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Constitutional Law - Unconstitutional Searches without Exclusionary Sanctions

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CONSTITUTIONAL LAW—UNCONSTITUTIONAL SEARCHES WITHOUT EXCLUSIONARY SANCTIONS

United States v. Herrold (1992)

I. INTRODUCTION

The Fourth Amendment to the United States Constitution provides in part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[1] The United States Supreme Court has interpreted the Fourth Amendment to require the suppression of evidence seized pursuant to an unconstitutional search.[2] In connection with this interpretation, the Supreme Court has developed the exclusionary rule, which prohibits the introduction of both tangible[3] and testimonial[4] evidence seized or acquired during an unlawful search. Furthermore, the Supreme Court has applied the exclusionary rule to prohibit the introduction of evidence derived from other evidence that was illegally obtained initially, as well as evidence acquired as an indirect result of an unlawful search.[5]

Over the years, the Supreme Court has recognized various exceptions to the exclusionary rule, allowing courts to admit illegally obtained evidence in cases in which its suppression would not further the rule's underlying purpose of deterring future Fourth Amendment violations by law enforcement officials.[6] One such exception to the exclusionary

1. U.S. CONST. amend. IV. The Fourth Amendment further sets forth the probable cause requirement for the issuance of a search warrant. *Id.* Specifically, a search warrant must be supported by oath or affirmation and must be particularized with regard to the place to be searched and the evidence to be seized. *Id.*

2. *See* Boyd v. United States, 116 U.S. 616, 634-35 (1886) (holding that evidence obtained in violation of Fourth Amendment is inadmissible in proceedings against defendant).

3. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that Fourth Amendment exclusionary rule prohibits introduction into evidence of tangible materials seized during unlawful search).

4. *See* Silverman v. United States, 365 U.S. 505, 511-12 (1961) (holding that Fourth Amendment exclusionary rule prohibits introduction into evidence of testimony concerning knowledge acquired during unlawful search).

5. *See* Wong Sun v. United States, 371 U.S. 471 (1963). The *Wong Sun* Court held that the exclusionary rule prohibits the introduction into evidence of derivative evidence, both tangible and testimonial, when its acquisition is the product or indirect result of primary evidence obtained in an illegal search. *Id.* at 484-86. This requirement that indirect and derivative evidence be excluded along with the primary evidence of an illegal search is often referred to as the "fruit of the poisonous tree" doctrine. *Id.*

6. *See*, Stone v. Powell, 428 U.S. 465, 486 (1976) (noting that "[t]he primary justification for the exclusionary rule . . . is the deterrence of police conduct that

rule is the independent source doctrine.[7] Pursuant to this doctrine, evidence is admissible despite illegal police investigatory activity as long as the evidence was discovered through a source independent of the illegality.[8] Based on this doctrine, the United States Supreme Court held in its 1988 decision in *Murray v. United States*[9] that evidence obtained pursuant to an independently obtained search warrant need not be suppressed, even though a portion of such evidence was observed in plain view at the time of a prior illegal entry.[10]

The *Murray* Court focused on the question of whether a legal search, pursuant to a warrant, was a genuinely independent source of information and tangible evidence which the defense sought to have the Court suppress.[11] The Court concluded that a subsequent legal search could be a genuinely independent source of the evidence, unless "the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that [illegal] entry was presented to the Magistrate and affected his decision to issue the warrant."[12]

In *United States v. Herrold*,[13] the United States Court of Appeals for the Third Circuit recently applied the *Murray* Court's independent source analysis.[14] In *Herrold*, the Third Circuit held that a court need not suppress evidence obtained during a lawful search despite its original discovery during an unlawful entry, as long as the subsequent lawful

violates Fourth Amendment rights"). *See generally* Molly A. Meegan, *Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1990-1991*, 80 GEO. L.J. 939, 1096-1108 (1992) (discussing exceptions to exclusionary rule and collecting cases).

7. Meegan, *supra* note 6, at 1099. The United States Supreme Court has identified four exceptions to the exclusionary rule: 1) the good faith exception; 2) the attenuation exception; 3) the inevitable discovery exception; and 4) the independent source exception. *Id.* For a discussion of the independent source exception to the exclusionary rule, see *infra* notes 35-64 and accompanying text.

8. *See* Murray v. United States, 487 U.S. 533, 537 (1988); Meegan, *supra* note 6, at 1106.

9. 487 U.S. 533 (1988). For a further discussion of the facts of *Murray* and the Supreme Court's analysis, see *infra* notes 44-51 and accompanying text.

10. *Murray*, 487 U.S. at 536-44. The *Murray* Court reasoned that a subsequent search pursuant to a lawfully obtained warrant could serve as an independent source of evidence originally discovered unlawfully. *Id.* at 541-42.

11. *Id.* at 542.

12. *Id.* The *Murray* Court concluded that the district court had not explicitly found whether the agents would have sought a warrant if they had not initially entered the warehouse illegally. *Id.* at 543. Consequently, the Court remanded the case to the court of appeals, with instructions that it remand to the district court for a determination of whether the subsequent warranted search was indeed prompted by information obtained in the prior illegal search of the warehouse. *Id.* at 543-44.

13. 962 F.2d 1131 (3d Cir.), *cert. denied*, 113 S. Ct. 421 (1992). For a further discussion of the facts of *Herrold* and the analysis of the United States Court of Appeals for the Third Circuit, see *infra* notes 65-120 and accompanying text.

14. *Herrold*, 962 F.2d at 1139-44.

search was an independent source of the evidence at issue.[15] However, the facts of *Herrold* differed from the facts of *Murray* in one significant respect. In *Murray*, the evidence discovered during the prior unlawful entry was not included in the affidavit for a search warrant.[16] Thus, it was clear that such evidence had not "affected" the Magistrate's decision to issue the warrant. In *Herrold*, by contrast, the evidence discovered during the prior unlawful entry was included in the affidavit for a search warrant.[17] Nonetheless, the Third Circuit concluded that even though the warrant application contained information obtained through an unlawful entry, this did not "per force" indicate that the Magistrate's decision to issue the warrant was "affected" by such information.[18]

This Casebrief first reviews the development of the exclusionary rule, focusing on the application of the independent source exception.[19] Next, this Casebrief details the facts of *United States v. Herrold* and sets forth the reasoning employed and the conclusions reached by the Third Circuit.[20] Finally, this Casebrief discusses the contrasting policy arguments underlying the exclusionary rule and the independent source exception, which provided the source of disagreement between the sharply divided majority and dissent in *Murray*.[21] This Casebrief ultimately concludes that courts, including the Third Circuit, should carefully consider the policies underlying the *Murray* Court's decision before extending the *Murray* holding to different factual situations, in order to avoid placing the Fourth Amendment rights of all citizens in serious jeopardy.[22]

II. BACKGROUND

The exclusionary rule requires the suppression of evidence ob-

15. *Id.* at 1140-44.

16. *Murray*, 487 U.S. at 535-36. The Court relied on the district court's findings that the agents did not reveal their warrantless entry to the Magistrate, and that they omitted from their warrant application any recitation of their observations made during the prior illegal entry. *Id.* at 543.

17. *Herrold*, 962 F.2d at 1135. The warrant application in *Herrold* contained facts relating to events that occurred prior to the officers' illegal entry into the defendant's trailer, and also included information relating to events occurring and observations made after the illegal entry. *Id.* at 1134-35.

18. *Id.* at 1141. The *Herrold* court instead concentrated on the question of whether the search warrant application contained probable cause for the issuance of a warrant apart from the improper information. *Id.*

19. For a complete discussion of the development of the exclusionary rule and the independent source doctrine, see *infra* notes 23-64 and accompanying text.

20. For a complete discussion of the facts and analysis in *Herrold*, see *infra* notes 65-120 and accompanying text.

21. For a complete discussion of the contrasting policy arguments underlying the exclusionary rule and the independent source doctrine, see *infra* notes 120-36 and accompanying text.

22. For a discussion of the practical implications of the *Herrold* and *Murray* opinions, see *infra* notes 134-36.

tained directly or indirectly through government violations of the Fourth,[23] Fifth,[24] or Sixth Amendments.[25] In the Fourth Amendment context, the Supreme Court has frequently identified the deterrence of illegal law enforcement activities as the primary policy goal underlying the exclusionary rule.[26] In *Weeks v. United States*,[27] the Supreme Court held that the exclusionary rule prohibited the introduction into evidence of tangible materials seized during an unlawful search.[28] Later, in *Silverman v. United States*,[29] the Supreme Court held that the exclusionary rule prohibited the introduction into evidence of testimony concerning knowledge acquired during an unlawful search.[30] Additionally, in *Wong Sun v. United States*,[31] the Supreme Court formulated the "fruit of the poisonous tree doctrine" to prohibit the introduction of derivative evidence, both tangible and testimonial, acquired as a direct or indirect result of an unlawful search.[32] Finally, in *Mapp v. Ohio*,[33] the Supreme Court held that the exclusionary rule applied to the states via the Fourteenth Amendment.[34]

The Supreme Court's development of the exclusionary rule and the "independent source" doctrine as an exception to the rule occurred almost simultaneously.[35] The Supreme Court first adopted the independ-

23. For a discussion of the development of the exclusionary rule in the context of the Fourth Amendment, see *infra* notes 26-34 and accompanying text.

24. *See* Blackburn v. Alabama, 361 U.S. 199, 205 (1960) (holding that exclusionary rule applies in state court to defendant's confession obtained through Fifth Amendment violations); Bram v. United States, 168 U.S. 532, 547-48 (1897) (holding that exclusionary rule applies in federal court to defendant's confession obtained through Fifth Amendment violations).

25. *See* United States v. Wade, 388 U.S. 218, 237-39 (1967) (excluding witness identification evidence because uncounseled postindictment lineup violated Sixth Amendment); Massiah v. United States, 377 U.S. 201, 205-07 (1964) (excluding evidence of defendant's statements because deliberately elicited in violation of defendant's Sixth Amendment rights).

26. *See* Stone v. Powell, 428 U.S. 465, 486 (1976) (noting that "[t]he primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights"); United States v. Leon, 468 U.S. 897, 906 (1984) (noting that exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect" (quoting United States v. Calandra, 414 U.S. 338, 348 (1974))).

27. 232 U.S. 383 (1914).

28. *Id.* at 398. In *Weeks*, police made a warrantless entry into the defendant's home when he was not present and seized various papers and articles that were used as evidence against the defendant at trial. *Id.* at 386.

29. 365 U.S. 505 (1961).

30. *Id.* at 511-12. In *Silverman*, police placed an electronic listening device inside a house used by the defendants and overheard conversations that were used as evidence against the defendants at trial. *Id.*

31. 371 U.S. 471 (1963).

32. *Id.* at 484-86.

33. 367 U.S. 643 (1961).

34. *Id.* at 659-60.

35. Murray v. United States, 487 U.S. 533, 537 (1988) (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

ent source exception to the exclusionary rule in its 1920 decision in *Silverthorne Lumber Co. v. United States*.[36] In *Silverthorne*, the Court held that knowledge of facts gained from copies of illegally seized documents could not be used to obtain an indictment or to secure a subpoena for the originals.[37] In dicta, the *Silverthorne* Court noted that although police had obtained knowledge of the facts in an unlawful manner, these facts did not become "sacred and inaccessible."[38] Rather, at trial, a prosecutor could prove such facts like any others, as long as knowledge of those facts was derived from an independent, lawful source untainted by the initial illegality.[39]

In *Segura v. United States*,[40] the Supreme Court held that a prior illegal entry did not require the Court to suppress evidence subsequently discovered at those premises by police executing a validly obtained search warrant.[41] In *Segura*, law enforcement agents unlawfully entered the defendant's apartment and waited inside until other agents obtained a search warrant.[42] Despite the illegal entry, the *Segura* Court held that the evidence found for the first time during the execution of the valid search warrant was admissible because it was discovered pursuant to an independent source.[43]

In *Murray*, the Supreme Court addressed the question of whether a portion of evidence that police obtained pursuant to an independently

36. 251 U.S. 385 (1920).

37. *Id.* at 391-92.

38. *Id.* at 392.

39. *Id.* The *Murray* Court referred to this original version of the independent source doctrine as the "specific" sense of the doctrine. *Murray*, 487 U.S. at 538. The *Murray* Court noted that the *Silverthorne* Court originally applied the independent source doctrine in the exclusionary rule context "with reference to that particular category of evidence acquired by an untainted search *which is identical to the evidence unlawfully acquired.*" *Id.* The *Murray* Court acknowledged that this specific sense of the independent source doctrine was the doctrine's more important use for purposes of the Court's analysis in *Murray*. *Id.* For a discussion of the independent source doctrine's more "general" sense, see *infra* note 43.

40. 468 U.S. 796 (1984).

41. *Id.* at 813-14.

42. *Id.* at 802.

43. *Id.* at 813-14. The *Murray* Court referred to this version of the independent source doctrine as the "general" sense of the doctrine. *Murray*, 487 U.S. at 537-38. The *Murray* Court noted that the more general sense of the independent source doctrine "identifies *all* evidence acquired in a fashion untainted by the illegal evidence-gathering activity." *Id.* In an example, the *Murray* Court explained that where an unlawful entry has given investigators knowledge of facts *x* and *y*, but fact *z* has been learned by other means, the independent source doctrine in its more "general" sense would render fact *z* admissible because it was derived from an independent source. *Id.* at 538. In contrast, in its more "specific" sense the independent source doctrine would render facts *x* and *y* admissible if knowledge of those facts was derived from an independent source. *Id.* For a further discussion of the independent source doctrine's "specific" sense, see *supra* note 39.

obtained search warrant should be suppressed because they had observed such evidence in plain view at the time of a prior illegal entry.[44] The *Murray* Court relied on the independent source doctrine and held that the Court need not suppress such evidence if the search pursuant to the warrant was in fact a genuinely independent source of the information and the tangible evidence that the defendant sought to suppress.[45] The *Murray* Court set forth a two-part analysis to determine whether the subsequent valid search was in fact a genuinely independent source of the evidence.[46] First, the agents' decision to seek the warrant must not have been prompted by what they had seen during the initial entry.[47] Second, the information obtained during the initial entry must not have been presented to the Magistrate and "affected" his decision to issue the warrant.[48]

The *Murray* holding is widely cited by courts as authority for the proposition that evidence discovered during an initial unlawful entry but "rediscovered" during a subsequent valid search need not be suppressed.[49] Notwithstanding this widespread acceptance, however, it is

44. *Murray*, 487 U.S. at 535. In *Murray*, federal agents illegally entered a warehouse and observed numerous burlap-wrapped bales, which they did not disturb. *Id.* They returned with a search warrant and seized 270 bales of marijuana and other evidence of crime. *Id.* at 535-36. In applying for the warrant, they did not mention the prior entry or include any recitations of their observations made during that entry. *Id.* The defendants filed a pretrial motion to suppress the evidence seized from the warehouse and argued that the warrant was tainted by the previous unlawful entry. *Id.* at 536.

45. *Id.* at 542. The *Murray* Court focused on the independent source doctrine in its "specific" sense and reasoned that although knowledge that the marijuana was in the warehouse was acquired at the time of the unlawful entry, it was also acquired at the time of entry pursuant to the warrant. *Id.* at 541. Therefore, the Court concluded that the independent source doctrine should apply so long as the "rediscovery" of this knowledge was not the result of the earlier entry. *Id.* The Court employed similar reasoning with regard to the bales of marijuana, and refused to recognize a distinction between the "reseizure" of the tangible marijuana bales and the "rediscovery" of the intangible knowledge of their existence. *Id.* at 541-42. Indeed, the Court concluded that "[t]he independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied." *Id.* at 542.

46. *Id.* at 542.

47. *Id.* In *Murray*, the Court held that this prong of the analysis was not met because the district court did not explicitly find that the agents would have sought a warrant even if they had not earlier entered the warehouse. *Id.* at 543-44. Therefore, the *Murray* Court concluded that the district court's findings did not amount to a determination of an independent source, and remanded the case for a determination of this issue. *Id.*

48. *Id.* at 542. In *Murray*, the Court held that this prong of the analysis was met because the district court explicitly found that the agents did not reveal their warrantless entry to the Magistrate and that they did not include any recitations of the observations in the warehouse in their warrant application. *Id.* at 543.

49. *See, e.g.*, United States v. Restrepo, 966 F.2d 964, 969 (5th Cir. 1992),

important to note that the *Murray* Court was sharply divided regarding the resolution of the issues presented.[50] Indeed, the majority and the dissent disagreed about the true policy underpinnings of the exclusionary rule as well as about whether the majority's holding would effectively deter or actually encourage unlawful police conduct.[51]

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cert. denied, 113 S. Ct. 968 (1993); United States v. Herrold, 962 F.2d 1131, 1143 (3d Cir.), *cert. denied*, 113 S. Ct. 421 (1992); United States v. Halliman, 923 F.2d 873, 880 (D.C. Cir. 1991); United States v. Salas, 879 F.2d 530, 537-38 (9th Cir.), *cert. denied*, 493 U.S. 979 (1989).

50. Murray v. United States, 487 U.S. 533 (1988). *Murray* was a four-to-three decision. *Id.* The majority consisted of Chief Justice Rehnquist and Justices Scalia, White and Blackmun. *Id.* at 544. The dissent consisted of Justices Marshall, Stevens and O'Connor. *Id.* Justices Brennan and Kennedy took no part in the decision. *Id.* Indeed, the participation of either of these Justices may have altered the outcome in *Murray*. *See* Jeffrey L. Kirchmeier, Note, Murray v. United States: *Legally Rediscovering Illegally Discovered Evidence*, 39 CASE W. RES. L. REV. 641, 644 n.26 (1988-89) (commenting that Justice Brennan had joined *Segura* dissent, which expressed concerns similar to those expressed by dissent in *Murray*). *But cf.* Edwin G. Fee, Jr., *Criminal Procedure I: Narrowing the Protection of the Fourth Amendment*, 1989 ANN. SURV. AM. L. 371, 411 (commenting that non-participation of Justices Brennan and Kennedy had "little practical significance" because Justice Brennan would have joined dissent while Justice Kennedy would most likely have joined majority).

51. *Murray*, 487 U.S. at 544-51. The majority in *Murray* focused its analysis on the exclusionary rule's goal of "putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred." *Id.* at 537 (quoting Nix v. Williams, 467 U.S. 431, 443 (1984)). In *Nix*, this "same position" result was deemed necessary to properly balance "[t]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime." *Nix*, 467 U.S. at 434.

The majority in *Murray* reasoned that if the subsequent search warrant was determined to be an independent source of the evidence sought to be suppressed, the independent source exception to the exclusionary rule would apply and the evidence could be introduced against the defendant. *Murray*, 487 U.S. 541-42. The exclusion of such evidence, the majority concluded, would place the police in a worse position than they would have occupied if no violation had occurred, and thus undermine an important goal of the exclusionary rule. *Id.* at 541.

By contrast, the dissent in *Murray* focused its analysis on the deterrence function of the exclusionary rule, and asserted that "[b]y excluding evidence discovered in violation of the Fourth Amendment, the rule 'compel[s] respect for the constitutional guaranty in the only effectively available way, by removing the incentive to disregard it.' " *Id.* at 544 (Marshall, J., dissenting) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). The dissent recognized that the independent source doctrine was primarily based on the theory that "under certain circumstances the beneficial deterrent effect that exclusion will have on future constitutional violations is too slight to justify the social cost of excluding probative evidence from a criminal trial." *Id.* at 544-45 (Marshall, J., dissenting). Thus, the dissent argued that the doctrine's applicability to given circumstances should be evaluated with regard to the practical effect that the admission of evidence in those circumstances would have on the deterrence function of the exclusionary rule. *Id.* at 545 (Marshall, J., dissenting).

Indeed, while recognizing that the independent source doctrine would be applicable in some circumstances, the dissent asserted that the admission of the evidence in *Murray*, where the evidence was previously discovered illegally, se-

Prior to the Supreme Court's decision in *Murray*, the Third Circuit had addressed the independent source doctrine, both implicitly and explicitly. In *United States v. Johnson*,[52] although the Third Circuit did not expressly incorporate the independent source doctrine into its analysis, the court did address the issue of warrants tainted by the police's inclusion in the affidavit of information they had unlawfully obtained during a prior search.[53] In *Johnson*, the Third Circuit rejected a criminal defendant's argument that a search warrant was invalid because the underlying affidavit was tainted by evidence that the police had seized unlawfully during a prior search.[54] The Third Circuit held that even assuming tainted facts were present in the search warrant affidavit, these facts would not vitiate a warrant otherwise validly issued upon probable cause reflected in the affidavit.[55]

Moreover, in *United States v. Zarintash*,[56] the Third Circuit explicitly recognized the independent source exception to the exclusionary rule.[57] Indeed, in *Zarintash*, the Third Circuit held that illegal actions by government agents did not render evidence inadmissible if the government

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verely undermined the deterrence function of the exclusionary rule, and ultimately "create[d] an affirmative incentive for [police to engage in] unconstitutional searches." *Id.* (Marshall, J., dissenting). The dissent reasoned that obtaining a warrant was inconvenient and that even when probable cause for a warrant existed, the majority holding would provide police with an incentive to first conduct a "confirmatory" illegal search to determine whether obtaining a warrant would be worthwhile. *Id.* at 546-47 (Marshall, J., dissenting). The dissent concluded that an officer would not be deterred from conducting initial illegal searches by the majority's two-part test because the officer could get the evidence admitted by withholding the results of the illegal search from the Magistrate, "rediscovering" the evidence legally and then claiming that the subsequent search was its independent source. *Id.* (Marshall, J., dissenting).

The majority, however, viewed the incentives differently and argued that its approach deterred rather than encouraged unlawful police conduct. *Id.* at 540. The majority reasoned that when probable cause for a warrant existed, its holding would actually discourage police from first conducting "confirmatory" searches because the police would then encounter the "onerous" burden of convincing a trial court that the information gained from the illegal entry had not affected either the law enforcement agent's decision to seek the warrant or the magistrate's decision to grant it. *Id.*

52. 690 F.2d 60 (3d Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983).

53. *Id.* at 63. The *Johnson* case is characterized in *Herrold* as involving the independent source doctrine despite the fact that the doctrine was not explicitly relied upon by the *Johnson* court. *Herrold*, 962 F.2d at 1142 n.10.

54. *Johnson*, 690 F.2d at 63. In *Johnson*, the initial entry was under exigent circumstances by the fire department responding to a fire at the defendant's home. *Id.* at 62. The defendant argued that such exigent circumstances did not extend to the drug squad officers later called to the scene, and that therefore, this latter portion of the search was unlawful. *Id.* at 63. The defendant argued that the evidence discovered by these drug agents tainted the subsequent warrant application and accordingly the subsequent search. *Id.*

55. *Id.* at 63.

56. 736 F.2d 66 (3d Cir. 1984).

57. *Id.* at 74.

subsequently learned of the evidence from an independent source.[58] In its application of the independent source doctrine, the Third Circuit focused predominantly upon the question of whether the evidence had been "discovered by means sufficiently distinguishable to be purged of the primary taint."[59]

Furthermore, during the four years between the *Murray* and *Herrold* decisions, several other courts of appeals had applied the *Murray* holding to facts similar to those in *Herrold* and had arrived at conclusions similar to those reached by the Third Circuit in *Herrold*. In *United States v. Halliman*,[60] for instance, the United States Court of Appeals for the District of Columbia Circuit held that the independent source doctrine permitted the police to introduce evidence seized during a warranted search of a hotel room, despite the fact that the emergency search warrant affidavit included information regarding drugs and drug paraphernalia seen by the officers during a prior illegal search.[61] Citing *Murray*, the D.C. Circuit reasoned that because overwhelming independent grounds existed to establish probable cause in the search warrant affidavit, the inclusion of the illegally obtained information could not have "affected" the judge's decision to issue the emergency warrant.[62] Similarly, in *United States v. Salas*,[63] the United States Court of Appeals for the Ninth Circuit held that *Murray* precluded the suppression of evi-

58. *Id.* (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)). In *Zarintash*, the initial illegal search of a suspect's apartment yielded police a photograph of the defendant, which was ultimately used to identify her as part of a drug conspiracy. *Id.* at 73. The defendant was arrested and a subsequent warranted search was undertaken that uncovered additional evidence. *Id.* The defendant argued for the suppression of the additional evidence, and claimed that the exploitation of the illegally obtained photograph by police led to her identification as part of the drug conspiracy and, thus, to her arrest and the subsequent search warrant. *Id.* Nonetheless, the *Zarintash* court held that the evidence was admissible because an informer's identification of the defendant did not depend on the photograph and, thus, constituted an independent source for the discovery of the evidence. *Id.* at 74.

59. *Id.* at 73-74 (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

60. 923 F.2d 873 (D.C. Cir. 1991).

61. *Id.* at 880-81. In *Halliman*, the police had an emergency justification for initially entering the defendants' hotel room without a warrant. *Id.* at 878-80. However, such exigent circumstances did not extend to their search of the remainder of the room and, thus, this further search was held to be unlawful. *Id.* at 880. Nonetheless, the *Halliman* court held that the evidence discovered during this extended search was admissible because the emergency search warrant subsequently issued constituted an independent source of such evidence. *Id.*

62. *Id.* at 880. The *Halliman* court also concluded that the police officers' decision to obtain a warrant was not prompted by the evidence discovered during the illegal portion of their search. *Id.* Indeed, the police had previously obtained warrants for other hotel rooms occupied by the defendants and would have also sought a search warrant for the additional room had they known of its existence. *Id.* at 878-79.

63. 879 F.2d 530 (9th Cir.), *cert. denied*, 493 U.S. 979 (1989).

dence seized during a warranted search, absent any evidence in the district court record to support an inference that information included in the affidavit that was obtained during a prior illegal search had "affected" the Magistrate's decision to issue the warrant.[64]

III. *UNITED STATES V. HERROLD*

In *United States v. Herrold*,[65] the defendant was approached by a confidential police informant who attempted to arrange a cocaine purchase with him.[66] The defendant told the informant that he had recently obtained a large quantity of cocaine and would be able to make the sale.[67] Later that day, the informant paid the defendant $300.00 toward the purchase, and the defendant agreed to complete the sale two days later.[68]

As planned, the informant went to the defendant's trailer while it was under surveillance.[69] The defendant entered the informant's car, and during a short drive, the drug deal was completed.[70] Upon completion of the transaction, the informant told the surveillance team that he had paid an additional $650.00 for the drugs, that the defendant intended to go to a bar later that evening, and that the defendant had been smoking crack cocaine earlier in the evening and was "squirrely."[71] The informant had earlier told the police that the defendant had a gun.[72]

The surveillance team members had originally intended to obtain a search warrant prior to searching the defendant's trailer.[73] However, they decided to arrest the defendant in his trailer without obtaining a search warrant based on the information they had received from the informant.[74] A state trooper informed the defendant that he was under

64. *Id.* at 538. In *Salas*, police illegally entered the defendants' hotel room and observed drugs and drug paraphernalia in plain view. *Id.* at 533. Such observations were included in their subsequent search warrant affidavit. *Id.* at 534. Nonetheless, the *Salas* court denied the defendants' motions to suppress the evidence discovered during the subsequent warranted search because the untainted information in the search warrant affidavit and the resulting lawful warrant constituted an independent source of such evidence. *Id.* at 538. The United States Court of Appeals for the Ninth Circuit reasoned that the exclusion of such evidence, solely as a result of the officers' mistaken belief that their initial entry was justified to prevent destruction of the evidence, would place them in a worse position than if they had not erred in this regard. *Id.*

65. 962 F.2d 1131 (3d Cir.), *cert. denied*, 113 S. Ct. 421 (1992).

66. *Id.* at 1133.

67. *Id.*

68. *Id.*

69. *Id.* at 1134.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* The police were concerned that the defendant would take cocaine

arrest after the defendant opened the door.[75] The trooper, who was subsequently joined by other officers, forcibly entered the trailer after the defendant slammed the door and ran down a hallway with a gun in his hand.[76] The defendant eventually surrendered his gun, which the officers seized, and submitted to arrest.[77] The officers at the scene did not search the trailer, but they observed drug paraphernalia and cocaine in plain view.[78]

Members of the surveillance team remained at the residence while other members left to obtain a search warrant.[79] In the search warrant application, the trooper included facts with respect to the events that occurred before the officers entered the trailer.[80] In addition, the affidavit set forth the events that took place following the forced entry into the defendant's residence.[81] The Magistrate issued the warrant and the officers conducted a complete search of the residence, during which they recovered the cocaine and drug paraphernalia observed during their original entry, as well as additional cocaine and drug paraphernalia.[82]

During his criminal prosecution, the defendant moved to suppress the evidence discovered in his trailer during both the original entry and the subsequent search.[83] The district court held that the police had conducted a warrantless search and seizure that violated the defendant's Fourth Amendment rights.[84] Therefore, the district court suppressed

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with him to the bar to sell to other people. *Id.* In addition, the police were concerned that due to the trailer's proximity to neighboring residences, they would be unable to maintain an effective surveillance without alerting the defendant to their presence and giving him the opportunity to destroy the evidence. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1134-35. Specifically, the trooper included such facts as those supplied by the informant regarding his purchase of drugs from the defendant and information regarding the positive results of the field test performed on the purchased drugs. *Id.*

81. *Id.* at 1135. Specifically, the trooper included in the affidavit information regarding the defendant's initial resistance and attempt to escape and the officers' forced entry into the defendant's trailer. *Id.* The trooper also included a description of the drugs and drug paraphernalia seen in plain view. *Id.*

82. *Id.* The Third Circuit noted that the district court record was unclear, but concluded that the gun had been seized during the initial unlawful entry. *Id.*

83. *Id.*

84. United States v. Herrold, 772 F. Supp. 1483, 1489-94 (M.D. Pa. 1991), *rev'd*, 962 F.2d 1131 (3d Cir.), *cert. denied*, 113 S. Ct. 421 (1992). The Third Circuit clarified that the district court ordered suppression of the gun seized during the unlawful entry and of the drugs and drug paraphernalia observed in plain view during such entry. United States v. Herrold, 962 F.2d 1131, 1136 n.2 (3d Cir.), *cert. denied*, 113 S. Ct. 421 (1992).

the evidence observed and seized at the time of the warrantless entry.[85]

The government moved for reconsideration on the ground that the "inevitable discovery" doctrine justified the admission of evidence discovered in the defendant's trailer during both searches.[86] The district court denied the government's motion for reconsideration holding that the government had not established by a preponderance of the evidence that the evidence discovered during the warrantless entry would have inevitably been discovered by an independent lawful police investigation.[87] The government appealed to the Third Circuit from the district court's denial of its motion for reconsideration.[88]

IV. ANALYSIS

The Third Circuit began its analysis in *Herrold* with a discussion of the law regarding tainted warrants.[89] The court asserted that tainted factual averments in a search warrant affidavit do not vitiate a warrant that is otherwise validly issued upon probable cause reflected in the affidavit.[90] Rather, a court must excise such tainted averments from the affidavit and determine whether the affidavit contains sufficient other information establishing probable cause.[91]

85. *Herrold*, 772 F. Supp. at 1494. The district court did not suppress the evidence discovered and seized during the subsequent warranted search. *Id.*

86. *Herrold*, 962 F.2d at 1136. The government argued that the officers would inevitably have discovered the gun and the drugs pursuant to a validly issued warrant. *Id.* The government reasoned that even assuming the original entry violated the defendant's Fourth Amendment rights, the subsequent entry did not because the officers had probable cause to obtain the search warrant for the defendant's trailer, even without the incriminating information originally obtained during the illegal entry. *Id.*

87. *Id.* The district court reasoned that the application for the search warrant was "tainted" by the information obtained during the unlawful first entry and that, as a result, the subsequent search was invalid. *Id.* Although the district court denied the motion for reconsideration based on this analysis, the court did not suppress the evidence discovered and seized during the warranted search. *Id.* The Third Circuit noted this inconsistency and decided that the district court had intended to suppress all the evidence seized in both entries. *Id.* at 1137.

88. *Id.* at 1136.

89. *Id.* at 1137-38. The Third Circuit's discussion of tainted warrants was in response to the defendant's contention that the search warrant obtained by police after their illegal entry into his trailer was tainted with evidence derived from this illegal entry and was, thus, invalid. *Id.* at 1137. The defendant further argued that the search conducted pursuant to this invalid warrant was likewise illegal and, thus, constituted a "poisonous tree," the fruit of which was the evidence discovered during such illegal search. *Id.*

90. *Id.* at 1138 (citing United States v. Johnson, 690 F.2d 60, 63 (3d Cir. 1982)).

91. *Id.* The Third Circuit noted that other circuits have taken similar approaches to tainted warrant problems. *See, e.g.*, United States v. Vasey, 834 F.2d 782, 788 (9th Cir. 1987) (holding that inclusion of tainted evidence in affidavit does not taint warrant if remaining untainted evidence would provide neutral magistrate with probable cause to issue warrant); United States v. Driver, 776 F.2d 807, 812 (9th Cir. 1985) (citing United States v. Giordano, 416 U.S. 505,

Based on these principles, the Third Circuit rejected the defendant's argument that the second search of his trailer was performed pursuant to an invalid warrant, and that therefore, the evidence discovered during this unlawful search was the "fruit" of this "poisonous tree" and, as such, inadmissible.[92] The court concluded that the second search was conducted pursuant to a valid warrant because the warrant affidavit contained sufficient additional information establishing probable cause, even after the references to the first entry and the fruits thereof were excised from the affidavit.[93]

The Third Circuit next discussed the distinctions between the independent source exception and the inevitable discovery exception to the exclusionary rule.[94] The court noted that the independent source doctrine focuses on what actually happened, whereas the inevitable discovery doctrine focuses on what would have happened had the initial search not taken place.[95] In *Herrold*, the Third Circuit reasoned that with regard to the evidence seized during the second search, there was no need to speculate as to whether the officers would have obtained a search warrant or whether they would have discovered the contraband had the initial search not taken place, because they had already actually obtained a search warrant and discovered the contraband at issue.[96] Therefore, the court concluded that an inevitable discovery analysis was inappropriate and that the independent source doctrine would provide a

554-56 (1974)) (same); United States v. Mankani, 738 F.2d 538, 545 (2d Cir. 1984) (holding that court must set aside tainted evidence in affidavit to determine whether remaining facts demonstrate probable cause). In addition, the Third Circuit noted that the United States Supreme Court, in Franks v. Delaware, 438 U.S. 154, 171 (1978), had "placed its imprimatur on this principle." *Herrold*, 962 F.2d at 1138.

92. *Herrold*, 962 F.2d at 1138-39.

93. *Id.*

94. *Id.* at 1138-40. This differentiation was made by the Third Circuit in response to the arguments of both the defendant and the government that the inevitable discovery doctrine applied to the facts of the case. *Id.* at 1138. The government argued that the officers would inevitably have discovered the gun and the drugs pursuant to a validly issued warrant. *Id.* at 1136. The government reasoned that, even assuming that the original entry violated the defendant's Fourth Amendment rights, the subsequent entry did not because the officers had probable cause to obtain the search warrant for the defendant's trailer even without the incriminating information originally obtained during the illegal entry. *Id.* In contrast, the defendant argued that "it was improper for a reviewing court to excise information in a warrant application obtained through unlawful means to evaluate whether the police *would have* [inevitably] discovered the incriminating evidence lawfully." *Id.* at 1138.

95. *Id.* at 1140. The court stated that under the inevitable discovery doctrine, evidence is admissible if it inevitably would have been discovered through lawful means, despite the fact that the search leading to its actual discovery was unlawful. *Id.* The court contrasted the independent source doctrine, under which evidence is admissible if it was in fact discovered lawfully and not as a direct or indirect result of illegal activity. *Id.*

96. *Id.* at 1139.

better analytical framework.[97]

Focusing on the independent source doctrine, the Third Circuit discussed the doctrine's application by the United States Supreme Court in *Murray v. United States*.[98] The Third Circuit reviewed the theoretical underpinnings of both the exclusionary rule and the independent source doctrine, as set forth by the majority in *Murray*.[99] The Third Circuit noted that, based on the principles underlying the independent source doctrine, the *Murray* Court had determined that the doctrine might justify the introduction of evidence discovered during a legal search that had originally been observed in plain view during a prior illegal entry.[100] The Third Circuit further acknowledged that, in deciding whether such evidence was admissible, the *Murray* majority had focused on the question of whether the search pursuant to the warrant was in fact a "genuinely independent source" of the evidence at issue.[101]

The *Herrold* court continued its analysis based on the independent source guidelines set forth in *Murray*, but modified its analysis to reflect the fact that in *Herrold*, the independent source that the prosecution sought to establish—a subsequent valid search—was based upon a partially tainted warrant.[102] Utilizing the *Murray* analysis, the court first sought to determine whether the police would have applied for the search warrant without regard to the information obtained during the prior illegal entry.[103] The court reasoned that based on the knowledge

97. *Id.*

98. *Id.* at 1139-40.

99. *Id.* at 1139. Specifically, the Third Circuit acknowledged that the Supreme Court had developed the independent source doctrine as a corollary to the exclusionary rule because:

> 'the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse* position, that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.'

Id. (quoting Murray v. United States, 487 U.S. 533, 537 (1988) (quoting Nix v. Williams, 467 U.S. 431, 443 (1984))).

100. *Id.* at 1140.

101. *Id.* The Third Circuit emphasized that the *Murray* Court held that the search pursuant to a warrant would not be an independent source of the evidence at issue if "the agents' decision to seek the warrant was prompted by what they had seen during their initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Id.* (quoting Murray v. United States, 487 U.S. 533, 542 (1988)).

102. *Id.* at 1140-44. It is important to remember the crucial distinction between *Murray* and *Herrold*. In applying for the warrant in *Murray*, the government agents did not mention the prior entry, nor did they rely on any observations made during that entry. Murray v. United States, 487 U.S. 533, 535-36 (1988). In *Herrold*, by contrast, this information was included in the affidavit for the search warrant. *Herrold*, 962 F.2d at 1135.

103. *Herrold*, 962 F.2d at 1140-41.

the officers already possessed regarding the defendant's activities, they would have arrested the defendant if he had left the trailer and would then have sought the warrant to search the trailer.[104] Therefore, the court concluded that, even without regard to the information obtained during the illegal entry, the police would nonetheless have sought a warrant to search the defendant's trailer.[105] In so concluding, the court rejected as clearly erroneous the district court's conclusion that it was "speculative" as to whether the police would have obtained a search warrant absent the original illegal entry.[106]

Next, the Third Circuit determined whether there would have been probable cause for the Magistrate to issue the search warrant without the information included in the affidavit obtained during the prior illegal entry.[107] The court reasoned that, in addition to the illegally obtained evidence, the search warrant affidavit contained details regarding the surveillance team's observation of a drug deal between the defendant and its informant and the results of a field test performed on the drugs, under which they tested positive for cocaine.[108] Therefore, the court concluded that even without the information obtained during the illegal entry, the warrant affidavit still contained sufficient probable cause for the warrant to be issued.[109] In so concluding, the Third Circuit rejected the district court's application of the *Murray* holding to the facts of *Herrold*.[110]

The Third Circuit asserted that the district court's interpretation of *Murray* conflicted with the policy underlying the independent source doctrine—that the police not be placed in a worse position than they

104. *Id.* at 1141. The court focused on the officers' knowledge of the defendant's previous drug convictions and on their knowledge of the defendant's sale of drugs to the government informant. *Id.* at 1140-41. Also important to the court's determination was the information previously communicated to the police by the informant regarding the defendant's possession of cocaine and a weapon, and the clear inference from the facts known to the officers that the remaining cocaine after the informant's purchase was in the defendant's trailer. *Id.* at 1141. The court's analysis also placed weight on the evidence that the police had originally intended to obtain a warrant, but altered their plans when they learned that the defendant was leaving the premises. *Id.*

105. *Id.* at 1141. Regarding the *Murray* holding, therefore, the Third Circuit implicitly concluded that the officers' decision to obtain a search warrant was not prompted by what they had seen during their initial entry. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* Thus, the Third Circuit implicitly concluded that the Magistrate's decision to issue the warrant in *Murray* was not affected by the inclusion in the search warrant affidavit of the information obtained during the prior illegal entry. *Id.*

110. *Id.* Indeed, the Third Circuit stated that the district court had erroneously reasoned that because the warrant affidavit contained information discovered during the unlawful entry, such information necessarily "affected" the Magistrate's decision to issue the warrant. *Id.*

otherwise would have been in, had they not engaged in the illegal conduct.[111] To advance this policy, the Third Circuit asserted that the *Murray* Court's use of the word "affect" must be understood in a "substantive" manner.[112] Therefore, the court reasoned that police officers' inclusion in a warrant application of information obtained during an unlawful entry does not "per force" indicate that the illegally obtained information "affected" the Magistrate's decision to issue the warrant.[113] Moreover, the court concluded that the inclusion of such improper information in the search warrant affidavit does not automatically vitiate the applicability of the independent source doctrine.[114] Rather, if the warrant application contains probable cause apart from the improper information, the warrant will be lawful and the independent source doctrine will apply, as long as the officers are not prompted to obtain a search warrant by what they observe during their initial unlawful entry.[115]

The Third Circuit noted that its result harmonized the tainted warrant and independent source doctrines.[116] Furthermore, the court asserted that its implementation of the *Murray* guidelines effectively preserved the policy underlying the independent source doctrine, of ensuring that the police are not placed in a worse position than they would otherwise have been in had they not violated the defendant's Fourth Amendment rights.[117] In addition, the Third Circuit maintained that its decision would not provide the police with an incentive to avoid the warrant requirement, because by its nature, the decision would only apply when the police had subsequently obtained a warrant.[118] The court emphasized that any information discovered in a prior unlawful search would be useless to the police in a subsequent warrant application, and thus the court's decision would not give the police any incentive to

111. *Id.*

112. *Id.* The *Murray* Court held that the search pursuant to a warrant would not be an independent source of the evidence at issue if "the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and *affected* his decision to issue the warrant." United States v. Murray, 487 U.S. 531, 542 (1988) (emphasis added).

113. *Herrold*, 962 F.2d at 1141.

114. *Id.*

115. *Id.* at 1141-42. In this regard, the Third Circuit concluded that the government was not required to show that the Magistrate's decision to grant the search warrant was entirely independent of the information acquired during the illegal warrantless entry. *Id.* at 1143. Rather, the government had the burden of establishing that a neutral magistrate would have issued a warrant based on the untainted information contained in the affidavit, which the police had obtained prior to their illegal entry. *Id.*

116. *Id.* at 1144.

117. *Id.*

118. *Id.* The Third Circuit stated that its result was dependent upon its conclusion that the police would have obtained the search warrant even if the initial unlawful entry had not taken place. *Id.*

search premises first without a warrant.[119] Consequently, the Third Circuit reversed the district court's order denying the Government's motion for reconsideration and remanded the case to the district court for trial, with none of the evidence obtained in either search suppressed on the basis of the exclusionary rule.[120]

V. CONCLUSION

The *Herrold* court's interpretation of the *Murray* holding was in accord with the Third Circuit's pre-*Murray* decisions concerning partially tainted warrants,[121] as well as with the decisions of other circuits in this context.[122] Notably, the Third Circuit was not the first court of appeals to extend the *Murray* holding to a partially tainted warrant situation.[123] Indeed, prior to *Herrold*, both the Ninth Circuit in *Salas* and the D.C. Circuit in *Halliman* cited *Murray* as authority for the proposition that evidence "rediscovered" pursuant to a search warrant was admissible, despite the fact that the search warrant affidavit was partially tainted by the

119. *Id.* The Third Circuit's opinion in *Herrold*, however, failed to address the concern of the *Murray* dissent that such a holding would undermine the deterrence function of the exclusionary rule. For further discussion of the concerns of the *Murray* dissent, see *supra* note 51.

120. *Herrold*, 962 F.2d at 1144. The Third Circuit acknowledged that the gun, which was actually seized by police during the illegal entry, presented a special and independent question. *Id.* at 1143. Nonetheless, the court concluded that the gun should be treated as being seized pursuant to the search warrant and was thus admissible under the independent source doctrine. *Id.* The court reasoned that it would be dangerous for police to leave a loaded weapon unsecured until they obtained a warrant, and senseless to require the formality of physically reseizing the gun. *Id.*

121. *See* United States v. Johnson, 690 F.2d 60 (3d Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983). *Johnson* was a pre-*Murray* Third Circuit decision holding a search warrant valid even though the search warrant application was tainted by evidence seized unlawfully during a prior search. *Id.* at 63. For a further discussion of the *Johnson* facts and holding, see *supra* notes 52-55 and accompanying text.

122. Several circuits have held in pre-*Murray* decisions that search warrants were valid even though the warrant applications contained tainted factual averments, as long as probable cause still existed upon excising such tainted factual averments from the warrant applications. *See, e.g.*, United States v. Driver, 776 F.2d 807, 812 (9th Cir. 1985) (holding that "[a] warrant may be upheld even where it contains tainted and untainted facts as long as the untainted portions contain a sufficient showing of probable cause to render the warrant valid" (citing United States v. Giordano, 416 U.S. 505, 554-56 (1974))); United States v. Antone, 753 F.2d 1301, 1307 (5th Cir. 1985) (holding search warrant valid because information gained through prior illegal search constituted only small part of information included in search warrant affidavit); United States v. Mankani, 738 F.2d 538, 545 (2d Cir. 1984) (holding that court must set aside tainted material in affidavit and determine if remaining facts demonstrate probable cause).

123. *See* United States v. Halliman, 923 F.2d 873, 880 (D.C. Cir. 1991) (holding that independent source doctrine applied despite tainted warrant affidavit); United States v. Salas, 879 F.2d 530, 537-38 (9th Cir.) (same), *cert. denied*, 493 U.S. 979 (1989).

inclusion of information derived from a previous illegal entry.[124] Moreover, subsequent to the Third Circuit's decision in *Herrold*, the United States Court of Appeals for the Fifth Circuit in *United States v. Restrepo*[125] also extended the *Murray* holding to a partially tainted warrant situation, citing with approval the *Herrold* court's interpretation of the *Murray* Court's use of the word "affect."[126]

Although the *Murray* decision has been consistently followed by lower courts, it has been the subject of stinging criticism by commentators.[127] Furthermore, it is important to recognize that *Murray* was a

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124. For a further discussion of the *Halliman* and *Salas* cases, see *supra* notes 60-64 and accompanying text.

125. 966 F.2d 964 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 968 (1993). In *Restrepo*, police officers conducted a warrantless "security sweep" that was later held to be violative of the criminal defendant's Fourth Amendment rights. *Id.* at 968. The police officers subsequently applied for a search warrant, and included in the affidavit the events that took place during the illegal search, including the fact that they had found the defendant hiding on the premises. *Id.* at 967-68. Relying on *Murray*, the district court in *Restrepo* concluded that the search warrant could not constitute an independent source of the evidence subsequently seized, because the search warrant affidavit had contained tainted factual averments derived from the previous unlawful entry, which affected the Magistrate's decision to issue the warrant. *Id.* at 968. Similar to the district court in *Herrold*, the district court in *Restrepo* interpreted the *Murray* Court's use of the word "affect" as requiring the court to consider the actual effect of the illegally acquired information contained in the warrant affidavit on the decision of the Magistrate to issue the search warrant. *Id.* at 969. The United States Court of Appeals for the Fifth Circuit rejected the *Restrepo* district court's interpretation, relying in part on the Third Circuit's rejection of a similar interpretation by the district court in *Herrold*. *Id.* at 970. The *Restrepo* court ultimately concluded that after excising the tainted evidence from the search warrant affidavit, sufficient facts still existed to establish probable cause. *Id.* at 971.

126. *Id.* at 970. The Fifth Circuit noted that the "affects" phrase was almost certainly a paraphrase of the approach long sanctioned by the circuits and that the Third Circuit's decision in *Herrold* "makes this point abundantly clear." *Id.* Additionally, the Fifth Circuit noted that it had found "no other post-*Murray* circuit cases concerning the independent source doctrine that have interpreted *Murray* as refuting their pre-*Murray* holdings that inclusion of illegally-acquired information on a warrant affidavit does not invalidate the warrant if the affidavit's other averments set forth probable cause." *Id.*

127. *See The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 162 (1988) [hereinafter *Leading Cases*] (commenting that *Murray* Court "eviscerated its protection of [F]ourth [A]mendment rights by expanding the scope of an exception to the exclusionary rule while dismissing too easily the undesirable effects its decision will have on deterrence of police misconduct"); Craig M. Bradley, Murray v. United States: *The Bell Tolls for the Search Warrant Requirement*, 64 IND. L.J. 907, 915 (1989) (discussing *Murray* and asserting that "[b]y a series of logical thrusts, the [*Murray*] Court guts not only the warrant requirement but the fruit of the poisonous tree doctrine as well"); Fee, *supra* note 50, at 371 (citing *Murray* as example of Supreme Court placing greater value on law enforcement than on personal liberties, and noting that *Murray* Court had increased ability of law enforcement officers to conduct warrantless searches by expanding scope of independent source doctrine); Kirchmeier, Note, *supra* note 50, at 650 (discussing *Murray* and asserting that *Murray* Court honed a rule that provided little deterrence to unlawful police conduct, thereby shifting its focus

four-to-three decision in which the majority and dissent were sharply divided on issues fundamental to Fourth Amendment protection.[128] Nonetheless, cases decided subsequent to *Murray*, including *Herrold*, have lacked both dissenting opinions and substantive discussion of the important policy issues raised by the *Murray* dissent and focused on by commentators critical of the *Murray* decision.[129]

This apparent lack of decisional tension in the lower courts is particularly alarming in *Herrold*-type cases, because in such cases the *Murray* holding is extended beyond its facts to encompass situations in which officers include evidence obtained during their prior illegal entry in the search warrant affidavit.[130] This additional factual element bolsters the plausibility of the *Murray* dissent's argument that allowing illegally discovered evidence to be "rediscovered" pursuant to a subsequently issued search warrant provides police with an incentive to conduct illegal "confirmatory" searches before attempting to obtain a warrant.[131] Indeed, while in *Murray* the search warrant affidavit contained no indicia of evidence discovered during the prior unlawful search, the affidavit in *Herrold* did include such illegally obtained evidence and still no exclusionary sanction attached to the unlawful police conduct.[132] Based upon the *Murray* and *Herrold* holdings, the police have everything to

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away from exclusionary rule's "core rationale" of deterring constitutional and statutory violations).

128. Murray v. United States, 487 U.S. 533, 534 (1988). The majority in *Murray* focused on the exclusionary rule's goal of putting police in the same position they would have been in, had they not engaged in illegal conduct. *Murray*, 487 U.S. at 537 (citing Nix v. Williams, 467 U.S. 431, 443 (1984)). In contrast, the dissent focused on the deterrence function of the exclusionary rule and argued that the majority's holding would actually encourage rather than deter police conduct violative of the Fourth Amendment. *Id.* at 544-45 (Marshall, J., dissenting). For a further discussion of the contrasting policies underlying the majority and the dissenting opinions in *Murray*, see *supra* note 51.

129. Importantly, no dissenting opinion was written in the Third Circuit's decision in *Herrold*. *Herrold*, 962 F.2d 1131 (3d Cir.), *cert. denied*, 113 S. Ct. 421 (1992). Furthermore, there was no dissenting opinion of the United States Court of Appeals for the D.C. Circuit in *Halliman*. United States v. Halliman, 923 F.2d 873 (D.C. Cir. 1991). Moreover, although there was a concurring in part and dissenting in part opinion to the Ninth Circuit's decision in *Salas*, the concurring and dissenting opinion did not focus on the majority's independent source analysis under *Murray*. United States v. Salas, 879 F.2d 530, 539 (9th Cir.), *cert. denied*, 493 U.S. 979 (1989) (Ferguson, J., concurring in part and dissenting in part). Finally, a concurring opinion was filed in the Fifth Circuit's decision in *Restrepo*, which disagreed not with the majority's methodology for analyzing a search warrant affidavit under *Murray*, but rather with the majority's conclusion under such analysis. United States v. Restrepo, 966 F.2d 964, 973 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 968 (1993) (Johnson, J., concurring).

130. For a further discussion of the Third Circuit's analysis in *Herrold*, which modified the *Murray* guidelines to reflect the inclusion of the unlawfully obtained evidence in the search warrant affidavit, see *supra* notes 102-15 and accompanying text.

131. *Murray*, 487 U.S. at 546-47 (Marshall, J., dissenting).

132. *Herrold*, 962 F.2d at 1144 (remanding case for trial in district court but

gain and nothing to lose by conducting illegal "confirmatory" searches to determine the utility of obtaining a warrant.[133] *Herrold* conveys the message that even when officers include unlawfully obtained evidence in the search warrant affidavit, a search conducted pursuant to the subsequently issued search warrant can nevertheless constitute an independent source of the same evidence when it is conveniently "rediscovered."

In conclusion, although the Third Circuit's interpretation of *Murray* may have been consistent with its pre-*Murray* decisions as well as with the post-*Murray* decisions of other circuits, it is important for lower courts applying the *Herrold* ruling to recognize the conflicting policies embraced by the majority and the dissent in the *Murray* opinion.[134] Indeed, the inclusion of the improperly obtained evidence in the search warrant application in *Herrold* emphasizes the fact that the *Murray* majority may have improperly balanced "the interest of society in deterring unlawful police conduct" against "the public interest in having juries receive all probative evidence of a crime."[135] Unfortunately, if not carefully monitored by courts relying on the *Murray* and *Herrold* decisions, this imbalance may ultimately jeopardize the Fourth Amendment rights of all citizens.[136]

Penny S. Indictor

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not suppressing any evidence obtained during either illegal entry or subsequent warranted search).

133. *See Leading Cases*, *supra* note 127, at 167 ("[I]f [the] illegal search turns up nothing, police will have saved themselves the time and trouble of preparing an affidavit and presenting it to the [M]agistrate; if the search is successful, they may [under *Murray*] obtain a warrant and validate the results of the prior search.").

134. For a discussion of the conflicting policy focuses of the majority and the dissent in *Murray*, see *supra* note 51.

135. *See* Kirchmeier, Note, *supra* note 50, at 650 (suggesting that *Murray* Court gave too much weight to concern of admitting probative evidence into criminal trials and failed to recognize that this concern could be outweighed by exclusionary rule's goal of deterring Fourth Amendment violations).

136. *See Leading Cases*, *supra* note 127, at 162 (noting that *Murray* Court provided police with incentive to conduct illegal "confirmatory" searches prior to obtaining a warrant and "thereby undermined citizens' [F]ourth [A]mendment rights to privacy and security in their homes"); Bradley, *supra* note 127, at 917 (noting that when warrantless searches, such as in *Murray*, are allowed to occur without any exclusionary sanction attaching, "it greatly increases the chance that the police will search the innocent"); Fee, *supra* note 50, at 412 (warning that *Murray* sends message to law-abiding citizens that "the Supreme Court will make many sacrifices in order to combat crime-including the sacrifice of basic freedoms guaranteed by the Constitution").