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Murray v. United States:Legally Rediscovering Illegally Discovered Evidence

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MURRAY V. UNITED STATES:[1] LEGALLY REDISCOVERING ILLEGALLY DISCOVERED EVIDENCE

EARLY IN 1983, federal agents received information implicating Michael F. Murray, James D. Carter, and others in a conspiracy to possess and distribute illegal drugs.[2] This information was corroborated by law enforcement officials and through a spot surveillance conducted by federal agents.[3] At about 1:45 p.m. on April 6, 1983, federal law enforcement agents observed Murray drive a truck and Carter drive a camper into a South Boston warehouse.[4] About twenty minutes later, Murray and Carter drove the vehicles out of the warehouse. At that time, those investigating agents looked in the warehouse and saw two individuals and a tractor-trailer rig, which carried a long, dark container. After Murray and Carter had relinquished control of the truck and camper to other drivers, those vehicles were seized and the drivers were arrested. Agents discovered marijuana in both vehicles.[5]

Upon learning that the vehicles contained marijuana, the federal agents forced entry into the South Boston warehouse. The warehouse was unoccupied, but numerous burlap-wrapped bales were in plain view, which were later found to contain marijuana; the agents also "detected a strong odor of marijuana."[6] Without disturbing the bales, the agents left the warehouse and did not reenter until they had a search warrant. The warehouse was kept under surveillance in the interim.[7]

The agents applied for a warrant without mentioning the prior entry or any observations made during that entry. The warrant was issued at 10:40 p.m., and the agents immediately reentered the warehouse and "seized 270 bales of marijuana and note-

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1. Murray v. United States, 108 S. Ct. 2529 (1988).

2. United States v. Moscatiello, 771 F.2d 589, 591 (1st Cir. 1985), *modified*, Murray v. United States, 108 S. Ct. 2529 (1988).

3. *Moscatiello*, 771 F.2d at 591.

4. Murray v. United States, 108 S. Ct. at 2532 (1988). In this case, the Supreme Court consolidated the appeals of Murray and Carter and granted certiorari. Both of these appeals had been consolidated with *United States v. Moscatiello* at the appellate level.

5. *Murray*, 108 S. Ct. at 2532.

6. *Moscatiello*, 771 F.2d at 595.

7. *Murray*, 108 S. Ct. at 2532.

books listing customers for whom the bales were destined."[8]

Before trial, Murray and the other defendants moved to suppress the evidence discovered in the warehouse, arguing that the warrant was invalid because the agents did not inform the Magistrate about the prior illegal entry and thereby the warrant was tainted.[9] The district court denied the motion, and the First Circuit Court of Appeals affirmed.[10] Subsequently, the defendants filed petitions for certiorari, which were granted by the United States Supreme Court.[11] The Court ordered the judgments vacated and the case remanded to the district court. The Court held that evidence first discovered through an illegal search may be admitted if the later search, pursuant to a warrant, was an independent source of the evidence.[12]

This Note will begin with a brief discussion of the cases leading up to *Murray*. Next, it will examine the *Murray* decision itself and the manner in which the majority and the dissenters applied the previous case law and policies underlying the exclusionary rule. Finally, this Note will analyze the majority and dissenting opinions, concluding that the majority's decision may seriously erode the fourth amendment rights protected by the exclusionary rule.

I. HISTORY

The exclusionary rule prohibits the admission of evidence acquired during an illegal search.[13] The exclusionary rule was first applied in 1914 to protect fourth amendment rights in *Weeks v. United States*.[14] In 1961, the Supreme Court held that the exclu-

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 2535.
13. *Id.* at 2532 (citing Weeks v. United States, 232 U.S. 383 (1914) and Silverman v. United States, 365 U.S. 505 (1961)).
14. 232 U.S. 383 (1914) (holding that in a criminal prosecution, federal courts cannot retain for evidence against the defendant his illegally seized letters where the defendant has applied for their return).

The fourth amendment to the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; 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

sionary rule applied to the states via the fourteenth amendment in *Mapp v. Ohio*.[15]

An early case applying the exclusionary rule also noted that there could be an exception to that rule. In *Silverthorne Lumber Co. v. United States*,[16] the Supreme Court stated:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . .[17]

In *Murray*,[18] the Supreme Court referred to this exception to the exclusionary rule as the " 'independent source' doctrine" in the "specific sense."[19] This doctrine applies to the illegally-obtained evidence itself which is later found in a legal, independent way. One should note, however, that the discussion of the "independent source" in *Silverthorne Lumber* was dicta because there was no independent source in that case.

The *Murray* Court also discussed the " 'independent source' doctrine" in the "general sense" as propounded in *Segura v. United States*.[20] In *Segura*, agents unlawfully entered the defendant's apartment and stayed there until a search warrant was obtained. The Supreme Court held that "evidence found for the first time during the execution of the valid and untainted search warrant was admissible because it was discovered pursuant to an 'independent source.' "[21] The independent source doctrine in the general sense applies to separate evidence not found in the illegal search. The doctrine in the "general sense" differs from the doctrine in the "specific sense," which applies to evidence found in

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seized.

U.S. CONST. amend. IV.

15. 367 U.S. 643 (1961)(holding that the fourth amendment guarantee of freedom from unreasonable search and seizure protected a woman whose obscene materials were seized without a search warrant and used to obtain a conviction against her for violating state law).

16. 251 U.S. 385 (1920).

17. *Id.* at 392.

18. Murray v. United States, 108 S. Ct. 2529 (1988).

19. *Id.* at 2533.

20. 468 U.S. 796 (1984).

21. *Murray*, 108 S. Ct. at 2533 (citing Segura v. United States, 468 U.S. 796, 813-14 (1984)).

the illegal search and later rediscovered by legal means. It is the doctrine in its specific sense which is closer to the inevitable discovery doctrine, first accepted by the Supreme Court in *Nix v. Williams*.[22]

Williams involved the murder of a ten-year-old girl. In violation of the defendant's right to counsel, the police obtained from the defendant incriminating statements about the location of the victim's body.[23] The Court held that the evidence was admissible because the search parties would have found the body without the benefit of the incriminating statements.[24] The Court reasoned that "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial."[25] Thus, the inevitable discovery doctrine and the independent source doctrine set the stage for the issue in *Murray*.

II. *Murray v. United States*

A. Majority Opinion

Justice Scalia wrote the majority opinion in *Murray*, a four to three decision.[26] He addressed the issue of "whether . . . assuming evidence obtained pursuant to an independently obtained search warrant, the portion of such evidence that had been observed in plain view at the time of a prior illegal entry must be suppressed."[27] The majority held that such evidence would not be suppressed if "the search pursuant to warrant was in fact a genu-

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22. 467 U.S. 431 (1984).

23. *Id.* at 435-36.

24. *Id.* at 449-50.

25. *Id.* at 446.

26. Justices Brennan and Kennedy did not participate in the consideration of the cases consolidated in *Murray*. One may speculate that the 4-3 decision would have come out differently had one or both of these justices participated. Justice Brennan, for instance, dissented in both Nix v. Williams, 467 U.S. 431, 458-60 (1984) and Segura v. United States, 468 U.S. 796, 817-40 (1984) for various reasons.

In *Nix v. Williams*, Justice Brennan argued in dissent that the Court failed to see the difference between the "inevitable discovery" exception and the "independent source" doctrine. Since the evidence was not actually obtained from an independent source, Brennan would have required the government to show clear and convincing evidence that the circumstances actually amounted to an inevitable discovery which would have been found by independent investigations.

In *Segura*, Justice Brennan joined the dissent of Justice Stevens arguing that the independent source doctrine should not apply. The dissent was concerned that the majority was providing an incentive for warrantless and unreasonable intrusions into the home. Thus, it is likely that Justice Brennan would have had the same concerns in *Murray*.

27. Murray v. United States, 108 S. Ct. 2529, 2532 (1988).

inely independent source of the information and tangible evidence at issue here."[28] The legal search, the Court added, would not be an independent source of the evidence "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant."[29] The majority focused on the belief that the rationale for the exclusionary rule is to deter unlawful police conduct 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."[30] This focus by the majority formed the basis for the majority's difference of opinion with the dissenters.

Justice Scalia discussed the history of related exceptions to the exclusionary rule:

> This "inevitable discovery" doctrine [of *Williams*] obviously assumes the validity of the independent source doctrine [in the specific sense] as applied to evidence initially acquired unlawfully. It would make no sense to admit the evidence because the independent search, had it not been aborted, would have found the [evidence], but to exclude the evidence if the search had continued and had in fact found the [evidence].[31]

Therefore, Justice Scalia concluded that the independent source doctrine would apply in this case and allow the admission of the marijuana as evidence.

Justice Scalia then addressed Murray's policy argument that the majority's rule will encourage unlawful police searches. Murray claimed that if such evidence is not excluded, police will make warrantless searches in order to determine whether they should bother getting a warrant.[32] Justice Scalia countered that such police action would be foolish. He reasoned that the act would "add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officer's decision to seek a warrant or the magistrate's decision to grant it."[33]

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28. *Id.* at 2535.

29. *Id.* at 2535-36 (footnote omitted).

30. *Id.* at 2533 (quoting Nix v. Williams, 467 U.S. 431, 443 (1984)).

31. *Id.* at 2534. Justice Marshall's dissent, however, distinguished the *Williams* situation. *See infra* text accompanying notes 36-37.

32. *Murray*, 108 S. Ct. at 2534.

33. *Id.*

Finally, Justice Scalia reasoned that invoking the exclusionary rule would put the police in a worse position than if no violation had occurred. The purpose of the exclusionary rule, according to the majority, is to put the police in the same position as they would have been in had the violation not occurred, not a worse position.

Applying this new rule to the facts, the Court concluded that the lower courts did not explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse illegally. Therefore, the Court remanded the cases for determination of whether the authorized search was an independent source of the challenged evidence.

B. The Dissenters

In his dissenting opinion, joined by Justices O'Connor and Stevens, Justice Marshall emphasized the deterrence function of the exclusionary rule. Arguing that the admission of the "reseized" evidence encourages illegal searches, Justice Marshall claimed that officers may perform illegal searches in order to decide whether to take the time to get a warrant. He argued that "[p]robable cause is much less than certainty, and many 'confirmatory' searches will result in the discovery that no evidence is present, thus saving the police the time and trouble of getting a warrant."[34]

Justice Marshall explained that the majority's rule requiring proof of "independence" does not provide enough protection against police misconduct:

> Under the circumstances of this case, the officers committing the illegal search have both knowledge and control of the factors central to the trial court's determination. First, it is a simple matter, as was done in this case, to exclude from the warrant application any information gained from the initial entry so that the magistrate's determination of probable cause is not influenced by the prior illegal search. Second, today's decision makes the application of the independent source exception turn entirely on an evaluation of the officer's intent . . . . The testimony of the officers conducting the illegal search is the only direct evidence of intent, and the defendant will be relegated simply to arguing that the officers should not be believed.[35]

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34. *Id.* at 2538.
35. *Id.*

In dealing with the history of the exclusionary rule, Justice Marshall pointed out that *Williams'* inevitable discovery doctrine required that, to find a search untainted by a prior illegal search, the court must focus on " 'demonstrated historical facts capable of ready verification or impeachment.' "[36] He continued by pointing out that "[i]n the instant case, there are no 'demonstrated historical facts' capable of supporting a finding that the subsequent warrant search was wholly unaffected by the prior illegal search . . . . The only evidence available that the warrant search was wholly independent is the testimony of the agents who conducted [the] illegal search."[37]

Justice Marshall also distinguished *Segura* from *Murray* by noting that "[t]he admission of evidence first discovered during a legal search does not significantly lessen the deterrence facing the law enforcement officers contemplating an illegal entry *so long as* the evidence that is seen is excluded."[38] The *Segura* Court distinguished evidence found during a prior warrantless entry from evidence that was not found until a subsequent legal search.[39]

In a separate dissenting opinion, Justice Stevens criticized *Segura*. He stated that *Segura* " 'provide[s] government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home.' "[40]

III. ANALYSIS

The main difference between the majority and dissenting opinions in *Murray* is one of focus. Justice Marshall's dissent focused on the deterrence function of the exclusionary rule, while Justice Scalia's majority opinion focused on the exclusionary rule's goal of putting the police in the same, not a worse, position than if no violation had occurred.[41] A second area of disagreement

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36. *Id.* at 2539 (quoting Nix v. Williams, 467 U.S. 431, 445 n.5 (1984)).

37. *Id.*

38. *Id.* at 2540.

39. *Id.*

40. *Id.* (quoting Segura v. United States, 468 U.S. 796, 817 (1984)(Stevens, J., dissenting)).

41. The question of whether the exclusionary rule is the most effective means of deterring unlawful police conduct is beyond the scope of this Note. As a basic foundation, this Note assumes that exclusion of illegal evidence does deter illegal police conduct because the United States Supreme Court, by using the rule, accepts that premise. Other commentators, however, have argued that the exclusionary rule does not adequately serve the goal of deterrence. *See generally* S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 50-69, 56 (1977) ("there are several reasons

between the opinions is whether the *Murray* rule would deter unlawful police conduct.

The majority argued that its rule will deter law enforcement officers from performing illegal searches. It reasoned that officers will avoid "the . . . onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it."[42]

The *Murray* rule, however, does not create a strong deterrence for illegal police conduct. Even assuming that a courtroom burden-of-proof rule would affect how officers in the field perform, there are ways around the "onerous burden" the majority puts on officers involved in illegal searches.

First, as Justice Marshall pointed out, the officers may exclude any mention of an illegal search from a warrant request, thereby insuring that the illegal search does not affect the magistrate's determination of probable cause. This prong of the majority's analysis, therefore, is easy to satisfy.

The other prong of the majority's test, which examines whether the illegal search affected the officers' decision to get a warrant, also offers little deterrence to illegal police conduct. Justice Marshall argued that the only evidence available here would be the officers' intent, and hence the officers' testimony at trial, arguably an unreliable source of evidence where an individual's fourth amendment rights are at stake.

Another problem with this prong of the majority's test is that if a magistrate does not know of an illegal search and finds probable cause, such a finding will, in effect, create a presumption that any illegal search did not affect the officers' decision to obtain a warrant. A court will likely hold that when an officer has probable cause before an illegal search is conducted, the officer probably intended to get a warrant at that time anyway, and therefore the illegal search did not affect his decision to obtain one.

Further, the majority in *Murray* seems misguided in asking whether the illegal search "affected" the decision to seek a warrant. If the officer does not have probable cause before an illegal search is conducted, he will not apply for a warrant. The officer, however, may still perform an illegal search to help decide whether to continue gathering enough evidence to achieve proba-

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for doubting the effectiveness of the [exclusionary] rule as a deterrent").

42. Murray v. United States, 108 S. Ct. 2529, 2534 (1988).

ble cause. If probable cause is found, the officer then will obtain a warrant. In that situation, the illegal search does not seem to "affect" the decision to seek a warrant, it only affects the decision whether to seek more legally obtained evidence.

One may argue that when officers do have probable cause, an illegal search conducted to decide whether it is worth the time to get a warrant does "affect[] . . . the law enforcement officers' decision to seek a warrant."[43] Had the illegal search turned up nothing, the officers would not have sought a warrant.

If, however, "affecting the officers' decision" is narrowly defined as "changing the officers' minds," police will be able to perform risk-free illegal searches when they already have probable cause but do not want to waste the time getting a warrant. In this situation, an illegal search would "affect" the officers' decision only when they find nothing and thereby decide not to get a warrant. However, even though the illegal search "affected" their decision, there is no evidence to exclude because the police found nothing. Moreover, when the police perform an illegal search based on probable cause and do find something, the evidence reinforces rather than changes their decision to get a warrant. Thus, evidence from the illegal search will not be excluded at trial.

The Court in *Murray* seems to agree with this narrow definition of "affect," stating that the evidence in *Murray* would not be excluded if the lower court had "explicitly [found] that the agents would have sought a warrant if they had not earlier entered the warehouse."[44] This statement leads to the conclusion that officers, with probable cause and plans to get a warrant, may perform an illegal search to help them decide whether getting a warrant is worth the time. It appears, therefore, that with or without probable cause, a decision to get a warrant rarely will be held to be "affected" by an illegal search. Consequently, the majority's test does not appear to further the deterrence function of the exclusionary rule.

The *Murray* rule, however, does serve the majority's primary goal of "putting the police in the same, not a *worse*, position than they would have been in if no police error or misconduct had occurred."[45] This goal was also enunciated in *Williams* as a way to balance the interests "in deterring unlawful police conduct" and

43. *Id.*
44. *Id.* at 2536.
45. *Id.* at 2533 (citing Nix v. Williams, 467 U.S. 431, 443 (1984)).

"in having juries receive all probative evidence."[46] It does not, however, properly balance the concerns in the *Murray* situation, where it has no effect in deterring fourth amendment violations. In the *Williams* inevitable discovery situation, different officers are involved in the illegal search from those involved in the legal search. Consequently, the officers conducting the illegal search are not helped by such a search because anything they find will be excluded, as far as they know. The evidence that is admitted is the result of an independent legal investigation.

The emphasis of the *Murrray* majority on putting police in the same position they would have been in had no violation occurred shifts the focus away from what *Williams II* called the "core rationale" for the exclusionary rule: deterrence of constitutional and statutory violations.[47] The majority's focus is too narrow and results in little or no deterrence to fourth amendment violations by the police.

CONCLUSION

The Court in *Murray* gave too much weight to the concern of admitting probative evidence into criminal trials. That concern is very important, but it has been held that the goal of deterring fourth amendment violations can outweigh that concern.[48] The majority in *Murray*, however, has honed a rule which provides little deterrence to unlawful police conduct, forgetting that the "purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' "[49] The Court in *Murray* failed to remove the incentives for disregarding the protections of the fourth amendment. Instead, a court should exclude the evidence in the *Murray* situation, giving "to the individual no more than that which the Constitution guarantees him, to the po-

46. Nix v. Williams, 467 U.S. 431, 443 (1984).

47. *Id.* at 442-43.

48. Weeks v. United States, 232 U.S. 383, 392-93 (1914).

49. Mapp v. Ohio, 367 U.S. 643, 656 (1961)(quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

lice officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."[50]

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50. *Mapp*, 367 U.S. at 660.