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Steven P. Grossman
University of Baltimore School of Law, sgrossman@ubalt.edu

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The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations

Steven P. Grossman*

I. Introduction

In reinstating the Iowa murder conviction of Robert Williams, the Supreme Court accepted explicitly for the first time the doctrine of inevitable discovery. Applied for some time by state and federal courts, the doctrine of inevitable discovery is a means by which evidence obtained illegally can still be admitted against defendants in criminal cases. Unfortunately, the Court chose to adopt the doctrine without any of the safeguards necessary to insure that the deterrent

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impact of the exclusionary rule would be preserved, and in a form that is subject to and almost invites abuse.

This article warns of the danger to fundamental constitutional protections posed by the open-ended approach taken by the Supreme Court to the doctrine of inevitable discovery in *Nix v. Williams (Williams II).* It then recommends a means of applying the doctrine so as to accomplish its purpose of avoiding unwarranted exclusion of probative evidence without significantly diluting the impact of the exclusionary rule.

II. *Brewer v. Williams*\(^4\)

The disappearance of ten-year old Pamela Powers from the YMCA building in Des Moines, Iowa on Christmas Eve, 1968 set off a chain of events which culminated in two major and highly controversial Supreme Court decisions separated in time by seven years. In order to comprehend the rationale and approach of the Supreme Court to the doctrine of inevitable discovery, it is first necessary to summarize the known facts surrounding the death of Pamela Powers.

A short time after Pamela Powers’ disappearance, Robert Williams, an escaped mental patient residing at the YMCA, asked a 14 year old boy to help him load a large bundle wrapped in a blanket into his car. The boy later reported that extending from the bundle he had seen two legs that were “skinny and white.” The next day Robert Williams’ car was located in Davenport, a city 160 miles east of Des Moines. Shortly thereafter, articles of clothing which the police believed belonged to Pamela Powers and an army blanket, similar in appearance to the one used to wrap the bundle Williams had removed from the YMCA, were found at a rest stop on Interstate 80, approximately 60 miles east of Des Moines. These facts led police to suspect that Williams had murdered the Powers girl and disposed of her body somewhere between Des Moines and the rest stop where the articles of clothing and the blanket were found. The police then obtained an arrest warrant for Robert Williams and began a large scale search for the child’s body in the vicinity of the rest stop.\(^5\)

On December 26th, while this search was underway, Williams, after speaking with an attorney, surrendered himself to the police in

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5. 467 U.S. at 434-35.
Davenport. He was given his Miranda rights, charged with murder and arraigned before a judge. Arrangements were then made to transport Williams, accompanied by two detectives, back to Des Moines by car. An agreement was reached between the police and Williams' attorneys that no questioning of Williams would occur during the ride. Both Williams and Detective Leaming, who was to accompany him, were made aware of this agreement. On the car ride back to Des Moines, however, Detective Leaming delivered the now famous "Christian burial speech" to Williams, in which he told Williams of the need to locate the child's body before the Iowa winter snows covered it up and prevented the girl from getting a proper Christian burial. After some more discussion between the two, Williams eventually led Leaming to the site of the child's body.

Based largely on the above facts, Williams was convicted of murder in the first degree for the death of Pamela Powers. After his appeal was rejected by the Iowa Supreme Court, Williams sought Habeas Corpus relief in the United States District Court for the Southern District of Iowa. The District Court reversed his conviction, and this decision was affirmed by the United States Court of Appeals for the Eighth Circuit. The United States Supreme Court affirmed the Eighth Circuit and ordered that Williams be retried (Williams I). The Court found that the statement that Detective Leaming had obtained from Williams during the ride from Davenport to Des Moines violated Williams' right to counsel under the sixth amendment. Because Williams had been arraigned, the formal judicial process had already commenced, and he was fully protected by the sixth amendment. The Court determined that the speech Leaming made to Williams was a deliberate elicitation of information from Williams and therefore a violation of Williams' right to

6. Id. at 435-36.
7. Detective Leaming reportedly said the following to Williams:
   I want to give you something to think about while we're traveling down the road . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is . . . and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area [where the body is] on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered . . . .

Id. at 435.
counsel\textsuperscript{12} under the holding in \textit{Massiah v. United States}.\textsuperscript{13}

Readers of this opinion could not help but be drawn to two other parts of the Supreme Court's decision. One was a particularly bitter dissent by the Chief Justice beginning with: "The result in this case ought to be intolerable in any society which purports to call itself an organized society."\textsuperscript{14} It was this same Chief Justice who would later author the opinion in \textit{Williams II} that, in the end, avoided this "intolerable result" by applying the doctrine of inevitable discovery. The second item of note in \textit{Williams I}, not related directly to the sixth amendment issue at hand, was the hint contained in the footnote at the conclusion of the Court's opinion given to those who would ultimately determine the judicial fate of Robert Williams:

\begin{quote}
[While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been cited from Williams.\textsuperscript{15}]
\end{quote}

It was in fact the doctrine of inevitable discovery, alluded to in this footnote, which became the vehicle through which evidence obtained from the victim's body was admitted against Williams in his second trial.

III. Fruits of the Poisonous Tree Doctrine

In order to assess the worthiness of the doctrine of inevitable discovery and to understand the parameters within which it should operate, the doctrine needs to be analyzed in its proper context. Such an analysis necessarily includes a discussion of the purposes of the Exclusionary Rule, the fruits of the poisonous tree doctrine and the exceptions to this doctrine, among which is the doctrine of inevitable discovery.

The rule which excludes illegally obtained evidence from use by the prosecution in a criminal case has traditionally been justified in two ways. First, it is argued that the use of evidence obtained in

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 399. Additionally, the Court ruled that although Williams may have understood his right to counsel, the state was unable to demonstrate that he relinquished that right. \textit{Id.} at 404-05.
\item \textsuperscript{13} 377 U.S. 201 (1964).
\item \textsuperscript{14} 430 U.S. at 415 (Burger, C.J., dissenting).
\item \textsuperscript{15} \textit{Id.} at 407 n.12.
\end{itemize}
violation of the law by courts charged with enforcing that law would threaten the integrity of the judicial system itself. This concept, known as the principle of judicial integrity, has been viewed with increasing disfavor by the Supreme Court in recent years. Instead, it is the purported deterrent impact upon the police produced by suppressing illegally obtained evidence that is cited most often today as the justification of the exclusionary rule. This deterrent impact is intended not only for the offending officer, but for all officers who in the future might consider engaging in the same improper conduct.

Bearing in mind that deterrence is currently perceived to be the primary justification behind the exclusionary rule, it is important now to assess the extent to which the exclusionary rule is applied.

The exclusionary rule has been applied by the Supreme Court to what has been called secondary or derivative evidence as well as primary evidence. This means that whether the illegal conduct of the police officer leads directly or indirectly to the discovery of evidence, that evidence will be suppressed providing there is a causal link between the original illegality and the evidence sought to be used. For example: A is illegally arrested, confesses following this

16. Elkins v. United States, 364 U.S. 206, 222 (1960). After noting “the imperative of judicial integrity” which emerged from Elkins, the Court in Mapp v. Ohio, 367 U.S. 643, 659 (1961), wrote: “The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.” Id. at 659.

17. See United States v. Janis, 428 U.S. 433, 446 (1976) (wherein the Court, quoting in part from United States v. Calandra, 414 U.S. 338, 347 (1974) states: “The Court, however, has established that the ‘prime purpose’ of the rule, if not the sole one, is to deter future unlawful police conduct.” See also Stone v. Powell, 428 U.S. 465 (1976), wherein the Court went even further in minimizing the significance of the principle of judicial integrity: “While courts of course, must ever be concerned with preserving the integrity of the judicial process, this concern has a limited force as a justification for the exclusion of highly probative evidence.” Id. at 485.


21. See Wong Sun, 371 U.S. at 484; Nardone, 308 U.S. at 340; Silverthorne, 251 U.S. at 392. LaCount & Girese, *The Inevitable Discovery Rule: An Evolving Exception to the Constitutional Exclusionary Rule*, 40 ALB. L. REV. 483, 506-09 (1976). See generally 3 LAFAYE, supra note 19, § 11.4, at 612. The reason for the application of the exclusionary rule
illegal arrest and implicates B as the source of his narcotics. If the police enter B’s house, seize the narcotics and ultimately use them in a prosecution against A, the narcotics will be suppressed due to the fact that their discovery stems from the original illegality committed against A. Such derivative or secondary evidence has been called the “fruit of the poisonous tree.”22 The exclusion of such illegally obtained or derivative evidence will result whether the evidence stems from an illegal search or seizure under the fourth amendment23 or a statement taken in violation of the defendant’s right under either the fifth or sixth amendment.24

Because the exclusionary rule operates to prevent the prosecution from using probative evidence against defendants in criminal cases, and the perception among many that guilty people often go free because of this exclusion,25 the exclusionary rule has been the subject of much criticism.26 In an effort to ameliorate both the actual and the perceived impact of the exclusionary rule, the Supreme Court has limited its application. Specifically, where the Court has determined that the deterrent impact upon the police of applying the exclusionary rule in a specific situation is minimal, the Court has been reluctant to apply the rule.27 When the evidence at issue is de-
rivative, the Court has been particularly sensitive to the concern that the cost to society of applying the exclusionary rule exceeds the benefit achieved by the deterrent impact of the rule.\textsuperscript{28} As a result, the Court has fashioned several exceptions to the principle that evidence which is the "fruit of a poisonous tree" must be excluded.

In 1920, the Court created the independent source exception to the exclusionary rule.\textsuperscript{29} Stated simply, the independent source exception provides that when the discovery of information or evidence is achieved both by illegal means and through an independent legal source, the evidence will not be suppressed.\textsuperscript{30} This exception, according to the current Supreme Court, stems from the principle that the police should not be put in a worse position than they would have been in had they not committed the illegality.\textsuperscript{31} For example, in a situation where narcotics are seized after the police learn of their location both through information obtained from an illegal statement by a defendant and through information learned from a witness whom they discovered legally, disallowing the use of that narcotics at trial would be putting the police in a worse position than they would have been in had they not obtained the illegal statement from the defendant.

Nineteen years after outlining the independent source exception in \textit{Silverthorne v. United States},\textsuperscript{32} the Court identified another situation where the exclusionary rule should not be applied to derivative evidence. In \textit{Nardone v. United States},\textsuperscript{33} the Court held that evidence may be admissible even where the discovery is linked exclusively to a police illegality. The Court, in \textit{Nardone}, concluded that

\textsuperscript{28}Rawlings v. Kentucky, 448 U.S. 98, 106-10 (1980); United States v. Ceccolini, 435 U.S. 268, 279-80 (1978); Wong Sun v. United States, 371 U.S. 471, 491 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939). In determining that the defendant's confession was a "fruit" of his "poisonous tree" illegal arrest, the Court in Brown v. Illinois, 422 U.S. 590, 603-04 (1975), reiterated that the existence of a causal connection between the illegality and the derivative evidence was not enough by itself to warrant exclusion. Instead a matrix of factors would have to be employed on a case by case basis to see if application of the exclusionary rule was justified.

\textsuperscript{29}Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

\textsuperscript{30}Wong Sun, 371 U.S. at 485 (quoting Silverthorne, 251 U.S. at 392). The justification for the independent source exception was stated in Sutton v. United States, 267 F.2d 271 (4th Cir. 1959) as follows:

It is one thing to say that officers shall gain no advantage from violating the individual's rights; it is quite another to declare that such a violation shall put him beyond the law's reach even if his guilt can be proved by evidence that has been obtained lawfully.

\textit{Id.} at 272.

\textsuperscript{31}Nix v. Williams, 467 U.S. 431, 443 (1984) [hereinafter \textit{Williams II}].

\textsuperscript{32}251 U.S. 385 (1920).

\textsuperscript{33}308 U.S. 338 (1939).
where the discovery of evidence occurs under circumstances that suggest that the effect of the original illegality has become "attenuated" or weakened, the causal chain between the illegality and the discovery of the evidence may be deemed to have been broken. In such situations the evidence would no longer be considered "tainted" and would therefore be admissible against the defendant.

The Court had an opportunity to explain the application of this attenuation doctrine in 1968 in the case of Wong Sun v. United States. In Wong Sun the Supreme Court held that although verbal evidence can be the fruit of a poisonous tree and therefore suppressible, suppression will not result automatically, even when a causal connection can be shown to exist between the original illegality and the discovered evidence. Expressed differently, the Court determined that merely because the evidence in question would not have been discovered "but for" the illegality does not mean exclusion will automatically result. Instead, courts should look to "whether granting establishment of the primary illegality, the evidence to which instant objection has been made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the premium taint."

Following his illegal arrest, Wong Sun made a statement to the police that he sought to have suppressed as a product of his illegal arrest. The Court noted that because Wong Sun had been freed after arraignment and had returned voluntarily several days later to make his statement, "the connection between the arrest and statement 'had become so attenuated as to dissipate the taint.'" Specifically, Wong Sun's several days of freedom after his illegal arrest and other events preceding his giving of the statement to the police had so weakened the lingering effects of his illegal arrest that it was unreasonable to say that the confession resulted from an exploitation of the illegal arrest.

The third exception to the fruits of the poisonous tree doctrine has been applied by some state and federal courts for years but was never explicitly accepted by the Supreme Court until its 1984 decision in Nix v. Williams (Williams II). Known as the doctrine of

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34. Id. at 341.
36. Id. at 487-78.
37. Id. at 488 (quoting from MAGUIRE, EVIDENCE OF GUILT 221 (1959)).
38. 371 U.S. at 491.
39. Id.
inevitable discovery, this exception allows for the admission of evidence whose discovery derives from a police illegality, but which the police can show would likely have been discovered eventually by legitimate means. Therefore, although the challenged evidence is linked causally to an illegality and no attenuation has occurred, the police are given the opportunity to demonstrate hypothetically that the evidence would have been discovered by some legal means in the future had the illegality not occurred. In order to understand and assess the doctrine of inevitable discovery as outlined by the Supreme Court in Williams II, it is necessary to pick up the story of Robert Williams after the Supreme Court reversed his conviction in 1977.

IV. Supreme Court Acceptance of the Inevitable Discovery Doctrine (Williams II)

At Williams' second murder trial in 1977, the prosecution introduced evidence obtained from the body of Pamela Powers which was located as a direct result of the illegal statement obtained from Williams by Detective Leaming. The theory behind the trial court's decision to admit this evidence was that the body would have been discovered ultimately by a police search which was well in progress at the time Detective Leaming obtained his statement from Williams; in other words, the doctrine of inevitable discovery. In affirming Williams' second conviction, the Iowa Supreme Court approved the trial court's use of the doctrine of inevitable discovery to allow evidence derived from the body to be used at Williams' trial. Referring to the doctrine as "the hypothetical independent source" exception to the exclusionary rule, the Iowa Supreme Court concluded that the necessary elements embodied in this exception were met in the Williams case. These elements were: "1) that the police did not act in bad faith for the purpose of hastening the discovery of the evidence in question; and 2) that the evidence in question would have been discovered by a lawful means."

With respect to the first element of the doctrine, the Iowa Su-

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41. Maguire, How to Unpoison the Fruit — The Fourth Amendment and the Exclusionary Rule, 55 J. CRIM. L. & CRIMINOLOGY 307, 315-17 (1964). One of the first reported cases using the doctrine of inevitable discovery is Somer v. U.S., 138 F.2d 790, 792 (2d Cir. 1943).
43. Id. at 437.
44. Id. at 437-38.
46. Id. at 260.
Supreme Court concluded that because there was a substantial disagreement over the validity of Detective Learning's "interrogation" among judges well-versed in criminal procedure at every level of the appellate process, "it can't be said that the actions of the police were taken in bad faith."\(^{47}\) Regarding the second element of the doctrine, the Iowa Supreme Court concluded that by a preponderance of the evidence, the State had shown that even without the illegally obtained statement, the ongoing police search would have turned up the body of Pamela Powers before its condition had materially changed.\(^{48}\)

In 1981, Williams' request for a Writ of Habeas Corpus was denied by the United States District Court for the Southern District of Iowa.\(^{49}\) The District Court agreed with the Iowa Supreme Court that the doctrine of inevitable discovery had been correctly applied by the trial court in the case. Two years later, however, the United States Court of Appeals for the Eighth Circuit reversed the denial of the Writ.\(^{50}\) The eighth circuit accepted, arguendo, the Iowa Supreme Court's statement of the elements necessary for the prosecutorial use of the inevitable discovery doctrine but disagreed with the Iowa court's conclusion that the lack of bad faith requirement had been met in this case.\(^{51}\) Specifically, the eighth circuit rejected the Iowa Supreme Court's reliance on the debate among judges to demonstrate the lack of bad faith and instead focused on what it believed was the intent of Detective Learning when he obtained the statement from Williams. Because the Supreme Court had concluded in 1977 that Learning had "deliberately," "designedly," and "purposely" elicited incriminating statements from Williams, and Learning had not testified at the state suppression hearing regarding his state of mind in taking the statement from Williams, the prosecution had failed to meet its burden of showing that Learning's actions were taken without bad faith.\(^{52}\) Accordingly, the eighth circuit found it unnecessary to consider whether the state court finding regarding the likely discovery of the body through legal means was supported by the record or even whether the preponderance of evidence standard adopted by the state court was the appropriate

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47. \textit{Id.} at 260-61.
51. \textit{Id.} at 1159.
52. \textit{Id.} at 1170-73.
one. 53

Reversing the eighth circuit, the Supreme Court held in Williams II that there was indeed an exception to the exclusionary rule known as the doctrine of inevitable discovery, but that proper application of the doctrine did not depend on a showing of the lack of bad faith on the part of the police. 54 Therefore, the Court felt it unnecessary to enter the debate between the Iowa Supreme Court and the eighth circuit concerning whether Detective Learning’s "interrogation" of Williams was not only illegal but also conducted in bad faith. Instead, the Court ruled that where the state can show by a preponderance of the evidence that the evidence discovered as a result of a police illegality would likely have been found eventually through legal means, that evidence is admissible in the state’s case-in-chief. 55

Prior to the court’s holding in Williams II, there was debate among courts and commentators about the wisdom of such a “hypothetical independent source doctrine.” Proponents argued that society was being punished disproportionately when courts suppressed illegally obtained probative evidence that would inevitably have been discovered through legal means. 56 Opponents objected to the speculative nature of the doctrine and its likely effect of encouraging improper police shortcuts to the detriment of the exclusionary rule’s goal of deterring such behavior. 57 In Williams II, however, the Court

53. Id. at 1169.
55. Id. at 444.
57. 3 LAFAVE, supra note 19, at 623. See, e.g., United States v. Houlton, 525 F.2d 943 (5th Cir. 1976); United States v. Castellana, 488 F.2d 65 (5th Cir. 1974); Parker v. Estelle, 498 F.2d 625 (5th Cir. 1974). See also Note, The Inevitable Discovery Exception to the Constitutional Exclusionary Rule, 74 COLUM. L. REV. 88, 99-100 (1974); Pitler, "The Fruits of the Poisonous Tree" Revisited and Shepardized, 56 CALIF. L. REV. 579, (1968) [hereinafter Pitler] (wherein the author writes:

For the present, the exclusionary rule, designed to discourage illegal activity is useless if the police may unlawfully invade a man’s home, illegally seize evidence and then claim “we would have obtained it anyway” and that the exclusionary rule is not designed to make the “theoretical availability” of evidence an excuse for obtaining it illegally.
decided upon an application of the doctrine which was limited only by the likelihood of discovery. As to this one limitation, the Court imposed the lowest burden of proof conceivable. In defending its decision to apply the inevitable discovery doctrine in this form, the Court drew support from its prior decisions concerning derivative evidence and the fruits of the poisonous tree doctrine.

The Court correctly referred to its prior holdings in *Silverthorne v. United States* and *Wong Sun v. United States* for the proposition that evidence which is derived from a police illegality need not always be suppressed by the fruits of the poisonous tree doctrine. Specifically, the Court quoted from *Wong Sun* as follows:

> 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.

This paragraph shows the view of the *Wong Sun* Court that the existence of a causal connection between illegal police conduct and the discovery of evidence does not automatically require the suppression of that evidence. Instead, courts should look to whether the police exploited the illegality or recovered the evidence through other means that are sufficiently remote as to be "purged" of the illegality. The court in *Williams II*, however, went far beyond this interpretation of the above passage and discerned that the *Wong Sun* court "thus pointedly negated the kind of good faith requirement advanced by the Court of Appeals."
In adopting the inevitable discovery exception without a good faith prerequisite, the Court found support for its position in the independent source exception to the exclusionary rule's derivative evidence principle. The derivative evidence principle, according to the Court in *Williams II*, rests on the notion that society needs to deter police from gaining any benefit from their illegal conduct whether that benefit be direct or indirect. To accomplish that deterrent purpose, derivative evidence acquired as a result of an antecedent illegal police practice is not useable by the government even though that evidence is probative on the issue of the defendant's guilt. On the other hand, the Court observed, application of the independent source exception insures that the prosecution will be put "in no worse position" because of some earlier police error or misconduct. According to the Court, this principle of putting the police in the same position that they would have been in had the illegality not occurred achieves the proper balance between the competing societal interests of deterring police impropriety and having juries receive all probative evidence. Since, in its opinion, the inevitable discovery doctrine and independent source doctrines have a "functional similarity," the Court maintained that, as with the independent source doctrine, the "no worse off" principle should be applied when considering the breadth and the limitations of the inevitable discovery doctrine.

In a recent article, Professors Wasserstrom and Merten have taken issue with the Court's grafting of the "no worse off" principle onto the exclusionary rule. They note that in those cases which created and fleshed out the independent source rule, such as *Silverthorne*, the Court never relied on the "no worse off" justifica-

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63. *Id.* at 443.
64. *Id.* at 443-44.
tion, but instead emphasized that where there is an independent source which leads to the discovery of evidence, no exploitation of the illegality has in fact occurred. Further, if the “no worse off” rule is interpreted to mean what it seems to say, the Court is communicating to the police that there is no real price to be paid for illegal conduct no matter how flagrant or purposeful, and regardless of how seriously a specific constitutional right is affected, when another source of discovery exists. It is not difficult to see how this principle would materially diminish the deterrent impact of the exclusionary rule.

Even if one accepts the Court’s questionable grafting of the “no worse off” concept onto the independent source rule, the Court’s assertion that the “no worse off” concept would therefore automatically be applicable to the inevitable discovery doctrine is unpersuasive. Without analysis, the Court discerns a “functional similarity” between the independent source and the inevitable discovery doctrines which logically compels the application of the “no worse off” rule to the inevitable discovery doctrine. The “no worse off” rule then serves as a justification for the Court’s holding that the question of whether the police acted purposefully or flagrantly in committing their illegality is irrelevant to the issue of whether the inevitable discovery doctrine applies. A closer examination of the doctrine of inevitable discovery reveals that it is different from the independent source rule in a fundamental way and, in fact, is more properly compared to another exception to the exclusionary rule’s derivative evidence principle, attenuation. Once it is understood how the inevitable discovery doctrine is fundamentally similar to the attenuation exception, it then follows that, as with the attenuation doctrine, courts considering application of the inevitable discovery exception should assess the purposefulness and flagrance of the police misconduct.

66. Id. at 159.

67. Different constitutional rights are designed to safeguard different interests and, arguably, require the protection of the exclusionary rule in different ways. Thus deciding whether to apply the inevitable discovery doctrine to evidence obtained in violation of the sixth amendment may require a consideration of different factors than deciding its application in a fourth amendment case. Williams II, 467 U.S. at 452-57 (Stevens, J., concurring). See also, Wasserstrom & Mertens, supra note 65, at 175-78; Comment, Inevitable Discovery: the Hypothetical Independent Source Exception to the Exclusionary Rule, 5 Hofstra L. Rev. 137, 140-43 (1976).

68. Attenuation or “‘dissipation of the taint’ attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.” Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring).
As the Court conceded, the independent source exception is not applicable to the facts of *Nix v. Williams* since the sole source of the discovery of the Powers girl's body was the illegal statement obtained from Williams. While the independent search for the girl's body may have ultimately discovered the body, whether it actually would have is clearly a hypothetical question. Although the Court noted and then quickly passed over this distinction, it is an essential one in any exclusionary rule analysis.

When there is no causal link between the police illegality and the ultimate discovery of secondary evidence in question because the police use a source independent of the illegality to uncover the evidence, the exclusionary rule is *inapplicable.* When there is such a causal link, the derivative evidence principle of the exclusionary rule applies, but it then becomes necessary to determine whether the need to exclude the evidence is overcome by countervailing factors. Such a situation exists, for example, when the effect of an illegal police action upon the ultimate discovery of evidence is attenuated to such a degree that the deterrent purpose of the exclusionary rule would not require the suppression of the derivative evidence. Where this causal connection exists, courts typically focus on whether there has been an exploitation of the illegal police conduct in determining whether the evidence acquired should be excluded.

An examination of the existence and the degree of exploitation necessarily includes an assessment of the intent of the police officer and the degree of approbrium that should be attached to the police activity involved. Using the fourth amendment as his subject,

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69. *Williams II*, 467 U.S. at 443.
74. See United States v. Edmons, 432 F.2d 570 (2nd Cir. 1970). In *Edmons*, the court said: "the Government exploits an unlawful arrest when it obtains a conviction on the basis of the very evidence . . . which it hoped to obtain by its unconstitutional act." *Id.* at 584. See also United States v. Ceccolini, 435 U.S. at 279-80; Brown v. Illinois, 422 U.S. at 604; Michigan v. Tucker, 417 U.S. 433, 447 (1974); 3 LAFAVE *supra* note 19, at 673; Pitler, *supra* note
Judge Charles Moylan has explained the distinction between a situation in which a principle is inapplicable and one in which it may be deemed to have been satisfied.\textsuperscript{75} Primarily, this difference reflects a distinction between defining the limits of the principle on one hand and describing its values on another. Although the ultimate result of a finding that the fourth amendment is inapplicable is the same as a finding that the fourth amendment is satisfied (that is, the evidence is admissible), the reasoning which leads to this result is quite different. In Judge Moylan's words:

\begin{quote}
When the Fourth Amendment is satisfied, Constitutional liberty is vindicated. God is in his heaven and all is right with the world. Involved is a matrix of values including such fine things as warrants, oaths and affirmations, particularity of description, probable cause, exigency, good faith on the part of the police officer and the sanctity of thresholds . . . . When however the Fourth Amendment is inapplicable, good and evil have no relevance.\textsuperscript{76}
\end{quote}

Similarly, the independent source exception can be viewed as a situation in which the exclusionary rule is inapplicable because there is no causal connection between the illegality and discovery of the evidence.\textsuperscript{77} Both the attenuation and inevitable discovery doctrines, on the other hand, are examples of the exclusionary rule satisfied in that the illegal police conduct involved in each does lead to the discovery of the challenged evidence, but other factors relevant to the purposes behind the exclusionary rule may result in overcoming the need to suppress the evidence.\textsuperscript{78}

In its treatment of the attenuation doctrine, the Supreme Court has consistently acknowledged the importance of looking to the intent of the police officer and the nature of his illegal conduct.\textsuperscript{79} There are two reasons why the fact that an officer committed an illegality purposefully and in a flagrant manner would be relevant to

\textsuperscript{56} at 597.
\textsuperscript{75} Moylan, \textit{supra} note 71, at 75.
\textsuperscript{76} Id.
\textsuperscript{78} Regarding attenuation, see United States v. Ceccolini, 435 U.S. at 274-75; Brown v. Illinois, 422 U.S. at 609 (1975) (Powell, J., concurring); Commonwealth v. Benoit, 382 Mass. 210, 233-34, 415 N.E.2d 818, 822 (1981); Ruffin, \textit{supra} note 60, at 73; Comment, \textit{supra} note 65, at 147; Note, \textit{supra} note 71, at 1050.
any analysis of whether the doctrine of attenuation should be applied to the facts of a given case. First, the more flagrant and purposeful the police conduct is, the less likely it is that the impact of the conduct upon the defendant would be weakened. For example, in a situation in which the defendant challenges a confession that is obtained after an illegal arrest, the details surrounding that illegal arrest concerning the bad faith, purposefulness and the flagrancy of the police conduct would be important factors. The more outrageous the police conduct in effecting the illegal arrest, the more likely it is that the impact of that illegality would still be felt by the defendant at the time he makes his statement and, therefore, the less likely it is that the impact of the illegality has attenuated.

The second reason why courts and commentators have looked to the flagrancy and the purposefulness of police wrongdoing in attenuation cases is because such conduct impacts directly and significantly on the deterrent purpose of the exclusionary rule. In Brown v. Illinois, the Supreme Court considered the admissibility of a statement made following an illegal arrest and after the proper administration of the Miranda warnings. The Court noted that: "[i]f Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violations, the effect of the Exclusionary Rule would be substantially diluted." In holding that statement to be a fruit of the improper arrest, the Court in Brown relied to a significant extent on its conclusion that the intent of the officers in

80. See Brown v. Illinois, 442 U.S. at 604. The Brown Court referred to the purposefulness and the flagrancy of the police action as the "most important" factors in determining attenuation. See also, Brown, 442 U.S. at 611 (Powell, J., concurring); Bain & Kelly, Fruits of the Poisonous Tree: Recent Developments as Viewed Through Its Exceptions, 31 U. MIAMI L. REV. 615, 648 (1977). In United States v. Leon, 468 U.S. 897 (1984), the Court, after noting the need to assess the costs and deterrent benefits of applying the exclusionary rule, said: "Not surprisingly in view of this purpose, an assessment of the flagrancy of the police misconduct constitutes an important step in the process." Id. at 911.

81. See 3 LAFAVE supra note 19, at 653, 658-59; Comment, The Fourth Amendment and Tainted Confessions: Admissibility As A Policy Decision, 13 HOUS. L. REV. 753, 768-72 (1976); Note, supra note 72, at 1148-50; Note, supra note 71 at 1050. See also Wasserstrom & Mertens, supra note 65, at 155 n.465 (describing the holding in Taylor v. Alabama, 457 U.S. 687 (1982) as a reflection of the Supreme Court's recognition that application of the attenuation doctrine requires more than just an assessment of how much the taint has actually dissipated. Additionally the Court, in the author's opinion, must have placed significant weight on the fact that "the police succeeded in obtaining just what they sought to gain."). Once it is established that the police have purposely and flagrantly violated a suspects constitutional rights, the deterrent purpose of the exclusionary rule warrants suppression of the defendant's confession.

82. 422 U.S. 590 (1975).
83. Id. at 602.
effecting the arrest was to elicit the very statement at issue.\textsuperscript{84} Furthermore, as Justice Powell pointed out in his concurring opinion, where the illegal police conduct is flagrant, the need for the deterrence achieved by the application of the exclusionary rule is more acute.\textsuperscript{85}

In \textit{Taylor v. Alabama},\textsuperscript{86} both the five justice majority and the three justices who joined in Justice O'Connor's dissent agreed that the flagrancy and purposefulness of the police conduct is an important fact in determining whether the defendant's statement was a fruit of her illegal arrest.\textsuperscript{87} The issue in \textit{United States v. Ceccolini}\textsuperscript{88} was whether the testimony of a witness discovered through an illegal search could be said to be sufficiently unconnected to the illegal search so that the attenuation exception would apply. After discussing the difference between live witnesses and inanimate objects for purposes of applying the fruits of the poisonous tree doctrine, the Court noted that the officer's illegal search was committed without the intent to find such a witness. The Court concluded that absent such an intent there would be no deterrent impact in suppressing the witness' testimony.\textsuperscript{89}

When the prosecution seeks to have evidence admitted through the doctrine of inevitable discovery, it is understood that, as with evidence sought to be introduced through the attenuation exception, the discovery of the evidence in question was derived in fact from the knowledge gained through illegal police activity.\textsuperscript{90} Therefore, as with the attenuation doctrine, and unlike the independent source rule, consideration of the inevitable discovery doctrine presumes that the exclusionary rule is applicable. If evidence is ultimately admitted based on the inevitable discovery exception, again as with attenuation and unlike the independent source rule, the exclusionary rule, although applicable, has been satisfied. In assessing whether the exclusionary rule has been satisfied, courts should consider all of the relevant purposes, values, principles and balancing factors that accompany the rule and then apply it to the facts of the case at hand.\textsuperscript{91}

\textsuperscript{84} \textit{Id.} at 604.
\textsuperscript{85} \textit{Id.} at 611 (Powell, J., concurring).
\textsuperscript{86} 457 U.S. 687 (1982).
\textsuperscript{87} \textit{Id.} at 693. \textit{See also}, Rawlings v. Kentucky, 448 U.S. 98, 99-100 (1980).
\textsuperscript{88} 435 U.S. 268 (1978).
\textsuperscript{89} \textit{Id.} at 279-80. \textit{See also}, Dunaway v. New York, 442 U.S. 200 (1979). In Dunaway, the Court noted that where a close causal connection exists between an illegal detention and subsequent confession, there is a greater need for the deterrent protection of the exclusionary rule. \textit{Id.} at 218.
\textsuperscript{90} \textit{Williams II} 467 U.S. at 443.
\textsuperscript{91} \textit{See} Moylan, \textit{supra} note 71, at 75.
Unfortunately, in adopting its version of the inevitable discovery doctrine in *Williams II*, the Court concluded that any time the challenged evidence would more likely than not have been discovered even without the illegal police conduct, then "the deterrence rationale has so little basis that the evidence should be received."\(^92\) For those who might doubt this assertion, the Court continued, "anything less would reject logic, experience and common sense."\(^93\)

The Court's conclusion that there is never a benefit to be derived from excluding illegally obtained evidence once the prosecution can show the likelihood of ultimate discovery through lawful means is a most significant one. The result of such a conclusion is that courts will essentially ignore illegal police activity that may be both purposeful and flagrant. In other words, if the prosecutor can convince the judge that evidence more likely than not would have been discovered even without the illegal police conduct, it is immaterial to the admissibility of that evidence that the police knowingly violated the defendant's rights in order to uncover that very evidence.

In refusing to require courts to do a case by case assessment of the need to deter (as demonstrated by the purposefulness and flagrancy of the police misconduct) before applying the inevitable discovery doctrine, the Court not only rejects comparison to attenuation cases but additionally ignores a significant aspect of recent exclusionary rule cases.\(^94\) As the concept of deterrence has become the prime justification for the exclusionary rule,\(^95\) the Court has consistently examined the nature of the wrong and the purposefulness of police misconduct.\(^96\) Only recently the Court ruled that, at least in

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\(^{92}\) *Williams II* 467 U.S. at 444.

\(^{93}\) *Id.*


warrant cases, the determining factor in the decision whether to exclude evidence obtained in violation of the fourth amendment is whether the police acted in good faith. In other words, evidence will be suppressed if the police purposely avoided the requirements of the fourth amendment in obtaining a warrant or should have known that the warrant that they acted upon was in fact deficient.

Given the Supreme Court’s inclination to look at both the purposefulness and the flagrancy of police illegality in exclusionary rule decisions, and the significance of these two factors in accomplishing the deterrent purpose of the exclusionary rule, it is important to analyze the Court’s justification for eliminating consideration of these factors with respect to application of the inevitable discovery doctrine. In *Williams II* the Court specifically rejected the eighth circuit’s conclusion that: “[i]f an absence of bad faith requirement were not imposed, 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.” The Court reasoned that an officer who has the opportunity to acquire evidence illegally will seldom be able to determine at that time whether the evidence sought would be discovered inevitably by legal means. Since deterrence is achieved only when an officer is aware of the consequences of his illegal conduct and in inevitable discovery factual scenarios he cannot so calculate, the Court concluded that no deterrent benefit is achieved by suppressing evidence that likely would have been discovered in any event. If, however, the officer does believe that the evidence will likely be discovered by legal means, he has no incentive to shortcut the legal method, presumably because of the danger that suppression would result. In the Court’s view, the fear of departmental discipline and the possibility of incurring civil liability also

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note 67 at 142-3; Comment, *supra* note 81 at 753, 768-72; Note, *supra* note 71 at 148-51.


98. See id.


100. *Williams II* 467 U.S. at 445-46.

101. One might just as reasonably assert that when an officer believes evidence he is thinking of obtaining illegally will ultimately be discovered by legal means, he may as well use the illegal shortcut because the evidence will be admitted in any event under the Court’s test. When he believes the evidence will not be legally discovered ultimately, he still may as well use the illegal shortcut because he has a chance to later convince a judge of a hypothetical legal discovery, and, in any event, he loses nothing by illegally obtaining evidence he could not otherwise obtain. Wasserstrom & Mertens, *supra* note 65, at 167-71; Comment, *Leading Cases of the 1983 Supreme Court Term*, 98 HARV. L. REV. 87, 125-26 (1984); Note, *supra* note 71, at 1143.
DOCTRINE OF INEVITABLE DISCOVERY

discourages the police officer from using illegal shortcuts.\textsuperscript{102} This explanation of why it is irrelevant to consider the possible bad faith of a police officer in applying the inevitable discovery doctrine reflects a skewed view of both the need and the means necessary to discourage purposeful police misconduct as well as a surprising naivete about law enforcement in general.

As the Court noted, an officer contemplating illegal conduct to acquire evidence will likely be unable to judge whether that same evidence would "inevitably" be discovered by legal means. This assertion, while possibly valid, is largely irrelevant because of the Court's misleading use of the word "inevitable." The Court's assertion makes sense only if the word inevitable is used in its dictionary sense, that is, "incapable of being avoided."\textsuperscript{103} Later, within the Williams II opinion, we learn that the Court's use of the inevitable discovery doctrine really means that an officer need show only the likelihood of discovery by a preponderance of the evidence.\textsuperscript{104} In other words, when contemplating the use of an illegal shortcut to obtain evidence, an officer will know that illegally seized evidence can be saved if a judge can be persuaded that it was more likely than not that the evidence would have been discovered eventually through other means. While an officer rarely may be in a position to assess whether a piece of evidence will "inevitably" be discovered, it is far more likely that he will be able to form a reasonable opinion about whether the evidence "probably" will be discovered. If an officer concludes that evidence he is contemplating obtaining illegally would likely be later discovered legally, and acting on this assumption he chooses the illegal shortcut to obtain the evidence, a decision to admit such evidence would clearly weaken the deterrent purpose of the exclusionary rule.\textsuperscript{105}

As the Court has repeatedly asserted, the exclusionary rule best serves its goals when it is applied in situations of bad faith misconduct by the police.\textsuperscript{106} The more purposeful the misconduct, the

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  \item \textsuperscript{102} Williams II 467 U.S. at 444.
  \item \textsuperscript{103} The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 672 (1969).
  \item \textsuperscript{104} Williams II, 467 U.S. at 444. The Court still requires a showing of "inevitability" but this "inevitability" must be shown only by a preponderance of the evidence, thus making use of the word "inevitable" superfluous if not misleading.
  \item \textsuperscript{105} See infra notes 179-89 and accompanying text.
  \item \textsuperscript{106} In Michigan v. Tucker, 417 U.S. 433, (1974), the Court stated:
    \begin{quote}
    The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the
    \end{quote}
\end{itemize}
greater the need to deter and the more effective is the lesson for those contemplating future illegalities.  

Conversely, allowing the use of evidence which is discovered through a deliberate violation of the law communicates to the police the possibility, if not the likelihood, of benefiting from their own purposeful wrongdoing.  

Quite often the pressure upon police to conclude an investigation is intense, and the temptation to act without obeying the rules is great. The doctrine of inevitable discovery, when applied without any regard for the purposefulness or flagrant nature of the police misconduct, adds immeasurably to that temptation. There may be, therefore, contrary to the Court's assertion, much to be gained in a police officer's mind from acting illegally when he believes the evidence is likely to be eventually discovered by legal means. When there is in the police officer's mind a likelihood of ultimate discovery, he can save time and avoid what may be viewed as needless effort by choosing an illegal shortcut.

The Court's response to this contention is to take note of "significant disincentives," other than the exclusionary rule, that act as a deterrence to police misconduct. As examples, the Court cites departmental disciplinary proceedings and the possibility of civil liability. In fact, neither of these "significant disincentives" has ever been shown to act as a meaningful deterrent to police illegality. Those constitutional violations which cause no physical injury are rarely the cause for police discipline. Civil suits as a solution to police actions in violation of the exclusionary rule have been largely ineffective where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.  


107. Brown, 422 U.S. at 611 (Powell, J., concurring); 3 LAFAVE supra note 19, at 616; Israel, Criminal Procedure: The Burger Court and The Legacy of the Warren Court, 75 Mich. L. Rev. 1319, 1413-14 (1977); Pitler, supra note 57 at 597; Comment, supra note 67, at 142-43; Comment, supra note 81, at 772; Note, Inevitable Discovery in New York: Further Limitation of the Exclusionary Rule, 43 Alb. L. Rev. 145, 159 (1978); Note, supra note 71, at 1150.  

108. 3 LAFAVE supra note 19, at 658; Pitler, supra note 57, at 597, 630; Note, supra note 56, at 99-100.  

109. Comment, supra note 10, at 126; Note, supra note 11, at 1143; Note, supra note 57, at 99. In Professor LaFave's words, "If the rule [Inevitable Discovery] were applied when such a shortcut 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." 3 LAFAVE, supra note 19, at 624.  

110. Williams II, 467 U.S. at 446.  

unsuccessful because of the unlikelihood of actual and significant recovery by plaintiffs. Imagine, for example, Robert Williams appearing before a jury of Iowans and requesting money damages against Detective Leaming and the State of Iowa for violating Williams' sixth amendment rights by tricking him into revealing where he discarded the lifeless body of Pamela Powers. The vast majority of criminal offenders as plaintiffs in such cases are unlikely to draw sympathy or recover significant damages from police defendants. Accordingly, attorneys are unlikely to take such cases on a contingency basis, and hence, it is unsurprising that so few of these cases have actually gone to trial.

In those situations where the officer believes it is unlikely that the evidence will ever be discovered except for his illegal methods, a thinking officer might believe he has nothing to lose by undertaking such illegal conduct and hoping he can later convince a sympathetic judge of the hypothetical likelihood of legal discovery. Thus, contrary to the Court's assertion, after Williams II, a police officer may contemplate an illegal method for acquiring evidence, and quite reasonably conclude that the illegal method is a worthwhile means of pursuit despite the fact that the evidence would most likely not have been discovered through legal means.

It appears that under Williams II, the only curb on the use of the doctrine of inevitable discovery is the requirement that the police show the probability of discovery by legal means. In the Court's view, to exclude evidence that would likely have been discovered eventually through legal means results in a major weakening of the truth finding process without achieving any concomitant benefit in
deterrence. Such a factorless interpretation of the doctrine can cause grave harm to certain fundamental constitutional protections. Perhaps most obvious among these protections threatened by the Court's broad application of the inevitable discovery doctrine is the warrant requirement of the fourth amendment.\footnote{116. The Warrant Clause of the fourth amendment reads, "and no Warrant 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.}

Taken literally, the Court's opinion in Williams II would permit the use of evidence seized in a house that the police have probable cause to search but for which they deliberately postpone seeking a warrant. The police could argue that since a warrant would have been obtained had one been sought (as probable cause to search was present), and since the evidence would have been discovered anyway, it should be admissible under the inevitable discovery doctrine. In Segura v. United States,\footnote{117. 468 U.S. 796 (1984).} the Court applied similar reasoning in its use of the independent source doctrine to save certain evidence seized after a warrantless entry into a house.\footnote{118. In Segura, the Court was faced with a warrantless entry into the defendant's house effected in order to "secure" the house and avoid the destruction or removal of evidence. As soon as possible, a warrant would have been obtained and a full search of the premises conducted. During the entry into the house and a security check that was conducted shortly thereafter, contraband was observed in plain view. Id. at 800-01. Some 19 hours after the initial entry, the police obtained a proper search warrant and conducted a full search of the apartment. Cocaine, a revolver, and $150,000 in cash were among the items seized during the warrant-based search. Id. at 801. The Supreme Court did not address the lower court's decision to suppress the evidence observed during the initial entry and security check, as the product of an illegal entry. The Court focused its attention instead on the evidence seized pursuant to the search warrant, evidence alleged by the defendant similarly to be the "fruit" of the illegal entry. Id. at 813. The Court held that this evidence was obtained not during the initial entry and possession of the home but instead during the warrant-based search. As the warrant authorizing the search was based on information entirely independent of that acquired during the illegal entry and occupation of the apartment, the independent source exception allows for the admissibility of the evidence. In so holding, the Court specifically rejected the contention of the dissenting justices that given the possibility of removal or destruction of the evidence by the defendant's cohorts before the warrant was obtained, the seizure of the challenged evidence was dependent on the illegal entry and continued possession of the apartment. Thus, according to the dissent, the independent source exception was inapplicable. Id. at 831-36 (Stevens, J., dissenting). The Court's response was to label this possibility of destruction or removal as "pure speculation." Id. at 816.}

Both state and federal courts have come to different conclusions as to whether evidence seized without a warrant should be admitted under the inevi-\footnote{119. See infra notes 174-78 and accompanying text.}
Doctrine of Inevitable Discovery

Significantly, post-Williams II cases admitting such evidence have taken a view of the inevitable discovery doctrine similar to that proposed by the Court in Williams II; since ultimately the evidence would likely have been discovered through legal means, the police should not be unduly punished for their failure to obtain a warrant. The danger of such thinking is that it reflects nothing less than a direct attack upon the principles behind the warrant requirement of the fourth amendment.

The purpose of the warrant requirement of the fourth amendment is to insure that magistrates will be interposed between the forces of government and the individual suspect. These magistrates are charged with the responsibility of forming their own opinions as to whether probable cause exists prior to the time that the


121. See, e.g., United States v. Silvestri, 787 F.2d 736 (5th Cir. 1986); State v. Butler, 676 S.W.2d 809, 813 (Mo. 1984). See also United States v. Cherry, 759 F.2d 1196 (5th Cir. 1985) (noting the significance of the "no worse off" principle to the Williams II Court's approach to inevitable discovery, yet warning that application of such a principle may cause irreparable damage to the exclusionary rule). Id. at 1203. See generally, United States v. Whitehorn, No. 86-5524 Slip op. at ___ (4th Cir. 1987); United States v. Merriweather, 777 F.2d 503, 506 (9th Cir. 1985); Krukov v. State, 702 P.2d 664, 666 n.2 (Alaska Ct. App. 1985).

122. McDonald v. United States, 335 U.S. 451, 455-56 (1964). In McDonald, the Court stated:

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

Id. at 455-56. See also J. HALL, SEARCH & SEIZURE 178-80 (1982).
government is permitted to intrude into those areas protected by the fourth amendment. Post hoc judicial determinations of probable cause in situations where warrants are clearly required, result in an abandonment of the magistrate's role as a buffer between the state and its citizens. Applying the inevitable discovery doctrine to warrant avoidance situations would, as a matter of course, permit the police to enter, search, and seize based on probable cause alone since they can demonstrate later that a warrant could have been obtained. There would be no reason for the police to engage in what is widely perceived as the burdensome requirement of obtaining a warrant.

Under such an approach, if there is not sufficient evidence to constitute probable cause, no warrant would have been issued and nothing is lost. If there is probable cause, police can act without a warrant and come back later and show that had they taken the time and the effort to obtain a warrant, the evidence would similarly have been discovered. Segura makes this post hoc determination easier by rejecting the defendant's claim that the evidence might have changed in form or been relocated in the time it would have taken the police to obtain a warrant. A literal reading of Williams II, especially with regard to its concern for insuring that the police be left in a position no worse off than they would have been absent their illegality, would seem to compel the admission of such evidence.

Because Williams II does not deal directly with a warrant situation, the door is open to interpret the inevitable discovery doctrine in a way that does not have this detrimental impact on the warrant requirement of the fourth amendment. For example, courts could require for application of the doctrine that some effort to obtain the warrant be under way at the time the police illegally entered the house in question and seized the evidence. Such a limitation of the doctrine would be consistent with the factual situations in Williams II, where the search for the girl's body was underway at the time


124. See, e.g., R. Van Duizerd. H. Sullon & C. Carler, The Search Warrant Process: Preconceptions, Perceptions, Practices, (National Center for State Courts, 1984) (concluding that "the plain fact of the matter is that many police officers perceive the warrant requirement as inhibiting the effective performance of their duty"). Id. at 77; J. Skolnick, Justice Without Trial, 228 (2d ed. 1966).

Detective Learning illegally learned of its whereabouts, and in Segura, where certain officers had instituted attempts to obtain a warrant when their colleagues entered Segura's apartment. Some courts and commentators have adopted this approach to the doctrine of inevitable discovery; they maintain that the doctrine should be applied only where there is already in existence at the time of the illegal discovery of evidence a demonstrable process at work which would likely have produced the same evidence.

Others, including the attorney who represented the state of Iowa in Williams II, have suggested that in order for the doctrine of inevitable discovery to be applied without the additional requirement of looking to the intent of the police, the government should have to show that the hypothetical legal discovery of the evidence would have occurred through an investigation entirely independent of the illegal discovery. Thus, where there is a race to the evidence between an investigation involving illegal police methods and an independent legal search, the fact that the illegal actions actually led to the discovery of the evidence would not result in its suppression if it can be shown that the lawful investigation would likely have uncovered the evidence eventually. Again, application of this limited form of the inevitable discovery doctrine would be consistent with the result in Williams II since the systematic search that the Court concluded would have eventually led to the body of Pamela Powers.

126. Williams II, 467 U.S. at 448-49.
128. See, e.g., United States v. Cherry, 759 F.2d 1196 (5th Cir. 1985). In Cherry, the Court said:

[when the police have not been in active pursuit of an alternative line of investigation that is at a minimum supportable by leads, the general application of the inevitable discovery exception would greatly encourage the police to engage in illegal conduct because (1) the police would usually be less certain that the discovery of the evidence is 'inevitable' in the absence of illegal conduct and (2) the danger that the evidence illegally obtained may be inadmissible would be reduced.

Id. at 1204-05. See also United States v. Amuny, 767 F.2d 1128-29 (5th Cir. 1985); United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984); United States v. Brookins, 614 F.2d 1037, 1042 (5th Cir. 1980); United States v. Levasseur, 620 F. Supp. 624, 631-32 (E.D.N.Y. 1985); Douglas-Bey v. United States, 490 A.2d 1137, 1139 (D.C. 1985); State v. Holman, 109 Idaho 382, 391-92, 707 P.2d 493, 502-03 (1985); Appel, The Inevitable Discovery Exception to the Exclusionary Rule, 21 CRIM. L. BULL. 1101, 11, 12-13 (1985); Note, supra note 71, at 1060, 1063 and cases cited therein. Other courts have not required that an independent lawful investigation be in progress at the time the evidence is illegally obtained. See, e.g., Bonuchi v. Wyrick, No. 83-0877 slip op. at ____ (W.D. Mo. Jul. 18, 1985); United States v. Silvestri, 787 F.2d 736, 744-46 (1st Cir. 1986); State v. Miller, 300 Or. 203, 293-94, 709 P.2d 225, 242-43 (1985) (specifically interpreting Williams II as not requiring that the lawful investigation already be in progress).

130. Id.
was conducted independent of Detective Learning’s interaction with Williams. 131

Under this theory, evidence which ultimately would have been discovered legally through the same process that in fact led to the illegal discovery of the evidence is characterized as “dependent” and is treated differently in examining its admissibility. In such situations, the purpose for the police offering a hypothetical independent source of discovery would only be to avoid suffering the consequences of their illegal conduct. In fact, they then would benefit from their illegal conduct. Before the court is asked to cure the illegality and reconstruct the investigation along hypothetical legal lines, this theory requires a close examination of the need for deterrence in such situations. Specifically, factors such as the bad faith of the police officer and the flagrant nature of the illegality are relevant in determining whether the exclusionary rule requires the suppression of evidence so discovered. 132

Under this approach to inevitable discovery, a house search where probable cause was present but no warrant obtained would be treated in a different manner than the investigation in the Williams II case. Since the hypothetical legal discovery of the evidence of this warrant avoidance situation would be “dependent,” before the inevitable discovery doctrine were applied in such a situation, a close examination of the officer’s motivation would ensue. If a police officer was found to have acted deliberately to avoid the warrant requirement, the deterrence based exclusionary rule would presumably require suppression of the evidence. Although as previously mentioned, the Court’s opinion in Williams II would survive such an application of the inevitable discovery doctrine, the Segura rationale might have to be changed. 133

131. Id. at 114-18.
132. Id. See generally Note, supra note 71, at 1055-57.
133. In Williams II the search for the girl’s body was being conducted entirely independent of Detective Learning’s questioning of Williams; whereas in Segura, the illegal entry and continued possession of the apartment which led to the police’s gaining custody of the evidence likely would be viewed as part of the same line of investigation that resulted in the seizure of the evidence pursuant to a warrant (and therefore “dependent”). See Segura 468 U.S. at 799-802. Therefore under Appel’s theory, the Williams II Court was correct in looking only to the likelihood of discovery, whereas the Segura Court should have assessed the motivation or bad faith of the officers as well before denying application of the exclusionary rule. Appel, supra note 128, at 122-23.

The single reference to the “good faith” of the officers in Segura occurs in a portion of Chief Justice Burger’s opinion, joined only by Justice O’Connor, which asserts that the original entry and continued possession of the apartment was justified. The reference to the apparent “good faith” of the officers is made to overcome an argument that the officers’ remaining without a warrant in the apartment for 19 hours made the seizure unreasonable. Segura, 468
Both of these aforementioned limitations on the inevitable discovery doctrine maintain the key features of the doctrine while providing some check on the doctrine's probable result of reducing the deterrent impact of the exclusionary rule. Unfortunately, the Court's reasoning in *Williams II* seems to preclude either of these more limited approaches to the inevitable discovery doctrine. If, as the Court asserts, the inevitable discovery doctrine is conceptually similar to the independent source doctrine and the latter doctrine compels the police to be placed in a position no worse off than they would have been but for the illegality, then the only requirement for application of the doctrine in any circumstance would be the likelihood of discovery by some form of legal means. Although the existence of an ongoing independent legal investigation presumably increases the likelihood of discovery, it is by no means necessary that an investigation be either ongoing or independent for one to conclude that the discovery through legal means more likely than not would have occurred. Nothing in the *Williams II* opinion suggests adoption of this dependent/independent approach.

Returning to the warrant avoidance situation, suppose that the police deliberately decide not to seek a warrant from a magistrate because they do not wish to undertake the task of locating the magistrate or drafting an affidavit or because they do not wish to run the risk of being denied their warrant or granted a warrant which limits the search in some way. Instead, the police deliberately and knowingly violate the warrant requirement of the fourth amendment and conduct a warrantless search. At a suppression hearing held after the evidence is uncovered, the government is able to demonstrate that when the police acted, they in fact possessed the requisite probable cause and would most likely have been granted a warrant had one been sought. If the judge suppressed the evidence, the police would be put in a position worse off than they would have been had they

U.S. at 813-14. No such reference is included in the portion of the majority opinion dealing with the "fruits of the poisonous tree" issue.

134. For a discussion of the "no worse off" principle and *Williams II*, see infra note 156.

135. See supra note 128 for application of the inevitable discovery doctrine after *Williams II* for instances in which no lawful line of investigation is underway at the time of the discovery of the evidence through illegal means. At one point in the *Williams II* opinion, the Court stated that "[i]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment . . . ." 467 U.S. at 444 n.5. It is not inconceivable that the Court, relying on this note, could someday require that in order to take advantage of the inevitable discovery doctrine, the prosecution must demonstrate a lawful investigation already in progress. See, e.g., United States v. Lewis, 486 A.2d 729, 735-36 (D.C. 1985)) (interpreting the above quoted footnote).
not proceeded illegally. Such a decision, therefore, could be seen as conflicting with the rationale of the *Williams II* opinion. Under a strict reading of the *Williams II* decision, such warrantless search situations would almost always fall within the bounds of the inevitable discovery doctrine.

In those situations in which the police are able to demonstrate the existence of some probable cause, they can persuasively argue that had they used legal methods (sought a search warrant) they inevitably would have discovered the evidence. The Court's holding in *Segura*, which rejects the defense argument that the evidence could have been moved or altered in the time it took to get a warrant, makes successful use of the inevitable discovery doctrine in illegal warrantless search situations even more likely.

Therefore, it is reasonable to conclude that an application of the inevitable discovery doctrine, which requires only a showing of likelihood of discovery, would largely remove any incentive for police officers to obtain warrants.

V. Applications of the Inevitable Discovery Doctrine

The open ended approach taken by the Supreme Court in *Williams II* has understandably led to non-uniform application of the inevitable discovery doctrine by different jurisdictions. For exam-

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136. See United States *v.* Whitehorn, No. 86-5524 slip op. at ____ (4th Cir. 1987); United States *v.* Silvestri, 787 F.2d 736, 745-46 (1st Cir. 1986); United States *v.* Merríweather, 777 F.2d 503, 505-06 (9th Cir. 1985); United States *v.* Levasseur, 620 F. Supp. 624, 631-32 (E.D.N.Y. 1985); Krukoff *v.* State, 702 P.2d 664, 666 n.2 (Alaska Ct. App. 1985); State *v.* Butler, 676 S.W.2d 809, 813 (Mo. 1984).


138. United States *v.* Cherry, 759 F.2d 1196, 1204 (5th Cir. 1985) (lawful investigation already ongoing when evidence illegally obtained); Bonuchi *v.* Wyrick, No. 83-0877, slip op. at ____ (W.D. Mo. Jul. 18, 1985) (doctrine applied although no lawful investigation in progress); United States *v.* Satterfield, 743 F.2d 827, 846 (11th Cir. 1984) (requiring that lawful means of discovery were possessed and were being pursued prior to illegal obtaining of evidence); Douglas-Bey *v.* United States, 490 A.2d 1137, 1139 n.6 (D.C. 1985) (requiring commencement of lawful process prior to illegal discovery of evidence); United States *v.* Lewis, 486 A.2d 729, 736 (D.C. 1985) (interpreting *Williams II* as requiring a showing of "inevitability" of discovery different from the burden of proof by preponderance of evidence); State *v.* Holman, 109 Idaho 382, 392, 707 P.2d 493, 502-03 (1985) ("narrow" application of doctrine in *Williams II* requiring investigation be in process); State *v.* Raj, 368 N.W.2d 14, 16 (Minn. Ct. App. 1985) (relying on multifactorial approach including purpose and flagrancy of misconduct; factors court viewed as surviving *Williams II*); State *v.* Miller, 300 Or. 203, 293-94, 709 P.2d 225, 242-43 (1985) (requiring that proper procedures "would have been utilized" and interpreting *Williams II* as not requiring that the lawful investigation be underway at the time of the illegal discovery); State *v.* Washington, 120 Wis.2d 654, 358 N.W.2d 304, 310 (1984) (appearing to rely on "no worse off" concept in applying doctrine).

With respect to using the doctrine to overcome the warrant requirement, some courts after *Williams II* have refused to apply the doctrine. See *People v.* Young, 159 Cal. App. 3d 138, ____ , 205 Cal. Rptr. 402, 410 (Cal. Ct. App. 1984); *People v.* Schoondermark, 717 P.2d 342.
ple, the fear expressed by some commentators, and by judges in some cases decided before *Williams II*, concerning the danger to the warrant requirement of an unlimited inevitable discovery doctrine\(^{139}\) has already been realized. In *State v. Butler*,\(^ {140}\) after quoting at length from *Williams II* and specifically noting the significance of the "no worse off" principle and the absence of non-bad faith requirement, the Supreme Court of Missouri allowed the prosecution to overcome the warrant requirement by use of this doctrine. In that case, the court ruled that although the police violated the defendant's Miranda rights in obtaining information concerning where in the defendant's house evidence might be recovered and then seized and searched the house without a warrant, it would be appropriate to apply the inevitable discovery doctrine because the police could


139. In *Griffin*, the Court said:

The assertion by police (after an illegal entry and after finding evidence of crime) that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such a mission would, as a practical matter, be beyond judicial review. Any other view would tend in actual practice to e


140. 676 S.W.2d 809 (Mo. 1984).
demonstrate probable cause through other means and could have obtained a warrant which would have led to discovery of the evidence in any event.\textsuperscript{141}

In \textit{U.S. v. Levasseur},\textsuperscript{142} a federal district court held that the search of a footlocker was permissible because agents were in the process of preparing an affidavit which would have led to a warrant authorizing the search. Thus, the fact that the warrant requirement was avoided in this case was not deemed to be fatal. In \textit{State v. Miller},\textsuperscript{143} the police learned of the whereabouts of a dead body from the defendant after violating his Miranda rights in a manner similar to the violation that occurred in \textit{Edwards v. Arizona}.\textsuperscript{144} Unlike \textit{Williams II}, the body was located in the defendant's hotel room, an area protected by the warrant clause of the fourth amendment. Concluding that the hotel maid would have found the body in 48 to 56 hours in relatively the same condition in which it was actually discovered, the court employed the inevitable discovery doctrine to excuse the officer's failure to obtain a search warrant.\textsuperscript{145}

From the perspective of inflicting the most damage to the warrant requirement, the most dangerous use of the inevitable discovery doctrine is its application to situations in which the evidence would not have been discovered by legal means independent of the illegal warrantless entry. Suppose that possessed with probable cause, the police enter a house without bothering to obtain a search warrant. Later they argue that had they sought a warrant they would have obtained one and inevitably discovered the evidence in question. This methodology requires, in essence, a judicial reconstruction of the police investigation incorporating the necessary legal prerequisite of obtaining a warrant.\textsuperscript{146} Understandably, prior to \textit{Williams II}, some courts were most reluctant to apply the inevitable discovery doctrine in such a manner.\textsuperscript{147} For example, in \textit{Commonwealth v. Benoit},\textsuperscript{148} the Massachusetts Supreme Judicial Court refused to apply the inevitable discovery doctrine "where its effect would be to read out of the Constitution the requirement that the police followed certain protec-

\textsuperscript{141} Id. at 813.
\textsuperscript{143} 300 Or. 203, 709 P.2d 225 (1985).
\textsuperscript{144} 451 U.S. 477 (1981).
\textsuperscript{145} 300 Or. at 293-94, 709 P.2d at 242-43.
\textsuperscript{146} Appel, \textit{supra} note 128, at 115.
tive procedures — in this case the Warrant Requirement of the 4th Amendment.”149 As stated previously, the “no worse off” principle accepted by the Supreme Court in Williams II could serve as the philosophical basis for just such a defacto elimination of the warrant requirement.

In attempting to discern how the inevitable discovery doctrine will be applied by courts in the post-Williams II world, it is instructive to look at warrant avoidance situations where the evidence could not have been legally acquired without a search warrant. In U.S. v. Satterfield,150 a warrantless search of the defendant’s house, subsequent to his arrest, turned up a gun that the prosecution wished to introduce into evidence. After the discovery of the gun, the police obtained a proper search warrant based on other information and claimed the gun would have been discovered during a warrant-based search had not the earlier warrantless search occurred.151 The United States Court of Appeals for the Eleventh Circuit interpreted Williams II as being silent on the requirements for application of the inevitable discovery doctrine with the exception of the High Court’s using a preponderance of evidence as its burden of proof respecting the likelihood of discovery.152 Therefore, in addressing the requirements for application of the doctrine, the eleventh circuit fell back on pre-Williams II cases decided by the circuit, specifically, the decision in United States v. Brookins.153 Brookins required that there be a reasonable possibility of discovery and that the leads which supposedly would have led to the legitimate discovery of the evidence must have been pursued prior to the illegal discovery. The Satterfield court asserted that suppressing evidence acquired while such legal procedures were in progress would put the police in a “worse off” position than if no illegality had occurred and, therefore, would conflict with the holding in Williams II.154 Applying these requirements to the search in Satterfield, the eleventh circuit refused to apply the inevitable discovery doctrine because the government had initiated its legal investigation after discovery of the evidence through illegal means. The court explained that: “because a valid search warrant nearly always can be obtained after the search has occurred, a contrary holding would practically destroy the requirement that a war-

149. Id. at ____, 415 N.E.2d at 823.
150. 743 F.2d 827 (11th Cir. 1984).
151. Id. at 845.
152. Id. at 846-47.
153. 614 F.2d 1037 (5th Cir. 1980).
154. 743 F.2d at 846.
rant for the search of a home be obtained before the search takes place. 165

What the court in Satterfield omitted in its analysis is any explanation of how the "no worse off" concept could survive a refusal to apply the inevitable discovery doctrine in situations when the police have not initiated the legal process prior to the improper discovery of the evidence. In this situation, but for the illegal warrantless search, the evidence would ultimately have been uncovered in a proper warrant-based search. Therefore, it would seem that by excluding the evidence the court is putting the government in a position worse off than they would have been had the government acted legally. 165

The United States Court of Appeals for the Fifth Circuit, in a recent interpretation of Williams II, noted that applying the exclusionary rule in just this type of warrant avoidance situation would in fact leave the police worse off than had they not acted illegally. 166 In refusing to apply the inevitable discovery doctrine to the seizure of a gun from any army barracks where the police had probable cause to search but never made any attempt to obtain a search warrant, the court refused to use the "no worse off" principle as a sine qua non in deciding whether to apply the inevitable discovery doctrine:

While suppression in such a case may put the prosecution in a worse position because of the police misconduct, a contrary result would cause The Inevitable Discovery Doctrine to swallow the rule by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means. When the police forego legal means of investigation simply in order to obtain evidence in violation of a suspect's constitutional rights, the need to deter is paramount and requires application of the Exclusionary Rule. 168

There is a clear tension between a mechanical application of the

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155. Id.
156. The facts of Williams II leave the door open to requiring that the process that would lead to the ultimate lawful discovery of the challenged evidence be in operation at the time of the illegal discovery. See generally supra note 127. However, where the police can demonstrate the likelihood that they would have undertaken in the future a lawful and successful investigation either through direct credible statement of their intention or through the fact that such an investigation is their customary procedure, it would seem that suppressing such evidence would indeed leave them "worse off." Thus the Brookins/Satterfield requirement of an "investigation in progress" would seem to run counter to the thrust of the Williams II "no worse off" rationale.
157. United States v. Cherry, 759 F.2d 1196 (5th Cir. 1985).
158. Id. at 1205.
"no worse off" rule in applying the inevitable discovery doctrine and the deterrent impact of the exclusionary rule. The test applied by both the fifth and eleventh circuits would permit use of the inevitable discovery doctrine when police are in the process of obtaining a warrant at the time that an illegal warrantless entry occurred. Because the Supreme Court has clearly held to be irrelevant any consideration of whether the police acted in bad faith, it would seem that when one police officer decides to enter a house without waiting for his colleague whom he knows to be actively seeking a warrant, the fifth and eleventh circuits would probably allow the fruits of that entry into evidence.

An examination of the cases involving police officers who avoided the warrant requirement in situations similar to those found in Satterfield and Brookins reveals the way most courts view how the application of the inevitable discovery doctrine will impact upon the deterrent role of the exclusionary rule. In United States v. Griffin, a pre-Williams II case, the United States Court of Appeals for the Sixth Circuit was confronted with a situation where an officer entered an apartment without a search warrant after no one answered the door. While they were "securing" the apartment, the police spotted illegal drugs in plain view and seized them. On appeal, the government conceded that the initial entry was illegal but argued that since another agent had been dispatched to procure a warrant prior to the illegal entry, and since a warrant was in fact ultimately obtained after the illegal entry without relying on what was seen during the illegal entry, the evidence would have been inevitably discovered legally by the post-warrant search and, therefore, should be admissible. The sixth circuit refused to apply the inevitable discovery doctrine holding that:

The assertion by police (after an illegal entry and after finding evidence of a crime) that the discovery was "Inevitable"


160. E.g., United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984); United States v. Miller, 666 F.2d 991, 996-97 (5th Cir. 1982); United States v. Brookins, 614 F.2d 1037, 1042 n.2 (5th Cir. 1980).


162. 502 F.2d 959 (6th Cir. 1974).

163. Id. at 960.

164. Id. at 960-61. This case was also decided before the Supreme Court's decision in Segura. See supra note 118.
because they had planned to get a search warrant and had sent an officer on such a mission, would as a practical matter be beyond a judicial review. Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment.\textsuperscript{165}

In \textit{U.S. v. Levasseur},\textsuperscript{166} the Federal District Court for the Eastern District of New York faced a somewhat similar factual situation to the one in \textit{Griffin}. Specifically, \textit{Levasseur} involved a situation in which an officer, already properly in a house, opened a footlocker while a second agent was in the progress of seeking a warrant to search the house.\textsuperscript{167} The court, in this post-\textit{Williams II} decision, adopted the standard enunciated by the fifth circuit in \textit{Satterfield} and required that the government show that the lawful means of discovery was in progress prior to the actual finding of the evidence.\textsuperscript{168}

In \textit{Levasseur}, the second agent had apparently been in the process of drafting the affidavit for the warrant when the footlocker was opened. The defendant argued that since the affidavit had not been "executed," the police had not undertaken enough of an independent proper investigation to trigger the inevitable discovery doctrine. The court held that enough proper steps had been taken to "initiate an avenue for obtaining the evidence," and, after finding \textit{Griffin} to be inapplicable, it applied the inevitable discovery doctrine.\textsuperscript{169}

Once the court determined there was a likelihood of discovery by legal means, the conditions of \textit{Williams II} had been met, and, at most, once a court concludes additionally that an investigation is already in progress, any \textit{Williams}-based inevitable discovery inquiry should end there.\textsuperscript{170} It is, therefore, noteworthy that the Court in \textit{Levasseur} found significance in the fact that the search of the footlocker had been undertaken by the police officer in good faith (as demonstrated by his searching only one item) although he incorrectly relied on the exigency exception to the warrant requirement.\textsuperscript{171} The finding of good faith on the part of the officer was significant to the court because it demonstrated that the officer had made "no attempt to evade the warrant requirement."\textsuperscript{172} In other words, the court considered and apparently placed some reliance on

\begin{itemize}
\item \textsuperscript{165} 502 F.2d at 961.
\item \textsuperscript{166} 620 F. Supp. 624 (E.D.N.Y. 1985).
\item \textsuperscript{167} \textit{id.} at 628-31.
\item \textsuperscript{168} \textit{id.} at 631-32.
\item \textsuperscript{169} \textit{id.}
\item \textsuperscript{170} See \textit{supra} notes 125-128, 135 and accompanying text.
\item \textsuperscript{171} 620 F. Supp. at 632.
\item \textsuperscript{172} \textit{id.}
\end{itemize}
the absence of bad faith on the part of the officer, a factor specifically rejected by the Supreme Court in *Williams II*. Thus, although both the holding and the basis of the holding in *Levasseur* are different than *Griffin*, the decision in *Levasseur* actually reflects the same inclination present in *Griffin*, but decidedly absent in *Williams II*, to look to the price in lost deterrence of applying the inevitable discovery doctrine in individual cases. Unsurprisingly, the *Levasseur* court found little need to deter where the officer acted in good faith.

An understanding of how expansive the Court intends the inevitable discovery exception to become may soon be demonstrated when the Court reviews *United States v. Moscatiello*. In this case, the United States Court of Appeals for the First Circuit affirmed a trial court's decision in which the inevitable discovery doctrine was used to overcome an improper warrantless search.

After properly searching the defendant's truck and garage, the investigators in *Moscatiello*, without a warrant, entered a warehouse used by the defendants. There they observed burlap-wrapped bales that they believed to contain marijuana. The investigators then went to a magistrate and presented him with the information learned from the lawful searches of the truck and garage but not with what they observed during the warrantless entry of the warehouse. A search warrant for the warehouse was issued, and, eight hours after entry, a full search of the warehouse was conducted uncovering other evidence of criminal activity.

Assuming, *arguendo*, that the initial entry of the warehouse was illegal, the first circuit considered the admissibility of both the marijuana observed during the entry and the evidence discovered only after the warrant-based search. As to the latter evidence, the court concluded that the Supreme Court's holding in *Segura* was "on all fours" and, therefore, this evidence was admissible under the independent source exception. In considering the admissibility of the marijuana bales, the court turned to *Williams II*, "a closely analogous situation." Because the only requirement for application of the

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173. Other cases in which courts have looked to the price in lost deterrence of applying the inevitable discovery exception without assessing the bad faith of the police include: *United States v. Cherry*, 759 F.2d 1196, 1205 (5th Cir. 1985); *State v. Raj*, 368 N.W.2d 14, 16 (Minn. Ct. App. 1985); *People v. Superior Court of Alameda County*, 80 Cal. App. 3d 665, 681-82, 145 Cal. Rptr. 795, 804-05 (1978). In *Raj*, the court viewed the need to assess the purpose and flagrancy of the police misconduct before applying the inevitable discovery exception as surviving *Williams II*.


175. *Id.* at 595-96.

176. *Id.* at 603.
inevitable discovery doctrine is the likelihood of discovery by lawful means (as Williams II seems to hold), the court held that the near certainty of discovering the marijuana during the warrant-based search compelled its admission. This holds true, the court noted, even though such a decision runs counter to the exclusionary rule's "chief and perhaps sole rationale . . . to deter future violations of the fourth amendment." 177

The Supreme Court's response to the holding in Moscatiello should be most significant because, as the first circuit noted: "this is as clear a case as can be imagined where the discovery of the contraband in plain view is totally irrelevant to the later securing of a warrant and the successful search that ensued." 178 Therefore, suppressing the evidence in this case would most certainly leave the police in a worse position than they would have been in had not the illegal pre-warrant entry occurred. Thus, the Court will have to confront the question of whether the "no worse off" principle as enunciated in Williams II is absolute or whether concern about the price to be paid in the lost deterrent impact of the exclusionary rule is a factor to be considered when applying the inevitable discovery exception.

The significance of the holding in Moscatiello may go beyond a determination of the breadth of the inevitable discovery doctrine and could signal the general approach of the Rehnquist Court to the exclusion of all illegally seized evidence. Should the court affirm the first circuit and apply the "no worse off" principle without limitation, the vitality of the warrant clause of the fourth amendment will be put in serious jeopardy by the ability of police to ignore the warrant requirement yet avoid exclusionary rule consequences. The Court may choose to ameliorate this impact on the exclusionary rule and the warrant clause by imposing limitations on the use of the inevitable discovery exception in warrant avoidance situations. Such limitations could include a requirement that a lawful warrant ultimately was obtained or that the decision not to obtain a timely warrant was not the result of police bad faith. However, even if such limitations are imposed by the Court, the requirement that the police obtain a warrant before entering a constitutionally protected area would be significantly weakened by application of the inevitable discovery doctrine to warrant avoidance situations.

177. Id. at 603-04.
178. Id. at 604.
VI. Improving the Inevitable Discovery Doctrine

The mechanical application of the inevitable discovery doctrine as espoused by the Supreme Court in Williams II is based on a combination of faulty logic and an unpersuasive reliance upon previous court decisions. What is particularly disturbing about such an open-ended, inevitable discovery doctrine is its potential, if not likely, effect of diminishing significantly the deterrent impact of the exclusionary rule. While a tension necessarily exists between the goals of allowing a factfinder to consider all probative evidence and deterring the police from engaging in illegal conduct to obtain that evidence through use of the exclusionary rule, both goals can reasonably be accommodated through a case-by-case balancing approach to the inevitable discovery doctrine. The use of such a balancing approach would be consistent with the method the Supreme Court has repeatedly advocated for determining whether illegally obtained evidence needs to be suppressed in order to satisfy interests behind the exclusionary rule.

The one requirement imposed by the Court in Williams II for application of the inevitable discovery doctrine is that the prosecution must demonstrate by a preponderance of the evidence that the evidence in question would ultimately have been discovered through legal means. Williams argued that such a low burden of proof was inconsistent with the higher standard that the Court imposed in United States v. Wade. The Wade court required a showing by a clear and convincing standard when the prosecution attempts to demonstrate that an in-court identification is not the product of an improper, uncounseled, pre-trial identification of a defendant.

179. See supra notes 59-116 and accompanying text.
181. Williams II, 467 U.S. at 444 n.5.
182. United States v. Wade, 388 U.S. 218, 240 (1967). McCormick defines “clear and convincing” as evidence which is “highly probable.” C. MCCORMICK ON EVIDENCE, § 320 (1954). Wigmore defines “clear and convincing” as “a stronger persuasion than preponder-
In rejecting comparison to the identification issues involved in *Wade*, the *Williams II* Court noted the difficulty of determining whether an in-court identification stemmed from the witness’ observation of the defendant at the illegal pre-trial display or instead from observing the defendant at the time of the crime. "By contrast, the inevitable discovery doctrine involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require departure from the usual burden of proof at suppression hearings." 183 This statement by the Court is particularly perplexing since the inevitable discovery doctrine, by its very nature, calls upon a court to hypothesize or speculate about something that did not in fact occur. 184 Perhaps the only way in which to assess the Court’s assertion that a decision to apply the inevitable discovery doctrine involves no speculation is to examine the factors relevant to determining the likelihood of discovery.

Most courts and commentators would require for application of the inevitable discovery doctrine that in one form or another the prosecution must successfully answer two questions: 1) what specific lawful methods would have been used to discover the evidence and 2) would the use of these particular methods likely have produced the evidence in a relatively unaltered condition? 185 Although the fact that the police may have used a specific means of investigation may

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183. *Williams II*, 467 U.S. at 444-45 n.5.
184. See United States v. Castellana, 488 F.2d 65, 68 (5th Cir. 1974); Parker v. Estelle, 498 F.2d 625, 630 (5th Cir. 1974); People v. Fitzpatrick, 32 N.Y.2d 499, 507-09, 300 N.E.2d 139, 146-147, 346 N.Y.S.2d 793, 796-98 (1973) (Wachtler, J., concurring); Johnson, *The Return of the "Christian Burial Speech" Case*, 32 EMORY L.J. 349, 365, 373 (1983); Note, Criminal Law N.Y. Adopts the Inevitable Discovery Exception, Upholds The Validity of Warrantless Arrests and Searches — Strikes Down The Death Penalty Statute, 23 BUFFALO L. REV. 275, 281 (1973-74) (requires forecasting of future); Comment, supra note 101, at 129-30 ("In practice, the [inevitable discovery] exception requires a court to assess post hoc conjecture by the prosecution, buttressed by police testimony as to what investigators would have done and would have achieved. Such avowals are easily made, yet particularly difficult to rebut persuasively."). 185. See United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984); United States v. Miller, 666 F.2d 991, 996-97 (5th Cir. 1982); United States v. Lewis, 486 A.2d 729, 735-36 (D.C. 1985); State v. Miller, 300 Or. 203, 293, 709 P.2d 225, 242 (1985); State v. Sugar, 100 N.J. 214, 265, 495 A.2d 90, 103 (1985); Pitler, supra note 57, at 491; Note, supra note 57, at 91-92; Comment, The Inevitable Discovery Exception in California: A Need for Clarification of the Exclusionary Rule, 15 U.S.F. L. REV. 283, 288-89 (1980-81); Comment, supra note 101, at 127.
be a "historical fact capable of ready verification," the likelihood of actual discovery will only occasionally be so demonstrable and not subject to speculation. In *Williams II* itself, the ongoing search for the girl's body was clearly demonstrated, but assessing the likelihood of success of the search required speculation by the Court on the following issues: 1) whether the area in which the girl's body was found would have been searched; 2) whether the body would have been seen off the side of the road in a culvert where it was found; 3) whether the snow would have covered the body by the time it was reached; and 4) whether time would have caused the body to change so that certain evidence derived from it would not have been available. When the Court imposes a relatively low burden of proof upon the prosecution regarding the likelihood of discovery, it comes closer to requiring a showing that the evidence *could* have been discovered as opposed to requiring that the evidence *would* have been discovered. A showing of the former does not break the causal chain between the initial illegality and the ultimate discovery of the evidence, and use of the inevitable discovery exception in such a situation makes the Court's analogy to the independent source doctrine particularly suspect.

Commenting on the hypothetical nature of the inevitable discovery doctrine, one commentator wrote: "Judges have a great deal of leeway when they are speculating about the answers to hypothetical questions." Johnson, *supra* note 184, at 364. See generally Comment, *supra* note 101, at 129-30; 74 COLUM. L. REV., *supra* note 57, at 93; Piter, *supra* note 57, at 505. See also cases cited *supra* note 170. See Respondent's Brief at 32, Nix v. Williams, 467 U.S. 431 (1984) (*Williams II*). See also Johnson, *supra* note 184, at 372-73 (commenting upon the likelihood of inevitable discovery).


Maguire, *supra* note 174, at 315. Professor Maguire, in discussing the essential requirements of the inevitable discovery doctrine, wrote:

"The significance of the word "would" cannot be overemphasized. It is not enough to show that the evidence "might" or "could" have been otherwise obtained. [To sever the causal connection between illegality and the finding of evidence] the Government must establish that it has not benefitted by the illegal acts; a showing it *might not* have so benefitted is insufficient."

*Id.* at 315. See also Piter, *supra* note 57, at 590 (danger of applying doctrine based on "might have" discovered); Comment, *supra* note 96, at 128-29 (greater quantum of evidence should be required where, as with inevitable discovery doctrine, application calls for speculation); Note, *supra* note 107, at 152 (the closer discovery is to certainty, the less likely the Government is to benefit from its illegal behavior); Johnson, *supra* note 84, at 365 (higher burden of proof may be justified "given the presumed temptation to resolve doubtful hypothetical questions in favor of admitting evidence").

In a case decided after *Williams II*, the Supreme Court of New Jersey rejected the *Williams II* "preponderance of the evidence" standard in favor of a "clear and convincing" evidence requirement. State v. Sugar, 100 N.J. 214, 265-66, 495 A.2d 90, 103-04 (1985). The
The closer the likelihood of discovering the evidence approaches actual "inevitability," the more the inevitable discovery exception resembles the independent source rule and therefore should be applied in a manner similar to that of the independent source rule. Take, for example, a defendant who is arrested on the street, then subjected to an immediate interrogation which violates his Miranda rights. During this interrogation, he admits that he has a glassine envelope of heroin in his pants pocket which he then proceeds to hand to the police. In such a situation, the police can readily demonstrate that they would have properly discovered the heroin pursuant to a search of the defendant's pocket incident to their arrest.\textsuperscript{191} Given the near certainty of the ultimate discovery of the evidence through legal means had the illegal questioning not occurred, the inevitable discovery exception should be applied in a manner similar to the independent source doctrine without great concern for whether the police illegality was purposeful or flagrant. As the likelihood of discovery diminishes there is a correspondingly greater chance that the police will benefit from their illegal conduct.\textsuperscript{192} In such situations, a variety of factors which impact upon the deterrent function of the exclusionary rule should come into play before a determination is made that the inevitable discovery exception should be applied.

Perhaps foremost among those factors are the purposefulness and the flagrance of the police illegality. As the Supreme Court has made clear on numerous occasions, it is particularly in those situations in which the police act with knowledge that their activity is illegal that the need to deter through suppression of evidence is most acute.\textsuperscript{193} The suppression of evidence in such situations, it is hoped, will deter not only the officer involved in the illegality, but more im-

\textsuperscript{191.} Searches incident to arrest have been explicitly sanctioned by the Supreme Court. See, e.g., Illinois v. LaFayette, 462 U.S. 640, 645 (1983); United States v. Robinson, 414 U.S. 218, 224 (1973).

\textsuperscript{192.} The reason for this is that evidence which would never have been obtainable will now be available for use against the defendant due entirely to the commission of an illegal act by the government.

\textsuperscript{193.} See United States v. Leon, 468 U.S. 897 (1984); United States v. Ceccolini, 435 U.S. 268, 279-80 (1978); United States v. Janis, 428 U.S. 433, 485-89 n. 35 (1976); Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J., concurring). Commenting upon the purposefulness and flagrance factors, one observer wrote "[w]here the officer recognizes that a search is clearly illegal, the special deterrence effect should not be diluted, since the officer also should recognize that the fruit of the search will be excluded . . . ." Israel, supra note 107, at 1413-14.
portantly, other officers who in the future would contemplate acting in a similarly illegal manner.\textsuperscript{194} The Court has described this forward-looking approach to the exclusionary rule by stating: "The [Exclusionary] Rule is calculated to prevent not to repair. Its purpose is to deter . . . to compel respect for the constitutional guarantee in the only effectively available way . . . by removing the incentive to disregard it."\textsuperscript{195}

Errors of constitutional magnitude that are committed by police officers who are aware of the illegal nature of their action (bad faith) are the more appropriate targets for application of the exclusionary rule for two reasons. The first of these reasons involves the need to deter, and the second concerns the effectiveness of the exclusionary rule as a deterrent.

There has for some time been debate about whether future unintentional police mistakes can be deterred through the use of the exclusionary rule.\textsuperscript{196} Proponents of a good faith exception to application of the rule argue that one cannot deter someone from acting in a manner which he is unaware is wrong at the time the action is taken.\textsuperscript{197} Opponents of a good faith exception respond that even an objective good faith test puts a premium on ignorance and communicates the wrong message to police departments concerning how they should train their new officers.\textsuperscript{198} Regardless, it is seldom disputed

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\item 195. 364 U.S. 206, 217 (1960). Professor Amsterdam has compared the deterrent purpose of the exclusionary rule with the aim of putting an identification number on a television set. Excluding evidence will not necessarily put fear in the mind of the officer contemplating an illegal action any more than seeing an identification number will frighten a potential thief. The value of the television and its attractiveness to the thief, however, will be diminished by the identification number in much the same way it is hoped the value of evidence illegally obtained will be reduced by the threat of the exclusionary rule. Amsterdam, supra note 194, at 431.
\item 196. See infra notes 197-98.
\end{itemize}
that if the exclusionary rule does deter, it works best in discouraging police officers who may be contemplating committing an act which they know or believe to be illegal and, therefore, know they are risking suppression of the evidence if they so proceed. Therefore, the effectiveness of the exclusionary rule as a deterrent is likely to be far greater when the police illegality involved is both knowing and deliberate.199

Furthermore, the need to deter is greater when the illegal activity of the police is deliberate. Society needs to make clear to the enforcers of our laws that when they deliberately violate constitutional principles a penalty must be paid.200 Constitutional violations committed by police officers are far more harmful to society when done deliberately because such errors are in fact more egregious and because they are perceived by society to be more egregious. The long term success of our criminal justice system depends in no small part upon the perception of that system.

In according no relevance to the bad faith of a police officer in determining whether the inevitable discovery doctrine should be applied, the Supreme Court in Williams II rejected the approach taken by both the Iowa Supreme Court201 which affirmed Williams' conviction and the eighth circuit which reversed it,202 as well as numerous other courts and commentators.203 The Court's failure to consider the bad faith of the officer is particularly disturbing when coupled with its requirement that the prosecution need only show the evi-


200. Brown v. Illinois, 422 U.S. at 590, 611 (1975) (Powell, J., concurring); Note, supra note 57, at 597; Israel, supra note 107, at 1413-14; Note, supra note 71, at 1138. With respect specifically to the relationship between the need to deter intentional police misconduct and the application of the inevitable discovery doctrine, see United States v. Cherry, 759 F.2d 1196, 1204; United States v. Alvarez-Porras, 643 F.2d 54, 65 (2d Cir. 1981); People v. Sciaccia, 45 N.Y.2d 122, 128-29, 379 N.E.2d 1153, 1156 (1978); Comment, supra note 67, at 142-43; Note, supra note 57, at 99-100.


202. See Williams v. Nix, 700 F.2d 1164, 1169-72 (8th Cir. 1983).

203. See United States v. Alvarez-Porras, 643 F.2d 54, 64-65 (2d Cir. 1981); United States v. Allard, 634 F.2d 1182, 1185-86 (9th Cir. 1980); United States v. Carseillo, 578 F.2d 199, 204 (7th Cir. 1978); United States v. Edmons, 432 F.2d 577, 584-85 (Ind. Cir. 1970). See also People v. Superior Court of Alameda County, 80 Cal. App.3d 665, 680-83, 145 Cal. Rptr. 795, 805 (Cal. Ct. App. 1978); People v. Sciaccia, 45 N.Y.2d 122, 128-29, 379 N.E.2d 1153, 1156, 408 N.Y.S.2d 22, 25-26 (1978); 3 LAFAVE, supra note 19, at 624; Comment, supra note 65, at 160; Comment, supra note 171, at 303; Note, supra note 56, at 100; Note, supra note 101, at 159; Note, supra note 69, at 1148-49. See generally Comment, supra note 78 at 768-69.
vidence more likely than not would have been discovered. The combination of these two factors permits a police officer to deliberately and flagrantly violate a constitutional requirement secure in the knowledge that he need only show that there is a slightly better than even chance that the evidence would ultimately have been discovered through legal means had he chosen to use them. In such a situation, both the need to deter and the likelihood of actually achieving deterrence in the future through suppression of the evidence is at its greatest.

Another factor largely ignored by both the majority and the dissenting opinions in Williams II is the nature of the right violated. Only the concurring opinion of Justice Stevens examines in depth the significance of Detective Learning's violation of William's right to counsel under the sixth amendment. Justice Stevens concludes that the use of the "Christian Burial Speech" "was nothing less than an attempt to substitute an ex parte, inquisitorial process for the clash of adversaries commanded by the constitution." The evil of such a process is that it is completely inconsistent with the notion of what is required for a fair trial. However, if the trial process is not tainted by the Williams statement or any information which flowed from it, the trial process has not been interfered with, and no suppression need result from the sixth amendment violation. As the prosecution must show that the evidence likely would have been uncovered even without the illegally obtained statement, the trial process, according to Justice Stevens, will not be tainted by admitting evidence derived from the Powers girl's body. With no taint in the adversary process, there is no sixth amendment violation and no need to suppress. Justice Stevens asserts further that since the process has not been affected there is no need to assess whether Detective Learning acted in bad faith once it is determined that discovery of the body would likely have ensued in any event.

Justice Stevens' criticism of the majority for ignoring the nature of the right violated before applying the inevitable discovery doctrine is warranted. The Supreme Court has recently made clear that courts should try to establish a test for determining whether a consti-

204. The majority opinion deals with the nature of the sixth amendment right violated only in response to the defendant's claim that a violation of the sixth amendment should not require a balancing of competing values before suppressing evidence. Williams II, 467 U.S. at 446-47. The dissent does not discuss the nature of the right violated at all. Id. at 458 (Brennan, J., dissenting).
205. Id. at 455 (Stevens, J., concurring).
206. Id. at 456-57 (Stevens, J., concurring).
207. Id. at 457 (Stevens, J., concurring).
tutional violation has occurred and, if so, tailor a remedy both to the wrong committed and protection of the interests that lie behind making the conduct unlawful.208 Accordingly, when police having probable cause but no search warrant search a house and seize evidence therefrom, it is wrong to limit consideration of whether the inevitable discovery doctrine should be applied to just the likelihood of discovery had a warrant in fact been obtained. A court considering inevitable discovery application in such a situation should place great weight upon the purpose of the warrant clause of the fourth amendment and the reason for excluding evidence obtained in violation of this constitutional principle.209 The Constitution requires that a warrant be obtained so that a magistrate, independent of the police, is interposed between the individual and the forces of law enforcement.210 It is this independent magistrate who, absent exceptional circumstances, must make the determination of probable cause before the police intrude upon fundamental privacy interests. Admitting evidence because of the fact that it likely would have been discovered had the police taken the time to comply with the warrant clause strikes directly at the purposes behind the warrant requirement.211 In order to deter the police from routinely avoiding the war-

208. In United States v. Morrison, 449 U.S. 361 (1981), the Court declared that a dismissal of the case was not an appropriate remedy for an alleged sixth amendment violation stemming from attempts by DEA officials to get the defendant to change counsel. Id. at 363. The approach advocated by the Court in Morrison was to "identify and then neutralize the taint by tailoring relief appropriate to the circumstances to assure the defendant the effective assistance of counsel and a fair trial." Id. at 365.

209. The Court itself has recently placed great weight upon these factors when it decided that evidence obtained pursuant to an invalid search warrant should be admissible if seized by an officer acting in reasonable good faith. United States v. Leon, 468 U.S. 897 (1984). Further, the Court considered the factors when it abandoned the "Aguillar-Spinelli test" for determining what constitutes probable cause and required appellate courts reviewing the sufficiency of affidavits to give "great deference" to the issuing magistrate's determination. Illinois v. Gates, 462 U.S. 213 (1984).

210. 12 LAFAVE, SEARCH AND SEIZURE 151 (2d ed. 1978); RINGEL, SEARCH & SEIZURE, p. 5-2 (1980). The Supreme Court has written:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.


rant requirement (especially given the relative ease of demonstrating the likelihood of both obtaining a warrant when probable cause exists and finding the evidence in the same condition), the inevitable discovery exception should not be applied to such warrant avoidance situations.

Even though Justice Stevens appropriately looks to the nature of the right to counsel as defined in *Massiah* and later cases, he is wrong to conclude that such an examination automatically requires application of the inevitable discovery exception in *Williams II* once the prosecution demonstrates it was more likely than not that the body would have been discovered absent the illegality. In addition to examining the nature of the right involved, Justice Stevens should have additionally required examination of how application of the inevitable discovery doctrine might weaken the deterrent impact of the exclusionary rule and, therefore, encourage violations of the right to counsel. Justice Stevens acknowledged that the inevitable discovery doctrine must not be applied in such a manner but found that the burden on the prosecution to demonstrate the likelihood of discovery would remove such an incentive by forcing the police to face the risk of suppression.

As previously stated, the risk of suppression in many instances may well be worth taking on the part of the police and, if it is, the disincentive to violate the right to counsel is largely removed. Moreover, once it was conceded by Justice Stevens that it is necessary to examine the police incentive to violate the constitutional principle in question, the intent of the officer who violates the law would seem to be a highly material consideration. That a police officer knows his actions to be violative of the right to counsel and still chooses to act in order to uncover evidence suggests there is a real need to insure that similar violations of this fundamental right by police in the future be avoided. Since the purpose of the right to counsel, unlike the

212. See *supra* notes 135-37 and accompanying text.
214. In *United States v. Brookins*, 614 F.2d 1037, 1047 (5th Cir. 1980), the United States Court of Appeals for the Fifth Circuit declared that the primary purpose of the exclusionary rule in sixth amendment cases was to *deter* the police from infringing upon the right to counsel.
215. 467 U.S. at 456-57 (Stevens, J., concurring).
216. See *supra* notes 99-114 and accompanying text.
217. 467 U.S. at 456 (Stevens, J., concurring).
warrant requirement, is to protect the fairness of the trial, if the
state can demonstrate the near certainty of discovering the evidence
eventually through lawful means, the evidence should be admissible.
However, admitting evidence based upon a showing of a mere likeli­
ood of eventual discovery when the evidence actually is discovered
through a deliberate violation of the right to counsel does not ade­
quately protect so fundamental a right from future encroachment.

VII. Conclusion

The doctrine of inevitable discovery can play a constructive role
in ameliorating the sometimes unduly harsh impact of the exclusion­
ary rule. In applying the doctrine, however, care should be taken to
ensure that important constitutional rights protected by the exclu­
sionary rule are not diluted. The approach taken by the Supreme
Court in *Williams II* regarding the inevitable discovery doctrine is
likely to result in just such a dilution.

By expressly permitting the government to use the doctrine to
overcome police illegalities committed deliberately and flagrantly,
the Court does real damage to important constitutional principles
such as the warrant requirement of the fourth amendment and the
exclusionary rule as a a means of protecting those principles. In se­
lecting the lowest conceivable burden of proof for a factual determi­
nation that is necessarily hypothetical and frequently speculative in
nature, the Court facilitates the process whereby these principles are
weakened.

The doctrine of inevitable discovery can largely achieve the pur­
pose envisioned by its proponents without paying such a heavy price
in lost constitutional protections. Before applying the doctrine, courts
should consider the nature of the right violated, the purposes behind
application of the exclusionary rule in the context of that right, and
the likelihood of actual discovery through a subsequent lawful
means.

As the degree of likelihood of discovery by subsequent lawful
means increases toward near certainty, the closer the case is to one
where an application of the independent source rule would be appro­
priate. In such cases, as with those applying the independent source
rule, the exclusionary rule approaches "inapplicability," and, there­
fore, such cases warrant little consideration of exclusionary rule con­
cerns, namely, the bad faith of the police. As the degree of likelihood
of discovery by lawful means diminishes toward the "preponder­
ance" level, the exclusionary rule is more clearly applicable, and ap­
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Application of the inevitable discovery doctrine is more aptly described as an overcoming or satisfaction of the rule. In such situations, as with the application of the attenuation doctrine, those factors that impact upon the purposes behind the exclusionary rule need to be considered. As the primary purpose of the rule is to deter police misconduct, an assessment of the purposefulness and flagrancy of the police action is most relevant when the likelihood of lawful discovery is not overwhelming.

Additionally, when the very purpose of the constitutional right violated would be defeated by application of the doctrine of inevitable discovery, even the near certainty of subsequent discovery should not result in the admissibility of the challenged evidence. Such a right is contained in the warrant clause of the fourth amendment. Use of the inevitable discovery doctrine to overcome searches of constitutionally protected areas undertaken without search warrants would undermine the constitutionally-mandated procedure of obtaining a warrant before such searches take place. By incorporating these considerations into a determination whether to apply the inevitable discovery doctrine, the Supreme Court can properly balance the competing interests of admitting probative evidence while not diluting our most important constitutional protections.