Pace Law Review

Volume 5
Issue 3 *Spring 1985*
International Commercial Arbitration Issue

Article 6

April 1985

Nix v. Williams: Conjecture Enters the Exclusionary Rule

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Nix v. Williams: Conjecture Enters The Exclusionary Rule

I. Introduction

In *Nix v. Williams*[1] the Supreme Court adopted the inevitable discovery exception[2] to the exclusionary rule,[3] concluding

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1. 104 S. Ct. 2501 (1984). *Nix v. Williams* was the second time the *Williams* case reached the Supreme Court. The first time was Brewer v. Williams, 430 U.S. 387 (1977). Throughout this Note, the cases leading up to and including *Brewer v. Williams* will be referred to as *Williams I*. The cases leading up to and including *Nix v. Williams* will be referred to as *Williams II*. For a discussion of *Williams I*, see *infra* notes 122-128 and accompanying text. *Williams I* was the topic of no less than eleven commentators. *See* Note, *Brewer v. Williams: The End of Post-Charging Interrogation?*, 10 SW. L.J. 331 (1978-1979); Note, *Brewer v. Williams: Express Waiver Extended to Sixth Amendment Right to Counsel*, 4 OHIO N.U.L. REV. 833 (1978); Note, *The Right to Counsel: An Alternative to* Miranda, 38 LA. L. REV. 239 (1977-1978); Note, *Where Suspect Has Not Waived His Right to an Attorney's Assistance Confession Prompted by Detective's Statements when Counsel was Absent is Inadmissible*, 11 CREIGHTON L. REV. 997 (1978); Note, *Criminal Law — Right to Counsel — Incriminating Statements Obtained During In-Custody Interrogation Not Admissible Without Proof of Waiver of Defendant's Right to Counsel*, 54 N.D.L. REV. 307 (1977-1978); Note, *Murder Suspect Denied Right to Counsel*, 63 A.B.A. J. 686 (1977); Note, *Interrogation and the Sixth Amendment: The Case for Restriction of Capacity to Waive the Right to Counsel*, 53 IND. L.J. 313 (1977-1978); Note, *The Right to Counsel and the Strict Waiver Standard*, 57 NEB. L. REV. 543 (1978); Note, *Constitutional Law — Criminal Procedure — A Confession Alone Does Not Effectively Waive the Right to Counsel If It Follows an Interrogation*, TEX. TECH. L. REV. 312 (1977-1978);Note, *Constitutional Law — Sixth Amendment Right to Counsel- Waiver*, 45 TENN. L. REV. 111 (1977); Note, *Constitutional Law: No Clear Standard for the Waiver of an Asserted Right to Counsel*, 29 U. FLA. L. REV. 778 (1977).

2. Previously, the inevitable discovery exception had been adopted by every circuit. *See* United States v. Durant, 730 F.2d 1180, 1185 (8th Cir. 1984); United States v. Fisher, 700 F.2d 780, 784 (2d Cir. 1983); United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982); United States v. Roper, 681 F.2d 1354, 1358 (11th Cir. 1982); Papp v. Jago, 656 F.2d 221, 222 (6th Cir. 1981); United States v. Bienvenue, 632 F.2d 910, 914 (1st Cir. 1980); United States v. Brookins, 614 F.2d 1037, 1042 (5th Cir. 1980); United States v. Schmidt, 573 F.2d 1057, 1073 (9th Cir. 1978); United States v. Twomey, 508 F.2d 858, 866 (7th Cir. 1974); Virgin Islands v. Gereau, 502 F.2d 914, 928 (3d Cir. 1974); United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir. 1970); Wayne v. United States, 318 F.2d 205, 209 (D.C. Cir. 1963).

3. *See infra* notes 7-14 and accompanying text. The exclusionary rule is a judicially created doctrine that prohibits the prosecution in a criminal trial from introducing evidence in the case-in-chief that has been obtained, even indirectly, through a governmen-

that the cost to society of excluding evidence that *would have been found* is too great.[4] Under the inevitable discovery exception, evidence that has been tainted by an illegality is admitted if it can be proven that the evidence would have been found without police misconduct.[5] The Court held that in order for such evidence to be admitted at trial the prosecution must demonstrate by a preponderance of the evidence that the evidence would have been inevitably discovered.[6] The prosecution is thus given a far reaching tool with a comparatively low burden to meet in order to invoke its use.

Part II of this Note examines the legal background of the inevitable discovery exception to the exclusionary rule, including a presentation of the many and diverse applications of the exception. Part III reviews the factual and procedural background of the *Williams* cases. Part IV sets forth the majority, concurring, and dissenting opinions of *Williams II*. Part V analyzes the Court's rationale and suggests that the Court ignored the purpose of the exclusionary rule and misinterpreted the inherent speculation of the inevitable discovery exception. The Note concludes, in Part VI, that although the inevitable discovery exception is a needed addition to the law of criminal procedure, it contradicts the purpose of the exclusionary rule. Adoption of the exception can only be justified by rationalizing that societal costs of not admitting probative evidence outweigh the deterrent benefit of excluding probative evidence. The Note also concludes that the Court's chosen burden of proof, preponderance of the evidence, is too low. The prosecution can meet this burden too easily, and therefore, the preponderance standard does not properly prevent tainted evidence from being admitted at trial. A clear and convincing standard is proffered as a more appropriate

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tal violation of the defendant's constitutionally protected rights. *See* Weeks v. United States, 232 U.S. 383 (1914); United States v. Leon, 104 S. Ct. 3405 (1984); *see also* 3 W. LAFAVE, SEARCH AND SEIZURE § 11.4 (1978).

The rule was first applied in Boyd v. United States, 116 U.S. 616 (1886), to bar testimony compelled in violation of the fifth amendment and was first applied to fourth amendment violations in Weeks v. United States, 232 U.S. 383 (1914). Recent decisions indicate a change in the justification for invoking the exclusionary rule. *See infra* notes 15-27 and accompanying text.

4. *Williams*, 104 S. Ct. at 2509.

5. *See* 3 W. LAFAVE, *supra* note 3, § 11.4(a), at 621-28.

6. *Williams*, 104 S. Ct. at 2509.

burden of proof.

II. Legal Background

A. *The Exclusionary Rule: Origin and Justification*

The exclusionary rule is a judicially created remedy that is applicable to both state[7] and federal[8] courts.[9] The rule has been used to protect fourth,[10] fifth,[11] and sixth[12] amendment rights. Until recently, the Supreme Court had premised its justification for use of the rule on two grounds. First, the Supreme Court reasoned that courts should not sanction illegal conduct.[13] Second, the Court reasoned that excluding illegally obtained evidence would deter future misconduct.[14]

Recently, in *United States v. Calandra*,[15] in which illegally obtained evidence was used as the basis for questioning a witness before a grand jury,[16] the Court abandoned the twofold jus-

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7. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

8. Weeks v. United States, 232 U.S. 383 (1914).

9. For a discussion of the history of the exclusionary rule, see Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.R.D. 109 (1984) (analyzing the cost-benefit rationale in relation to the exclusionary rule's justifications); Wilson, *Enforcing the Fourth Amendment: The Original Understanding*, 28 CATH. LAW. 173 (1983) (arguing that the exclusionary rule has no constitutional support); Wilson, *The Origin and Development of the Federal Rule of Exclusion*, 18 WAKE FOREST L. REV. 1073 (1982) (linking the development of the rule to judicial sleight of hand).

10. Mapp v. Ohio, 367 U.S. 643 (1961) (excluding evidence obtained through a warrantless search of a home).

11. Miranda v. Arizona, 384 U.S. 436, 467-73 (1966) (excluding statements taken without Miranda warnings).

12. United States v. Wade, 388 U.S. 218, 241 (1967) (suppressing evidence taken outside the presence of counsel after the right to counsel had attached); Escobedo v. Illinois, 378 U.S. 478, 490-92 (1964); Massiah v. United States, 377 U.S. 201, 207 (1964).

13. In United States v. Weeks, 232 U.S. 383 (1914), the Supreme Court stated:

> [T]he Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his house by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the action of the Government and officers of the law acting under it. . . . To 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.

United States v. Weeks, 232 U.S. 383, 394 (1914).

14. Mapp v. Ohio, 367 U.S. at 656; Elkins v. United States, 364 U.S. 206, 217 (1960).

15. 414 U.S. 338 (1974).

16. *Id.* at 339.

tification for the rule.[17] Although the Court stated that the exclusionary rule is designed to safeguard fourth amendment rights through its deterrent effect,[18] the Court made no mention of the apparent impropriety in the judiciary sanctioning police misconduct by receiving tainted evidence.[19] Rather, the Court promulgated a cost-benefit analysis to be applied when determining if the exclusionary rule is applicable.[20]

In the cases after *Calandra,* the Court applied the cost-benefit rationale and held that the benefit to society of admitting probative evidence outweighed the cost of deterrence of excluding the evidence when the illegally seized evidence was not being used in the case-in-chief.[21] The rationale enunciated by the

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17. *Id.* at 348. In Harris v. New York, 401 U.S. 222 (1971), a case preceding *Calandra,* the Court allowed statements made in violation of *Miranda* to be used by the prosecution to impeach the defendant during cross examination. The Court reasoned that there was a sufficient deterrent when the questioned evidence could not be used in the case-in-chief. Harris v. New York, 401 U.S. at 225. *Harris* signifies the Court's modification in its use of the exclusionary rule in the fifth ammendment context, whereas *Calandra* introduces the Court's assault on the fourth amendment exclusionary rule.

18. United States v. Calandra, 414 U.S. at 348. The Court reiterated that the exclusionary rule is a judicially created remedy. The Court held that use of the rule should be "restricted to those areas where its remedial objectives are thought most efficaciously served."

19. However, Justice Brennan argued in dissent that the Court was enabling the Judiciary to become parties in official lawlessness. *Id.* at 360 (Brennan, J., dissenting). In Stone v. Powell, 428 U.S. 465 (1976), the Court stated that "[a]lthough our decisions often have alluded to the 'imperative of judicial integrity,' . . . they demonstrate the limited role of this justification in the determination whether to apply the rule in a particular context." *Id.* at 485 (quoting United States v. Peltier, 422 U.S. 531, 536 (1975)). This language is the most definitive statement the Court has made on the status of the judicial integrity rationale. For a discussion of the present status of the judicial integrity rationale, see Lustiger, *supra* note 9; Schrock & Welsh, *Up From Calandra: The Exclusionary Rule As A Constitutional Requirement,* 59 MINN. L. REV. 251 (1974).

20. The cost-benefit analysis is a balancing process used by the Court. The Court weighed the cost to society of excluding probative evidence against the deterrence benefit of exclusion. The Court held that the benefits in excluding evidence from the grand jury was outweighed by the cost of exclusion. The Court concluded that there would be an insignificant deterrent effect on police misconduct if the rule was extended to grand jury proceedings because the deterrent effect is already achieved by the evidence being excluded in the case-in-chief. United States v. Calandra, 414 U.S. at 349-52.

21. *See* United States v. Janis, 428 U.S. 433 (1976). The *Janis* Court allowed evidence illegally seized by a criminal law enforcement officer to be used in a civil trial. The Court reasoned that a deterrent purpose would not be served by exclusion in the civil proceeding. *Id.* at 453-54. In United States v. Havens, 446 U.S. 620 (1980), the Court allowed illegally seized evidence to be used to impeach the defendant at his trial. *Id.* at 622-23.

Court was that a sufficient deterrent effect was realized when the evidence was not being admitted in the case-in-chief.[22] The Court partly abandoned the protection given to the defendant's case-in-chief when it adopted the good faith exception in *United States v. Leon*.[23] For the first time, the Court applied the cost-benefit analysis in the context of admitting illegally seized evidence in the prosecution's case-in-chief.[24] The Court concluded that when the police conduct a search in good faith reliance on an invalid warrant, the illegally seized evidence is admissible in the case-in- chief.[25] *Leon* suggests that judicial sanctioning of governmental misconduct is no longer a primary justification for invoking the rule.[26] More importantly, by applying the cost-benefit rationale to allow illegally seized evidence to be admitted in the case-in-chief, the Court has rewritten the deterrence justification for applying the rule. The new justification is not whether exclusion will deter police misconduct, but rather whether the benefit of deterrence will outweigh the cost of exclusion.[27] The new justification is applied not only to evidence that is obtained as a direct result of a governmental illegality but also to evidence obtained derivatively from an illegality.

B. *Origin of the Inevitable Discovery Exception to the Exclusionary Rule*

The inevitable discovery exception to the exclusionary rule applies when evidence that was obtained as a result of an illegality and thus would otherwise be suppressed under the exclusionary rule, is admitted into evidence because the prosecution can demonstrate that the evidence *would have been found* without

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22. United States v. Calandra, 414 U.S. at 349-52.

23. 104 S. Ct. 3405 (1984).

24. *Id.* at 3416. *See also* INS v. Lopez-Mendoza, 104 S. Ct. 3479, 3486 (1984). In *Lopez-Mendoza*, the Court applied the cost-benefit analysis to allow illegally seized evidence to be used in the case-in-chief: a deportation proceeding.

25. United States v. Leon, 104 S. Ct. at 3416. *See also* Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85 (1984); Note, *Leading cases of the 1983 Term* 98 HARV. L. REV. 87 (1984).

26. For a discussion of the judicial integrity rational, see *supra* note 19.

27. United States v. Leon, 104 S. Ct. at 3421-23. In applying the cost- benefit analysis, the Court noted that there would be minimal deterrent benefit when the police acted in good faith reliance on a warrant. The deterrent benefit will be greater when there is not a good faith reliance on a warrant. *Id.*

the governmental illegality.[28] The inevitable discovery exception evolved from the derivative evidence rationale of the independent source doctrine.[29] *Silverthorne Lumber Co. v. United States*,[30] which marks the origin of the independent source doctrine, has also been cited as the cornerstone of the inevitable discovery exception.[31]

In *Silverthorne*[32] the government obtained records of a company through an illegal search of the corporate offices.[33] The Court suppressed the corporate records and ordered them returned. The government then sought to procure the same records by issuing a federal grand jury subpoena. Silverthorne Lumber Co. refused to comply and was found in contempt of court.[34] The Court held that the company did not have to comply with the subpoena because knowledge of the existence of the corporate records, which led to the issuance of the subpoena, was obtained through the illegal search.[35] Writing for the Court, Justice Holmes stated that "[t]he 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."[36] Thus the exclusionary rule applied not only to direct evidence obtained through an illegal-

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28. *See 3* W. LAFAVE, *supra* note 3, § 11.4(a) at 612-27.

29. The inevitable discovery exception has also been referred to as the hypothetical independent source. *See* State v. Williams, 285 N.W.2d 248, 256 n.3 (1979). United States v. Falley, 489 F.2d 33, 42 (1973) (Oakes, J., concurring); Note, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137 (1976).

30. 251 U.S. 385 (1920).

31. No less than eight commentators have stated that the inevitable discovery exception evolved from the independent source doctrine with its origin in *Silverthorne*. *See* Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 137-40 (1984); Note, *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 123 n.44 (1984); 3 W. LAFAVE, *supra* note 3, at 620 (1978); Bain & Kelly, *Fruits of the Poisonous Tree: Recent Developments As Viewed Through Its Exceptions*, 31 U. MIAMI L. REV., 615, 622-23 (1977); LaCount and Girese, *The "Inevitable Discovery" Rule, An Evolving Exception to the Constitutional Exclusionary Rule*, 40 ALB. L. REV. 483, 484-85 (1976); Note, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137, 140 (1976).

32. 251 U.S. 385 (1920).

33. *Id.* at 390.

34. *Id.* at 391.

35. *Id.* at 392.

36. *Id.*

ity but also to evidence derived from the primary evidence. The Court, however, was clear in stating that the facts obtained by the illegality did not become "sacred and inaccessible."[37] Rather, the Court noted that if the government could show that knowledge of the illegally obtained facts was also obtained from a source independent from the illegally obtained source, the facts "may be proved like any others."[38]

In *Nardone v. United States* (*Nardone II*),[39] the Supreme Court termed this derivative evidence "fruit of the poisonous tree."[40] The Court stated that the "fruit" of the illegally obtained evidence could be admitted if the prosecution could prove that the nexus between the original illegality and the derivative evidence became so "attenuated as to dissipate the taint."[41] The *Nardone II* Court made clear that the attenuation doctrine applied exclusively to derivative evidence.[42] By contrast, primary or direct evidence could not avoid suppression because this evidence is obtained as a direct result of the illegality and could never be "attenuated."[43]

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37. *Id.*.

38. *Id.*

39. 308 U.S. 338 (1939).

40. *Id.* at 341. The *Nardone II* decision restated the *Silverthorne* independent source exception. *Id.* at 340. In *Nardone II* the defendants were convicted of smuggling alcohol and other related offenses. At trial the prosecutor produced evidence of defendant's telephone conversations. The conversations were obtained as a result of illegal wiretaps. The Supreme Court in Nardone v. United States (*Nardone I*), 302 U.S. 379 (1937), excluded the evidence as direct evidence of an illegality.

The defendants were retried in *Nardone II*. The prosecutor did not submit the suppressed evidence relating to the telephone conversations. However, the defense sought and was denied the opportunity to explore whether the prosecution had received any indirect benefit from the initial illegality. *Nardone II*, 308 U.S. at 342.

41. *Nardone I*, 302 U.S. at 341.

42. *Id.* The Court stated that a "[s]ophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become attenuated as to dissipate the taint."

43. In order for the exclusionary rule to have any deterrent impact, evidence that is obtained as a direct result of an illegality must be suppressed. For example, when police illegally enter a house in search of drugs, the drugs obtained must be suppressed as a direct result of the illegality. Any other result would render the exclusionary rule useless as a deterrent to police misconduct.

For a discussion of the exclusionary rule deterrence rationale, see Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition?"*, 16 CREIGHTON L. REV., 565, 597-606 (1983); Mathias, *The Exclusionary Rule Revisited*, 28 LOYALA L. REV. 1 (1982); Kamisar, *The Exclusionary Rule*

Four years after *Nardone II*, Judge Learned Hand, writing for the Second Circuit, extended the use of the independent source doctrine in *Somer v. United States.*[44] *Somer* has been cited by commentators as the genesis of the inevitable discovery exception.[45] In *Somer* federal agents illegally entered the defendant's apartment.[46] While in the apartment, the agents obtained information from Somer's wife that he was out and would return shortly.[47] A search of Somer's car upon his return revealed contraband.[48] The Second Circuit reversed the trial court and held that the prosecution should be given an opportunity to show that independent of what Somer's wife disclosed to the police, the officers *would have* gone to the street, waited for Somer, and arrested him exactly as they did.[49] Judge Hand reasoned that by proving that the police did not need the illegally obtained information, the seizure could be declared lawful.[50]

The Supreme Court's next statement on derivative evidence was in *Wong Sun v. United States.*[51] The Court rejected a "but for" test in which all evidence that would not have been discovered but for the illegal actions of the police would be excluded.[52] Instead, the Court reasoned that "the more apt question in such a case is whether, granting establishment of the primary illegal-

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in Historical Perspective: The Struggle to Make the Fourth Amendment More than "An Empty Blessing", 62 JUDICATURE 337 (1979); Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 935-36 (1979); Pitler, *The Fruit of the Poisonous Tree Revisited and Shepardized*, 56 CALIF. L. REV. 579, 581-89 (1968).

44. 138 F.2d 790 (2d Cir. 1943).

45. *See* 3 W. LAFAVE, *supra* note 3, § 11.4 (a), at 621 (quoting Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88, 90 (1974)), "[t]he first clear application of inevitable discovery is to be found in Somer v. United States"; *see also* LaCount and Girese, *The "Inevitable Discovery" Rule, An Evolving Exception to the Constitutional Exclusionary Rule*, 40 ALB. L. REV. 483, 486 (1976) (citing *Somer* as the origin of the inevitable discovery exception).

46. Somer v. United States, 138 F.2d at 791.

47. *Id.*

48. *Id.*

49. *Id. Cf.* United States v. Paroution, 299 F.2d 486 (2d Cir. 1962). In *Paroution*, the Second Circuit rejected the inevitable discovery exception holding that "the test must be one of actualities, not possibilities." United States v. Paroutin, 299 F.2d at 489. The Second Circuit has since adopted the exception in United States v. Fisher, 700 F.2d 780 (2d Cir. 1983).

50. Somer v. United States, 138 F.2d at 792.

51. 371 U.S. 471 (1963).

52. *Id.* at 488 (quoting MACGUIRE, EVIDENCE OF GUILT, 221 (1959)).

ity, 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."[53] *Wong Sun* not only serves as a restatement of the *Silverthorne* independent source doctrine but also supports a separate attenuation exception.[54] It has become the modern barometer in determining whether derivative evidence will be admitted.[55]

Before *Wong Sun* the circuit courts had begun to develop the inevitable discovery exception as a logical extension of the independent source doctrine.[56] Between Judge Hand's initial use of the exception forty-one years ago in *Somer* and the *Williams*

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53. *Id.*.

54. At the core of the independent source doctrine is the separation between the primary illegality and the independent source. *See supra* notes 28-35 and accompanying text. As such, the *Wong Sun* holding of obtaining evidence "by means sufficiently distinguishable to be purged of the primary taint" restates the *Silverthorne* independent source rationale. In addition to restating the independent source rationale, *Wong Sun* has been cited as the origin of the attenuation exception. The attenuation exception is similar to the independent source exception in its separation from the initial illegality. However, it is different from the independent source exception in that it is not a separate factual source which is proven to lead to the evidence; rather it is a series of attenuated circumstances which are claimed to separate the illegality from the derivative evidence. Brown v. Illinois, 422 U.S. 590 (1975), is the most recent statement by the Supreme Court on the attenuation exception. In *Brown*, the defendant was illegally seized by police officers, read his *Miranda* warnings, and subsequently confessed. Brown v. Illinois, 422 U.S. at 591. The Court held that there was insufficient attenuation between the initial illegality and the confession, therefore the confession remained tainted and was suppressed. In so holding, the Court delineated intervening factors that would remove the taint from the fruits. Factors such as whether the confession was a product of free will, "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct" will be considered. Brown v. Illinois, 422 U.S. at 603-04.

55. The derivative evidence doctrine consists of the independent source, attentuation, and inevitable discovery exceptions. As is apparent from the case law, the exceptions that make up the derivative evidence doctrine are intertwined. The common theme among the exceptions is the rule stated in *Wong Sun*. The evidence must have been obtained "by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. at 488.

56. Chief Justice Burger, then a circuit judge in the District of Columbia, helped shape the present use of the exception with his opinion in Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963). In *Wayne* police located a body through an illegal entry of the defendant's apartment. Judge Burger wrote that "[i]t is inevitable that, even had the police not entered appellant's apartment at the time and manner they did, the coroner *would sooner or later have* been advised by the police of the information reported by the sister, *would have* obtained the body, and *would have* conducted the post mortem examination prescribed by law." *Id.* at 209.

II decision, the inevitable discovery exception has been applied in a growing variety of situations and has become an often used prosecutorial tool.

C. *Various Applications of the Inevitable Discovery Exception*

The inevitable discovery exception is invoked when a police illegality occurs before the police find the evidence that is the subject of their investigation, thereby tainting the evidence.[57] The prosecution must then prove that in the course of the normal police investigation the police would have inevitably uncovered the evidence. The illegality thus serves only to accelerate the conclusion of the investigation and not to alter its final outcome.[58]

1. *Normal Police Investigations*

By far the most common use of the inevitable discovery exception is in situations involving normal police investigations and procedures.[59] Standard police procedures such as searching for witnesses,[60] checking records,[61] impounding vehicles,[62] identi-

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57. *See* supra notes 46-50 and accompanying text.

58. United States v. Apker, 705 F.2d 292, 307 (8th Cir. 1983) ("illegal warrant clearly did no more than hasten the discovery of the guns."); Leak v. Maryland, 353 F.2d 526, 528 (4th Cir. 1968) (Fourth Circuit admitted illegally obtained evidence holding that "the knowledge merely expediated the time of petitioner's arrest.").

59. *See* LaCount and Girese, *The "Inevitable Discovery" Rule, An Evolving Exception to the Constitutional Exclusionary Rule*, 40 ALB. L. REV. 483, 491-98 (1976) (discussing the predictability of police work in relation to application of the exception); Note, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137, 164 (1976) (discussing evidence that would be produced through routine investigation); Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88, 91 (1974) ("The majority of the cases employing the inevitable discovery exception involve instances in which the illegal police conduct occurred while an investigation was already in progress and resulted in the discovery of evidence that would have eventually been obtained through routine police investigatory procedure.").

60. *See* United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980). In *Brookins* a witness, who was located as a result of illegal police interrogation of the defendant, was allowed to testify at the defendant's trial. The court found that "[m]ore than a reasonable probability existed that normal police investigation, if the interrogation had never occurred, *would have* disclosed the identity of [the witness]." *Id.* at 1048 (emphasis added).

61. *See* United States v. Durant, 730 F.2d 1180 (8th Cir. 1984). *Cf.* United States v. Finucan, 708 F.2d 838 (1st Cir. 1983). In *Finucan*, the defendants were involved in an

fication checks by the FBI,[63] and canvassing,[64] have been used to invoke the inevitable discovery exception. Police investigations are the most common situational use of the exception because of their predictability. Courts have found that because the police procedures are mandatory and standardized, it is highly predictable that the investigation would have uncovered the evidence. Whether the inevitable discovery exception will be adopted by the court depends on whether the procedure was one that has a history of being used successfully in similar cases.[65]

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odometer "rollback" scheme. The court stated that

> the government was looking for information on hundreds of cars, registered in numerous states, each of which passed through several hands. Given the enormous difficulty and expense of uncovering all of this information . . . the district court . . . [did not err in finding] that discovery of some of the documents was far from inevitable.

Id. at 844.

62. United States v. Wiga, 662 F.2d 1325, 1333 n.9 (9th Cir. 1981). In *Wiga*, the court determined that a lawful routine search of a vehicle in an impoundment area *would have* produced the evidence. *Id.*

63. United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir. 1970). In *Seohnlein*, the court found that a FBI identification check *would have* turned up the identity of the defendant. *Id. Accord* United States v. Huberts, 637 F.2d 630 (9th Cir. 1980).

64. United States v. Bienvenue, 632 F.2d 910 (1st Cir. 1980). In *Bienvenue*, the defendant was convicted of conspiracy to import cocaine. Evidence of the defendant's travel plans, which were obtained as a result of an illegal search, were admitted at trial. The court held that the police, based on the information they had before the illegal search, *would have* canvassed all of the travel agencies to determine the defendant's operation. *Id.* at 914.

65. *See, e.g.*, United States v. Brookins, 614 F.2d at 1048; *see also* United States v. Durant, 730 F.2d 1180 (8th Cir. 1984). In *Durant* the defendants were convicted of bank robbery. *Id.* at 1184. Defendant Durant was arrested at his residence on an unrelated charge. While leaving his residence the officer asked Durant, in violation of his *Miranda* rights, whether he owned a car. Durant pointed to a blue Oldsmobile which the officer noted by taking down the plate numbers. Before the interrogation of Durant, the FBI knew that a blue Oldsmobile was involved in the bank robbery. The car was subsequently impounded and photographed. The court concluded that the police *would have* inevitably learned of Durant's connection to the blue Oldsmobile once they became aware of his participation in the bank robbery; therefore, the court admitted the photograph of the Oldsmobile into evidence despite the *Miranda* violation. The court reasoned that the police *would have* traced a driver's license, belonging to Durant's brother, which they obtained from Durant during his arrest. In tracing the license, authorities would have been led to the blue Oldsmobile registered to Durant's brother. *Id.* at 1185.

2. *Searches*

Unlike mandatory police procedures, searches are for the most part not standard police operating procedures.[66] Application of the inevitable discovery exception to search situations is therefore often limited because of the unpredictability of searches. The exception has been applied, however, to a number of different types of searches including searches incident to arrest,[67] saturation searches,[68] inventory searches,[69] searches conducted pursuant to an invalid warrant,[70] and sweep searches.[71]

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66. Searches incident to arrest or pursuant to inventory are standard police operating procedures and, as such, are highly predictable and are readily available to application of the exception. *See, e.g.*, NEW YORK CITY POLICE DEP'T PATROL GUIDE, Procedure No. 113-1 (effective June 9, 1978) (invoicing general property); *id.* Procedure No. 113-11 (effective June 9, 1978) (recovered vehicle stolen and recovered within New York City); *id.* Procedure No., 110-48 (effective March 24, 1978) (arrests forfeiture proceedings for property seized as evidence); *id.* Procedure No. 116-33 (effective August 8, 1976) (stop and frisk).

67. *See* United States v. Roper, 681 F.2d 1354 (11th Cir. 1982); *see also* People v. Green, 80 Misc. 2d 626, 363 N.Y.S. 2d 753 (N.Y. Sup. Ct. 1975), *rev'd*, 51 A.D.2d 938, 381 N.Y.S.2d 246 (1st Dep't 1976), *rev'd*, 42 N.Y.2d 1023, 368 N.E.2d 834, 398 N.Y.S.2d 656 (1977). In *Green*, before executing a valid search warrant on an apartment owned by a suspect named Lucas, police illegally seized and searched the defendant as he left the Lucas apartment. The court held that the heroin found on Green as a result of the illegal search and seizure is admissible because police *would have* inevitably found the heroin incident to a lawful arrest after executing the search warrant. People v. Green, 80 Misc. 2d at 363, 363 N.Y.S.2d at 759.

68. *See* Gov't of the Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974). The *Gereau* court determined that because FBI agents had commenced a saturation search in the area where the gun was found, the agents *would have* found the gun without using the statement they had illegally obtained from the defendant. *Id.* at 927-29. In United States v. Falleys, 489 F.2d 33 (2d Cir. 1973), information leading to customs brokers was obtained from an address book that was illegally seized from the defendant's home. The court held that

> [It] *would have* been only a question of time before the government by a so- called saturation investigation or otherwise, *would have* discovered the broker and the importation documents. Even if the address book had shortened or facilitated the investigation, it did not supply fruit sufficiently poisonous to be fatal.

Id. at 40 (emphasis added). *See also* United States v. Cole, 463 F.2d 163 (2d Cir. 1972) (discussing a saturation search in relation to the independent source doctrine). For another example of a saturation search, see *Williams II*, 104 S.Ct. 2501 (1984). *See infra* notes 107-121 and accompanying text.

69. *See* United States v. Wiga, 662 F.2d at 1333 n.9. *See generally* Illinois v. LaFayette, 462 U.S. 640 (1983) (discussing the reasonableness of inventory searches as being within the confines of the fourth amendment).

70. *See* United States v. Apker, 705 F.2d 293 (8th Cir. 1983). Guns were seized pursuant to an invalid federal warrant. The court relied on the inevitable discovery exception to admit the evidence of the illegal search because there were valid state warrants

The most common use of the exception in the search context is in situations in which police fail to give *Miranda* warnings in a custodial setting.[72]

3. *Use of Non-Police Personnel*

In certain situations courts have been willing to consider information supplied by civilians employed by governmental agencies when analyzing the inevitability of discovery.[73] In *People v. Soto*,[74] for example, the defendant fatally stabbed the victim and deposited the knife into a mailbox.[75] The defendant was arrested and confessed to the police. Included in the confession was the whereabouts of the knife.[76] At the defendant's trial, although the illegally obtained confession was suppressed, the knife was admitted because the court noted that postal regulations required the postman, who inevitably *would have* found the knife, to turn it in to superiors.[77]

Courts have also permitted civilians not associated with governmental agencies to be used to demonstrate the inevitabil-

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available at the time of the illegal search. Thus the illegal search served only to hasten the discovery. *Id.* at 307.

71. *See* United States v. Fitzgerald, 724 F.2d 633 (8th Cir. 1983) (Gibson, J., concurring). In *Fitrgerald*, a warrant was held to be valid because it was based upon the observation of narcotics viewed during the course of sweep searches incident to the execution of arrest warrants. The concurrence determined that because the officer saw the narcotics during the sweep search, the state warrant *would have* been valid and the questioned evidence admissible under the inevitable discovery exception. *Id.* at 638 (emphasis added); *See generally* United States v. Gardner, 627 F.2d 906 (9th Cir. 1980) (A sweep search is a search for the purposes of looking for persons at the premises who might present a security risk.); United States v. Briddle, 436 F.2d 4, 6-8 (8th Cir. 1970).

72. United States v. Roper, 681 F.2d 1354 (11th Cir. 1982), is an example of a court using the inevitable discovery exception to cure a *Miranda* violation. In *Roper* agents procured evidence as a result of an illegal interrogation. The court admitted the evidence, holding that the agents *would have* inevitably conducted a search incident to arrest. The court reasoned that in conducting the search incident, the agents *would have* located the evidence without the use of the tainted statements. *Id.* at 1357. *See also* People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793 (1973); State v. Tillery, 107 Ariz. 34, 481 P.2d 271 (1971); Cook v. State, 8 Md. App. 243, 259 A.2d 326 (1969).

73. *See* People v. Soto, 55 Misc. 2d 219, 285 N.Y.S.2d 166 (1967).

74. *Id.*

75. 55 Misc. 2d 219, 285 N.Y.S.2d 166 (1967).

76. *Id.*

77. 55 Misc. 2d at 220, 285 N.Y.S.2d at 168.

ity of discovery.[78] The prosecution, however, has a more difficult time of proving inevitability because civilians are not subject to regulations and their conduct is therefore less predictable.

4. *Inevitable Discovery Through Witness Testimony*

The inevitable discovery exception has been used to admit testimonial evidence when the court finds that the questioned evidence would have been found inevitably through trial questioning.[79] Although the number of cases applying the exception in this manner is limited, it is probably due more to the unusual fact pattern needed than reluctance to use the rule.[80] A more common application of the inevitable discovery exception is when the court finds that the witness would have been *physically* located despite the illegality.[81]

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78. *See* United States v. Killough, 336 F.2d 929 (D.C. Cir. 1964) The victim's body was found pursuant to an illegal investigation, but the court noted that the body, being near the road, *would have* been found by passing pedestrians. *Id.* at 934. In United States v. Miller, 666 F.2d 991 (5th Cir. 1982), the defendants were convicted of mail fraud. A diary with names of victims was illegally seized and suppressed at the trial. Thus, none of the victims whose names were found as a result of the diary was allowed to testify. The court concluded that all the witnesses *would have* come forward to testify if they had known of the fraud. The court concluded that it was to their advantage to testify because they were representatives of organizations that were either direct victims or unknowing facilitators of the defendants' fraud. *Id.* at 996. *See generally* United States v. Schaefer, 691 F.2d 639 (3d Cir. 1982). *But see* United States v. Rubalcava-Montoya, 597 F.2d 140 (9th Cir. 1978); United States v. Scios, 590 F.2d 956 (D.C. Cir. 1978) (In both cases it was held that the prosecution failed to prove that the witnesses would have come forward of their own volition.).

79. *See* Warren v. Territory of Hawaii, 119 F.2d 936 (9th Cir. 1941). A police officer was electrocuted while raiding the defendant's brothel. The warrantless seizure of the front door with the electrocuting device was illegal. The court held that although the device was illegally seized by police, the prosecution had the right to show that it was the same device used by the defendant to kill the officer. The court reasoned that the "[k]nowledge thus independently gained *would inevitably* lead at the trial to the examination of the denizens disclosing the installation by appellant of the entire device." *Id.* at 938 (emphasis added). *See also* United States v. Nagelberg, 434 F.2d 585 (2d Cir. 1970).

80. *See supra* note 79. In order to use the inevitable discovery exception in this manner, the prosecution must prove that independent trial testimony will produce the same probative evidence that is being suppressed. Because it is easier to claim the witness would have been physically discovered than to prove what the witness will testify, *see infra* note 81, the prosecution will rarely use the exception in this manner.

81. *See* United States v. Twomey, 508 F.2d 858 (7th Cir. 1974). The defendant was convicted of rape and kidnapping. Police searched the defendant's apartment without a warrant. The court allowed a witness, whose identity was discovered from a booklet illegally seized from the defendant's apartment, to testify at the defendant's trial. The court

5. *Unique Situations*

The inevitable discovery exception has also been applied in situations that are not easily categorized.[82] In *United States v. Wilson*,[83] the defendant was convicted of threatening the life of President Reagan.[84] Wilson's conviction was based on a letter confiscated from him while he was a prisoner in Florida. Rather than analyze whether the search of the defendant's mail violated the fourth amendment, the Eleventh Circuit invoked the inevitable discovery exception. The court held that the President's staff *would have* inevitably opened the threatening letter upon its arrival in Washington.[85] By invoking the exception, the court effectively mooted the fourth amendment issue.[86]

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held that although her identity was obtained pursuant to a booklet seized during the illegal search, it was "inevitable that her identity *would have* been revealed without her work address in the booklet." *Id.* at 866 (emphasis added). *See also* United States v. Kandik, 633 F.2d 1334 (9th Cir. 1980). The *Kandik* court noted that "[e]ven without the [illegal] search it is likely the Government *would have* used the witness' testimony and sought the same three corroborative witnesses." *Id.* at 1336 (emphasis added). It should be noted that the Supreme Court carved out a special distinction to live witness testimony in United States v. Ceccolini, 435 U.S. 268 (1978). In *Ceccolini*, the Court held that "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." *Id.* at 280. Although it did not invoke the inevitable discovery exception the Court made clear that witnesses are usually found through police investigation. The Court also noted that the free will of live witnesses distinguishes them from other evidence, in that "witnesses can, and often do, come forward and offer evidence entirely of their own volition." *Id.* at 276.

82. One unique situation involves evidence seized based on legal and illegal leads. Normally the independent source doctrine would apply. *See supra* notes 29-38 and accompanying text. *See also* United States v. Bacall, 443 F.2d 1050 (9th Cir. 1971); James v. United States, 418 F.2d 1150 (D.C. Cir. 1969) (applying the independent source doctrine where the evidence was obtained through legal and illegal leads). However, in People v. Reisman, 29 N.Y.2d 278, 277 N.E.2d 396, 327 N.Y.S.2d 342 (1971), the police staked out an airport based in part on information received from illegally seized evidence. The court held that the police *would have* responded similarly if information that was untainted *had been* transmitted. The court reasoned that the untainted information " '*would have* inevitably resulted' in the New York surveillance" which resulted in part from the tainted information. *Id.* at 285, 277 N.E.2d at 399, 327 N.Y.S.2d at 347 (emphasis added). *Reisman* is unusual because the court had legally obtained information from which it could have justified a factual independent source. But the court chose instead to rely on speculation and to invoke the inevitable discovery exception.

83. 671 F.2d 1291 (11th Cir. 1982).

84. *Id.* at 1293.

85. *Id.*

86. *Id.* at 1294.

Despite the many applications of the inevitable discovery exception, its most prevalent use is in the predictable world of police investigation.[87] The prosecution has the burden of proving that the police would have employed a specific technique and that the technique employed would have inevitably led to the discovery of the evidence if the illegality had not occurred. This burden of proof may limit the application of the exception.

D. *Burden of Proof*

The inevitable discovery issue arises in the context of a suppression hearing.[88] The burden of proof set by the Supreme Court for suppression hearings is a preponderance of the evidence.[89] The prosecution must demonstrate by a preponderance of the evidence that the tainted evidence *would have been* inevitably discovered.

When the Court set the burden of proof in *United States v.*

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87. *See supra* notes 57-65 and accompanying text.

88. A suppression hearing is a "pretrial proceeding in criminal cases in which a defendant seeks to prevent the introduction of evidence alleged to have been seized illegally. The ruling of the court then prevails at the trial." BLACK'S LAW DICTIONARY 1291 (5th ed. 1979). *See generally* N.Y. CRIM. PROC. § 710.10 - 710.70 (McKinney 1984).

In suppression hearings, the Supreme Court has held that the burden is first on the defendant to show that the evidence in question is "fruit of the poisonous tree." Once the defendant has established that the evidence is fruit the burden shifts to the prosecution to prove that the evidence should be admitted under one of the exceptions to the exclusionary rule. *See* Alderman v. United States, 394 U.S. 165, 183 (1969). *See also* United States v. Kandik, 633 F.2d 1334 (9th Cir. 1980) (holding that the government must prove that the evidence is not tainted, "but a defendant has the initial burden of establishing a factual nexus between the illegality and the challenged evidence."). *Id.* at 133.

89. United States v. Matlock, 415 U.S. 164, 177 n. 14 (1974). The Court held that this standard of proof serves the purpose of the exclusionary rule. *See* Lego v. Twomey, 404 U.S. 477 (1972). The Court stated that

> the exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence.

Id. at 489.

Although the Supreme Court has set preponderance of the evidence as the standard for federal courts, state courts are free to adopt their own standard as long as the state does not descend below the preponderance level. "States are free, pursuant to their own law, to adopt a higher standard." *Id.*

Matlock,[90] the two accepted exceptions to the exclusionary rule were the independent source and attenuation exceptions.[91] The inevitable discovery exception differs in proof from both the attenuation and independent source exceptions because the inevitability is based on conjecture as opposed to fact.[92] In independent source cases, the prosecution prevails by revealing the factual independent source.[93] The same factual basis is available in attenuation cases in which the prosecution proves, based on facts, that the taint has been purged from the derivative evidence.[94] By contrast, in proving the inevitable discovery exception, the prosecution must prove that an investigation or police procedure[95] *would have* uncovered the evidence and that the discovery was inevitable. In some cases, the prosecution may have factual proof that the investigation was underway, which will help carry the burden.

Although the Supreme Court in *Matlock* held that the preponderance of the evidence standard is the appropriate burden of proof in suppression hearings,[96] the Court has raised the standard when the risk of unreliable evidence is great. Thus, in *United States v. Wade*,[97] the Court held that a clear and convincing standard was required to prove that an independent source existed for an in-court identification after an unconstitutional line-up.[98] The need for a heightened burden of proof was premised on the speculative nature of determining that a separate independent recollection existed for an in-court identification.[99]

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90. 415 U.S. 164 (1974).

91. *See supra* notes 32-41, 51-56 and accompanying text.

92. *See supra* note 65. *Cf.* United States v. Goldstein, 120 F.2d 485 (2d Cir. 1941) (placing burden of proving factual independent source on the state).

93. United States v. Goldstein, 120 F.2d 485 (2d Cir. 1941). *See also* United States v. Crews, 445 U.S. 463, 471 (1980) (comparing attenuation and independent source doctrines).

94. *See* Brown v. Illinois, 422 U.S. 590, 602 (1975).

95. There are situations, however, in which police investigation is not involved in the inevitable discovery determination. *See, e.g., supra* notes 74- 81 and accompanying text.

96. *See supra* note 89 and accompanying text.

97. 388 U.S. 218 (1967).

98. *Id.* at 240.

99. *Id.* (The court's major concern was that unreliable evidence not be received by a court.).

Similarly, in developing the inevitable discovery exception, the circuit courts have also deviated from the Supreme Court's preponderance of the evidence standard. The Fifth Circuit has stated that it does "not require absolute inevitability of discovery but simply a reasonable probability that the evidence in question would have been discovered. . . ."[100] The Eleventh Circuit has also adopted the Fifth Circuit's reasonable probability approach.[101] The Third Circuit, however, has held that the government "must prove by clear and convincing evidence" that the evidence would have been found without illegality.[102] The Tenth Circuit has interpreted the burden in yet another way stating that the "unlawfully seized evidence is admissible if there is no doubt that the police would have lawfully discovered the evidence later."[103]

By far the most divergent approach was taken by the Eighth Circuit in *Williams v. Nix*.[104] In *Williams II*, the Eighth Circuit adopted the two prong test established by the Iowa Supreme Court: the prosecution must prove by a preponderance of the evidence that the police did not act in bad faith and that the evidence would have been discovered in any event.[105] The court reasoned that the state should not receive the benefit of the inevitable discovery exception without proving that the police did not act in bad faith.[106]

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100. United States v. Brookins, 614 F.2d at 1042 n.2. The court also stated that their holding was based on two additional factors: (1) the prosecutor proved the police were already working on the leads that would have made the discovery inevitable, and (2) the evidence in question was the voluntary evidence of a witness. *Id.*

101. United States v. Roper, 681 F.2d at 1358.

102. Gov't of Virgin Islands v. Gereau, 502 F.2d at 927.

103. United States v. Romero, 692 F.2d 699 (10th Cir. 1982). The court does not define what it means by "no doubt." However, the court stated that "[w]e recognize the danger of admitting unlawfully obtained evidence 'on the strength of some judge's speculation that it would have been discovered legally anyway,' but that danger is diminished when, as here, the evidence clearly would have been discovered within a short time through a lawful investigation already underway." *Id.* at 704 (quoting United States v. Castellana, 488 F.2d 65, 68 (5th Cir. 1974).

104. 700 F.2d 1164 (8th Cir. 1983).

105. *Id.* at 1169.

106. *Id.* at 1169 n.5.

III. *Nix v. Williams*

A. *The Facts*

On the night of December 24, 1968, a ten-year-old girl named Pamela Powers disappeared from the Y.M.C.A. in Des Moines, Iowa.[107] After her disappearance, Robert Williams was seen leaving the Y.M.C.A. carrying a bundle.[108] Police found Williams' car the next day in Davenport, Iowa, 160 miles east of Des Moines,[109] and later found clothing belonging to the child at a rest stop on Interstate Eighty connecting Davenport with Des Moines.[110] A warrant was issued for Williams' arrest, and authorities, with the help of 200 volunteers, commenced a search of the area between Des Moines and the rest stop.[111]

While the search was underway, Williams turned himself in at the Davenport police station.[112] The Des Moines police sent two detectives to Davenport to drive Williams back to Des Moines.[113] Williams was arraigned in Davenport, and it was agreed by his counsel and the detectives that no interrogation would take place in the police car during the trip back to Des Moines.[114]

One of the detectives, Detective Cletus Leaming, was familiar with Williams' past history as a mental patient and knew that Williams was deeply religious.[115] The detective was convers-

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107. State v. Williams, 182 N.W.2d 396, 399 (Iowa 1970).

108. *Id.* at 399. A 14 year old boy testified that he had helped Williams place the bundle in a car and that he "saw two legs in it and they were skinny and white." *Id.*

109. Brewer v. Williams, 430 U.S. 387, 390 (1977).

110. State v. Williams, 285 N.W.2d 248, 261 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980).

111. Nix v. Williams, 104 S. Ct. 2501, 2504-05 (1984). The Iowa Bureau of Criminal Investigation commenced the search. The police theorized that because the girl's clothing was found at the rest stop, Williams must have disposed of her body somewhere between Des Moines and the rest stop. Agent Ruxlow, the agent in charge, obtained and gridded the maps of Jasper and Poweshick counties. The rest stop is located in Poweshick county; Jasper county lies directly west of Poweshick. On the morning of December 26, 200 volunteers were assembled to search the gridded areas. The volunteers were broken up into teams of four to six, and each team was assigned a gridded area from the maps. The searchers were instructed to search anywhere where a small child's body could be hidden. This included all roads, ditches, abandoned farm buildings, and culverts. *Id.*

112. *Williams I*, 430 U.S. at 390.

113. *Id.* at 391.

114. *Id.*

115. *Id.* at 392. Justice Powell referred to Williams as "a young man with quixotic

ing with Williams on a number of different topics including religion.[116] Detective Leaming then delivered what has been referred to as the "Christian burial speech."[117] The officer was successful in arousing Williams' religious convictions, and Williams agreed to lead them to the body.[118] At the time the search was called off, one search team had moved within two and one-half miles of where the body was eventually found.[119] The body of Pamela Powers was discovered frozen to the side of a cement culvert[120] about two miles south of Interstate Eighty.[121]

B. *Procedural History*

Williams was tried and convicted of first degree murder in the Iowa State Court and sentenced to life imprisonment. After his appeal to the Iowa Supreme Court was rejected,[122] Williams petitioned the United States District Court for a writ of habeas corpus. The District Court granted the writ and ordered a new

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religious convictions." *Id.* at 412 (Powell, J., concurring).

116. *Id.* at 392.

117. *Id.* at 392-93. Calling Williams "Reverend," Detective Leaming said:

> I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, 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. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

Id. See also Kamisar, *Foreward:* Brewer v. Williams — *A Hard Look at a Discomforting Record*, 66 GEO. L.J. 209, 216 (1977), in which Professor Kamisar has documented the existence of two versions of the "Christian burial speech" as recalled by Detective Leaming. Professor Kamisar also argues that evidence throughout the record indicates that the detective's conduct may have involved far more interrogation than the "Christian burial speech" discloses.

118. *Williams I*, 430 U.S. at 393.

119. *Williams II*, 104 S.Ct. at 2505. The body was found in Polk County, an area not gridded on the search maps. *Id.*

120. State v. Williams, 285 N.W.2d at 262.

121. *Williams II*, 104 S. Ct. at 2505.

122. State v. Williams, 182 N.E.2d at 406.

trial, holding that Williams' fifth and sixth amendment rights were violated by the officer's "interrogation."[123]

The Eighth Circuit affirmed the district court's decision,[124] and the state appealed to the United States Supreme Court. In a five to four decision,[125] the Court held that Detective Leaming interrogated Williams in violation of his sixth amendment right to counsel.[126] The Court remanded the case to be retried in the state court, without the incriminating statements made in violation of the sixth amendment.[127] But the Court held that evidence of the body could be admitted, if the state could prove that the body would have been discovered without Williams' statements.[128]

Williams' new trial ended in a second murder conviction.[129] On appeal the Iowa Supreme Court affirmed the conviction and adopted the inevitable discovery exception.[130] The court re-

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123. Williams v. Brewer, 375 F. Supp. 170, 186 (S.D. Iowa 1974). "The statements explicitly encouraged incriminating responses, and by Detective Leaming's own admission, they specifically were *intended* to produce such responses." *Id.* at 178.

124. Williams v. Brewer, 509 F.2d 227 (8th Cir. 1974).

125. Justice Stewart delivered the opinion of the Court in which Justices Brennan, Marshall, Powell, and Stevens joined. Chief Justice Burger was joined in his dissenting opinion by Justices Blackmun, Rehnquist, and White.

126. *Williams I*, 430 U.S. at 405. The sixth amendment right to counsel was adopted by the Court in Massiah v. United States, 377 U.S. 201 (1964). In *Massiah* the Court held that a defendant could not be interrogated by police, in the absence of his attorney, after arraignment. *Id.* at 205.

127. *Williams I*, 430 U.S. at 406.

128. *Id.* at 406 n.12. "While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body *would have* been discovered in any event, even had incriminating statements not been elicited from Williams." *Id.* (emphasis added).

129. State v. Williams, 285 N.W.2d at 252.

130. *Id.* at 260. The court noted the freezing temperatures and concluded:

> as a result of the search which was underway and which would have been continued, the body of Pamela Powers would have been found even in the absence of assistance by defendant. Further, that body would have been found in essentially the same condition it was in at the time of the actual discovery, so that all of the evidence which it actually yielded would have been available to the police.

Id. at 262.

The court concluded, after the prosecution produced an expert who testified that based on the records of temperature, if the body was not disturbed by animals, the body would have remained in the same condition from the month of December 1968 through the month of April 1969. The court also noted that one leg of the body was frozen in

quired the defendant to show unlawful conduct by the police.[131] After meeting this requirement, the court ruled that "the State has the burden to show by a preponderance of the evidence that (1) the police did not act in bad faith for the purpose of hastening discovery of the evidence in question, and (2) that the evidence in question would have been discovered by lawful means."[132]

Williams again petitioned the United States District Court for a writ of habeas corpus.[133] The District Court refused to grant the writ, concluding that the state had met its burden when proving the inevitable discovery exception.[134] However, the Court of Appeals for the Eighth Circuit disagreed and reversed the district court, granting Williams a retrial.[135] Although the circuit court accepted the state's two prong test the court held that the state did not prove by a preponderance of the evidence that the police did not act in bad faith in obtaining Williams' statement.[136]

IV. The Supreme Court Opinions in Williams II

A. *The Majority*

Chief Justice Burger, writing for the Court, adopted the inevitable discovery exception to the exclusionary rule and rejected the Eighth Circuit's good faith requirement.[137] The Court

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midair and thus would not have been covered by the inch of snow which accumulated on December 26. *Id.*

131. *Id.* at 260.

132. *Id.* The court concluded that the derivative evidence was admissible because the police acted in good faith and would have found the body without Williams' assistance. The derivative evidence that the court admitted included pictures taken of the clothing the child wore, the articles of clothing, reports on the condition of the body, and results of post mortem medical and chemical tests. *Id.* at 262.

133. Williams v. Nix, 528 F. Supp. 664 (S.D. Iowa 1981).

134. *Id.* at 671.

135. Williams v. Nix, 700 F.2d at 1175.

136. *Id.* at 1173. The court acknowledged that a finding by an appellate court of a state is entitled to the same presumption of correctness that attaches to trial court findings under 28 U.S.C. § 2254(d) (1982). But the court held that the Iowa Supreme Court's finding that the police did not act in bad faith was not entitled to the § 2254(d) presumption for two reasons. First, the court found that the Iowa court's finding was a legal conclusion and not a finding of fact, and second, the court held that the finding was not supportable by the record. *Id.* at 1169.

137. Nix v. Williams, 104 S.Ct. at 2501, 2507-12 (1984).

held that if the prosecution could prove by a preponderance of the evidence that the questioned evidence[138] ultimately or inevitably would have been found without police misconduct, then the evidence should be admitted.[139] Because the body was found near a culvert, an area where searchers were specifically told to look, the Court concluded that the body would have been inevitably discovered.[140] The Court noted that although the search had stopped when Williams said he would cooperate, it would have commenced in the direction of the body if Williams had not led them to it first.[141]

Initially, the majority determined that the *Wong Sun* attenuation doctrine applies not only to fourth amendment violations but also to fifth and sixth amendment violations. Moreover, the Court maintained that the *Wong Sun* formulation of the doctrine had "pointedly negated a good faith requirement."[142] The Court contrasted the exclusionary rule's deterrence rationale with the independent source derivative evidence[143] rationale of not putting the police in a worse position because of an attenuated misconduct.[144] The Court concluded that society's interests in deterring police misconduct and the public interest in having juries receive truthful evidence are "properly balanced by putting the police in the same, not a *worse*, position than they

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138. *See supra* note 132.

139. *Williams I*, 104 S. Ct. at 2512.

140. *Id.* Agent Ruxlow of the Iowa Bureau of Criminal Investigation testified that he had received reports of the searches following instructions and going into ditches and culverts. State v. Williams, 285 N.W.2d 261 (Iowa 1979). The body of Pamela Powers was found in Polk County in an area the searchers had not mapped out to search. Before the search was suspended it had covered parts of neighboring Jasper and Poweshick Counties. In holding that the body would have inevitably been discovered the Court relied heavily on the testimony of Agent Ruxlow who testified that he had obtained a map of Polk County, which he would have gridded in the same manner as the other maps in order to extend the search into Polk County. The agent concluded that had the search continued it would have taken three to five hours to locate the body. *Williams II*, 104 S. Ct. at 2512.

141. *Williams II*, 104 S. Ct. at 2512.

142. *Id.* at 2508. The Court cited the *Wong Sun* "but for" language. *See supra* notes 51-54 and accompanying text. It is clear that the Court's analysis was literal in nature. The Chief Justice concluded that the Court had not included a good faith requirement in the *Wong Sun* "but for" test, and therefore one was not required when proving the inevitable discovery exception.

143. *See supra* notes 32-54 and accompanying text.

144. *Williams II*, 104 S. Ct. at 2509.

would have been in if no police error or misconduct had occurred."[145] The majority determined that the inevitable discovery doctrine served the same functional purpose as the independent source doctrine: in both instances evidence is not excluded because to do so would put the government in a worse position.[146]

Citing its decision in *Lego v. Twomey*,[147] the Court held that preponderance of the evidence should be the controlling burden of proof.[148] The Eighth Circuit's requirement that the prosecution prove the "absence of bad faith" was rejected because it placed the court in a position of withholding evidence that would have been available absent police misconduct.[149] Withholding evidence from the jury put the police in a worse position and was an enormous cost to society.[150]

Finally, the Court rejected the defendant's argument that when a sixth amendment interest is at stake, societal costs of excluding evidence are irrelevant.[151] Although the Court agreed that the sixth amendment right to counsel protects against unfairness by guaranteeing an adversarial trial, the exclusion of evidence that would have inevitably been discovered "adds nothing to either the integrity or fairness of a criminal trial."[152] The majority also rejected the argument that suppression would protect against unfairness by safeguarding the adversary system of justice.[153] Fairness, the Court stated, is premised on placing the prosecution in the same position absent the illegality; suppression where inevitable discovery is applicable would disturb the adversary system by placing the state in a worse position.[154]

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145. *Id.*

146. *Id.*

147. 404 U.S. 477 (1972).

148. The Court adopted the lower burden, reasoning that it was consistent with the derivative evidence rationale "because the police would have obtained that evidence if no misconduct had taken place." *Williams II*, 104 S. Ct. at 2509 The Court also noted in *Williams II* that "[t]he purpose for the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct." *Id.* at 2509 n.4.

149. *Id.* at 2510.

150. *Id.* The majority maintained that "[n]othing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach." *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 2511.

B. *Justice Stevens' Concurrence*

Concurring in the judgment, Justice Stevens stated that the Chief Justice had characterized the inevitable discovery exception as a "remarkable" and "unlikely theory" in his dissent in *Williams I*.[155] Justice Stevens, cited Chief Justice Burger's remarks in *Williams I* to emphasize that the character of the crime had an impact on the majority's decision.[156] Unlike the majority, Justice Stevens did not address the fourth amendment fruits doctrine, but rather sought to justify the adoption of the exception on sixth amendment precedents.[157] Justice Stevens concluded that the Court's common theme in sixth amendment cases is to preserve the integrity of the adversarial process.[158] Thus the Justice concurred with the majority's dismissal of the good faith requirement but on different doctrine.[159] Justice Stevens reasoned that if the body would have been discovered anyway, the sixth amendment violation did not taint the trial.[160] Therefore the good or bad faith of the officer is irrelevant.[161] Furthermore, if the trial process was not tainted by the sixth amendment violation, the defendant ultimately received the type of trial warranted under the sixth amendment.[162]

Justice Stevens also concurred in the burden of proof required by the majority. But unlike the majority, he stressed that

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155. *Id.* at 2513. Chief Justice Burger stated:

> But the Court's further — and remarkable statement that evidence of where the body was found and of its condition could be *admitted* only on the theory that the body would have been discovered in any event makes clear that the Court is determined to keep the truth from the jurors pledged to find the truth. If all use of the *corpus delicti* is to be barred by the Court as fruit of the poisonous tree under *Wong Sun*, . . . except on the unlikely theory suggested by the Court, the Court renders the prospects of doing justice in this case exceedingly remote.

Williams I, 430 U.S. at 416 n.1.

156. *Williams II*, 104 S. Ct. at 2513 (Stevens J., concurring). Justice Stevens appears to have concluded that the Chief Justice did not care under what theory the evidence would be admitted, as long as it was admitted. Justice Stevens reaches this conclusion by citing Chief Justice Burger's apprehension in adopting the inevitable discovery exception in *Williams I* as compared to the ease with which the Chief Justice adopted the exception in *Williams II*.

157. *Id.* at 2514-15.

158. *Id.*

159. *Id.* at 2516 at n.8.

160. *Id.* at 2515

161. *Id.*

162. *Id.*

"the inevitable discovery finding is based on objective evidence concerning the scope of an ongoing investigation which can be objectively verified or impeached."[163]

Justice Stevens' final divergence from the majority is in the area of societal cost. The Justice states that the years of costly litigation due to a police officer's "short cut" is a more relevant cost to society than the exclusion of probative evidence.[164] Under this rationale, the monetary cost to the State of Iowa provides an adequate deterrence against police misconduct.[165]

C. *The Dissent*

Justice Brennan wrote the dissent in which Justice Marshall joined. The dissenters agreed that the inevitable discovery exception is consistent with the Constitution and is an outgrowth of the independent source doctrine, but concluded that the *would have been* discovered rationale distinguishes the doctrine: the inevitable discovery exception implicates a *hypothetical* finding differing in kind from the *factual* finding implicated in the independent source exception.[166] Because of this distinction the dissenters would require a greater burden of proof than is used in independent source situations. By requiring clear and convincing evidence, Justice Brennan theorized that the application of the exception would be limited "to circumstances that are functionally equivalent to an independent source."[167] This higher standard would be more likely to ensure that no tainted evidence is admitted.[168]

V. *Analysis*

After forty-one years of a precarious existence in the circuit courts, the inevitable discovery doctrine has passed constitutional muster. Although *Williams II* addressed a sixth amend-

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163. *Id.* at 2516 n.9. Justice Stevens stated: "This is not a case in which the prosecution can escape responsibility for a constitutional violation through speculation; to the extent uncertainty was created by the constitutional violation the prosecution was required to resolve that uncertainty through proof." *Id.* at 2516.

164. *Id.* at 2516.

165. *Id.* at 2517.

166. *Id.*

167. *Id.*

168. *Id.*

ment violation, it is clear that the exception also applies to fourth and fifth amendment violations.[169] The significance of *Williams II* lies in the Court's inadequate discussion of the exclusionary rule rationale, which produced an imprecise formulation of an inherently uncertain doctrine. The Court compounded the uncertainty by adopting a low burden of proof, which fails to introduce any certainty into the speculative nature of the exception.

A. *Inevitable Discovery: An Outgrowth of the Independent Source Doctrine*

The majority stated that the independent source doctrine teaches us that a balance can be struck between deterring police misconduct and admitting probative evidence.[170] The balance places the police in the same position they would have been in had no illegality taken place, not a worse position.[171] The balance the Court refers to is the cost-benefit analysis being applied to the independent source doctrine. If an independent source exists, there is a strong societal interest in admitting evidence and not punishing a separate police wrong by suppressing the independent source.[172] Thus, the deterrence gained from suppression of an independent source is outweighed by the societal cost of suppressing probative evidence that is obtained lawfully.

The Court extends this cost-benefit rationale, which justifies the independent source doctrine, in order to adopt the inevitable discovery exception.[173] The Court claims that there is a functional similarity between the two doctrines: under both doctrines evidence is not excluded because to do so would put the police in a worse position and not the position they would have

169. The exclusionary rule prohibits the use of evidence which has been obtained in violation of constitutionally protected rights. As such, exceptions to the rule apply to all constitutionally protected rights. *Williams II*, 104 S. Ct. at 2508.

170. *Id.* at 2509.

171. *Id. See also* Note, *The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?*, 22 AMER. CRIM. L. REV. 85, 158-59 (1984) (questioning the "no worse off" rationale and concluding that it is not warranted as an extension of the *Silverthorne* rationale).

172. *See supra* notes 32-56 and accompanying text.

173. *Williams II*, 104 S. Ct. at 2509. Applying a cost-benefit analysis to justify adoption of the inevitable discovery exception is consistent with the reasoning the Court commenced in United States v. Calandra, 414 U.S. 338, 347 (1974). *See supra* notes 15-27 and accompanying text.

been in had no illegality taken place. The Court states the obvious when it asserts that with either doctrine, if the evidence is suppressed, the police will be in a worse position. What the Court fails to address is the dissimilarity between the evidence received through an independent source and the evidence admitted by invoking the inevitable discovery doctrine. The evidence admitted when there is an independent source is, in most instances,[174] derivative evidence. Whereas both direct and derivative evidence is admitted pursuant to the inevitable discovery exception.[175] An example of direct evidence being admitted pursuant to the exception is as follows: police illegally search a travel agency and the search reveals a suspect's travel plans. The travel plans constitute direct evidence from an illegal search and are subject to suppression. But the travel plans can be admitted if the prosecution can prove that, pursuant to their investigation, the police *would have* canvassed agencies to determine the suspect's operation and in so doing *would have* inevitably discovered the suspect's travel plans.[176] Therefore, unlike the independent source exception in which arguably a proper balance exists between deterring police misconduct and admitting evidence because the primary evidence is suppressed, there can be no similar deterrence achieved pursuant to the inevitable discovery exception. When inevitable discovery is applied to primary evidence, no deterrence effect is achieved at all. The only instance

174. *See* Segura v. United States, 104 S.Ct. 3380 (1984). This case may alter the way the independent source doctrine is applied. In *Segura*, police seized the defendant's apartment for 20 hours while they obtained a search warrant. The purpose of the seizure was to make sure no contraband was destroyed or removed. The Court held that the police had an independent source for the evidence prior to the their illegal entry. The Court reasoned that the police had enough probable cause to obtain a search warrant before their illegal entry. *Id.* at 3389. Therefore, if they had staked out the apartment while applying for a warrant, the police would have been able to seize the same evidence with a legal warrant. The Court's rationale extends the independent source doctrine to direct evidence.

175. *See supra* notes 57-86 and accompanying text. An example in which the discovery doctrine allows derivative evidence to be admitted is People v. Soto, 55 Misc. 2d 219, 285 N.Y.S.2d 166 (1967). In *Soto*, police obtained evidence as a result of an illegally obtained confession. The confession was direct illegal evidence, whereas the evidence obtained as a result of the illegal confession, a knife, was considered derivative evidence. By invoking the inevitable discovery exception, the derivative evidence (knife) was admitted. *Id.* 55 Misc. 2d at 220-21, 285 N.Y.S. 2d at 168-69.

176. *See* United States v. Bienvenue, 632 F.2d 910 (1st Cir. 1980).

in which there is a deterrence similarity between the two doctrines is when the inevitable discovery exception is applied to admit derivative evidence.[177]

B. *The Scope of the Inevitable Discovery Exception*

In adopting an imprecise formulation of the exception, the Court has left the proper scope and application of the doctrine to be determined by lower courts.[178] Lower courts are thus given great leeway in applying the exception to either direct or derivative evidence. Nevertheless, the fact that the search was already underway when the illegality took place[179] may serve as a limitation on the use of the exception. Although in the past courts have not required that an investigation be underway,[180] if *Wil-*

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177. The Court made no mention of the inevitable discovery doctrine's applicability to direct evidence. The Court based its decision solely on the derivative evidence rationale and precedents. *See supra* notes 32-56 and accompanying text. Therefore, the majority's cost-benefit analysis is flawed because there is clearly a greater deterrent benefit in excluding direct evidence. The exclusionary rule stands for the proposition that there is a stronger societal interest in seeking a deterrent effect when direct, as opposed to derivative evidence, is involved. The issue is clouded, however, by the Court's decision in United States v. Leon, 104 S. Ct. 3405 (1984), because apparently the admission of direct or derivative evidence will not weigh heavily in the Court's analysis.

178. Before the Supreme Court's first analysis of the inevitable discovery exception in *Williams I*, five circuit courts had fully applied the exception, while seven circuit courts had not applied the exception in any manner. The Second, Third, Fourth, Fourth, Seventh, and D.C. Circuits had adopted the exception before *Williams I*. *See, e.g.*, United States v. Ceccolini, 542 F.2d 136 (2d Cir. 1976); United States v. Twomey, 508 F2d 858 (7th Cir. 1974); Gov't of Virgin Islands v. Gerau, 502 F.2d 914 (3d Cir. 1974); United States v. Seonlien, 423 F.2d 1051 (4th Cir. 1970); Wayne v. United States, 318 F.2d 205 (D.C. Cir. 1963). The First, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits had not adopted the exception prior to *Williams I*. *See* United States v. Durant, 730 F.2d 1180 (8th Cir. 1984); United States v. Roper, 681 F.2d 1354 (11th Cir. 1982); Papp v. Jago, 656 F.2d 221 (6th Cir. 1981); United States v. Bienvenue, 632 F.2d 910 (1st Cir. 1980); United States v. Brookins, 614 F.2d 1039 (5th Cir. 1980); United States v. Schmidt, 573 F.2d 1057 (9th Cir. 1978).

179. *Williams II*, 104 S. Ct. at 2512.

180. *See* United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980); Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964).

Courts that have been reluctant to use the rule because of the speculation involved may choose not to apply it when no investigation is underway. *See, e.g.*, United States v. Castellana, 488 F.2d 65 (5th Cir. 1974). The *Castellana* court stated that "[t]o admit unlawfully obtained evidence on the strength of some judge's speculation that it would have been discovered legally anyway would be to cripple the exclusionary rule as a deterrent to improper police conduct." *Id.* at 68; *see also* United States v. Hoffman, 607 F.2d 280 (9th Cir. 1979); United States v. Houltin, 525 F.2d 943 (5th Cir. 1976).

liams II is confined to its facts, it can be used to distinguish cases in which there is no investigation underway. Limiting *Williams II* in this way would increase the predictability and certainty that the questioned evidence would have been discovered. The limitation should be satisfied in situations in which the police would have carried out standardized police procedures because standardized procedures are highly predictable.[181]

Although it is more predictable that a legal discovery would have occurred when an investigation is underway, the prosecution must still show by a preponderance of the evidence when the hypothetical discovery would have taken place and that at that time the evidence would still have been available.[182] This requirement furthers the objective of predictability, namely, that the ongoing investigation would have in fact revealed the tainted evidence if the investigation had continued.[183] In addition to the requirement that the prosecution objectively demonstrate that the evidence would have been discovered, another way to limit the scope of the inevitable discovery exception is to

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181. Police procedures are mandatory and should fall under the Court's *verifiable facts* analysis. *Williams II*, 104 S. Ct. at 2509 n.5. But all the applications of the inevitable discovery doctrine, discussed *supra* notes 57-86 and accompanying text, may be limited because the facts in *Williams I* contained a search that was underway.

182. It can be inferred from the facts of the *Williams II* case that in warmer temperatures in which tissue decomposition can occur, the prosecution will have the added burden of proving that the forensic evidence would still have been available at the time of discovery.

183. Although the predictability of discovery is a major reason that the Court adopted the inevitable discovery doctrine, it would be inappropriate to conclude that emotion played no part in the Court's reasoning. The Court expressed outrage in both of the *Williams* cases. *See* Williams v. Brewer, 403 U.S. 387, 415 (1977) (Burger, C.J., dissenting). In his dissent, Chief Justice Burger stated that "[t]he result in this case ought to be intolerable in any society which purports to call itself an organized society." *Id.* In *Williams II*, the Chief Justice stated that "[s]omeday, Cardozo speculated, some court might press the Exclusionary Rule to the outer limits of logic-or-beyond and suppress evidence relating to the 'body of a murdered' victim because of the means by which it was found. . . . [His] prophecy was fulfilled in *Killough v. United States*." *Williams II*, 104 S. Ct. at 2511 (citing Killough v. United States 336 F.2d 929 (D.C. Cir. 1964)).

It is apparent from the outrage expressed by the Court that it would be more likely to accept invocation of the exception when a particularly heinous crime has taken place. Thus, it is fair to conclude that a lesser standard of predictability may be acceptable if a court is faced with *hard facts*. Justice Stevens, in concurrence, gives credence to this argument when he noted that "there can be no denying that the character of the crime may have an impact on the decisional process." *Williams II*, 104 S. Ct. at 2513 (Stevens, J., concurring).

require the prosecution to show that the police acted in good faith.

C. *The Abandonment of the Good Faith Requirement*

The Court applies a cost-benefit analysis in rejecting the good faith requirement.[184] The requirement was adopted by the Supreme Court of Iowa as part of the prosecution's burden of proof in order to ensure a deterrent effect when applying the inevitable discovery exception.[185] It is argued that requiring the police to make a showing of good faith after committing an illegality would deter police from committing future illegalities.[186] The Court maintained that the societal cost of excluding evidence outweighs the deterrence that could be gained from a good faith requirement.[187]

To justify its position, the Court gave an example of how deterrence would still be served when applying the inevitable discovery exception without the requirement. It was hypothesized that an officer faced with the opportunity to illegally obtain evidence will rarely be in a position to calculate whether the evidence would have been inevitably discovered.[188] Rather, when an officer was in a position to realize evidence would be inevitably discovered, he would avoid illegality. This supposition is questionable considering that Detective Leaming in *Williams II* knew of the ongoing search and could have, with reasonable certainty, calculated that the evidence would have been discovered, and yet he still persisted in an illegal shortcut. Given the fact that the exception is applied in situations when it is very predictable that normal police procedures will eventually uncover the evidence, there is, contrary to the Court's belief, a strong

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184. *Williams II*, 104 S. Ct. at 2510. The Court reasoned that the possibility of departmental discipline and civil liability would serve as a deterrent. Studies have shown civil remedies to be ineffective in deterring police misconduct. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 673-74 (1970).

185. State v.Williams, 285 N.W.2d 248, 259 (1979).

186. The simple rationale for this is that because bad faith is often synonymous with an illegality, an officer would not embark on an illegality with the knowledge that he would have to make a good faith showing. Under the good faith requirement, questioned evidence would be admitted if the police acted in good faith when committing the misconduct.

187. *Williams II*, 104 S. Ct. at 2510.

188. *Id.* at 2510.

possibility that an officer will take a calculated shortcut on the assumption that it can be easily proven at a suppression hearing that the evidence would have been inevitably discovered.

In the past, courts have refused to adopt the inevitable discovery exception for fear that it would lead to police shortcuts that would emasculate the fourth amendment warrant requirement.[189] The theory behind this fear is that when police take a shortcut and make a warrantless search, the Court would accept the argument that the police inevitably *would have* obtained a warrant.[190] Acceptance of such an argument would make obtaining a warrant meaningless because in any instance in which probable cause exists, police could make the argument that the officer *would have* inevitably obtained a warrant. Because use of the inevitable discovery exception in this manner would drastically alter the fourth amendment warrant mandate,[191] it is highly unlikely that courts will permit it to be invoked in this situation. But *Williams II* gives the Court a doctrine that could be applied when the Court reasons that the warrant requirement would result in an injustice.

Although the Court's deterrence rationale is not persuasive and the absence of a good faith requirement will allow officers to violate constitutional rights to hasten the discovery of evidence, a holding requiring a showing of good faith could result in the anomaly that "[t]he criminal is to go free because the constable has blundered."[192] Judge Cardozo's prophetic statement would be realized because it is often impossible for the prosecution to make a showing of good faith when police are involved in an illegality.[193] The high cost to society of excluding probative evi-

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189. United States v. Griffin, 502 F.2d 959, 961 (6th Cir. 1974); Commonwealth v. Benoit, 382 Mass. 210, 218-19, 415 N.E.2d 818, 823 (1981); People v. Fitzpatrick, 32 N.Y.2d 499, 516, 300 N.E.2d 139, 148, 346 N.Y.S.2d 793, 805 (1973) (Wachtler, J., concurring).

190. *See* Note, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137, 157-59 (1976).

191. The fourth amendment provides in part that "no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV.

192. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

193. It is unclear when police could act in good faith when committing a constitutional violation. Bad faith appears to be synonymous with police violations. Police inadvertently forgetting to give *Miranda* warnings is one situation in which police may be acting in good faith when committing a constitutional violation.

dence because a prosecutor fails to prove good faith on the part of the officers justifies rejecting the good faith requirement. Instead of requiring the prosecution to demonstrate good faith on the part of the police, a preferable approach to limit the scope of the exception would be to address the problem of speculation by applying a higher standard of proof.

D. *Burden of Proof*

Citing earlier decisions,[194] the Court chose preponderance of the evidence as the appropriate standard in a suppression hearing[195] in which inevitable discovery is the basis for allowing the use of illegally obtained evidence at trial. This comparatively low standard applied by the Court is not applicable to the states under *Lego v. Twomey*.[196] Therefore the states are free to apply higher standards and may even include a good faith requirement.[197]

A clear and convincing standard was rejected by the Court as unnecessary.[198] *United States v. Wade*,[199] which required clear and convincing proof of an independent source for an in-court identification,[200] was distinguished by the Court.[201] The Court noted that when a witness makes an in-court identification, there is great difficulty in determining whether the identification was based on an independent recollection or whether the identification was aided by an unconstitutional lineup.[202] The Court stated that "[b]y contrast, inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings."[203]

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194. The Court cited United States v. Matlock, 415 U.S. 164, 177 n.14 (1974) and Lego v. Twomey, 404 U.S. 477, 488 (1972).

195. *Williams II*, 104 S. Ct. at 2509.

196. 404 U.S. 477, 489 (1972).

197. *Id.*

198. *Williams II*, 104 S. Ct. at 2509 n.5. *See supra* notes 147-150 and accompanying text.

199. 388 U.S. 218 (1967).

200. *Id.* at 240.

201. *Williams II*, 104 S. Ct. at 2509 n.5.

202. *Id.*

203. *Id.*

On this point the Court's reasoning is clearly in error. Determining that evidence would be inevitably discovered is just as speculative as determining that an independent source exists for an in-court identification. This similarity is because the facts used to prove the hypothetical inevitable discovery are in no way more verifiable than the facts used to prove the existence of an independent source for an in-court identification. In general, the factors that constitute an independent source are more verifiable because they have actually occurred.[204] The Court ignores the fact that the verifiable facts used by a prosecutor to prove inevitable discovery are temporally limited because actual legal discovery never transpires. Thus, the determination that the discovery would have occurred is totally speculative.

It is apparent that the rationale used in *Wade* to justify a clear and convincing standard could have been used to adopt the same burden of proof for the inevitable discovery exception: both determinations require a similar amount of conjecture. Moreover, because there is a high level of risk that unreliable evidence will be received in the in-court identification situation does not justify a lower burden of proof in the inevitable discovery context, when the existence, not the reliability of the evidence, is at issue. On the contrary, *Wade* illustrates the need for a heightened burden of proof when the factfinder is weighing speculative factors, irrespective of the reliability of the evidence.

The choice of preponderance of the evidence as the burden of proof could lead to hypothetical findings that are erroneous. By requiring only a fifty-one percent probability that the evidence would have been discovered, there is a forty-nine percent chance that evidence that never would have been discovered could be admitted. In adopting a standard that could lead to erroneous findings in a criminal case, the Court ignores the

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204. In United States v. Wade, 388 U.S. 218 (1967), the Court cited six factors:

> [t]he prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.

Id. at 241.

unique characteristics of a criminal proceeding, which mandate a more stringent standard. As Justice Harlan once stated, "the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility [of allocating the risk of error]. . . . In a criminal case[,] . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty."[205] Justice Harlan believed that the standard set in trial conveyed a message to the factfinder "concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions."[206]

A preponderance standard is therefore an inadequate allocation in a suppression proceeding because it conveys societal ambivalence to the factfinder. Moreover, a preponderance standard results in a higher risk of factual error that could lead to convicting an innocent man. Although the suppression proceeding does not determine the guilt or innocence of the accused, the evidence admitted or suppressed in this hearing determines, in most cases, whether the state will be able to prove the accused's guilt. Thus, this is a crucial stage in a criminal proceeding. An assessment of the "comparative social disutility" requires that if there is an error in the suppression hearing, the proceeding should err in favor of the accused.[207] The preponderance standard clearly errs in favor of the state.[208] In order to preserve the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free,"[209] the prosecution should prove by clear and convincing evidence that it would inevitably discover the controverted evidence.

Increasing the burden to a clear and convincing standard would lessen the chance of error and limit the application of the inevitable discovery exception to situations that are functionally equivalent to the situations in which the independent source ex-

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205. *In Re* Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring).

206. *Id.* at 370.

207. Improper suppression of evidence still serves a purpose: it impresses upon the police the importance of acting within the bounds of the law.

208. *See* J. MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 179-95 (1947) (discussing of the difficulties associated with the preponderance of evidence standard).

209. *In Re* Winship, 397 U.S. at 372 (Harlan, J., concurring).

ception is invoked.[210] Application to these limited situations would be consistent with the Court's analogy of the exception to the independent source doctrine.[211] Moreover, it would reduce the likelihood that a purely speculative finding will be admitted into evidence. Prosecutors would not be put in a better position than the exclusionary rule permits and would be deterred from exploiting the exception.

VI. Conclusion

In *Nix v. Williams*, the Supreme Court adopted the inevitable discovery exception to the exclusionary rule. Under the exception, evidence that would have been discovered absent police misconduct will be admitted. The exception is a welcome addition to constitutional law because it will place police in the same position they would have occupied had no illegality taken place. However, the exception does not serve the deterrence purpose of the exclusionary rule and can only be justified by rationalizing that societal costs of not admitting probative evidence outweigh the deterrent benefit of excluding probative evidence.

The Court chose the preponderance of the evidence standard as the appropriate burden of proof the prosecution must bear when proving the exception. The Court correctly dismissed a requirement of good faith because it is a burden that is too high for the prosecution to overcome. But the preponderance of the evidence standard does not prevent tainted evidence from being admitted at trial. Instead, a clear and convincing standard should have been adopted by the Court. By not adopting this heightened standard, it is all too possible that evidence that would not have been legally discovered will be received by a court.

Vincent A. Nagler

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210. In dissent, Justice Brennan stated that "to ensure that [the] hypothetical finding is narrowly confined to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule, I would require clear and convincing evidence." *Williams II*, 104 S. Ct. at 2517 (Brennan, J., dissenting).

211. *Id.* at 2509.