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Cover Page Footnote

28-3

**THE INEVITABLE DISCOVERY RULE—JUSTICE SERVED OR
JUSTICE THWARTED?**

**SUPREME COURT OF NEW YORK
BRONX COUNTY**

People v. Pinckney¹
(decided September 9, 2011)

I. FACTUAL BACKGROUND

While performing general law enforcement duties, New York City Police Officer Joel Gomez responded to the scene of a motor vehicle accident to investigate.² An eyewitness advised Officer Gomez that defendant, Sincere Pinckney, caused the mishap by sideswiping three parked vehicles.³ Officer Gomez approached defendant to inquire about the accident and requested that defendant remove his hands from his pockets.⁴ In doing so, Officer Gomez obtained evidence collateral to the initially suspected crime.⁵ Despite complying with the request promptly and without protest, defendant later contested the inculpatory evidence revealed by his conduct.⁶ That is, two bags of illegally possessed marijuana fell to the ground in plain sight.⁷ As warranted by the exigent circumstances,⁸ Officer Gomez performed a standard pat down of defendant and asked for his driv-

¹ No. 75334C-10, 2011 WL 4011362, at *1 (N.Y. Sup. Ct. Sept. 9, 2011).

² *Id.* at *2.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Pinckney*, 2011 WL 4011362, at *1-2.

⁷ *Id.* at *2.

⁸ *Id.*; see also *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (observing the renowned exigency exception whereby police may validate an otherwise unlawful search and seizure upon demonstrating that their conduct was justified by “the need ‘to prevent the imminent destruction of evidence’ ” (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006))).

er's license.⁹ Upon disclosing that his license was suspended, defendant was formally arrested and taken into police custody.¹⁰

Defense counsel moved to suppress both the marijuana obtained at the scene and a third bag discovered during a precinct inventory search of defendant and his personal belongings.¹¹ It was undisputed that defendant was lawfully arrested in violation of New York Vehicle and Traffic Law, sections 509.1¹² and 511.1(a).¹³ Yet, construing the seized marijuana as “fruit of the poisonous tree,”¹⁴ the court suppressed the evidence that supported the possession charge.¹⁵ The court's decision was twofold—considering both the United States Supreme Court precedent, excluding evidence irreparably tainted by its unlawful procurement and the more protective approach to permissible privacy encroachments as adopted by New York State.¹⁶

⁹ *Pinckney*, 2011 WL 4011362, at *2.

¹⁰ *Id.*

¹¹ *Id.* at *1-2. Defense counsel also had challenged the constitutionality of admitting defendant's statement, “I don't have a license,” but this issue is not further explored because the court held that it was “admissible, as it was made in response to a lawful level one request for information.” *Id.* at *5.

¹² *Id.* at *1; *see generally* N.Y. VEH. & TRAF. LAW § 509.1 (McKinney 2009) (“[N]o person shall operate or drive a motor vehicle upon a public highway of this state . . . unless he is duly licensed pursuant to the provisions of this chapter.”).

¹³ *Pinckney*, 2011 WL 4011362, at *1; *see generally* N.Y. VEH. & TRAF. LAW § 511.1(a) (McKinney 2006) (“A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the third degree when such person operates a motor vehicle . . . while knowing or having reason to know that such person's license or privilege . . . is suspended, revoked or otherwise withdrawn”).

¹⁴ *Pinckney*, 2011 WL 4011362, at *5 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)). For a more complete understanding of the Fruit of the Poisonous Tree Doctrine to which the court refers in *Pinckney*, see Louis J. Sirico, Jr., *Failed Constitutional Metaphors: The Wall of Separation and the Penumbra*, 45 U. RICH. L. REV. 459 (2011). The author observed that:

In the law of criminal procedure, the doctrine of the “fruit of the poisonous tree” has played a significant role in defining the constitutionally based exclusionary rule. According to the doctrine, evidence is inadmissible when it is obtained in an illegal arrest, unreasonable search, or coercive interrogation. The initial illegal evidence is the “poisonous tree” and the secondary evidence is the “tainted fruit.”

Id. at 460.

¹⁵ *Pinckney*, 2011 WL 4011362, at *1; *see generally* N.Y. PENAL LAW § 221.05 (McKinney 2011) (“A person is guilty of unlawful possession of marihuana when he knowingly and unlawfully possesses marihuana.”).

¹⁶ *Pinckney*, 2011 WL 4011362, at *2 (noting that the New York Constitution is more protective of the right to privacy than the United States Constitution, and thus, vast differences surface in the context of search and seizure litigation); *see also* *Weeks v. United States*, 232 U.S. 383, 392 (1914) (explaining that a “conviction [secured] by means of unlawful seizures

Nearly a century ago, the United States Supreme Court constrained search and seizure jurisprudence to expressly prohibit the prosecutorial use of evidence seized through an intrusive and unreasonable search.¹⁷ The federal exclusionary rule is a judicial mandate that has since been incorporated to the states.¹⁸ It is meant to ensure citizens' entitlement to freely exercise their rights to privacy and security granted by the United States Constitution,¹⁹ and in effect, serves to protect parallel rights set forth under state constitutions.²⁰ However, federal and state courts generally agree that "exigent circumstances [may] necessitate an exception to the warrant require-

and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices [is] destructive of rights secured by the Federal Constitution").

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

Id. at 391-92; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390-91 (1920) (reversing judgment against defendant because the Government obtained the inculpatory evidence through an illegal search and seizure). For an example of the invasions that prompted the Supreme Court to adopt the federal exclusionary rule, see *Silverthorne*, 251 U.S. at 390 (observing that "without a shadow of authority [the Government] went to the office of [defendant's] company and made a clean sweep of all the books, papers, and documents found there" and the "indictment was framed based upon the knowledge thus obtained").

¹⁷ See *Weeks*, *supra* note 16, at 398 (noting that Fourth Amendment precludes the admission of evidence obtained in a manner that directly undermines the constitutional rights of an accused).

¹⁸ See *infra* note 54 (noting the ultimate extension of the exclusionary rule to the states); *but see* *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (resisting the need to mandate state compliance with the exclusionary rule, considering "[h]ow such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered from an allowable range of judgment on issues not susceptible to quantitative solution").

¹⁹ U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

²⁰ See, e.g., N.Y. CONST. art. I, § 12 ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.") (noting that the federal exclusionary rule is a procedural right assertable by those persons, who have suffered an infringement by the state government upon their fundamental constitutionally protected rights to privacy and security).

ment,” requiring adherence to a reasonableness standard.²¹ While evidence seized “by an unconstitutional search is [presumably] inadmissible,”²² whether suppression is appropriate depends on whether the circumstances caused an elevated suspicion of criminality, warranting greater intrusiveness than the law inherently authorizes.²³

Although invocation of the exclusionary rule marked a paramount change in search and seizure law, its variant applications at both the state and federal levels have created an influx of contradictory and controversial opinions.²⁴ For instance, the court in *Pinckney* recognized that “New York has adopted standards considerably more protective of individual liberty than federal precedent mandates.”²⁵ Thus, adhering to a heightened standard of scrutiny of law enforcement conduct, the court invoked the test used by the New York Court of Appeals to analyze two actions employed by Officer Gomez.²⁶ First, because his official duties obliged him to investigate the allega-

²¹ *United States v. Alvarez-Porras*, 643 F.2d 54, 64 (2d Cir. 1981) (“[O]ur jurisprudence has bent to accommodate [] unusual circumstances.”); *People v. DeBour*, 352 N.E.2d 562, 571 (N.Y. 1976) (“[V]arious intensities of police action are justifiable as the precipitating and attendant factors increase in weight and competence.”).

²² *Pinckney*, 2011 WL 4011362, at *2.

²³ Compare *People v. Cantor*, 324 N.E.2d 872, 878 (N.Y. 1975) (observing that “the common-law authority of the police to make investigative inquiries . . . does not give the police a license to violate the Constitution” and will not justify a search and seizure conducted because of “vague suspicion or as means of harassment,” with *DeBour*, 352 N.E.2d at 567 (demonstrating that “[c]ontrary to the appellant’s assertions, *Cantor* should not be read as a blanket prohibition of all police-citizen encounters conducted in the absence of probable cause of reasonable suspicion based on concrete observations”); see also *Adams v. Williams*, 407 U.S. 143, 145 (1972) (“The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.”). Rather, the United States Supreme Court has established that “[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.” *Id.* at 146 (citing *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968)).

²⁴ Compare *United States v. Jefferson*, 906 F.2d 346, 350 (8th Cir. 1990) (suppressing material evidence needed to sustain a drug dealer’s conviction discounting the officer’s alleged suspicions for taking immediate police action), with *Irvine v. California*, 347 U.S. 128, 132 (1954) (admitting evidence seized by a destructive and unlawful search of a home with the desperate justification that the officers did not assault defendant while conducting the search). For an in-depth burden-benefit discussion of the exclusionary rule’s impact on criminal procedure and constitutional law, see William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443 (1997).

²⁵ *Pinckney*, 2011 WL 4011362, at *2.

²⁶ *Id.* at *3 (considering primarily whether Officer Gomez was justified in first asking defendant to remove his hands from his pockets, and thereafter, asking defendant for his driver’s license).

tion that defendant caused the “fender-bender,” the court found that Officer Gomez had an “objective, credible, and articulable reason” to approach defendant.²⁷ Thus, the officer’s inquiry of whether defendant possessed a license was “a permissible level-one inquiry.”²⁸

Next, evaluating the “directive to the defendant that he take his hands out of his pockets,” the court concluded that Officer Gomez made a level-two inquiry.²⁹ This second level emulates “the common-law right of inquiry,”³⁰ the constitutionality of which is contingent upon a “founded suspicion that criminal activity is afoot.”³¹ However, the court in *Pinckney* clarified that under the New York standard, conduct that is “susceptible of innocent as well as culpable interpretation[s]” will not suffice to permit a level-two inquiry.³²

²⁷ *Id.* at *3-4 (noting that the court subsequently made clear that the limited knowledge possessed by Officer Gomez “d[id] not on its own suggest criminality”).

²⁸ *Id.* at *3.

²⁹ *Id.*; see *DeBour*, 352 N.E. at 567 (“The basic purpose of the constitutional protections against unlawful searches and seizures is to safeguard the privacy and security of each and every person against all arbitrary intrusions by government.”). New York State uses a threshold test to first measure the level of an intrusion, and subsequently, determine whether “the Constitution has been violated and [or] the aggrieved party may invoke the exclusionary rule or appropriate forms of civil redress.” *Id.* at 567-68. For a comparison of the “threshold test” applied by the federal courts, see *Terry*, 392 U.S. at 11 (justifying the federal test used to measure intrusiveness, the Supreme Court stated that the Fourth Amendment impliedly mandated “a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution”); but see *id.* at 15, as Chief Justice Warren further advised that “a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.” (observing that “[n]o judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us”); PRISCILLA H. MACHADO ZOTTI, *INJUSTICE FOR ALL: MAPP VS. OHIO AND THE FOURTH AMENDMENT* 166 (Peter Lang Publishing, Inc., New York 2005).

The exclusionary rule, seemingly a “bright line” one, would be subject to interpretations of “context” as the Chief mentioned. The diversity of encounter between the citizenry and law enforcement would lead to the eventual creation of rules and exceptions to make the exclusionary rule pragmatically workable. For example, the much-heralded *Terry* decision in which Warren made his above-mentioned comment, focused on reasonableness of stopping a suspicious individual without a warrant, yet allowing the incriminating evidence to be admissible in court.

Id.

³⁰ *Pinckney*, 2011 WL 4011362, at *3 (citing *DeBour*, 352 N.E.2d at 572).

³¹ *Id.* (citing *DeBour*, 352 N.E.2d at 572).

³² *Id.* at *3-4 (citing *DeBour*, 352 N.E.2d at 567). The New York Court of Appeals explained that just as “[t]he police may not justify a stop by a subsequently acquired suspicion

Ultimately deciding that the car accident was not a lawful predicate to “order a civilian to remove his hands from his pockets,”³³ the court premised its ruling on two findings. First, the court construed the police command, inculcating defendant on the possession charge as beyond the scope of the intrusion permissible under the circumstances.³⁴ Further, it explained that the sequence in which the investigation transpired was improper and unlawful.³⁵ On cross-examination, Officer Gomez admitted that “he first directed the defendant to remove his hands and then asked for the license.”³⁶ There-

resulting from the stop,” they may neither attempt to “validate a search by what it produces.” *DeBour*, 352 N.E.2d at 566-67.

³³ *Pinckney*, 2011 WL 4011362, at *3 (citing *People v. Boodle*, 391 N.E.2d 1329, 1330 (N.Y. 1979)). In *Boodle*, the court noted that “[w]hile the defendant’s entering the police car may not have been coerced, the command to keep his hands exposed demonstrates his freedom of movement was significantly restrained.” *Boodle*, 391 N.E.2d at 1331 (suppressing heroin illegally seized by police absent a founded suspicion connecting defendant to a crime).

³⁴ *Pinckney*, 2011 WL 4011362, at *3-4 (finding no reasonable relation between the initial vehicular investigation and the order for defendant to reveal his hands); see *DeBour*, 352 N.E.2d at 571 (“[A]ny inquiry into the propriety of police conduct must weigh the interference it entails against the precipitating and attending conditions.”).

³⁵ *Pinckney*, 2011 WL 4011362, at *2 (noting that it was detrimental to the prosecutorial case that Officer Gomez ordered defendant to remove his hands from his pockets before inquiring about a driver’s license). Thus, it is worth mentioning that if Officer Gomez had first inquired about defendant’s license, he would have obtained legal cause to place defendant under arrest and the marijuana would have been lawfully revealed in either a search incident to arrest or an inventory search at the precinct. Compare *Terry*, 392 U.S. at 30-31 (explaining that in order to justify a search upon a reasonable suspicion of criminal activity, the police must perceive “unusual conduct” and believe that a suspect “may be armed and presently dangerous,” and even then, the subsequent search is circumscribed to “a carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault him”), with *United States v. Robinson*, 414 U.S. 218, 234 (1973) (noting that “standards traditionally governing a search incident to a lawful arrest are not, therefore, commuted to the stricter *Terry* standards by the absence of probable fruits or further evidence of the particular crime for which the arrest is made”); see *Illinois v. Lafayette*, 462 U.S. 640 (1983). In *Lafayette*, the Supreme Court established that:

[C]onsistent with the Fourth Amendment, it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police stationhouse incident to booking and jailing the suspect. The justification for such searches does not rest on probable cause, and hence the absence of a warrant is immaterial to the reasonableness of the search.

Id. at 643; *United States v. Gorski*, 852 F.2d 692, 696 (2d Cir. 1988) (observing that “a routine procedure incident to booking and detention of a suspect” is sufficient grounds to invoke the inevitable discovery rule).

³⁶ *Pinckney*, 2011 WL 4011362, at *3; but see *id.* (noting that the court discounted a clear discrepancy in Officer Gomez’s testimony having first “testified on direct examination that

fore, because nothing atypical occurred to warrant what the court characterized as an invasive inquiry, it reasoned that “its fruit must be discarded.”³⁷

Most troubling with the resolution of this matter was the court’s erroneous interpretation of the inevitable discovery rule and the prosecution’s unequivocal failure to meet its burden.³⁸ The exclusionary rule evolved as a procedural mechanism to halt the gradual diminution of the protections afforded by the Fourth Amendment; nevertheless, the United States Supreme Court and the states employ a garden-variety of exceptions to admit traditionally barred evidence.³⁹ Most pertinent to the present discussion is the inevitable discovery rule, which authorizes the use of inculcating evidence unlawfully procured upon the government’s showing that the evidence would have inevitably been obtained by lawful means.⁴⁰

In *Pinckney*, a proper invocation of the inevitable discovery rule should have enabled the prosecution “to show the legality of the police conduct.”⁴¹ Indeed, the court noted that “the New York Court of Appeals narrowed the inevitable discovery doctrine to exclude primary evidence, applying it only to secondary evidence.”⁴² Thus, the two bags of marijuana retrieved by result of the “command to the defendant to remove his hands from his pockets was unlawful and any evidence recovered as a result” required suppression.⁴³ However, contrary to the court’s holding, the rule as currently applied in New

he asked defendant for his license immediately upon approaching him, and instructed him to remove his hands from his pockets only after the defendant informed him that he did not have one”).

³⁷ *Id.* at *4.

³⁸ *Id.* at *2 (requiring the People to merely establish that “the circumstances authorized the officer’s behavior”).

³⁹ *See infra* note 67 (observing the attenuation principle) and note 83 (observing the independent source doctrine).

⁴⁰ *See infra* note 92 (observing the inevitable discovery rule, which is the turning point of the forthcoming analysis).

⁴¹ *Pinckney*, 2011 WL 4011362, at *2 (citing *People v. Baldwin*, 250 N.E.2d 62, 64 (N.Y. 1969)).

⁴² *Id.* at *4; *see also* *People v. Stith*, 506 N.E.2d 911, 914 (N.Y. 1987) (noting that the court limited the application of the inevitable discovery rule to secondary evidence, explaining that “failing to exclude wrongfully obtained primary evidence” would consequentially condone police misconduct).

⁴³ *Pinckney*, 2011 WL 4011362, at *4 (affirming the established precedent that “evidence . . . revealed as a direct result of . . . unlawful police action . . . is tainted and must be suppressed on defendant’s motion” (quoting *Boodle*, 391 N.E.2d at 1331)).

York State, indicates that suppression of the third bag of marijuana was an error.⁴⁴ Because defendant was unlicensed, his arrest was forthcoming despite the initial discovery of marijuana in his possession.⁴⁵ Thus, the third bag of marijuana, retrieved in a lawful search conducted incident to an inevitable arrest,⁴⁶ should have been sustained at trial.

Recognizing that the speculative operation of the inevitable discovery rule has provoked controversy, this case note observes how its inconsistent application is slowly eroding the Fourth Amendment. The United States Supreme Court is bound to accommodate competing interests in search and seizure jurisprudence by adopting novel exceptions to evade the consequences of the exclusionary rule. Nevertheless, this case note posits that unless and until the Supreme Court adequately defines the scope of the inevitable discovery rule, New York State and the circuit courts alike, will undermine the exclusionary rule's inherent purpose—to deter police misconduct *in the interests of* advancing the constitutional rights to privacy and securi-

⁴⁴ *Id.* at *4-5 (questioning the court's interpretation of the inevitable discovery exception, as the record demonstrated that third bag of marijuana was *not* "in fact a primary result of the illegal police conduct and therefore not subject to the inevitable discovery rule"). For a general preface of the controversial application of the exclusionary rule see WALTER P. SIGNORELLI, *THE CONSTABLE HAS BLUNDERED: THE EXCLUSIONARY RULE, CRIME, AND CORRUPTION* 43 (Carolina Academic Press 2010).

Since 1980, state courts have increasingly exercised their prerogative to apply the exclusionary rule in more expansive ways than the Supreme Court required. These state courts, at trial and appellate levels, are where tens of thousands of exclusionary rule cases are decided, and many of the decisions rendered in these courts have not followed the Supreme Court path to moderation but instead have applied the rule in absolutist terms. Consequently, in those states, the exclusionary rule is employed today as much as or more than ever, and it continues to undermine the goals of the criminal justice system.

Id.

⁴⁵ *Pinckney*, 2011 WL 4011362, at *2.

⁴⁶ *Id.* (noting that this bag was derivative evidence to that which carried the initial taint of the unlawful search). For a comprehensive discussion explaining how the inevitable discovery rule varies in its application to primary and derivative evidence, see 6 WAYNE R. LAFAYE, ET AL., *SEARCH AND SEIZURE* § 11.4(a) (4th ed. 2004). *Compare* LAFAYE, at 255 ("This 'direct' or 'primary' evidence includes not only the physical evidence discovered but also photographs taken of the physical evidence as a consequence of the search for or seizure of it."), *with id.* at 265-66 (observing the controversial debate between courts and commentators, as to whether to circumscribe the scope of the inevitable discovery rule to secondary evidence; nevertheless, some jurisdictions have exploited the rule "to save primary evidence which would otherwise have been excluded").

ty, as secured for all citizens whether innocent, guilty, or accused.

This case note proposes that the exclusionary rule, its exceptions, and the protections enshrined in the Fourth Amendment are capable of an active coexistence. New York State courts and several circuit courts have employed manageable ways to address police illegality without undermining the prospects of obtaining a criminal conviction. While prophylactic rules create hurdles for the judiciary, efficiency may not take precedence at the expense of the Constitution. The United States Supreme Court is versed in the countervailing views in this area, and further, equipped to resolve the issue of whether and to what degree the government may render a police hall pass to interfere with citizens' privacy. Thus, this case note advocates that the Supreme Court should revisit and redefine the contours of the exclusionary rule to guarantee that all courts respect and uphold the Fourth Amendment to the same extent.

II. THE FEDERAL EXCLUSIONARY RULE: DEFINING THE CONTOURS WITH EXCEPTIONS

At first glance, the actual ramifications of the holding in *Pinckney* might appear nominal. However, the aggregate impact of the erroneous application of the exclusionary rule encumbers the judicial process⁴⁷ and undermines the constitutional guarantees of the

⁴⁷ See, e.g., *Pinckney*, 2011 WL 4011362, at *3-4 (noting that the court's failure to impose a penalty on defendant for unlawful marijuana possession conveys a societal message that crime-related incidents will go unpunished by the courts); see also *United States v. Leon*, 468 U.S. 897 (1984) (Brennan, J., dissenting). In *Leon*, Justice Brennan, with whom Justice Marshall joined in dissenting, professed concerns that:

Ten years ago in *United States v. Calandra*, 414 U.S. 338 (1974), I expressed the fear that the Court's decision 'may signal that a majority of my colleagues have positioned themselves to reopen the door to evidence secured by official lawlessness still further and abandon altogether the exclusionary rule in search and seizure cases.' Since then, in case after case, I have witnessed the Court's gradual but determined strangulation of the rule. It now appears that the Court's victory over the Fourth Amendment is complete. That today's decisions represent *pièce de résistance* of the Court's past efforts cannot be doubted, for today the Court sanctions the use in the prosecution's case in chief of illegally obtained evidence against the individual whose rights have been violated—a result that had previously been thought to be foreclosed.

Leon, 468 U.S. at 928; *United States v. Havens*, 446 U.S. 620, 629 (1980) (Brennan, J. and Marshall, J., dissenting joined in part one by Justices Stewart and Stevens) (critiquing the

Fourth Amendment.⁴⁸ The Fourth Amendment declares:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴⁹

The exclusionary rule, though it is not a constitutional requirement, was formulated to safeguard the Fourth Amendment.⁵⁰ In *Mapp v.*

Court's "trend to depreciate the constitutional protections guaranteed [to] the criminally accused"); *Michigan v. DeFillippo*, 442 U.S. 31, 41 (1979) (Brennan, J., Marshall, J., and Stevens, J., dissenting) ("[T]he police conduct, whether or not authorized by state law, exceeded the bounds set by the Constitution and violated respondent's Fourth Amendment rights."); *United States v. Janis*, 428 U.S. 433, 463-64 (1976) (Stewart, J., dissenting) ("If state police officials can effectively crack down on gambling law violators by the simple expedient of violating their constitutional rights and turning illegally seized evidence over to Internal Revenue Service agents on the proverbial 'silver platter,' then the deterrent purpose of the exclusionary rule is wholly frustrated."); *United States v. Peltier*, 422 U.S. 531, 560 (1975) (Brennan, J. and Marshall, J., dissenting) ("Today's formulation extended to all search-and-seizure cases would inevitably introduce the same uncertainty, by adding a new layer of fact-finding in deciding motions to suppress in the already heavily burdened federal courts.").

⁴⁸ *Leon*, 468 U.S. at 928-30. Although "the nature of crime itself changed dramatically since the Fourth Amendment became part of the Nation's fundamental law in 1971," Justice Brennan rejected the reasoning, which the majority posited, emphasizing that "what the Framers understood then remains true today—that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by temptations of expediency into forsaking our commitment to protecting individual liberty and privacy." *Id.*

⁴⁹ See *supra* note 19.

⁵⁰ See Robert F. Maguire, *How To Unpoison The Fruit—The Fourth Amendment And The Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307, 308 (1964) ("Simply stated, the purpose of the exclusionary rule is to ensure full compliance with the fourth amendment to the Constitution by law enforcement officials.").

The underlying rationale is that the civil liability of such officials for tortious invasions of the personal rights guaranteed by the fourth amendment has proved inadequate as a sanction where such invasions can effectively be used by these officials to assist them in the discharge of their official responsibilities of the investigation of crimes and the prosecution of criminals. It is believed that the exclusionary rule serves not only to deter unlawful conduct, negligent or otherwise, in this area but also to provide an added incentive for full compliance with all applicable rules of law. It is obvious that the rule confers a substantial benefit upon the defendant who successfully invokes it, but it is important to keep in mind that this bonanza is a regrettable by-product of the rule and not its objective.

Ohio,⁵¹ the Supreme Court remarked that the exclusionary rule was an “imperative of judicial integrity,” resting its decision on traditional constitutional and evidentiary principles.⁵² While previously holding that compliance with the exclusionary rule “was not required of the States, that they could apply such sanctions as they choose,”⁵³ the Court in *Mapp* rejected this reasoning.⁵⁴ Instead, the Court estab-

Id.

⁵¹ *Mapp v. Ohio*, 367 U.S. 643 (1961). The Court acknowledged that the exclusionary rule was “clear, specific, and constitutionally required—even if judic[i]ally implied—[as a] deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to ‘a form of words.’” *Id.* at 659 (quoting *Silverthorne*, 251 U.S. at 392)). *But see* THOMAS N. MCINNIS, *THE EVOLUTION OF THE FOURTH AMENDMENT*, 5 (2009) (observing that a vast dichotomy of opinions exist regarding the Fourth Amendment, the exclusionary rule, and the advantages and consequences resulting from its unpredictable interpretation). The author observes:

While members of the Court understand that the exclusionary rule plays an important role in enforcing the Fourth Amendment and stopping police from violating the Fourth Amendment, they often dislike the costs of the rule’s application. These costs mean that probative evidence which directly point towards a person’s guilt will not be allowed to be entered at trial as evidence and the guilty may go free. Due to this cost, the Court has often tried to avoid the necessity of applying the rule in Fourth Amendment cases. When there is a violation of the Fourth Amendment the Court is put in the position of trying to determine what brings more harm on society, the violation of the law by criminals or the violation of the law by the government. It also brings forth the issue of how society can best stop both types of violations from taking place in the future.

MCINNIS, *supra*, at 5-6.

⁵² *Mapp*, 367 U.S. at 659 (quoting *United States v. Elkins*, 364 U.S. 206, 222-23 (1960) (“Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”)). Thus, the Court in *Mapp* reasoned that “[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.” *Id.*

⁵³ *Id.* at 669 (Douglas, J., concurring) (observing that the Court’s decision in *Weeks* to limit the exclusionary rule to its preconceived federal application “had the necessary votes to carry the day,” it nevertheless “was not the voice of reason or principle”). Justice Douglas emphasized that permitting a state court to raise “evidence seized in violation of the Fourth Amendment” against an accused, undermines its value and dilutes its intended meaning, in such a way that it “might as well be stricken from the Constitution.” *Id.* at 669-70 (quoting *Weeks*, 232 U.S. at 393).

⁵⁴ *Id.* at 656-57 (majority opinion) (extending the exclusionary rule to the states upon observation that “as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an ‘intimate relation’ in their perpetuation”). Raising the question: “Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effect, documents, etc.?” the Court concluded that the Fourth Amendment must confer the same rights upon all persons. *Mapp*, 367 U.S. at 656.

lished that no federal or state court could enter a conviction upon evidence unlawfully seized, as it would compromise the notion of justice to rely on “unconstitutional evidence.”⁵⁵

In *Mapp*, the police forced entry into a private residence despite the homeowner’s clear “refus[al] to admit them without a search warrant.”⁵⁶ From the inception of this misconduct and at trial, the officers involved apparently saw nothing offensive about their action, volunteering that they pried open doors to gain entrance.⁵⁷ However, condemning such lawless behavior, the Court observed that evidence was obtained only after “ransacking through every room and piece of furniture, while [defendant] sat, a prisoner in her own bedroom.”⁵⁸

The Court broadened the scope of the exclusionary rule in *Mapp* in an effort “to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”⁵⁹ In turn, the ruling imposed an onerous burden on police, bearing the risk that evidence tainted by illegality would be suppressed and defeat the prosecution’s case.⁶⁰ Endeavoring to rebut the “technicality that inures to the benefit of a guilty person,” the Court explained that the historical evolution of “criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.”⁶¹

To control the net effect of bitter dissenting opinions,⁶² so-

⁵⁵ *Id.* at 657 (“The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.”).

⁵⁶ *Id.* at 644.

⁵⁷ *Id.* at 644 n.2.

⁵⁸ *Id.* at 668 (Douglas, J., concurring).

⁵⁹ *Mapp*, 367 U.S. at 656 (majority opinion) (citing *Elkins*, 364 U.S. at 213) (noting that by unanimous vote, the Court previously held that “the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers”). The Court in *Mapp* explained that given “the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right.” *Id.* at 655-56.

⁶⁰ *Id.* at 648 (“The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.” (quoting *Weeks*, 232 U.S. at 393)).

⁶¹ *Id.* at 658 (quoting *Miller v. United States*, 357 U.S. 301, 313 (1958)).

⁶² See *supra* note 47; *Leon*, 468 U.S. at 928; *Havens*, 446 U.S. at 629; *DeFillippo*, 442 U.S. at 41; *Janis*, 428 U.S. at 463-64; *Peltier*, 422 U.S. at 560.

cietal costs, and prosecutorial hurdles,⁶³ the Supreme Court observed exceptions by which tainted evidence could evade *per se* exclusion.⁶⁴ In *Nardone v. United States*,⁶⁵ the Court sought to resolve tensions at the interface of the exclusionary rule and “realm of privacy left free by [the] Constitution.”⁶⁶ Thus, the Court invoked the attenuation principle to permit the admission of unlawfully procured evidence where its casual connection to the initial illegality was “so attenuated as to dissipate the taint.”⁶⁷ Although in practice, “the facts improperly obtained do not ‘become sacred and inaccessible,’ ”⁶⁸ the Court put a “curb on their full indirect use.”⁶⁹ Recognizing that “a Congressional prohibition against the availability of certain evidence would . . . subordinate the need for rigorous administration of justice,” the Court vested confidence in the obedience of law enforcement, the ability of litigants to meet their burdens, and the discretion of “experienced trial judges.”⁷⁰

⁶³ See, e.g., *Herring v. United States*, 555 U.S. 135, 150 (2009) (“[T]he exclusionary rule is not a defendant’s right; rather it is simply a remedy applicable only when suppression would result in appreciable deterrence that outweighs the cost to the justice system.”). For further analyses, exploring the variant justifications for invoking and avoiding the exclusionary rule see Robert M. Bloom and David H. Fentin, “*A More Majestic Conception*”: *The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47 (2010). In a brief synopsis, the authors contend that:

[T]he rise and fall of judicial integrity as the principal justification for the use of the exclusionary rule mirrored the rise and fall of the Court’s interest in applying the rule as a remedy to Fourth Amendment violations. As the rationale of deterrence rose, judicial integrity was downplayed and then completely subsumed . . . Not only did deterrence become the only benefit on one side of the ledger, but . . . the remedy was perceived to have only “marginal” or “incremental” deterrent value. In contrast, the exclusion of “highly probative evidence” was deemed a “substantial social cost” of applying the remedy. As a result, [there was] a significant curtailment of the exclusionary rule and ultimately a downgrading of the Fourth Amendment right itself.

Id. at 58-59.

⁶⁴ See *infra* notes 67, 83, and 92.

⁶⁵ 308 U.S. 338 (1939).

⁶⁶ *Id.* at 339-40 (granting writ of certiorari upon realizing that the Fourth Amendment exclusionary rule had created “a far-reaching problem in the administration of criminal justice”).

⁶⁷ *Id.* at 341 (recognizing that the attenuation principle, as an exception to the exclusionary rule was “[a] sensible way of dealing with such a situation—fair to the intentment of [of a statute], but fair also to the purposes of the criminal law”).

⁶⁸ *Id.* (quoting *Silverthorne*, 251 U.S. at 392).

⁶⁹ *Id.* at 340 (citing *Silverthorne*, 251 U.S. at 392).

⁷⁰ *Nardone*, 308 U.S. at 341-42 (“[T]imely steps must be taken to secure judicial determi-

However, in *Wong Sun v. United States*,⁷¹ the scope of the exclusionary rule was enlarged to also preclude evidence deemed an “indirect product or ‘fruit’ of unlawful police conduct.”⁷² The Court established that law enforcement could not validate a search and seizure that was “unlawful at its inception,” using the very evidence disclosed by the course of illegal conduct.⁷³ It is noteworthy however, that the Court narrowed its holding by recognizing that:

[Not] all evidence is “fruit of the poisonous tree” simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”⁷⁴

In *Murray v. United States*,⁷⁵ another exception saved material evidence from suppression.⁷⁶ Federal agents suspected defendant of “conspiracy to possess and distribute illegal drugs.”⁷⁷ After the agents observed the transportation of suspicious containers, the drivers were arrested and their vehicles, which contained marijuana, were

nation of claims of illegality on the part of agents of the Government obtaining testimony. To interrupt the course of the trial for [] auxiliary inquiries impedes the [trial] momentum . . . and breaks the continuity of the jury’s attention.”).

⁷¹ 371 U.S. 471 (1963).

⁷² *Nix*, 467 U.S. at 441 (citing *Wong Sun*, 371 U.S. at 487-88). In *Wong Sun*, the Court concluded that even the “evidence at the third or fourth remove was equally inadmissible with the matter originally obtained” as a result of unlawful police conduct. JAMES GEORGE, JR., CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 46 (The Institute of Continuing Legal Education 1966) (noting that the Court held that both defendant’s statements and evidence obtained after the initial illegality were derivatives from the seizure, but nevertheless, inadmissible because neither was severable from the primary taint).

⁷³ *Wong Sun*, 371 U.S. at 484 (citing *Byars v. United States*, 273 U.S. 28, 33 (1927)). The Court in *Byars* refused to uphold the use of “equivocal methods, which regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.” *Byars*, 273 U.S. at 33-34.

⁷⁴ *Wong Sun*, 371 U.S. at 487-88 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

⁷⁵ 487 U.S. 533 (1987).

⁷⁶ See *infra* note 83.

⁷⁷ *Murray*, 487 U.S. at 535.

lawfully seized.⁷⁸ Next, the agents forcibly entered the premises, discovering “without disturbing” bales of marijuana.⁷⁹ Knowing that the warehouse held such contraband, the agents subsequently applied for a warrant.⁸⁰ However, they neither mentioned, nor shared their observations from the prior entry.⁸¹ Thus, defense counsel argued that “the warrant was tainted” because of the earlier warrantless search.⁸²

Invoking the independent source doctrine, the Court found that the “lawful seizure [was] genuinely independent of an earlier tainted one.”⁸³ The Court discarded the “position that the ‘independent source’ doctrine does apply to independent acquisition of evidence previously derived indirectly from the unlawful search, but does not apply to what [the defense] call[s] ‘primary evidence,’ ”⁸⁴ explaining that “this strange distinction would produce results bearing no relation to the policies of the exclusionary rule.”⁸⁵ Moreover, the Court in *Murray* reasoned that:

This is as clear a case as can be imagined where the discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued. As there was no causal link whatever between the illegal entry and the discovery of the challenged evidence, we find no error in the court’s refusal to suppress.⁸⁶

To say that the Supreme Court has navigated creative detours around the exclusionary rule would be an understatement because the most innovative of its exceptions is to follow.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 535-36.

⁸¹ *Id.*

⁸² *Murray*, 487 U.S. at 536.

⁸³ *Id.* at 542 (invoking the independent source doctrine to rehabilitate and admit the unlawfully procured evidence).

⁸⁴ *Id.* at 540-41.

⁸⁵ *Id.* at 541 (“Invoking the exclusionary rule [in this context] would put the police (and society) not in the same position they would have occupied if no violation occurred, but in a worse one.”) (emphasis omitted).

⁸⁶ *Id.* at 543 (quoting *United States v. Moscatiello*, 771 F.2d 589, 604 (1st Cir. 1985)), *vacated by* *Rooney v. United States*, 476 U.S. 1138 (1986).

III. THE INEVITABLE DISCOVERY RULE—FINDING A FACTUAL PREDICATE TO DISTINGUISH BETWEEN “WOULD HAVE” VERSUS “COULD HAVE” ALLEGATIONS

Although each exception to the exclusionary rule carries a unique burden and benefit, the inevitable discovery rule appears most problematic in its administration. Indeed, the attenuation principle raises “the question of causal connection,” but nevertheless, this is an issue “with which the law concerns itself.”⁸⁷ Furthermore, application of the attenuation principle does not rest exclusively on causation, but rather, the test “necessarily includes other elements.”⁸⁸ Likewise, the independent source doctrine is to an extent circumscribed by a reliable and factual predicate—the tainted evidence must be ultimately found “through a source independent of the illegality.”⁸⁹

In contrast, the interesting paradox behind the inevitable discovery rule derives from the vague Supreme Court precedent established in *Nix v. Williams*.⁹⁰ As Justice Stevens observed, concurring in the opinion, the “[g]eneralizations about the exclusionary rule employed by the majority . . . simply [did] not address the primary question in the case.”⁹¹ The Court hastily concluded that evidence illegally procured, but destined to a lawful, inevitable discovery does not warrant suppression, but failed to affirmatively define the contours of the prophylactic rule.⁹²

Surprisingly, an isolated footnote is perhaps the most informative portion of the decision. The Court remarked that “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 unusual burden of proof at

⁸⁷ *United States v. Ceccollini*, 435 U.S. 268, 274 (1978).

⁸⁸ *Id.*

⁸⁹ *The Exclusionary Rule*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 192, 204 (2008) (“The independent source doctrine reflects the idea that, although the government should not profit from its own misconduct, it also should not be made worse off than it would have been had the misconduct not occurred.”).

⁹⁰ 467 U.S. 431 (1984).

⁹¹ *Id.* at 456 (Stevens, J., concurring).

⁹² *Id.* at 444 (majority opinion) (observing that the inevitable discovery rule repairs the evidence tainted by unlawful procurement where the prosecution demonstrates that a sequence of predictable, but hypothetical, facts would have caused an inevitable discovery of the same evidence).

suppression hearings.”⁹³ Thus, there is at least some indication that the United States Supreme Court did not intend for the inevitable discovery rule to stampede the exclusionary rule, creating an “anything goes” playing field for the police. Despite inferring that the prosecution must provide a constellation of facts that *would have* led to an inevitable discovery, many of these cases, at the state and federal levels, manifest reliance on what the police *could have*, but deliberately chose not to do.

There is no denying the repugnant facts before the Court in *Nix*, as a child was murdered, her body discarded, and then exposed to “freezing temperatures” and “tissue deterioration.”⁹⁴ Nevertheless, because defendant invoked the right to counsel upon arrest, the Court considered the unlawfulness of the custodial interrogation done in the absence of defendant’s attorney.⁹⁵ It was undisputed that a detective coerced defendant into disclosing incriminating details related to the murder.⁹⁶ Yet, stressing that a search party was in the vicinity where the body was found, the prosecutor showed “a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers’ search.”⁹⁷

Despite the police misstep, the Court in *Nix* admitted “evidence of the body’s location and condition.”⁹⁸ The Court stated that “the deterrence rationale” for exclusion was not served in this con-

⁹³ *Id.* at 444 n.5.

⁹⁴ *Id.* at 438.

⁹⁵ *Nix*, 467 U.S. at 435-36.

⁹⁶ *Id.* While transporting defendant from the local police station to the city in which arrangements were made to meet with his attorney, a detective provoked defendant to inadvertently incriminate himself by informing him that they were passing the location where the victim’s body was allegedly discarded. *Id.* at 436. The detective stated:

I want to give you something to think about while we’re traveling down the road . . . 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 . . . 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 [where the body is] 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 . . . [A]fter a snow storm [we may not be] able to find it at all.

Id. at 435-36.

⁹⁷ *Id.* at 444.

⁹⁸ *Nix*, 467 U.S. at 441.

text, haphazardly explaining that law enforcement officers presented “with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered.”⁹⁹ Moreover, noting that suppression would facilitate the release of a dangerous offender and put the general public at risk, the Court refused to allow the misjudgment of a police officer to relieve defendant of the conviction.¹⁰⁰

While the inevitable discovery rule was justified as necessary to serve justice and protect society, the Supreme Court left several important questions unresolved, including: (i) what does “inevitable” mean; (ii) how to satisfy the preponderance standard using hypothetical facts; and (iii) whether the doctrine can remove the taint of any and all categories of evidence. That is, the predominant dispute in this area turns on whether the Court meant to restrict the scope of the inevitable discovery rule to derivative or secondary evidence, or alternatively, to permit its use to admit primary evidence.

IV. THE POST-*NIX* CIRCUIT SPLIT

The Court in *Nix* did not articulate the scope of the inevitable discovery rule, but rather, left the circuits (and the states) to interpret

⁹⁹ *Id.* at 444-45 (finding that suppression would not deter police from misconduct); *but see id.* at 441 (observing that defendant urged the court to make the inevitable discovery rule contingent upon “a threshold showing of police good faith”). However, rejecting this proposal, the Court refused “to impose added burdens on the already difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries.” *Id.* at 444 n.5. While the Court in *Nix* did not impose a good faith requirement in this specific context, it has been duly recognized as an independent exception to the exclusionary rule. *See Leon*, 468 U.S. at 924 (concluding that the Court should consider and “the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time”). *But see id.* at 929 (Brennan, J., dissenting) (criticizing the majority for condoning entry into “a curious world where the costs of excluding illegally obtained evidence loom to exaggerated heights and where the benefits of such exclusion are made to disappear with a mere wave of the hand”) (emphasis omitted). *Compare People v. Goldstone*, 682 N.W.2d 479, 490 (Mich. 2004) (“Although the warrant was later determined to be deficient, excluding the evidence recovered in good-faith reliance on the warrant would not further the purpose of the exclusionary rule, i.e., to deter police misconduct.”), *with Dorsey v. State*, 761 A.2d 807, 820 (Del. Sup. Ct. 2000) (“[T]here can be no good faith exception when the probable cause requirement in the Delaware Constitution is absent—as in this case.”).

⁹⁹ *See infra* note 174.

¹⁰⁰ *Nix*, 467 U.S. at 447.

its precedent. There remains a split among the federal circuits, as these courts have adopted divergent approaches to apply and reject the application of the inevitable discovery rule. Some circuit courts expansively read *Nix* to preserve primary and derivative or secondary evidence, which was unlawfully procured, but destined for an inevitable discovery.¹⁰¹ Meanwhile, other courts bar its use where the evidence is found as an immediate consequence of an unlawful search and seizure.¹⁰² These courts have narrowly read *Nix* to limit the in-

¹⁰¹ See, e.g., *United States v. Woody*, 55 F.3d 1257, 1270 (7th Cir. 1995) (noting that the Seventh Circuit allowed for the admission of primary evidence on the ground that discovery would have inevitably occurred in an inventory search, but entertained no further discussion of the distinction between primary and derivative evidence); *United States v. Seals*, 987 F.2d 1102, 1108 (5th Cir. 1993) (stating that “[t]his circuit and several other circuits recognize that evidence which was originally obtained improperly should not be suppressed, provided that it would have been legitimately uncovered pursuant to normal police practices”). Upon concluding that “the rifle and crack cocaine would have been inevitably discovered during the normal inventory procedures” of the precinct, the court in *Seals* applied the inevitable discovery rule to primary evidence. *Id.* (noting however, that the court failed to provide any comprehensive analysis distinguishing primary from derivative evidence); accord *United States v. Zapata*, 18 F.3d 971, 979 n.7 (1st Cir. 1994) (observing that the court “decline[d] to embrace the suggestion that courts should confine the inevitable discovery rule to cases in which the disputed evidence comprises a derivative, rather than primary, fruit of unlawful police conduct”); *United States v. Whitehorn*, 813 F.2d 646, 650 (4th Cir. 1987) (concluding that “unless and until the Supreme Court rules otherwise, the inevitable discovery rule may be applied even though the evidence validly obtained under a search warrant was previously uncovered in an illegal search”); *United States v. Pimentel*, 810 F.2d 366, 369 (2d Cir. 1987) (noting that where “there was an ongoing audit which surely would have uncovered the letters,” the inevitable discovery rule was invoked to admit the primary evidence and defeat the challenge premised upon their unlawful procurement); *United States v. Silvestri*, 787 F.2d 736, 746 (1st Cir. 1986) (finding the “later drafted [] affidavits for the warrants” sufficient evidence that “a search warrant for the garage would have inevitably been sought and issued even if the illegal search had never taken place”); *United States v. Roper*, 681 F.2d 1354, 1357 (11th Cir. 1982) (reasoning that because “the search of the briefcase and shoulder bag were incident to [defendant’s] arrest [] even if the search was tainted, the evidence is admissible under the inevitable discovery exception”); *United States v. Romero*, 692 F.2d 699, 704 (10th Cir. 1982) (observing that where the arrest “followed quickly on the heels of the challenged search,” the marijuana that police seized prior to the arrest was admissible despite its classification as primary evidence) (quoting *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980)). In *Romero*, the court explained the importance of timing and the immediacy of events transpiring to lead up the lawful arrest. *Id.* at 703-04 (finding the police action “justifiable as a search incident to a lawful arrest” because of the officer’s pertinent observations at this particular scene and general law enforcement experience).

¹⁰² See, e.g., *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984) (recognizing that “at the time the Government violated [defendant’s] fourth amendment right, it did not possess the legal means that would have led to the discovery of the shotgun,” nor could it use the inevitable discovery rule to rehabilitate the direct products of an illegal search and seizure).

evitable discovery rule's application to derivative evidence.¹⁰³ Considering an overarching justification for this view, it has been said that allowing the police to conduct a premature warrantless search, but "later initiate a lawful avenue of obtaining the evidence and then claim that it should be admitted because its discovery is inevitable" offends basic notions of justice.¹⁰⁴ Thus, the courts that accept this position require that challenged evidence be an indirect product of the unlawful search to justify admission by its inevitable discovery.¹⁰⁵

In addition to differentiating between primary and derivative evidence, several circuits further qualified the inevitable discovery rule. First, there exists an active pursuit requirement, which courts have recognized in variant degrees.¹⁰⁶ Second, several courts have found the search incident to arrest¹⁰⁷ and/or the inventory search,¹⁰⁸ as

¹⁰³ *Id.* at 847. *But see* Ara K. Ayvazian, Note, *People v. Saldana*, 27 TOURO L. REV. 631, 648 (2011) (observing that the inevitable discovery rule is interpreted and applied unpredictably between and within various jurisdictions, and thus, "[t]he distinction between primary and secondary evidence is questionable . . . and needs to be cleared up by the high court.").

¹⁰⁴ *Id.* at 846. The Court in *Satterfield* explained:

Because a valid search warrant nearly always can be obtained after the search has occurred, a contrary holding would practically destroy the requirement that a warrant for the search of a home be obtained before the search takes place. Our constitutionally-mandated preference for substituting the judgment of a detached and neutral magistrate for that of a searching officer, *United States v. Martinez-Fuerte*, 428 U.S. 543, 568 (1976) (Brennan, J., dissenting), would be greatly undermined.

Id.; *Alvarez-Porras*, 643 F.2d at 64 ("[W]e will not risk the whittling down of the warrant requirement, without regard for compelling circumstances vel non, by justifying the admission of evidence under a broad inevitable-discovery exception."); *United States v. Griffin*, 502 F.2d 959, 961 (6th Cir.) (prohibiting police from "enter[ing] a home without a warrant merely because they plan subsequently to get one," as such a rule "would tend in actual practice to emasculate . . . the Fourth Amendment.").

¹⁰⁵ *See, e.g.*, *United States v. \$639, 558 in United States Currency*, 955 F.2d 712, 720 (D.C. Cir. 1992) (limiting application to derivative evidence upon observation that "[t]he reasoning of *Nix* in support of the inevitable discovery exception relied heavily on the derivative nature of evidence, and the Court's statement about not putting the government in a worse position because of police misconduct was limited to that subject").

¹⁰⁶ *United States v. Kennedy*, 61 F.3d 494, 498 (6th Cir. 1995) ("Whether an independent line of investigation is required for the inevitable discovery exception to apply is a question that has divided the circuits."). However, the circuit courts that have imposed an active pursuit requirement have done so in varying degrees. *Compare* *United States v. Owens*, 782 F.2d 146, 152-53 (10th Cir. 1986) (rejecting the inevitable discovery rule's application absent an ongoing, independent investigation at the time of the unlawful search), *with* *Cherry*, 759 F.2d at 1205 (observing the active pursuit requirement, but adopting a less stringent approach).

¹⁰⁷ *Adams v. Williams*, 407 U.S. 143, 149 (1972) (observing that because "the arrest on the weapons charge was supported by probable cause, [] the search of his person and of the

upheld by the Supreme Court, to satisfy the requisite criteria for inevitable discovery.¹⁰⁹ Significantly, these rules are founded upon factual predicates.¹¹⁰ Therefore, where invocation of the inevitable discovery rule is synchronized with one of the aforesaid principles, there

car incident to that arrest was lawful”); *Brinegar v. United States*, 338 U.S. 160, 177 (1949) (noting generally, that the search incident to arrest exception authorizes a limited search of the arrestee before incarceration); accord *SIDNEY H. ASCH, POLICE AUTHORITY AND THE RIGHTS OF THE INDIVIDUAL* 71 (1968) (“A search is authorized without a warrant when a person has been legally arrested for a crime. At that point, the police may search him to discover if he has a weapon, burglar tools, or stolen goods. At times, the premises where he was arrested m[a]y be subjected to search.”).

¹⁰⁸ *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (giving deference to the standard inventory procedures employed by law enforcement, as the search authorized “serve[s] to protect an owner’s property while it is in custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger”); *Lafayette*, 462 U.S. at 645 (explaining that “[t]he governmental interests underlying a stationhouse search of the arrestee’s person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest”); *United States v. Edwards*, 415 U.S. 800, 804 (1974) (noting that upon arrival at the precinct, “[w]ith or without probable cause, the authorities were entitled . . . not only to search [defendant’s] clothing but also to take it from him and keep it in official custody”). The Court in *Edwards* further elicited that “belongings may be seized upon arrival of the accused at the place of detention and later . . . admissible at trial.” *Id.*

¹⁰⁹ See, e.g., *Zapata*, 18 F.3d at 978 (observing that several “courts often have held that evidence which would have turned up during an inventory search comes under the umbrella of the inevitable discovery rule”); *United States v. Andrade*, 784 F.2d 1431, 1433 (9th Cir. 1986) (affirming the lower court’s decision to admit evidence, although it was unlawfully procured, as “it is normal DEA procedure to inventory defendant’s possessions, including a garment bag, at the time of booking, the government has shown by preponderance of the evidence that cocaine would have been inevitably discovered”); *United States v. Seohnlein*, 423 F.2d 1051, 1053 (4th Cir. 1970) (observing that “[a]lthough the knowledge gained from examining the wallet may have accelerated a lawful arrest on the Baltimore warrant, it did not taint the evidence that was subsequently obtained,” as defendant was lawfully arrested before the search of his possessions) (citing *Leek v. Maryland*, 353 F.2d 526, 528 (4th Cir. 1965)). But see *U.S. Currency*, 955 F.2d at 721 (concluding that neither the inventory search exception, nor the contemplation of a search incident to arrest, were sufficient grounds to show that discovery was inevitable under the circumstances). For further analysis of the rationale for authorizing post-arrest warrantless searches, see *MACHADO ZOTTI, supra* note 29, at 166-67 (noting that “the justices concluded it was reasonable for arresting officers to secure any evidence suspects might have on their person and moreover, to ensure the safety of the police officer”). Ultimately, the task of defining the scope of these searches proved a difficult task, *i.e.*, the police departments were obliged to adjust their policies and instruct officials accordingly, as [r]etraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily enforcement function.” *Id.* at 167 (citing Michael Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEXAS L. REV. 939, 941 (1966)).

¹¹⁰ See *Edwards*, 415 U.S. at 804 (noting that the accused was in fact placed under arrest to show inevitability).

is less risk of an ambitious prosecutor arbitrarily eschewing the facts and narrating a hypothetical to show that the discovery was forthcoming.¹¹¹

A. The Active Pursuit Requirement—A Veiled Dissolution Of The Primary v. Derivative Evidence Distinction

The active pursuit requirement mandates the preexistence of an alternative investigation before the police misconduct occurs in order to invoke the inevitable discovery rule.¹¹² The Fifth Circuit imposed this prerequisite in *United States v. Cherry*.¹¹³ Upon reviewing circuit decisions preceding *Nix*, the court in *Cherry* concluded that its earlier precedent remained good law.¹¹⁴ The court established that unless a lawful investigation was active and ongoing, admission of tainted evidence undermined Fourth Amendment protection.¹¹⁵ Although “suppression in such a case may put the prosecution in a worse position because of the police misconduct,” the court conceded that “a contrary result would cause the inevitable discovery exception to swallow the [exclusionary] rule.”¹¹⁶ Accordingly, the court reconsidered and interpreted three companion factors, which the prosecution must prove to prevail under the inevitable discovery rule.¹¹⁷

The court decided that: (i) “a reasonable probability [must exist] that the evidence would have been discovered by lawful means but for the police misconduct;” (ii) police must possess sufficient leads, as a basis for contending inevitable discovery; and (iii) police

¹¹¹ See *U.S. Currency*, 955 F.2d at 720 (observing the court’s well-founded fear that application of the inevitable discovery rule to save primary evidence from suppression would invite eager police officers to conduct warrantless searches at their leisure by subsequently relying on standard inventory practice).

¹¹² *United States v. Cherry*, 759 F.2d 1196, 1204 (1985) (citing *United States v. Brookins*, 614 F.2d 1037, 1042 (5th Cir. 1980)). Although the Court in *Nix* did not expressly impose an active pursuit requirement, the facts underlying its invocation of the inevitable discovery rule illicit evidence that lawful search was ongoing at the time the illegal seizure occurred. See *Nix*, 467 U.S. at 435 (noting that “the Iowa Bureau of Criminal Investigation initiated a large-scale search” with the assistance of volunteers in an effort to locate the body that was ultimately, and allegedly unlawfully, procured by the police).

¹¹³ 759 F.2d 1196 (5th Cir. 1985).

¹¹⁴ *Id.* at 1204.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1205.

¹¹⁷ *Id.* at 1204.

must have been “actively pursuing the alternate line of investigation” when the unlawful search occurred.¹¹⁸ Observing a slight change from the initial Fifth Circuit prerequisites, the court in *Cherry* did not mandate that the police maintain specific leads *at the time of the seizure*, but rather, compensated for the circumstances in which “an intervening and independent event occurring subsequent to the misconduct” might nevertheless render the evidentiary discovery inevitable.¹¹⁹

Despite disavowing the requirement that the police maintain the requisite leads when the constitutional violation occurs, the court did differentiate between primary and derivative evidence.¹²⁰ Thus, while affirming the admissibility of fingerprint evidence that was indirectly gained via the unlawful arrest, the court in *Cherry* held that the pistol and related contraband required suppression, as each was primary evidence and irreparably tainted.¹²¹

Likewise, in *United States v. Silvestri*,¹²² observing that the exclusionary rule is provoked by “many different fact patterns,” the First Circuit stated that a “bright-line rule goes too far.”¹²³ As the court found that the unlawful discovery of drugs neither influenced, nor accelerated the “decision to seek a search warrant,” it upheld the use of the inevitable discovery rule to admit primary evidence absent an ongoing investigation.¹²⁴ Thus, without addressing the outer bounds of the inevitable discovery rule and despite the prejudice suf-

¹¹⁸ *Cherry*, 759 F.2d at 1204 (citing *Brookins*, 614 F.2d at 1048).

¹¹⁹ *Id.* at 1205 (adopting a flexible approach to the active pursuit requirement) (citing *United States v. Miller*, 666 F.2d 991 (5th Cir. 1982)); *see* *United States v. Larsen*, 127 F.3d 984, 985 (10th Cir. 1997) (noting that the Tenth Circuit rejected that “proof of a separate investigation *ongoing* at the time of the constitutional violation” is required to invoke the inevitable discovery rule). For consideration of the divergent outcomes in this context due to the weight given to different factors, *compare Brookins*, 614 F.2d at 1043 (observing “the voluntariness of the witness’ testimony,” *id.* n.4, in tandem with the leads known by police at the time of the illegal search in assessing the inevitability of discovery), *with Pinckney*, 2011 WL 4011362, at *2 (noting that defendant did not object when the officer requested he remove his hands from his pockets and the officer’s initial encounter with defendant was prompted by eyewitness statements that defendant caused the motor vehicle accident).

¹²⁰ *Cherry*, 759 F.2d at 1212.

¹²¹ *Id.*

¹²² 787 F.2d 736 (1st Cir. 1986).

¹²³ *Id.* at 745-46 (discarding the active pursuit requirement and determining that “a search warrant for the garage would have inevitably been sought and issued even if the illegal search had never taken place.”).

¹²⁴ *Id.* at 745.

ferred by defendant,¹²⁵ the court in *Silvestri* allowed a warrant subsequently secured to rehabilitate the tainted evidence.¹²⁶

Hence, the First Circuit discards the material distinction between primary and derivative evidence in the application of the inevitable discovery rule.¹²⁷ The court ruled in *United States v. Zapata*¹²⁸ that “both the fruits of the search and the ensuing confession” were admissible¹²⁹ on the ground that “suppression would not lie in this instance for the contraband inevitably would have been discovered.”¹³⁰ Unsurprisingly, the court’s theory was full of ambiguity, stating that:

Evidence which comes to light by unlawful means nonetheless can be used at trial if it ineluctably would have been revealed in some other (lawful) way,¹³¹ so long as (i) the lawful means of its discovery are independent and would necessarily have been employed, (ii) discovery by that means is in fact inevitable, and (iii) application of the doctrine in a particular case will

¹²⁵ *Id.* at 738 (noting that on appeal, defendant urged the court to interpret inevitability, as contingent upon “the legal means for finding the illegally discovered evidence be in process at the time of discovery”); *see also* *United States v. Ford*, 22 F.3d 374, 379 (1st Cir. 1994) (stating that if tainted evidence is inextricably involved in the procurement of a search warrant, a court should “set aside the tainted information and then determine if ‘there remains sufficient content in the warrant affidavit to support a finding of probable cause’”) (quoting *Franks v. Delaware*, 438 U.S. 154, 172 (1978)).

¹²⁶ *Silvestri*, 787 F.2d at 745 (adopting a flexible standard that required a threshold inquiry into the circumstances preceding the search and the events which transpired thereafter).

¹²⁷ *See infra* note 128 (noting that in *Zapata*, the court unequivocally applied the inevitable discovery rule to the original evidence retrieved as a direct product of the alleged unlawful search and that which was later revealed).

¹²⁸ 18 F.3d 971, 978 (1st Cir. 1994) (applying the inevitable discovery rule to both primary and derivative evidence).

¹²⁹ *Id.* at 975.

¹³⁰ *Id.* at 978 (noting that a vast majority of federal circuit courts “have held that evidence which would have turned up during an inventory search comes under the umbrella of the inevitable discovery rule”); *see, e.g.*, *United States v. Horn*, 970 F.2d 728, 732 (10th Cir. 1992); *United States v. Mancera-Londono*, 912 F.2d 373, 375-76 (9th Cir. 1990) (noting that that inventory searches conducted in compliance with standardized law enforcement procedures create permissible grounds for the government to search and seize contraband absent the establishment of probable cause, acknowledging both written procedures, as well as oral procedures to suffice in a judicial determination).

¹³¹ *Zapata*, 18 F.3d at 978 (citing *Nix*, 467 U.S. at 448) (reiterating the central rationale articulated in *Nix* that where “the evidence in question would have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible”).

not sully the prophylaxis of the Fourth Amendment.¹³²

Thus, possibly due to practical difficulties or the potential for abuse, as broadly illustrated above, several circuit courts have either qualified the active pursuit rule or discarded it entirely.

B. Active Pursuit Found Insufficient—Alternative Grounds For Inevitability

The predominant concern with the inevitable discovery rule is its use to revive primary evidence directly retrieved by the unlawful search.¹³³ Although the active pursuit requirement does not resolve the immediate fear that law enforcement will abuse this exception and avoid the exclusionary rule, it at least mandates a preexisting investigation of the accused in an attempt to comply with the precedent set by *Nix*.¹³⁴

However, expressly rejected by several of the circuits, these courts use threshold tests, requiring circumstantial assessments of inevitability.¹³⁵ The following discussion explores a seemingly heightened standard governing inevitability, mandating substantiated facts beyond the mere claim of an active investigation. The vast majority of decisional law explored exemplifies the reliance on an inventory search or a search incident to arrest to establish the foundational facts to invoke the inevitable discovery rule.

The Second Circuit does not use the active pursuit require-

¹³² *Zapata*, 18 F.3d at 978.

¹³³ See *supra* note 112 (fearing that substantive rights under the Fourth Amendment and the companion procedural protections guaranteed to a criminal defendant would be cleverly undermined by police that execute a warrantless search and subsequently claim inevitability as a scapegoat to prevent exclusion of primary evidence); see also *Brinegar*, 338 U.S. at 176 (noting the “long-prevailing standards [in place that] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crimes,” as deemed necessary to protect “law-abiding citizens [from] the mercy of the officers’ whim or caprice”).

¹³⁴ *Nix*, 467 U.S. at 455 n.5 (Stevens, J., concurring) (“[I]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment.”).

¹³⁵ See *United States v. Perea*, 986 F.2d 633, 644 (2d Cir. 1993); *United States v. George*, 971 F.2d 1113, 1121-22 (4th Cir. 1992); *Seals*, 987 F.2d at 1107-08; *United States v. Kennedy*, 61 F.3d 494, 499-500 (6th Cir. 1995); *Andrade*, 784 F.2d at 1433 (recognizing that these circuit courts applied the inevitable discovery rule to prevent the suppression of unlawfully procured evidence on the ground that it was forthcoming pursuant to either an inventory search or an alternative standardized procedure).

ment, but supports the basic policy to “prevent the inevitable discovery exception from swallowing the exclusionary rule.”¹³⁶ In *United States v. Eng*,¹³⁷ the Second Circuit identified factors intended to reduce the general uncertainty underlying the inevitable discovery rule. The court proposed that:

[P]roof of inevitability is made more convincing when the areas of the search or investigation are well-defined, the government effort is planned and methodical, and a direct causal relationship and reasonably close temporal relationship exist between what was known and what had occurred prior to the government misconduct and the allegedly inevitable discovery of the evidence.¹³⁸

In *Eng*, the government was investigating defendant on tax evasion suspicions when it conducted a warrantless search, seizing incriminating evidence from a personal safe.¹³⁹ Emphasizing the undue delay before the government finally procured a subpoena for defendant’s financial records,¹⁴⁰ the court concluded that “[t]he mere fact the government serves a subpoena” does not by design make it inevitable “that it will obtain the documents it requests.”¹⁴¹ In turn, it reasoned that an active investigation on its own is insufficient to prove inevitable discovery and alleviate the constitutional implications of an unreasonable search and seizure.¹⁴²

In *United States v. Cabassa*,¹⁴³ the Second Circuit similarly endeavored to prevent the government from using the inevitable discovery rule to cover up its hypothetical leapfrog.¹⁴⁴ In sum, the court

¹³⁶ *United States v. Eng*, 971 F.2d 854, 860 (2d Cir. 1992).

¹³⁷ *Id.* at 859.

¹³⁸ *Id.*

¹³⁹ *Id.* at 857.

¹⁴⁰ *Id.*

¹⁴¹ *Eng*, 971 F.2d at 860 (“Moreover, we can deplore but not ignore the possibility that the recipient of a subpoena may falsely claim to have lost or destroyed the documents called for, or may even deliberately conceal or destroy them after service of the subpoena.” (quoting *United States v. Roberts*, 852 F.2d 671, 676 (2d Cir. 1988))).

¹⁴² *Id.* (“While we decline to draw a bright line, it is essential that there be a substantial degree of directness in the government’s chain of discovery argument, rather than a hypothesized ‘leapfrogging’ from one subpoena recipient to the next until the piece of evidence is reached.”).

¹⁴³ 62 F.3d 470 (2d Cir. 1995).

¹⁴⁴ *Eng*, 971 F.2d at 860.

held that “the doctrine of inevitable discovery requires something more where the discovery is based upon the expected issuance of a warrant.”¹⁴⁵ The dispute arose after police acted prematurely, following the lead of a cooperating informant with regard to locations where defendant “allegedly ran his drug business” and “stored and processed the narcotics.”¹⁴⁶

At the outset, federal agents arranged “to maintain surveillance at the target location until the search warrant was obtained and then conduct the search.”¹⁴⁷ Instead, acting on instinct and without receiving “news about the status of the search warrant,” the team forcibly entered the premises, handcuffed defendant, and unlawfully seized drugs, weaponry, and contraband from the apartment.¹⁴⁸ On review, the court sought to determine “what would have happened had the unlawful search never occurred.”¹⁴⁹ To minimize the speculative nature of its inquiry, the court narrowly focused on the “affairs as they existed at the instant before the unlawful search.”¹⁵⁰

Because the police deviated from their initial plan,¹⁵¹ the court examined what prompted the illegal search.¹⁵² The record revealed that the DEA agent anticipated “event[s] that might well have led to

¹⁴⁵ *Cabassa*, 62 F.3d at 474. The court took several factors into consideration, explaining that:

First, the extent of completion relates directly to the question of whether a warrant would in fact have issued; ultimate discovery would obviously be more likely if a warrant is actually obtained. Second, it informs the determination of whether the same evidence would have been discovered pursuant to the warrant. If the process of obtaining a search warrant has barely begun, for example, the inevitability of discovery is lessened by the probability, under all the circumstances of the case, that the evidence in question would no longer have been at the location of the illegal search when the warrant actually issued.

Id. at 473.

¹⁴⁶ *Id.* at 471.

¹⁴⁷ *Id.* at 472 (anticipating receipt of the warrant to seize the premises).

¹⁴⁸ *Id.* (highlighting the instantaneous decision to act without legal authority, as initially intended).

¹⁴⁹ *Cabassa*, 62 F.3d at 473 (citing *Eng*, 997 F.2d at 990).

¹⁵⁰ *Id.*

¹⁵¹ See *supra* notes 147 and 148.

¹⁵² *Cabassa*, 62 F.3d at 474 (noting that “[a]lthough the warrant process had commenced, the application was not completed at the time of the search”). Compare *id.* at 473 (refusing to apply the inevitable discovery rule where a warrant was never issued), with *United States v. Whitehorn*, 829 F.2d 1225, 1232 (2d Cir. 1987) (observing that the warrant application was granted merely six hours after the unlawful search, enhancing the likelihood that a lawful discovery was inevitable).

the disappearance of the evidence.”¹⁵³ In turn, the court in *Cabassa* clarified that in this instance, the perceived risk of losing evidence neither justified the warrantless search, nor proved inevitable discovery.¹⁵⁴ To the contrary, the contemplation of losing what might become *unattainable* evidence reduced the odds of inevitable discovery.¹⁵⁵ Thus, stressing the necessary distinction “between proving by a preponderance that something would have happened” from “something would inevitably have happened,” the court construed the agent’s fear that failing to act would obstruct the investigation, as indicative of the government’s negligible warrant expectations.¹⁵⁶

C. The Inevitability Of A Standard Protocol Inventory Search Or A Search Conducted Incident To Lawful Arrest

In *United States v. Mendez*,¹⁵⁷ the Second Circuit allowed admission of evidence under “the inevitable discovery exception on the basis of an inventory search.”¹⁵⁸ The court recognized that explicit standard procedures that would have authorized the search and the seizure alleviated the need to accept a presumptive set of facts and held that discovery was inevitable.¹⁵⁹ Thus, the circumstances of this case are distinguishable from the preceding Second Circuit opinions.¹⁶⁰ That is, the “inevitable inventory search” undergone in the present case withstood reliance on the usual question: but for the illegality, would lawful action have procured the same discovery?

In *Mendez*, the officer obtained an auto-theft warrant, which provided sufficient legal cause to first approach defendant.¹⁶¹ How-

¹⁵³ *Cabassa*, 62 F.3d at 474 (noting that the agent’s testimony, expressing that he feared defendant would flee if he suspected police presence, “undercut[] the argument that the same evidence would inevitably have been found by a later search pursuant to a warrant.”).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ 315 F.3d 132 (2d Cir. 2002).

¹⁵⁸ *Id.* at 138.

¹⁵⁹ *Id.* at 139.

¹⁶⁰ See *supra Eng*, note 141, at 860 and *Cabassa*, note 145, at 473 (noting that these decisions reflected variable factors, but did not involve facts ascertainable by written precinct rules or undisputed customary precinct practice).

¹⁶¹ *Mendez*, 315 F.3d at 134 (observing that the officer had an auto-theft warrant and although the search revealed he was the rightful owner, he was arrested after discovery that he was not properly licensed or registered).

ever, defendant moved to suppress the evidence seized post-arrest in a vehicle search.¹⁶² Specifically, the defense challenged the admission of a loaded gun and heroin that the officers found in an unlocked glove compartment while taking inventory of the vehicle.¹⁶³ Reviewing the case *de novo*, the court determined that the government had proven inevitable discovery.¹⁶⁴ Three factors were pertinent to the finding of inevitability to include: (i) legitimate police custody of the property;¹⁶⁵ (ii) an inventory search executed in accord with “established or standardized procedures;”¹⁶⁶ and (iii) set procedures that “would have inevitably led to the discovery of the challenged evidence.”¹⁶⁷ Thus, the court said that “notwithstanding the fact that the policy was not in writing,” the lawful arrest laid a proper foundation to establish that “the evidence would inevitably have been discovered in a valid inventory search.”¹⁶⁸

V. THE INEVITABLE DISCOVERY DOCTRINE IN NEW YORK STATE: RAISING THE BAR

Just as the circuit courts independently interpreted and adopted various highlights of the Supreme Court’s establishment of the inevitable discovery rule, the states alike have followed in this trend. Most significantly, New York State courts restrict the application of the inevitable discovery rule to secondary or derivative evi-

¹⁶² *Id.* at 135.

¹⁶³ *Id.* at 134-35.

¹⁶⁴ *Id.* at 139.

¹⁶⁵ *Id.* at 138; *Lafayette*, 462 U.S. at 644 (noting that an “inventory search is not an independent legal concept but rather an incidental administrative step following arrest and preceding incarceration”). As the Court explained in *Lafayette*, the “proper perspective” of the reasonableness and lawfulness of an inventory search requires courts to scrutinize “the evolution of interests [an individual’s right to privacy competing with the duty of a police officer to serve and protect] along the continuum from arrest to incarceration.” *Id.*; *United States v. Jenkins*, 876 F.2d 1085, 1089 (2d Cir. 1989) (“[B]efore an inventory search is permissible, the government must have legitimate custody of the property to be inventoried, either as a result of lawful arrest [. . .] or by some other method.”).

¹⁶⁶ *Mendez*, 315 F.3d at 138 (internal quotations omitted).

¹⁶⁷ *Id.* (internal quotations omitted); see *United States v. Griffiths*, 47 F.3d 74, 78 (2d Cir. 1995) (observing that the government must present evidence of inevitable discovery “pursuant to an established inventory policy, written or otherwise, including a specific procedure [of] dealing” with the property in question).

¹⁶⁸ *Mendez*, 315 F.3d at 138-39.

dence.¹⁶⁹ At the outset, it is worth reiterating that while this limitation is not destructive to the inevitable discovery rule, the court in *Pinckney* failed to differentiate between the primary and derivative evidence challenged in the case. Thus, the concern is that until the Supreme Court delineates the proper scope of the inevitable discovery rule, lower courts are bound erratically apply, or fail to apply, this exception.

The New York Court of Appeals decided *People v. Fitzpatrick*¹⁷⁰ in the pre-*Nix* era, and thus, reliance on the decision might incite criticism. Nevertheless, its precedential impact on the inevitable discovery rule in New York State is renowned, differentiating between primary and derivative evidence.¹⁷¹ In *Fitzpatrick*, the state police stopped defendant to inquire about a gas station hold up when he “produced a pistol and shot both officers.”¹⁷² Responding to a lead, but “acting without a warrant,”¹⁷³ the police entered a private home, found defendant in a closet, and pursued questioning about “the gun he had used.”¹⁷⁴

Although voluntarily directing the officers back to the closet where the gun was stashed, defendant argued for its exclusion, alleging that the search was made without legal authority and evidence seized was fruit of the poisonous tree.¹⁷⁵ In turn, the court in *Fitzpatrick* observed that:

[E]vidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous

¹⁶⁹ *People v. Stith*, 506 N.E.2d 911, 913-14 (N.Y. 1987) (“[O]ur court has never applied the rule where, as here, the evidence sought to be suppressed is the very evidence obtained in the illegal search.”). The court in *Stith* observed that neither the United States Supreme Court, nor the New York Court of Appeals has invoked the inevitable discovery rule to prevent the suppression of “evidence illegally obtained during or as the immediate consequence of the challenged police conduct.” *Id.* at 914.

¹⁷⁰ 300 N.E.2d 139 (N.Y. 1973), *cert. denied*, 414 U.S. 1033 (1973).

¹⁷¹ *Id.* at 141-42 (observing that defendant’s statements comprised of the primary evidence, but the revelations of those statements were mere derivatives, and thus, admissible under the inevitable discovery rule).

¹⁷² *Id.* at 140.

¹⁷³ *Id.* (“When a knock, an announcement that they were police officers and a telephone call from next door produced no answer, the police, acting without a warrant, opened the door—which was ajar—went into the house and began searching for the defendant.”).

¹⁷⁴ *Id.* (recognizing that defendant ultimately surrendered, shouting from the closet, “Don’t shoot. I give up.”).

¹⁷⁵ *Fitzpatrick*, 300 N.E.2d at 140.

tree doctrine where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence.¹⁷⁶

Thus, recognizing that the police had cause to believe defendant was at the premises, the court rejected the notion that “but for the defendant’s admission, the police would not have looked for incriminating evidence in the closet where he had been hiding.”¹⁷⁷

Furthermore, the court cautioned that “it may not always be certain what the police would have done, clear as it may be what they could have or should have done.”¹⁷⁸ In turn, the court remarked that the inevitable discovery rule “may safely be applied—and erosion of the salutary exclusionary rule avoided—as long as the prosecution has the burden of proving ‘that the illegal act was not a *sine qua non* of the discovery of the otherwise tainted evidence.’”¹⁷⁹ Hence, narrowly restricting the inevitable discovery rule to the realm of derivative evidence, the court noted that the gun did not carry the initial taint.¹⁸⁰ Rather, defendant’s statements constituted the primary evidence and the ensuing revelations of those statements yielded derivative evidence.¹⁸¹

*People v. Stith*¹⁸² again raised the question of the inevitable

¹⁷⁶ *Id.* at 141.

¹⁷⁷ *Id.* at 142 (noting that weaponry is “a prime object of any investigation and[] unless thrown away[] was certain to be either on or near the defendant”). Observing that the closet search was inevitable, the court explained that “it [could] not fairly be said that the police exploited the illegality in their interrogation.” *Id.* (emphasis omitted).

¹⁷⁸ *Id.*

¹⁷⁹ *Fitzpatrick*, 300 N.E.2d at 142 (citing *MAGUIRE*, *supra* note 50, at 317) (“One cannot help but speculate as to the number of cases in which a proper invocation and application of these principles might have avoided the unfortunate result of a guilty defendant going free merely because of the unlawful act of a police officer.”).

¹⁸⁰ *Fitzpatrick*, 300 N.E.2d at 142; *see* *People v. Arnau*, 444 N.E.2d 13 (N.Y. 1982).

The court in *Arnau* observed:

There can be little doubt that the proper method for resolving Fourth Amendment issues, as demonstrated in the aforementioned cases, is to examine each phase of the police officers’ activities as analytically separate events and then decide whether the police acted illegally during any of those phases. If such illegal activity is found to have occurred, it must then be determined whether or not the evidence seized was come at by exploitation of the illegal police activity.

Id. at 19.

¹⁸¹ *Fitzpatrick*, 300 N.E.2d at 142.

¹⁸² 506 N.E.2d 911 (N.Y. 1987).

discovery rule in the context of a hypothetical inventory search.¹⁸³ State troopers initially stopped defendants for speeding.¹⁸⁴ Despite complying with the request to produce a license, one trooper ordered defendants from the truck “to conduct his own search” because they could not find the vehicle’s registration.¹⁸⁵ Upon discovering an unauthorized revolver, defendants were arrested for criminal possession.¹⁸⁶ Thereafter, the troopers also learned that the driver was unlicensed and the truck was stolen.¹⁸⁷

The search of the vehicle was in fact unlawful, but it was contested that upon conducting a routine registration check, the troopers would have learned the truck was stolen, made a lawful arrest, and inventoried the vehicle.¹⁸⁸ Nevertheless, the court strictly assessed the inevitability of events, mandating “a very high degree of probability” to prevent suppression.¹⁸⁹ Furthermore, observing that New York State courts “ha[ve] never applied the rule where, as here, the evidence sought to be suppressed is the very evidence obtained in the illegal search,” the court denied the government’s inevitable inventory search argument.¹⁹⁰

Thus, the court in *Stith* established that the inevitable discovery rule is not determinative by merely presuming “the chain of events which would customarily have been set in motion.”¹⁹¹ Instead, as “failing to exclude wrongfully obtained primary evidence ‘would encourage unlawful searches in the hope that probable cause would be developed after the fact,’ ” the court mandated that the exclusio-

¹⁸³ *Id.* at 912.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Stith*, 506 N.E.2d at 912-13.

¹⁸⁸ *Id.* at 914.

¹⁸⁹ *Id.* at 913.

¹⁹⁰ *Id.* at 913-14. Rejecting the use of the inevitable discovery rule to admit primary evidence, the court stated that:

[A]dmission in evidence effects what amounts to an after-the-fact purging of the initial wrongful conduct, and it can never be claimed that a lapse of time or the occurrence of intervening events has attenuated the connection between the evidence ultimately acquired and the initial misconduct. The illegal conduct and the seizure of the evidence are one and the same.

Id. at 914.

¹⁹¹ *Stith*, 506 N.E.2d at 914.

nary rule serve its purpose to bar the directly tainted evidence.¹⁹²

Despite similar circumstances in *People v. Turriago*,¹⁹³ the court's mode of analysis was not the same as provided in *Stith*.¹⁹⁴ Defendant was likewise stopped for a speeding violation, but allegedly consented to a vehicle search whereby the state troopers discovered a corpse.¹⁹⁵ Presuming, as defendant urged, consent was in fact coerced, the government sought to use the inevitable discovery rule to prevent exclusion.¹⁹⁶ Because the troopers subsequently "ran a computer check on the status of [] [defendant's] license," revealing that it was suspended, the government urged that discovery of this evidence was inevitable.¹⁹⁷

The court considered trial testimony eliciting that discovery was inevitable because "the New York State Police policy embodied in regulations required arresting the driver . . . [and conducting] an inventory search of the vehicle and all of its contents."¹⁹⁸ Given the evidence attesting the hypothetical of defendant's arrest, the court concluded that "a constitutionally valid, nonpretextual inventory search of the van and its contents undoubtedly would have been conducted by the troopers."¹⁹⁹ In turn, the court in *Turriago* used the in-

¹⁹² *Id.* (quoting *State v. Crossen*, 536 P.2d 1264, 1264 (Or. Ct. App. 1975)).

¹⁹³ 681 N.E.2d 350 (N.Y. 1997).

¹⁹⁴ Compare *Stith*, 506 N.E.2d at 914 (suppressing the primary evidence and rejecting the inevitable inventory discovery proposition), with *Turriago*, 681 N.E.2d at 356 (determining that "the body of [the victim] would have been discovered through that inventory search and that, following the discovery, incriminating secondary evidence" would have turned up). Interestingly, the "defendant moved to suppress his statements and the physical evidence seized by the police," see *id.* at 352, but the court merely focused on the fact that incriminating secondary evidence would have been inevitably discovered without further discussing the evidence seized as an immediate effect of the initial illegal search. *Id.* at 356. In addition, in raising "considerable authority for applying the inevitable discovery doctrine when the proof demonstrates that evidence obtained illegally would certainly have fallen lawfully into the hands of the police in the course of a constitutionally valid inventory search," the court recites federal precedent and the vast majority of these courts apply the rule to primary and secondary evidence. *Id.* at 355; see, e.g., *Zapata*, 18 F.3d at 979 n.7 (suggesting that the distinction between these types of evidence, which is presently made by New York courts is unsound and unwarranted in the inevitable discovery analysis).

¹⁹⁵ *Turriago*, 681 N.E.2d at 352.

¹⁹⁶ *Id.* at 353.

¹⁹⁷ *Id.* at 352-53.

¹⁹⁸ *Id.* at 355.

¹⁹⁹ *Id.* The court in *Turriago* reasoned that:

Based upon such a finding, the suppression court could have further found the existence of a very high degree of probability that the body of [the victim] would have been discovered through that inventory search

evitable discovery rule to save the derivative evidence from suppression.²⁰⁰

VI. CONCLUSION

The court's failure to properly apply the inevitable discovery rule in *Pinckney* illuminates that courts need guidance in this area of law.²⁰¹ The divergent approaches employed at the state and federal levels have infused more confusion than necessary and endurable in modern search and seizure jurisprudence. So much is manifest in "the brevity of the Fourth Amendment and the clarity of its principle that the government not be able to arbitrarily interfere in the lives of its citizens," and nevertheless, it is apparent that "the courts have struggled to come up with a clear understanding of what constitutes a violation of the amendment."²⁰²

In effect, due to the court's misplaced use of the exclusionary rule in *Pinckney*, defendant was released without punishment. Suppressing the primary evidence was proper given its direct taint from the illegal search, consequentially reducing the possession charge. Yet, the derivative evidence is admissible under New York State precedent and should have sustained a conviction. Instead, the court's ruling took the Fourth Amendment to an unintended extreme.

The officer in *Pinckney* had legal cause and a professional obligation to pursue defendant, responding to the scene of an accident. Because his license was suspended, a subsequent arrest and lawful search was inevitable. The police action against defendant was not overly intrusive. Given the shifting nature of police authority in a contemporary society,²⁰³ the dismal claim of a Fourth Amendment

and that, following the discovery, incriminating secondary evidence, i.e., evidence not obtained during the invalid consent search [. . .] would also have been obtained by the police.

Turriago, 681 N.E.2d at 356.

²⁰⁰ *Id.* at 356 (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

²⁰¹ *Pinckney*, 2011 WL 4011362, at *3.

²⁰² MCINNIS, *supra* note 51, at 4-5 (noting as Justice Jackson observed that "through its ability to give meaning to the Fourth Amendment, the Supreme Court defines in what type of society we will live.").

²⁰³ See ASCH, *supra* note 108, at 27 (illuminating the consequence of the vast uncertainties underlying search and seizure jurisprudence, as "[t]he policeman may not act because he has not mastered all the intricacies of the increasingly complex criminal law, or it may be that he cannot keep up with its volume.").

violation where an officer simply requests that a suspect remove his hands from his pockets undercuts the cardinal rule—the threshold inquiry is one of reasonableness.²⁰⁴

Indeed, the federal and state constitutions bar *unreasonable* search and seizures to protect privacy and security rights.²⁰⁵ However, the United States Supreme Court's invocation of the inevitable discovery rule was justified on its merits—where facts demonstrate that evidence was not born exclusively to an unlawful search and seizure, its preservation is proper. Exclusion of evidence that was tainted by an illegal predicate, but inevitably within the reach of police does not serve as a deterrent. To the contrary, it hinders prosecutorial and law enforcement efforts to proactively fight crime. Police action, whether wrongful or legitimate, has become the scapegoat for “unsatisfactory and unjust outcomes in the criminal justice system.”²⁰⁶

Today, the harsh reality is: “Damned if you do; damned if you don’t.”²⁰⁷ Observing the recurring issues and ambiguities in this context, the Supreme Court must formally redress the *Nix* precedent to clearly define the contours of the inevitable discovery rule.

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²⁰⁴ See *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990) (acknowledging Justice Scalia’s wise words, explaining that “sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment”).

²⁰⁵ See *supra* notes 19 and 20 (observing the express language in both the federal and New York State Constitution).

²⁰⁶ SIGNORELLI, *supra* note 44, at vii.

²⁰⁷ *Id.*; see *Michigan v. Tucker*, 417 U.S. 433, 446 (1974) (“Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policeman investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic.”).

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