CRIMINAL LAW—THE INEVITABLE DISCOVERY EXCEPTION TO THE EXCLUSIONARY RULE—THE SEARCH FOR ITS PRINCIPLED APPLICATION TO PREWARRANT EVIDENCE

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Recommended Citation
Gordon D. Quinn, CRIMINAL LAW—THE INEVITABLE DISCOVERY EXCEPTION TO THE EXCLUSIONARY RULE—THE SEARCH FOR ITS PRINCIPLED APPLICATION TO PREWARRANT EVIDENCE, 10 W. New Eng. L. Rev. 59 (1988), http://digitalcommons.law.wne.edu/lawreview/vol10/iss1/5

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NOTES

CRIMINAL LAW—THE INEVITABLE DISCOVERY EXCEPTION TO THE EXCLUSIONARY RULE—THE SEARCH FOR ITS PRINCIPLED APPLICATION TO PREWARRANT EVIDENCE

INTRODUCTION

The exclusionary rule renders illegally obtained evidence inadmissible at trial. Its primary purpose is to deter law enforcement authorities from implementing investigative procedures that violate constitutional rights. One result of the rule is that the government would not be entitled to the possession of the papers. In Weeks v. United States, 232 U.S. 383 (1914), the Court restated the exclusionary principles expressed in Boyd and suppressed evidence that had been obtained as the result of a search conducted in violation of the fourth amendment. The Supreme Court applied the exclusionary rule to state criminal proceedings in Mapp v. Ohio, 367 U.S. 643 (1961). The Mapp Court declared that the fourth amendment implicitly requires the suppression of evidence obtained in contravention of the warrant requirement. In addition, the exclusionary rule has been utilized to suppress an accused's statements elicited in violation of the accused's sixth amendment rights. See Massiah v. United States, 377 U.S. 201 (1964).

1. The principle of suppressing unlawfully obtained evidence at the trial of an accused had its genesis in Boyd v. United States, 116 U.S. 616, 623 (1886) (Where the purpose of the government's search and seizure of an accused's private papers is to compel the accused's testimony in violation of the fifth amendment, such a search and seizure is unreasonable and the government is not "entitled to the possession" of the papers.). In Weeks v. United States, 232 U.S. 383 (1914), the Court restated the exclusionary principles expressed in Boyd and suppressed evidence that had been obtained as the result of a search conducted in violation of the fourth amendment. The Supreme Court applied the exclusionary rule to state criminal proceedings in Mapp v. Ohio, 367 U.S. 643 (1961). The Mapp Court declared that the fourth amendment implicitly requires the suppression of evidence obtained in contravention of the warrant requirement. Id. at 648. The exclusionary rule also has been applied to bar an accused's statements which were violative of the accused's fifth amendment right against self-incrimination. See Miranda v. Arizona, 384 U.S. 436 (1966). In addition, the exclusionary rule has been utilized to suppress an accused's statements elicited in violation of the accused's sixth amendment rights. See Massiah v. United States, 377 U.S. 201 (1964).

2. While courts and commentators traditionally have advanced several rationales to justify the exclusionary rule, two have been most prominent. The first rationale is that suppression of illegally obtained evidence will discourage police from using improper investigatory methods. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665, 668 (1970). The second rationale, termed the "judicial integrity rationale," is that suppressing unlawfully obtained evidence distances the courts from constitutionally proscribed conduct. See Johnson v. State, 282 Md. 314, 326, 384 A.2d 709, 716 (1978) (suppressing illegally obtained evidence ensures that the judiciary does not become an accomplice with the police in their willful circumvention of the law, thus preventing the debasement of judicial processes). However, the Supreme Court has noted the "limited role of this justification." Stone v. Powell, 428 U.S. 465, 485 (1976); Michigan v. Tucker, 417 U.S. 433, 450 n.25 (1974) (judicial integrity rationale does not "provide an independent basis for excluding challenged evidence."); see generally Schroeder, Detering Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 GEO. L.J. 1361, 1370-73 (1981).
often can neither charge nor convict culpable persons due to the inadmissibility of illegally obtained evidence.\(^3\) Courts, aware of this undesirable consequence, have fashioned limited exceptions to the rule's application.\(^4\) These exceptions permit the government to introduce unlawfully obtained evidence when suppression of the evidence would not serve the exclusionary rule's deterrence rationale.\(^5\) One exception is the inevitable discovery doctrine: illegally obtained evidence will be admissible if the prosecution can prove that in the absence of the misconduct, officers would have discovered the evidence lawfully during the course of a routine and predictable police investigation.\(^6\)

Courts have applied the inevitable discovery exception to admit incriminating physical evidence that officers discover during a warrantless search in violation of the fourth amendment.\(^7\) Generally,
there are two warrantless search situations where the inevitable discovery rationale has been applied.

In the "hypothetical warrant" situation, officers do not obtain a search warrant either before or after their unlawful discovery of evidence. The government's justification for admitting this evidence is that the existence of probable cause prior to the unlawful search proves that a magistrate could have issued a search warrant if requested. Most courts refuse to apply the inevitable discovery exception to this situation, reasoning that application of the exception would not deter unlawful police shortcuts and "would completely obviate the warrant requirement of the fourth amendment."

In contrast to the hypothetical warrant situation is the prewarrant search. In this situation, officers discover incriminating evidence without a warrant and later seize the evidence with a search warrant. Therefore, in the prewarrant search situation, there is no need to speculate whether the officers could have obtained the evidence lawfully because they seize the evidence pursuant to a search warrant.

Lower courts are divided sharply over the appropriateness of admitting prewarrant evidence under an inevitable discovery analysis.

against unreasonable searches and seizures, shall not be violated, and no War­
rants 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.
U.S. CONST. amend. IV.

8. See United States v. Echegoyen, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986); see also
United States v. Boatwright, 822 F.2d 862, 865 (9th Cir. 1987) (in a "hypothetical war­
tant" situation evidence is not admissible because "no independent basis for discovery [is]
established"); United States v. Salgado, 807 F.2d 603, 608-09 (7th Cir. 1986) (It is improper
to admit evidence when the government only "show[s] that it would have gotten a warrant
if it had asked for one."); United States v. Silvestri, 787 F.2d 736, 744-45 (1st Cir. 1986)
(hypothetical warrant “approach substantially weakens” fourth amendment protection),
petition for cert. filed, 54 U.S.L.W. 2546 (U.S. June 2, 1986) (No. 85-1534); Commonwealth
obtained during an illegal warrantless search on the theory that it could have been obtained
under a warrant). But see State v. Butler, 676 S.W.2d 809, 813 (Mo. 1984) (en banc) (chal­
lenged evidence is admissible because “a search warrant could have been obtainable”).

9. Federal courts of appeals cases addressing this question are: United States v.
Whitehorn, 813 F.2d 846, 650 (4th Cir. 1987) (inevitable discovery rule applies to admit
evidence that officers observed during an unlawful search because they seized this evidence
later pursuant to a valid search warrant); United States v. Silvestri, 787 F.2d 736, 746 (1st
Cir. 1986) (prewarrant evidence is admissible if probable cause is present before the unlaw­
ful search), petition for cert. filed, 54 U.S.L.W. 2546 (U.S. June 2, 1986) (No. 85-1534); United States v. Salgado, 807 F.2d 603, 607 (7th Cir. 1986) (illegally discovered evidence
admissible when evidence seized later under a valid warrant); United States v. Merri­
weather, 777 F.2d 503, 506 (9th Cir. 1985) (canister of money observed during an unlawful
search admissible when found later by other officers pursuant to a valid warrant), cert.
denied, 475 U.S. 1098 (1986); United States v. Satterfield, 743 F.2d 827, 846 (11th Cir.
This inconsistency among the courts will soon be resolved by the United States Supreme Court in *Murray v. United States*. In *Murray*, the Supreme Court will determine if the inevitable discovery exception allows the admission of evidence that police officers observed in plain view during their unlawful entry into a warehouse and later seized pursuant to a search warrant. In advance of the Court's resolution of *Murray*, this comment proposes a framework for the principled application of the inevitable discovery exception to prewarrant evidence and suggests an appropriate analysis for deciding *Murray*.

Part I of this comment briefly traces the origins and development of the inevitable discovery exception to the exclusionary rule, culminating in its adoption by the Supreme Court in *Nix v. Williams*. Part II analyzes three cases that exemplify the disagreement among courts over when prewarrant evidence is admissible under an inevitable discovery analysis. Finally, Part III proposes an analytical frame-

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10. The United States Court of Appeals for the First Circuit consolidated *Murray v. United States* and *Carter v. United States* with *United States v. Moscatiello*, 771 F.2d 589 (1st Cir. 1985). The Supreme Court consolidated *Murray* and *Carter* and granted certiorari in these cases. See *Murray*, 107 S. Ct. 1368 (1987). Although the first listed case in the appeals court opinion is *Moscatiello*, for purposes of clarity this comment refers to the court of appeals case as *Murray*.

* Editor's Note—The United States Supreme Court heard oral argument in *Murray v. United States* on December 8, 1987.

11. 467 U.S. 431 (1984) [*Williams II*]. See infra notes 28-57 and accompanying text. There are actually two *Williams* cases. In *Brewer v. Williams*, 430 U.S. 387 (1977) [*Williams I*], the Supreme Court set aside Williams' conviction for the abduction and murder of a young girl because Iowa police had obtained the location of the girl's body in violation of his sixth amendment right to counsel. The Court, however, reasoned that "evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event ..." *Id.* at 406-07 n.12. In *Williams II*, the prosecution advanced this theory as the basis for admitting the evidence.


13. See infra notes 60-141 and accompanying text.
work for resolving this disagreement and suggests an appropriate resolution for *Murray v. United States*.14

I. THE ORIGINS AND DEVELOPMENT OF THE INEVITABLE DISCOVERY EXCEPTION

The inevitable discovery exception is the “conceptual” and “hypothetical”15 extension of the independent source and attenuation exceptions which the Supreme Court proffered in three cases.16 In these cases, the Court not only expanded the scope of the exclusionary rule to suppress tainted derivative evidence or “fruit of the poisonous tree,”17 but it also allowed the admission of certain types of illegally obtained evidence.

In the seminal case of *Silverthorne Lumber Co. v. United States*,18 the Supreme Court carved out the first exception to the exclusionary rule. The independent source exception allows unlawfully obtained evidence to be used against an accused when law enforcement officers

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14. See infra notes 201-15 and accompanying text.
17. The “fruit of the poisonous tree” doctrine, as articulated by Justice Frankfurter in Nardone v. United States, 308 U.S. 338, 341 (1939), applies the exclusionary rule to evidence derived from illegally obtained “primary” or “direct” evidence. Professor LaFave describes the operation of the fruit of the poisonous tree or “taint” doctrine as follows:

In the simplest of Fourth Amendment exclusionary rule cases, the challenged evidence is quite clearly ‘direct’ or ‘primary’ in its relationship to the prior arrest or search . . . . Not infrequently . . . an illegal search may result in the police obtaining a confession or a witness who is now prepared to testify against the defendant, or may uncover facts which lead to an arrest or to another search . . . . In these situations, it is necessary to determine whether the derivative evidence is ‘tainted’ by the prior Fourth Amendment violation.

W. LAFAVE, supra note 6, § 11.4, at 612; see generally Annotation, “Fruit of the Poisonous Tree” Doctrine Excluding Evidence Derived from Information Gained in Illegal Search, 43 A.L.R.3d 385, 389 (1972).
18. 251 U.S. 385 (1920). In *Silverthorne*, corporate officers were not required to obey government subpoenas which ordered them to provide a grand jury with corporate records because the subpoenas were based on facts retrieved through an illegal search and seizure. The Court emphasized, however, that not all facts obtained in violation of the fourth amendment were “sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . .” Id. at 392 (emphasis added).
obtained the evidence through means independent of unlawful conduct. 19

In Nardone v. United States, 20 the Court created the attenuation exception. Under Nardone, illegally obtained evidence will be admitted at trial when the "causal" connection between the misconduct and the challenged evidence is sufficiently tenuous. 21 When illegally obtained evidence is admitted under the attenuation exception it is conceded that the evidence can be traced logically to the unlawful police conduct rather than to an independent, lawful source. Unlawfully obtained evidence not admissible under the independent source exception might, therefore, be admissible under the attenuation rationale. 22

19. See, e.g., United States v. Crews, 445 U.S. 463 (1980). In Crews, a robbery victim's in-court identification of the accused was admissible even though the identification was obtained through an illegal arrest. According to the Court, police knowledge of accused's identity and victim's description of her assailant before the arrest provided an independent source for the identification. Id. at 470-73. See also State v. O'Bremski, 70 Wash. 2d 425, 423 P.2d 530 (1967). In O'Bremski, the testimony of a girl whom officers illegally discovered in a search of the defendant's apartment was admissible against the defendant under the independent source doctrine. The police, before conducting the illegal search, possessed independent knowledge through a police informant that the girl was hidden on the premises. Id. at 429-30, 423 P.2d at 533.

20. 308 U.S. 338 (1939). The issue in Nardone was whether information acquired by the government through illegal wiretaps should be suppressed under the taint doctrine as fruit of the poisonous tree. In expanding the independent source doctrine, the Court observed that "[s]ophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint." Id. at 341 (emphasis added).

21. See, e.g., United States v. Ceccolini, 435 U.S. 268 (1978). This case illustrates the attenuation doctrine in operation. A police officer illegally discovered gambling slips located in an envelope found on the premises of a business establishment. The police subsequently informed the FBI of the discovery, although not of the illegal method which was used to obtain the evidence. Four months later, the FBI interviewed an employee of the business who was present when the officer conducted the prior illegal search. The employee knew that the gambling slips belonged to one Ceccolini, the owner of the business. The employee agreed to testify for the government in its prosecution of Ceccolini for perjury. The Supreme Court reversed an order suppressing the employee's testimony notwithstanding the fact that the testimony could be "logically traced back" to the police officer's initial illegal search. Id. at 279-80. The Court reasoned that the testimony was attenuated from the initial illegality. In applying the attenuation doctrine, the Court considered such factors as the "[s]ubstantial periods of time" which intervened between the illegal search and the government's contact with the witness, as well as the truly volitional nature of the witness' testimony. Id. at 279.

22. Courts have applied the attenuation doctrine extensively to confessions and voluntary testimony stemming from police misconduct. See United States v. Ceccolini, 435 U.S. 268 (1978). See also supra note 21. In Brown v. Illinois, 422 U.S. 590 (1975), the Court analyzed three factors in determining the degree of attenuation between police misconduct and a defendant's confession: (1) the proximity in time between the arrest and the confession; (2) the presence or absence of intervening circumstances; and (3) the egregiousness of the police misconduct involved. Id. at 603-04. For a critical analysis of the attenua-
In *Wong Sun v. United States*, the Court formulated a broad standard incorporating the “independent source” and “attenuation” principles espoused in *Silverthorne* and *Nardone*. The Court stated:

We need not hold that 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.”

Most courts and commentators agree that the preceding standard also encompasses the inevitable discovery rationale.

Since Judge Learned Hand first articulated the inevitable discovery doctrine over forty years ago, every United States Circuit Court of Appeals has applied its rationale to illegally obtained evidence.
The doctrine, therefore, has emerged gradually as a valid constitutional principle. Despite this acceptance by lower courts, the Supreme Court did not endorse the inevitable discovery exception to the exclusionary rule until 1984. In *Nix v. Williams*,28 Iowa police were led to the body of a murdered girl by means of a confession obtained in violation of the accused’s sixth amendment right to counsel.29 The Court held “evidence of the body’s location and condition”30 to be admissible since the prosecution could prove by a preponderance of the evidence that the body would have been discovered through investigative procedures independent of the sixth amendment violation.31 The prosecution satisfied this burden by showing that a search already in progress at the time that Williams confessed would have uncovered the remains had law enforcement officers not obtained the illegal

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28. 467 U.S. 431 (1984). *Williams II* was the first case in which the Supreme Court officially endorsed the inevitable discovery exception to the exclusionary rule. Prior to *Williams II*, two Supreme Court Justices, in dicta, had considered it “a significant constitutional question whether the ‘independent source’ exception to inadmissibility of fruits ... encompasses a hypothetical as well as an actual independent source.” See *Fitzpatrick v. New York*, 414 U.S. 1050, 1051 (1973) (White & Douglas, JJ., dissenting from denial of certiorari).

29. *Williams II*, 467 U.S. at 431. Police were transporting Williams, a suspect in the disappearance of a young girl, from Davenport to Des Moines, Iowa, where the girl was seen last. His attorney was not present. During the drive, a Detective Leaming spoke with Williams and delivered what is infamously known as the “Christian burial speech”:

> I want to give you something to think about while we’re traveling down the road. ... [I]t’s raining, it’s sleetling, it’s freezing, driving is very treacherous, visibility is poor. ... I feel that you yourself are the only person that knows where this little girl’s body is. ... 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 Eve and murdered.

Brewer v. Williams [*Williams I*], 430 U.S. 387, 392-93 (1977). Williams, deeply religious and a former mental patient, directed the detectives to the body. *Id.*

30. *Williams II*, 467 U.S. at 441.

31. *Id.* at 444.
Chief Justice Burger, writing for the majority, reviewed the rationale behind the inevitable discovery exception to the exclusionary rule and explored its functional similarity to the independent source exception. The Court reasoned that because application of the exclusionary rule often results in the release of culpable persons, the rule is justified only for its deterrent effect. Consistent with its purpose, proper application of the rule ensures that the "prosecution is not to be put in a better position than it would have been in if no illegality had transpired."

The exclusionary rule is applied improperly in cases where suppression of evidence would leave the prosecution in a worse position than it would have been in if there had not been unlawful conduct. The inevitable discovery exception promotes a proper application of the exclusionary rule because the admission of illegally obtained evidence that would have been discovered through independent legal means ensures that the prosecution is placed in the same, not a worse, position than if the illegality never had occurred.

In applying the inevitable discovery exception, the Court rejected the Eighth Circuit Court of Appeals' requirement that the prosecution prove that Detective Learning was not acting in bad faith when he acted illegally. The Court observed that precluding application of
the inevitable discovery exception when police act in bad faith would withhold from juries highly probative evidence that would have been available to the prosecution if the unlawful activity had not occurred. 39 This would place the prosecution in a worse position than it would have been, had there been no unlawful conduct. 40

The Court also rejected the argument that application of the inevitable discovery exception when officers act in bad faith would reduce the deterrent effect of the exclusionary rule. 41 The Court reasoned that inevitable discovery analysis without an absence of bad faith requirement would not encourage police misconduct because the police "rarely, if ever, [will] be in a position to calculate whether the evidence sought would inevitably be discovered." 42 If police were aware that evidence inevitably would be discovered, they would realize that little would be accomplished by taking "dubious 'short-cuts' to obtain the evidence." 43 Furthermore, police will avoid following "questionable practice[s]" because of the threat of interdepartmental disciplinary sanctions and civil liability. 44

Justice Stevens, concurring in the judgment of the Court, 45 agreed that the prosecution must demonstrate by a preponderance of the evidence that unlawfully obtained evidence would have been discovered.

peals for the Eighth Circuit, reviewing Williams' habeas corpus petition reversed, finding that the State had failed to meet the first criterion. See Williams v. Nix, 700 F.2d 1164, 1169-73 (8th Cir. 1983). The court reasoned that "if there is to be an inevitable-discovery exception the State should not receive its benefit without proving that the police did not act in bad faith. Otherwise the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the exclusionary rule reduced too far." Id. at 1169 n.5.

40. Id.
41. Id. at 445-46. For a review of the Eighth Circuit Court of Appeals reasoning, see supra note 38.
42. Williams II, 467 U.S. at 445.
43. Id. at 445-46.
44. Id. at 446. The Court was referring to a monetary damage award which would be available to the defendant when law enforcement agents violate the defendant's constitutional rights. See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). In Bivens, federal narcotics agents unlawfully entered the defendant's apartment without a warrant and subsequently arrested him on a narcotics charge. The defendant sought to recover damages for the unlawful entry. The Court concluded that the defendant had stated "a cause of action under the Fourth Amendment," and that he was "entitled to recover money damages for any injuries ... suffered as a result of the agents' violation of the Amendment." Id. at 397.
45. Justice Stevens, while agreeing that the majority had applied the inevitable discovery rule properly, filed a concurring opinion because he felt that the majority did not focus its discussion "adequately" upon the magnitude of the constitutional violation that had occurred. Williams II, 467 U.S. at 451.
lawfully in the absence of unlawful conduct.\textsuperscript{46} He reasoned that “[a]n inevitable discovery finding is based on objective evidence concerning the scope of [an] ongoing investigation which can be objectively verified or impeached.”\textsuperscript{47} Requiring the police to be engaged in an ongoing investigation occurring simultaneously with the constitutional violation serves to “subject the prosecution’s case to . . . meaningful adversarial testing,”\textsuperscript{48} without the need to impose upon it an “extraordinary burden” of proof. In \textit{Williams II}, the prosecution demonstrated that at the time of Williams’ unlawful interrogation, a search for the girl’s body would have discovered the remains “in the natural and probable course of events.”\textsuperscript{49}

In dissent, Justice Brennan did not question the validity of the inevitable discovery exception and found the Court’s application of the exception to be “consistent with the requirements of the Constitution.”\textsuperscript{50} However, Justice Brennan disagreed with the evidentiary standard for demonstrating that evidence would have been discovered lawfully in the absence of a constitutional violation. In lieu of the preponderance standard enunciated by the majority,\textsuperscript{51} Justice Brennan proposed a clear and convincing standard of proof.\textsuperscript{52} Justice Brennan agreed with Justice Stevens that the prosecution should demonstrate the presence of an ongoing investigation at the time of the misconduct as a prerequisite to admitting unlawfully obtained evidence under the inevitable discovery exception.\textsuperscript{53}

In summary, the Supreme Court articulated four factors which guided its application of the inevitable discovery exception in \textit{Williams II}. First, the Court claimed that suppressing evidence of the location

\begin{itemize}
\item \textsuperscript{46} \textit{Id.} at 457 n.8.
\item \textsuperscript{47} \textit{Id.} (emphasis added).
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{Id.} at 457.
\item \textsuperscript{50} \textit{Id.} at 459 (Brennan, J., dissenting).
\item \textsuperscript{51} \textit{Id.} at 444.
\item \textsuperscript{52} Justice Brennan observed that:
The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule. To ensure that this hypothetical finding is narrowly confined to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule, I would require \textit{clear and convincing evidence} before concluding that the government had met its burden of proof on this issue.
\item \textsuperscript{53} \textit{Id.} at 459 (Brennan, J., dissenting) (emphasis added).
\item \textsuperscript{54} Justice Brennan reasoned that “[i]n particular, the Court concludes that unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred.” \textit{Id.}.
\end{itemize}
and condition of remains that would have been discovered by the advancing search party was unwarranted; suppression would place the police in a worse position than they would have been in in the absence of their misconduct. Second, the government did not have to demonstrate the absence of bad faith on the part of Detective Learning as a prerequisite to admitting this evidence. Third, the government only had to prove by a preponderance of the evidence that the girl's remains would have been obtained lawfully. Finally, the government satisfied this evidentiary burden by showing that a search party was approaching the location of the remains prior to its unlawful discovery by the detectives.

II. PREWARRANT EVIDENCE ADMISSIBILITY UNDER THE INEVITABLE DISCOVERY EXCEPTION—A DISCUSSION OF THE RELEVANT CASE LAW

During the 1987 Term, the United States Supreme Court will hear oral argument in Murray v. United States, and will define the scope of the inevitable discovery exception when applied to prewarrant evidence. Murray will provide the Court with a second opportunity to delineate the contours of the inevitable discovery exception. Before suggesting an appropriate analysis for deciding Murray, this Part analyzes the facts and holdings of three other cases. These cases exemplify the confusion that exists over how courts should apply the inevitable discovery exception to prewarrant evidence.

A. United States v. Griffin

In United States v. Griffin, federal agents developed probable
cause to search an apartment for narcotics. While one agent was sent to obtain a search warrant, other agents forcibly entered the apartment and seized narcotics and drug paraphernalia in plain view. Four hours after their unlawful entry into the apartment, the agents confiscated the evidence pursuant to the search warrant.

The government attempted to avoid suppression of the evidence by invoking the inevitable discovery exception to the exclusionary rule. The government argued that seizure of the evidence pursuant to a search warrant, amply supported by probable cause, proved that the lawful discovery of the evidence "was inevitable without any reference to the illegal entry." The Court of Appeals for the Sixth Circuit rejected this reasoning. The court held that "[a]bsent 'exigent circumstances,' police who believe they have probable cause to search cannot enter a home without a warrant merely because they

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61. Griffin, 502 F.2d at 960.
62. Id.
63. The government argued that the warrantless entry was justified because the agents reasonably believed that evidence within the apartment could be destroyed or removed before they could obtain a warrant. Id. The district court disagreed, observing that prior surveillance revealed no basis for believing that anyone was present in the apartment. On appeal to the Court of Appeals for the Sixth Circuit, the government attempted to admit the evidence under a new theory, the inevitable discovery doctrine. Id.
64. Id.
65. Id. at 961.
66. The exigent circumstances exception is one of the "few specifically established and well-delineated exceptions" to the fourth amendment's warrant requirement. See Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). The rationale behind this exception is that the need for immediate action outweighs the impracticality of prior resort to a magistrate. The exception, therefore, encompasses a variety of common situations. See United States v. Santana, 427 U.S. 38, 42-43 (1976) (citing Warden v. Hayden, 387 U.S. 294 (1967)) (warrantless entry justified by "hot pursuit" of a felon); Chambers v. Maroney, 399 U.S. 42, 51-52 (1970) (warrantless search of an automobile justified because of its mobility); Vale v. Louisiana, 399 U.S. 30, 35 (1970) (warrantless entry justified when contraband is "in the process of destruction"). In Vale, the Supreme Court implied that application of this exception should be limited to situations where contraband was "in the process of destruction." See id. However, lower courts have broadened the scope of this exception to situations where there is a threatened destruction of evidence. See United States v. Rubin, 474 F.2d 262, 268 (3d Cir. 1973) (warrantless search justified when officers "reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant . . . "). cert. denied, 414 U.S. 833 (1973). See generally 2 W. LaFave, supra note 6, § 6.5, at 432-50; Note, Police Practices and the Threatened Destruction of Tangible Evidence, 84 Harv. L. Rev. 1465 (1971).
plan subsequently to get one . . . any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment.\textsuperscript{67}

Under the exigent circumstances exception to the fourth amendment warrant requirement, a warrantless search is lawful if officers possess probable cause to search for contraband and have a reasonable basis for believing that the destruction or removal of the contraband is imminent.\textsuperscript{68} The exclusionary rule's deterrence rationale required suppression of the prewarrant evidence in \textit{Griffin} because no exigent circumstances justified the officers' immediate, warrantless entry into the defendant's apartment.\textsuperscript{69} A contrary holding would allow law enforcement agents, with no reasonable basis for believing that a warrantless search is justified, to enter and secure premises illegally and cleanse the taint from their misconduct by subsequently obtaining a valid warrant. Suppression of prewarrant evidence in \textit{Griffin}-like cases, therefore, discourages law enforcement officers' treatment of the "warrant requirement as merely an ex post facto formality."\textsuperscript{70}

The Sixth Circuit Court of Appeals' holding in \textit{Griffin} is consistent with \textit{Williams II} because \textit{Williams II} is distinguishable factually. In \textit{Williams II}, the prosecution relied upon an independent investigation, entirely unrelated to the unlawful conduct, as the basis for admitting the challenged evidence under the inevitable discovery rationale. Even if Detective Learning had not violated Williams' constitutional rights, the lawful search party ultimately would have obtained the evidence. Thus, the Supreme Court reasoned that admission of this evidence was proper because the "deterrence rationale ha[d] so little basis that the evidence should be received."\textsuperscript{71}

In a \textit{Griffin}-like case, however, the government cannot base its inevitable discovery theory upon the existence of an independent investigation, unrelated to unlawful conduct. Instead, as one commentator observed, admission of evidence in a \textit{Griffin}-like case "depends, causally, upon conduct found to be illegal, and the legal and illegal aspects of the case are inextricably bound in a continuous course of conduct."\textsuperscript{72} In a \textit{Griffin}-like case, officers are asking a court to excuse

\textsuperscript{67} \textit{Griffin}, 502 F.2d at 961.
\textsuperscript{68} See supra note 66.
\textsuperscript{69} See supra note 63 and accompanying text.
\textsuperscript{70} United States v. Allard, 634 F.2d 1182, 1185 n.3 (9th Cir. 1980).
\textsuperscript{71} \textit{Williams II}, 467 U.S. at 444.
\textsuperscript{72} See Appel, supra note 60, at 115. During oral argument before the Supreme Court in \textit{Williams II}, Mr. Appel, as deputy attorney general of Iowa, represented the petitioner State of Iowa. In his article Mr. Appel identifies two "classes of inevitable discovery." \textit{Id.} at 110. In "independent inevitable discovery" cases such as \textit{Williams II}, law
their unlawful search because of their subsequent acquisition of a valid search warrant. Suppression of prewarrant evidence in this type of case, therefore, discourages law enforcement’s circumvention of the fourth amendment warrant requirement.

B. Segura v. United States

In Segura v. United States, New York Drug Enforcement Task Force agents placed Segura’s apartment under surveillance. When the agents observed Segura entering the lobby of the apartment building, they arrested him and escorted him upstairs. After forcibly entering Segura’s apartment without a search warrant, the agents arrested Segura’s friend Colon and three others. When the agents moved from room to room in search of other persons they observed various “accoutrements of drug trafficking.” Two agents remained in the enforcement officers are “simultaneously pursuing two totally unrelated lines of investigative activity.” Id. at 111. Thus, application of the inevitable discovery rule in this context constitutes a “modest variation” of the independent source rule articulated in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). See supra note 18 and accompanying text. “Dependent inevitable discovery” cases such as Griffin, however, are not characterized by an “independent avenue of discovery.” Appel, supra note 60, at 114-15. Instead, courts in dependent inevitable discovery cases are “asked to undo the [unlawful] transaction, reconstruct it in a legal fashion, and thereby purge the taint from the evidence.” Id. at 115.

Interestingly, an illustration of a “dependent inevitable discovery” case can be found in Williams II. Police officers investigating the disappearance of Pamela Powers searched Williams’ room at the YMCA without a warrant. The next day they seized evidence observed during the unlawful search pursuant to a warrant. The petitioner State of Iowa in its brief distinguished the circumstances surrounding the ultimate discovery of the body from the prewarrant search and concluded that the prewarrant evidence found in Williams’ room was properly suppressed. See Brief of Petitioner at 16 n.13, Nix v. Williams, 467 U.S. 431 (1984) (No. 82-1651).

74. Id. at 115-16. Despite the Supreme Court’s rejection of an “absence of bad faith” requirement in Williams II, some commentators, without articulating a clear standard for implementation, have suggested that courts apply a good faith requirement when faced with a Griffin-like case. See id. at 116 (An absence of bad faith requirement is essential “to prevent police officers from using ... [a valid warrant] as a bootstrap to introduce evidence ... ”); 3 W. LaFAVE, supra note 6, § 11.4(a), at 624 (good faith requirement is necessary in a Griffin-like case because if “such a short-cut was intentionally taken, the effect would be to read out of the Fourth Amendment the requirement that other, more elaborate and protective procedures be followed”); Cf: Hypothetical Source, supra note 15, at 160 (to ensure that inevitable discovery doctrine is applied “consistently” with deterrence rationale, a showing that “police officers have not acted in bad faith to accelerate the discovery” of evidence is necessary).
76. Id. at 800.
77. Id. at 800-01.
78. Id. at 801. These items were a triple-beam scale, jars of lactose placed on a
apartment pending the arrival of a search warrant while their colleagues drove Segura and his confederates to Drug Enforcement Administration (DEA) headquarters. Due to "administrative delay," the agents did not execute a search warrant until nineteen hours after their unlawful entry.\textsuperscript{79} During their authorized search of the apartment, the agents seized other evidence in addition to the items which they had observed in plain view without the warrant.\textsuperscript{80} Segura and Colon moved to suppress all of the items found in the apartment—the prewarrant evidence as well as evidence first obtained during the execution of the search warrant.\textsuperscript{81}

The United States District Court for the Eastern District of New York agreed with the defendants and suppressed all of the evidence seized by the agents pursuant to the warrant.\textsuperscript{82} According to the court, "no exigent circumstances" justified the agents' warrantless entry into the apartment.\textsuperscript{83} The court further reasoned that all of the evidence might have been unavailable to the agents had they waited to enter the apartment lawfully because Colon might have removed or destroyed the evidence before the agents' authorized search.\textsuperscript{84}

The United States Court of Appeals for the Second Circuit held that the district court properly suppressed the prewarrant evidence.\textsuperscript{85} The court claimed that the agents impermissibly had created an exigency to justify their unlawful intrusion into the apartment.\textsuperscript{86} The court of appeals, however, reversed the suppression of the postwarrant evidence. The court observed that Second Circuit Court of Appeals precedent supported its holding that evidence first discovered pursuant to a valid warrant should not be suppressed even when the lawful discovery of the evidence is preceded by an unlawful, warrantless entry.\textsuperscript{87}

\textsuperscript{79} Segura, 468 U.S. at 801. The government conceded that the nineteen hour delay was unreasonable. Its "only explanation" for the delay was that the agents spent most of the day following the entry processing the defendants' arrests. \textit{See id.} at 825 n.17.

\textsuperscript{80} \textit{Id.} at 801. The agents, during their second search, obtained approximately three pounds of cocaine, ammunition for a handgun, records of narcotics transactions and $50,000 in cash. \textit{Id.}

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.} at 801-02.

\textsuperscript{83} \textit{Id.} at 802.

\textsuperscript{84} \textit{Id.}


\textsuperscript{86} \textit{Id.} at 417.

\textsuperscript{87} \textit{Id.} at 414-15. The court relied on its reasoning in United States v. Agapito, 620 F.2d 324 (2d Cir. 1980), cert. denied, 449 U.S. 834 (1980). In Agapito, following a two day surveillance of a hotel room, federal agents arrested the defendants while they were in the
The court also dismissed as "speculative" and "prudentially unsound" the district court's assertion that all of the evidence in the apartment might have been destroyed or removed had the unlawful search not occurred.\textsuperscript{88}

After their convictions were affirmed, Segura and Colon petitioned the Supreme Court for a writ of certiorari. The government did not appeal the portion of the court of appeals' opinion suppressing the prewarrant evidence.\textsuperscript{89}

The Supreme Court\textsuperscript{90} affirmed the Second Circuit Court of Appeals decision admitting the postwarrant evidence. The majority reasoned that the search warrant provided an independent, untainted source for this evidence because the warrant was based upon information known by the agents prior to their warrantless entry.\textsuperscript{91} The majority also agreed with the court of appeals and dismissed as "speculative" and "prudentially unsound" the district court's assen-

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\textsuperscript{88} Segura, 663 F.2d at 416-17.

\textsuperscript{89} Segura, 468 U.S. at 802-03 n.4.

\textsuperscript{90} Chief Justice Burger delivered the opinion of the Court, in which Justices White, Powell, Rehnquist, and O'Connor joined. However, only Justice O'Connor joined Chief Justice Burger on Part IV of the opinion. Justice Stevens filed a dissenting opinion, in which Justices Brennan, Marshall, and Blackmun joined.

\textsuperscript{91} Segura, 468 U.S. at 814. The majority observed that under Silverthorne Lumber and its progeny, courts should not suppress unlawfully obtained evidence "unless the illegality is at least the "but for" cause of the discovery of the evidence." \textit{Id.} at 814-15. Here, the "but for" requirement was not satisfied because "[t]he illegal entry . . . did not contribute in any way to discovery of the evidence seized under the warrant." \textit{Id.} at 815.

The Court also observed that its holding was "consistent with the vast majority of Federal Courts of Appeals" that have addressed this question. \textit{Id.} at 814 n.9. Among the cases that the Court cited were United States v. Kinney, 638 F.2d 941, 945 (6th Cir. 1981) (search pursuant to a valid warrant is constitutional even when preceded by an unlawful search), cert. denied, 452 U.S. 918 (1981), and United States v. Agapito, 620 F.2d 324 (2d Cir. 1980), cert. denied, 449 U.S. 834 (1980). \textit{See supra} note 87. The Court noted, however, that the Ninth Circuit Court of Appeals had held "otherwise." Segura, 468 U.S. at 814 n.9. \textit{See}, e.g., United States v. Lomas, 706 F.2d 886, 893-94 (9th Cir. 1983) (valid warrant based upon independent source rationale cannot cure prior unconstitutional seizure), cert. denied, 464 U.S. 1047 (1984).

The Court addressed another question, in addition to the independent source or "taint" issue: whether the agents' impoundment of the apartment was reasonable under the fourth amendment. The Court reasoned that assuming the impoundment of the apartment constituted a seizure of its contents, the seizure was reasonable under the fourth amendment. \textit{Segura}, 468 U.S. at 798. For a discussion of this aspect of the Court's holding, see Recent Developments, \textit{The Securing of the Premises Exception: A Search for the Proper Balance}, 38 \textsc{Vand. L. Rev.} 1589, 1606-11 (1985).
tion that all of the evidence in the apartment might have been unavailable to the agents had they waited to enter the apartment lawfully. The majority was unwilling to "def[y] both logic and common sense [by endorsing a] 'constitutional right' to destroy evidence."

Throughout its opinion, the majority stressed that it was only deciding the precise question of whether a warrantless entry by officers taints evidence that they first discover pursuant to a valid search warrant obtained after their allegedly unlawful entry. However, in a part of the opinion in which only two Justices joined, the majority implied that the court of appeals properly suppressed the prewarrant evidence. According to the Court, the illegal "entry may have constituted an illegal search . . . requiring suppression of all evidence observed during the entry." Later, the Court observed that admitting the postwarrant evidence in Segura would not create an incentive for unlawful entries because "officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed." The Court also repeated the assertion it made in Williams II that the prospect of civil liability provided an additional deterrent to illegal conduct.

Justice Stevens, writing for the dissent, decried the "blatant unconstitutionality" of the illegal entry into, and impoundment of, the apartment. He reasoned that because the exclusionary rule's "principle purpose" is to deter fourth amendment violations, the admissibility of the postwarrant evidence in Segura should not depend solely upon the outcome of a strict causation analysis. He stressed that "exclusion [of evidence] is required to remove the incentive for the police to engage in the unlawful conduct."

Justice Stevens then critically examined the majority's approach and noted its "analytical difficulties." He reasoned that if the search warrant provided an "independent source" for the postwar-

92. Segura, 468 U.S. at 816.
93. Id. at 798, 802-03 n.4, 804.
94. Justice O'Connor joined Chief Justice Burger in Part IV of the opinion which addressed the "reasonableness" of the impoundment. Id. at 805-13.
95. Segura, 468 U.S. at 811.
96. Id. at 812 (emphasis added).
97. Id.
98. Id. at 838 (Stevens, J., dissenting). Justice Stevens viewed the impoundment of the apartment as both an unlawful search and seizure because of its 18-20 hour duration. Id. at 824-25.
99. Id. at 828.
100. Id. at 830.
101. Id.
102. Id.
rant evidence, it would be incongruous to admit this evidence while excluding the items which the agents observed in plain view during their unlawful entry. In this case, "[t]he warrant provided an 'independent' justification for seizing all the evidence in the apartment—that in plain view just as much as the items that were concealed."\(^{103}\)

The dissent further observed that although the search warrant was based upon lawfully obtained information, this fact by itself should not have been dispositive of the petitioners' claims:

The Court states that the fruits of the judicially authorized search were untainted because "[n]o information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. . . ." That is sufficient to dispose only of a claim that petitioners do not make—that the information which led to the issuance of the search warrant was tainted. It does not dispose of the claim that petitioners do make—that the agents' access to the fruits of the authorized search, rather than the information which led to that search, was a product of illegal conduct.\(^{104}\)

The dissent concluded that the exclusionary rule's deterrence rationale required the suppression of all the evidence which the officers obtained through their unconstitutional conduct absent a finding "that the evidence in fact would have remained in the apartment had it not been unlawfully impounded."\(^{105}\) Because there was substantial doubt as to whether all of the evidence would have been discovered had the unlawful entry into and impoundment of the apartment not occurred, the dissent would have remanded the case to the district court for further consideration of this question.\(^{106}\)

Segura is inconsistent with Williams II in several respects. For example, in Segura, some if not all of the evidence might have been removed or destroyed before the acquisition of the search warrant had the officers not entered the apartment illegally. Thus, by upholding

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103. \textit{Id.} at 831.

104. \textit{Id.} at 831-32. Justice Stevens stressed that "[t]he element of access, rather than information, is central to virtually the whole of our jurisprudence under . . . the Fourth Amendment." \textit{Id.} at 833 n.27. He continued:

In all of our cases suppressing evidence because it was obtained pursuant to a warrantless search, we have focused not on the authorities' lack of appropriate information to authorize the search, but rather on the fact that that information was not presented to a magistrate. Thus, suppression is the consequence not of a lack of information, but of the fact that the authorities' access to the evidence in question was not properly authorized and hence was unconstitutional.

\textit{Id.}

105. \textit{Id.} at 836-38.

106. \textit{Id.} at 837-38.
the admission of the postwarrant evidence, the Court may have placed the prosecution in a better position than they would have been had police misconduct not occurred, a result plainly contrary to its pronouncement in Williams II.107

Segura is also inconsistent with Williams II because of the Court's refusal in Segura to admit the prewarrant evidence. Admission of this evidence could have been based on either one of two theories—an independent source theory, as Justice Stevens suggested,108 or an "inevitable discovery" theory, as advocated by the Court of Appeals for the First Circuit.109 If based on the latter theory, then admission of this evidence seemingly was required by Williams II once the Court held that the valid search warrant provided an independent source for the postwarrant evidence. The agents "inevitably" obtained the prewarrant evidence through an independent, lawful source after seizing this evidence unlawfully.110

In sum, the Supreme Court held that the search warrant, issued upon lawfully obtained information, provided an independent source

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107. See supra text accompanying note 35.
108. Justice Stevens questioned whether there was any principled reason for distinguishing between the prewarrant and postwarrant evidence for purposes of applying the Court's independent source analysis: "If the execution of a valid warrant takes the poison out of the hidden fruit, I should think that it would also remove the taint from the fruit in plain view." Segura, 468 U.S. at 83 J. See supra text accompanying note 103.
109. See United States v. Silvestri, 787 F.2d 736 (1st Cir. 1986), petition for cert. filed, 54 U.S.L.W. 2546 (U.S. June 2, 1986) (No. 85-1534). See infra notes 111-38. In the wake of Segura, there is a certain amount of confusion over when prewarrant evidence can be admitted under an independent source or inevitable discovery theory. In Silvestri, the Court of Appeals for the First Circuit attempted to clarify this largely semantic distinction. Silvestri, 787 F.2d at 739. See infra text accompanying notes 124-26. The court reasoned that the independent source exception applies to admit prewarrant evidence when this evidence "can be considered to be cleanly 'rediscovered' when the warrant is executed." Silvestri, 787 F.2d at 739. The court recalled that it had applied the independent source rationale to admit prewarrant evidence in United States v. Murray, 771 F.2d 589 (1st Cir. 1985), because the evidence in that case was cleanly rediscovered pursuant to a valid warrant. Id. at 602. For a review of the facts of Murray and the First Circuit Court of Appeals analysis in that case see infra notes 166-200. In Murray, officers entered a warehouse without a warrant, observed incriminating evidence, and retreated, securing the building from the outside pending the arrival of a warrant. Murray, 771 F.2d at 595.

The court held that prewarrant evidence is admissible under an inevitable discovery analysis when officers observe this evidence during an illegal search but continue to assert control over the evidence by securing the premises. Silvestri, 787 F.2d at 740. In these cases the evidence is seized unlawfully and a search warrant does not effectuate a lawful seizure of this evidence pursuant to the independent source rationale. Id. However, this analysis suggests that Murray is not an "independent source" case but an "inevitable discovery" case because the officers observed the evidence illegally and then asserted control over the evidence by securing the premises. Murray, 771 F.2d at 595.

110. See Williams II, 467 U.S. at 443-44 (noting "functional similarity" of independent source and inevitable discovery doctrines).
for the postwarrant evidence. However, the Court did not apply the logic of this analysis to admit the prewarrant evidence. The Court, therefore, left for another day the question of whether a valid search warrant vel non can be the basis for admitting prewarrant evidence under either an independent source or inevitable discovery theory.

C. United States v. Silvestri

In United States v. Silvestri, the Court of Appeals for the First Circuit asserted that a valid search warrant provides the basis for admitting prewarrant evidence under an inevitable discovery analysis, thus accepting a proposition which the Supreme Court refused to endorse in Segura.

In Silvestri, New Hampshire state police, without a warrant, entered and secured property owned by Frederick Silvestri, Sr. Sergeant DuBois of the New Hampshire state police asked Silvestri for the keys to his garage and Silvestri complied. Inside the garage Sergeant DuBois observed "many bales of marijuana and blocks of hashish." Sergeant DuBois immediately reported his finding to the New Hampshire State Police Barracks in Epping, New Hampshire. The police arrived with a warrant eight hours later and the officers seized ninety-nine bales of marijuana, 1489 pounds of hashish and several incriminating documents.

At trial, Silvestri moved to suppress all of the evidence which the officers seized pursuant to the warrant. The district court conceded that the officers' entry upon Silvestri's property was "illegal and inexcusable." However, it refused to suppress the evidence, reasoning that the search warrant was valid because it was based upon probable

112. Id. at 737.
113. Id. at 737-38.
114. Id. at 738.
115. Id.
116. Id. (quoting United States v. Curry, 751 F.2d 442, 447 (1st Cir. 1984)). Silvestri was the second time the court of appeals addressed the legality of the police entry into Silvestri's premises. In United States v. Curry, 751 F.2d 442 (1st Cir. 1984), the court held that while the entry clearly was unlawful, all evidence obtained under the valid warrant was admissible in light of the Supreme Court's analysis in Segura. The court, then, remanded the case to the district court to determine whether the officers observed any of the evidence in plain view before the arrival of the warrant. Id. at 449. See infra notes 117-19 and accompanying text.

In Silvestri, the court of appeals determined whether evidence seen before the arrival of the valid search warrant was admissible under the inevitable discovery exception. See infra text accompanying notes 123-26.
cause existing before the entry.\textsuperscript{117}

On appeal, the Court of Appeals for the First Circuit held that the Supreme Court’s analysis in \textit{Segura} required the admission of all evidence first seized under the valid warrant.\textsuperscript{118} Because the Supreme Court in \textit{Segura} had not considered the admissibility of evidence observed in plain view before the arrival of a search warrant, the court of appeals remanded the case to the district court to determine if the officers had seen any of the evidence seized pursuant to the search warrant before the warrant was obtained.\textsuperscript{119}

On remand, the district court determined that Sergeant DuBois had observed the bales of marijuana and hashish before the arrival of the search warrant and that this evidence was not in plain view.\textsuperscript{120} The district court ruled that the prewarrant evidence was admissible under the inevitable discovery exception to the exclusionary rule because the police obtained the evidence pursuant to the valid warrant and officers had been preparing an application for the warrant when Sergeant DuBois observed the evidence.\textsuperscript{121}

In its second review of the case, the court of appeals found no evidence supporting the district court’s finding that officers had initiated the warrant application process before the unlawful seizure of the evidence.\textsuperscript{122} The court of appeals nevertheless held the prewarrant evidence to be admissible, claiming that there was no “necessary requirement that the warrant application process have already been initiated” when Sergeant DuBois observed the narcotics.\textsuperscript{123}

\textsuperscript{117} \textit{Curry}, 751 F.2d at 447.
\textsuperscript{118} \textit{Id.} at 448.
\textsuperscript{119} \textit{Id.} at 449.
\textsuperscript{120} \textit{Silvestri}, 787 F.2d at 738.
\textsuperscript{121} \textit{Id.} (citing \textit{Nix v. Williams}, 467 U.S. 431 (1984)).
\textsuperscript{122} \textit{Id.} at 742. The court of appeals reasoned that Sergeant DuBois’ observation of the narcotics in Silvestri’s garage constituted an unlawful seizure of that evidence. \textit{Id.} at 741. According to the court, “The conjunction of observation of specific objects and the assertion of control over those objects via the ‘securing’ of the property sufficiently affects [an individual’s] possessory interests in those particular objects . . . .” \textit{Id.} at 740. Therefore, the later arrival of a warrant “does not effect a legal seizure” of evidence observed unlawfully. \textit{Id.} The court then examined the record to determine if officers had commenced the warrant application process before Sergeant DuBois’ unlawful seizure of the narcotics in Silvestri’s garage. The court determined that the unlawful seizure occurred between 4:00 and 4:30 a.m. \textit{Id.} at 741. At this time, the only officers who possessed the information necessary to draft the warrant application were in transit between Leominster, Massachusetts, and the New Hampshire state police barracks in Epping. These officers began preparing the search warrant at 6:00 a.m., two hours after the unlawful seizure of the evidence. Therefore, the court found that the warrant process had not commenced before the unlawful seizure of the narcotics. \textit{Id.} at 741-42.
\textsuperscript{123} \textit{Id.} at 746.
In its analysis, the court of appeals observed that admissibility of the prewarrant evidence in *Silvestri* depended upon an application of the inevitable discovery exception and not the independent source doctrine. According to the court, the Supreme Court properly admitted the postwarrant evidence in *Segura* under the independent source exception because the illegal entry into and impoundment of the apartment did not amount to an unlawful "seizure of the unobserved objects contained within the premises." However, in a case like *Silvestri*, where evidence is observed during an illegal entry, the evidence is seized illegally at the moment that the officers view it and assert control over the premises. Thus, the later acquisition of a valid warrant does not effectuate a lawful seizure of this evidence pursuant to the independent source rationale. The court of appeals concluded that "[t]he question in this kind of situation must be . . . whether the evidence inevitably would have been seized by an independent legal means."

The court then observed that when the Supreme Court endorsed the inevitable discovery exception in *Williams II*, it had not established an "active pursuit" of lawful means requirement. Instead, the Supreme Court "concluded only that the inevitability of the discovery [of the victim's body] was demonstrated by the ongoing nature of the search and the progress it had already made." The court of appeals noted that other courts had required that "the legal process of discovery must be ongoing" before the occurrence of unlawful conduct as a prerequisite to admitting evidence under an inevitable discovery analysis. However, the court reasoned that applying this require-

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124. *Id.* at 739 (citing *Segura*, 468 U.S. at 811).
125. *Id.* at 740.
126. *Id.*
127. *Id.* at 742.
128. *Id.*
129. *Id.* at 742-44. The court cited five cases in which federal courts of appeals, applying the inevitable discovery rule, required a showing that ongoing, independent investigations would have obtained tainted evidence in the absence of police misconduct. See United States v. Owens, 782 F.2d 146, 152 (10th Cir. 1986) (inevitable discovery rule only applies where an independent investigation would have obtained evidence lawfully); United States v. Cherry, 759 F.2d 1196, 1206 (5th Cir. 1985) (evidence obtained during an unlawful search suppressed because "[n]o finding was made . . . [that officers] were actively pursuing a warranted means of" obtaining the evidence when misconduct occurred), *cert. denied*, 107 S. Ct. 932 (1987); United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984) (prewarrant evidence admissible when police, before illegal search, possessed a warrant and were "actively pursuing" these lawful means), *cert. denied*, 471 U.S. 1117 (1985); United States v. Finucan, 708 F.2d 838, 843 (1st Cir. 1983) (suggesting that inevitable discovery exception only applies when lawful means of discovery were ongoing when unlawful conduct occurred); United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982)
ment in prewarrant search cases would be inappropriate.

According to the court, an "active pursuit requirement" in a case such as *Williams II* or an unlawful search case where a warrant is never obtained, is necessary to demonstrate the inevitability of the lawful discovery of evidence. However, this requirement is unnecessary in prewarrant search situations because "[t]he fact that a warrant has been obtained removes speculation as to whether a magistrate would in fact have issued a warrant on the facts . . . ." The court of appeals conceded that "other concerns rise to the fore. . . . where a warrant is only sought after an illegal search reveals evidence of criminal activity . . . ." The obvious concern was the possibility that evidence obtained during the illegal search might have influenced the decision to obtain a search warrant. The court observed that a requirement that the police be in the process of applying for a warrant prior to the illegal discovery of the evidence ensures that the warrant is based upon preexisting probable cause. However, the court reasoned that conditioning the admissibility of prewarrant evidence solely upon this requirement was an inflexible "bright-line" approach: "Most of the time, if the police are already in possession of probable cause for the warrant, a gap between the illegal discovery and the initiation of the warrant will be due to various practical problems entirely unrelated to a decision to seek a warrant." The court observed that in *Silvestri*, the delay in applying for the warrant was due to such a problem.

The court, therefore, concluded that in prewarrant search situations "there is no necessary requirement that the warrant application process have already been initiated at the time an unlawful search occurs." Instead, prewarrant evidence is admissible under an inevitable discovery analysis when the warrant that officers obtain after an illegal search is based upon valid probable cause.

(unlawfully obtained evidence admissible when evidence "would have been discovered . . . through a lawful investigation already underway.").

130. *Silvestri*, 787 F.2d at 746.
131. Id. at 745.
132. Id.
133. Id.
134. Id.
135. Id.
136. Id. "[T]he delay between the search of the garage and the time that . . . [the officers] initiated the warrant process was clearly attributable to the time it took the two officers to complete their duties in Massachusetts and drive back to New Hampshire." Id.
137. Id. at 746.
138. Id.
The First Circuit Court of Appeals' approach in *Silvestri* and the Sixth Circuit Court of Appeals' ruling in *Griffin* exemplify two contrasting views concerning the appropriateness of admitting prewarrant evidence under the inevitable discovery doctrine. In *Griffin*, the Court of Appeals for the Sixth Circuit, by focusing its analysis upon the conduct of the officers who had acted illegally, properly adopted an approach that was consistent with the exclusionary rule's deterrence rationale. The purpose behind the court's decision to suppress the prewarrant evidence in *Griffin* was to discourage law enforcement officers from engaging in unjustified circumventions of the fourth amendment's warrant requirement.

In *Silvestri*, the Court of Appeals for the First Circuit did not focus its analysis upon the deterrence factor. Instead, this court mechanically applied the logic of the majority's reasoning in *Segura* to admit prewarrant evidence on the basis of a valid, later-acquired, search warrant.

There are two reasons why courts should not admit prewarrant evidence solely upon this basis. First, language in the Supreme Court's opinion in *Segura* suggests that courts should suppress physical evidence observed during an unlawful search even when this evidence is seized later pursuant to a valid search warrant. The Court in *Segura* reasoned that suppressing prewarrant evidence serves the deterrence rationale of the exclusionary rule because it discourages unlawful entries and impoundments.

Second, a determination that a search warrant is based upon information unrelated to an earlier illegal search shows that the officers who acted illegally could have acted lawfully and obtained the valid warrant before their search. The approach which the First Circuit Court of Appeals adopts is inimical to the exclusionary rule's deterrence rationale because these officers would know that they could conduct illegal warrantless entries and any evidence that they find would be admissible if they subsequently obtain a valid search warrant. With this invitation to conduct objectively unreasonable searches, officers might well decide to pursue an improper course of conduct, as they did in *Griffin* and *Segura*, to lessen any likelihood that incriminating evidence would be removed or destroyed. They also would be able to

139. See supra text accompanying notes 94-96.

140. *Segura v. United States*, 468 U.S. 796, 810-12 (1984). Professor LaFave, however, characterizes this language in *Segura's* majority opinion as "a brief bow" to the exclusionary rule's deterrence rationale. See 3 W. LaFAVE, supra note 6, § 11.4, at 349 (Supp. 1986). He argues that the logic of the Court's independent source analysis makes it "relatively easy" for it to admit prewarrant evidence in a future case. Id.
“confirm” the existence of incriminating evidence to determine whether it is even necessary to apply for a warrant.141

III. A SUGGESTED APPROACH FOR DETERMINING THE ADMISSIBILITY OF PREWARRANT EVIDENCE AND ITS APPLICATION TO MURRAY V. UNITED STATES

The preceding discussion has shown the impropriety of an inevitable discovery approach which allows the admission of prewarrant evidence merely because the officers who act illegally subsequently obtain a valid search warrant. In lieu of such an approach, courts should look to Williams II for guidance and admit prewarrant evidence only when the government bases its inevitable discovery theory upon an independent investigation, totally unrelated to unlawful conduct.142 The difficulty of proving the existence of an alternative line of investigation would discourage officers from attempting to use the inevitable

141. In “confirming” search cases, officers with probable cause are not motivated by a desire to preserve incriminating evidence. Instead, these searches are undertaken by officers to determine whether obtaining a warrant is necessary.

In Krauss v. Superior Court, 5 Cal. 3d 418, 487 P.2d 1023, 96 Cal. Rptr. 455 (1971), the California Supreme Court held that an officer’s illegal confirming search and discovery of incriminating evidence did not require the suppression of that evidence when it was seized later by the same officer pursuant to a valid warrant. Justice Peters, writing for the dissent, criticized this result:

[T]he search-unlawfully-first-obtain-the-warrant-later procedure would totally undermine the purposes of the exclusionary rule. By holding that a search warrant subsequently obtained on the basis of probable cause insulates the prior unlawful search, the majority provide profit for the unlawful search, thus violating the principle of deterrence on which the exclusionary rule is based ... we may expect that many officers will engage in unlawful searches ... to determine whether their information is correct or not before seeking a warrant.


142. The majority opinion in Williams II did not include language limiting application of the inevitable discovery exception to situations where unlawfully obtained evidence would have been obtained through an independent investigation unrelated to unlawful conduct. However, Justice Stevens and Justice Brennan seemed to accept this limitation. For example, Justice Stevens observed that “[a]n inevitable discovery finding is based on objective evidence concerning the scope of the ongoing investigation which can be objectively verified or impeached.” Williams II, 467 U.S. at 457 n.8 (Stevens, J., concurring).

Justice Brennan, noting the exception’s “compatibility with the Constitution,” reasoned that evidence admissible under an inevitable discovery analysis “would have been discovered as a matter of course if independent investigations were allowed to proceed.” Id. at 459 (emphasis added) (Brennan, J., dissenting). See generally Appel, supra note 60, at 120 (The concurring and dissenting opinions in Williams II suggest that inevitable discovery “exception should be limited to independent inevitable discovery contexts.”).
discovery exception as a "bootstrap to introduce evidence." This requirement, therefore, would provide officers with an incentive to comply with the fourth amendment's mandate that they obtain a warrant before undertaking a search. This comment now reviews the facts of a Seventh Circuit Court of Appeals case which illustrates an application of *Williams II*’s independent investigation principle in the prewarrant search context.

### A. The Independent Investigation Requirement

In *United States v. Salgado*, federal agents arrested Salgado one half hour after engaging him in a sham narcotics transaction. During a search of his person they obtained information leading them to suspect that narcotics and other incriminating evidence were located at a nearby apartment. The agents, without a search warrant, entered the apartment and conducted a limited security check during which they observed various items of incriminating evidence. They then sealed the apartment from the outside pending the arrival of a warrant. Four hours later, another team of officers seized the evidence that was observed in plain view during the warrantless entry and seized additional evidence pursuant to a valid search warrant. Salgado moved to suppress all of the items seized from the apartment. The district court denied this motion and Salgado appealed to the Seventh Circuit Court of Appeals.

The court of appeals affirmed the district court’s holding, stating that *Segura* permitted the admission of evidence which the officers first obtained pursuant to the warrant during the second search of Salgado’s apartment. The court then dismissed Salgado’s contention that *Segura* required the suppression of evidence which the other officers originally discovered in plain view during their security check. The court observed that in *Segura* “[t]he issue of the admissibility of the ‘seen’ items was not before the Supreme Court . . . .” Furthermore, according to the court, the passage in *Segura* suggesting that

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144. 807 F.2d 603 (7th Cir. 1986).
145. *Id.* at 605. During their search of Salgado, the agents obtained a receipt from a lock company indicating that the company had rekeyed the door to an apartment located at 2580 West Golf Road. According to the receipt, Salgado resided at this apartment. *Id.*
146. *Id.* at 605-06.
147. *Id.* at 606. The warrant was based upon information “describing the circumstances” surrounding the arrests of Salgado and an associate, Bernal. *Id.*
148. *Id.* at 604.
149. *Id.* at 606-10.
150. *Id.* at 608.
courts should suppress prewarrant evidence was "dictum" and appeared "in a part of the opinion that only two members of the Court joined . . . ."\textsuperscript{151}

The court of appeals also observed that the Supreme Court's reasoning in \textit{Williams II}\textsuperscript{152} supported admission of the prewarrant evidence in \textit{Salgado}.\textsuperscript{153} The court of appeals noted that "a different group of officers" had seized the evidence pursuant to a valid warrant after the allegedly unlawful search.\textsuperscript{154} The court then implicitly noted \textit{Salgado}'s factual similarity with \textit{Williams II}:

Suppose one team of officers seizes a piece of evidence illegally for which another team has already obtained, but not yet executed, a lawful search warrant—which is one way to describe the present case. . . . There would be no closer causal relationship between the initial search and the introduction of evidence at trial than in a case where the police have two independent sources of information regarding the location of a corpse, one source having been coerced illegally, the other being lawful; evidence of the location, having an independent untainted source, would be admissible.\textsuperscript{155}

Although it is unclear whether the magistrate, in fact, issued the warrant before the unlawful search, the Seventh Circuit Court of Appeals' decision to admit the prewarrant evidence in \textit{Salgado} nevertheless seems consistent with \textit{Williams II}. If the government in \textit{Salgado} could establish that the officers who obtained the valid warrant neither authorized the previous search, nor acted in collusion with the officers who conducted that search, then \textit{Salgado}, in the prewarrant search context, would be closely analogous to \textit{Williams II}. The officers executing the search warrant constituted an "independent line of investigation"\textsuperscript{156} entirely unrelated to the unlawful conduct, and they seized the evidence after the unlawful search of Salgado's apartment.\textsuperscript{157}

\begin{itemize}
\item\textsuperscript{151} \textit{Id}.
\item\textsuperscript{152} For a discussion of \textit{Williams II}, 467 U.S. 431 (1984), see \textit{supra} notes 28-57 and accompanying text.
\item\textsuperscript{153} \textit{Salgado}, 807 F.2d at 608.
\item\textsuperscript{154} \textit{Id}. at 607.
\item\textsuperscript{155} \textit{Id}. at 608 (emphasis added).
\item\textsuperscript{156} \textit{Williams II}, 467 U.S. at 459 (Brennan, J., dissenting).
\item\textsuperscript{157} The Tenth Circuit Court of Appeals has endorsed the view that the inevitable discovery exception only applies when unlawfully obtained evidence would have been discovered through an investigation, independent of unlawful conduct. See United States \textit{v. Owens}, 782 F.2d 146 (10th Cir. 1986). In \textit{Owens}, police officers without a search warrant searched the defendant's hotel room and discovered incriminating evidence. The officers never obtained a warrant after their search. The court refused to apply the inevitable discovery exception to admit the evidence, reasoning that "[a]ll the cases that have endorsed the inevitable discovery exception have relied upon independent, untainted investigations
However, the later seizure of the evidence by another team of officers would not, in every case, prove that prewarrant evidence is the “ultimate” product of an independent and untainted investigation. For example, if in *Salgado* the officers who obtained and executed the lawful search warrant had also ordered the unlawful, prewarrant entry, the Court of Appeals for the Seventh Circuit would not have been faced with two analytically distinct avenues of conduct. Instead, such a case would factually resemble *Griffin*, where prewarrant evidence is essentially the product of a single course of unlawful conduct.

In illegal, prewarrant search cases where the government cannot base its inevitable discovery theory upon an independent investigation unrelated to unlawful conduct, the exclusionary rule’s deterrence rationale requires the suppression of prewarrant evidence. A judicial determination that a warrantless search is unlawful means that the officers who conducted that search acted unreasonably.\(^{158}\) If officers could purge the taint from physical evidence observed during an un-

that would have inevitably uncovered the same evidence.” *Id.* at 152. *But see United States v. Boatwright*, 822 F.2d 862 (9th Cir. 1987).

In a case that is similar factually to *Owens*, Justice Kennedy, at the time writing for the Ninth Circuit Court of Appeals, observed that “[the] existence of two independent investigations at the time of discovery is not . . . a necessary predicate to the inevitable discovery exception.” *Id.* at 864. Reasoning that the inevitable discovery exception is best developed on a case-by-case basis, he stressed that it at least must be shown “that the fact or likelihood that makes the discovery inevitable arise from circumstances other than those disclosed by the illegal search itself.” *Id.* at 864-65. Justice Kennedy concluded that the inevitable discovery exception was inapplicable in *Boatwright* because the government failed to show that an “independent search occurred or was likely to occur at any point.” *Id.* at 865 (emphasis added).

Although Justice Kennedy rejected an “independent investigation” restriction to inevitable discovery, he also rejected any approach which would permit officers “to ignore search requirements at any convenient point . . .” *Id.*

158. Under the exigent circumstances exception to the fourth amendment warrant requirement, the legality of a warrantless search depends upon whether the officers’ decision to conduct a warrantless search is objectively reasonable. For a discussion of prior cases defining the limits of this exception, see *supra* note 66. *See United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973) (warrantless search is lawful when “based on the surrounding circumstances . . . [the officers] reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant . . . .”) (emphasis added).

In some cases, a subsequent determination that the warrantless search, in fact, was unjustified does not render the search unlawful, provided that the officers acted reasonably under the circumstances. *See, e.g., Archibald v. Mosel*, 677 F.2d 5 (1st Cir. 1982). In *Archibald*, officers responded to a robbery call and were informed by the victim that he had chased the robber into a nearby apartment. When the officers and the robbery victim went to the apartment they heard noise sounding “like furniture being moved inside.” *Id.* at 6. When no one responded to their requests to enter, the officers forcibly entered the apartment and discovered a frightened child. *Id.* The Court of Appeals for the First Circuit affirmed the district court’s ruling that the entry was lawful because “a reasonable perception of exigent circumstances” justified the entry. *Id.* at 7.
lawful search by simply obtaining a valid warrant after the fact, they would know that they could act unreasonably and still ensure the admission of incriminating evidence. When a compelling opportunity arises, officers might be more likely to choose an illegal and expedient route to incriminating evidence to ensure its preservation, and cleanse their conduct later by obtaining a valid warrant. Suppressing prewarrant evidence in these circumstances would compel officers to conform their conduct to a standard of reasonableness, and therefore would discourage "confirming" searches and the type of egregious misconduct that occurred in *Griffin* and *Segura*.

Arguably, the threat of interdepartmental disciplinary sanctions and civil liability provides an additional deterrent to unreasonable, prewarrant searches. However, there is no indication that the Supreme Court is prepared to use this fact as a basis for refusing to apply the exclusionary rule to situations where its application traditionally has been appropriate. Indeed, suppression of physical evidence observed during an illegal prewarrant search is consistent with the Court's current posture regarding the exclusionary rule's proper scope. For example, in *United States v. Leon* the Court observed that the purpose of the exclusionary rule is to deter unlawful searches and seizures. The Court then concluded that this purpose is not furthered by suppressing evidence that officers obtain illegally when they rely in objective good faith upon a defective warrant issued by a neutral and detached magistrate.

Although the Court carefully limited its application of this "good faith exception" to *Leon*'s factual context, the rationale used to justify adoption of the exception was not so limited. The Court broadly

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159. See supra note 141.


162. Id. at 922.

163. Indeed, Justice Brennan, dissenting in *Leon*, expressed concern about extending the good faith exception to other contexts:

[A]lthough the Court's decisions are clearly limited to the situation in which po-
stated that the exclusionary rule's deterrence rationale is not served "when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." Conversely, the Court's analysis in *Leon* suggests that courts should suppress physical evidence observed in *illegal*, prewarrant searches because such searches necessarily are objectively unreasonable. Suppression of the evidence therefore would deter similar unreasonable conduct.

In light of the preceding discussion, this comment now considers the facts of *Murray v. United States* and determines whether the Court of Appeals for the First Circuit properly admitted the prewarrant evidence at issue in that case.

**B. Murray v. United States**

In connection with their investigation of an ongoing narcotics conspiracy, a team of federal agents stopped a green camper, driven by Christopher Moscatiello, on the Massachusetts Turnpike near Boston. After arresting Moscatiello and impounding the camper, the agents obtained a warrant and searched the vehicle. In the vehicle they discovered several bales of marijuana wrapped in burlap. Five minutes after Moscatiello's arrest another team of federal agents followed a white Ford truck, driven by John Rooney, into the driveway of a garage located on Sylvester Road in Boston. After arresting Rooney, a confederate of Moscatiello's, the agents opened the rear door of the vehicle and observed inside approximately sixty bales of marijuana. Based on these discoveries, the agents obtained a warrant to search the garage.

Meanwhile, federal agents drove to a warehouse on D Street and observed a man "pacing back and forth . . . in front of the [warehouse]
... looking at traffic as it passed."171 After driving around the block, the agents noticed that the man had disappeared. Those agents, joined by another team of federal agents, surrounded the warehouse. They then banged on the building's overhead doors as they announced their identity as federal agents.172 When there was no response from inside the warehouse, the agents forcibly entered the building and observed a number of bales of marijuana wrapped in burlap.173 After finding no one in the warehouse the agents retreated and secured the building from the outside.174

In their application for a warrant to search the warehouse the agents did not mention their forced entry into the building or the bales of marijuana which they had seen in plain view. Instead, the agents relied upon lawfully obtained information as their sole basis for obtaining a warrant.175

A magistrate issued a search warrant for the warehouse which the agents executed approximately eight hours after their initial entry into the building.176 During their lawful search of the warehouse the agents not only seized the bales of marijuana which they had seen earlier, but also "a red and a blue spiral notebook, tape dispensers, marking pens, and marked pieces of tape" apparently used for labelling the bales of marijuana.177

In the Federal District Court for the District of Massachusetts, Moscatiello, Rooney, and three others—Carter, Murray and Barrett—were charged with various drug-related offenses.178 The defendants moved to suppress the evidence which the agents seized during their searches of the two vehicles and the garage. In addition, Carter and Murray moved to suppress all of the evidence which the agents seized during their warranted search of the warehouse. The district court denied all of the defendants' motions and the defendants appealed.179

The Court of Appeals for the First Circuit held that the searches

171. Id.
172. Id.
173. Id.
174. Id.
175. Id. The agents relied upon information which their associates obtained during their searches of the green camper and the white truck, which had occurred prior to the warehouse entry. Id.
176. Id.
177. Id. at 595-96.
178. In a five count indictment, the government charged Moscatiello, Murray, Carter, Rooney and Barrett with possession and conspiracy to possess over one thousand pounds of marijuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(6), 846. Murray, 771 F.2d at 591.
of the two vehicles were lawful under the automobile exception to the fourth amendment's warrant requirement.\textsuperscript{180} The court also agreed with the district court that the agents' lawful discovery of the marijuana in these vehicles furnished probable cause for the issuance of the warrant to search the garage.\textsuperscript{181} The court of appeals, therefore, held that all of the contraband which the agents seized during their searches of the two vehicles and the garage could be admitted into evidence.\textsuperscript{182} The court then considered the admissibility of the evidence which the agents seized during their search of the warehouse pursuant to the warrant.

On appeal, Murray and Carter challenged the district court's ruling that they lacked standing to contest the admissibility of the warehouse evidence.\textsuperscript{183} They then urged the court of appeals to suppress all of the evidence which the agents seized in the warehouse pursuant to the warrant. The defendants claimed that the search warrant was invalid because the agents had failed to mention in their warrant application their prior unlawful entry into the warehouse.\textsuperscript{184} Alternatively, the defendants urged the court of appeals to suppress all of the evidence in the warehouse which the agents observed in plain view without a warrant "as the direct product of a fourth amendment violation."\textsuperscript{185} The government denied the defendants' assertions and argued that exigent circumstances justified the agents' warrantless entry into the warehouse.\textsuperscript{186}

After agreeing with the defendants' contention that they had

\textsuperscript{180} The automobile exception is described in California v. Carney, 471 U.S. 386 (1985). In Carney, the Supreme Court reaffirmed the principle that warrantless searches of automobiles are lawful when based upon probable cause. The Court asserted two justifications for the "automobile exception" to the warrant requirement: the "ready mobility" of the automobile and the reduced "expectation of privacy with respect to one's automobile." \textit{Id.} at 390-91 (quoting South Dakota v. Opperman, 428 U.S. 364, 367 (1976)).

In Murray, the Court of Appeals for the First Circuit concluded that information supplied by three informants as well as the "complex pattern of vehicular activity" that occurred on the afternoon of the searches provided the agents with probable cause to believe that the two vehicles were carrying contraband. \textit{Murray}, 771 F.2d at 596-600. Thus, the searches of these two vehicles were lawful. \textit{Id.} at 600.

\textsuperscript{181} \textit{Murray}, 771 F.2d at 600.

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Id.} at 601. The district court advanced two reasons for concluding that Murray and Carter lacked standing to challenge the constitutionality of the warehouse searches. First, the warehouse was owned by a corporation and not by the defendants in their individual capacities. Second, there was no evidence "that any portion of the warehouse was set aside for the personal use of any defendant as corporate officer, employee or financial backer." \textit{Id.}

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{Id.} at 601-02.
standing to contest the legality of the warehouse searches, the court considered the government's assertion that exigent circumstances justified the agents' warrantless search of the warehouse. The court recalled that under *Archibald v. Mosel*, warrantless searches are lawful when law enforcement officials "have a reasonable perception that exigent circumstances obtain." The court, however, was "loath to conclude that exigent circumstances existed" because the district court had not addressed this question. Instead, the court concluded that even if the agents' initial search of the warehouse was unlawful, it would not suppress all of the evidence found in the building if the agents obtained the evidence "through an independent, lawful source."

The court of appeals recalled that in *Segura v. United States*, the Supreme Court applied the "independent source" rationale to admit evidence that officers first obtained in an apartment pursuant to a valid warrant even when those officers initially entered the apartment unlawfully. The court, therefore, concluded that *Segura* required the admission of the notebook, tape dispensers, marking pens and tape that the agents first discovered in the warehouse pursuant to the warrant. The court rejected the defendants' claim that the search warrant was invalid because the agents had failed to disclose their prior warrantless search of the warehouse to the magistrate. The court reasoned that "the mere omission of irrelevant facts from" a warrant affidavit does not invalidate a warrant that is otherwise supported by "overwhelming probable cause."

The court of appeals then addressed the "harder question" of whether to admit the bales of marijuana which the agents observed in plain view during their unauthorized search of the warehouse.

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187. The court of appeals reversed the district court's finding that the defendants lacked standing. The court observed that both Murray and Carter had a "legitimate expectation of privacy in the area searched" because they each had a "proprietary interest" in the warehouse, stored personal property there, and were the only persons who had keys to the building. *Id.* at 601 (quoting United States v. Salvucci, 448 U.S. 83, 92 (1980)).
188. 677 F.2d 5 (1st Cir. 1982). For a discussion of the facts of *Archibald*, see supra note 158.
189. Murray, 771 F.2d at 602.
190. *Id.*
191. *Id.* (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).
193. Murray, 771 F.2d at 602-03 (citing *Segura*, 468 U.S. at 813-16).
194. *Id.* at 603 ("As for the evidence uncovered for the first time during the warehouse search conducted pursuant to the warrant, *Segura* is on all fours and we necessarily affirm the denial of defendants' motion to suppress.").
195. *Id.*
Although conceding that the Supreme Court had not addressed this question in *Segura*, the court recalled Justice Stevens' assertion in that case that "[t]he warrant provided an 'independent' justification for seizing all the evidence in the apartment—that in plain view just as much as the items that were concealed." The court reasoned that application of this "independent justification" rationale in the present case would be more defensible than in *Segura* because "agents entering the [warehouse] found [it] to be deserted, and hence the possibility seems nil that the evidence in plain view would or could have been removed or destroyed before the second search" pursuant to the warrant. The court then observed that the Supreme Court "adhered to the independent justification analysis" in the "closely analogous situation" of *Williams II*.

The court of appeals concluded its discussion by noting the conflict between its application of the "independent justification" analysis to admit the prewarrant evidence and the exclusionary rule's deterrence rationale:

Since the chief, and perhaps sole, rationale for the exclusionary rule is to deter future violations of the fourth amendment, see *Leon*, 104 S. Ct. at 3412 (decided same day as *Segura*), arguably all evidence first spied through illegal procedures must be suppressed, no matter how 'inevitable' its later, legal discovery. But the reasoning in *Segura* and, certainly, that in . . . [*Williams II*], lead us to conclude that the . . . [prewarrant evidence] should not be suppressed. 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.

The court of appeals admitted the bales of marijuana, finding no "causal link" between the agents' unlawful search of the warehouse

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196. *Id.* (quoting *Segura* v. United States, 468 U.S. 796, 831 (1984) (Stevens, J., dissenting)). The court's use of this quote to support admission of the prewarrant evidence in *Murray* implies that the dissent in *Segura* endorsed the majority's independent source analysis. However, Justice Stevens specifically rejected the majority's strictly causal approach. See supra text accompanying notes 98-101. Instead, Justice Stevens identifies the "controlling question [as] . . . whether the deterrent purposes of the exclusionary rule would be served or undermined by suppression of . . . evidence." *Segura*, 468 U.S. at 836 (Stevens, J., dissenting).

197. *Murray*, 771 F.2d at 603. Because the evidence in the warehouse would have been available to the police even if they had complied with lawful procedures, the illegal entry did not place them in a better position than they would have been in in the absence of their illegality. This was Justice Stevens' major concern in *Segura*.


199. *Id.* at 604.
and their subsequent, lawful seizure of this evidence. 200

C. A Proposal for Resolving Murray v. United States

The Court of Appeals for the First Circuit reasoned that "the logic of the majority's reasoning" in Segura compelled the admission of the prewarrant evidence in Murray. 201 According to the court, the valid search warrant provided an "independent justification" for admitting this evidence. 202 The court concluded, without analysis, that this independent justification analysis was consistent with Williams II. 203 There are two flaws in the court's reasoning.

First, seizure of the narcotics pursuant to the valid warrant shows that the agents could have avoided a constitutional challenge to their conduct by obtaining this evidence originally through legal means. Law enforcement officers should be discouraged from engaging in conduct that objectively is unreasonable, such as failing to comply with the requirement that they obtain a warrant before a search, whenever practicable. 204

The Supreme Court's analysis in Leon supports suppression of evidence observed during illegal, prewarrant searches. 205 In illegal,
prewarrant searches, officers necessarily are acting in an objectively unreasonable manner. Because the purpose of the exclusionary rule is to deter objectively unreasonable conduct, suppression of evidence observed during an illegal prewarrant search serves the deterrence rationale and is, therefore, consistent with Leon.

In Griffin, the Court of Appeals for the Sixth Circuit implicitly recognized that suppression of prewarrant evidence was necessary to deter objectively unreasonable conduct. The court held that “absent any of the narrowly limited exceptions . . . to the search warrant requirement, police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one.” Thus, the court was unwilling to endorse an inevitable discovery approach which would have given law enforcement officers carte blanche to undertake unreasonable searches in violation of the exigent circumstances exception to the fourth amendment warrant requirement.

Justice Stevens, dissenting in Segura, also stressed the importance of the deterrence rationale. He reasoned that this rationale was “plainly applicable” in Segura because the officers conducted the illegal prewarrant entry to ensure the preservation of incriminating evidence. Therefore, he urged application of the exclusionary rule to wipe out any advantage which accrued to the agents as a result of their illegal prewarrant entry into and impoundment of the defendant’s apartment.

In Murray, the Court of Appeals for the First Circuit improperly failed to take the deterrence rationale into account when deciding to admit the bales of marijuana under its “independent justification” analysis. After finding the search warrant valid, the Court of Appeals for the First Circuit should have determined whether suppression of the bales of marijuana was necessary to discourage similar conduct in future cases.

The second flaw in the court of appeals’ analysis is the assertion that Williams II is “closely analogous” to Murray, and, therefore, sup-

206. See supra note 158.
207. Griffin, 502 F.2d at 961.
208. For a brief discussion of the exigent circumstances exception and an explanation of why warrantless searches in violation of this exception are objectively unreasonable, see supra note 158.
209. Segura, 468 U.S. at 836 (Stevens, J., dissenting).
210. Id. at 837.
ports admission of the bales of marijuana. *Williams II* is a factually distinguishable case.

In *Williams II*, evidence of the location and condition of remains was admissible because the girl's remains would have been obtained through an independent investigation unrelated to the illegal conduct of Detective Learning. In *Murray*, however, the government cannot claim that the challenged evidence would have been obtained if independent investigations were allowed to continue in the absence of the illegal search. Instead, the agents who discovered the incriminating evidence during the allegedly unlawful search were the same agents who subsequently seized this evidence pursuant to the warrant. In a case like *Murray*, therefore, the lawful discovery of prewarrant evidence can never be deemed truly "inevitable." It is possible that without the initial entry into the warehouse in which the agents saw the contraband, the agents would not have sought the search warrant.\(^{211}\)

Law enforcement officers should be precluded from using a valid warrant "in an effort to engage in after-the-fact repair of unlawful conduct."\(^{212}\) If the initial search was unlawful in *Murray*, then suppression of the prewarrant evidence is necessary to discourage agents from failing to comply with the often cumbersome, but constitutionally required procedures of the fourth amendment.

The district court did not determine whether the forced entry into the warehouse was lawful because the officers had "a reasonable perception that exigent circumstances obtain[ed]."\(^{213}\) The Court of Appeals for the First Circuit did not reach this question, preferring instead to rely upon its "independent justification" analysis to admit the evidence.\(^{214}\) *Murray* should be remanded to the district court. The bales of marijuana should be admissible only if the district court determines that the agents' initial entry was lawful because it was consistent with the objective reasonableness standard articulated in *Archi-

\(^{211}\) Although there was sufficient evidence for the warrant, the agents may not have put together the evidence without first having seen the contraband.


\(^{213}\) *Murray*, 771 F.2d at 602 (citing Archibald v. Mosel, 677 F.2d 5 (1st Cir. 1982)).

\(^{214}\) *Id.* at 602-04.
If the district court determines otherwise, then the prewarrant evidence should be suppressed.

IV. CONCLUSION

In Murray v. United States, the United States Supreme Court will address a question left unanswered in Segura: when is evidence first seen during an unlawful entry and later seized pursuant to a valid search warrant admissible?

The Court of Appeals for the First Circuit, applying the logic of the majority's independent source analysis in Segura, reasoned that a valid search warrant provides an "inevitable" independent basis for admitting this evidence. If the Supreme Court adopts this approach in Murray, the Court will ignore the observation it made in Segura that suppression of prewarrant evidence is necessary to discourage warrantless searches in the absence of exigent circumstances. It was this concern for deterring unreasonable conduct which prompted the Court of Appeals for the Sixth Circuit in Griffin and the Court of Appeals for the Second Circuit in Segura to suppress the prewarrant evidence at issue in those cases.

In Leon, the Supreme Court implicitly recognized that a principal purpose of the exclusionary rule is to deter unreasonable conduct. In Murray, therefore, the Court should evince its unwillingness to sanction unreasonable police conduct by endorsing an approach which is consistent with the exclusionary rule's deterrence rationale. Instead of admitting the prewarrant evidence under an inevitable discovery analysis, the Court should remand Murray to the district court. Upon remand, the district court should determine whether the prewarrant evidence is admissible because the officers harbored an objectively reasonable belief that exigent circumstances justified their warrantless entry into the warehouse.

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215. 677 F.2d 5 (1st Cir. 1982). This is assuming that the court will not suppress the prewarrant evidence because the agents could have obtained the evidence originally through lawful means.