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By Professor Steven Grossman

The protection afforded by the warrant requirement of the fourth amendment and the use of the exclusionary rule as a remedy for unlawful searches and seizures have been significantly reduced by the Supreme Court's recent decision in *Murray v. United States.*[1] Although somewhat overlooked because of a flurry of decisions during the final weeks of its term involving other important issues such as the constitutionality of the independent counsel,[2] the ability of states to execute minors,[3] and the right to confront victims in child sex-abuse cases,[4] the Court's opinion in *Murray* is a most significant one.

Stated most succinctly, *Murray* holds that when the police acting with probable cause but in violation of the warrant requirement discover evidence of a crime, that evidence will be admissible if the police later obtain a search warrant without using the information gained during the unlawful search. Essentially, the Court's approach is to treat the first unlawful entry and search as if it never happened, so that the police are placed in a position "no worse off"[5] than if that search had not been conducted. The purpose of this article is to show how this approach strikes directly at the purpose behind the warrant requirement and runs precisely counter to the avowed goal of the exclusionary rule, which is the deterrence of illegal police activity.

The facts of *Murray* are largely undisputed. Federal agents observed two vehicles, operated by the defendant and his co-conspirator, drive into a warehouse in South Boston. Twenty minutes later the same two vehicles, driven by the same individuals, emerged from the warehouse. Shortly thereafter these two vehicles were stopped and pursuant to a lawful search found to contain marijuana. The agents then forcibly entered the warehouse and observed large burlap-wrapped bales which were later found to contain marijuana. The bales were left undisturbed, and the agents secured the warehouse until a warrant was obtained. This warrant, signed eight hours after the unlawful entry, was apparently obtained without the use of information gained through that entry. During the search conducted after the warrant was issued, the police seized 270 bales of marijuana and other incriminating evidence. Some of this evidence had been discovered during the previous unlawful entry and some was seen for the first time during the warrant-based search.[6]

Four years earlier in the case of *Segura v. United States,*[7] the Court had decided in a factual situation similar to *Murray* that evidence uncovered for the first time during the post-warrant search was admissible, because the discovery of that evidence had a source independent of the original unlawful search (the independent source rule). The Court in *Segura,* however, specifically left undecided the question of the admissibility of the evidence discovered by the unlawful pre-warrant search and, in fact, suggested different treatment for such evidence.[8] In *Murray,* however, the Court rejected the need to treat the evidence seized pursuant to the unlawful entry any different than the evidence discovered after the warrant is obtained.

In treating the evidence discovered before the warrant is obtained the same as that obtained after the warrant is issued, the Court held that the independent source exception to the exclusionary rule applies to both types of evidence. In so doing the Court negated the significance of the fact that the bales of marijuana had already been discovered and seized[9] prior to their seizure by independent lawful means. Contrary to the Court's holding, the seizure of tangible evidence in violation of the warrant requirement, as occurred in *Murray,* should preclude the use of the independent source rule and lead instead to consideration of the doctrine of inevitable discovery.

The *Murray* Court correctly observed that the independent source rule has been applied to "evidence acquired by an untainted search *which is identical to the evidence unlawfully acquired.*"[10] In support of this position, the Court cites Justice Holmes' well known opinion for the Court in *Silverthorne Lumber Co. v. United States.*[11] Comparing the facts of *Silverthorne* and the language quoted by the *Murray* Court from Holmes' opinion reveals a crucial distinction from the *Murray* case.

In *Silverthorne,* government agents, after arresting the defendant, seized documents from his office in violation of the warrant requirement. Even though the documents were later returned to the defendant, the government sought to use information acquired from the documents in its prosecution.[12] In its decision, the Court established the derivative evidence rule declaring that not only the illegally seized evidence but any information derived from it cannot be used by the prosecution. As noted in *Murray, however,* the Court in *Silverthorne* went on to say:

"Of course this does not mean that the *facts* thus obtained become sacred and inaccessible. If *knowledge* of them is gained from an independent source they may be proved like any others (emphasis added)."[13] Justice Holmes referred to "knowledge" or "facts" as the kind of evidence which although discovered illegally can be admissible if later learned through independent lawful means.

Limiting the application of the independent source rule to intangible evidence when the government seeks to apply it to the same evidence seized first unlawfully and later legally is sensible for several reasons. First, as the U.S. Court of Appeals for the First Circuit observed in *United States v. Silvestri*,[14] intangible evidence, such as information, cannot be seized in the manner in which tangible evidence is seized.[15] Facts cannot be possessed or controlled in the same way as a tangible item, and these facts can be learned or "seized" an infinite number of new ways. A tangible item can be seized at one moment only (unless of course control of the item is surrendered and later reasserted, which did not occur in *Murray*). Therefore, tangible evidence cannot be "reseized" without, in effect, pretending the original seizure did not occur. Although the Court dismisses this approach as "metaphysical,"[16] it surely is preferable to one based on the illogical notion of reseizure of an object, the control of which was never surrendered.

The consequence of the *Murray* Court's approach to reseizure of tangible items is the likelihood of even more undesirable and absurd results. What, for example, should occur if prior to the issuance of a search warrant, the police remove the evidence discovered during an unlawful search? Can this evidence later be "reseized" in the inventory room at the police station? If, as the Court maintains, tangible evidence is treated the same as intangible for purposes of the independent source rule, then, since the location of the discovery of intangible information is no bar to its admissibility, it should not be so for tangible evidence either. Further, if the sole criterion for admitting the evidence is that its lawful discovery was genuinely independent of the prior illegal discovery, such could still be the case even where the evidence is moved.[17] If evidence seized and removed to the police station after an illegal search is saved by the independent source rule, the policy of "search and seize first and obtain a warrant later" will be legitimated.

The Court should have rejected the concept of reseizure of tangible evidence necessary for application of the independent source rule in *Murray* and considered instead whether the doctrine of inevitable discovery should be applied. The doctrine of inevitable discovery or hypothetical independent source rule allows for the admissibility of evidence seized unlawfully when the government can show the likelihood that it would ultimately have acquired the evidence by lawful means.[18] Such was the case in *Nix v. Williams*[19] where the defendant was induced, in violation of his sixth amendment right to counsel, into divulging where he had left the body of his murder victim.[20] The Court in *Williams* ultimately allowed evidence from the body at trial because it concluded that a large scale search for the victim would have uncovered the body eventually.[21] In *Murray*, the Court could have said that, given the existence of probable cause and the pre-entry inclination of the police to seek a warrant, the evidence would have been discovered eventually through lawful means.[22] While such an application of the inevitable discovery doctrine would be premised on a more sensible and honest approach to the exclusionary rule (although just as damaging to the purposes of both the exclusionary rule and the warrant requirement), the Court may have chosen to use the independent source rule for reasons related to differences in the application and the nature of the two doctrines.

> ***"Facts cannot be possessed... in the same way as a tangible item..."***

Had the Court applied the doctrine of inevitable discovery to the facts of *Murray*, it would have raised even greater questions concerning the breadth of its holding. For example, if the police illegally enter a dwelling and seize evidence but never obtain a warrant, will the evidence be admitted if it can be shown that the police ultimately intended to get a warrant and that in fact such a warrant would have been issued? The doctrine of inevitable discovery arguably should be applied to such a situation especially since failure to do so would place the police in a "worse position" than if the illegal search had not occurred.[23] Such a holding, however, would likely reduce the number of times the police seek a warrant.[24]

Perhaps an important difference between the nature of the independent source and inevitable discovery doctrines contributed to the Court's opting for the former in *Murray*. When the independent source rule is applied, the evidence has in fact been discovered through lawful means independent of the previous illegality. As the causal link between the illegal act and the discovery of the evidence has largely been severed, it is reasonable to look at the exclusionary rule as being inapplicable.[25] When the inevitable discovery doctrine is applied, however, the seizure of the evidence is through unlawful means alone and the exclusionary rule is clearly applicable. Admission of the evidence would then require overcoming or satisfying the exclusionary rule by examining the costs and benefits of exclusion in a specific situation.[26] Primarily, the difference between the two doctrines reflects the distinction between defining the limits of the exclusionary rule on one hand and describing its values on another.[27] While consideration of the limits of the exclusionary rule when applying the independent source rule to warrant avoidance situations calls for an examination of the purposes of the exclusionary rule and warrant requirements, application of the inevitable discovery doctrine makes the need for such an examination of values even more acute. With the above in mind, it becomes important to examine the values at stake in the Court's decision to admit evidence seized initially during a search conducted in violation of the warrant requirement of the fourth amendment.

The primary purpose of the exclusionary rule is to deter unlawful police activity.[28] The defendant in the *Murray* case argued that admitting the evidence seized during the unlawful entry of the warehouse would remove this deterrent impact upon the police and in fact would give the police an incentive to violate the warrant requirement. The defendant claimed that police possessing probable cause would routinely enter dwellings without search warrants, secure in the knowledge that if evidence of a crime was found, a warrant could safely be obtained later. If no evidence was found, the time and effort needed to obtain a warrant would be saved.[29] The Court's response to this argument was to note the unlikelihood that a police officer would risk evidentiary suppression by entering illegally, "since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officer's decision to seek a warrant or the

magistrate's decision to grant it."[30] The Court's response is disturbing for two reasons: first, because its overestimation of the burden placed on the officer who acts without a warrant skews its assessment of police incentives and deterrence; and second, because the result of its response is essentially a merger of the probable cause and warrant requirements of the fourth amendment, effectively eviscerating the latter.

These consequences can most easily be seen by looking at what undoubtedly will be a not uncommon situation in the post-*Murray* criminal law. A police officer, armed with information from two reliable informants, decides to enter a suspect's house without a warrant. He tells his sergeant of his plan and his intention to obtain a warrant after the search is complete. The officer finds drugs, then obtains a search warrant from a magistrate and reseizes the evidence. Clearly this evidence should be admissible under *Murray* as the officer ultimately seized the evidence under a warrant obtained without any information gained from the unlawful entry and which he always intended to seek. Let us now weigh the deterrent impact on this officer regarding his decision to enter and search before seeking a warrant.

Not presenting the probable cause to a magistrate before the search was not much of a risk for the officer since his conclusion that he had probable cause is likely to be a correct one, especially after *Illinois v. Gates*.[31] If his assessment of probable cause is incorrect, he has lost nothing since he would have been unsuccessful in obtaining a warrant, and at least he has removed some drugs from the community. The "more onerous burden" alluded to by the Court was satisfied by demonstrating that the reliable informants communicated to the officer before the entry and by the officer's stated intention to seek a warrant. The Court made it particularly easy to prove the officer's inclination to obtain a warrant by rejecting Justice Marshall's proposed requirement that at least the officer should have to point to some historically verifiable fact, e.g., that the warrant process had already been initiated in some form prior to the unlawful entry.[32] This officer, therefore, could have overcome this burden merely by expressing for the first time at a suppression hearing his pre-search intention to seek a warrant, and such would have been sufficient to meet the officer's burden unless the "facts render those assurances implausible." Contrary to the Court's assertion, there is little to deter the officer from searching first and obtaining a warrant later. Therefore a deliberate, unreasonable decision to avoid the warrant requirement, arguably the kind of police action requiring the highest level of deterrence,[33] has been legitimated.

The second result of the Court's approach lies in the direct attack of this decision on the purpose behind the warrant clause of the fourth amendment. The warrant clause is designed to insure that magistrates will be interposed between the forces of government and the individual suspect.[34] These magistrates are charged with the responsibility of forming their own opinions as to whether probable cause exists *prior* to the time that the government is permitted to intrude into those areas protected by the fourth amendment. Post hoc judicial determinations of probable cause in situations where warrants are clearly required result in an abandonment of the magistrate's role as a buffer between the state and its citizens.[35] No amount of probable cause can by itself satisfy these concerns addressed by the warrant clause. By removing the magistrate as a buffer, the Court has effectively merged the warrant clause and the probable cause requirements resulting in the inevitable diminution of the warrant clause.

> ***"Murray . . . will reduce the value of the exclusionary rule . . ."***

The decision of the Supreme Court in *Murray v. United States* is an unfortunate one in its misapplication of the independent source rule. This decision will weaken the protection afforded by the warrant requirement and will reduce the value of the exclusionary rule as a deterrent to unlawful searches and seizures.

Footnotes

[1] ___ U.S. ___, 108 S. Ct. 2529 (1988).
[2] *Morrison v. Olson*, ___ U.S. ___, 108 S. Ct. 2597 (1988).
[3] *Thompson v. Oklahoma*, ___ U.S. ___, 108 S. Ct. 2687 (1988).
[4] *Coy v. Iowa*, ___ U.S. ___, 108 S. Ct 2798 (1988).
[5] The "no worse off" principle, first articulated by the Court in *Nix v. Williams* as a corollary to the derivative evidence rule, holds that although the police cannot benefit either directly or indirectly from their wrongdoing, neither should they be placed in a position worse than if the illegality had not occurred. 467 U.S. 431, 443 (1984).

The grafting of the "no worse off" principle onto the derivative evidence rule in *Williams* has been criticized as being the result of the Court's misreading of prior cases. Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial*, 22 Am. Crim. L. Rev. 85, 158-66 (1984).
[6] ___ U.S. at ___, 108 S. Ct. at 2532 (1988).
[7] 468 U.S. 796 (1984).
[8] In responding to the assertion that the ruling in *Segura* would reduce the deterrent impact of the exclusionary rule, Chief Justice Burger wrote, "officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case." *Id.* at 812 (opinion joined by O'Connor, J.) cited in *Murray*, ___ U.S. at ___, 108 S. Ct. at 2540 (Marshall, J., dissenting).
[9] The Court makes no claim that the bales discovered during the unlawful entry were not seized, and in fact implicitly concedes seizure by referring to the post-warrant activity as "reseizure." ___ U.S. at ___, 108 S. Ct. at 2535.
[10] *Id.*
[11] 251 U.S. 385 (1920).
[12] *Id.* at 390-91.
[13] *Id.* at 392.
[14] 787 F.2d 736 (1st Cir. 1986).
[15] *Id.* at 739.
[16] ___ U.S. at ___, 108 S. Ct. at 2535.
[17] The Court does note parenthetically that this independence "may well be difficult to establish where the seized goods are kept in the police's possession." *Id.* at ___, 108 S. Ct. at 2535. Presumably the Court is implying that when the police keep or remove the evidence, that is somehow indicative that a subsequently obtained warrant may more likely be the product of the finding of such evidence. There are, however, many reasons the police can offer as to why they chose to keep or remove the evidence which are perfectly consistent with what undoubtedly will be their pre-search intention to seek a warrant.
[18] The case that first applied the doctrine of inevitable discovery is said to be *Somer v. United States*, 138 F.2d 790, 792 (2d Cir. 1943). For other cases, state and federal, that have used the doctrine, see Grossman, *The Doctrine of Inevitable Discovery: A Plea For Reasonable Limitations*, 92 Dick. L. Rev. 313, 313 nn. 1-2 (1988).
[19] 467 U.S. 431 (1984).
[20] *Id.* at 435-36.
[21] *Id.* at 437-38.

[22] The inevitable discovery doctrine has been so applied in *United States v. Silvestri,* 787 F.2d 736, 746 (5th Cir. 1986); *United States v. Merriweather,* 777 F.2d 503, 506 (9th Cir. 1985); *United States v. Apker,* 705 F.2d 293, 309-10 (8th Cir. 1983); *Krukoff v. State,* 702 P.2d 664, 666 (Alaska Ct. App. 1985); *State v. Butler,* 676 S.W.2d 809, 812-13 (Mo. 1984).

[23] *State v. Washington,* 120 Wis. 2d 654, 308 N.W.2d 304, 310 (1984).

[24] *United States v. Griffin,* 502 F.2d 959, 961 (6th Cir. 1974), wherein the Court said:

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

See also Commonwealth v. Benoit, 382 Mass. 210, 415 N.E.2d 818 (1981). The *Benoit* court's position was: "We decline to apply the rule in a situation where its effect would be to read out of the Constitution the requirement that the police follow certain protective procedures - in this case, the warrant requirement of the Fourth Amendment." 372 Mass. at 234, 415 N.E.2d at 823; *United States v. Allandro,* 634 F.2d 1182, 1185 n.3 (9th Cir. 1980), taking the position that: "[m]echanical application [of independent source/inevitable discovery doctrine analysis] where a search warrant is subsequently commissioned...would allow police officers to treat the warrant requirement as merely an ex post facto formality." *United States v. Alvarez-Porras,* 643 F.2d 54, 63-64 (2d Cir. 1981); 3 LaFave, *Search and Seizure,* at 624 (1978); LaCount & Girese, *The Inevitable Discovery Rule: An Evolving Exception To The Constitutional Exclusionary Rule,* 40 Alb. L. Rev. 483, 506 ("[t]he unfettered use of 'inevitable discovery' would potentially void the necessity to ever obtain a warrant because of the presence of the argument that the investigation would have obtained a warrant and inevitably discovered the evidence."); Pitler, *The Fruits of the Poisonous Tree Revisited and Shepardized,* 56 Calif. L. Rev. 579, 630 (1968), ("[t]he exclusionary rule, designed to discourage illegal police activity, is useless if the police may unlawfully invade a man's home, illegally seize evidence and then claim 'we would have obtained it anyway'").

[25] *Wong Sun v. United States,* 371 U.S. 471, 487 (1963).

[26] *Commonwealth v. Benoit,* 382 Mass. 210, 233-34, 415 N.E.2d 818, 822-23 (1981); 3 LaFave, *Search and Seizure* at 616-18 (1978); Note, *The Inevitable Discovery Exception to the Exclusionary Rule,* 16 Suffolk U. L. Rev. 1043, 1049-50 (1982).

[27] Using the fourth amendment as his subject, Judge Charles Moylan explained the kinds of values assessed when a constitutional principle is satisfied as opposed to inapplicable:

> When the Fourth Amendment is satisfied, constitutional liberty is vindicated. God is in His heaven and all is right with the world. Involved is a matrix of values including such fine things as warrants, oaths and affirmations, particularity of description, probable cause, exigency, good faith on the part of the police officer and the sanctity of thresholds.

Moylan, *The Fourth Amendment Inapplicable v. The Fourth Amendment Satisifed: The Neglected Threshold of "So What,"* 1977 S. Ill. U.L.J. 75 (1977).

[28] *United States v. Leon,* 468 U.S. 897, 908-21 (1984); *United States v. Janis,* 428 U.S. 433, 446 (1976); *Stone v. Powell,* 428 U.S. 485, 486 (1976).

[29] ____ U.S. at ____, 108 S. Ct. at 2534.

[30] *Id.*

[31] 462 U.S. 213 (1983). The *Gates* decision made it easier for the police to demonstrate probable cause by abandoning the "two prong" or "Aguilar-Spinnelli test" in favor of a totality of the circumstances approach.

[32] ____ U.S. at ____, 108 S. Ct. at 2539 (Marshall, J., dissenting). *See also United States v. Satterfield,* 743 F.2d 827, 846-47 (11th Cir. 1984); *United States v. Cherry,* 759 F.2d 1196, 1204-05 (5th Cir. 1985).

[33] *Brown v. Illinois,* 442 U.S. 590, 611 (1975) (Powell, J., concurring); *Michigan v. Tucker,* 417 U.S. 433, 447 (1974); 3 LaFave, *supra* note 26 at 616; Israel, *Criminal Procedure: The Burger Court and The Legacy of the Warren Court,* 75 Mich. L. Rev. 1319, 1413-14 (1977); Pitler, *The Fruits of the Poisonous Tree Revisited and Shepardized,* 56 Calif. L. Rev. 579, 597 (1968).

[34] In *McDonald v. United States,* 335 U.S. 451 (1948), the Court wrote:

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

Id. at 455-56. *See also* J. Hall. *Search and Seizure,* 178-80 (1982).

[35] *United States v. Satterfield,* 743 F.2d 827, 846 (11th Cir. 1984); *United States v. Alvarez-Porras,* 643 F.2d 54, 63-64 (2d Cir. 1981); *United States v. Griffin,* 502 F.2d 959, 961 (6th Cir. 1974); *People v. Schoondermark,* 717 P.2d 504, 506 (Colo. Ct. App. 1985); *Commonwealth v. Benoit,* 382 Mass. 210, 415 N.E.2d 818, 823 (1981); *State v. Johnson,* 301 N.W.2d 625, 629 (N.D. 1981).

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