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Criminal Procedure—Scope of the Exclusionary Rule—Inevitable Discovery Exception Adopted

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CRIMINAL PROCEDURE—SCOPE OF THE EXCLUSIONARY RULE—"INEVITABLE DISCOVERY" EXCEPTION ADOPTED. *Fain v. State*, 271 Ark. 874, 611 S.W.2d 508 (1981).

On March 14, 1980, two men robbed the Union Bank in Benton, Arkansas. Immediate pursuit of the suspects led two state police officers and a sheriff to a house where they found David Fain and Michael Brewer hidden in the attic. After forcing the men from the attic, one officer took Fain outside the house to a patrol car. The other officer remained in the attic with the sheriff and searched for a gun used in the robbery and for money taken from the bank. When their search proved unsuccessful, the sheriff walked downstairs and asked Fain where he had hidden the gun and money. Fain revealed the location of the items. The sheriff returned to the attic, where the gun and the money were immediately discovered hidden under insulation as Fain had described. None of the officers had advised Fain of his rights as required by *Miranda v. Arizona*[1] when the sheriff asked Fain for the items' location.

The Saline County Circuit Court denied Fain's motion to suppress the introduction into evidence of the gun and the money as products of the unlawful interrogation. The evidence was admitted at trial, and Fain was convicted of aggravated robbery and theft of property and sentenced to twenty-one years in prison. In affirming Fain's conviction, the Arkansas Supreme Court adopted the "Inevitable Discovery Rule." The court held that the gun and money were indeed found as a result of illegal questioning, but that they were nevertheless properly admitted at trial under this rule because they would have been discovered regardless of whether Fain had revealed their location. *Fain v. State*, 271 Ark. 874, 611 S.W.2d 508 (1981).

Generally, any evidence obtained through violation of an individual's constitutional rights is not admissible against him in a criminal prosecution.[2] As developed by the United States Supreme

1. 384 U.S. 436 (1966). According to this decision, an individual in police custody must be warned of the following before being subjected to interrogation: That he has the right to remain silent; that anything he says can be used against him in a court of law; that he has the right to the presence of an attorney; and that an attorney will be appointed for him prior to any questioning if he cannot afford one.

2. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

Court,[3] this "exclusionary rule" is applied by both federal[4] and state[5] courts in criminal prosecutions, and is designed to ensure enforcement of an individual's constitutional guarantees.[6] The rationale is that law enforcement officials will be deterred from using unlawful means to discharge their duties if the government cannot use at trial any advantage it gained in this way.[7]

To fully accomplish this deterrent purpose, the exclusionary rule must apply not only to evidence seized as a direct result of an illegal act, but also to any other evidence ultimately discovered because of that act. The Supreme Court has therefore extended the scope of the rule through development of the "fruit of the poisonous tree" doctrine.[8] According to this doctrine, all derivative evidence is

3. Miranda v. Arizona, 384 U.S. 436 (1966) (exclusionary rule was applied to bar all warningless confessions); Escobedo v. Illinois, 378 U.S. 478 (1964) (rule applied to sixth amendment violations); Mapp v. Ohio, 367 U.S. 643 (1961) (rule extended to fourth amendment violations in state court proceedings); Weeks v. United States, 232 U.S. 383 (1914) (rule applied to bar fourth amendment violations in federal court proceedings); Boyd v. United States, 116 U.S. 616 (1886) (rule first applied by the Court to bar compelled testimony).

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

5. Mapp v. Ohio, 367 U.S. 643 (1961).

6. The Court stated in Walder v. United States, 347 U.S. 62, 65 (1954), "All these methods [of illegal search] are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men."

7. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914); Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307 (1964) [hereinafter cited as *Unpoisoning the Fruit*].

8. The basis for the fruit of the poisonous tree doctrine is in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The case involved government subpoenas issued as the result of information obtained in an unlawful search and seizure. Holding that a court could not force the company to obey the subpoenas, Justice Holmes stated for the Court, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392.

The fruit of the poisonous tree doctrine was first described as such in Nardone v. United States, 308 U.S. 338 (1939), in which the Court held that the prosecution must allow the accused to inquire into the uses to which it had put information gained through illegal wiretapping. The Court stated that to exclude the exact words heard through the unlawful interception but "to put no curb on their full indirect use" would stultify the policy enunciated in *Silverthorne* and would only invite the very methods there deemed inconsistent with ethical standards and destructive of personal liberty. *Id.* at 340.

The Court has not yet decided whether the fruit of the poisonous tree doctrine applies to evidence obtained as a result of information gained in an interrogation conducted without *Miranda* warnings. The Court found it unnecessary to consider this broad question in Michigan v. Tucker, 417 U.S. 433 (1974), in which the Court refused to apply the doctrine to exclude the testimony of a witness whose identity was revealed by the accused during a pre-*Miranda* interrogation conducted without the full *Miranda* warnings. Justice Brennan, joined by Justice Marshall, concurred, stating that if *Miranda* applied to the fruits of warningless statements, its effect should be limited to those cases which involved a post-*Miranda*

"fruit" of the "poisonous tree" (the initial police illegality) and is as inadmissible in a criminal prosecution as is the direct evidence gained from the illegality.[9]

Ironically, the same cases which *expanded* the scope of the exclusionary rule through development of the fruit of the poisonous tree doctrine simultaneously *limited* the scope of the rule through the creation of three exceptions to its operation: the independent source, attenuated connection, and purged taint exceptions. In *Silverthorne Lumber Co. v. United States*,[10] the Supreme Court emphasized that, despite the operation of the exclusionary rule, evidence acquired as the result of an illegal act does not "become sacred and inaccessible."[11] Rather, if knowledge of facts "*is gained from an independent source* they may be proved like any others . . . ."[12] The Court again recognized this implied independent source exception to the exclusionary rule in *Nardone v. United States*,[13] yet at the same time created a new exception through the following statement: "In practice this generalized statement [from *Silverthorne*, quoted above] may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, *such connection may have become so attenuated as to dissipate the taint*."[14]

In *Wong Sun v. United States*,[15] the government conceded that it would not have found the evidence in question but for the defendant's illegally obtained statement. The Supreme Court, in holding that the evidence was inadmissible, considered both the independent source and attenuated connection exceptions to the exclusionary rule and found neither was applicable. However, the Court then formulated another exception to the rule, the purged taint exception, which arguably is broader than the other two. The Court stated

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interrogation. *Id.* at 458. However, Justice Douglas in a dissent stated that the testimony "must be excluded to comply with *Miranda*'s mandate that '*no* evidence obtained as a result of interrogation [not preceded by adequate warnings] can be used against' an accused." *Id.* at 464 (citing *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (emphasis added)).

9. *See, e.g.*, United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962). This doctrine was not expressed in the form of a rule by the Supreme Court in the cases in which it was developed; thus, there is no classic statement of the doctrine.

10. 251 U.S. 385 (1920).

11. *Id.* at 392.

12. *Id.* (emphasis added).

13. 308 U.S. 338 (1939).

14. *Id.* at 341 (emphasis added).

15. 371 U.S. 471 (1963).

that, even if the tainted evidence is indisputably the "but for" cause of locating the derivative evidence, the derivative evidence may be admitted if it has not been obtained by exploitation of that initial illegality but instead *by means sufficiently distinguishable to be purged of the primary taint*.[16]

Thus, the Supreme Court has developed three separate, yet interrelated, exceptions to the operation of the exclusionary rule. Although they are formulated with differing terminology, all three exceptions allow the prosecution to remove the taint from fruits of illegal police acts by establishing that the improper conduct was not a *sine qua non* or "but for" cause of the discovery of the evidence.[17] As an extension of this rationale, lower courts have developed the "inevitable discovery" exception to the exclusionary rule, which allows the prosecution to remove the taint from derivative evidence by proving that the evidence would have been discovered through lawful means even without the official misconduct.[18]

The United States Supreme Court has neither ruled on the constitutionality of this inevitable discovery doctrine nor expressly adopted it as an exception to the exclusionary rule. In fact, the Court has denied certiorari in many cases clearly raising the issue.[19] However, the Court has twice acknowledged the existence of the inevitable discovery rationale, once in a footnote[20] and once in a dissenting opinion.[21] Additionally, at least two Justices have expressed

16. *Id.* at 488 (quoting J. MAGUIRE, EVIDENCE OF GUILT 221 (1959)) (author's emphasis).

17. *See Unpoisoning the Fruit*, *supra* note 7, at 313. *Accord*, United States v. Coplon, 185 F.2d 629, 640 (2d Cir. 1950), in which Judge Learned Hand stated that evidence is excluded by the fruit of the poisonous tree doctrine only when it "would not have been found, if officials had not violated the laws designed to deny them access to it."

18. LaCount & Girese, *The "Inevitable Discovery" Rule, An Evolving Exception to the Constitutional Exclusionary Rule*, 40 ALBANY L. REV. 483, 485-86 (1976) [hereinafter cited as LaCount & Girese].

19. *E.g.*, United States v. Seohnlein, 423 F.2d 1051 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970); United States v. Schipani, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *cert. denied*, 414 U.S. 1050 (1973).

20. In Brewer v. Williams, 430 U.S. 387 (1977), police elicited incriminating statements and the location of the victim's body from an accused murderer after he had terminated interrogation until able to consult with his lawyer. The Court sustained exclusion of the incriminating statements, but stated in a footnote that "evidence of where the body was found and of its condition might well be admissible on the theory that the body *would have been discovered in any event*, even had incriminating statements not been elicited from Williams." *Id.* at 407 n.12 (emphasis added).

21. In United States v. Ceccolini, 435 U.S. 268 (1978), the Court held that the attenuated connection between the illegal search and the testimony of a witness discovered through that search rendered the testimony admissible. *Id.* at 279. Thus, the Court based its

an interest in the doctrine, stating that "it is a significant constitutional question whether the 'independent source' exception to inadmissibility of fruits encompasses a hypothetical as well as an actual independent source."[22] The development of the exception has, however, been left to federal circuit and state courts, where it has received fairly wide-spread acceptance.

The first clear application of the theory of inevitable discovery was in 1943 by the Second Circuit in *Somer v. United States*.[23] There, police officers arrested the defendant after his wife revealed, during an unlawful search of his apartment, that he would soon return home. At the time of the arrest, the officers seized incriminating evidence from the defendant's car. Although the Second Circuit reversed the district court's refusal to suppress this evidence, the court remanded the case with leave to the prosecution to retry the case to

> show that, quite independently of what Somer's wife told them, the officers would have gone to the street, have waited for Somer and have arrested him, exactly as they did. If they can satisfy the court of this, so that it appears that they did not need the information, the seizure may have been lawful.[24]

Although the Second Circuit impliedly rejected the inevitable discovery exception in 1962 in *United States v. Paroutian*,[25] stating that

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holding on the attenuated connection exception to the exclusionary rule and did not decide the validity of the inevitable discovery holding of the lower court. However, the dissenting opinion noted,

> The Court would apparently first determine whether the evidence stemmed from an independent source *or would inevitably have been discovered*; if neither of these rules was found to apply, as here, the Court would still somehow take into account [as attenuation] the fact that . . . witnesses sometimes do come forward of their own volition.

Id. at 287-88 (Marshall, J., dissenting) (emphasis added).

22. Fitzpatrick v. New York, 414 U.S. 1050, 1051 (1973) (White and Douglas, JJ., dissenting from the Court's denial of certiorari).

23. 138 F.2d 790 (2d Cir. 1943). Throughout this discussion of the development of the inevitable discovery exception, only those cases with facts most similar to those in Fain v. State, 271 Ark. 874, 611 S.W.2d 508 (1981), will be examined in the text.

24. *Id.* at 792.

25. 299 F.2d 486 (2d Cir. 1962). The court, in holding that heroin and a letter found as the result of information obtained in a prior illegal search of the defendant's apartment should have been suppressed, stated that

> a showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. Such a rule would relax the protection of the right of privacy in the very cases in which, by the government's own admission, there is no reason for an unlawful

"[t]he test must be one of actualities, not possibilities,"[26] the court subsequently returned to its *Somer* reasoning and has apparently adopted this exception to the exclusionary rule.[27]

The District of Columbia Circuit has likewise apparently accepted the inevitable discovery exception to the exclusionary rule. In two cases in 1963 and 1964, the court applied the rationale of the exception to uphold the admission of coroners' testimony concerning the cause of death of illegally discovered corpses. Because the bodies would inevitably have been found even without the unlawful police conduct, the court reasoned that any taint on the evidence secured from the bodies had been purged.[28]

In *United States v. Melvin*,[29] the First Circuit upheld the district court's refusal to suppress firearms found in the defendant's home during a search pursuant to his arrest, even though the defendant claimed the evidence was found as a result of statements elicited from him before he was given *Miranda* warnings. Although the court specifically held that this evidence fell into the independent source exception to the exclusionary rule,[30] it used language indicating that the true basis for the decision was the inevitable discovery exception. Noting that police had already started their search of the cellar where the firearms were discovered before the defendant made his statements, the court stated that the officers "certainly

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search. The better the government's case against an individual, the freer it would be to invade his privacy. We cannot accept such a result.

Id. at 489.

26. *Id.* at 489.

27. *See* United States v. Leonardi, 623 F.2d 746, 751 (2d Cir.), *cert. denied*, 447 U.S. 928 (1980), in which the court stated that the connection between evidence which was "subject to inevitable discovery through lawful means" and its illegal source was sufficiently attenuated that admission of the evidence at trial would not tend to encourage future violations.

Accord, United States v. Falley, 489 F.2d 33 (2d Cir. 1973), in which the court upheld the district court's refusal to suppress the testimony of a witness whose identity was discovered by means of an address book illegally seized from the defendant's apartment. The court stated that "[e]ven if the address book had shortened or facilitated the investigation, it did not supply fruit sufficiently poisonous to be fatal" because "[i]t would have been only a question of time before the government by a so-called saturation investigation, or otherwise, would have discovered the broker and the importation documents." *Id.* at 40.

28. Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964) (the body was found as the result of the defendant's illegally secured confession, but its location near a road, in an open space only partially covered by debris, and close to a heavily populated area near where the defendant was arrested indicated that it soon would have been discovered).

Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963) (the body was discovered during an unlawful search of the defendant's apartment, but the victim's sister had informed police prior to their search that her sister was there).

29. 596 F.2d 492 (1st Cir.), *cert. denied*, 444 U.S. 837 (1979).

30. *Id.* at 500.

would have uncovered the firearms regardless of appellant's statements."[31]

Both the Third Circuit and the Fourth Circuit have decided cases clearly applying the rationale of the inevitable discovery exception to the exclusionary rule.[32] Although the Fifth Circuit had previously rejected the exception as a valid limitation upon the operation of the exclusionary rule,[33] the court expressly adopted it in a recent case.[34] The Ninth Circuit has also expressly adopted the inevitable discovery exception.[35]

The Seventh Circuit expressly adopted the inevitable discovery exception in *United States ex. rel. Owens v. Twomey*.[36] The court in that case stated that *Wong Sun* added a third dimension to the fruit of the poisonous tree doctrine such that there were three tests to be applied in the determination of whether evidence is indeed tainted

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31. *Id.*

32. In Government of Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975), the Third Circuit upheld the district court's refusal to suppress a gun which police had found on the roof of a house near the house where the defendant was arrested. At the time of his arrest, the defendant indicated he had thrown a gun out the rear window of the house, but he made the statement after indicating his desire to have an attorney present. Thus, the gun was a fruit of the illegally obtained statement. The court agreed with the lower court's finding that

> in light of the observations of the police officers, the nature of the 'saturation' search being conducted, the location of the luger (which, while out of sight, was neither concealed so as to make detection exceedingly difficult nor deposited in a location far removed from any place police had reason to search), and its identification as a murder weapon, the police and F.B.I. agents would have found the luger without utilization of [defendant's] statement.

Id. at 927-28.

In United States v. Seohnlein, 423 F.2d 1051 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970), the Fourth Circuit found that information gained from the defendant's illegally seized wallet may have accelerated his lawful arrest on a Baltimore warrant, but that because the police would have learned about the warrant and arrested the defendant even if they had not discovered the papers in the wallet, any evidence subsequently obtained was not tainted.

33. United States v. Houltin, 525 F.2d 943 (5th Cir. 1976), *cert. denied*, 439 U.S. 826 (1978); Parker v. Estelle, 498 F.2d 625 (5th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); United States v. Castellana, 488 F.2d 65 (5th Cir. 1974). *See also* United States v. Brookins, 614 F.2d 1037, 1044-46 (5th Cir. 1980) (containing a detailed discussion of Fifth Circuit precedent on the inevitable discovery exception).

34. United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980), in which the court listed as a third category of insufficient connection between fruit and poisonous tree derivative evidence which "would inevitably have been discovered during a police investigation without the aid of the illegally obtained evidence." *Id.* at 1042.

35. *E.g.*, United States v. Huberts, 637 F.2d 630 (9th Cir. 1980); United States v. Kandik, 633 F.2d 1334 (9th Cir. 1980); United States v. Hoffman, 607 F.2d 280 (9th Cir. 1979); United States v. Schmidt, 573 F.2d 1057 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978).

36. 508 F.2d 858 (7th Cir. 1974).

fruit; in addition to the independent source and attenuated connection tests, the court listed a third test as being met when "the evidence inevitably would have been gained even without the unlawful search."[37]

Although the Eighth Circuit has applied the rationale of the inevitable discovery exception in two cases,[38] in *United States v. Kelly*[39] the court expressly declined to decide "whether to follow the Seventh Circuit and recognize the inevitable discovery limitation to the exclusionary rule . . . because the government clearly failed to establish that the evidence would have inevitably been gained without the illegal search."[40]

The Tenth Circuit recently adopted the inevitable discovery exception by implication in *United States v. Leonard*.[41] In that case, police found a gun in the glove compartment of the defendant's car during an inventory search executed after his arrest. However, the arresting officer had asked defendant if he had a gun before giving him the *Miranda* warnings and defendant had revealed the gun's location. The court agreed with the district court's refusal to suppress the gun because it was found as a result of the inventory search rather than because of defendant's statement, but also because its discovery was inevitable regardless of the statement.

Thus, three circuit courts have expressly adopted this exception, six have adopted it by implication through applying its rationale, and one has expressly declined to decide whether to adopt it but has recognized that it has been adopted by other circuits. Several state courts have also either expressly or impliedly adopted the

37. *Id.* at 865. The court upheld the district court's refusal to suppress a witness' testimony, stating that, because of other leads, "[i]t was inevitable that her identity would have been revealed without her work address in the booklet [seized in an illegal search]." *Id.* at 866.

38. In United States v. DeMarce, 513 F.2d 755 (8th Cir. 1975), the court upheld the admission of a rifle into evidence, finding that because police knew its approximate location, they would have discovered it even without defendants' unlawfully elicited statements about its location.

In United States v. Evans, 454 F.2d 813 (8th Cir.), *cert. denied*, 406 U.S. 969 (1972), the court upheld the district court's refusal to suppress witness testimony because it found that normal police investigative procedures would have revealed the identity of the witnesses even without the defendant's unlawfully elicited statements identifying them.

39. 547 F.2d 82 (8th Cir. 1977).

40. *Id.* at 86. In this case, the district court had suppressed items found in a warrantless search of the defendant's car, but had refused to suppress the derivative evidence found as a result. Reversing defendant's conviction, the court held that the government had failed to prove that either the independent source or attenuated connection exceptions applied, so the lower court should have suppressed all the evidence.

41. 630 F.2d 789 (10th Cir. 1980).

exception.[42]

The inevitable discovery exception has been the subject of much controversy. One commentator has approved it as serving the purpose of the exclusionary rule well by denying the government the use of illegally obtained evidence, yet at the same time minimizing the opportunity for the accused to receive "an undeserved and socially undesirable bonanza."[43] However, another commentator has argued that, even though the logic of the exception has a certain appeal, it is inconsistent with the purpose of the exclusionary rule, and that the focus must remain on actualities not on probabilities if the exclusionary rule is to remain a viable deterrent to illegal police activity.[44]

The majority of the cases which have applied the inevitable discovery exception to the exclusionary rule have involved situations in which the police illegality occurred during an investigation already in progress; thus, the illegality merely served to accelerate the discovery of evidence which would have been found eventually through routine police investigatory procedures.[45] The primary considerations in assessing the inevitability of discovery of evidence in these cases are whether the procedures are the type standardly employed by the law enforcement agency and whether the results of the investigation are clearly predictable.[46]

The inevitable discovery limitation has been less frequently applied in situations involving a search conducted by police, because of the unpredictable results of a search. For the inevitable discovery exception to apply, the general burden of proof is on the prosecution to show that the evidence would have been discovered by proper and predictable investigatory procedures even without the illegal act. This is really a two part test: the prosecution must show (1) that proper and predictable investigatory procedures would have been used by the police and (2) that these procedures would

42. *E.g.*, State v. Tillery, 107 Ariz. 34, 481 P.2d 271 (1971); Lockridge v. Superior Ct. of Los Angeles County, 3 Cal. 3d 166, 474 P.2d 683, 89 Cal. Rptr. 731 (1970), *cert. denied*, 402 U.S. 910 (1971); Cook v. State, 8 Md. App. 243, 259 A.2d 326 (1969); Santiago v. State, 444 S.W.2d 758 (Tex. Crim. App. 1969).

43. *Unpoisoning the Fruit*, *supra* note 7, at 317.

44. Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CAL. L. REV. 579, 630 (1968).

45. *See, e.g.*, United States v. Leonard, 630 F.2d 789 (10th Cir. 1980); United States v. Evans, 454 F.2d 813 (8th Cir.), *cert. denied*, 406 U.S. 969 (1972); United States v. Seohnlein, 423 F.2d 1051 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970).

46. *See, e.g.*, Leek v. Maryland, 353 F.2d 526 (4th Cir. 1965); Duckett v. State, 3 Md. App. 563, 240 A.2d 332 (1968); Santiago v. State, 444 S.W.2d 758 (Tex. Crim. App. 1969).

inevitably have resulted in discovery of the evidence.[47] In a search situation, if the search is conducted incident to a lawful arrest or is already planned, the second part of this test becomes crucial. The prosecution can usually sustain its burden on this issue if the evidence was located in an obvious place,[48] or was in plain sight.[49] However, if the evidence was hidden, it is extremely difficult for the prosecution to show that its discovery was inevitable even without the illegally acquired information.[50]

Although it is clear that the prosecution has the burden of proof of the inevitability of discovery, it is not so clear just what that burden of proof is. Few cases applying the inevitable discovery exception have considered this question. In *United States v. Schipani*,[51] the Second Circuit approved the district court's finding that the prosecution's burden in these cases is a preponderance of the evidence. However, the Third Circuit approved a "clear and convincing evidence" standard in *Government of Virgin Islands v. Gereau*.[52] In *State v. Byrne*,[53] the Missouri Court of Appeals set up a two-part test for the prosecution to meet before application of the inevitable discovery exception will be granted; the court stated that the prosecution must show by *clear and convincing* evidence that (1) the state would have acquired the evidence through legal means regardless of the illegality, and that (2) the police officers did not act in bad faith in accelerating the discovery of the evidence.[54]

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47. LaCount & Girese, *supra* note 18, at 491.

48. *E.g.*, State v. Tillery, 107 Ariz. 34, 481 P.2d 271, *cert. denied*, 404 U.S. 847 (1971) (evidence seized from the defendant's car which was parked alongside the road between the point of arrest and the scene of the crime).

49. *E.g.*, Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963) (incriminating evidence concerning cause of death was obtained from a body discovered unhidden in defendant's apartment during an unlawful search).

50. *E.g.*, People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *cert. denied*, 414 U.S. 1050 (1973). In this case, the New York court held that the prosecution had met its burden of showing the inevitability of discovery of the murder weapon, which police had found in the closet where the accused was hiding immediately before his arrest. The court stated that the gun was properly admitted into evidence because if it were not found on the defendant's person, "the next most reasonable place to look for it was where he had been just before he was seized." *Id.* at 507, 300 N.E.2d at 142, 346 N.Y.S.2d at 797.

51. 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

52. 502 F.2d 914, 927 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975).

53. 595 S.W.2d 301 (Mo. Ct. App. 1979), *cert denied*, 101 S. Ct. 355 (1980).

54. *Id.* at 305 (emphasis added). In this case, police discovered the gun used in a robbery under a cake dish in the kitchen of a house where the defendant was arrested; however, defendant had revealed its location in response to an officer's question before he was given *Miranda* warnings. The court applied its two-part test to these facts, and found that search of the kitchen and discovery of the gun were inevitable because police had found defendant hiding in the kitchen. Also, the court found no bad faith in the officers' actions because

The Arkansas Supreme Court, in adopting the inevitable discovery exception in *Fain v. State*,[55] first considered whether the gun and money were indeed "fruits" of the illegal interrogation of Fain. Finding that the prosecution had failed to meet its burden of showing that the evidence was *not* tainted fruit, the court stated that it was nevertheless properly admitted at trial under the "Inevitable Discovery Rule."[56] The court considered the rationale of the inevitable discovery exception, stating that it operates to remove evidence discovered as the result of improper conduct from the exclusionary rule if it is clearly evident that the evidence would have been discovered in any event.[57] However, the court stated that the rule must be strictly adhered to, and set out a two-part test to determine its applicability in a given situation. In order for the rule to apply, the state must prove by clear and convincing evidence that (1) it *would* have acquired the items through legal means regardless of the illegality and that (2) the police officers involved acted in good faith in accelerating the discovery of the evidence.[58] The court then "cautiously" adopted the exception with the understanding that it was not intended to erode the exclusionary rule,[59] citing as its chief reason for doing so the prevention of a situation in which a party can avoid having incriminating evidence used against him by blurting out its location when he observes the police about to discover it.[60] The court then applied the inevitable discovery exception to the facts of the case and found the evidence clear and convincing that the items would have been found even if Fain had not revealed their location because one state policeman remained in the attic to search for them throughout the entire time. Therefore, the court affirmed Fain's conviction.[61]

Although the supreme court established a two-part test for de-

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there was ample and sufficient evidence that they had seized the gun for their self-protection, not knowing if defendant's armed accomplices were also hiding in the kitchen.

55. 271 Ark. 874, 611 S.W.2d 508 (1981).

56. *Id.* at 876, 611 S.W.2d at 509.

57. *Id.* The court noted that other states have adopted the inevitable discovery exception, citing State v. Byrne, 595 S.W.2d 301 (Mo. Ct. App. 1979), *cert. denied*, 101 S. Ct. 355 (1980) and People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *cert. denied*, 414 U.S. 1050 (1973).

58. Fain v. State 271 Ark. 874, 876, 611 S.W.2d 508, 509 (1981).

59. *Id.* at 877, 611 S.W.2d at 510.

60. *Id.* at 876-77, 611 S.W.2d at 509-10.

61. *Id.* at 877, 611 S.W.2d at 510. In a brief concurring opinion, Justice Hickman stated that he would not adopt the inevitable discovery exception cautiously with the idea that the exclusionary rule should not be eroded because he feels that the exclusionary rule needs to be eroded. *Id.*

termining the applicability of the inevitable discovery exception similar to that used by the Missouri Court of Appeals in *State v. Byrne*,[62] the court did not follow that test in *Fain*. It did not require the prosecution to meet its burden of proof. In considering the first part of the test, the requirement of inevitability of discovery even without the defendant's illegally obtained statement, the court did not require the prosecution to show that the officers would certainly have discovered the gun and the money hidden under insulation in the attic. Rather, the court seems to have just decided that these items would inevitably have been found. Yet, because the evidence was neither obvious nor in plain sight, it is unlikely that the prosecution could have met its burden of showing inevitable discovery by clear and convincing evidence.

The court apparently failed to consider the second part of the test altogether, making no mention of the officers' possible bad faith in accelerating the discovery of the evidence. Since both suspects were removed from the attic during the search, there was no self-protection justification for accelerating the discovery as used by the Missouri court in *Byrne*.[63] Regardless, it seems that the court should have remanded the case for the prosecution to have an opportunity to meet its burden of proof before making the determination of the exception's applicability.

Because the police officers had begun their search of the attic before Fain's unlawful interrogation, the court could have applied the independent source exception to the facts of this case and reached the same result without adopting a new exception to the exclusionary rule. The on-going search, which was lawful because conducted pursuant to an arrest, was a *real*, not a *hypothetical*, independent source of the gun and money. The First Circuit in *United States v. Melvin*[64] and the Tenth Circuit in *United States v. Leonard*[65] applied the independent source exception to facts very similar to those in *Fain*.

It is unclear exactly what the supreme court meant by "cautiously" adopting the inevitable discovery exception. Also, the court's statement that the exception is not intended to erode the exclusionary rule is interesting since the exception seems contrary to the purpose of the rule because it actually encourages police short-

62. 595 S.W.2d 301 (Mo.. Ct. App. 1979), *cert. denied*, 101 S. Ct. 355 (1980).

63. *Id. See* note 54 *supra*.

64. 596 F.2d 492 (1st Cir.), *cert. denied*, 444 U.S. 837 (1979). *See* text accompanying notes 29-31 *supra*.

65. 630 F.2d 789 (10th Cir. 1980). *See* text accompanying note 41 *supra*.

cuts. If a result could be more easily or quickly obtained through unlawful than through lawful means, it is natural to assume that the police will take the unlawful route, particularly if they can then excuse the action by merely stating that the result would have been obtained in any event. For example, in *Fain*, it was more expedient to unlawfully interrogate Fain than to continue searching for the gun and money with no guarantee that the items would ever be found. However, the language used in adopting the inevitable discovery exception indicates that the court is aware of the dangers of the doctrine; further decisions on the subject are necessary to show how this exception will be applied by state circuit courts and to what extent it actually does erode the exclusionary rule in Arkansas.

Melanie J. Strigel