CITY COURT OF NEW YORK
CITY OF WATERTOWN

People v. Saldana[1]
(decided December 7, 2009)

Jason Saldana lived in the northern part of New York in a small town called Watertown.[2] Two days after a small fire broke out at his residence, he was arrested by the Watertown Police Department after the local fire department found evidence of a marijuana growing operation.[3] At trial, Mr. Saldana sought to suppress the marijuana cultivation evidence on the basis that the police obtained the evidence in violation of the necessary warrant requirements under the Fourth Amendment of the United States Constitution[4] and article I, section 12 of the New York State Constitution.[5] The trial court granted the motion and dismissed the indictment because the police's warrantless search and seizure did not satisfy any of the exclusionary rule exceptions to the Fourth Amendment.[6]

The conflagration occurred on the early evening of August 30, 2009, at Jason Saldana's residence.[7] Responding to the call was both the Watertown Fire Department and Watertown Police Department Officer Frederick March.[8] The fire department extinguished the fire and, while performing the usual search of the residence for victims or

[1] No. 43564, 2009 WL 4667446 (N.Y. City Ct. Dec. 7, 2009).

[2] *Id.* at *1.

[3] *Id.*

[4] The Fourth Amendment to the United States Constitution states, in pertinent part: "The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. CONST. amend. IV.

[5] The New York Constitution states, in pertinent part: "The right of the people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ." N.Y. CONST. art. I, § 12.

[6] *Saldana*, 2009 WL 4667446, at *2, 4-5.

[7] *Id.* at *1.

[8] *Id.*

signs of arson, came upon a marijuana cultivation operation.[9] The firefighters egressed from the home and notified Officer March that they had found something on the third floor.[10] Officer March was brought up to the location of the fire and observed a marijuana growing operation in plain view.[11]

Officer March returned downstairs and questioned Saldana about the contraband in the attic.[12] Saldana initially claimed he was "growing pumpkins and vegetables."[13] However, approximately an hour and a half after Officer March responded to the scene, Saldana admitted to cultivating about fifteen marijuana plants for his personal use.[14] Subsequently, Saldana furnished a supporting deposition and gave "the police permission to search [t]he house and collect the marijuana."[15] After this supporting deposition was obtained, another officer arrived and collected the contraband as evidence.[16] In addition to the marijuana plants, firefighters found a badly-burned marijuana-smoking device that Saldana admitted was used to smoke his home-grown drugs.[17] However, Officer March declined to seize the bong as evidence.[18] Consequent of his growing operation, Saldana was charged with cannabis cultivation and issued a ticket to appear in court.[19]

During preliminary proceedings, Saldana filed a Notice of Motion arguing that the indictment should be dismissed.[20] Saldana argued that all evidence seized should be suppressed because the police's entry and search of his residence was illegal.[21] In response, the

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[9] *Id.*

[10] *Id.*

[11] *Saldana*, 2009 WL 4667446, at *1.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Saldana*, 2009 WL 4667446, at *1.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Saldana*, 2009 WL 4667446, at *1. Additionally, Saldana contested the constitutionality of the supporting deposition that he gave to Officer March. *Id.* at *1 n.2. However, the City Court of New York decided not to consider the issue of whether the consent was valid. *Id.* For a more in depth analysis of the issue of retroactive consent and how it impacts the legality of a warrantless search, see Kimberly J. Winbush, Annotation, *Effect of Retroactive Consent on Legality of Otherwise Unlawful Search and Seizure*, 76 A.L.R.5th 563 (2004).

People filed an affidavit stating that the entry and seizure by the police was lawful under the exclusionary exceptions to the federal and state warrant requirements, specifically the emergency exception or the inevitable discovery exception.[22]

The issue at trial was "the propriety of Officer March's warrantless search of Mr. Saldana's home."[23] The judge analyzed the People's second argument that "even if Officer March's search wasn't properly sanctioned, the marijuana plants should be admitted pursuant to the inevitable discovery doctrine."[24] Upon reviewing the inevitable discovery doctrine, the judge held that the People's argument did not meet the burden necessary to permit the admission of the marijuana plants into evidence at trial.[25] Furthermore, "even if the People meet this burden, the doctrine exempts only secondary evidence from exclusion, not that evidence won at the Constitution's expense."[26] The judge held that the marijuana seized as a result of Officer March's search was considered "primary evidence" and therefore may not be admissible at trial.[27] As a result of the court's decision, Saldana's motion to dismiss was granted on the grounds that Officer March's entry was in violation of the Fourth Amendment and article I, section 12 of the New York Constitution.[28]

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[22] *Saldana*, 2009 WL 4667446, at *1.

[23] *Id.* The city court first analyzed whether the search of Saldana's home by Officer March fell into one of the various emergency exceptions to the warrant requirement. *Id.* at *2. Explaining that emergency exceptions have been used "when public safety concerns eclipse those of privacy," the judge concluded that the search of Saldana's residence did not fall into the exceptions for two reasons. *Id.* First, no emergency situation existed at the time the officer entered Saldana's home. *Id.* Second, the officer's "apparent intent was to investigate a crime, not to provide emergency services." *Saldana*, 2009 WL 4667446, at *3. For the author's detailed exploration in regards to the emergency exceptions to the exclusionary rule as applied to *People v. Saldana*, see Ara Ayvazian, *City Court of New York, City of Watertown, People v. Saldana*, 27 Touro L. Rev. 685 (2011).

[24] *Id.* at *4.

[25] *Id.* at *4-5 ("To prevail, the People must demonstrate to a very high degree of probability that normal police procedures would have uncovered the challenged evidence independently of [a] tainted source." (quoting People v. Payton, 380 N.E.2d 224, 231 (N.Y. 1978) (internal quotation marks omitted))).

[26] *Id.* at *4.

[27] *Id.* at *5. *See infra* notes 54-57 and accompanying text for a discussion on the distinctions between primary and secondary evidence.

[28] *Saldana*, 2009 WL 4667446, at *5. Therefore, the court ruled that seizure of a marijuana growing operation, occurring as a result of a warrantless search, when no emergency exception continued to exist, and no facts required for the implication of the inevitable discovery doctrine, infringed on a person's Fourth Amendment and New York Constitutional rights.

> The Fourth Amendment states:
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> > 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 seized.[29]

With this statutory language of the Fourth Amendment comes the judicially-created exclusionary rule.[30] Under this rule, "evidence obtained in violation of an individual's right to be secure against unreasonable search and seizure is inadmissible in a criminal proceeding."[31] This rule, also known as the "fruit of the poisonous-tree doctrine," has caused much confusion in the courts due to multiple exceptions created by the judiciary.[32] These exceptions include the independent source doctrine, attenuation, and the inevitable discovery doctrine.[33] The inevitable discovery doctrine was the most recent doctrine to be implemented and is closely related to the older independent source doctrine.[34]

The United States Supreme Court first adopted the inevitable discovery doctrine in *Nix v. Williams*.[35] In *Nix*, the Supreme Court examined whether a murder victim's body would have inevitably been found during an on-going search had the defendant not directed

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[29] U.S. CONST. amend. IV.

[30] *See* Stephen E. Hessler, Comment, *Establishing Inevitability without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 MICH. L. REV. 238, 239 (2000); *see also* United States v. Leon, 468 U.S. 897, 906 (1984) ("The [exclusionary] rule thus operates as a judicially created remedy designed to safeguard Fourth Amendment rights." (quoting United States v. Calandra, 414 U.S. 338, 348 (1974) (internal quotation marks omitted))).

[31] Hessler, *supra* note 30, at 238.

[32] Nardone v. United States, 308 U.S. 338, 341 (1939). *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2 (4th ed. 1996) ("For well over half a century now, the validity and efficacy of the Fourth Amendment exclusionary rule have been vigorously debated by legal commentators."); *see generally* 6 WAYNE R. LAFAVE, SEARCH & SEIZURES § 11.4(a) (4th ed. 2004).

[33] Nix v. Williams, 467 U.S. 431, 440-41 (1984) (inevitable discovery doctrine); *Nardone*, 308 U.S. at 341 (attenuation doctrine); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (independent source doctrine).

[34] *See supra* note 33; *Nix*, 467 U.S. at 443-44.

[35] 467 U.S. 431.

officials to the body.[36] Examining the exceptions to the exclusionary rule of the Fourth Amendment, the Court made clear that evidence that has been illegally obtained is not always inadmissible in court.[37]

The Court first examined the independent source doctrine, which "allows admission of evidence that has been discovered by means wholly independent of any constitutional violation."[38] The Court stated that the prime purpose of the exclusionary rule is to deter police misconduct.[39] "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means-here the volunteers' search-then the deterrence rationale has so little basis that the evidence should be received."[40] The Court strongly stated the "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial."[41] To support its notion that the inevitable discovery doctrine would not extinguish the deterrence of unlawful police behavior, the Court stated:

> [W]hen an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice. In that situation, there will be little to gain from taking any dubious "shortcuts" to obtain the evidence. Significant disincentives to obtaining evidence illegally-including the possibility of departmental discipline and civil liability-also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct.[42]

The paramount point derived from *Nix* is the Court's adoption of the inevitable discovery doctrine, that is: if the evidence that is being challenged would have been discovered absent any constitutional vi-

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[36] *Id.* at 434.

[37] *Id.* at 441.

[38] *Id.* at 443.

[39] *Id.* at 442-43 ("The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections.").

[40] *Nix*, 467 U.S. at 444.

[41] *Id.* at 446.

[42] *Id.* at 445-46.

olation, it will be admissible at trial.[43]

However, one vital point concerning *Nix* is that the Court made no attempt "to define the contours" of the inevitable discovery exception.[44] In trying to answer what "inevitable" means, the Court stated that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment."[45] Nevertheless, for one to say that evidence would have inevitably been discovered "involves some degree of speculation. The exception requires the district court to determine, viewing affairs as they existed at the instant before the unlawful search, what *would have happened* had the unlawful search never occurred."[46]

More recently, the Supreme Court in *Hudson v. Michigan*,[47] discussed in dictum the inevitable discovery doctrine in relation to the ensuing procurement of a search warrant.[48] The Court stated the inevitable discovery doctrine:

> [R]efers to discovery that did occur or that would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2) *independently* of that unlawful behavior. The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one.[49]

Instead, the government "must show that the same evidence 'inevitably *would* have been discovered *by lawful means*.' "[50] Additionally, the Court stated that "[t]he inevitable discovery exception rests upon the principle that the remedial purposes of the exclusionary rule are not served by suppressing evidence discovered through a 'later, *lawful* seizure' that is '*genuinely independent* of an earlier, tainted one.' "[51]

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[43] *Id.* at 444.
[44] United States v. Cherry, 759 F.2d 1196, 1204 (5th Cir. 1985).
[45] *Nix*, 467 U.S. at 444 n.5.
[46] United States v. Eng, 971 F.2d 854, 861 (2d Cir. 1992) (emphasis in original).
[47] 547 U.S. 586 (2006).
[48] *Id.* at 616.
[49] *Id.* (emphasis in original)
[50] *Id.* (quoting *Nix*, 467 U.S. at 444).
[51] *Id.* (quoting Murray v. United States, 487 U.S. 533, 542 (1988)).

It has been almost twenty-seven years since the Supreme Court has discussed the inevitable discovery doctrine in great detail.[52] *Nix v. Williams* was the Court's first and last case having to do with this exception to the exclusionary rule. Furthermore, the question of what makes a discovery "truly" inevitable has yet to be definitively answered by the Court.[53] However, before and after the *Nix* decision lower courts have dealt with the inevitable discovery doctrine in a variety of ways. One method in which courts analyze whether the doctrine should be used is by determining if the evidence that is challenged is direct (also known as primary) evidence, or indirect (also known as secondary or derivative) evidence.[54] Primary evidence is the evidence that is directly seized during or as a result of a Fourth Amendment violation.[55] Indirect evidence is evidence that is seized after the primary illegal search.[56] Many jurisdictions differ on whether the inevitable discovery doctrine should apply regardless of the evidential category or only to secondary/indirect evidence.[57] Shortly after *Nix*, the Second Circuit faced this question.

The Second Circuit applied the inevitable discovery doctrine in *United States v. Pimentel*.[58] In *Pimentel*, the court was faced with the issue of "whether . . . the inevitable discovery exception to the exclusionary rule applies to the direct as well as the indirect products of the government's unlawful search."[59] The Second Circuit held that nothing in *Nix* stated that only the "fruit of the poisonous tree"

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[52] *See Nix*, 467 U.S. 431.

[53] United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984) ("Except for the application of its rule to the specific facts before the Court and its holding that the Government must establish the inevitability of discovery by a preponderance of the evidence, the Supreme Court was silent as to what constitutes an 'inevitable' discovery under the doctrine."). *See* Hessler, *supra* note 30, at 242.

[54] *See* cases cited *infra* note 57 and accompanying text.

[55] *Saldana*, 2009 WL 4667446, at *4-5; 3 WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 3:3 (2010).

[56] Jessica Forbes, Note, *The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment*, 55 FORDHAM L. REV. 1221, 1228 (1987).

[57] *See* United States v. Whitehorn, 813 F.2d 646, 650 (4th Cir. 1987) (primary evidence); United States v. Pimentel, 810 F.2d 366, 368 (2d Cir. 1987) (both primary and secondary evidence); United States v. Silvestri, 787 F.2d 736, 746 (1st Cir. 1986) (primary evidence); *Satterfield*, 743 F.2d at 846-47 (Eleventh Circuit refused to apply the doctrine to primary evidence); United States v. Apker, 705 F.2d 293, 307 (8th Cir. 1983) (inevitable discovery doctrine usually applies to secondary evidence only, but here it applied to primary).

[58] 810 F.2d 366.

[59] *Id.* at 368.

could be admissible as opposed to the "poisonous tree" itself.[60] Distinguishing federal law from New York State law, the Second Circuit's holding in *Pimentel* evidences the application of the inevitable discovery doctrine to both primary and secondary evidence.[61] Although some lower Second Circuit district courts do not agree with this rationale, *Pimentel* is still valid law.[62]

The Sixth Circuit, in *United States v. Haddix*,[63] was faced with an inevitable discovery case that should be noted for its focus on the importance of the Fourth Amendment.[64] In *Haddix*, police and United States Forest Service Officers conducted an aerial search of marijuana-growing locations.[65] During the aerial search, they pinpointed the defendant's backyard as a possible growing zone.[66] Without obtaining a warrant, ground officers entered the defendant's backyard and noticed over sixty marijuana plants cultivating.[67] Officers knocked on the door, and with no answer, pursued inside to arrest the defendant, who had asleep.[68] After the arrest, police obtained a warrant to search the rest of the home and seize the drugs.[69]

The court in *Haddix* repeated the language of the Fourth amendment and stated:

> As a practical matter, this provision normally requires the police to have a warrant whenever their conduct compromises an individual's privacy in his or her per-

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[60] *Id.* at 368-69.

[61] *Id.* at 368 ("[W]hether, under the facts of this case, the inevitable discovery exception to the exclusionary rule applies to the direct as well as the indirect products of the government's unlawful search. We hold that it does.").

[62] *See* United States v. Snaith, 666 F. Supp. 645 (D. Vt. 1987).

> If the police can violate an individual's constitutional rights just because they have independent information of its existence or because they would inevitably have found the evidence anyway, they have no motivation to honor the constitutional rights of citizens. . . . This rule, we believe, clearly violates the spirit, if not the letter, of the Fourth Amendment warrant provision. However, we are constrained to follow the rulings of the Second Circuit and the Supreme Court.

Id. at 648 n.3.

[63] 239 F.3d 766 (6th Cir. 2001).

[64] *Id.* at 767.

[65] *Id.* at 766.

[66] *Id.*

[67] *Id.*

[68] *Haddix*, 239 F.3d at 766-67.

[69] *Id.* at 767.

> sonal affairs. When the police do so without a warrant, however, a given search or seizure might still be "reasonable" under a recognized exception to the warrant requirement.[70]

The court continued to explain that in this situation there were no exigent circumstances for the police to proceed without a warrant.[71] Furthermore, the court held that "[p]olice officers may not, in their zeal to arrest an individual, ignore the Fourth Amendment's warrant requirement merely because it is inconvenient."[72] However, the court recognized: "This Circuit acknowledges that the exclusionary rule does not apply when the Government can demonstrate that evidence found because of a Fourth Amendment violation would inevitably have been discovered lawfully."[73] In light of this acknowledgment the court outright rejected the prosecution's argument that "evidence that would constitute probable cause for a warrant, even when that evidence's existence is unknown to the police, is inherently destined to be 'inevitably discovered.' "[74] In reiterating the importance of constitutional rights, the court stated: "Today, we . . . hold that the warrant requirement is at the very heart of the Fourth Amendment, and that judicial exceptions to it are only exceptions."[75]

Prior to *Nix* and *Pimentel*, the New York Court of Appeals re-

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[70] *Id.*

[71] *Id.* at 768.

[72] *Id.* (quoting United States v. Morgan, 743 F.2d 1158, 1164 (6th Cir. 1984)).

[73] *Haddix*, 239 F.3d at 768 (quoting 6 LAFAVE, *supra* note 32, at § 11.4(a) (internal quotation marks omitted)).

[74] *Id. See also* Hessler, *supra* note 30, at 275 n.185 (citing to United States v. Chanthavong, No. 98-4244, 1999 U.S. App. LEXIS 21554, at *25 (4th Cir. 1999) ("The inevitable discovery doctrine does not apply where the police officers had probable cause to conduct a search but simply failed to obtain a warrant."); United States v. Mejia, 69 F.3d 309, 320 (9th Cir. 1995) ("This court has never applied the inevitable discovery exception so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant."); United States v. Johnson, 22 F.3d 674, 683 (6th Cir. 1994) ("[T]o hold that simply because the police could have obtained a warrant, it was therefore inevitable that they would have done so would mean that there is inevitable discovery and no warrant requirement whenever there is probable cause.")).

[75] *Haddix*, 239 F.3d at 768. *See also* United States v. Quinney, 583 F.3d 891, 893-95 (6th Cir. 2009). The police moved forward with a warrantless search and unlike the police in *Haddix*, never obtained a warrant. *Id.* at 893. The prosecutor relied on the fact that the police could have obtained a warrant. *Id.* at 894. Needless to say, the court rejected the prosecution's argument and the evidence recovered from the illegal search was suppressed. *Id.* at 894-95.

viewed the inevitable discovery doctrine in *People v. Fitzpatrick*.[76] In *Fitzpatrick*, the defendant had committed numerous crimes including the murder of two police officers.[77] As a manhunt was underway, police entered the defendant's residence without a warrant and found the defendant hiding in the closet.[78] Police officers read the defendant his rights and asked him where the gun used to shoot the officers was located.[79] After revealing its location, the police seized the weapon.[80]

At trial, the defendant argued that the evidence of the gun itself should be suppressed because of the fruit-of-the-poisonous-tree doctrine.[81] The court recognized that there are exceptions to the premise that all evidence is inadmissible if obtained from unlawful police activity.[82] The court referred to a previous United States Supreme Court decision and stated that not all evidence seized illegally by the police falls under the fruit of the poisonous tree doctrine.[83] Rather, under these circumstances, the more appropriate question would be "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[84]

Following this quote, the court synthesized its own understanding of the inevitable discovery doctrine, stating:

> [E]vidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous tree doctrine where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence.[85]

Therefore, the court required that in order for the evidence illegally

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[76] 300 N.E.2d 139 (N.Y. 1973).
[77] *Id.* at 140.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Fitzpatrick*, 300 N.E.2d at 140.
[82] *Id.* at 141.
[83] *Id.*
[84] *Id.* (quoting Wong Sun v. United States, 371 U.S. 471, 487-88 (1963)).
[85] *Id.*

seized by the police to be allowed, the prosecution has to prove that the police, by using an alternative yet legal means of search and seizure, would have obtained such evidence.[86] The court then stated that the gun used during the crimes is the "prime object of . . . investigation" and it would reasonably have expected the police to search for it near where the defendant was found.[87] "[A] search of the closet was inevitable regardless of the defendant's answers to questions put to him beyond its confines, it may not fairly be said that the police 'exploited' the 'illegality' involved in their interrogation."[88] More importantly, the court, whether consciously or not, distinguished the vital difference between primary and secondary evidence, stating: "In the present case, it was entirely fortuitous that the police delayed the search of the immediate area where the defendant was discovered until they had begun questioning him and, as a result, very quickly learned where the gun was located."[89] Had the police done otherwise, the gun itself would be primary evidence and possibly excluded under New York's application of the fruit-of-the-poisonous-tree doctrine. However, the court held that the prosecution met their burden and therefore refused to suppress the evidence.[90]

In a cautious concurrence, Judge Wachtler opposed the court's adoption of the inevitable discovery doctrine.[91] Worried about how the doctrine would be used, he stated: by "allowing 'poisoned' evidence in on the ground that some hypothetical police search would have uncovered the evidence anyway results in a speculative theory with no discernable limits."[92] Furthermore, "[t]he 'inevitable discovery' doctrine is speculative at best, and there is absolutely nothing to prevent the expansion of the doctrine far beyond 'the closet.' "[93] Judge Wachtler continued to show his reluctance to the doctrine by stating that the doctrine should be defined more clearly due to the varying degrees of what the majority mentioned constitutes "normal police conduct."[94] "The normal course of police inves-

[86] *Fitzpatrick*, 300 N.E.2d at 142.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Fitzpatrick*, 300 N.E.2d at 146 (Wachtler, J., concurring).
[92] *Id.*
[93] *Id.*
[94] *Id.* at 146-47.

tigation differs greatly from one police department to another and even within departments, so theoretically at least the constitutional standard would differ from locale to locale."[95] In a powerful conclusion illustrating his disagreement with the use of the inevitable discovery doctrine, he avowed:

> I think both for the sake of certainty and the integrity of our State and Federal Constitutions we should follow an objective test in situations such as these. If the police did in fact discover the evidence as the result of an unconstitutional action, the evidence should be suppressed. The 'inevitable discovery' doctrine is so ambiguous and so subject to abuse that I think it is unwise to adopt it.[96]

The New York Court of Appeals returned to the inevitable discovery doctrine eight years later in *People v. Knapp*.[97] The court stated the doctrine's purpose: "that fruits of an unlawful search need not be suppressed where there is a very high degree of probability that the evidence in question would have been obtained independently of the tainted source."[98] In *Knapp*, the facts were clear that but for the illegal search, the drugs would not have been recovered by the officers unless a search warrant had been issued.[99] The court refused to

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[95] *Id.* at 146 (internal quotation marks omitted).

[96] *Fitzpatrick*, 300 N.E.2d at 147. *See also* People v. Payton, 380 N.E.2d 224 (N.Y. 1978). There the court made an important statement regarding the textual reading of the inevitable discovery doctrine, stating:

> In the first place the label "inevitable discovery" is inaccurate and therefore misleading. The doctrine does not call for certitude as the literal meaning of the adjective "inevitable" would suggest. What is required is that there be a very high degree of probability that the evidence in question would have been obtained independently of the tainted source.

Id. at 230-31. Furthermore, Judge Wachtler had a chance to return to his position on the doctrine, stating "[t]he inevitable discovery doctrine is unrealistic in the purest sense. It permits the court to ignore what really happened and to rely instead on hypothesis." *Id.* at 232 (Wachtler, J., dissenting).

[97] 422 N.E.2d 531 (N.Y. 1981).

[98] *Id.* at 536 (quoting *Payton*, 380 N.E.2d at 231 (internal quotation marks omitted)).

[99] *Id.* ("The People do not suggest any other means by which they would have gained possession of the contraband in question except for the by now tainted search of the bedroom and basement."). *See also* People v. Walker, 605 N.Y.S.2d 726, 728-29 (App. Div. 4th Dep't 1993) (holding that the People did not provide any other means in which the evidence would have been discovered absent the illegal conduct of the police).

apply the notion that a hypothetical search would have recovered the contraband:

> Were the rule otherwise, every warrantless nonexigent seizure automatically would be legitimatized by assuming the hypothetical alternative that a warrant had been obtained. Without the deterrment [sic] effect of the exclusionary rule, in such circumstances the constitutional warrant procedure for shielding Americans from unreasonable searches and seizures would be a shambles.[100]

In post-*Nix* decisions, New York courts have applied the inevitable discovery doctrine in a unique manner. The genesis of New York's distinction is evidenced in *People v. Stith*.[101] In *Stith*, two defendants were arrested for criminal possession of a weapon following the unlawful search of one of the defendant's truck during a traffic stop.[102] Shortly after the defendants were placed under arrest, the police officers discovered that the truck had been stolen.[103] Subsequently, the defendants were charged and convicted of criminal possession of a weapon and criminal possession of stolen property.[104]

The appellate division held that even though the search of the truck was a violation of the defendants' Fourth Amendment rights, a routine registration check of the vehicle would have revealed that the vehicle was stolen, which in turn would have led to the discovery of the gun during a police inventory search of the vehicle.[105] The New York Court of Appeals granted review and faced the issue of "whether the inevitable discovery exception to the exclusionary rule was properly invoked."[106] In its reasoning, the court stated that "[t]he exclusionary rule generally bars from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion."[107] The court stated that the primary purpose of the rule "is to

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[100] *Knapp*, 422 N.E.2d at 536.

[101] 506 N.E.2d 911 (N.Y. 1987).

[102] *Id.* at 912.

[103] *Id.* at 912-13.

[104] *Id.*

[105] *Id.* at 914.

[106] *Stith*, 506 N.E.2d at 912.

[107] *Id.* at 913 (quoting *Wong Sun*, 371 U.S. at 485 (internal quotation marks omitted)).

deter police misconduct."[108] Although this rule calls for the requirement of a warrant during a search, the Supreme Court has declared "that in some circumstances strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes."[109]

The court in *Stith* thoroughly reviewed its prior decisions, and remarked that this question of the inevitable discovery was one of first impression because "the evidence sought to be suppressed [was] the very evidence" acquired during the illegal search.[110] In prior cases, the New York Court of Appeals found that the primary purpose of the inevitable discovery doctrine was "not to excuse the unlawful police actions by admitting what was obtained as a direct result of the initial misconduct."[111] Furthermore, and more importantly, the court in *Stith* stated that the inevitable discovery doctrine only applied to "secondary" evidence rather than primary.[112] In its reasoning, the court stated that if primary evidence were admissible at trial, it would not deter police misconduct, and it would "be an unacceptable dilution of the exclusionary rule."[113] As a result of the *Stith* decision, the court concluded that the inevitable discovery doctrine did not apply.[114] The defendants' motion to suppress the weapon was subsequently granted.[115]

Ten years later, in *People v. Turriago*,[116] the New York Court of Appeals applied its holding in *Stith* to secondary evidence. In *Tur-*

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[108] *Id.*

[109] *Id.* (quoting Brown v. Illinois, 422 U.S. 590, 608-09 (1975) (Powell, J., concurring in part)).

[110] *Id.* at 913-14.

[111] *Stith*, 506 N.E.2d at 914.

[112] *Id.*

> It is not the tainted evidence that is admitted, but only what comes from it as a result of further police investigation. The rationale is that when the secondary evidence would have been found independently in any event, the prosecution [should not be] put in a *worse* position simply because of some earlier police error or misconduct.

Id. (quoting *Nix*, 467 U.S. at 443) (internal quotation marks omitted).

[113] *Id.*

[114] *Id.*

[115] *Stith*, 422 N.E.2d at 915.

[116] 681 N.E.2d 350 (N.Y. 1997).

riago, police stopped the defendant for speeding.[117] At the time of the stop, the police asked the defendant for consent to search his vehicle.[118] The defendant agreed, and the murdered body of a male was found inside the rear of the van along with the hammer used during the murder.[119] Back at police headquarters the defendant was interrogated, and information of where and when the victim was murdered was uncovered.[120] Using this information, the police obtained search warrants to investigate the two apartment buildings used by the defendant.[121] These subsequent searches revealed more evidence of the murder and a large quantity of cocaine.[122]

The appellate division held that the consent given by the defendant was unlawful, and rejected the People's argument that even if the consent was invalid, the body of the victim would have been discovered during an inventory check after the police learned of the defendant's lack of a valid driver's license.[123] The New York Court of Appeals returned to its inevitable discovery definition created in *Fitzpatrick*, where it stated that New York courts require a high degree of probability that the evidence obtained by the illegal search would have been recovered during routine police procedures.[124] The court in *Turriago*, relying on its earlier decision in *Stith*, stated that primary evidence cannot overcome the exclusionary rule and will never be admissible if it is discovered as a direct result of an illegal search.[125] As a result of the court's reasoning, it held that the police

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[117] *Id.* at 352.

[118] *Id.*

[119] *Id.* at 352, 355.

[120] *Id.* at 352.

[121] *Turriago*, 681 N.E.2d at 352.

[122] *Id.*

[123] *Id.* at 353.

[124] *Id.* at 354-55.

[125] *Id.* at 355.

> In *People v. Stith*, we held as a matter of State constitutional law that primary evidence, i.e., "the very evidence . . . obtained during or as the immediate consequence" of the illegal conduct, would still be subject to exclusion even if it would most likely have been discovered in the course of routine police procedures.

Turriago, 681 N.E.2d at 355 (quoting *Stith*, 506 N.E.2d at 913-14 (citations omitted)). More recently, in *People v. Thurman*, 917 N.Y.S.2d 784, 786-87 (N.Y. App. Div. 2010), the appellate division restated the premise that "the inevitable discovery doctrine 'applies only to secondary evidence and does not justify admission of the very evidence that was obtained as the immediate consequence of the illegal police conduct . . .'. " (citing to People v. James, 684

would have undoubtedly conducted an inventory search once they realized that the van was being illegally operated.[126] Therefore, the murdered body would have been "inevitably discovered."[127] Accordingly, the obtaining of the secondary evidence, i.e. the hammer used during the murder, satisfied the requirements of the inevitable discovery doctrine and should not have been suppressed.[128]

As demonstrated by federal and New York case law, a difference exists on whether to apply the inevitable discovery doctrine to primary evidence.[129] This concept is exhibited by the fact that the Second Circuit does not agree with New York's narrow application of the doctrine.[130] In *United States v. Taddeo*,[131] the defendant wanted suppression of the evidence that was crucial to convicting him of criminal possession of firearms.[132] The defendant claimed that the contraband should be suppressed because it fell into the category of primary evidence.[133] The defendant cited to the New York Court of Appeal's decision in *Stith* in hopes of using state law ideology that the inevitable discovery doctrine only applies to secondary evidence.[134] The court discarded the defendant's contention and held: "There is no requirement that this court apply New York law to this case . . . . Furthermore, the Second Circuit has expressly rejected the direct-indirect evidence distinction drawn in earlier inevitable discovery cases."[135] The court further stated that to hold otherwise would ignore the Supreme Court's decision in *Nix*.[136]

The court in *Saldana* correctly rejected the inevitable discovery rule under *Stith*. However, the Supreme Court in *Nix*, and the Second Circuit in *Pimentel* and *Taddeo* have applied the doctrine to evidence found regardless of whether it was primary or secondary.

N.Y.S. 112, 112 (N.Y. App. Div. 1998)).

[126] *Id.* at 356.

[127] *Id.*

[128] *Id.*

[129] *See supra* note 57 and accompanying text.

[130] United States v. Taddeo, 932 F.2d 956, 956 (2d Cir. 1991). *See infra* note 131 and accompanying text.

[131] 724 F. Supp. 81 (W.D.N.Y. 1989).

[132] *Id.* at 81-82.

[133] *Id.* at 87.

[134] *Id.* (citing *Stith*, 506 N.E.2d at 914).

[135] *Id. See, e.g.*, United States v. Whitehorn, 829 F.2d 1225, 1232 (2d Cir. 1987); *Pimentel*, 810 F.2d at 368-69.

[136] *Taddeo*, 724 F. Supp. at 87.

The facts of *Saldana* illustrate that the Watertown Police Policy is to allow police officers to investigate a person's home after a fire to evaluate property damage or investigate arson.[137] Therefore, the People's argument that Officer March would have inevitably discovered the marijuana would most likely have been upheld under the *Nix* and *Pimentel* decisions. However, New York takes a more liberal approach to the law, affording greater protection of constitutional rights to its citizens.

Although New York offers higher standards to protect its citizens, the facts of *Saldana* differ uniquely from prior case law. According to Watertown Police Policy, Officer March had a right to be at the defendant's home to conduct an arson investigation.[138] Secondly, the marijuana was first discovered by the fire department during a lawful warrantless search that satisfied the emergency exception to the Fourth Amendment. Thus, the evidence of the growing operation was discovered before the police were even involved. Certainly, the police officers in *Saldana* had enough probable cause to acquire a warrant, and it further seems that the correct exclusionary rule exception to the Fourth Amendment should have been the independent source doctrine.[139] However, by removing the fact that the firefighters first discovered the marijuana operation, the prosecution relied on a theory that because of the policy allowing officers to search a home post-fire, the evidence would have been discovered.

Ultimately, it would be dishonorable to the constitutional rights of citizens and to the Fourth Amendment to allow police to violate a person's rights solely because a speculative seizure would have taken place, or because there is an independent source with knowledge of the location of the evidence. The inevitable discovery rule is ambiguous due to the lack of clarity given by the Supreme Court. This ambiguity is seen in courts around the country, i.e. the courts basing decisions around whether the evidence is primary or secondary, and also whether a warrant must have been in the process of being sought for the exception to be valid. Judge Wachtler's cau-

[137] *Saldana*, 2009 WL 4667446, at *5.

[138] *Id.* (stating that "it is the policy of the Watertown Police Department following any structure fire to enter the premises, investigate the potential cause of the fire, and document the extent and location of the damage while this information is still available in case there is a subsequent arson investigation"). However, this recent case is strictly set to analyze the arguments made in the court, and not the inherent question of this policy's constitutionality.

[139] *See supra* note 38 and accompanying text.

tious concurrence foresaw the problems faced by the exception and desired the courts to "follow an objective test . . . . If the police did in fact discover the evidence as the result of an unconstitutional action, the evidence should be suppressed. The 'inevitable discovery' doctrine is so ambiguous and so subject to abuse that I think it is unwise to adopt it."[140]

The court in *Nix*, however, did clearly state that the primary purpose of the exclusionary rule was to deter police misconduct. Here, Officer March believed he had a right to enter the defendant's home according to his employer's post-fire investigation policy.[141] Secondly, he spoke with the defendant regarding the contraband found in the attic and attained a supporting deposition, which granted police the ability to search and seize the evidence.[142] Although the court in *Saldana* did not discuss the validity of this deposition, one can infer that Officer March took reasonable steps that a lawful police officer would take. However, following New York precedent, primarily *Stith*, the court in *Saldana* held that the marijuana contraband was primary evidence. Therefore, regardless of the actual intent of the officer to follow police procedures, the court correctly held that the inevitable discovery doctrine was not applicable.

Further juxtaposing the reasoning in *Nix* and *Saldana*, the evidence in both cases was initially discovered by someone other than the police. To further distinguish *Stith*, *Knapp*, and *Turriago* from *Saldana* we must look at how the evidence was discovered. In all three New York Court of Appeals' decisions, the evidence was discovered directly by the police. However, in *Saldana*, the evidence was first discovered by the fire department, an independent source that discovered the evidence while performing its official duties. Had Officer March seized Saldana's bong upon the second search of the defendant's residence, that evidence would have been classified as secondary evidence and consequently admissible at trial. Furthermore, had this fact pattern occurred in a jurisdiction that refuses to differentiate between primary and secondary evidence, Officer March's conduct would have been acceptable. The distinction between primary and secondary evidence is questionable in circumstances like this, and needs to be cleared up by the high court.

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[140] *Fitzpatrick*, 300 N.E.2d at 147 (Wachtler, J., concurring).

[141] *Saldana*, 2009 WL 4667446, at *5.

[142] *Id.* at *1.

Therefore, *Saldana's* holding reaffirms the guidelines in *Stith* pursuant to the classifications of evidence used in the New York state court system. This ruling will inevitably be used to support the proposition that law enforcement should always acquire a warrant prior to conducting a search and/or seizure. Police officers should not rely on the notion that a speculative search would have taken place and that because of this, they will be allowed to enter a private individual's residence. In regard to the inevitable discovery exception, the court in *Haddix* said it best; "the warrant requirement is at the very heart of the Fourth Amendment, and [] judicial exceptions to it are only exceptions."[143]

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[143] *Haddix*, 239 F.3d at 768.

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