THE EXCLUSIONARY RULE, PARTS I & II

Professor Jack W. Nowlin

OBJECTIVES:
After this session, you will be able to:
1. Summarize the exclusionary rule;
2. Define the “fruit of the poisonous tree” doctrine;
3. Describe when the “attenuation of the taint” doctrine applies;
4. Identify when the “independent source” doctrine applies;
5. Describe the “inevitable discovery” rule;
6. Identify the applicability of “good faith” in the area of inevitable discovery; and
7. Summarize the “impeachment” exception to the exclusionary rule.

REQUIRED READING:

<table>
<thead>
<tr>
<th>PAGE</th>
<th>REQUIRED READING</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Jack Wade Nowlin, The Exclusionary Rule I &amp; II (Sept. 2011) [NCJRL PowerPoint]</td>
</tr>
<tr>
<td>7</td>
<td>Jack Wade Nowlin, The Exclusionary Rule I &amp; II Presentation Handout (Sept. 2011) [NCJRL Outline]</td>
</tr>
</tbody>
</table>
I. INTRODUCTION TO THE EXCLUSIONARY RULE

A. THE IMPORTANCE OF THE EXCLUSIONARY RULE

1. The Text of the Fourth Amendment Provides No Remedy for a Fourth Amendment Violation
2. The Primary Remedy in Criminal Trials is the Judicially-Created Exclusionary Rule Mandating Suppression of Illegally-Obtained Evidence

B. THE EXCLUSIONARY RULE IS NOT A CONSTITUTIONAL RIGHT

1. Initial Indication that the Exclusionary Rule is a Constitutional Right
2. The Court Holds that the Exclusionary Rule is a Judicially Created Remedy, Not a Constitutional Right
3. Significance of "De-Constitutionalization" of the Exclusionary Rule: Creation of Exceptions

C. THE PRIMARY POLICY RATIONALE OF THE EXCLUSIONARY RULE IS DETERRENCE

1. Initial Policies: Deterrence and Judicial Integrity
2. Shift in Emphasis to Deterrence Policy
3. Significance of Shift to Deterrence Policy: Creation of Exceptions to the Exclusionary Rule

D. WHERE THE EXCLUSIONARY RULE DOES NOT APPLY

1. Determination of (Non-)Application Through Cost-Benefit Analysis
2. General Scope of Application of the Exclusionary Rule
3. "Thumbnail" Summary of Scope of Application of Exclusionary Rule
II. THE “FRUIT OF THE POISONOUS TREE” DOCTRINE

A. WHAT IS THE “FRUIT OF THE POISONOUS TREE”?
   1. The Metaphor of Choice
   2. Exclusion of Both Primary and Derivative Evidence
   3. “Fruit of the Poisonous Tree” Policy and Exclusion of Derivative Evidence
   4. Metaphorical Confusion and the Limits of Metaphor

B. THREE “QUALIFICATIONS” TO THE “FRUIT OF THE POISONOUS TREE”
   2. Causation Analysis is the Key

C. THE FIRST QUALIFICATION: ATTENUATION OF THE TAINT
   1. Introduction to “Attenuation of the Taint” Analysis
      a. Causation Analysis as Background for Attenuation Analysis
      b. Attenuation Analysis Policy is Cost-Benefit Deterrence Policy
      c. Attenuation Analysis as Case-by-Case, Multi-Factor, “Proximate Cause” Analysis

II. THE “FRUIT OF THE POISONOUS TREE” DOCTRINE

2. Examination of Attenuation Factors
   a. Temporal Proximity
   b. Intervening Circumstances
      (1) Generally
      (2) Special Issue: Unlawful Arrest, Free Will, Miranda Warnings, and Brown
      (3) Segura, Attenuation, and Destruction of Evidence
         (i) No Constitutional Right to Destroy Evidence?
         (ii) Potential Attenuation Rationale in Segura
   c. Flagrancy of the Violation: Greater “Poison” Equals Longer “Taint”
   d. Nature of the Evidence: “Faster” Attenuation for Witnesses
II. The “Fruit of the Poisonous Tree” Doctrine

(e) Interest Protected by the Constitutional Guarantee Not Served by Suppression of the Evidence Obtained

(1) Unlawful Manner of Entry, Wilson, and Hudson
   (i) An Unlawful Entry into the Home in Violation of Wilson’s Knock-and-Announce Requirement Does Not “Taint” Evidence Discovered During Execution of a Valid Search Warrant
   (ii) Policy Explanation of Hudson: Attenuated Connection between Illegality and Evidence

(2) Unlawful Arrest in the Home, Payton, and Harris
   (i) An Unlawful Arrest in the Home in Violation of Payton does not “Taint” Statements Later Made Outside the Home
   (ii) Potential Policy Explanation of Harris: Attenuated Connection between Illegality and Evidence

II. THE “FRUIT OF THE POISONOUS TREE” DOCTRINE

D. THE SECOND QUALIFICATION: THE INDEPENDENT SOURCE DOCTRINE

1. Introduction to the Independent Source Doctrine
   a. Independent Source and “But For” Causation Analysis
   b. The Independent Source Doctrine’s Policy Justification: Place the Police in No Worse a Position than They Would Have Been Absent the Illegality

II. THE “FRUIT OF THE POISONOUS TREE” DOCTRINE

2. Special Issue: “Rediscovered” Evidence and Confirmatory Searches
   a. “Rediscovered” Evidence and Confirmatory Searches in General
   b. “Rediscovered” Evidence is Admissible if “Rediscovery” is “Genuinely Independent” of Initial Illegal Search
   c. Establishing “Genuine Independence” of Second Search
      (1) Evidence from Unlawful Search Not Necessary to Magistrate’s Probable Cause Determination for Issuance of Warrant for Second Search
      (2) Evidence from Unlawful Search Not the Motive for Second Search
II. THE “FRUIT OF THE POISONOUS TREE” DOCTRINE

3. The Independent Source Doctrine Applies to Both Derivative and Primary Evidence
   a. No Basis for Distinction Between Derivative and Primary Evidence
   b. Policy Basis: Place the Police in No Worse a Position that They Would Have Been Absent the Illegality

II. THE “FRUIT OF THE POISONOUS TREE” DOCTRINE
E. THE THIRD QUALIFICATION: THE INEVITABLE DISCOVERY DOCTRINE

1. Inevitable Discovery as a “Hypothetical” Independent Source Rule
2. Inevitable Discovery and “Hypothetical” “But For” Causation Analysis
3. Inevitable Discovery Policy is the Same as Independent Source Doctrine Policy: Place the Police in No Worse a Position that They Would Have Been Absent the Illegality
4. Divisions in Lower Courts on Limitations on the Inevitable Discovery Exception
   a. Introduction
   b. “Active Pursuit” Requirement?
   c. Application to Primary Evidence?
5. Demonstration of Inevitable Discovery
   a. Preponderance of the Evidence Standard
   b. True Inevitability

III. THE IMPEACHMENT EXCEPTION TO THE EXCLUSIONARY RULE

A. INTRODUCTION TO THE IMPEACHMENT EXCEPTION
B. IMPEACHMENT EXCEPTION POLICY

1. Exclusionary Rule Cost-Benefit Analysis
2. Concern About the Criminal Defendant’s Right to Testify and Call Witnesses
III. THE IMPEACHMENT EXCEPTION TO THE EXCLUSIONARY RULE

C. THE SCOPE OF THE IMPEACHMENT EXCEPTION IN DETAIL

1. Introduction
2. Scope I: The Impeachment Exception Extends to Both Statements Made on Direct Examination and Statements Made on Cross-Examination Plainly Within the Scope of Issues Raised on Direct Examination
3. Scope II: The Impeachment Exception Extends to Both Use of Evidence of Collateral Crimes and Use of Evidence of Crimes Charged
4. Scope III: The Impeachment Exception is Limited to the Criminal Defendant and thus Does Not Include Other Defense Witnesses

D. INTERACTION OF IMPEACHMENT EXCEPTION WITH RULES OF EVIDENCE

1. To be Admissible Evidence Must Meet the Requirements of Both the Exclusionary Rule and Rules of Evidence
2. Rules of Evidence Balancing Probative Value Against Prejudicial Effect May Implicate Questions of Admissibility of Evidence Admissible Under the Impeachment Exception

IV. THE “GOOD FAITH” EXCEPTION TO THE EXCLUSIONARY RULE

A. INTRODUCTION TO THE “GOOD FAITH” EXCEPTION
B. THE POLICY BASIS OF THE “GOOD FAITH” EXCEPTION
   1. Cost-Benefit Balancing Analysis
   2. Deterrence Benefit Is Minimal Because Police Behaved Reasonably and Non-Police Actors are Non-Deterrable
C. “GOOD FAITH” REASONABLE RELIANCE ON MAGISTRATES, LEGISLATURES, AND COURT CLERKS
D. THE CONTOURS OF REASONABLE RELIANCE
V. HERRING V. UNITED STATES AND RELIANCE ON POLICE CLERKS

A. RELIANCE ON POLICE CLERKS AND THE “GOOD FAITH” EXCEPTION
   1. In Arizona v. Evans, the Court Reserved Judgment on the Question of the Applicability of the “Good Faith” Exception to Reasonable Police Reliance on Police Clerks
   2. Difficulties with the Application of the Traditional “Good Faith” Exception to Reasonable Police Reliance on Police Clerks

B. IN HERRING V. UNITED STATES, THE COURT RECOGNIZED AN EXCEPTION TO THE EXCLUSIONARY RULE FOR ERRORS RESULTING FROM ISOLATED POLICE NEGLIGENCE ATTENUATED FROM THE FOURTH AMENDMENT VIOLATION

C. HERRING V. UNITED STATES AND THE FUTURE OF THE EXCLUSIONARY RULE
   1. The “Narrow” Reading of Herring
   2. The “Broad” Reading of Herring and “Mere” Negligent Violations of the Fourth Amendment
THE EXCLUSIONARY RULE I & II

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Presentation Handout
Fourth Amendment Training Session
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OUTLINE

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4. Divisions in Lower Courts on Limitations on the Inevitable Discovery Exception
   (a) The “Good Faith” Limitation Rejected by the Supreme Court
   (b) “Active Pursuit” Requirement?
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I. INTRODUCTION TO THE EXCLUSIONARY RULE
A. THE IMPORTANCE OF THE EXCLUSIONARY RULE.

1. The Text of the Fourth Amendment Provides No Remedy for a Fourth Amendment Violation

The text of the Fourth Amendment commands 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.” But, notably, the text of the Fourth Amendment fails to provide a remedy for Fourth Amendment violations.

2. The Primary Remedy in Criminal Trials is the Judicially-Created Exclusionary Rule Mandating Suppression of Illegally-Obtained Evidence

In order to fill this textual void and to promote respect for Fourth Amendment rights, both judicial and legislative actors over the years have provided various forms of remedies for Fourth Amendment violations. For instance, if an individual’s Fourth Amendment rights have been violated, an obvious remedy, created by Congress, is a civil suit for a violation of one’s constitutional rights. See 42 U.S.C. § 1983.

Even so, most Fourth Amendment litigation arises from legal action surrounding a judicially-crafted remedy known as the “exclusionary” rule. If law enforcement violate the Fourth Amendment rights of an individual and thereby uncover evidence of criminal wrongdoing the state later seeks to introduce in a criminal prosecution of that individual, the primary remedy sought by the criminal defendant will be the exclusion of that evidence from trial. See Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 376 U.S. 643 (1961).

As a general matter, the exclusionary rule requires the suppression of evidence obtained in violation of the Fourth Amendment rights of the defendant. Thus the application of the exclusionary rule as a remedy for violations of the Fourth Amendment is a recurring and perennial issue in criminal trials in the United States.

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B. THE EXCLUSIONARY RULE IS NOT A CONSTITUTIONAL RIGHT.

1. Initial Indication that the Exclusionary Rule is a Constitutional Right
The Supreme Court in *Mapp v. Ohio* expressly held that the exclusionary rule is “part and parcel” of the rights protected by the Fourth and Fourteenth Amendments, suggesting that the exclusionary rule should be viewed as an aspect of one’s constitutional rights under the Fourth Amendment. *Mapp v. Ohio*, 376 U.S. 643 (1961).

2. **The Court Holds that the Exclusionary Rule is a Judicially Created Remedy, Not a Constitutional Right**

The Supreme Court, however, later implicitly overruled this important aspect of the reasoning in *Mapp*, stating that the exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment Rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.” *United States v. Calandra*, 414 U.S. 338 (1974)

The Court thus “de-constitutionalized” the exclusionary rule, holding expressly that the exclusionary rule is a mere judicially-crafted remedy for a violation of a Fourth Amendment right, but is not itself a Fourth Amendment right or essential component of such a right.

It is therefore likely that the exclusionary rule will be viewed by the Court as a mere “constitutional rule” rather than an actual constitutional right, a view in line with the Court’s recent decision in *Dickerson*, which held that the requirement of *Miranda* warnings is not itself a constitutional right, but rather a (mere) constitutional rule designed to safeguard, prophylactically, the Fifth Amendment constitutional right against self-incrimination. *See Dickerson v. United States*, 530 U.S. 428 (2000).

3. **Significance of “De-Constitutionalization” of the Exclusionary Rule: Creation of Exceptions**

While the significance of the de-constitutionalization of the exclusionary rule is open to some debate, the primary effect is likely demonstrated in the ready willingness of the Court to create major exceptions to the application of the exclusionary rule in cases where the Fourth Amendment has been violated.

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C. **THE PRIMARY POLICY RATIONALE OF THE EXCLUSIONARY RULE IS DETERRENCE.**
1. Initial Policies: Deterrence and Judicial Integrity

At the time of “incorporation” of the exclusionary rule (i.e., its application to the states through the Fourteenth Amendment) in Mapp v. Ohio, the Court cited two policy rationales for the rule.

First, the Court cited the value of the exclusionary rule in deterring police violations of the Fourth Amendment, without which crucial “deterrent safeguard” the “Fourth Amendment would [be] reduced to a ‘form of words.’” Map v. Ohio, 376 U.S. 643 (1961)(quoting Silverthorne Lumber Co v. United States, 251 U.S. 385, 392 (1920)).


2. Shift in Emphasis to Deterrence Policy

It is important to note that this second rationale, judicial integrity, has been de-emphasized in the Court’s opinions, and the Supreme Court now views the primary purpose of the exclusionary rule as deterrence of Fourth Amendment violations. See, e.g., Stone v. Powell, 428 U.S. 465, 485 (1976); United States v. Janis, 428 U.S. 433, 446 (1976).

3. Significance of Shift to Deterrence Policy: Creation of Exceptions to the Exclusionary Rule

The significance of the deterrent policy rationale of the exclusionary rule is found in the Court’s willingness to create exceptions to the exclusionary rule in those areas where the benefits of exclusion, in terms of its deterrent effect, are outweighed by its costs to law enforcement and the
public safety, in terms of loss of probative evidence of criminal wrongdoing. The Court thus now routinely balances the costs and benefits of the application of the exclusionary rule to determine if (further) exceptions to its application should be created. See, e.g., United States v. Leon, 468 U.S. 897 (1984).

D. WHERE THE EXCLUSIONARY RULE DOES NOT APPLY

1. Determination of (Non-)Application Through Cost-Benefit Analysis

In the view of the Supreme Court, “the application of the [exclusionary] rule [is] restricted to those areas where its remedial objectives are thought most efficaciously served.” United States v. Calandra, 414 U.S. 338, 348 (1974).

As indicated above, the Supreme Court’s typical approach is to apply the exclusionary rule only in those circumstances where the Court determines that the benefits of the exclusionary rule outweigh its costs. The benefits of the exclusionary rule are viewed principally in terms of general deterrence of Fourth Amendment violations, while the costs of the rule are viewed primarily in terms of loss of probative evidence of criminal wrongdoing and the resulting harm to efforts to control crime and protect the public. See United States v. Calandra, 414 U.S. 338 (1974).

In recent cases, the Court in dicta has stated that exclusionary rule cost-benefit balancing indicates that the rule should apply only to “deliberate, reckless, or grossly negligent [police] conduct, or in some circumstances recurring or systemic negligence.” See Herring v. United States, 555 U.S. _____ (2009); Davis v. United States, 131 S. Ct. 2419(2011). On this view, the exclusionary rule would not apply to violations of the Fourth Amendment resulting from isolated acts of simple negligence or to non-negligent police conduct. If the Court ultimately converts this dicta into holdings, the end result will be a dramatic narrowing of the scope of the exclusionary rule to “egregiously” culpable police conduct. See Davis v. United States, 131 S. Ct. 2419, 2440 (2011)(Breyer, J., dissenting).

2. General Scope of Application of the Exclusionary Rule

Under this analysis, generally speaking, the exclusionary rule has been held inapplicable in non-criminal proceedings, such as ordinary civil actions, civil tax proceedings, or deportation hearings. See, e.g., United States v. Janis, 428 U.S. 433, 446 (1976)(civil tax proceedings); Immigration and
The Court, however, has held that the exclusionary rule does apply in some quasi-criminal contexts, such as property forfeiture proceedings related to criminal wrongdoing. See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

The Court has also held that the rule has limited application in federal habeas corpus proceedings. See Stone v. Powell, 428 U.S. 465, 485 (1976) (holding that “where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.”).

Additionally, the Court has also repeatedly declined to extend the exclusionary rule to non-trial aspects of criminal proceedings, such as grand jury proceedings and parole revocation hearings. See, e.g., United States v. Calandra, 414 U.S. 338 (1974) (grand jury proceedings); Pennsylvania Board of Probation and Parole, 523 US. 357 (1998) (parole revocation hearings).

Further, as will be discussed in detail below, the Court has also qualified application of the exclusionary in three areas usually grouped together under fruit of the poisonous tree: The attenuation of the taint exception, the independent source doctrine exception, and the inevitable discovery doctrine exception. Each of these areas will be covered in detail below.

Moreover, the Court has also qualified application of the exclusionary rule by creating an “impeachment” exception. Thus the state is allowed to introduce illegally-obtained evidence at trial in order to impeach the credibility of the defendant with respect to any statement made on direct examination or on cross examination if plainly within the scope of issues raised on direct examination.

Finally, the Court has held that the exclusionary rule does not apply in trial aspects of criminal proceedings, where the evidence was obtained by law enforcement acting in good faith reliance on the judgment of a magistrate, legislature, or court clerk. See, e.g., United States v. Leon, 468 U.S. 897 (1984) (good faith reliance on a magistrate).

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3. “Thumbnail” Summary of Scope of Application of Exclusionary Rule

In sum, the exclusionary rule, as a general matter, does NOT apply in:
II. THE “FRUIT OF THE POISONOUS TREE” DOCTRINE

A. WHAT IS THE “FRUIT OF THE POISONOUS” TREE?

1. The Metaphor of Choice

The “fruit of the poisonous tree” is the Court’s metaphor of choice for discussing the operation of the exclusionary rule in light of the relationship of:

(1) an illegal search or seizure;
(2) the *primary* evidence obtained directly through the illegal search or seizure; and
(3) further *derivative* evidence obtained through the primary evidence and thus only indirectly from the illegal search or seizure.
EXAMPLE: A police officer violates the Fourth Amendment by searching the trunk of a car without probable cause or any other justification. The officer finds in the trunk a bag of marijuana and a Rolodex filled with names of individuals involved in drug transactions. Further investigation into the names in the Rolodex turns up a witness whose testimony is damaging to the criminal defendant in question. The narcotics and Rolodex are viewed as primary evidence, that is, evidence found directly and immediately as a result of the illegal search of the trunk. The testimony of the witness, found as a result of investigation into the primary evidence (i.e., the Rolodex), is viewed as derivative evidence, i.e., that evidence that flows from the primary evidence.

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2. Exclusion of Both Primary and Derivative Evidence

Subject to the three “qualifications” discussed below, the “fruit of the poisonous tree” doctrine holds, in essence, that both the primary evidence flowing from an illegal search or seizure and any derivative evidence flowing from the primary evidence (and thus ultimately flowing indirectly from the illegal search or seizure) will be suppressed under the exclusionary rule as “tainted” by the illegal search or seizure.

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3. “Fruit of the Poisonous Tree” Policy and Exclusion of Derivative Evidence

The exclusion of both primary and derivative evidence is based on the exclusionary rule’s deterrence rationale. The basic thought here is that all the evidence the government derives from an unlawful search, primary and derivative, should be subject to exclusion.

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4. Metaphorical Confusion and the Limits of Metaphor

It is important to note here that the use of the “fruit of the poisonous tree” metaphor is a potential source of confusion. While it is clear that derivative evidence is the “fruit of the poisonous tree,” there is some confusion in the use of terminology as to whether the metaphorical “poisonous tree” refers to the primary evidence or the initial illegality. Perhaps the clearest usage would be to call the illegality the “poison,” the primary evidence the “poisonous tree,” and the derivative evidence flowing from the primary evidence the “fruit of the poisonous tree.” As shall be shown below, however, the key point is that the metaphor is much less important than the substantive rules, policies, and policy rationales crafted by the Supreme Court.

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B. THREE “QUALIFICATIONS” TO THE “FRUIT OF THE POISONOUS TREE”


There are three important “qualifications” or “exceptions” to the application of the “fruit of the poisonous tree” exclusionary rule doctrine of excluding both the primary and derivative evidence flowing from an illegal search or seizure. The three qualifications fall under:

(1) the “attenuation of the taint” doctrine;
(2) the “independence source” doctrine; and
(3) the “inevitable discovery” doctrine.

2. Causation Analysis is the Key

The key to understanding these qualifications of the application of the “fruit of the poisonous tree” exclusionary rule doctrine is basic causation analysis— including what is commonly known as (i) proximate (or legal) and (ii) factual (or “but for”) cause.

As a first take on the issues to be covered in detail below, one can note the following: The “attenuation of the taint” doctrine essentially involves what is a form of proximate or legal cause analysis and thus “attenuation” only becomes an issue once some form of “but for” cause is established.
The independent source doctrine, on the other hand, is essentially a form of factual or “but for” cause analysis and thus typically precedes any concern of attenuation of the taint.

Finally, the inevitable discovery doctrine is essentially a “hypothetical” form of the independent source doctrine and thus also turns on a kind of factual or “but for” cause analysis. Each of these qualifications or exceptions will be covered in detail.

C. THE FIRST QUALIFICATION: ATTENUATION OF THE TAINT

1. Introduction to “Attenuation of the Taint” Analysis

(a) Causation Analysis

The key rule in the area of “attenuation” or “dissipation” of the “taint” of a Fourth Amendment violation is that exclusion of evidence under the exclusionary rule requires what amounts to both (i) a factual/“but for” causal relationship and (ii) a “proximate” causal relationship between a violation of the Fourth Amendment and the evidence sought to be excluded.

Thus even if a factual or “but for” causal relationship can be established between an illegal search or seizure and the evidence the state seeks to introduce at trial, such evidence will not be excluded under the exclusionary rule as “tainted” by the Fourth Amendment violation unless there is also what is, in effect, a proximate causal relationship between the illegality and the evidence in question.

In short, when no sufficient proximate causal relationship exists, the Court holds that there has been “attenuation” or “dissipation” of the “taint” and the evidence may be admitted at trial. See Nardone v. United States, 308 U.S. 338 (1939); Wong Sun v. United States, 371 U.S. 471 (1963); Brown v. Illinois, 422 U.S. 590 (1975).

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(b) Attenuation Analysis Policy is Cost-Benefit Deterrence Analysis

The policy driving “attenuation of the taint” analysis is an application of the general exclusionary rule policy of deterrence of Fourth Amendment violations subject to the Court’s common cost-benefit analysis that determines the limits to the exclusionary rule’s application.

The Court here has stated that attenuation of the taint analysis ‘attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.” Brown v. Illinois, 422 U.S. 590, 609 (1975)(Powell, J., concurring).

(c) Attenuation Analysis as Case-by-Case, Multi-Factor, “Proximate Cause” Analysis

The (non-)attenuation analysis is essentially a legal or proximate cause analysis, centered around a series of factors. As most lawyers recall from their law school days or practice, proximate cause in criminal law centers around a policy of “fairness” to criminal defendants and involves a multi-factor analysis involving issues such as remoteness of time, space, and chain of events; intervening acts of free will, and “intended consequences.” See Joshua Dressler, Understanding Criminal Law (3rd ed., 2001); Model Penal Code 2.03(2)(b)(“actual result . . . not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense.”)(brackets in original).

Similarly, “attenuation of the taint” analysis, as what amounts to a form of proximate cause analysis, is a case-by-case, multi-factor, “totality of the circumstances” analysis, and involves inquiry into a series of factors, including those of (1) temporal proximity; (2) the nature of intervening circumstances; (3) flagrancy of the violation; and (4) the nature of the evidence the prosecution seeks to introduce. Each of these factors requires discussion in greater detail.
2. Examination of Attenuation Factors

(a) Temporal Proximity

The key point here is that the longer the period of the time between a Fourth Amendment violation and the discovery of the evidence, the more likely it is that a court will find that the taint has attenuated.

(b) Intervening Circumstances

(1) Generally

As a general matter, the more events that occur in the causal chain between the initial illegality and the evidence in question, the more likely it is that the court will find that the taint has attenuated.

(2) Special Issue: Unlawful Arrest, Free Will, Miranda Warnings, and Brown

As a general matter, the Supreme Court has held that an intervening act of free will by the criminal defendant can “attenuate the taint” in some cases. See, e.g., Wong Sun v. United States, 371 U.S. 471 (1963) (holding that defendant’s voluntary return to police station several days after an unlawful arrest and his voluntary provision of written statement act to purge or dissipate taint of the unlawful arrest).

Notably, however, the Supreme Court has held that in cases of unlawful arrest the mere fact that a statement is made by the arrestee voluntarily and after proper Miranda warnings have been administered does not “alone and per se” break “the causal connection between the illegality and the confession.” The Court reasoned that “[a]ny incentive to avoid Fourth Amendment violations would be eviscerated by making [Miranda] warnings, in effect, a cure-all.” Brown v. Illinois, 422 U.S. 590, (1975)

Rather the proper analysis here requires a totality of the circumstances analysis in light of all the factors and a simple “mirandizing” of the arrestee after an unlawful arrest followed by a voluntary statement in response to interrogation is unlikely to be viewed in isolation as attenuating the taint. See Brown v. Illinois, 422 U.S. 590 (1975).
(3) Segura, Attenuation, and Destruction of Evidence

(i) No Constitutional Right to Destroy Evidence?

In Segura v. United States, in the context of a discussion of both the independent source doctrine and attenuation of the taint, the Court observed that the facts of the case indicated that police agents’ potentially illegal entry into an apartment may have prevented suspects from destroying or removing evidence later found by police. Therefore, the Court reasoned, the “agents’ actions could be considered the ‘but for’ cause for discovery of the evidence.” While the Court argued that this line of “but for” causal reasoning was in fact highly speculative in nature given the facts of the case, the Court also cited Nardone’s “attenuation of the taint” language and concluded that there is no “constitutional right” to destroy evidence.” Segura v. United States, 468 U.S. 796 (1984).

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(ii) Attenuation Rationale

While the Court’s precise reasoning and resolution of the issue is open to some question, Segura can be read as in part endorsing, if perhaps only in dicta, the proposition that if a “but for” connection between an unlawful act by police and contested evidence consists of nothing more than that the unlawful police act prevented the destruction or removal of the evidence by the defendant, then there is an insufficient proximate causal relationship for invocation of the exclusionary rule and the taint of illegality in such cases is properly viewed as attenuated. See United States v. Jones, 214 F.3d 836 (7th cir., 2000)(citing Segura and stating that “[a]n argument that the suspects would have destroyed the drugs [but for their disorientation as a result of police use of concussion grenades potentially in violation of the Fourth Amendment] is not a good reason to suppress probative evidence of crime.”).

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(c) Flagrancy of the Violation: Greater “Poison” Equals Longer “Taint”
As a general matter, the more flagrant a violation of the Fourth Amendment is, the less likely a court is to find that the taint has attenuated. See Brown v. Illinois, 422 U.S. 590 (1975).

Metaphorically, the more flagrant the violation the greater the “poison” and resulting taint and thus the longer down the causal chain the taint takes to dissipate or attenuate.

As a matter of deterrence policy, the more flagrant the violation, the greater the need to deter it, and therefore the greater the desire of courts to exclude evidence flowing from such violations, suggesting that courts will be less likely to admit evidence from “flagrant” violations under an attenuation theory.

(d) Nature of the Evidence: Faster Attenuation for Witnesses

The “nature” of the evidence derived from illegal action is relevant to attenuation of the taint analysis. In Ceccolini, the Supreme Court held that the “taint” of illegality that requires the exclusion of evidence attenuates or dissipates faster with witness testimony that with inanimate or physical evidence. See United States v. Ceccolini, 435 U.S. 268 (1978).

The Court’s reasoning in Ceccolini turned on two basic points. First, that witnesses, unlike inanimate physical evidence, can come forward of their own volition and therefore law enforcement are more likely to have obtained this kind of evidence absent the illegality in question. And, second, that exclusion of such evidence would “permanently disable[]” probative evidence of criminal wrongdoing. While the Court’s reasoning remains controversial, the rule is quite clear. United States v. Ceccolini, 435 U.S. 268 (1978).
(e) Interest Protected by the Constitutional Guarantee Not Served by Suppression of the Evidence Obtained.

In *Hudson v. Michigan*, the Supreme Court stated that attenuation occurs not only “when the causal connection is remote” but also “when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” See *Hudson v. Michigan*, 126 S.Ct. 2159 (2006). In other words, as the Court also observed in *Hudson*, “the reason for a rule must govern the sanctions for the rule’s violation” and thus governs the application of the exclusionary rule through attenuation analysis. See *Hudson v. Michigan*, 126 S.Ct. 2159 (2006).

(1) Unlawful Manner of Entry, *Wilson*, and *Hudson*

(i) An Unlawful Entry into the Home in Violation of *Wilson’s* Knock-and-Announce Requirement does not “Taint” Evidence Discovered During Execution of a Valid Search Warrant

The Court has articulated a special bright-line attenuation rule in the area of the knock-and-announce requirement. In *Hudson v. Michigan*, the Court held that an unlawful entry into the home in violation of *Wilson’s* knock-and-announce requirement does not “taint” evidence discovered during the execution of a valid search warrant after the illegal manner of entry. See *Hudson v. Michigan*, 126 S.Ct. 2159 (2006).

The Supreme Court in *Wilson v. Arkansas* held that the common law “knock and announce” rule “forms a part of the reasonableness inquiry under the Fourth Amendment” and therefore that the Fourth Amendment, as a general matter, prohibits violations of the traditional contours of the “knock and announce” rule. See *Wilson v. Arkansas*, 514 U.S. 927 (1995). The “knock and announce” requirement is viewed as promoting policies of minimizing violence, property damage, and privacy interests implicated by sudden and unexpected intrusions.

(ii) Policy Explanation of *Hudson*: Attenuated Connection between Illegality and Evidence

The policy explanation of *Hudson* is that “the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” As the Court stated: The knock-and-announce rule protects one’s interests in “human life and limb,” “property,” and aspects of “privacy and dignity” that could be compromised by unannounced intrusions but “has never protected . . . one’s interest in preventing the government from seeing or taking evidence described in a warrant.” Thus, “[s]ince the interests that [are] violated in [knock-and-announce violation cases] have nothing to do with the seizure of evidence” discovered during an otherwise lawful search, the exclusionary rule is inapplicable.” See *Hudson v. Michigan*, 126 S.Ct. 2159 (2006).
(2) Special Issue: Unlawful Arrest in the Home and *Harris*

(i) A Unlawful Arrest in the Home in Violation of *Payton* does not “Taint” Statements Made Outside the Home

The Court has also articulated a special bright-line rule in one area of unlawful arrest. In *New York v. Harris*, 445 U.S. 573 (1990), the Court stated that: “[W]here the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State’s use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in a home in violation of *Payton*.” *New York v. Harris*, 445 U.S. 573 (1990)

The *Payton* decision held that an arrest warrant is required for entry into a suspect’s home in order to arrest the suspect. The justification for the warrant requirement here is the need to provide some measure of procedural protection of the suspect’s privacy in his or her home. *Payton v. New York*, 445 U.S. 573 (1980).

(ii) A Potential Policy Explanation for *Harris*: Attenuated Connection Between Illegality and Evidence

While the precise reasoning of *Harris* remains somewhat obscure, the Court’s reasoning clearly suggests that factual cause analysis—rather than proximate cause or attenuation analysis—was the basis for the admissibility of the evidence in *Harris*.

In brief, the Court reasoned that once Harris was removed from his home, his continuing custody by police was no longer a factual result of the *Payton* violation, but rather was based on simple continuing probable cause to arrest and thus was lawful under the Fourth Amendment. The Court also suggested that *Payton*’s policy concerns were no longer implicated once Harris was removed from his home.

This reasoning is controversial for two reasons. First, as a matter of factual causation, it does seem clear that “but for” the *Payton* violation, Harris would not have been in custody and therefore factual causation analysis supports exclusion of the statements. Second, exclusion analysis turning on the issue of police (non-)exploitation of a Fourth Amendment violation is routinely done as a form of attenuation analysis, not “but for” causal analysis.

Thus the *Harris* decision may in fact be better understood as an attenuation or dissipation case in the guise of a factual causation case. On this re-interpretation, the Court’s decision essentially turns on the attenuated link between the violation of the *Payton* arrest warrant requirement—intended to protect the arrestee’s privacy interest in the home, not his or her liberty against unjustifiable arrest—and the statements made by the arrestee once he is removed from the home, where no warrant is required for a felony arrest.

This attenuation-based understanding of *Harris* has been confirmed by the recent case of *Hudson v. Michigan*, in which the Court cited *Harris* and stated: “Attenuation . . . occurs when, even given
a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” See Hudson v. Michigan, 126 S.Ct. 2159 (2006).

D. THE SECOND QUALIFICATION: THE INDEPENDENT SOURCE DOCTRINE

1. Introduction to the Independent Source Doctrine

(a) Independent Source and “But For” Causation Analysis

Evidence, quite obviously, should not be excluded as “tainted” or “poisoned” by a Fourth Amendment violation if in fact there is no significant causal connection between the Fourth Amendment violation and the evidence.

What result, then, if there are two sources from which the same piece of evidence derives—one source a Fourth Amendment violation and the other source lawful police activity?

The Supreme Court’s “independent source” doctrine holds that evidence causally derived from a Fourth Amendment violation that also has a lawful “independent source” is not subject to exclusion under the exclusionary rule. See Silverthorne Lumber Co. V. United States, 251 U.S. 385 (1920); Segura v. United States, 468 U.S. 796 (1984); Murray v. United States, 487 U.S. 533 (1988).

In such cases, there is insufficient “but for,” actual, or factual causal connection between the illegality and the evidence to justify exclusion, given that the police also obtained the very same evidence from a lawful source independent of the illegality and thus would possess the evidence even if the illegal action had not occurred.

In short, in cases where there is a lawful independent source, it cannot accurately be said that “but for” the unlawful action, the police would not have obtained the evidence. See United States v. Crews, 445 U.S. 463 (1980). Evidence of this kind does not become “sacred and inaccessible” to the prosecution merely because one path to the evidence is tainted by illegality. Silverthorne Lumber Co. V. United States, 251 U.S. 385 (1920)
(b) The Independent Source Doctrine’s Policy Justification: Place the Police in No Worse a Position Than They Would Have Been Absent the Illegality

The policy justification for the “independent source” doctrine is a simple application of cost-benefit analysis under the exclusionary rule’s deterrence policy. As stated by the Supreme Court: “[T]he 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 than they would have been in if no police error or misconduct had occurred.” Nix v. Williams, 467 U.S. 431, 443 (1984). Thus the Court believes that the state, for purposes of deterrence, must disgorge any benefit derived as a matter of “but for” causality from an illegal search or seizure but should not be (further) actively penalized and placed in a worse position than if the illegal acts had not occurred.

2. Special Issue: “Rediscovered” Evidence and Confirmatory Searches

(a) “Rediscovered” Evidence and Confirmatory Searches in General

An issue of special interest and concern in the area of the independent source doctrine is that of whether to admit evidence initially discovered during an unlawful warrantless search and then later “rediscovered” by the same investigators under a warrant obtained immediately after the initial illegal search.

Such police practices pose the danger of “confirmatory” searches—illegal searches done without a search warrant by law enforcement to confirm (or dispel) their suspicions of criminal wrongdoing before officers actually expend the time and effort needed to obtain a search warrant for a lawful search.
(b) “Rediscovered” Evidence is Admissible if “Rediscovery” is Genuinely Independent of Initial Illegal Search

The Supreme Court in *Murray* held that “rediscovered” evidence initially discovered in an illegal search and then later re-discovered in a second lawful search is admissible under the “independent source” doctrine if the second search is “genuinely independent” of the first, unlawful search. *See Murray v. United States*, 487 U.S. 533 (1988).

(c) Establishing “Genuine Independence” of Second Search

In order to establish the “genuine independence” of the second search from the first search, two essential requirements must be demonstrated:

1. **Evidence from Unlawful Search Not Necessary to Magistrate’s Probable Cause Determination for Issuance of Warrant for the Second Search**

   First, the state must show that no evidence from the unlawful search was necessary to the magistrate’s probable cause determination for issuance of the search warrant for the second search. *See Murray v. United States*, 487 U.S. 533 (1988).

2. **Evidence from Unlawful Search Not the Motive for Second Search**

   Second, the state must show that the evidence found in the first search was not the officer’s motivation for pursuing the second search. *Murray v. United States*, 487 U.S. 533 (1988).

Note that this second aspect of “genuine independence” does not require that police would have sought a search warrant to conduct a lawful search even if they had found no evidence of crime, contraband, etc. in the initial unlawful search, but rather this aspect of “genuine independence” requires only that the police would have sought a warrant in order to conduct a lawful search even if they had not done a confirmatory search and thus had not had their initial suspicions either confirmed or dispelled. *See Murray v. United States*, 487 U.S. 533 (1988).
3. The Independent Source Doctrine Applies to Both Derivative and Primary Evidence

(a) No Distinction Between Derivative and Primary Evidence

While the independent source doctrine is usually analyzed as a “fruit of the poisonous tree” doctrine, it is clear from the Court’s decision in *Murray*, a “primary” evidence case, that the independent source doctrine is not limited to derivative evidence (i.e., the fruit of the poisonous tree in the strictest sense) but also applies to primary evidence, that evidence found directly and immediately as a result of an illegal search or seizure. *See Murray v. United States*, 487 U.S. 533 (1988).

(b) Policy-Basis: Place the Government in No Worse a Position that They Would Have Been Absent the Illegality

The Court’s reasoning here turns on the deterrence-based, cost-benefit policy rationale of the independent source doctrine, a sub-set of exclusionary rule policy, which the Court views as mandating that police be placed in no worse a position than they would have been absent the illegality in question. As the Court explained in Murray, the “strange distinction [between primary and derivative evidence] would produce results bearing no relation to the policies of the exclusionary rule.” *Murray v. United States*, 487 U.S. 533 (1988)

As the Court observed, exclusion of evidence in “primary evidence” cases would, indeed, place the government in a “worse position” than it would have been absent the illegality, an outcome inconsistent with well-established exclusionary rule policy balancing. *See Murray v. United States*, 487 U.S. 533 (1988). In short, whether the evidence contested is primary or derivative evidence, it should not be suppressed under the exclusionary rule if the police have a “genuinely independent” lawful source.

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E. THE THIRD QUALIFICATION: THE INEVITABLE DISCOVERY DOCTRINE

1. Inevitable Discovery as a “Hypothetical” Independent Source Rule

The “inevitable discovery” rule holds that evidence derived from a Fourth Amendment violation that would have been discovered “inevitably” by police in the absence of the violation (i.e., by lawful means completely independent of the Fourth Amendment violation) is not subject to exclusion and is thus admissible at trial. See Nix v. Williams, 467 U.S. 431 (1984)(adopting the inevitable discovery doctrine in the context of the Sixth Amendment Right to Counsel exclusionary rule).

EXAMPLE: Police unlawfully interrogate an arrestee who leads them to the body of a murder victim, as a result of the unlawful interrogation. Because police locate the body through this unlawful activity, they call off a systematic search for the body in the area pursuant to a search grid which includes the specific location of the body as a place to be searched, strongly suggesting that absent the unlawful interrogation police would have (“i.e., hypothetically speaking”) found the body within a short period of time. See Nix v. Williams, 467 U.S. 431 (1984).

The inevitable discovery doctrine is sometimes known as the “hypothetical” independent source rule because under this doctrine the state need not show an actual independent source (i.e., a second, lawful source for the evidence in question actually obtained by police), but rather merely a hypothetical independent source (i.e., a second, lawful source the police would have used to obtain the evidence but in fact did not because the first, unlawful source appeared to preempt the need to pursue the second lawful source).

2. Inevitable Discovery and Hypothetical “But For” Causation Analysis

As a “hypothetical version” of the independence source rule, this analysis turns on a “hypothetical” version of factual or “but for” cause. Under the inevitable discovery doctrine, evidence should not be suppressed if the state can demonstrate that the illegal act is not a “but for” cause of the acquisition of the evidence in question in the sense that absent the illegal act the police still would have obtained the evidence “inevitably” through a “hypothetical” lawful source.

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3. Inevitable Discovery Policy is the Same as Independent Source Doctrine Policy: Place the Police in No Worse a Position Than They Would Have Been Absent the Illegality

The Court’s policy rationale in the area of inevitable discovery is essentially identical to its reasoning in the area of the independent source doctrine: The purpose of the exclusionary rule is to deter violations of the Fourth Amendment, application of the exclusionary rule requires a cost-benefit analysis, and a proper balancing of the costs and benefits of the exclusionary rule mandate that the rule operate to force law enforcement to disgorge the benefits of an illegal search but the rule should not further operate to put the police in a worse position that they would have been absent the illegal search or seizure. See Nix v. Williams, 467 U.S. 431 (1984).

Thus if the state can show inevitable discovery of contested evidence, then exclusion of that evidence would place the police in a worse position than they would have been had they not violated the Constitution and thus exclusion of evidence in such a case would exceed, in the Court’s opinion, the proper application of the exclusionary rule.

4. Divisions in Lower Courts on Limitations on Inevitable Discovery

(a) The “Good Faith” Limitation Rejected by the Supreme Court

In Nix, the Supreme Court rejected a “good faith” requirement in the area of inevitable discovery, which would have limited its application to those cases in which the police conducted their illegal search or seizure in “good faith.” See Nix v. Williams, 467 U.S. 431 (1984).

While the Supreme Court has not addressed the issue of other possible limits on the application of inevitable discovery, lower courts are split on whether additional limits exist constraining the scope of the inevitable discovery doctrine, including (i) whether “inevitable discovery” requires an independent “active pursuit” of a the lawful “inevitable” means of discovery at the time the illegality occurs or (ii) whether “inevitable discovery” applies to primary evidence as well as derivative evidence.

(b) “Active Pursuit” Requirement?
A number of courts have adopted an independent “active pursuit” requirement, holding that law enforcement must be independently “actively pursuing” the lawful means by which discovery is determined to be “inevitable” at the time the illegal search or seizure occurs. See United States v. Khoury, 901 F.2d 948 (11th Cir. 1990)(finding evidence obtained through the unlawful search of a vehicle inadmissible and rejecting an “inevitable discovery” argument predicated upon inevitability of a later inventory search because the inventory search had not yet begun at the time of the illegal search and therefore the requirement of “active” pursuit was not met).

While the independent “active pursuit” requirement fits the facts of Nix v. Williams, it is plainly inconsistent with the Court’s but-for causation analysis and the cost-benefit policy rationale of placing the police in no worse a position that they would have been absent the illegality. See Nix v. Williams, 467 U.S. 431 (1984).

In the recent case of Hudson v. Michigan, the Supreme Court cast the independent “active pursuit” requirement in further doubt. In Hudson, officers who possessed a valid warrant under the Fourth Amendment to search an individual’s home entered the home in violation of the Fourth Amendment’s knock-and-announce requirement. While the main ground of decision in Hudson turned on attenuation analysis, the Supreme Court did state as a preliminary matter that “the constitutional violation of illegal manner of entry in violation of the knock-and-announce rule was not a but-for cause of obtaining the evidence” in Hudson because “[w]hether that preliminary misstep had occurred or not, the police would have executed the warrant they had obtained, and would have discovered” the evidence. See Hudson v. Michigan, 126 S.Ct. 2159 (2006). The implication of this statement is that a but-for causation doctrine such as the inevitable discovery doctrine does not require, as a matter of causation analysis, properly understood, any independent “active pursuit” of the hypothetical lawful source for obtaining the evidence.

(b) Application to Primary Evidence?

While the facts of the Supreme Court’s decision in Nix v. Williams, concerning discovery of a victim’s body derived from unlawfully obtained statements by the criminal defendant, make clear that the inevitable discovery doctrine applies to derivative evidence (evidence obtained indirectly and derivatively from unlawful activity via the primary evidence), lower courts are split on the question of whether the inevitable discovery also doctrine applies to primary evidence (evidence obtained directly and immediately from the unlawful activity of police).

The argument that the inevitable discovery doctrine should apply to primary as well as derivative evidence is based on the doctrine’s causation analysis and policy rationale (i.e., that police should
not be placed in a worse position than they would have been absent the constitutional violation in question) and the Supreme Court’s emphatic rejection of a primary/derivative evidence distinction in the closely related area on the independent source doctrine. See Murray v. United States, 487 U.S. 533 (1988).

The argument that the inevitable discovery doctrine should not apply to primary evidence—in other words, should be limited exclusively to derivative evidence—is grounded in concern that the hypothetical nature of the independent source of the evidence in the area of inevitable discovery would create a too large an exception to the deterrence of the exclusionary rule. See People v. Stith, 69 N.Y.S.2d 201 (1987).

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5. Demonstration of Inevitable Discovery

(a) Preponderance of the Evidence Standard

The Supreme Court has held that the government must demonstrate inevitable discovery by a preponderance of the evidence, expressly rejecting the higher standard of clear and convincing evidence. See Nix v. Williams, 467 U.S. 431 (1984).

(b) True Inevitability

The inevitable discovery doctrine holds that the state must show true inevitability of discovery of the evidence, not a mere possibility that the evidence might have been discovered.

Therefore the state must demonstrate how the discovery would have been made in light of actions law enforcement would actually have taken had the illegal search or seizure not occurred, not actions that law enforcement might have taken under ideal but counter-factual conditions. See United States v. Feldhacker, 849 F2d 293 (8th Cir. 1988).

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III. THE IMPEACHMENT EXCEPTION TO THE EXCLUSIONARY RULE

A. INTRODUCTION TO THE IMPEACHMENT EXCEPTION

Briefly stated, the “impeachment” exception to the exclusionary rule allows the prosecution to use unlawfully obtained evidence for purposes of impeachment of the defendant, casting doubt on his or her credibility as a witness, but not substantively to prove his or her guilt with respect to crimes charged. Thus evidence admitted at trial for the limited purpose of impeachment must be accompanied by the appropriate limiting instructions, i.e., that the jury may consider the evidence only for purposes of the defendant’s credibility as a witness.

EXAMPLE: Defendant, charged with sale of narcotics, testifies on direct examination that he has never possessed narcotics. The prosecution may introduce unlawfully obtained evidence that narcotics were once found in the defendant’s home by police but the jury must be instructed to consider this evidence only for purposes of the defendant’s credibility as a witness not whether he is guilty of the crime of drug possession. See Walder v. United States, 347 U.S. 62 (1954).

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B. IMPEACHMENT EXCEPTION POLICY

1. Exclusionary Rule Cost Benefit Analysis

The policy rationale of the impeachment exception is grounded in the exclusionary rule’s deterrence rationale and a cost-benefit assessment of the value of exclusion in the area of impeachment. In the view of the Supreme Court, the deterrent effect achieved by exclusion of evidence from the prosecution’s case-in-chief is sufficient to safeguard the Fourth Amendment and any additional marginal incremental deterrent effect that would be achieved by exclusion of illegally-obtained evidence for impeachment purposes is outweighed by the clear value of the evidence for the jury’s determination of the defendant’s credibility.

As the Court explained in Harris v. New York, “[t]he impeachment process here undoubtedly
provided valuable aid to the jury in assessing petitioner’s credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct would be encouraged thereby.” *Harris v. New York*, 401 U.S. 222 (1971). The Court has thus stated that the Exclusionary Rule is not a “shield” or “licence” for perjury. *Id.*

2. Concern About the Criminal Defendants Right to Testify and Call Witnesses

The Court, however, has also expressed concern about the impact of the impeachment exception on the trial rights of criminal defendants. *See James v. Illinois*, 493 U.S. 307 (1990) (stating that “expanding the impeachment exception . . . would chill some defendants from presenting their best defense”).

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C. THE SCOPE OF THE IMPEACHMENT EXCEPTION IN DETAIL

1. Introduction

The present scope of the impeachment exception has been established through a long, complex, and seemingly contradictory line of cases. In brief, the impeachment exception includes within its scope:

(a) impeachment of statements by the criminal defendant made during direct examination of the defendant and impeachment of statements made by the criminal defendant on cross-examination plainly within the scope of the defendant’s direct examination;
(b) impeachment with illegally-obtained evidence indirectly related to the charged crimes (i.e., concerning collateral or uncharged crimes) and impeachment with illegally-obtained evidence directly related to the charged crimes; and
(c) impeachment of the criminal defendant’s own testimony but NOT the testimony of other defense witnesses.

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2. Scope I: The Impeachment Exception Extends to Both Statements Made During Direct Examination and Statements Made During Cross-Examination if Plainly Within Scope of Direct Exam

The Supreme Court held in *Walder* that a criminal defendant may be impeached for statements made during direct examination. *See Walder v. United States*, 347 U.S. 62 (1954). Again, the Court’s basic rationale is that the benefits of such exclusion in terms of deterrence of Fourth Amendment violations is outweighed by the costs of loss of evidence valuable to the jury in assessing the criminal defendant’s credibility as a witness.

In *Havens*, the Supreme Court held that the impeachment exception also extends to statements first made by the criminal defendant during cross-examination in response to questions plainly within the scope of issues raised by defendant and defense counsel on direct examination. As the Court explained, there is “no difference of constitutional magnitude between the defendant’s statements on direct examination and his answers to the questions put to him on cross-examination that are plainly within the scope of the defendant’s direct examination.” *United States v. Havens*, 446 U.S. 620 (1980).

**EXAMPLE:** Defendant is on trial for importation and conspiracy to import narcotics. Defendant’s alleged co-conspirator *B* testifies against defendant, alleging that Defendant supplied him with an altered T-shirt with makeshift sewn pockets for purposes of importing narcotics into the U.S. and that *B* wore such a T-shirt on the day he was arrested. Defense counsel, on direct examination, asks Defendant if he (Defendant) has heard *B’s* testimony that *B* wore an altered T-shirt and asks if Defendant had engaged in “that kind of activity” with *B*. Defendant replies that he has heard the testimony and that he had not engaged in that activity with *B*. On cross examination, Defendant is asked whether he had altered a T-shirt and provided it to *B*, and he replies “no”; Defendant is then asked whether he had a T-shirt with a swatch of cloth missing from the shirt tail in his luggage on the day of his arrest, and he again says “no.” The government may impeach this statement by the defendant, calling his credibility as a witness into question, with illegally-obtained evidence, such as a T-shirt with the makeshift-pocket-sized swatch of cloth missing from the shirt tail, seized from Defendant’s luggage on the day of his arrest. This is so because the prosecution’s question concerning the presence of the altered T-shirt in Defendant’s luggage is plainly within the scope of the issues raised during the direct examination. *United States v. Havens*, 446 U.S. 620 (1980).
3. Scope II: The Impeachment Exception Extends to Both Use of Evidence of Collateral Crimes and Use of Evidence of Charged Crimes

The Supreme Court in *Walder* allowed unlawfully-obtained evidence to be used to impeach a criminal defendant but, notably, the evidence at issue in *Walder* did not directly relate to the crime for which Walder was being prosecuted. Rather the evidence used to impeach Walder concerned an *earlier* crime for which Walder was not on trial. The Court therefore noted that use of the use of this evidence to impeach Walder’s testimony would not in fact deny him the “fullest opportunity to meet the accusation” made against him by the state in his criminal trial. *See Walder v. United States*, 347 U.S. 62 (1954).

Despite this language, the Court in *Harris v. New York* extended the impeachment exception beyond admission of evidence unrelated to, or only very indirectly related to, the charged crimes (i.e., evidence of collateral crimes) to include admission of evidence directly related to the charged crimes. *See Harris v. New York*, 401 U.S. 222 (1971)

The Court’s reasoning was grounded in a cost-benefit analysis, the general exclusionary rule and impeachment exception policy, which, in the Court’s view, suggests that the marginal deterrent value of exclusion of such evidence for impeachment purposes does not outweigh the value of the evidence to the jury for determination of the defendant’s credibility. The Court also observed that the right to “testify or refuse to testify” did not include a “right to commit perjury” and concluded that any limitation such evidence might place on the defendant’s opportunity to testify did not outweigh its value to the jury. *Harris v. New York*, 401 U.S. 222 (1971).

Thus a criminal defendant who takes the stand and denies the charges against him may have his testimony impeached with illegally-obtained evidence tending to prove he actually committed the charged crime in order to demonstrate his lack of *credibility* as a witness, but not his substantive guilt with respect to that crime.

3. Scope III: The Impeachment Exception is Limited to the Criminal Defendant and thus Does
The Supreme Court in *James v. Illinois* declined to extend the impeachment exception beyond impeachment of the criminal defendant to the criminal defendant’s *witnesses*. The Court expressed concern that such an extension of the impeachment exception beyond the criminal defendant himself to defense witnesses generally could substantially limit or “chill” a defendant’s ability to call witnesses on his or her behalf. Additionally, the Court reasoned that the cost-benefit analysis under the exclusionary rule’s deterrence policy required limiting the impeachment exception to impeachment of the criminal defendant, given that broader use of illegally-obtained evidence for impeachment of defense witnesses generally might tempt officers to violate the Constitution. *James v Illinois*, 493 U.S. 307 (1990).

### D. INTERACTION OF IMPEACHMENT EXCEPTION WITH RULES OF EVIDENCE

1. **To be Admissible Evidence Must Meet the Requirements of Both the Exclusionary Rule and Rules of Evidence**

   Obviously, evidence admissible under the applicable rules of evidence may be excluded under the exclusionary rule if the evidence is obtained in violation of the Fourth Amendment. Also, obviously, evidence admissible under the Fourth Amendment may still be subject to exclusion under the applicable rules of evidence if, for instance, the evidence in question is irrelevant or hearsay.

2. **Rules of Evidence Balancing Probative Value Against Prejudicial Effect May Implicate Questions of Admissibility of Evidence Admissible Under the Impeachment Exception**

   Notably, Federal Rule of Evidence 403 allows for the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Many states have similar rules permitting exclusion based upon a balancing of probative value and prejudicial effect. These rules remain a potential basis for exclusion of evidence which is admissible under the Fourth Amendment.
Amendment impeachment exception for impeachment purposes but which may also be thought to unfairly prejudice the jury against the defendant because the evidence is suggestive of substantive guilt with respect to the charged crimes.

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IV. THE “GOOD FAITH” EXCEPTION TO THE EXCLUSIONARY RULE

A. INTRODUCTION TO THE “GOOD FAITH” EXCEPTION

Briefly stated, the “good faith” exception to the exclusionary rule holds that if police officers act in violation of the Fourth Amendment while reasonably relying on a determination by non-police personnel that they are acting in compliance with the Fourth Amendment, then the exclusionary rule does not apply. Non-police actors on whom the police may rely under the “good faith” exception include magistrates, legislatures, and court clerks. See, e.g., United States v. Leon, 468 U.S. 897 (1984).

Notably, the term “good faith” is a misnomer since the Court is clear that this exception does not turn on the subjective “good faith” of the police officers but rather on the objective reasonableness of their reliance. See, e.g., United States v. Leon, 468 U.S. 897 (1984).

For an example of the “good faith” exception, consider the following scenario: Police officers discover evidence while executing a search warrant–acting in reasonable reliance on a magistrate’s issuance of the warrant and underlying probable cause determination. In such a case, the exclusionary rule will not operate to suppress the evidence discovered during the search even if a reviewing court determines that the warrant was not supported by probable cause and that the magistrate issued it in error. See, e.g., United States v. Leon, 468 U.S. 897 (1984).

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B. THE POLICY BASIS OF THE “GOOD FAITH” EXCEPTION

1. Cost-Benefit Balancing Analysis
The policy basis of the “good faith” exception is found in the Court’s common exclusionary rule cost-benefit balancing analysis. The Court has concluded that in cases of reasonable police reliance on non-police actors—such as magistrates, legislators, and court clerks—the cost of the exclusionary rule in terms of loss of probative evidence of criminal wrongdoing remains high, while the benefit in terms of deterrence of Fourth Amendment violations is quite low. Therefore, balance of costs and benefits justifies the creation of an exception to the exclusionary rule. See United States v. Leon, 468 U.S. 897 (1984).

2. Deterrence Benefit is Minimal because Police Have Behaved Reasonably and Non-Police Actors Are Non-Deterrable

Why does the Court believe that the deterrent benefits of the exclusionary rule are minimal in the reasonable reliance context? There are two fundamental reasons. First, the Court believes that the exclusionary rule will have only a very limited deterrent effect on police officers who are reasonably relying on a non-police officer’s judgment that a search or seizure is justified under the Fourth Amendment. In such instances, the police officers have conducted themselves reasonably, and so there is little, if any, police misconduct to deter with the exclusionary rule. See United States v. Leon, 468 U.S. 897 (1984).

Second, the Court believes that the exclusionary rule can have only a very limited effect on non-police actors such as magistrates, legislators, and court clerks whose errors or misjudgements may lead to Fourth Amendment violations. This is so for three interrelated and overlapping reasons: (i) the exclusionary rule is designed to deter police misconduct violative of the Fourth Amendment rather than the conduct of non-police actors; (ii) non-police actors have little or no incentive to violate the Fourth Amendment because they are not engaged in the competitive enterprise of law enforcement entailing the collection of evidence; and (iii) the threat of exclusion of evidence will not deter non-police actors from making erroneous determinations as to whether a given police search or seizure is authorized under the Fourth Amendment since such actors have no stake in the success of criminal prosecutions. See United States v. Leon, 468 U.S. 897 (1984).

In sum, in situations where the police violate the Fourth Amendment by reasonably relying on the mistake or erroneous judgment of a non-police actor such as a magistrate, the costs of the exclusion of the evidence obtained outweigh its deterrent benefits.

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C. “GOOD FAITH” REASONABLE RELIANCE ON MAGISTRATES, LEGISLATURES,
AND COURT CLERKS

The Supreme Court originated the “good faith” exception in *United States v. Leon* in the context of reasonable police reliance on judicial personnel issuing warrants and on the underlying judicial determination that probable cause exists for the issuance of a warrant. *United States v. Leon*, 468 U.S. 897 (1984). The “good faith” exception in this context also extends to reasonable reliance on judicial determinations that warrants meet other strictures of the Fourth Amendment—such as the particularity requirement. *See Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

The Supreme Court extended the “good faith” exception in *Illinois v. Krull* to reasonable police reliance on a legislative authorization of a search by statute. *Illinois v. Krull*, 480 U.S. 340 (1987)(O’Connor, J., dissenting). While this holding has proved controversial given the plausible contention that legislatures have substantial incentives to authorize Fourth Amendment violations, it remains the law.

The Supreme Court also extended the “good faith” exception in *Arizona v. Evans* to reasonable police reliance on court-clerk maintained computer databases or record-keeping systems containing information such as the existence of outstanding warrants for arrest. *Arizona v. Evans*, 514 U.S. 1 (1995).

Finally, the Supreme Court recently extended the “good faith” exception in *Davis v. United States* to police reliance on binding appellate court precedent. Thus, for example, if a police officer conducts a search relying reasonably on circuit court precedent governing his or her jurisdiction and approving of the search under the Fourth Amendment, the good faith exception will apply if a later binding decision determines that the precedent is mistaken and holds that the search is actually a violation of the Fourth Amendment. *Davis v. United States*, 131 U.S. 2419 (2011).

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D . THE CONTOURS OF REASONABLE RELIANCE

The “good faith” exception requires that police reliance on non-police actors such as magistrates, legislatures, and court clerks be objectively reasonable.

In the context of reliance on magistrates, police reliance is not “reasonable” if: (i) affiant police officers mislead the magistrate by putting forth information in the warrant application known to be false or with reckless disregard for its truth or falsity; (ii) the magistrate “wholly abandon[s] the judicial role” in manner apparent to officers rendering their reliance on the magistrate unreasonable;
(iii) the warrant is “so lacking in indicia of probable” as to render belief in the existence of probable cause unreasonable; and (iv) the warrant is “so facially deficient” in an aspect such as particularity as to render belief in its validity unreasonable. United States v. Leon, 468 U.S. 897 (1984).

In the context of reliance on legislatures, police reliance is not “reasonable” if: (i) the legislature “wholly abandoned its responsibility to enact constitutional laws” in passing the statutory authorization; or (ii) the statute authorizes a search or seizure that “a reasonable officer should have known . . . was unconstitutional.” Illinois v. Krull, 480 U.S. 340 (1987).

In the context of reliance on court-clerk maintained computer databases and record-keeping systems, Justice O’Connor’s concurrence in Arizona v. Evans suggested that police reliance would not be objectively “reasonable” if the computer database in question is known to contain “no mechanism to ensure its accuracy over time” and it “routinely leads to false arrests.” Arizona v. Evans, 514 U.S. 1 (1995).

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V. HERRING V. UNITED STATES AND RELIANCE ON POLICE CLERKS

A. RELIANCE ON POLICE CLERKS AND THE “GOOD FAITH” EXCEPTION

1. In Arizona v. Evans, the Court Reserved Judgment on the Question of the Applicability of the “Good Faith” Exception to Reasonable Police Reliance on Police Clerks

In Arizona v. Evans, the Supreme Court expressly reserved judgment on the question of the applicability of the “good faith” exception to police reliance on computer databases or record-keeping systems operate by police personnel rather than by judicial personnel. Arizona v. Evans, 514 U.S. 1 (1995).

In Herring v. United States, the Supreme Court finally confronted this question in a case involving evidence discovered as a result of an unlawful arrest made by an officer acting in reasonable reliance on a police-personnel maintained computer database which erroneously indicated an outstanding arrest warrant for the defendant. Herring v. United States, 555 U.S. ____ (2009).

2. Difficulties with the Application of the Traditional “Good Faith” Exception to Reasonable Police Reliance on Police Clerks

The traditional “good faith” exception would appear not to apply in the context of reasonable police
reliance on police clerks because the policy foundation for the “good faith” exception rests on the belief that non-police actors such as magistrates, legislatures, and court clerks have no incentive to violate the Fourth Amendment and cannot be deterred by the prospect of exclusion. Therefore, one police actor’s “good faith” reliance on another police actor rather seems to fall outside the traditional parameters of the “good faith” exception.

B. IN HERRING V. UNITED STATES, THE COURT RECOGNIZED AN EXCEPTION TO THE EXCLUSIONARY RULE FOR ERRORS RESULTING FROM ISOLATED POLICE NEGLIGENCE ATTENUATED FROM THE FOURTH AMENDMENT VIOLATION

The Court in Herring recognized an exception to the exclusionary rule that in many respects parallels the traditional “good faith” exception. The Court concluded in Herring that the exclusionary rule’s cost-benefit balancing policy precludes exclusion of the evidence obtained as a result of an unlawful arrest in cases where the police “error was the result of isolated negligence attenuated from the arrest.” Herring v. United States, 555 U.S. ____ (2009).

Several points are worth noting about this exception, its relationship to the traditional “good faith” exception, and its one key difference in application. First, the requirement that the police “error” be “attenuated from the arrest” seems in practice to track the operation of the traditional “good faith” exception’s “reliance” principle: The field officer arresting the defendant in violation of the Fourth Amendment is acting reasonably and relying on another police officer whose clerical or record-keeping error is remote or “attenuated” from the arrest.

Second, the requirement that the error be a “result of isolated negligence” seems to track in part the traditional “good faith” exception’s principle that reliance be reasonable: The officer arresting the defendant in violation of the Fourth Amendment is acting in reliance on the record-keeping system and reliance is reasonable because the record-keeping system contains only “isolated” negligent errors rather than “systemic error[s]” which lead to routine unlawful arrests.

Third, the Herring exception’s key difference from the traditional “good faith” exception is found in its requirement of suppression of evidence for reckless police clerical errors. The Herring exception to the exclusionary rule pivots on whether a given police error “attenuated” from the arrest is (i) the result of an isolated act of simple negligence (ii) or the result of systemic negligence or recklessness. If the police error is the former, the Herring exception to the exclusionary rule applies and the evidence is admissible. If the police error is the latter, the Herring exception to the exclusionary rule does not apply and the evidence is inadmissible.

What is the justification for this distinction? Since police records-keeping personnel are police actors rather than non-police actors, they can be deterred from making mistakes by the prospect of the suppression of evidence in at least those instances where their errors evince some self-awareness or heightened culpability. When the police error is the result of isolated negligence, the Court believes that the error cannot be sufficiently deterred by suppression of evidence to justify the application of the exclusionary rule. When the police error is the result of systemic negligence or recklessness, the Court believes that the error can be sufficiently deterred to justify the application

An example will illustrate the principal distinction between the traditional good faith exception in the context of reckless errors by court clerks and the *Herring* exception applied to the reckless errors by police clerks: A police officer makes an arrest reasonably relying on a computer database erroneously indicating an outstanding arrest warrant. The error in the computer database is the result of an isolated but reckless clerical oversight. Evidence is obtained incident to arrest. If the clerk is a judicial employee, the traditional good faith exception applies under *Arizona v. Evans* because the court clerk is deemed non-deterrable, and the evidence is admissible. If the clerk is a police employee, the police clerk’s reckless error is deemed sufficiently deterrable to justify application of the exclusionary rule under *Herring*’s exclusionary rule analysis, and the evidence is inadmissible.

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C. *HERRING V. UNITED STATES* AND THE FUTURE OF THE EXCLUSIONARY RULE

1. The “Narrow” Reading of *Herring*

The interpretation of *Herring* recounted above is what might be called the “narrow” reading, one which emphasizes the facts of the case and the Court’s clear language characterizing the issue as one involving a police “error” (i.e., the record-keeping mistake in the database) resulting from “isolated negligence” which is “attenuated” from the police conduct actually in violation the Fourth Amendment (i.e., the unlawful arrest). This interpretation of *Herring* also emphasizes the parallels between *Herring*, a case about police clerks, and the Court’s analysis of the traditional “good faith” exception in the context of court clerks in *Arizona v. Evans*—while recognizing the important differences between the two cases on the question of the exclusionary rule and reckless clerical errors.

B. The “Broad” Reading of *Herring* and “Merely” Negligent Violations of the Fourth Amendment
Other language in *Herring* suggests a potentially broader reading of the case calling into question the application of the exclusionary rule in instances where officers have violated the Fourth Amendment in a merely negligent or non-negligent fashion:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level. *Herring v. United States*, 555 U.S. ____ (2009).

This language—if read in isolation from both the facts of *Herring* and other important language in the majority opinion—could be understood to call into question the broad application of the exclusionary rule to cases where police officers mistakenly believe they have authority to search and the officer’s mistaken belief is non-negligent or only an isolated instance of negligence—rather than a result of systemic negligence or recklessness.

For instance, what if an officer believes he or she has lawful authority to search a vehicle under the automobile exception because the officer mistakenly believes that there is probable cause that the vehicle contains contraband? If the officer’s mistaken belief about the existence of probable cause to search is non-negligent or merely an isolated instance of ordinary negligence—as opposed to a reckless belief or a belief resulting from gross, systemic, or recurring negligence—then the “broad” reading of *Herring* suggests non-application of the exclusionary rule. Obviously, an acceptance of such a broad reading of *Herring* would represent a dramatic narrowing of the scope of the exclusionary rule, which is routinely applied today to exclude evidence resulting from negligent and non-negligent police conduct violating the Fourth Amendment.

Justice Breyer, dissenting in *Davis v. United States*, raised these concerns and expressed the view that the *Herring* dicta, if taken seriously, would lead to “a watered-down Fourth Amendment, offering its protections against only those searches and seizures that are *egregiously* unreasonable.” *Davis v. United States*, 131 S. Ct. 2419, 2440 (2011)(Breyer, J., dissenting)(emphasis in the original).

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