Louisiana Law Review

Volume 51 | Number 2
November 1990

Search and Seizure

Eulis Simien Jr.

Search and Seizure

*Eulis Simien, Jr.**

I. Seizure of Persons

Minnesota v. Olson[1]

The *Olson* defendant was arrested in a home where he was staying as an overnight guest. Claiming that his arrest violated *Payton v. New York*,[2] the defendant contended the statement he gave at the police station less than one hour after his arrest was the fruit of this allegedly unlawful arrest. This claim brought before the Court the issue of whether the limitations imposed in *Payton* apply to the arrest of an overnight guest in the home of another.[3]

Rakas v. Illinois[4] rejected the implications of the earlier language in *Jones v. United States*[5] that merely being "legitimately on [the] premises" was sufficient to clothe a defendant with the legitimate expectations of privacy of those premises and to allow him to challenge the priority of the entry into those premises.[6] Accordingly, courts must now determine whether the person seeking the protection of the premises entered by the police has "a legally sufficient interest in a place other

---

* Associate Professor of Law, Louisiana State University.

1. 110 S. Ct. 1684 (1990).

2. 445 U.S. 573, 100 S. Ct. 1371 (1980). In *Payton*, the Supreme Court concluded that the arrest of that defendant after a forcible entry into *his* home without an arrest warrant violated the fourth amendment. However, the arrest in a public place without a warrant does not offend the fourth amendment. See United States v. Watson, 423 U.S. 411, 96 S. Ct. 820 (1976). If a person's arrest occurs in a private place, but one in which that person has no legitimate expectations of privacy, then he has no right to complain about the entry. Thus, his arrest, in so far as he is concerned, is just as though it had taken place in a public place.

3. Had the Court applied New York v. Harris, 110 S. Ct. 1640 (1990), discussed at notes 96-106 infra, to the facts, it might have avoided the resolution of this issue. However, the Court chose not apply *Harris* because the issue was not raised by the state, which conceded at oral argument that the statement was the fruit of the arrest. 110 S. Ct. at 1687 n.2.

4. 439 U.S. 128, 99 S. Ct. 421 (1978).

5. 362 U.S. 257, 80 S. Ct. 725 (1960).

6. Id. at 267, 80 S. Ct. at 734.

than his own home so that the fourth amendment protects him from unreasonable governmental intrusion into that place."[7]

Unlike *Jones* and *Rakas*, which involved issues of standing to object to a search, the issue in *Olson* centered on the propriety of the defendant's arrest. However, the reasoning of *Olson* should apply equally when the issues involve standing to object to the admissibility of evidence found in the home rather than the propriety of the arrest. The basis of the *Olson* Court's opinion that *Payton* rather than *Watson* governed the propriety of the arrest was its conclusion that an overnight guest is vested with the legitimate expectations of privacy of the premises in which he is a guest.[8] As such, he should have standing to object to the entry into the premises wherein a search is conducted or evidence is otherwise obtained (i.e., in plain view).[9]

After deciding that *Payton* applied, the Supreme Court addressed an issue left unresolved in *Payton*. Although the *Payton* Court concluded that a warrant would generally be required for entry into someone's home to make an arrest, that requirement would be excused if sufficient exigency justified the entry.[10] The Court, however, did not discuss how much evidence the police must have before they may act based on the believed existence of an exigency. The Minnesota Supreme Court determined that in order to enter upon a claimed exigency, the police must have probable cause to believe, at the time of their action, that the exigency exists. The United States Supreme Court agreed that the application of the probable cause standard was correct.[11]

Justice Stevens concurred, raising an interesting point on federalism that many have forgotten since *Rakas* merged the fourth amendment

---

7. 439 U.S. at 141-42, 99 S. Ct. at 429-30. The *Rakas* Court concluded that although *Jones* was correctly decided, merely being "legitimately on the premises" would not give rise to such a relationship and that this language in *Jones* was inappropriate. Id. at 142-48, 99 S. Ct. at 429-33. Some commentators have questioned whether *Rakas* has application beyond its facts or is limited to searches of automobiles. See, e.g., Williamson, Fourth Amendment Standing and Expectations of Privacy: *Rakas v. Illinois* and New Directions for Some Old Concepts, 31 U. Fla. L. Rev. 831, 838, 844-45 (1979). However, the example used by the Court in *Rakas* specifically referred to a guest in a home, 439 U.S. at 142, 99 S. Ct. at 429-30, indicating that it applied beyond merely automobiles.

8. Minnesota v. Olson, 110 S. Ct. 1684, 1687 (1990).

9. Two issues not addressed by the Minnesota Supreme Court were also not resolved by the United States Supreme Court, whether statements by others at the scene of the arrest and a statement made by a co-defendant after seeing defendant's illegally obtained statement should be suppressed. Based on Olson's legitimate expectations of privacy in the premises entered and the fact that this additional evidence was a result of that initial illegality, he should have had standing to object. Despite his standing, however, he might have lost on the merits because the evidence may be considered as too attenuated to be considered as an "exploitation of the primary illegality." United States v. Crews, 445 U.S. 463, 469, 100 S. Ct. 1244, 1249 (1980).

10. 445 U.S. 573, 587, 100 S. Ct. 1371, 1381 (1980).

11. 110 S. Ct. at 1690.

standing inquiry into the question on the merits.[12] He argued that although a person lacks standing to assert the claim in federal court, a state may nevertheless decide to open its courts to the claim. This position is not inconsistent with *Rakas* and similar cases arising out of state court prosecutions where the defendant seeks review in the United States Supreme Court. Where the state court has denied the defendant's fourth amendment claim and he seeks a federal forum to further litigate the issue, it is appropriate for the United States Supreme Court to determine the class of litigants to whom it will open its doors. Therefore, *Rakas*' standing discussion is not inconsistent with Justice Stevens' position in *Olson*.

Although Justice Stevens' position is tenable even after *Rakas*, it still raises some yet unresolved issues. The fourth amendment standing inquiry is a device used to limit access to the courts and is not coextensive with a determination of whether the fourth amendment has been violated.[13] As such, if the standing inquiry were viewed in isolation, the institutional interests it is designed to protect should only be of concern to the forum in which the issue is litigated. However, the current view on the Court is that the exclusionary rule is not part and parcel of the fourth amendment but merely a tool used to advance compliance with the provision.[14] As such, to the extent that a state court proposes to give standing to persons other than those allowed standing in the federal system and to allow these persons, based on a violation of federal law, the federal exclusionary rule remedy, the standing inquiry may become, even in state court, a federal concern.[15]

It is very likely that the Court will be faced with this issue in the near future. State courts may be used as vehicles to advance constitutional rights not or no longer recognized by the federal courts.[16] To the

---

12. 110 S. Ct. at 1690-91 (Stevens, J., concurring).

13. When a federal court determines that a particular class of persons lacks standing under the fourth amendment, it does so by looking to what it views as the group to whom the fourth amendment's protections are extended. However, the determination of that issue adversely to a claimant is not a determination that the commands of the fourth amendment have remained inviolate. It is only a determination that this claimant's fourth amendment interests were not implicated and he has no right to request the court to make the determination as to whether someone else's rights have been violated.

14. See Simien, The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches, 41 Ark. L. Rev. 487, 526-39 (1988).

15. This issue cannot be fully explored in this recent developments piece and I merely raise the issue, leaving its further discussion for the future.

16. See Devlin, State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived from Federal Sources, in 3 Emerging Issues in State Constitutional Law 195 (1990); Williams, Methodology Problems in Enforcing State Constitutional Rights, 3 Ga. St. U.L. Rev. 143 (1986-87).

extent that the expansion of constitutional rights is based on adequate and independent state grounds, no substantial federal question is presented.[17] However, to the extent that the expansion results not from an adequate and independent state ground but from an expansion of the class of persons entitled to assert a violation of federal law, the propriety of this approach has not been settled.

Alabama v. White[18]

In *White*, the defendant consented to the search of her car. She claimed, however, that the consent was the fruit of an illegal stop.[19] Accordingly, the Supreme Court had to determine whether the police had sufficient articulable suspicion to stop the defendant.

The defendant's stop was based on an anonymous tip, which was totally lacking in evidence from which one could conclude that the caller was honest and his information reliable, leading the Court to conclude that this tip, standing alone, was not sufficient to justify the stop under *Terry v. Ohio*.[20] Despite this conclusion, it found that the stop was justified. It reasoned that the tip *and* the corroborating information obtained by the police did constitute articulable suspicion, justifying a brief investigatory stop.[21] The analysis used was very similar to that employed in *Illinois v. Gates*[22]—the corroboration of some information tended to add credence to the other information, making it more likely that the tip information about the defendant's illegal activity was reliable.[23]

White is significant because it appears to be the first time that the Court has used the *Gates* "totality of the circumstances" approach to

---

17. See Bice, Anderson and the Adequate State Ground, 45 S. Cal. L. Rev. 750 (1972).

18. 110 S. Ct. 2412 (1990).

19. 110 S. Ct. at 2414.

20. See discussion of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968) in *White*, 110 S. Ct. at 2415-16. The Court did, however, leave open the possibility that some anonymous tips might be sufficient to justify a *Terry* stop. 110 S. Ct. at 2415.

21. 110 S. Ct. at 2417.

22. 462 U.S. 213, 103 S. Ct. 2317 (1983). *Gates* involved the determination of whether a search warrant could be validly issued on the basis of an anonymous tip which was corroborated by independent investigation and observation. *White* involved the determination whether a brief investigatory stop was justified, which requires only articulable suspicion rather than probable cause.

23. Just as in *Gates*, the tip was corroborated by acts which, other than for the suspicion raised by the tip, objectively appeared totally innocent. Also just as in *Gates*, some of the facts as related in the tip were inconsistent with the facts observed by the police prior to the stop (i.e., according to the tip defendant was supposed to carry the contraband in a case but was observed getting into her car without a case). 110 S. Ct. at 2417.

determine the sufficiency of an officer's factual justification in a non-warrant context. Since *White* was concerned with the sufficiency of the factual basis to justify a brief investigatory seizure, it did not employ the "totality of the circumstances" approach to test probable cause. The Court instead used the approach to test whether the officers had sufficient articulable suspicion. All indications in the *White* opinion, however, are that even when the issue surrounds the determination of probable cause in a non-warrant context the "totality of the circumstances" approach will be used.[24]

The "totality of the circumstances" approach may have significant merit in the warrant context.[25] However, there is good reason why it may not be an appropriate substitute for the *Aguilar/Spinelli* test where a non-warrant determination of probable cause is being reviewed. At least for searches, warrants are the preferred method of operation.[26] If the more restrictive *Aguilar/Spinelli* approach were used when an officer acted, despite the practicality of obtaining a warrant, without a warrant, he would be encouraged to go through the warrant process, where the relaxed "totality of the circumstances" approach would be applied.

This argument carries less force for non-warrant seizures than it does for non-warrant searches. Despite the Court's preference for search warrants, there are indications in the Court's precedent that no such preference exists for seizures.[27] Therefore, for seizures there is less of a justification for developing rules that will encourage officers to obtain warrants in order to execute seizures.[28]

---

24. Despite the fact that it was not necessary to discuss probable cause in *White*, the Court's discussion of *Gates* refers to it as a case concerning the determination of probable cause (without limiting that discussion to the warrant context). 110 S. Ct. at 2415-17. Nor is there any indication that the test will be reserved to testing the factual justification for a search, as was in issue in *Gates*.

25. See criticism of the approach gleaned from Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584 (1969) in *Gates*, 462 U.S. at 230-41, 103 S. Ct. at 2328-33.

26. United States v. Ventresca, 380 U.S. 102, 105-06, 85 S. Ct. 741, 744 (1965).

27. There is a presumption that a non-warrant search is unconstitutional. There is no such presumption for seizures. Compare See v. City of Seattle, 387 U.S. 541, 543, 87 S. Ct. 1737, 1739 (1967) and Marshall v. Barlow's, Inc., 436 U.S. 307, 312, 98 S. Ct. 1816, 1820 (1978) with United States v. Watson, 423 U.S. 411, 96 S. Ct. 820 (1976).

28. There was one other point discussed in *Gates* which should be noted. That Court concluded that a reviewing court should give deference to the issuing magistrate's probable cause determination. It concluded that even if the reviewing court does not agree with the determination of probable cause, it should not reverse the finding so long as there is a "substantial basis for concluding" that probable cause existed. 462 U.S. 213, 236, 103 S. Ct. 2317, 2331 (1983). However, in the non-warrant context, there is no reason for an application of the deferential review.

Michigan Department of State Police v. Sitz[29]

Last term, the Supreme Court settled the debate over the validity of road blocks, a popular device in the battle against intoxicated drivers. As a general rule, some level of particularized suspicion is required before the government is allowed to intrude upon an individual's fourth amendment protected interests by a search or seizure.[30] By definition, road blocks involve the seizure of at least some persons as to whom there is no particularized suspicion. In *Delaware v. Prouse*,[31] the Supreme Court held that the fourth amendment was violated when police officers determine which vehicles are to be stopped even though they lack particularized articulable suspicion. However, the Court also noted that it might find that there would be no violation if the stops are made pursuant to well-organized administrative guidelines.[32]

In *Sitz*, the Court specifically held what was implied in *Prouse*.[33] The Court held that since the Michigan stops were based on well-organized administrative guidelines, they did not violate the fourth amendment despite the lack of any particularized suspicion to justify the stops. The Court reasoned that there are significant governmental interests in apprehending and deterring intoxicated drivers and that road blocks are effective tools in achieving these interests. Balanced against these interests is what the Court characterized as the insubstantial intrusion into the fourth amendment protected interests suffered by the stopped drivers. Finding that the government's interests outweighed the individual's fourth amendment interests, the Court concluded that the intrusion was reasonable.[34]

The *Sitz* reasoning was based on a bifurcation of the two clauses of the fourth amendment first articulated in *Terry*.[35] In explaining why a diminished level of particularized suspicion was sufficient to justify a brief investigatory detention, the Court in *Terry* reasoned that the fourth amendment is made up of two independent clauses.[36] Under this rea-

---

29. 110 S. Ct. 2481 (1990).

30. See, e.g., Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966).

31. 440 U.S. 648, 99 S. Ct. 1391 (1979).

32. Id. at 663, 99 S. Ct. at 1401.

33. The Court's inquiry was limited to the initial stop and not the level of factual justification needed to detain "particular motorists for more extensive field sobriety testing," which the Court found "may require satisfaction of an individualized suspicion standard." 110 S. Ct. at 2485.

34. Id. at 2484-85.

35. See supra note 20.

36. Under the *Terry* Court's reasoning, the first clause of the fourth amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated;" whereas the second clause of the amendment provides, "and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

soning, the second clause of the fourth amendment, relating to the warrant requirement, mandates a probable cause inquiry. However, the reasoning goes on to allow a bifurcation of this clause from the first clause, which the Court concluded only requires that the intrusion not be "unreasonable." Since all that was required in *Terry* was that the detention be reasonable, rather than supported by probable cause, that Court found that a short investigatory detention did not violate the fourth amendment if supported by articulable suspicion, a lesser level of suspicion than probable cause.[37] Although *Terry*, involving particularized suspicion (merely at a lower level), is distinguishable from *Sitz*, the reasoning of the *Sitz* Court is consistent with the earlier bifurcation of the fourth amendment.[38]

Sitz is not the first time the Court has used the bifurcation reasoning to justify an intrusion into fourth amendment interests without any particularized factual justification. In 1989, the same reasoning was used in *National Treasury Employees Union v. Von Raab*[39] and *Skinner v. Railway Labor Executives' Association*.[40] Both of these cases allowed drug testing of individuals—a search under the fourth amendment analysis—despite the lack of particularized suspicion.[41] However, those cases dealt with administrative searches rather than action aimed at apprehending criminal defendants and investigation of crimes.[42] Such administrative action has traditionally been judged by a different standard than criminal investigation.[43]

In *Sitz*, the Supreme Court specifically rejected the notion that only in the context of administrative searches and seizures may the State act without any particularized suspicion. In so doing, it relied upon *United States v. Martinez-Fuerte*.[44] However, this reliance was not well-founded. In *Martinez-Fuerte*, the Court ruled that the stopping of all cars that passed through an administratively-fixed check point near the Mexican-American border did not violate the fourth amendment. It further allowed some of those cars to be pulled over for brief questioning "even

37. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968).

38. My admission that *Sitz* is consistent with *Terry*'s bifurcation should not be viewed as an endorsement of the approach. This bifurcation is subject to substantial criticism. For a more detailed discussion of *Terry*, see Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of *Camara* and *Terry*, 72 Minn. L. Rev. 383 (1988).

39. 489 U.S. 656, 109 S. Ct. 1384 (1989).

40. 489 U.S. 602, 109 S. Ct. 1402 (1989).

41. For a discussion of these cases, see Simien, Developments in the Law, 1988-1989, Criminal Procedure, 50 La. L. Rev. 229, 232-33 (1989).

42. An administrative search or seizure "serves special governmental needs, beyond the normal need for law enforcement." *Von Raab*, 489 U.S. at ____, 109 S. Ct. at 1390.

43. See, e.g., Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 67 S. Ct. 1727 (1967).

44. 428 U.S. 543, 96 S. Ct. 3074 (1976).

though there [was] no reason to believe the particular vehicle contain[ed] illegal aliens."[45] A border or near border search for illegal aliens may result in criminal prosecutions. However, a border or near border search usually "serves special governmental needs, beyond the normal need for law enforcement."[46] It is designed to protect the integrity of the borders. To this extent it should be viewed as an administrative search and therefore, under current jurisprudence, subject to a different analysis than a search or seizure in the context of a criminal investigation.[47] In addition, *Martinez-Fuerte* is distinguishable because the mere fact that a border crossing is involved has been used to apply different standards than if there had been no border crossing.[48]

In *State v. Church*,[49] the Louisiana Supreme Court anticipated the ruling in *Sitz*. It, however, ruled that even if DWI road blocks established pursuant to well-organized administrative guidelines satisfy federal constitutional requirements, they violate article 1, section 5 of the Louisiana Constitution of 1974. The *Church* opinion is subject to at least two readings. The first reading is a rejection of the *Sitz* thesis that allows an intrusion into fourth amendment interests without the showing of particularized suspicion.[50] As though this rejection of the *Sitz* thesis were not sufficient to support its conclusion that road blocks violate the Louisiana Constitution, however, the *Church* court went on to review the efficacy of road blocks in apprehending and deterring drunk drivers,

---

45. Id. at 545, 96 S. Ct. at 3077.

46. *Von Raab*, 489 U.S. at ____, 109 S. Ct. at 1390.

47. See supra text accompanying notes 41-43.

48. C.f., United States v. Montoya de Hernandez, 473 U.S. 531, 538, 105 S. Ct. 3304, 3309 (1985) ("Consistently, therefore, with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior."). Compare Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524 (1886) (mail originating in and to be delivered within the United States is protected by the fourth amendment probable cause requirement) with United States v. Ramsey, 431 U.S. 606, 97 S. Ct. 1972 (1977) (mail originating outside the United States may be opened and read based upon "reasonable cause to suspect" that merchandise or contraband may be found inside); also, compare Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968) (brief investigatory detention is only allowed if the officer has articulable suspicion to believe that the detainee has committed or is about to commit an offense) with *Montoya de Hernandez*, 473 U.S. at 538, 105 S. Ct. at 3309 ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion.").

In their dissenting opinions, Justices Brennan and Stevens point out other distinctions between *Sitz* and *Martinez-Fuerte*. 110 S. Ct. 2481, 2488-90 (1990) (Brennan, J., dissenting); Id. at 2492-96 (Stevens, J., dissenting).

49. 538 So. 2d 993 (La. 1989).

50. The *Church* Court pointed out that "[b]efore a police officer may stop a person for investigatory purposes he must reasonably suspect that the person has committed or is about to commit a criminal offense." Id. at 997 (quoting from State v. Matthews, 366 So. 2d 1348, 1351 (La. 1978)).

concluding that they are not very effective.[51] This raises the question of whether, despite the indications to the contrary, the Louisiana Supreme Court might be willing to use the balancing test approach to eliminate the particularized suspicion requirement if the State can prove sufficient State interests and that the challenged conduct is sufficiently tailored to achieving those interests.

II. SEIZURES OF THINGS

Horton v. California[52]

In *Horton*, the search warrant executed by the officer only authorized the search for proceeds of a robbery in which the defendant was believed to have been engaged. In executing the warrant the officer *also* desired to look for and find the weapons used.[53] However, he looked in no place that the warrant did not justify in the search for the proceeds. When the officer found the weapons during this search, he seized them. The defendant argued that inadvertence was required and that the subjective intent of the officer negated the validity of the plain view seizure of the weapons. The Supreme Court rejected his argument.

Although inadvertence was often referred to as a requirement of plain view searches and seizures, for the so called "plain view searches" it had already been eliminated.[54] After this elimination, it would appear that the only function to be served by the inadvertence requirement for plain view seizures would be as a justification for the physical intrusion into the fourth amendment protected area from which the seizure is made.[55] This proposition was confirmed in *Horton*. Since the intrusion into the fourth amendment protected area was already justified in *Horton* by the warrant, there was no need for inadvertence.

---

51. 538 So. 2d at 997.

52. 110 S. Ct. 2301 (1990).

53. It should be noted that, as pointed out in Justice Brennan's dissent, the Court was not faced with the situation of a complete pretextual search (where officer was not interested in finding the proceeds but *only* looking to discover the weapons). 110 S. Ct. at 2313 (Brennan, J., dissenting).

54. See, e.g., Florida v. Riley, 488 U.S. 445, 109 S. Ct. 693 (1989).

55. This is no argument for the underlying validity of the elimination of the inadvertence requirement for plain view searches, which presents a completely different question. It is merely an acknowledgement that acceptance of the validity of the elimination of inadvertence for plain view searches substantially limits the interests that inadvertence can legitimately serve for plain view seizures.

III. SEARCHES OF PLACES/THINGS

United States v. Verdugo-Urquidez[56]

The defendant in *Verdugo-Urquidez* was a nonresident alien suspected of being a leader of a large, violent Mexican organization believed to be engaged in smuggling narcotics into the United States. Based on a complaint charging narcotic related offenses, the defendant was being held in custody in the United States. During that custody and pursuant to an agreement between the Mexican government and the Drug Enforcement Agency, DEA agents and Mexican authorities went to and searched the defendant's residence in Mexico without a search warrant.

The issue presented to the Court was a narrow one, "whether the fourth amendment applies to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country."[57] In answer to this issue, the Court held that the fourth amendment was not applicable to the conduct and therefore was not violated, finding that, at least for non-residents, the Constitution does not have extra-territorial effect.[58]

Although the issue presented to the Court was a very narrow one, Justice Rehnquist, writing for a five member majority, took the opportunity to point out that there is some question about the applicability of the fourth amendment to aliens even if the alleged unconstitutional conduct takes place within this country. Relying upon the language of the preamble and fourth amendment, Justice Rehnquist indicated that the fourth amendment "refers to a class of persons who are part of a

---

56. 110 S. Ct. 1056 (1990).

57. Id. at 1059.

58. There is some support for the Court's conclusion, that the Constitution does not have extra-territorial effect, at least where non-residents are concerned. C.f., Johnson v. Eisentrager, 339 U.S. 763, 70 S. Ct. 936 (1950) (habeas corpus provision does not apply to aliens convicted and held in foreign country after conviction for war crimes). The Court distinguished a fourth amendment claim from one based in the fifth amendment privilege against compelled self-incrimination. Citing Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653 (1972), the Court noted that even when this privilege is violated by pretrial conduct, the constitutional violation occurs when the evidence is admitted at the trial. However, the Court reasoned that the fourth amendment is different because it "prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion." 110 S. Ct. at 1060.

As additional support for its conclusions, the Court relied upon a dearth of evidence that the framers intended the fourth amendment to apply to extra-territorial searches of the property of foreign nationals and language in the Constitution's preamble and the fourth amendment itself. 110 S. Ct. at 1060-61.

national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[59] He went on to state that it is yet unsettled "how the Court would rule on a fourth amendment claim by illegal aliens in the United States if such a claim were squarely before [it]."[60]

To the extent that this questioning of the applicability of the fourth amendment was intended to apply not only to aliens within the United States and governmental conduct outside the United States but also to governmental conduct within the United States, it is, to say the least, surprising. To find that the fourth amendment does not apply to the search or seizure of an alien within this country would be inconsistent with the express assumption of the Court in *INS v. Lopez-Mendoza*.[61] It would also be inconsistent with the reasoning employed in a host of other cases, where the Court analyzed the governmental treatment of aliens under fourth amendment standards.[62]

This reasoning also raises questions about what other rights might be construed as limited to that "class of persons who are part of a national community."[63] There are several other references in the Constitution to "the people."[64] In fact, Justice Rehnquist's opinion states, "While this textual exegesis is by no means conclusive, it suggests that 'the people' protected by the Fourth Amendment, *and by* the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to [this class of people]."[65]

Justice Kennedy, the fifth member to join in the opinion, also specially concurred.[66] He specifically renounced the part of Justice Rehnquist's opinion which might be construed as limiting the application of the fourth amendment to residents of the United States and would

---

59. 110 S. Ct. at 1061. The preamble starts off with the phrase, "[w]e the People of the United States" and the fourth amendment provides for the protection of the "right of the people to be secure."

60. 110 S. Ct. at 1065.

61. INS v. Lopez-Mendoza, 468 U.S. 1032, 104 S. Ct. 3479 (1984). However, as the Court noted, the assumption of an antecedent proposition when it grants certiorari is not binding on future cases. United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1064 (1990).

62. See, e.g., United States v. Montoya de Hernandez, 473 U.S. 531, 105 S. Ct. 3304 (1985).

63. 110 S. Ct. at 1061.

64. See, e.g., first amendment ("Congress shall make no law . . . abridging . . . the right of *the people* peaceably to assemble"); second amendment ("right of *the people* to keep and bear Arms"); ninth amendment (enumeration shall not be construed to "deny or disparage other rights retained by *the people*"); tenth amendment (powers not delegated nor prohibited "are reserved to the States respectively, or to *the people*.") (emphasis added). C.f., United States ex rel. Turner v. Williams, 194 U.S. 279, 292, 24 S. Ct. 719, 723 (1904) (Excludable alien is not entitled to first amendment rights, because "[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter, forbidden by law").

65. 110 S. Ct. at 1061 (emphasis added).

66. Id. at 1066 (Kennedy, J., concurring).

provide the same protections to all persons searched or seized within the territorial limits of this country.[67] He also indicated that the application of the Constitution should not be limited to the territory of the United States. He would simply find that there is substantially more flexibility in the scope of the coverage of the Constitution in foreign countries.[68] The approach he would use for extra-territorial conduct appears to be very similar to the old fundamental rights approach to incorporation of the bill of rights under the fourteenth amendment due process clause.[69]

Because of Justice Kennedy's special concurrence, it might first appear that there is no majority for the proposition that more than mere physical presence and the governmental conduct within this country is necessary for the fourth amendment to apply to non-resident aliens. Only five members (counting Justice Kennedy) joined in the opinion. Justice Kennedy, however, disagreed with that part of the opinion which required some additional nexus between an alien searched or seized within this country before protection of the fourth amendment is applicable.[70] Despite this disagreement, there *may* still be a majority for this proposition. Justice Stevens also concurred (but did not join in the opinion) and seemed to implicitly agree with the nexus requirement even where the governmental conduct takes place in this country.

Justice Stevens concluded that the defendant in *Verdugo-Urquidez* had the right to object to the search because he was "among those 'people' who are entitled to the protection of the Bill of Rights."[71] It is impossible to tell from Justice Stevens' very short opinion whether he would require more than physical presence when the conduct giving rise to the fourth amendment claim actually takes place in the United States. However, Justice Stevens does not expressly draw any distinction between searches conducted in or out of the United States, leaving the implication that he would treat these in the same manner.

If, as it appears, Justice Stevens agrees with this proposition, the next inquiry is how much of a nexus would be required before an alien searched or seized in this country may assert the protection of the fourth amendment. Although the "majority" opinion would appear to require a substantial nexus between the alien and this country before the fourth

67. Id. at 1066-67 (Kennedy, J., concurring).

68. Id.

69. See, e.g., Rochin v. California, 342 U.S. 165, 72 S. Ct. 205 (1952).

70. Since he also disagreed with the conclusion that the fourth amendment has *no* extra-territorial effect, U.S. v. Verdugo-Urquidez, 110 S. Ct. 1056, 1066 (1990), and no other member of the Court expressly joined the remaining members of the "majority" on this issue, this aspect of what is reported as the opinion of the Court only received four votes.

71. Id. at 1068 (Stevens, J., concurring).

amendment applies,[72] Justice Stevens would be the swing vote on this issue. His view of the required nexus seems to be somewhat relaxed from the indications in the "majority" opinion. He indicates that as long as the alien is legally within this country he would find a sufficient nexus for the alien to take advantage of the protection of the fourth amendment.[73]

One question not addressed by the Court is what effect its reasoning might have in the context of a search or seizure of property owned by United States residents but located in foreign countries. Much of the Court's discussion about the fourth amendment protecting a community of people indicates that the right is personal rather than territorial. Under this reasoning, the search or seizure of property outside this country but belonging to a member of the community would be judged by fourth amendment standards. This would be consistent with the result reached in *Reid v. Covert*,[74] where the court held that the fifth and sixth amendments applied to military trials of non-military persons in foreign lands.[75] In the *Verdugo-Urquidez* opinion, however, Justice Rehnquist points out that only four Justices in *Reid* "reject[ed] the idea that when the United States acts *against citizens* abroad it can do so free

---

72. Justice Rehnquist's opinion refers to a series of cases where constitutional protections were provided to resident aliens. See, e.g., Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S. Ct. 472 (1953) and Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886). However, he never indicated that formal resident alien status is a necessary finding, only that the cases establish "that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." 110 S. Ct. at 1064.

Justice Rehnquist's opinion specifically rejects the notion that a short-term lawful but involuntary presence is a sufficient nexus to allow the alien to seek the protections of the fourth amendment. It leaves open the questions of whether lawful voluntary presence or a long-term lawful but involuntary presence are sufficient. As discussed above, it implies that illegal presence is not. Id. at 1064-65.

73. "In my opinion aliens who are lawfully present in the United States are among those 'people' who are entitled to the protections of the Bill of Rights." 110 S. Ct. at 1068 (Stevens, J., concurring).

A related issue left unresolved by *Verdugo-Urquidez* is what result should be reached if the police engage in a search of property within the United States that belongs to a foreign national. In this scenario, the extra-territorial effect of the Constitution is not implicated. However, if the "community of people" language is followed, it would appear that the fourth amendment would not be applicable. Justice Kennedy indicated that "[he would] have little doubt that the full protections of the Fourth Amendment would apply." Id. at 1067-68 (Kennedy, J., concurring). Justice Stevens, the other swing vote on this issue, gave no indication of his views on this issue.

74. Reid v. Covert, 354 U.S. 1, 77 S. Ct. 1222 (1957).

75. See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318, 57 S. Ct. 216, 220 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory *unless in respect of our own citizens*") (emphasis added).

of the Bill of Rights."[76] He then notes that the result in *Reid* was, in part, due to the concurrences of Justices Frankfurter and Harlan who resolved the issue on narrower due process grounds.[77] Additionally, the opinion's distinction between the fourth and fifth amendment might also be instructive here.[78]

Florida v. Wells[79]

Wells is one of the rare cases in recent fourth amendment adjudication where there was unanimous agreement within the Supreme Court on the result. All members of the Court agreed that the search of closed containers during the course of an inventory search, under the facts of that case, violated the Constitution. Justice Rehnquist, writing the opinion for the Court, concluded that absent established routine or standard criteria indicating whether containers could be opened during an inventory search, the officer conducting the search who chose to open containers was granted too much discretion, resulting in a violation of the Constitution.[80] However, this opinion specifically rejected the notion that the established routine or standard criteria must eliminate all discretionary authority to open containers by either providing that all containers be opened or that all remain closed.[81] The opinion was not specific as to precisely how much discretion was too much, and this issue will have to await further development.

The concurring opinions in *Wells* were critical of Justice Rehnquist's opinion because they claimed that the only issue before the Court was whether the opening of the containers in that case—with no established routine or standard criteria that allowed it—was valid. They argued that it was not necessary to discuss whether some discretion might still be reserved to the officer without violating the fourth amendment.[82] Justices Brennan and Stevens also contended that the majority's conclusions went beyond *Colorado v. Bertine*,[83] which had previously been considered the

76. U.S. v. Verdugo-Urquidez, 110 S. Ct. 1056, 1063 (1990) (quoting *Reid*, 354 U.S. at 5, 77 S. Ct. at 1225) (emphasis provided by Court).

77. Id.

78. See supra text accompanying note 58, discussing the Court's conclusion that any fourth amendment violation is complete at the time of the unlawful search or seizure (outside the United States) and therefore, possibly not subject to fourth amendment limitations.

79. Florida v. Wells, 110 S. Ct. 1632 (1990).

80. Id. at 1634-35.

81. Id. at 1635.

82. Id. at 1637 (Brennan, J., concurring); Id. at 1639 (Blackmun, J., concurring); Id. (Stevens, J., concurring).

83. Colorado v. Bertine, 479 U.S. 367, 107 S. Ct. 738 (1987).

high mark on the authority of officers to exercise discretion in the context of an inventory search.[84]

Depending on exactly what was meant by Justice Rehnquist's comments that the officer may be allowed discretion in deciding whether to open containers, the concurrences' criticism that the comments are an extension of *Bertine* may or may not be correct. If the comments merely mean that the officer may be given some discretion about opening containers but the discretion must be exercised within established routine or standard criteria, they are merely the logical extension of *Bertine*. In *Bertine*, the officer was given some discretion (within guidelines) as to the decisions whether and how to impound, which decisions determined whether he could conduct an inventory search and open containers during the search. Assuming the correctness of *Bertine*, it would only be logical that the officer should be allowed some discretion (within similar guidelines) as to whether to open containers—that would merely be directly allowing the officer to do what he is indirectly allowed to do under *Bertine*. If on the other hand, *Wells* is read to mean that the officer's discretion need not be limited by guidelines but only that the established routines or standard criteria must authorize the opening of containers, then it expands *Bertine*. At least in *Bertine* there were guidelines which the officer was to follow in exercising the discretion; therefore, his decision about impoundment, which ultimately determined whether he could open containers, was not unfettered.

Maryland v. Buie[85]

A valid plain view seizure can only take place where the thing seized is seen and seized from a place in which the officer has a right to be. The police in *Buie* entered the defendant's home in order to arrest him for robbery pursuant to an arrest warrant. No search warrant was issued authorizing the search of the house. However, instead of exiting from the house immediately after the arrest, one of the officers went into the basement from which the defendant had exited immediately prior to the arrest. There the officer saw a shirt which fit the description of one worn by one of the robbery suspects.[86] This shirt was seized and

84. Florida v. Wells, 110 S. Ct. 1632, 1637 (1990) (Brennan, J., concurring); Id. at 1639 (Stevens, J., concurring). The Court in *Bertine* upheld the inventory search of an automobile despite the fact that the regulations under which it was seized allowed the officer some discretion, within guidelines, as to whether to impound and the type of impoundment. The type of impoundment chosen would, in turn, determine the permissible scope of the inventory search. However, under the regulations in force in the *Bertine* case, opening of containers was specifically provided for when the car was impounded in the manner chosen by the officer.

85. Maryland v. Buie, 110 S. Ct. 1093 (1990).

86. The officer testified that the entry was made just "in case there was someone else" in the basement. Id. at 1095.

entered into evidence at the defendant's trial. Accordingly, the Supreme Court was faced with the issue of the officer's right to enter the basement.

Justice White, writing for the majority, concluded that the entry into the basement may have been proper. This conclusion was based on the authority of police, under limited circumstances, to conduct a protective sweep without violating the fourth amendment.[87] Using a balancing test,[88] the Court rejected the defendant's contention that, even if the warrant requirement were relaxed, the proper test for determining whether the police could enter other parts of his home after the arrest was probable cause.[89] The Court instead held that a protective sweep may be conducted if the police have articulable suspicion that there may be a person in the area to be swept who might pose a danger to the officers.[90] However, even where the sweep is authorized, the search is limited to a *cursory* inspection of those areas where a person may be found rather than a full scale search.[91] Finally, the Court concluded that the sweep could last no longer than necessary to dispel reasonable fear and could not last longer than the arrest and exit.[92]

Although the Court was fairly detailed in its delineation of the scope of a proper protective sweep, it still left many questions unanswered. One of those questions is what authority police will have to conduct a protective sweep of a home when the arrest is made just outside, rather than within, the home. This issue could arise where the police arrest a suspect outside his home and have reason to believe that a sniper is inside who will pose a risk of danger as they attempt to bring the suspect to the police car. In *Vale v. Louisiana*,[93] the Court held that where an arrest is made outside the home, the officers may not enter to conduct a search even if they have probable cause. *Vale* is, however, distinguishable. In *Vale*, the claimed justification for the entry was acquisition of evidence rather than the protection of the officers. The State has more significant interests in the protection of its police officers than in the acquisition of evidence. Thus, if the Court uses a balancing test, as it is so apt to do in fourth amendment adjudication, it could distinguish *Vale* on that basis.

---

87. The Court defined a protective sweep as "a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Id. at 1094.

88. Id. at 1097-99.

89. Id. at 1095.

90. Id. at 1098.

91. Id. at 1099.

92. Id.

93. 399 U.S. 30, 90 S. Ct. 1969 (1970).

Another very significant unanswered question is whether there is any limit on the areas of the house in which officers may legitimately sweep. In *Buie*, the sweep was in the basement from which the defendant had just exited. The limitation placed upon the sweep—"no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart"[94]—would imply that the police will not be allowed to create their right to sweep into any areas except those to which the suspicion relates. However, once a reasonable suspicion of danger is found, it would not appear to matter that the area is not the one from which the defendant emerged or even not one in close proximity thereto.

A related question is raised by the fact that as police are emerging from a house, the egress they choose may create circumstances that justify articulable suspicion of danger from areas of the house from which they could not have reasonably feared danger at the time and place of the arrest. In order to justify a protective sweep into these additional areas, will courts now require that the officers justify the method of egress and demonstrate that the method chosen was not merely used to allow entry into additional areas? If the limitations upon the scope of the protective sweep are to be effective, courts must be willing to at least consider the reason the police chose one means of egress over other alternatives (i.e., Was it merely a ploy designed to create the right to sweep?).[95]

IV. THE EXCLUSIONARY RULE

In the last term, the United States Supreme Court sent out conflicting signals on the continued viability of the exclusionary rule for fourth amendment violations. If *Harris v. New York*[96] were read in isolation, one would surely think that the end of the slow death of the rule that was once viewed as part and parcel of the fourth amendment[97] and then

94. 110 S. Ct. at 1099.

95. Other limitations might result from a fairly strict reading of the articulable suspicion standard. In *Buie*, the police had probable cause to believe that the defendant and a confederate had recently committed a violent crime and knew that the defendant had just emerged from the basement. The Supreme Court found that these facts were sufficient to justify an articulable suspicion that there might be danger lurking in the basement.

Justice Stevens suggested that the scope of the protective sweep should also be limited by burden allocation. He concluded that the burden of proof should be upon the State to prove that there was a reasonable basis for a police officers' articulable suspicion and that the action taken was a reasonable means of protecting themselves. Id. at 1100 (Stevens, J., concurring). Justice Kennedy specifically disagreed with Justice Stevens' comments. Id. at 1101 (Kennedy, J., concurring).

96. New York v. Harris, 110 S. Ct. 1640 (1990).

97. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961).

relegated to being a prophylactic, justified only by its deterrent effect,[98] was not long in coming. However, *James v. Illinois*[99] indicates that the plug to the respirator has not yet been pulled.

Harris v. New York

In *Harris*, the police were in possession of sufficient facts to justify a probable cause to arrest the defendant. However, since he was arrested in his home and without a warrant, the arrest was in violation of *Payton v. New York*.[100] Despite the violation of *Payton*, the Court concluded that the defendant's statement made after he was removed from the house and advised of his rights under *Arizona v. Miranda*[101] could be used in the prosecution's case in chief at the defendant's trial.

It is significant to note that although the arrest was without the benefit of a warrant, the police had probable cause. When the police make an arrest without probable cause, there is no lawful justification for the initial seizure or subsequent detention of the defendant. Therefore, if a statement is made during that seizure or detention, it is inadmissible unless it is sufficiently attenuated from the illegal seizure or detention.[102] The Court reasoned that the same is not true for a violation of *Payton*. According to the Court's reasoning in *Harris*, *Payton* is designed to protect the integrity of the home and is not directly related to the authority to seize and maintain custody of the person.[103] Although acknowledging that there is a "but for" causal connection between the intrusion into the integrity of the home (the *Payton* protection) and the subsequent acquisition of the statement, the Court did not find the connection sufficient to warrant the imposition of the exclusionary rule for a statement obtained once the intrusion has ceased.[104] Under those facts, the Court reasoned, evidence is not a "product of the illegal governmental activity"[105] and should not be excluded.

Harris should be distinguished from a case in which the officers obtain the statement while still within the unlawfully entered residence. If the defendant makes the statement in the house, then presumably,

98. United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984).
99. James v. Illinois, 110 S. Ct. 648 (1990).
100. 455 U.S. 573, 100 S. Ct. 1371 (1980).
101. 384 U.S. 436, 86 S. Ct. 1602 (1966).
102. Rawlings v. Kentucky, 448 U.S. 98, 110, 100 S. Ct. 2556, 2564 (1980).
103. New York v. Harris, 110 S. Ct. 1640, 1643 (1990).
104. Id. at 1643-44.
105. Id. at 1643 (quoting United States v. Crews, 445 U.S. 463, 471, 100 S. Ct. 1244, 1250 (1980)). See also Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254 (1975); Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248 (1979); Taylor v. Alabama, 457 U.S. 687, 102 S. Ct. 2664 (1982).

unless otherwise attenuated, it would be a fruit of the continuing violation of the integrity of the home. The same reasoning would allow the defendant standing to argue the inadmissibility of any evidence obtained from within the home. As the Court pointed out, the "warrant requirement for an arrest in the home is imposed to protect the home, and *anything* incriminating the police gathered from arresting Harris in his home . . . has been excluded, as it should have been . . . ."[106]

James v. Illinois

In *James*, a statement was obtained from the defendant following an illegal arrest. When the defendant called a witness to the stand to testify, the prosecution used the defendant's statement to impeach the testimony of the defense witness. Distinguishing *Harris v. New York*,[107] the Supreme Court held that the prosecution should not have been allowed to impeach the witness with the defendant's statement.

The Court reasoned that the expansion of the rule would unnecessarily chill the defendant's right to present testimony.[108] The Court concluded that this reasoning is consistent with the notion that the defendant has no right to present perjured testimony.[109] In reaching this conclusion the Court relied upon the presumption that a witness sworn to tell the truth will do so, and, to the extent that the witness would not otherwise tell the truth, a potential perjury prosecution is a sufficient deterrent.[110]

The Court also reasoned that in many instances the defendant may not be involved in and will not know whether the witness will testify inconsistently with the defendant's prior statement. It may turn out that the witness would testify truthfully or otherwise not inconsistently with the defendant's prior statement. Unlike the control a defendant has over his own testimony, however, the defendant has no control over what a witness will say on the witness stand. Therefore, the defendant may be chilled—out of fear that the witness might say something inconsistent with his illegally seized statement and thereby open the door to the

106. 110 S. Ct. at 1644 (emphasis added).

107. 401 U.S. 222, 91 S. Ct. 643 (1971). In *Harris*, the defendant had been illegally arrested and gave a statement, which was considered as the fruit of that illegal arrest. Although noting that the statement was inadmissible in the prosecution's case-in-chief, the Supreme Court concluded that the statement could be used to impeach the defendant who testified inconsistently with the illegally obtained statement.

108. James v. Illinois, 110 S. Ct. 648, 653 (1990).

109. See, e.g., Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988 (1986).

110. 110 S. Ct. at 652-53. The Court found that the impeachment of the defendant was more justified because of the defendant's increased interests in providing self-serving testimony and because, depending on the offense charged, the defendant may lose more by not risking a perjury conviction.

admission of that statement for impeachment—from presenting what he hopes to be truthful, rather than perjured testimony.[111]

The Court also reasoned that by expanding the scope of the exception to the exclusionary rule there would be a corresponding diminution in the rule's deterrent effect.[112] The Court then concluded that even if the expansion of the *Harris* impeachment exception might reduce the occurrences of perjury (with or without complicity of the defendant), the benefit would not be sufficient to outweigh the loss in deterrence.[113]

There is at least one additional argument that the Court did not use but might have been persuasive. When the *Harris* exception is used, the defendant is already on the stand testifying. Thus, if his statement is used to impeach him, he has the opportunity to give his version of the circumstances surrounding the statement and explain why the trial court testimony is more accurate. If an exception were recognized which would allow impeachment of other witnesses, it would put the defendant in the horns of the dilemma of having to choose between two constitutional rights. The defendant might be forced to choose between his right to present evidence under the sixth amendment[114] and his right not to take the stand under the fifth amendment.[115] Because the witness might testify inconsistently with the illegally seized statement, expansion of the impeachment exception would put the defendant in the position of knowing that his prior illegally seized statement might be presented to the jury as impeachment. If so, the illegally seized statement would be unexplained unless the defendant were to waive his fifth amendment right and take the stand to explain it. Forcing this sort of choice between two constitutional rights might violate due process.[116]

State v. Brumfield[117]

In *Brumfield*, the Louisiana First Circuit Court of Appeal used a very questionable inevitable discovery analysis to hold admissible evidence obtained in violation of the fourth amendment and article 1, section 5 of the Louisiana Constitution.[118] The officer who searched the car from which the evidence was obtained testified that the search was not con-

111. Id. at 653-54.
112. Id. at 654.
113. Id.
114. See Webb v. Texas, 409 U.S. 95, 93 S. Ct. 351 (1972).
115. See Carter v. Kentucky, 450 U.S. 288, 101 S. Ct. 1112 (1981).
116. Cf. Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967 (1968) (compelling a choice between the fourth and fifth amendment protections by allowing the use of defendant's suppression hearing testimony at trial violates the due process clause).
117. 560 So. 2d 534 (La. App. 1st Cir.), writ denied, 565 So. 2d 942 (1990).
118. The inevitable discovery doctrine was adopted and discussed in Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501 (1984).

ducted for inventory purposes, leading the court to conclude that the requirements for a valid inventory search had not been proven.[119] The court, however, concluded that the evidence was still admissible because had the search been conducted for inventory purposes, the inventory search would have been permissible.

This analysis is not appropriate. It completely undermines the deterrent effect of the exclusionary rule. Allowing the admission of the evidence simply because it could have been properly obtained by a lawful search does nothing to encourage police officers to conform their conduct to the requirements of the federal and state constitutions. Additionally, it affirmatively discourages them to take the extra effort often necessary to do so. If the evidence is admissible so long as the officer *could have properly found* it, there is no incentive to make sure that the proper steps are taken to search for the evidence. The inevitable discovery doctrine, based in the same principles as the independent source rule,[120] should only be applicable when the evidence would have been discovered by action independent of the very conduct that gave rise to the violation. In that way, the deterrent effect of the exclusionary rule will not be undermined. At the same time, the government will not be unduly penalized by the prohibition of the use of evidence that it would have gotten even without the violation.

---

119. 560 So. 2d at 537.
120. See *Nix*, 467 U.S. 431, 104 S. Ct. 2501.