). "We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 922.

166. *Id.* at 906.

167. *Id.* at 907. *See id.* at 907 n.6 which reviewed recent commentaries on the empirical cost of the exclusionary rule. Justice White disagreed with the conclusion of these commentaries and asserted:

> Many of these researchers have concluded that the impact of the exclusionary rule is insubstantial, but the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures . . . . Because we find that the rule can have no substantial deterrent effect in the sorts of situations under consideration in this case . . . we conclude that it cannot pay its way in those situations.

ysis approach, Justice White then reviewed whether the result of this analysis indicates whether the good faith exception should be accepted.[168] He found that the benefits of applying the exclusionary rule were minimal, and, therefore, the good faith exception was adopted.[169] The Court limited the good faith exception by requiring that the officer's reliance on the deficient warrant be reasonable and by recognizing that there are some circumstances where an officer "will have no reasonable grounds for believing that the warrant was properly issued."[170]

4. *Objection to the Exclusionary Rule*

The major objection to the exclusionary rule was articulated by Chief Justice Burger in his dissent in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*.[171] The basis of this objection is the fact that the exclusionary rule results in the suppression of evidence that is relevant and often essential to obtain a conviction.[172] He interpreted the purpose of the exclusionary rule as resting "on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence."[173] He further proposed that "[i]f an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule."[174] After noting that

---

Id. at 907 n.6.

168. *Id.* at 908-26.

169. *Id.* at 922. Justice White viewed the deterrence factor only from the point of view of the officer making the search, not from the point of view of the entire criminal justice system. *Id.* at 915-17. Thus, suppression of evidence due to an error by a judge or a magistrate would not have a deterrent effect on the *police* and, consequently, a cost-benefit analysis would indicate that this evidence should not be suppressed. *Id.* at 917. *See also* Massachusetts v. Sheppard, 468 U.S. 981 (1984) (decided the same day as *Leon*). "[T]he exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid . . . ." *Id.* at 987-88.

170. *Leon*, 468 U.S. at 923. *See* Dripps, *Living with Leon*, 95 YALE L.J. 906 (1986) and Duke, *Making Leon Worse*, 95 YALE L.J. 1405 (1986) for divergent opinions on *Leon*.

171. 403 U.S. 388 (1971) (individuals entitled to a cause of action under the fourth amendment if they have been damaged as a result of federal agent's violation of the amendment).

172. *Id.* at 413 (Burger, C.J., dissenting).

173. *Id.*

174. *Id.* at 414.

the exclusionary rule has rested on the deterrent rationale, Burger stated that "it is both conceptually sterile and practically ineffective in accomplishing its stated objective."[175] As proof of this proposition, he indicated that no empirical evidence existed to support the claim that the rule actually deters illegal conduct of law enforcement officials.[176]

Numerous empirical studies have been conducted over the last ten years to determine the cost to society of the exclusionary rule.[177] Various studies have found that between 0.8% to 2.4% of federal felony arrests are lost as a result of the exclusionary rule.[178] Most recently, the American Bar Association's Section of Criminal Justice has issued an interim report reviewing whether constitutional protection under the Bill of Rights prevents effective crime control.[179] In the preparation of this report, the committee, established by the Criminal Justice Section in 1986, conducted a methodologically developed opinion poll of nearly 1,000 police officers, prosecutors, defense attorneys, judges, and other participants in the criminal justice system.[180] The committee also held hearings to focus on whether constitutional protection serves to protect criminals from prosecution, to prevent police from solving crimes, and to frustrate the prosecutor's ability to obtain convictions.[181] The committee's findings were summarized as follows:

> Constitutional restrictions, such as the exclusionary rule and *Miranda*, do not significantly handicap police and prosecutors in their efforts to arrest, prosecute and obtain convictions of criminal defendants for most serious crimes. Rather, the major problem for the criminal justice system, identified by all criminal justice respondents to the Committee, is lack of sufficient resources.

---

175. *Id.* at 415.

176. *Id.* at 416.

177. *See* R. VAM DUIZEND, L. SUTTON, & C. CARTER, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES (1983); Nardulli, *supra* note 148; Schlesinger, *The exclusionary rule: have proponents proven that it is a deterrent to police?*, 62 JUDICATURE 404 (1979); Wilkey, *The exclusionary rule: why suppress valid evidence?*, 62 JUDICATURE 214 (1978).

178. *See* Nardulli, *supra* note 148, at 590.

179. *Criminal Justice in Crisis*, ABA CRIM. JUS. SEC., [hereinafter *Criminal Justice in Crisis*] (transcript on file at Pace University School of Law Library).

180. *Id.* at 2.

181. *Id.*

> The entire system is starved: police, prosecution, criminal defense, courts and corrections. As currently funded, the criminal justice system cannot provide the quality of justice the public legitimately expects and the people working within the system wish to deliver.[182]

It was noted in the American Bar Association Journal review of this report that "[t]heir opinion was corroborated by the committee's examination of numerous exclusionary rule studies. According to these studies, only 0.6% to 2.35% of all adult felony arrests are screened out before filing or dismissed by the court because of illegal searches."[183]

F. *The Independent Source Doctrine*

The independent source doctrine[184] and its related corollary doctrines — attenuated connection and inevitable discovery — were developed by the Court to provide both a framework for the appropriate application of the exclusionary rule and a limitation on the extent of the application of the rule. After the development of the exclusionary rule, the Court expressed concern that not every constitutional violation should automatically result in all evidence being suppressed[185] and, consequently, developed these doctrines to serve as effective exceptions to the exclusionary rule.

1. *Origin of Independent Source Doctrine* — Silverthorne Lumber Co. v. United States

The independent source doctrine, as a justification for not applying the exclusionary rule, was first set forth in *Silverthorne Lumber Co. v. United States*.[186] Justice Holmes in his opinion stated "[i]f knowledge of . . . [facts illegally obtained] is gained from an independent source they may be proved like any others,

---

182. *Id.* at 4.

183. Raven, *Crime and the Bill of Rights: Separating Myth from Reality*, 74 A.B.A. J. 8 (1988).

184. *See* Annotation, *"Fruit of the Poisonous Tree" Doctrine Excluding Evidence Derived from Information Gained in Illegal Search*, 43 A.L.R.3D 385 (1972 & Supp. 1988) for extensive background material on independent source doctrine.

185. *See* Nardone v. United States, 308 U.S. 338, 341 (1939).

186. 251 U.S. 385 (1920).

but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."[187] The issue in *Silverthorne* was whether the petitioner could be held in contempt of court for failing to obey subpoenas ordering production of documents which had previously been illegally seized by United States marshals and returned by court order to the petitioner.[188] The Court reversed the district court judgment, finding that the government had gained knowledge of the documents illegally and that without this knowledge the government would not have been able to issue a subpoena.[189] Justice Holmes asserted that to allow the government to violate the fourth amendment by illegally seizing items, returning them, and then finally using the knowledge gained as a result of the illegal search to subpoena the same items, would "[reduce] the Fourth Amendment to a form of words."[190]

Traditional independent source doctrine required that the illegal act not be connected to the actual acquisition of the evidence or knowledge in question. As Justice Holmes expressed in *Silverthorne*,

> 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. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . .[191]

The *Silverthorne* case presented the independent source doctrine as applying to evidence that has two separate and distinct sources: one, an illegal source as a result of a violation of a constitutional right by the government; and two, a totally separate source not connected to that constitutional violation.[192] A "but for" test provides an analytical framework for the application of the independent source doctrine. If "but for" the constitutional violation the evidence would not have been obtained, then the

187. *Id.* at 392.
188. *Id.*
189. *Id.* at 391.
190. *Id.* at 392.
191. *Id.*
192. *Id.*

evidence should not be admitted. Thus, under a strict application of this doctrine, if there is any causal connection between the constitutional violation and the obtaining of the evidence, the evidence must be suppressed.

2. *Attenuated Connection Development*

a. Nardone v. United States

The problem with the independent source doctrine, as set forth in *Silverthorne*,[193] is that evidence is suppressed if there is any degree of causal connection between the violation and the acquisition of evidence. This rigid application of the independent source doctrine was addressed by Justice Frankfurter in *Nardone v. United States*.[194] The issue presented in *Nardone* was whether the court had improperly refused to allow the defendant to examine the prosecution regarding how it had used information secured in violation of an illegal telephone intercept.[195] As pointed out in the case, the problem with the application of the *Silverthorne* independent source doctrine was that "[s]ophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof."[196] Thus, *Silverthorne* would hold that if there were any connection between the illicit wire-tapping and the acquisition of the evidence, the evidence should be suppressed. This would then lead to detailed analysis of whether there was any causal linkage between the illegal action and the actual attainment of information or evidence. The Court rejected this approach and recognized that "[a]s a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."[197]

---

193. 251 U.S. 385 (1920).

194. 308 U.S. 338 (1939).

195. *Id.* at 339.

196. *Id.* at 341.

197. *Id. See* Stratton, *The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic*, 75 CRIM. L. & CRIMINOLOGY 139 (1984). This article provides a sound analysis of the attenuation exception doctrine and concludes that the attenuation exception is inconsistent with the fourth amendment because it permits use of evidence discovered through illegal search and seizures. *Id.* at 142. The attenuated connection doctrine is also referred to as the attenuation exception to the exclusionary rule. *Id.*

Nardone instructs that even if there is some causal connection between the information obtained and the illegal act, it should not result in the suppression of the evidence, provided the connection is so attenuated as to dissipate the taint of the illegal act.[198] No test was developed in *Nardone*, however, to address the degree of attenuation required and the factors to be assessed in order to determine if the taint has been dissipated.

b. Wong Sun v. United States

The classic application of the attenuated connection doctrine is illustrated by *Wong Sun v. United States*.[199] In *Wong Sun*, petitioner James Wah Toy's statement to the police and the subsequent seizure of heroin from Johnny Yee were considered "fruits" of the illegal entry,[200] but petitioner Wong Sun's unsigned confession was not considered "fruits" of an illegal arrest by the government.[201] Both statements, in fact, had a similar cause-and-effect relationship to the illegal fourth amendment violations. A "but for" analysis of these facts would find all of the evidence inadmissible since "but for" the original illegal entry into Toy's apartment and "but for" the illegal arrest of Wong Sun, none of the evidence would have been obtained. In analyzing Toy's statement, the Court found no intervening independent act of free will on Toy's part. Specifically, Toy's statement closely followed the illegal entry and Toy was handcuffed and under arrest.[202] In addition, since it was Toy's statement that led police directly to Johnny Yee, the heroin seized at Yee's was also inadmissible against Toy as "fruits" obtained by the exploitation of the illegal entry into Toy's apartment.[203]

The Court, conversely, did find that Wong Sun's confession

198. *Nardone*, 308 U.S. at 341.

199. 371 U.S. 471 (1963). In *Wong Sun*, federal narcotics agents made an illegal entry into the residence of "Blackie" Toy and illegally arrested him. After the arrest, Toy told the agents he had no narcotics but Johnny Yee did. Acting on this information, the agents entered Yee's premises and obtained narcotics from him. Yee told the agents upon subsequent questioning that he had received the narcotics from Toy and Wong Sun. The narcotics were later admitted against Toy and Wong Sun.

200. *Id.* at 487-88.

201. *Id.* at 491.

202. *Id.* at 486.

203. *Id.* at 488.

was purged of the primary taint because the confession occurred several days after his illegal arrest, and was, concomitantly, the result of Wong Sun's voluntary return to the police.[204] Thus, the fact that Wong Sun was not in custody and had a significant period to reflect on the situation attenuated the causal connection between the fourth amendment violation and the confession. Justice Brennan provided direction in *Wong Sun*, in terms of evaluating whether the evidence is "fruit of the poisonous tree,"[205] by stating that the appropriate question 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.' "[206]

c. Brown v. Illinois

Further development of the attenuated connection analysis is presented in Justice Blackmun's opinion for the Court in *Brown v. Illinois*.[207] The petitioner in *Brown* had been arrested without probable cause and without a warrant, resulting in a particularly egregious fourth amendment violation.[208] The question presented was the admissibility of two in-custody inculpatory statements made by Brown after he had been given *Miranda*[209] warnings. The State Supreme Court of Illinois held that the giving of the *Miranda* warnings to Brown prior to interrogation had served to break the causal connection between the illegal arrest and Brown's statements.[210]

The United States Supreme Court rejected the *per se* rule

204. *Id.* at 491.

205. Justice Frankfurter coined the phrase, "fruit of the poisonous tree" in Nardone v. United States, 308 U.S. 338, 341 (1939). The metaphor used by Justice Frankfurter was that the "poisonous tree" is the fourth amendment violation and the "fruit" is the evidence or knowledge gained by that violation which, therefore, is also poisonous. *Id.*

206. *Wong Sun*, 371 U.S. at 488 (quoting MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

207. 422 U.S. 590 (1975).

208. *Id.* at 592. Petitioner had been arrested at gunpoint without probable cause and without a warrant by officers who were illegally in his apartment in the evening awaiting petitioner's return. *Id.*

209. Miranda v. Arizona, 384 U.S. 436 (1966) (Court mandated that prior to all custodial interrogations the four-fold warnings be given in order to safeguard the privilege against self-incrimination).

210. People v. Brown, 56 Ill. 2d 312, 317, 307 N.E.2d 356, 358 (1974).

which had been accepted by the Illinois court.[211] The Court also declined to adopt the "but for" approach, under which it would have found the confession inadmissible; "but for" the illegal arrest, no confession would have been given and, therefore, the confession should be excluded.[212]

Instead, the Court followed the guidelines established under *Wong Sun v. United States*—whether a confession is the product of free will must be "answered on the facts of each case."[213] The Court proceeded to develop the applicable test to determine whether statements are a product of a free will and of such a tenuous connection that the taint of the statements had dissipated. Having indicated that "[n]o single fact is dispositive,"[214] the Court went on to list the following factors:

> The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant.[215]

This test focuses on the different factors to be reviewed in determining whether the causal relationship between the evidence and the constitutional violation is sufficiently attenuated for the taint to be dissipated.

3. *Inevitable Discovery* — Nix v. Williams

In 1984, the Supreme Court expressly adopted the inevitable discovery exception to the exclusionary rule[216] in its opinion

---

211. *Brown*, 422 U.S. at 603. The United States Supreme Court rejected the *per se* rule which in this context would find that the *Miranda* warnings alone would be sufficient to break the causal connection and make the statements a product of free will. *Id.* The Court found that "the *Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited." *Id.*

212. *Id.*

213. *Id.* 422 U.S. at 603 (citing Wong Sun v. United States, 371 U.S. 471, 479 (1963) (*Wong Sun* Court ruled that probable cause must be "measured by the facts of the particular case")).

214. *Id.* at 603.

215. *Nix v. Williams*, 467 U.S. 431 (1984). at 603-04 (citation omitted).

216. This case involved two petitions to the United States Supreme Court for writs

in *Nix v. Williams*.[217] The facts of *Nix* involved the Christmas Eve disappearance of a ten year old girl from Des Moines, Iowa.[218] Several days later, Williams was arrested and arraigned in Davenport, Iowa in connection with this disappearance and presumptive murder.[219] At that time, police were searching for the child.[220] This search involved over 200 volunteers and police personnel who were following a systematic planned search pattern to locate either the child or the child's body.[221] Williams, on the trip from Davenport to Des Moines in a police vehicle, was given a "Christian Burial Speech"[222] by a police officer and, as a result, made incriminating statements which guided the police to the location of the body.[223]

Petitioner Williams was convicted in state court. Subsequently, Williams twice petitioned for, and was granted, writs of habeas corpus in federal court.[224] On his first petition, the Supreme Court, in *Brewer v. Williams*,[225] affirmed the court of appeals' and the district court's judgment that the defendant's sixth amendment right to counsel had been violated and that the incriminating statements obtained through this violation were not admissible at trial.[226] Consequently, Williams was tried for a second time in state court and was again convicted of

---

of habeas corpus. The Supreme Court granted both petitions. The case is cited as *Brewer v. Williams*, 430 U.S. 387 (1977) on its first petition, and is cited as *Nix v. Williams*, 467 U.S. 431 (1984) on its second petition. For the purposes of this discussion, the article will refer to this case generally as *Nix v. Williams*.

217. 467 U.S. at 444.

218. *Id.* at 434.

219. *Id.* at 435.

220. *Id.*

221. *Id.*

222. *Brewer*, 430 U.S. at 392-93. The "Christian Burial Speech" given by the police officer to Williams indicated that the decent act would be to tell the officer the location of the body in order that the victim could receive a proper Christian burial. Emphasis in this recitation included addressing Williams as "Reverend;" noting the young age of the victim; and finally, reminding Williams of the fact that the victim's body would be buried by an expected snow fall and that "the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered." *Id.* at 393.

223. *Id.* at 405-06.

224. *Id.* at 394 (1977). *See supra* note 216.

225. 430 U.S. 387 (1977).

226. *Id.* at 406.

murder.[227]

At Williams' second trial, Williams sought to suppress the evidence obtained from the body and all evidence related to the discovery of the body as "fruits" of the prior sixth amendment violation.[228] The Iowa state court admitted the evidence after taking the lead suggested in *Brewer* that the evidence "might well be admissible on the theory that the body would have been discovered in any event . . . ."[229]

In *Nix v. Williams*,[230] the Supreme Court reviewed the grant of habeas corpus relief by the Eighth Circuit after Williams' second trial[231] and rejected the circuit court's requirement that police must act in good faith in order for a court to consider the application of the independent source doctrine.[232] Chief Justice Burger, writing for the Court, asserted that the core rationale for the exclusionary rule is to prevent the government from being in a better position to convict a suspect because of illegal conduct of its police officers.[233] However, "[t]he independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation"[234] because the police should not be put in a worse position than they would have been without the police error or misconduct.[235] Burger recognized the functional similarity between the doctrines of independent source and inevitable discov-

---

227. *Nix*, 467 U.S. at 437-38.

228. *Id.*

229. *Brewer*, 430 U.S. at 406 n.12.

230. 467 U.S. 431 (1984).

231. *Id.* at 434.

232. *Id.* at 445-46. "The requirement that the prosecution must prove the absence of bad faith, imposed here by the Court of Appeals, would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity." *Id.* at 445. "In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce." *Id.* at 446.

233. *Id.* at 442-43.

234. *Id.* at 443.

235. *Id.* In his opinion, Justice Burger reasoned that:

> [t]he independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position than they would have been in if no police error or misconduct had occurred.

Id.

ery and noted that "while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule."[236] Thus, the inevitable discovery principle is that evidence acquired illegally will not be suppressed if the government can establish that the evidence would have inevitably been discovered by the government through legal means.

The significant difference between the independent source doctrine and the inevitable discovery doctrine is that in the inevitable discovery doctrine, the evidence is acquired pursuant to a constitutional or statutory violation by the government. Thus, in cases presenting inevitable discovery issues, it is clear that the evidence seized was the direct result of illegal action by the government. The Court argued that if the core rationale of the exclusionary rule is to deter illegal police conduct, and if the costs of this application of the exclusionary rule are significant to society and the benefits of deterrence of police misconduct are minimal, then in inevitable discovery situations, that core rationale does not exist.[237]

4. *Application of Independent Source Doctrine to Warrantless Searches followed by Warrant-Authorized Searches*

a. *The "But For" Analysis in* Segura v. United States

Segura v. United States,[238] which was decided less than one month after *Nix v. Williams*,[239] presented a warrantless illegal search followed by a warrant-authorized search of the same apartment. New York Drug Enforcement Task Force agents had been involved in a surveillance of petitioners which resulted in the arrest of Parra and Rivudalla-Vidal, who were suspected of illegal drug activity.[240] Following their arrests these two individuals provided information supporting the agents' belief that drugs would be found in Andres Segura's apartment.[241] Conse-

236. *Id.*
237. *Id.*
238. 468 U.S. 796 (1984).
239. 467 U.S. 431 (1984). *See supra* notes 216-37 and accompanying text.
240. *Segura*, 468 U.S. at 799-800.
241. *Id.* at 800.

quently, the Assistant United States Attorney authorized the arrest of Segura but indicated that a search warrant would probably not be obtained until the following day due to the lateness of the hour.[242] Agents were instructed to secure the premises to prevent the destruction of evidence. That evening, agents arrested Segura in the lobby of his apartment building.[243] After the arrest, they took him to his apartment and entered the apartment without requesting or receiving permission.[244] The agents only conducted a limited security search of the apartment and, in the process, observed various drug paraphernalia in plain view.[245] Two agents remained in the apartment awaiting the search warrant.[246]

The search warrant was not issued until nineteen hours after the entry.[247] At that time the agents conducted a full scale search of the apartment and discovered various illegal drugs and records of narcotic transactions.[248] The Court of Appeals for the Second Circuit affirmed the district court holding that the evidence discovered in plain view on the initial entry must be suppressed since it was the direct product of the illegal entry into the apartment.[249] The court also held that the evidence seized as a result of the full scale search pursuant to the search warrant was admissible at trial since it had an independent source.[250] The government did not appeal the suppression of the evidence discovered upon the illegal entry,[251] thus, the only question before the Supreme Court was "whether drugs and the other items observed during the initial entry and first discovered by the agents the day after the entry, under an admittedly valid search warrant, should have been suppressed."[252]

Chief Justice Burger, in his opinion for the Court, reviewed the development of the exclusionary rule, especially in light of

---

242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 801.
246. *Id.*
247. *Id.*
248. *Id.*
249. Segura v. United States, 697 F.2d 300 (2d Cir. 1982).
250. *Id.*
251. *Segura*, 468 U.S. at 802 n.4.
252. *Id.* at 804.

United States v. Calandra,[253] and noted that the rule is a judicially prescribed remedial measure and as "with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[254] Burger reviewed the independent source doctrine as enunciated in *Silverthorne Lumber Co. v. United States*,[255] *Nardone v. United States*,[256] and *Wong Sun v. United States*,[257] and asserted, "[i]n short, it is clear from our prior holdings that 'the exclusionary rule has no application [where] the Government learned of the evidence from an independent source.' "[258]

The Court analyzed petitioners' claim that the primary evidence should be excluded as a "fruit" derived from the illegal entry and found that the illegal entry into petitioners' apartment "did not contribute in any way to discovery of the evidence seized under the warrant."[259] Burger concluded "that not even the threshold 'but for' requirement was met in this case."[260]

The primary basis for the Court's conclusion was that the search warrant application had been started *before* the illegal entry and search. In addition, the Court reasoned that the original securing of the apartment did not result in an illegal seizure of all contents of the apartment.[261] Thus, items seized pursuant to the warrant-authorized search were seized for the first time by a process that was found not to have a "but for" connection to the illegal search.

The Court also dispensed with petitioners' argument that the initial entry was the "but for" cause of the ultimate discovery of the evidence. Petitioners reasoned that "but for" the entry, the individuals present in the apartment could have removed and destroyed the evidence before the warrant was issued. The Court declined this analysis of the "but for" test be-

253. 414 U.S. 338 (1974).
254. *Id.* at 348.
255. 251 U.S. 385 (1920).
256. 308 U.S. 338 (1939).
257. 371 U.S. 471 (1963).
258. *Segura*, 468 U.S. at 805 (quoting *Wong Sun*, 371 U.S. at 487).
259. *Id.* at 815.
260. *Id.*
261. *Id.* at 805-06.

cause it would "extend the exclusionary rule, which already exacts an enormous price from society and our system of justice, to further 'protect' criminal activity . . . ."[262]

In summary, *Segura* held that the search warrant provided the independent source for the discovery and seizure of the evidence not seen in the original search. This search warrant was independent[263] since it was obtained through information sufficient to support a probable cause finding known *prior* to the entry into the apartment. This was factually documented by the agents' initiation of the process of obtaining the warrant prior to the arrest of Segura.[264]

b. *The Application of Inevitable Discovery in* United States v. Silvestri

The Court of Appeals for the First Circuit in *United States v. Silvestri*[265] found that evidence illegally discovered as a result of a warrantless entry and search of a house and garage would be reviewed in terms of the admissiblity of the evidence through the inevitable discovery exception.[266] *Silvestri* involved an entry by the New Hampshire State Police into both a single family dwelling and a garage apartment in a separate structure on the property.[267] Entry was made after 3:00 a.m. with the purpose of securing the property pending the arrival of a search warrant.[268] The original warrantless entry was found by the district court to be "illegal and inexcusable."[269] The circuit court, in analyzing the difference between independent source and inevitable discovery, posed the question: "which is the proper analysis to apply when evidence is discovered as the result of either an illegal entry or search of premises for which a legal search warrant

262. *Id.* at 816.

263. *Id.* at 814.

264. *Id.* at 800. *See* Recent Developments, *The Securing of the Premises Exception: A Search for the Proper Balance*, 38 VAND. L. REV. 1589 (1985) for an extensive review and criticism of *Segura*.

265. 787 F.2d 736 (1st Cir. 1986).

266. *Id.* at 738.

267. *Id.* at 737.

268. *Id.*

269. United States v. Curry, 751 F.2d 442, 447 (1st Cir. 1984).

eventually issues?"[270] The circuit court found that the answer will depend on "whether the evidence first observed illegally can be considered to be cleanly 'rediscovered' when the warrant is executed."[271] The question was then posed: "whether objects seen as the result of either an illegal security sweep or search should be considered illegally seized before the warrant is executed."[272] The circuit court concluded that because the police did not relinquish control over the premises and the evidence they observed the "independent source exception cannot be applied because the independent source does not result in a legal seizure."[273]

Having rejected the independent source exception as inapplicable when the illegal search precedes the process of obtaining a search warrant, the court addressed defendant's claim "that *Nix* holds that the inevitable discovery exception applies only where the legal process for discovering the evidence has already been set in motion at the time of the illegal discovery."[274] In assessing this claim, the First Circuit reviewed the other circuit court opinions as to whether inevitable discovery requires that the legal discovery process be set in motion prior to illegal discovery.

The Fifth Circuit in *United States v. Cherry*[275] concluded that in order for the inevitable discovery exception to apply, the legal process of discovery must be ongoing at the time of the illegal discovery.[276] In order to establish this, the prosecution must demonstrate:

> (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct, and (3) that the police also prior to the misconduct were actively pursuing the alternate line of investigation.[277]

---

270. *Silvestri*, 787 F.2d at 739.
271. *Id.*
272. *Id.*
273. *Id.* at 740.
274. *Id.* at 742.
275. 759 F.2d 1196 (5th Cir. 1985).
276. *Id.* at 1204.
277. *Id.*

The Eleventh Circuit adopted nearly the same rule in *United States v. Satterfield*.[278] The *Satterfield* court found that evidence discovered through an illegal warrantless search was not admissible, even though the evidence was later seized pursuant to a search warrant, because at the time of the illegal search the government did not possess a search warrant nor were they in the process of obtaining one.[279] The *Satterfield* court noted that "a valid search warrant nearly always can be obtained after the search has occurred."[280] The Tenth Circuit in *United States v. Owens*[281] also limited the inevitable discovery exception to cases where officials were already pursuing an independent line of investigation at the time of the constitutional violation.[282]

In contrast, the Ninth Circuit in *United States v. Merriweather*[283] applied the inevitable discovery exception without the requirement that the process for requesting the search warrant be already undertaken prior to the constitutional violation. The court in *Merriweather* found that the discovery was inevitable because the agents who legally searched the hotel room were not aware of the existence of the evidence.[284] The logic of *Merriweather*[285] was based on the *Nix* reasoning that there would be no deterrence value in suppressing the evidence discovered prior to the warrant.[286] Similarly, in 1980, the Fifth Circuit allowed admission of evidence discovered during an illegal entry, even though the search warrant process had not been initiated, on the grounds that the evidence inevitably would have been discovered.[287]

The First Circuit in *Silvestri* concluded that its review of the circuits reveals:

---

278. 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985).

279. *Id.* at 846.

280. *Id.*

281. 782 F.2d 146 (10th Cir. 1986).

282. *Id.* at 152-53.

283. 777 F.2d 503 (9th Cir. 1985) The court admitted evidence initially discovered in a warrantless search of defendant's hotel room based on the inevitable discovery exception. The evidence was later seized pursuant to a search warrant. *Id.*

284. *Id.* at 506.

285. *Id.*

286. *Id.*

287. *United States v. Fitzharris*, 633 F.2d 416 (5th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

> that there are three basic concerns which surface in an inevitable discovery analysis: are the legal means truly independent; are both the use of the legal means and the discovery by that means truly inevitable; and does application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken fourth amendment protection?[288]

The court recognized that in cases where the search occurs before the warrant has been obtained, the principle concern is "whether the later warrant is truly inevitable and independent of the police misconduct."[289] It also expressed concern over the "spectre of random or not so random searches" which would reduce the protection provided by the fourth amendment requirement that a warrant be obtained before a search occurs.[290]

The First Circuit, in applying these guidelines to *Silvestri*, found that even though the search warrant process had not been started, the "decision to seek a search warrant had been made which was in no way influenced or accelerated by Sergeant DuBois' discovery of the drugs."[291] The court concluded that "in this case there is no necessary requirement that the warrant application process have already been initiated at the time the illegal search took place."[292] The court was confident "that a search warrant for the garage would have inevitably been sought and issued even if the illegal search had never taken place."[293] Thus, the court affirmed the district court's decision to admit the drugs as evidence pursuant to the inevitable discovery exception to the exclusionary rule.

III. *Murray v. United States*

A. *Facts of Arrest of Petitioners and Seizure of Evidence*

1. *FBI and DEA Surveillance Activity*

Beginning in April of 1982, the Federal Bureau of Investigation (FBI) and the Drug Enforcement Agency (DEA) began sur-

---

288. *Silvestri*, 787 F.2d at 744.
289. *Id.* at 745.
290. *Id.*
291. *Id.*
292. *Id.* at 746.
293. *Id.*

veillance activities that focused on several individuals suspected of large-scale illegal drug activity, including petitioners Michael Murray and James Carter.[294] Through informants, the agents had learned of the existence of a warehouse located in South Boston which was allegedly used in connection with this illegal drug activity.[295] Extensive surveillance activity, including the tailing of suspects, led agents to follow petitioners Murray and Carter on April 6, 1983 to a warehouse located at 345 D Street in South Boston.[296]

Agents observed a white truck driven by Murray and a green Dodge camper driven by Carter proceed into the warehouse at 1:45 p.m.[297] At 2:05 p.m., both vehicles departed the warehouse.[298] Agents who were conducting the surveillance observed two men who remained inside the warehouse after the vehicles departed.[299] Before the overhead doors were closed, the agents also saw a tractor trailer rig in the warehouse.[300] Most of the agents[301] continued following both vehicles as they entered a parking lot in South Boston.[302] The truck driven by Murray was then turned over to accomplice Rooney who drove it away.[303] Co-defendant Christopher Moscatiello entered the Dodge camper, which had been driven by Carter, and exited the parking lot.[304] Agents followed both vehicles, and at 2:25 p.m., the Dodge camper driven by co-defendant Moscatiello was stopped by agents at a toll plaza on the Massachusetts Turnpike.[305] The agent who pulled the camper to the side of the road noticed a burlap covered bale of marijuana in the camper compartment of

---

294. Joint Appendix, *supra* note 1, at 15-18 (affidavit of DEA Agent Keaney attached to search warrant).

295. *Id.* at 17.

296. *Id.*

297. *Id.* at 30-31 (report of investigation).

298. *Id.* at 31.

299. *Id.*

300. *Id.*

301. DEA Agent Sampson remained at warehouse keeping it under surveillance. *Id.* at 82 (pretrial transcript). Testimony of FBI Agent Cleary indicates that the warehouse was under constant surveillance beginning at 2:00 p.m. *Id.* at 49 (pretrial transcript).

302. *Id.* at 31 (report of investigation).

303. *Id.* at 31-32.

304. *Id.* at 32.

305. *Id.* at 33. Agents stopped both Moscatiello and a co-defendant who was in a jeep. Both Moscatiello and the co-defendant were driving in tandem.

the vehicle and placed Moscatiello under arrest.[306]

At 2:30 p.m., co-defendant Rooney was arrested as he proceeded to back the truck into a driveway at a private home in Dorchester, Massachusetts.[307] At the time Mr. Rooney was stopped, one of the agents detected the odor of marijuana coming from the truck, and upon searching the truck, found sixty bales of marijuana.[308]

After the agents, who were maintaining surveillance on petitioners Murray and Carter, were informed that both the truck and camper had been stopped and had been found to contain bales of marijuana, they arrested petitioners.[309] Several agents, including Supervising Agent Ronald Garibotto, departed from the group that had arrested Murray and Carter and returned to the warehouse.[310]

2. *Search of the Warehouse*

At 2:40 p.m., several agents converged on the warehouse where the truck and camper had apparently been loaded. DEA Supervisor Garibotto was in charge of this contingent.[311] Agents knocked on the doors and announced their presence several times.[312] No one replied to their request for admission.[313] The

---

306. *Id.* DEA agents also had mistakenly stopped and arrested an innocent driver of an identical vehicle which indicates some apparent confusion regarding who was following which vehicle. Petition for Writ of Certiorari at 5, Murray v. United States, 108 S. Ct. 2529 (1988) (No. 86-995).

307. Joint Appendix, *supra* note 1, at 33 (report of investigation).

308. *Id.* at 34.

309. *Id.*

310. *Id.* at 56 (pretrial transcript). The agents upon returning to the scene noticed a man with work gloves in the back of his pockets standing in front of the warehouse. The man appeared agitated. *Id.* at 35 (report of investigation). The agent who was conducting the surveillance from his car while driving around the block where the warehouse was located did not see the individual on the next trip around the block. *Id.* The implication in the report of investigation was that this individual may have entered the warehouse. Yet, the testimony of DEA Agent Sampson and FBI Agent Cleary who both had the warehouse under surveillance during this period does not give any indication that this individual entered the warehouse. *Id.* at 49, 83 (pretrial transcript: testimony of Agents Cleary and Sampson).

311. *Id.* at 72 (pretrial transcript). Agent Garibotto was the group supervisor over Agent Keaney who was the case agent in charge of the investigation. *Id.* at 60.

312. *Id.* at 75 (pretrial transcript).

313. Brief for the United States at 5, Murray v. United States, 108 S. Ct. 2529 (1988) (Nos. 86-995 & 86-1016).

agents who had lifted the mail slot on the building to announce their presence noticed the smell of a strong unidentified odor from within the warehouse.[314] Supervisor Garibotto, having already decided at 2:30 p.m. to enter the warehouse, obtained a tire iron from his car to force open the door.[315] The testimony of FBI Special Agent Cleary, who was on the scene, indicated that Garibotto's decision to enter the warehouse was one that was not discussed.[316] Presumably, the agents saw Garibotto proceed to his car, open the trunk and take out the tire iron — the purpose of which was unmistakably clear.[317] That purpose was to forcibly enter the warehouse.

Garibotto indicated that he decided to enter the warehouse in order to prevent the destruction of written documents that might indicate the supply and distribution network of the marijuana.[318] Ten of the approximately sixteen FBI and DEA agents assigned to the case entered the warehouse with guns drawn[319] and remained inside the warehouse for approximately five minutes.[320] The agents searched the warehouse for people; none were found.[321] During this search the agents found, in plain view, numerous bales which they suspected contained marijuana.[322] At the end of this period, supervisor Garibotto ordered everyone to leave the warehouse and to secure it from the

---

314. *Id.*

315. Joint Appendix, *supra* note 1, at 75 (pretrial transcript).

316. *Id.* at 52 (pretrial transcript). There is clear indication throughout the pretrial transcript that Garibotto's decision was one made with time for reflection and was not one made in the midst of a crisis. In fact, given the decision to stop the vehicles which had departed the warehouse, it could have been anticipated that the agents would desire to search the warehouse. In addition, the testimony of DEA Agent Keaney indicated that Garibotto did not consult with DEA Agent Keaney, the case agent in charge of the investigation, who was present at the arrest of Murray and Carter when Garibotto proceeded to the warehouse. *Id.* at 68 (pretrial transcript).

317. *Id.* at 75. Yet the testimony of FBI Special Agent Cleary was that he was taken by surprise by Garibotto's action to break into the warehouse. *Id.* at 68.

318. *Id.* at 78 (pretrial transcript).

319. *Id.* at 57.

320. The issue of the length of time that the agents remained in the warehouse was in dispute at trial. Petitioner maintained that the agents were actually in the warehouse for over 15 minutes. Brief for Petitioner at 6, Murray v. United States, 108 S. Ct. 2529 (1988) (Nos. 86-995 & 86-1016).

321. Joint Appendix, *supra* note 1, at 58.

322. *Id.* at 68.

outside.[323]

3. *Request for Search Warrant and Second Search of Warehouse*

After this search a decision was made to obtain a search warrant for the warehouse, the garage in Dorchester where Rooney was arrested, and the green Dodge camper.[324] According to Agent Keaney, a conscious decision was made at the time the affidavit for the warrant was prepared to exclude reference to the warrantless entry into the warehouse.[325] On April 6th at 10:35 p.m., a warrant authorizing a search of the warehouse was issued by U.S. Magistrate Joyce Alexander.[326] It was immediately executed and resulted in the seizure of approximately 270 bales of marijuana weighing 18,022.9 pounds.[327]

B. *Procedural History*

1. *Arraignment and Suppression Hearing*

Following their arrest on April 6, 1983, the petitioners were arraigned and later indicted on April 20, 1983 for the crimes of possession of more than 1,000 pounds of marijuana with intent to distribute and conspiracy in violation of 21 U.S.C. §§ 841(A)(1), 841(B)(6) and 846.[328] Petitioners sought to suppress the evidence seized at the warehouse as "fruits" of the illegal

---

323. *Id.* at 77.

324. *Id.* at 52 (pretrial transcript). The testimony of FBI Agent Cleary indicates that to his knowledge there were no discussions of obtaining a search warrant prior to the entry. *Id.*

325. *Id.* at 70 (pretrial transcript: testimony of DEA Agent Keaney at suppression hearing).

Q. I just asked you, did you decide intentionally not to include in the affidavit that you and other agents had already been inside the warehouse?
Mr. Crossen: I object, your Honor. I believe he answered that question.
The Court: Well, I suppose it can be derived but just a plain yes or no.
A. Yes, your Honor.
Q. Yes is your answer?
A. That's correct.

Id.

326. *Id.* at 11-12 (search warrant).

327. *Id.* at 25 (search warrant return).

328. *Id.* at 39-42 (superseding indictment).

search.[329] The issue presented in federal court at the pretrial suppression hearing was whether the evidence in the warehouse was inadmissible due to the prior warrantless entry into the warehouse.[330]

In reviewing whether the officers were justified in initially arresting the defendants, as well as searching the white truck and seizing the green Dodge camper, Judge Skinner found that there were sufficient facts of a collective nature to justify such arrests, seizures and searches.[331] Having found that the search of the white panel truck was pursuant to the standards established in *United States v. Ross*,[332] the court asserted that: "It follows that the same facts, with the addition of the results of the search of the white Ford truck and the observation of marijuana in the green Dodge camper, furnished probable cause for the issuance of search warrants."[333] Thus, having found that probable cause existed independent of the illegal entry, the court denied petitioners' request for suppression of the evidence because "none of . . . the arrests, searches or seizures violate[d] the Fourth Amendment."[334] District Judge Skinner also ruled that: "None of the defendants have standing to challenge the search of the warehouse, which was owned by a corporation in the absence of any evidence that any portion of the warehouse was set aside for the personal use of any defendant as corporate officer, employee or financial backer."[335]

In summary, the district court findings on the suppression

---

329. Petition for a Writ of Certiorari at 33a, Murray v. United States, 108 S. Ct. 2529 (1988) (Nos. 86-995 & 86-1016) (memorandum and order on various motions of the defendants to suppress and to dismiss). The defendants at trial also sought suppression of the evidence from the searches of the vehicles and the garage at Dorchester. *Id.*

330. *Id.* at 32a. Petitioners at the suppression hearing also asserted that the agents' failure to reveal in their search warrant affidavit the prior illegal entry of the warehouse should be viewed as false statements made with the intent to deceive the magistrate. *Id.* at 45a. District Court Judge Skinner found that "the courts have uniformly held that an omission of facts from an affidavit without warrant does not constitute a false statement made with intent to deceive within the meaning of *Franks v. Delaware*." *Id. See supra* notes 97-99 and accompanying text for a discussion of *Franks*.

331. *Id.* at 46a.

332. *Id.* at 44a (citing United States v. Ross, 456 U.S. 798 (1982)). *See supra* notes 102-08 and accompanying text.

333. *Id.* at 46a.

334. *Id.* at 47a.

335. *Id.* at 48a.

of evidence were that: one, none of the seizures violated the fourth amendment, as the seizures were either pursuant to the automobile exception under *Ross*, or pursuant to the search warrant issued which was based entirely on the probable cause that existed prior to the illegal entry; and two, none of the defendants had standing to challenge the search of the warehouse.[336]

2. *Federal District Court Trial*

Having denied petitioners' suppression motion, the trial of Murray, Carter and the other co-defendants[337] commenced on January 23, 1984. On January 27th, a jury verdict of guilty was entered.[338] Petitioners Murray and Carter, though acquitted on two counts, were each convicted on one count of conspiracy, were sentenced to four years imprisonment and were fined $15,000.[339]

3. *First Court of Appeals Decision*

The Court of Appeals for the First Circuit affirmed the district court's conviction in an opinion written by Chief Judge Campbell on August 26, 1985.[340] Two issues were raised in this appeal: One, that the appellants had been denied their rights to a speedy trial;[341] and two, that their fourth amendment rights had been violated in the searches of vehicles and various buildings.[342] On the issue of petitioners' standing to object to the ad-

---

336. *Id.* at 47a-48a.

337. John Rooney and Christopher Moscatiello were co-defendants. They both entered a conditional plea of guilty to one count of possession. United States v. Moscatiello, 771 F.2d 589, 591 (1st Cir. 1985), *cert. granted and remanded sub nom.* Murray v. United States, 476 U.S. 1138, *aff'd on remand sub nom.* United States v. Carter, 803 F.2d 20 (1st Cir. 1986), *vacated and remanded sub nom.* Murray v. United States, 108 S. Ct. 2529 (1988).

338. *Moscatiello*, 771 F.2d at 591-92.

339. The trial court had previously dismissed two counts against Murray at the close of the government's case. Petition for Writ of Certiorari at 3-4, Murray v. United States, 108 S. Ct. 2529 (1988) (Nos. 86-995 & 86-1016).

340. *Moscatiello*, 771 F.2d 589.

341. *Id.* at 591-92. The Speedy Trial Act, 18 U.S.C. § 3161(c)(1) provides that the trial of defendants who plead not guilty shall commence within 70 days of their indictment. The act excludes from the computation of the seventy-day period delays resulting from any pretrial motion.

342. *Moscatiello*, 771 F.2d at 591-92.

mission of evidence obtained from the warehouse, both Murray and Carter argued that they had a reasonable expectation of privacy in the warehouse and therefore, the trial court had erred in holding that they lacked standing to contest the legality of the searches.[343] The court noted that Murray and Carter "further assert[ed] that the search warrant for the warehouse was tainted by the agents' failure to mention the earlier warrantless search of the warehouse, requiring the suppression of all evidence seized at the warehouse . . . ."[344] Petitioners also argued in the alternative that even if the search warrant were found not to be tainted, all of the evidence discovered in plain view during the initial unauthorized entry should be suppressed as the direct product of the fourth amendment violation.[345]

a. *Petitioners Found to Have Standing to Raise Fourth Amendment Issue*

On the issue of whether Murray and Carter had standing to assert that their fourth amendment rights had been violated by the illegal search of the warehouse, the First Circuit found that "the court erred in ruling that '[n]one of the defendants have standing to challenge the search of the warehouse, which was owned by a corporation . . . .' "[346] Its analysis of the lower court's reasoning was that the trial court viewed fourth amendment protection as requiring personal ownership of the warehouse or personal use of some portion of the warehouse.[347] The court found that "there was ample evidence to indicate that Murray and Carter had 'a legitimate expectation of privacy in the area searched,' "[348] and, therefore, held that Carter and Murray had standing to contest the search of the warehouse.[349]

---

343. *Id.* at 601.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* (citing United States v. Salvucci, 448 U.S. 83, 92 (1980)). This would appear to be consistent with See v. City of Seattle, 387 U.S. 541 (1967), *see supra* notes 86-89 and accompanying text.

349. *Moscatiello*, 771 F.2d at 601.

b. *Review of Exigent Circumstances*

The circuit court also reviewed the issue of whether exigent circumstances existed to justify the warrantless search of the warehouse.[350] The court disposed of this issue by concluding that the issue of exigent circumstances was not raised at the trial level and that they were therefore "loath to conclude that exigent circumstances [exist] as now argued."[351] The court noted that "[w]e accordingly do not reach the government's claim of exigency but turn directly, as did the district court, to the question of whether or not to suppress the evidence found in the warehouse on the assumption, *arguendo*, that the warrantless entry was in violation of the fourth amendment."[352]

c. *Independent Source Doctrine Applied; Conviction Affirmed*

The circuit court, for the first time, raised the issue of whether the evidence was obtained through an independent lawful source, citing *Silverthorne Lumber Co. v. United States*.[353] The court of appeals concurred with the district court that the warrant was not tainted by the omission of any reference to the illegal entry and asserted that "the mere omission of *irrelevant*

350. *Id.* at 601-02.

351. *Id.* at 602. The record clearly indicates, however, that this issue was directly raised by the prosecution at the suppression hearing. Joint Appendix, *supra* note 1, at 48 (pretrial transcript). In the opening statement by Mr. Crossen for the prosecution, he stated "the agents will also tell you there was an exigent circumstance took [sic] place . . . . The agents, again, will testify to the reason behind the exigent circumstances entry. To secure the premises to determine whether or not confederates were inside . . . ." *Id.* As this issue was not decided at the federal court trial, this Note will assume for the purpose of analyzing the development of independent source doctrine that exigent circumstances did not exist. Obviously, if exigent circumstances existed, then the warrantless search would be justified and consistent with traditional interpretations of the protection provided by the fourth amendment. The critical point is that all courts reviewing *Murray* have proceeded from the position that exigent circumstances did not exist and, therefore, justified the admission of the evidence based on the independent source doctrine. *See* United States v. Gallo, 859 F.2d 1078, 1084 (2d Cir. 1988); United States v. Holzman, 871 F.2d 1496, 1513 (9th Cir. 1987); *In re* Grand Jury Proceedings, 707 F. Supp. 1207 (D. Haw. 1989).

352. *Moscatiello*, 771 F.2d at 602.

353. 251 U.S. 385, 392 (1920). The circuit court stated that "evidence obtained through an independent, lawful source need not be suppressed even if the police were also led to it through means that violated the fourth amendment . . . ." *Moscatiello*, 771 F.2d at 602.

facts from an affidavit constitutes no reason to suppress the warrant."[354] The court further found that the omission neither enhanced the contents of the affidavit nor deceived the magistrate into granting a warrant he would otherwise not have issued.[355]

Moving on to the more difficult question, the court analyzed whether a reading of *Segura v. United States*[356] would require suppression of the evidence found in plain view during the illegal entry. The circuit court concluded this analysis by citing *Segura* and *Nix v. Williams*[357] as support for the conclusion that the evidence seen in plain view during the initial warrantless search should not be suppressed.[358]

> This is as clear a case as can be imagined where the discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued. As there was no causal link whatever between the illegal entry and the discovery of the challenged evidence, we find no error in the court's refusal to suppress.[359]

A rehearing on this appeal was denied on October 31, 1985.[360]

4. *The First Supreme Court Appeal, Subsequent Remand to the First Circuit, and Second Supreme Court Appeal*

James Carter, Michael Murray, and John Rooney appealed the First Circuit decision to the Supreme Court which granted certiorari[361] and vacated the judgment of the lower court. The case was remanded to the Court of Appeals for the First Circuit for further consideration in light of *Henderson v. United States*.[362] The First Circuit on remand reviewed the case in light of *Henderson* and affirmed the defendants' convictions.[363] On

---

354. *Moscatiello*, 771 F.2d at 603 (emphasis added).

355. *Id.* (citing United States v. Strini, 658 F.2d 593, 597 (8th Cir. 1981); United States v. Lewis, 621 F.2d 1382, 1389 (5th Cir. 1980), *cert. denied*, 450 U.S. 935 (1981)).

356. 468 U.S. 796 (1984). *See supra* notes 238-64 and accompanying text.

357. 467 U.S. 431 (1984).

358. *Moscatiello*, 771 F.2d at 604.

359. *Id.*

360. *Id.* at 589.

361. Carter v. United States, Murray v. United States, and Rooney v. United States, 476 U.S. 1138 (1986).

362. 476 U.S. 321 (1986) (*Henderson* provided guidance as to interpreting the Speedy Trial Act's handling of time periods during pretrial motions.).

363. United States v. Carter, 803 F.2d 20 (1st Cir. 1986). The decision by Chief

December 17, 1986, petitioners filed for a second writ of certiorari with the Supreme Court.[364] The Court, in granting certiorari,[365] limited arguments to the fourth amendment issue. On June 28, 1988, on the second to last day of the 1987-1988 term, Justice Scalia delivered the opinion for the Court.[366] Justice Marshall dissented.[367]

C. *Opinion of the Court*

Justice Scalia opened the majority opinion in *Murray v. United States* with a recitation of the holding of *Segura v. United States*[368] and proposed that the question presented in *Murray* is "whether, again assuming evidence obtained pursuant to an independently obtained search warrant, the portion of such evidence that had been observed in plain view at the time of a prior illegal entry must be suppressed."[369] Thus, Scalia suggests that *Murray* will finally answer the unanswered question in *Segura*.[370] After a brief statement of the facts of the case, Jus-

---

Judge Campbell focused only on the Speedy Trial Act issue as Henderson v. United States provided guidelines on the handling of pretrial motions under the Speedy Trial Act. *Id.* Neither the Supreme Court in its 1986 decision to grant certiorari and remand nor the First Circuit in its affirmation of the petitioners' conviction addressed the fourth amendment claim of petitioners.

364. Murray v. United States 803 F.2d 20 (1st Cir. 1986), petition for cert. filed, 56 USLW 3026 (U.S. Dec. 17, 1986) (No. 86-995).

365. 480 U.S. 916 (1987).

366. Murray v. United States, 108 S. Ct. 2529 (1988). Justice Scalia's opinion was joined by Chief Justice Rehnquist and Justices White and Blackmun.

367. *Id.* at 2536 (Marshall, J., dissenting). Justice Marshall's dissent was joined by Justices Stevens and O'Connor. A separate dissent was also filed by Justice Stevens. *Id.* at 2540 (Stevens, J., dissenting).

368. 468 U.S. 796 (1984). "[W]e held that police officers' illegal entry upon private premises did not require suppression of evidence subsequently discovered at those premises when executing a search warrant obtained on the basis of information wholly unconnected with the initial entry." *Murray*, 108 S. Ct. at 2531-32.

369. *Murray*, 108 S. Ct. at 2532.

370. *Segura*, 468 U.S. at 802 n.4. Chief Justice Burger noted that:

> Both the District Court and the Court of Appeals held that the initial entry into the apartment was not justified by exigent circumstances, and thus that the items discovered in plain view during the limited security check had to be suppressed to effect the purposes of the Fourth Amendment. . . . Because the Government has decided not to press its argument that exigent circumstances existed, we need not and do not address this aspect of the Court of Appeals decision. We are concerned only with whether the Court of Appeals properly determined that the Fourth Amendment did not require suppression of the evidence seized during execution

tice Scalia, in Part II of the opinion, proceeded to state the function of the exclusionary rule in reference to prohibiting the introduction of products of an unlawful search into evidence.[371] Scalia classified the types of evidence to be excluded as being tangible material seized,[372] knowledge acquired during the search,[373] and derivative evidence of both tangible and testimonial nature that is the indirect result of the unlawful search.[374] Scalia cited *Nardone v. United States*[375] as supportive of the proposition that derivative evidence is subject to the exclusionary rule up to the point at which the connection between the acquisition of the evidence and the unlawful search becomes " 'so attenuated as to dissipate the taint.' "[376]

Justice Scalia next analyzed the independent source doctrine and commented that cases before the Supreme Court "have used the concept of 'independent source' in a more general and a more specific sense. The more general sense identifies *all* evidence acquired in a fashion untainted by the illegal evidence-gathering activity."[377] He further explained that where knowledge of facts *X* and *Y* are obtained through an unlawful entry, fact *Z*, learned of by other legal means, is admissible because it is from an independent source.[378] One example given by Justice Scalia of independent source in this more general sense is where evidence found for the first time during the execution of the valid untainted search warrant was admissible because it was discovered pursuant to an "independent source."[379] This evidence in *Segura* was not the evidence found during the unlawful entry, but was evidence subsequently learned by other legal

---

of the valid warrant.

Id.

371. *Murray*, 108 S. Ct. at 2532.

372. *Id.* (citing Weeks v. United States, 232 U.S. 383 (1914)).

373. *Id.* (citing Silverman v. United States, 365 U.S. 505 (1961)).

374. *Id.* at 2533 (citing Nardone v. United States, 308 U.S. 338, 341 (1939)).

375. 308 U.S. 338 (1939).

376. *Murray*, 108 S. Ct. at 2533 (citation omitted).

377. *Id.*

378. *Id.* The point that Justice Scalia was making with his use of *X*, *Y*, and *Z* facts is that in the general sense not only is the source independent but also the knowledge itself (or the evidence) is different and not derivative of knowledge gained through an unlawful entry.

379. *Id.* (citing Segura v. United States, 468 U.S. 796, 813-14 (1984)).

means.[380]

The *Murray* case presented an example of independent source used in its more specific sense; that is, the evidence acquired by the untainted search warrant was identical to the evidence unlawfully acquired during the illegal search.[381] Continuing his earlier analogy, Justice Scalia described this use of independent source doctrine: where facts "X" and "Y" are obtained through an unlawful entry, but where the same facts "X" and "Y" are obtained pursuant to legal means, knowledge of facts "X" and "Y" are considered derived from an independent source.[382] Having provided this brief overview of the independent source doctrine, Scalia proceeded to review the concept of the doctrine through its application in the inevitable discovery doctrine context.

> 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 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 had in fact found the body.[383]

Scalia next addressed the critical question presented in *Murray*: whether the finding of the applicability of the independent source doctrine to cases where the police unlawfully search and subsequently seek a legal search warrant would lead to the encouragement of unlawful police activity.[384] The petitioners, in their brief,[385] and Justice Marshall, in his dissent,[386] raised the

---

380. Also cited by Justice Scalia as examples of this sense of independent source were the following cases: United States v. Wade, 388 U.S. 218, 240-42 (1967); Costello v. United States, 365 U.S. 265, 280 (1961); Nardone v. United States, 308 U.S. 338, 341 (1939). *Id.*

381. *Murray*, 108 S. Ct. at 2533.

382. *Id.* Justice Scalia, in connection with this explanation of independent source doctrine, cited Justice Holmes' comments from Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), "if knowledge of them is gained from an independent source they may be proved like others." *Id.* at 392.

383. *Murray*, 108 S. Ct. at 2534.

384. *Id.*

385. Brief for Petitioners at 42, Murray v. United States, 108 S. Ct. 2529 (1988) (Nos. 86-995 & 86-1016). The petitioners argued:

> Officers will have everything to gain and nothing to lose by searching illegally first and then seeking a warrant. As we have discussed, if their initial illegal entry turns up nothing, they will have saved themselves the time and trouble of prepar-

concern that law enforcement officers would routinely search without a search warrant in order to ensure that the evidence they had probable cause to believe to be present on the premises was in fact present prior to the time-consuming process of requesting a warrant. If the evidence was not present, then searching unlawfully before going through the process of requesting a search warrant would spare the officers considerable time.[387] If the evidence is present, the officers can obtain the warrant despite the unlawful entry provided they do not utilize any information learned as a result of the unlawful entry.[388] Justice Scalia replied:

> We see the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officer's decision to seek a warrant or the magistrate's decision to grant it.[389]

In Part III of the opinion Justice Scalia applied his preceding comments on the independent source doctrine to *Murray*. Scalia noted that the agents acquired the knowledge that the marijuana was in the warehouse both at the time of the unlawful entry and also at the time of the entry pursuant to the search warrant. "[I]f that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply."[390] Scalia rejected the differentiation be-

---

ing an affidavit and presenting it to the magistrate. On the other hand, if they do find something but the magistrate determines that probable cause is lacking, the officers will have lost nothing because they would not have been able to enter legally anyway.

Id. at 42 n.40.

386. *Murray*, 108 S. Ct. at 2538 (Marshall, J., dissenting).

387. *Id.*

388. *Id.* Justice Marshall noted in dissent that "[t]he police thus know in advance that they have little to lose and much to gain by foregoing the bother of obtaining a warrant and undertaking an illegal search." *Id.*

389. *Id.* at 2534.

390. *Id.* at 2535.

tween tangible and intangible evidence[391] proposed by the First Circuit in *United States v. Silvestri*.[392] In *Silvestri*, the First Circuit found that in cases where warrantless illegal searches are followed by warrant-authorized searches, the physical objects once seized can not be easily reseized.[393] Since the evidence in *Silvestri* had been illegally seized, the First Circuit reasoned that in order to find grounds for admission of the evidence, the inevitable discovery exception would have to apply. Scalia departed from the First Circuit's reasoning in *Silvestri* by asserting that the knowledge of illegal drugs was acquired both during the illegal entry and during the warrant-authorized search,[394] and thus, the independent source doctrine could be utilized.[395]

Having determined that the independent source doctrine can be applied to the present matter, Scalia then raised the final question: whether the search pursuant to the warrant was, in fact, a genuinely independent source of the information.[396] Scalia rejected the findings of the court of appeals[397] on this

---

391. Tangible evidence is the physical evidence itself (*e.g.*, the illegal drugs); intangible evidence is the knowledge of some fact which was received through the senses where the thing perceived is not a physical object (*e.g.*, verbal confession). BLACK'S LAW DICTIONARY 498-99 (5th ed. 1979).

392. 787 F.2d 736, 739 (1st Cir. 1986). *See supra* notes 265-93 and accompanying text. Justice Scalia asserted that:

> [R]eseizure of tangible evidence already seized is no more impossible than rediscovery of intangible evidence already discovered. The independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply.

Murray, 108 S. Ct. at 2535.

393. *Silvestri*, 787 F.2d at 739.

394. *Murray*, 108 S. Ct. at 2535.

395. *Id.* at 2533. Justice Scalia noted that "[t]he original use of the term, however, and its more important use for purposes of *this case*, was more specific." *Id.* (emphasis added). In addition, Justice Scalia maintained that "[t]he ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." *Id.* at 2535. Though Justice Scalia indicated that classical independent source doctrine is employed in *Murray*, many of his citations for support are to Nix v. Williams, 467 U.S. 431 (1984), the case which established the inevitable discovery exception. *Murray*, 108 S. Ct. at 2533-35.

396. *Murray* 108 S. Ct. at 2535.

397. The court of appeals found that "[t]his is as clear a case as can be imagined where the discovery of the contraband in plain view was totally irrelevant to the later

point, since this issue was not addressed by the district court and because it "is the function of the District Court rather than the Court of Appeals to determine the facts . . . ."[398] Consequently, the Court vacated the judgments and remanded the cases to the court of appeals with instructions that it remand to the district court "for determination whether the warrant-authorized search of the warehouse was an independent source of the challenged evidence in the sense we have described."[399]

D. *Justice Marshall's Dissent*

Justice Marshall dissented to the Court's opinion[400] finding that "the Court's decision, by failing to provide sufficient guarantees that the subsequent search was, in fact, independent of the illegal search, emasculates the Warrant Clause and undermines the deterrence function of the exclusionary rule."[401] To Justice Marshall, the independent source exception is primarily based on a practical view that "under certain circumstances the beneficial deterrent effect that exclusion will have on future constitutional violations is too slight to justify the social cost of excluding probative evidence from a criminal trial."[402]

The first footnote in Marshall's dissent provided a clear, concise example of the application of the independent source exception: "when a wholly separate line of investigation, shielded from information gathered in an illegal search, turns up the same evidence through a separate, lawful search."[403] Marshall noted that the exclusion of such evidence would not be a deterrent to law enforcement officers because they would have little reason to anticipate separate investigations leading to the same evidence.[404]

---

securing of a warrant and the successful search that ensued." United States v. Moscatiello, 771 F.2d 589, 604 (1st Cir. 1985).

398. *Murray*, 108 S. Ct. at 2536.

399. *Id.*

400. *Id.* at 2529, 2536-40 (1988) (Marshall, J., dissenting). Justice Marshall's dissent was joined by Justices Stevens and O'Connor.

401. *Id.* at 2536.

402. *Id.* at 2537.

403. *Id.* at 2537 n.1. In note 3, Justice Marshall compared *Murray* to *Nix* in terms of whether the investigation in *Murray* was wholly separate; he found that there were significant differences. *Id.* at 2539 n.3.

404. *Id.* at 2537 n.1.

Marshall criticized the majority opinion by indicating that he believed that the Court has lost sight of the "practical moorings"[405] of the independent source doctrine. Marshall contended that a review of the *Murray* facts clearly indicated that the FBI and DEA agents had made no effort to obtain a warrant prior to the initial entry and that the affidavit in support of the warrant did not make any mention of the warrantless search of the warehouse.[406] Consequently, he found that the admission of the evidence "reseized" pursuant to the search "undermines the deterrent function of the exclusionary rule."[407] Marshall found that the admission of such evidence affirmatively encouraged illegal searches because the police "have little to lose and much to gain by foregoing the bother of obtaining a warrant and undertaking an illegal search."[408] Marshall rejected Scalia's assessment that the police would realize that they had an additional burden of convincing a trial court that no information gained from the illegal entry affected either the decision to seek a warrant or the magistrate's decision to grant one.[409] Marshall rejected this because "it is a simple matter . . . to exclude from the warrant application any information gained from the initial entry so that the magistrate's determination of probable cause is not influenced by the prior illegal search."[410]

More critically, he asserted that "today's decision makes the application of the independent source exception turn entirely on an evaluation of the officers' intent."[411] Marshall appears to have correctly assessed the importance of the officers' intent; especially in light of the Court's remand to the district court to determine whether or not "the agents *would have sought* a warrant if they had not earlier entered the warehouse."[412] Thus, if the officers had intended to obtain a search warrant prior to the illegal entry, Scalia, and the Court, would find that the subsequent warrant-authorized search was an independent source.

---

405. *Id.* at 2537.
406. *Id.* at 2538.
407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.* at 2536 (emphasis added).

Justice Marshall recognized the very practical problem with an intent-based rule since "[t]he testimony of the officers conducting the illegal search is the only direct evidence of intent, and the defendant will be relegated simply to arguing that the officers should not be believed."[413] In addition, Marshall responded to this focus on the intention of the officers as being of dubious value for the following reasons:

> First, the intent of the officers prior to the illegal entry often will be of little significance to the relevant question: whether, even if the initial entry uncovered no evidence, the officers' would return immediately with a warrant to conduct a second search . . . . In addition, such an intent rule will be difficult to apply. The Court fails to describe how a trial court will properly evaluate whether the law enforcement officers' fully intended to obtain a warrant regardless of what they discovered during the illegal search.[414]

Marshall expressed concern that in order to eliminate incentives for illegal action, the Court should closely scrutinize the application of the independent source exception and should not rely on the intent of the law enforcement officers who conduct warrantless searches.[415] Marshall contended that to insure that there is a genuinely independent source, the Court should focus, as it did in the inevitable discovery doctrine, on "demonstrated historical facts capable of ready verification or impeachment."[416] Marshall noted that in the instant case there were no demonstrated historical facts which supported the subsequent warrant search as wholly unaffected by the prior illegal search.[417]

Marshall proceeded to demonstrate that the decision in

---

413. *Id.* at 2538.

414. *Id.* at 2538 n.2. Justice Marshall commented that "[o]fficers who have probable cause to believe contraband is present genuinely might intend later to obtain a warrant, but after the illegal search uncovers no such contraband, those same officers might decide their time is better spent than to return with a warrant." *Id.*

415. *Id.*

416. *Id.* at 2539 (citing Nix v. Williams, 467 U.S. 431, 445 n.5 (1984)). In *Nix*, the demonstrated historical fact that Justice Marshall referred to was the actual independent investigation and search by over 200 individuals in the area where the child's body would have been found. *Nix*, 467 U.S. at 435. *See supra* notes 216-37 and accompanying text for further discussion on *Nix*.

417. *Murray*, 108 S. Ct. at 2539.

Segura v. United States[418] is consistent with his view of *Murray*. He cited as authority the Chief Justice's statement that "officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case."[419] Marshall argued that extending the holding of *Segura* to cover evidence discovered during an initial illegal search will eradicate this remaining deterrent to illegal entry.[420] Justice Marshall consequently dissented to the Court's opinion.[421]

IV. Analysis of *Murray v. United States*

The application of the independent source, attenuated connection, or inevitable discovery doctrines in *Murray v. United States*[422] reveals that the evidence in question must be suppressed. This conclusion is reached through an analysis of the various tests developed for each doctrine. This analysis will demonstrate that the strict "but for" test does not support admission of the evidence in the situation where the police have searched first and sought a search warrant later. In addition, the inevitable discovery doctrine does not support the admission of this evidence where the police have not initiated a request for a search warrant prior to the illegal search. The application of the attenuated connection exception to the facts presented in *Murray* presents a more difficult assessment in determining whether evidence should be suppressed. A modified test articulated in *Brown v. Illinois*[423] will be applied in this analysis. The result of this application is that even under the attenuated connection doctrine, the evidence should be suppressed.

A further analysis of the three doctrines demonstrates that though they focus on different aspects of the relationship be-

418. 468 U.S. 796 (1984).

419. *Id.* at 812.

420. *Murray*, 108 S. Ct. at 2540.

421. *Id.* at 2536-40. Justice Stevens filed a separate dissent in which he noted that he remained "convinced that the *Segura* decision itself was unacceptable because, even then, it was obvious that it would 'provide government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home.'" *Id.* (quoting Segura v. United States, 468 U.S. 796, 817 (1984)).

422. 108 S. Ct. 2529 (1988).

423. 422 U.S. 590 (1975).

tween the illegal search and the acquisition of evidence, the three doctrines need to be applied in the sequence starting with independent source, followed by attenuated connection, and concluding with inevitable discovery. Often courts proceed directly to the test that appears most relevant without a systematic review of all three doctrines. This was the course followed by the Supreme Court in *Nix v. Williams*[424] and *Murray v. United States*.[425] The use of this unsystematic approach results in the posing of irrelevant and misleading questions concerning the acquisition of the evidence. This assessment is based on the different purposes that the independent source, attenuated connection, and inevitable discovery doctrines serve when applied to the exclusionary rule's prohibition of use of "the fruit of the poisonous tree."[426] In reaching the conclusion that the evidence should be suppressed, *Murray v. United States* will be compared with *Segura v. United States*.[427] In addition, recent material examining the cost of the exclusionary rule will be presented since an incorrect assessment of this cost by the Court underlies its conclusion.

A. *Tests for the Application of the Independent Source, Attenuated Connection, and Inevitable Discovery Doctrines*

The application of the independent source doctrine as enunciated in *Silverthorne Lumber Co. v. United States*[428] is limited to those situations where the "but for" analysis indicates that there is no causal linkage between the illegal activity and the acquisition of the evidence.[429] Consequently, questions such as the temporal relationship or the flagrancy of the constitutional violation are not at issue. The issue is strictly one of reviewing

---

424. 467 U.S. 431 (1984).

425. 108 S. Ct. 2529 (1988).

426. Nardone v. United States, 308 U.S. 338, 341 (1939). *See supra* notes 193-98 and accompanying text.

427. 468 U.S. 796 (1984), *see supra* notes 238-64 and accompanying text.

428. 251 U.S. 385 (1920), *see supra* notes 186-92 and accompanying text. *See also* Segura v. United States, 468 U.S. 796 (1984).

429. For example, if in Nix v. Williams, 467 U.S. 431 (1984), the police had discovered the child's body *at the same time* the discovery was made by the officers by virtue of the tainted confession, the evidence from the body would have been admissible because the constitutional violation was not the "but for" cause of the obtaining of the evidence.

the causal connections and if the result of such review indicates that the illegal action by the government is not the "but for" cause of the acquisition of the evidence, then the evidence is admitted.

The attenuated connection doctrine is applied when there is a causal relationship between the illegal government action and the acquisition of the evidence. *Wong Sun v. United States*[430] and *Brown v. Illinois*[431] provide significant guidance as to how attenuated the causal relationship must be for the taint to be dissipated. *Wong Sun* is an example of a causal relationship that both is and is not sufficiently attenuated.[432] *Brown* provides the test to determine if the attenuation is sufficient to remove the taint of the constitutional violation.[433] The test proposed in *Brown* evaluates whether the evidence " 'has been come at by the exploitation of that illegality or instead by means sufficiently distinguished to be purged of the primary taint.' "[434] The factors to be assessed are the following: one, the issuance of *Miranda* warnings; two, the temporal proximity between the fourth amendment violation and the obtaining of the evidence; three, the presence of intervening circumstances; and four, an assessment of the flagrancy of the official misconduct.

The test for the application of inevitable discovery, as presented in *Nix v. Williams*,[435] involves a factual showing that the government was in the process of pursuing an independent investigation and that the government would have found the evidence through legitimate means had it not already been discovered pursuant to the illegal act. As noted in *Nix*, "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means — here the volunteers' search — then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and com-

430. 371 U.S. 471 (1963), *see supra* notes 199-206 and accompanying text.

431. 422 U.S. 590 (1975), *see supra* notes 207-15 and accompanying text.

432. *Wong Sun*, 371 U.S. at 486 and 491.

433. *Brown*, 422 U.S. at 603-04. *See supra* notes 207-15 and accompanying text for further discussion on *Brown*.

434. *Wong Sun*, 371 U.S. at 488 (quoting MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

435. 467 U.S. 431 (1984), *see supra* notes 216-37 and accompanying text.

mon sense."[436] *Nix* suggests that in order for inevitable discovery to apply, the independent investigation must be underway prior to the illegal act which results in the actual discovery of the evidence.[437]

The following matrix summarizes the factors that these tests assess and clearly indicates that each doctrine has its distinct application depending on the circumstances.

COMPARISON OF COMMON FACTORS IN INDEPENDENT SOURCE, ATTENUATED CONNECTION, AND INEVITABLE DISCOVERY DOCTRINES

FACTOR	INDEP. SOURCE	ATTEN. CONNECT.	INEVITABLE DISCOVERY
Causal connection between violation and acquisition of evidence	N	Y	Y
Attenuation of connection between violation and acquisition of evidence	I	Y	I
Flagrancy of constitutional violation	I	N	I
Close temporal relation between violation and the acquisition of evidence	I	N	Y
Alternate means of discovery of evidence was in progress	I	I	Y

N = Must not be present in order to apply exception

Y = Must be present in order to apply exception

I = Factor irrelevant to application of doctrine

This matrix demonstrates that only the independent source doctrine requires no casual connection between the violation and the acquisition of the evidence. Similarly, while the attenuation of this causal connection factor is an absolute requirement of the attenuated connection doctrine, this factor is not a consideration of the independent source or inevitable discovery doctrines. The flagrancy of the constitutional violation is irrelevant to the inde-

436. *Id.* at 444.
437. *Id.*

pendent source and inevitable discovery doctrines but is a significant factor when applying the attenuated connection doctrine. While a causal connection between the violation and acquisition of the evidence must be present in the inevitable discovery doctrine, it must be absent in the attenuated connection doctrine, and is irrelevant in the independent source doctrine. In addition, the fact that alternate means of discovering the evidence were in progress is relevant only to inevitable discovery.

The different tests and applications of the independent source, attenuated connection, and inevitable discovery doctrines demonstrate that although these tests have much in common, it is critical to be precise about which doctrine is being applied when analyzing a particular fact pattern.[438] This is significant because the same questions require different responses in order for each doctrine to apply in a particular situation. Although each doctrine should be applied separately, there is an interrelation among the doctrines. This interrelation indicates a specific order of application of the doctrines to determine if evidence is "fruit of the poisonous tree."

The first doctrine to be applied is the independent source doctrine, using the "but for" test. The analysis should focus on whether there is any causal connection between the illegal search and the acquisition of evidence. If there is no connection, then the evidence is admitted and the analysis stops. Logically, it makes sense to apply this doctrine first since the question of attenuated connection or independent discovery assumes some connection between the two events. For example, one would not need to assess the factors listed in the test for the attenuated connection doctrine if the acquisition of the evidence is truly

438. It is interesting to note that both Justices Scalia and Marshall focused their argument on whether allowing this evidence to be admitted would encourage police to violate the Constitution. Both Justices applied the independent source doctrine in their analysis. But consideration of whether the admission of this evidence encourages police to violate the Constitution is not a factor in the independent source doctrine. It is a factor to be considered only in the inevitable discovery doctrine. If the constitutional violation is not the "but for" cause of the acquisition of the evidence, then the evidence should be admitted. All that is required under *Silverthorne* is that the evidence have a separate independent untainted source. Consequently, this focus by Justices Scalia and Marshall on an inevitable discovery factor when the issue is application of the independent source doctrine indicates a conceptual problem in the application of all three doctrines.

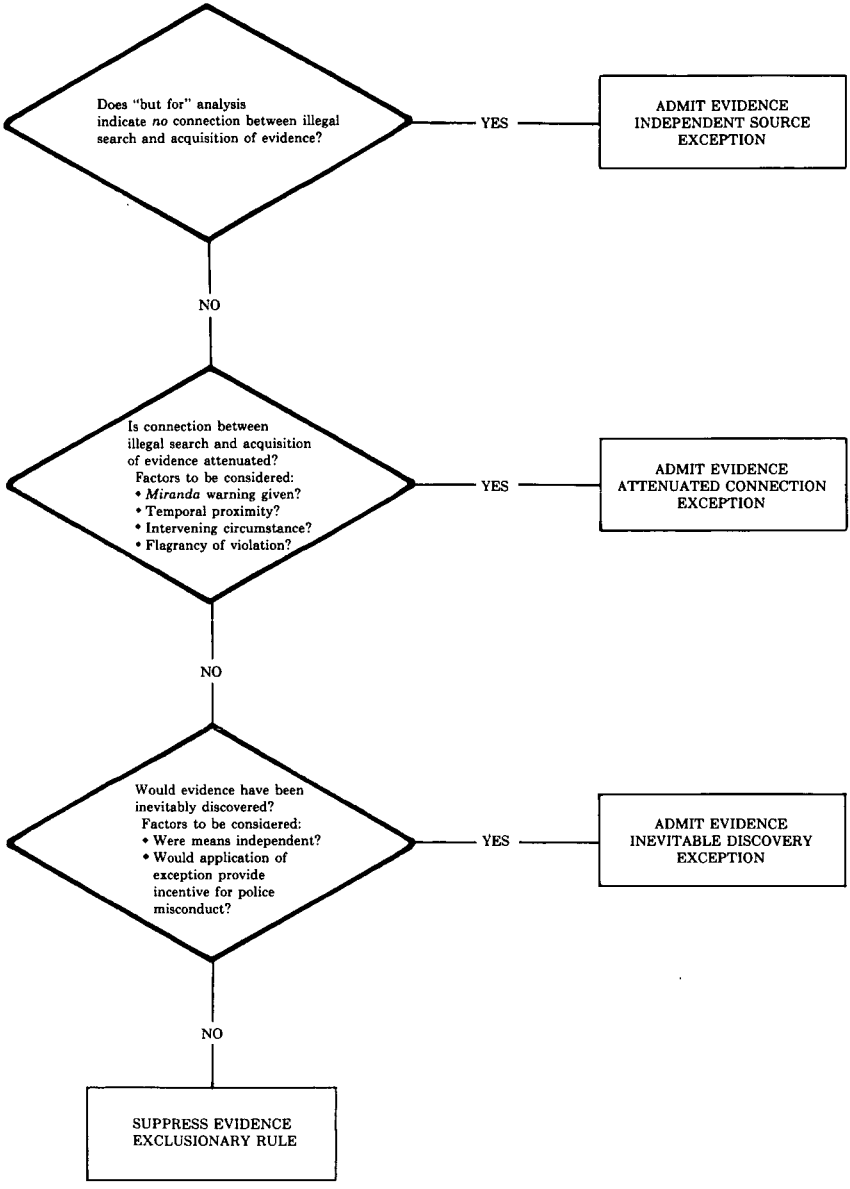
separate.

The second doctrine to be applied is attenuated connection, using the test developed in *Brown v. Illinois*.[439] Again, if the application of this test indicates that the connection is sufficiently attenuated to remove the taint of the constitutional violation, then the evidence is admitted and the analysis stops. Logically, this analysis should precede application of the inevitable discovery doctrine since the inevitable discovery doctrine requires that the evidence must have been first acquired through a constitutional violation. The advantage of applying these three doctrines in this order is that, in cases such as *Murray*, this systematic approach ensures that each doctrine is applied using the factors which are relevant to its application. The following flowchart demonstrates this approach.

439. 422 U.S. 590, 603-04 (1975).

FRUIT OF THE POISONOUS TREE

FLOW CHART ANALYSIS



B. *Application of the Independent Source Doctrine and Comparison with* Segura v. United States

Having reviewed the appropriate tests for application of the independent source, attenuated connection, and inevitable discovery doctrines, an analysis of *Murray v. United States*[440] must begin with application of the "but for" test from the independent source doctrine. This analysis must provide a detailed comparison between *Segura v. United States*[441] and *Murray* in order to determine whether the "but for" analytical framework provided in *Segura* can be applied to *Murray*.

There are obvious similarities between these two cases. First, the evidence in question was drug related material.[442] Second, the original entry was determined to be unlawful as no exigent circumstances were found to be present.[443] Third, the agents involved had probable cause (as later confirmed by the magistrates who issued the warrants) to believe that drugs would be present in both the apartment in *Segura*[444] and the warehouse in *Murray*.[445] Finally, the evidence at issue was later seized during a subsequent search pursuant to a search warrant based on the probable cause that existed prior to the illegal entry into the apartment or warehouse.[446]

Three significant features distinguish these two cases. In *Segura*, the search warrant process had already been started prior to entry.[447] In *Murray*, the process was started after the entry.[448] In addition, since the search warrant process in *Segura* had been started before the initial entry, there is no question presented in the case regarding consideration of whether to include or exclude in the affidavit information obtained as a result

440. 108 S. Ct. 2529 (1988).

441. 468 U.S. 796 (1984), *see supra* notes 238-64 and accompanying text.

442. *Segura*, 468 U.S. at 801. *Murray*, 108 S. Ct. at 2532.

443. *Segura*, 468 U.S. at 804. *Murray*, 108 S. Ct. at 2532.

444. *Segura*, 468 U.S. at 810-11.

445. United States v. Moscatiello, 771 F.2d 589, 600 (1st Cir. 1985), *cert. granted and remanded sub nom.* Murray v. United States, 476 U.S. 1178 (1986), *aff'd on remand sub nom.* United States v. Carter, 803 F.2d 20 (1st Cir. 1986), *vacated and remanded sub nom.* Murray v. United States, 108 S. Ct. 2529 (1988).

446. *Segura*, 468 U.S. at 814. *Murray*, 108 S. Ct. at 2536.

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

448. *Murray*, 108 S. Ct. at 2532.

of the search.[449] In *Murray*, however, there was clear testimony of this consideration as well as the decision by the agents not to include any reference to the illegal search in the warrant affidavit.[450] Finally, in *Segura*, the evidence found in plain view during the illegal search was not addressed by the Court.[451] In *Murray*, this issue was addressed directly.[452]

When considering these critical differences between *Segura* and *Murray*, it would appear that Justice Scalia's reliance on *Segura* is unfounded. The primary and most critical difference between the two cases is that the search warrant process in *Segura* had started prior to the actual illegal entry.[453] Thus, there is no question that the decision to obtain a search warrant was independent of the illegal entry. In addition, the warrant application and the affidavit for the search warrant were not affected by the search. The agents in *Segura* could maintain that even if they had not entered the apartment and seen the drug related material on the initial entry, they still would have received the same search warrant. Consequently, the "but for" analysis of *Segura* appears correct.

The fact that in *Murray* the process of requesting the search warrant was initiated after the illegal entry and the discussion that occurred over whether to include the fact of the illegal entry in the warrant affidavit,[454] indicates a causal relationship between the two events. Clearly, had the agents not found any evidence during the illegal search, they would have submitted a different search warrant affidavit or would not have requested a search warrant at all. The *Franks v. Delaware*[455] prohibition on misleading the magistrate would prevent the agents from maintaining the probable cause belief they once had, but no longer continued to have, due to the change in circumstances. Here, the inclusion in the affidavit of facts that had originally

449. *Segura*, 468 U.S. at 800-01. Agents clearly discussed obtaining the search warrant prior to entry but due to "lateness of the hour, a search warrant for petitioners' apartment could not be obtained until the following day. . . ." *Id.*

450. Joint Appendix, *supra* note 1, at 70.

451. *Segura*, 468 U.S. at 802 n.4.

452. *Murray*, 108 S. Ct. at 2532.

453. *Segura*, 468 U.S. at 800.

454. Joint Appendix, *supra* note 1, at 70.

455. 438 U.S. 154 (1978), *see supra* notes 97-99 and accompanying text.

led them to believe there were quantities of illegal drugs present in the warehouse[456] would have been misleading if they knew the drugs were not present. For Agent Keaney to maintain that he had probable cause to believe facts that he knew to be untrue would be a false statement. Because this statement would be necessary to a finding of probable cause, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."[457] Thus, the results of the illegal search had a *direct* bearing on the decision to obtain a search warrant and determined what information was to be included in and excluded from the search warrant affidavit.

This assessment that the illegal search had a direct bearing on the search warrant process is correct even if the agents had some nonformulated plan to eventually obtain a search warrant for the warehouse. The agents had not indicated in their testimony that specific plans for obtaining a search warrant existed prior to the entry. Furthermore, Supervising DEA Agent Garibotto testified that his decision to enter the warehouse was made prior to his arrival there,[458] making it clear that the exigent circumstances exception to the search warrant preference rule would not be appropriate.[459] The essence of this analysis is that there is a "but for" relationship between the illegal search and the warrant-authorized search. Consequently, an application of the independent source doctrine, as enunciated in *Silverthorne* and *Segura*, requires that the evidence be suppressed.

---

456. Joint Appendix, *supra* note 1, at 22 (affidavit of Agent Keaney attached to search warrant). Agent Keaney asserted: "I believe, based on all the foregoing facts, that there is probable cause to believe that controlled substances, including marijuana, . . . are concealed and will be found at . . . the white cinderblock building [the warehouse]. . . ." *Id.*

457. *Franks*, 438 U.S. at 156.

458. Joint Appendix, *supra* note 1, at 50 (pretrial transcript).

459. *See* Vale v. Louisiana, 399 U.S. 30 (1970). Officers where possible should obtain a warrant or use less restrictive means such as securing the premises from the outside. *Id.* at 34. *See supra* notes 116-19 and accompanying text for futher discussion on *Vale*. An analysis of the factors presented in United States v. Rubin, 474 F.2d 262, 268-69 (3d Cir. 1973), would also indicate exigent circumstances did not exist. *See supra* notes 120-22 and accompanying text for further discussion on *Rubin*.

C. *Application of Attenuated Connection Doctrine through Test Proposed in* Brown v. Illinois

The more difficult assessment of whether the evidence is the "fruit of the poisonous tree" in *Murray* is the attenuated connection analysis using a modified test developed in *Brown v. Illinois*.[460] The *Brown v. Illinois* test, as proposed by Justice Blackmun, would provide guidance over the determination of whether evidence seized pursuant to the search warrant was sufficiently attenuated to remove the taint from the prior illegal warrantless entry into the warehouse.[461] This analysis would focus on the following factors: 1) the issuance of *Miranda* warnings; 2) the temporal proximity between the fourth amendment violation and the obtaining of the evidence; 3) the presence or absence of intervening circumstances; and 4) the flagrancy of the violation. The first factor, the issuance of *Miranda* warnings, may be eliminated where prior to the process of requesting a warrant, the police conduct an illegal search. In *Murray*, it can be assumed that petitioners were given *Miranda* warnings at the time they were arrested. Since no incriminating statements were made that led to the decision to enter the warehouse, this factor is irrelevant to the assessment of whether the causal connection was attenuated.

The second factor, temporal proximity between the fourth amendment violation and the acquisition of evidence, suggests a close connection between these two events. In *Murray*, the process of requesting a search warrant began immediately after the illegal entry.[462] Therefore, an analysis of the second factor would suggest that the greater the time delay between these two events, the more attenuated the connection. An illegal search of a building should not bar a legal warrant-authorized search forever. At some point in time, the connection between the initial illegal entry and the decision to re-enter under the authority of a search warrant becomes appropriately attenuated. Conversely, the closer in time these two events occur, the greater the causal relationship might be. A lengthy time period between the illegal search and the subsequent warrant-authorized search would not

460. 422 U.S. 590, 603-04 (1975), *see supra* notes 207-15 and accompanying text.
461. *Id.*
462. Joint Appendix, *supra* note 1, at 69-70.

be sufficient, by itself, to attenuate the connection, but it would be a consideration.

Application of the third factor, the presence or absence of intervening factors, suggests that in *Murray* there were no intervening circumstances. After entering the warehouse, the agents immediately began the process of obtaining the search warrant. While the determination of a magistrate in issuing a search warrant could be an intervening factor in some circumstances, it is not an intervening factor in *Murray* because the agents chose not to inform the magistrate that they had already searched the warehouse.[463] A strong argument could be made that if the agents had informed the magistrate of the prior search, then the magistrate's issuance of a search warrant would be an intervening circumstance. Policy considerations dictate that a magistrate who issues a search warrant does so on the basis of a complete understanding of the situation. Disclosure of prior illegal entries is essential if a truly *neutral* and *detached* magistrate is to issue a search warrant. Magistrates who are presented with affidavits which fail to mention any preceding fourth amendment violations, such as in *Murray*, are not performing the function envisioned by the Framers; that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[464]

A review of the fourth factor, the flagrancy of the fourth amendment violation, indicates that the official misconduct in *Murray* was egregious. The violation was not a temporary maintenance of the status quo or a securing of a building from the outside, actions which would be more limited in scope and less invasive of the rights of individuals. In addition, exigent circumstances were not found to justify this warrantless entry. Indeed, the warrantless search in *Murray* is exactly the type of violation conceived of by the Framers when the fourth amendment was adopted. The Framers were particularly incensed by the use of the general writ to search for contraband items in places of business. It was this practice by the Crown, among others, that inflamed the colonists to revolt. Thus, the flagrancy of this viola-

463. *Id.*
464. U.S. CONST. amend. IV.

tion would strongly support exclusion of evidence at trial.

In sum, this analysis indicates that the evidence in *Murray* should not be admitted based on the attenuated connection doctrine. The three relevant factors supporting attenuation are not present. There was a close temporal relationship, there was no intervening circumstance, and the violation was particularly flagrant.

D. *Application of Inevitable Discovery*

The basic principle of inevitable discovery as enunciated in *Nix v. Williams*[465] is that this doctrine allows admission of evidence even though it has been discovered through a constitutional violation, provided that the evidence *would have been* discovered by lawful means. The Court in *Nix* detailed the historical facts which were documented at trial and provided the basis for the assertion that the police would have inevitably discovered the body within a short period of time.[466] The Court concluded that:

> On this record it is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found.[467]

Justice Marshall appears to be on solid ground in his analysis that the holding of *Nix* indicates that inevitable discovery requires historical facts to demonstrate that the discovery was, in fact, inevitable.[468]

Other than in *Murray* and *Segura v. United States*, the Supreme Court has not provided clear guidelines regarding the correct doctrine to be applied and the factors to be considered where police conduct warrantless illegal searches followed by warrant-authorized searches and where the search warrant pro-

---

465. 467 U.S. 431 (1984); *see supra* notes 216-37 and accompanying text.

466. 467 U.S. at 448-49. The Court commented on the extensive testimony that detailed the process of the search and the systematic approach that was followed. The Court noted that the testimony at the trial court indicated that the body would have been discovered in approximately three to five hours. *Id.* at 449.

467. *Id.* at 449-50.

468. *Murray*, 108 S. Ct. at 2539 (Marshall, J., dissenting).

cess was not initiated until after the illegal search. Assuming, *arguendo*, that one rejects Justice Scalia's position that the knowledge was obtained both legally and illegally,[469] then it would be necessary to demonstrate whether the inevitable discovery exception would apply. This would require that: one, an independent legal means of discovery could have discovered the evidence if it had not first been discovered through a fourth amendment violation; two, the police through this independent legal means would have inevitably made this discovery; and three, the information necessary to make the discovery inevitable was possessed by the police.

A major unresolved issue is whether the police must be in actual pursuit of the alternate line of investigation prior to the misconduct.[470] Since the holding in *Murray* is based on the independent source doctrine and not on inevitable discovery, this issue is still unresolved. The argument in *United States v. Cherry*[471] is that failure to require active pursuit of alternate lines of investigation would encourage police misconduct.[472] The problem with not meeting this requirement is that there is a question of what indicia is to be used to assert that there was inevitability of discovery. If, as in *Murray*, the application for the search warrant had not been initiated until after the agents' misconduct, then the assertion that the evidence would have been discovered would be based entirely on the agents' own testimony as to their intentions. There would be little to challenge the agents' testimony on their subjective intentions other than inferences based on the length of the investigation and the information known prior to the misconduct.

In *Murray* there are no facts in the record which provide the basis for concluding that the evidence would have been discovered by lawful means. All testimony indicates that the issue of the search warrant was not discussed prior to the entry.[473] *Silvestri* instructs that the inevitable discovery doctrine can only be applied when there is a showing that the decision to seek

469. *Murray*, 108 S. Ct. at 2535.

470. *See* United States v. Silvestri, 787 F.2d 736, 742-44 (1st Cir. 1986) for review of circuits which disclosed clear division on this issue.

471. 759 F.2d 1196 (5th Cir. 1985).

472. *Id.* at 1205.

473. Joint Appendix, *supra* note 1, at 68 (pretrial transcript).

a search warrant was made prior to the fourth amendment violation.[474] The *Silvestri* court summarized the three basic concerns raised when applying the inevitable discovery analysis: "are the legal means truly independent; are both the use of the legal means and the discovery by that means truly inevitable; and does application of the inevitable exception either provide an incentive for police misconduct or significantly weaken fourth amendment protection?"[475] Consequently, in *Murray* the direct testimony that no discussions occurred concerning the acquisition of a search warrant prior to the entry mandates that the evidence must be suppressed. The inevitable discovery exception would not apply.

E. *Cost-Benefit Analysis Myth*

The underlying basis for Scalia's holding in *Murray* is the strong sentiment toward the rejection or at least the confinement of the exclusionary rule. The Court, through a progression of cases, has effectively emasculated the exclusionary rule and the warrant clause of the fourth amendment. *United States v. Calandra*[476] established a cost-benefit balancing analysis approach to fourth amendment jurisprudence. *United States v. Leon*[477] established that the good faith of the officers would be sufficient to allow admissibility of otherwise inadmissible evidence. *Nix v. Williams*[478] established the inevitable discovery doctrine, allowing evidence to be admitted even though directly obtained through a constitutional violation. *Segura v. United States*[479] allowed the admissibility of evidence through the independent source doctrine where police had started the process of requesting a warrant prior to the illegal search and seizure. The policy underlying this trend is the belief that the exclusionary rule's cost to society is too excessive. The legacy of this strong

474. *Silvestri*, 787 F.2d at 746. The court found that "[t]here can be little doubt that at the time the securing of the property was ordered, a decision to seek a search warrant *had been made* which was in no way influenced or accelerated by Sergeant DuBois' discovery of drugs." *Id.* at 745 (emphasis added).

475. *Id.* at 744.

476. 414 U.S. 338 (1974).

477. 468 U.S. 897 (1984).

478. 467 U.S. 431 (1984).

479. 468 U.S. 796 (1984).

sentiment can be seen in Justice White's remarks in *Coolidge v. New Hampshire*[480] and Chief Justice Burger's dissent in *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*.[481] The overall effect of these rulings is to reduce the fourth amendment to "a form of words"[482] and to deprive meaning from the requirement of the warrant clause. This effectively returns the fourth amendment jurisprudence to the principles espoused in *Harris v. United States*[483] and *United States v. Rabinowitz*.[484] These cases gave priority to the reasonableness of the conduct of the officers in a search or seizure over the requirement of obtaining a warrant. Although Justice Powell indicated that "[t]he warrant clause of the Fourth Amendment is not dead language,"[485] the effect of *Leon*, *Nix*, *Segura*, and *Murray* is that the warrant clause *is* "dead language."

In terms of an overall assessment of the criminal justice system in America and the cost of the exclusionary rule, the report by the American Bar Association's Section of Criminal Justice seriously questions the Court's findings of the high cost of the exclusionary rule.[486] The committee formed by the Section of Criminal Justice to prepare the report found that "[c]onstitutional restrictions . . . do not significantly handicap police and prosecutors in their efforts to arrest, prosecute and obtain convictions of criminal defendants for most serious crimes."[487] The committee was more concerned over the fact that of the estimated thirty-four million serious crimes committed in the United States in 1986, only approximately three million resulted in arrest, and of these three million only several hundred thousand led to successful felony convictions punished by imprisonment.[488] This failure was found not to be due to constitutional restrictions, but according to the professionals inter-

480. 403 U.S. 443, 516-17 (1971) (White, J., concurring and dissenting).

481. 403 U.S. 388, 415-16 (1971).

482. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

483. 331 U.S. 145 (1947); *see supra* notes 64-66 and accompanying text.

484. 339 U.S. 56 (1950).

485. United States v. United States Dist. Court E. Dist. of Mich., 407 U.S. 297, 315 (1972).

486. *Criminal Justice in Crisis*, *supra* note 179.

487. *Id.* at 2.

488. *Id.* at 3.

viewed, was a result of the lack of fiscal resources.[489] Thus, the concern expressed by these professionals, as noted in the committee report, was that a criminal justice system is not so much affected by the constitutional restraints as it is affected by the lack of necessary financial resources. Funding is needed to seek out and arrest the guilty, to bring them to trial, and to provide a correctional system which can handle the volume of prisoners.[490] It is this lack of financial resources which is affecting the judicial process.[491] The committee also found throughout the questioning of criminal justice professionals that the exclusionary rule has in fact promoted professionalism in police departments across the country.[492] Consequently, this would indicate that the holding of *Mapp v. Ohio*[493] has dramatically improved the adherence to constitutional standards and has resulted in appropriate training.

Thus, it would appear that the Supreme Court, in its decision in *Murray*, is continuing to reflect the myth of the excessive cost of the exclusionary rule and has been utilizing this myth as the underpinning to various decisions which cut away at the rule. This perception of the "costs" of the exclusionary rule is the basis for the cost-benefit analysis approach begun in *Calandra*. The empirical studies do not support the application of the cost-benefit analysis; in fact, these studies provide significant support for Justice Marshall's dissenting opinion.[494] In addition, the very concept of a cost-benefit analysis is not consistent with the intent of the fourth amendment.[495]

---

489. *Id.* at 4.

490. *Id.*

491. Recent lack of space in the New York City correctional system has resulted in repeated instructions to the police not to arrest individuals committing crimes which are minor. Here, it is not the constable that has blundered, but the taxpayers, resulting in the guilty going free.

492. *Criminal Justice in Crisis*, *supra* note 179, at 15.

493. 367 U.S. 643 (1961).

494. *See* Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 678-80.

495. *See* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983).

> "The very purpose of the Bill of Rights," added Justice Jackson, in an oft-quoted passage, "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to estab-

V. Conclusion

The appropriate analysis for the situation presented in *Murray v. United States*[496] in which police first conduct an illegal search and then obtain a search warrant, is through the attenuated connection analysis, utilizing the modified test articulated in *Brown v. Illinois*.[497] The independent source doctrine and the inevitable discovery doctrine are inappropriate where the police have searched first without having begun the process of obtaining a search warrant. This conclusion is based on the different purposes that the independent source, attenuated connection, and inevitable discovery doctrines serve in fourth amendment violations. The Supreme Court, in not reversing and ordering the suppression of evidence discovered through a clear fourth amendment violation, may provide an incentive to law enforcement officers to disregard the constitutional imperatives. This holding and other recent holdings[498] are based on an incorrect analysis regarding the cost of the exclusionary rule. Moreover, this holding ignores the fact that the cost-benefit analysis approach is inappropriate for fourth amendment questions. The Framers understood and accepted the cost of the amendment.

In addition, it has been a requirement of the Court that exceptions to the exclusionary rule be limited in number and

---

lish them as legal principles to be applied by the courts." The purpose of the Bill of Rights, I would add, was to place certain subjects beyond the reach of cost-benefit analysis (except for the most extraordinary circumstances).

Id. at 653 (quoting Board of Educ. v. Barnette, 319 U.S. 624, 638 (1943)); *see also* Stewart, *supra* note 142, at 1393.

Similarly, the rule has been critized for hindering the police in the performance of their duties. Once again, this criticism is properly reserved for the fourth amendment. The exclusionary rule places no limitation on the actions of the police. The fourth amendment does. The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. That is not a political outcome impressed upon an unwilling citizenry by unbeknighted judges. It is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power. The elimination of the exclusionary rule would not lift these constitutional restraints on the conduct of the police.

Kamisar, *supra* at 653.

496. 108 S. Ct. 2529 (1988).

497. 422 U.S. 590 (1975).

498. Arizona v. Hicks, 107 S. Ct. 1149 (1987); United States v. Leon, 468 U.S. 897 (1984); Nix v. Williams, 467 U.S. 431 (1984).

scope. This would suggest that Justice Marshall was correct in asserting that the inevitable discovery doctrine be based on facts that can be verified.[499] Justice Scalia's position that "such a prophylactic exception to the independent source rule is [not] necessary"[500] begs the question and is not consistent with the history of exceptions to the search warrant requirement and to the exclusionary rule. Since the analysis has indicated that the independent source doctrine, attentuated connection doctrine, and the inevitable discovery doctrine are not appropriate for the situation presented in *Murray*, the evidence in question should not be admitted; it is the fruit of the poisonous tree.

The suppression of evidence found during an initial warrantless search in plain view is necessary because it provides the only disincentive to illegal prewarrant entries. This, in turn, furthers the constitutional requirement that probable cause be determined by a neutral and detached magistrate, not by the officials engaged in the competitive enterprise of ferreting out crime.[501] The seizure of the evidence in *Murray* pursuant to a search warrant is not attenuated in the sense in which the term is used in *Nardone v. United States*,[502] *Wong Sun v. United States*,[503] and *Brown v. Illinois*.[504] A traditional evaluation of attenuated connection looks to historical facts to determine if the connection is truly independent.[505] The majority opinion in *Murray* allows the intent of the officers to determine if means are independent. Thus, the Court has provided an incentive for police violations of the Constitution and has effectively emasculated the warrant clause of the fourth amendment.

John P. Ekberg

499. *Murray*, 108 S. Ct. at 2539 (Marshall, J., dissenting).

500. *Id.* at 2534 n.2.

501. *See* United States v. Leon, 468 U.S. 897, 914-15 (1984); Illinois v. Gates, 462 U.S. 213, 240 (1983); Lo-ji Sales, Inc. v. New York, 442 U.S. 319, 326-27 (1979); Johnson v. United States, 333 U.S. 10, 14 (1948).

502. 308 U.S. 338 (1939).

503. 371 U.S. 471 (1963).

504. 422 U.S. 590 (1975).

505. *Wong Sun*, 371 U.S. 471 (1963).