Active Pursuit, Inevitable Discovery, and the Federal Circuits: The Search for Manageable Limitations Upon an Expansive Doctrine

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I. INTRODUCTION

It is no surprise that serious discussion of the inevitable discovery doctrine so frequently turns to its potential limitations. The exception to the exclusionary rule, permitting the introduction of evidence acquired through constitutional illegality on the grounds that it would have been discovered in any event, calls for judicial hypothesizing by its own terms. The comparative lateness of the Supreme Court’s adoption of the inevitable discovery exception in 1984 in Nix v. Williams1 itself seemed to be a testament to the thorny nature of the issues of conjecture which it presented—if, indeed, the exclusionary remedy for constitutional violations was to be taken seriously.

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1. 467 U.S. 431, 448 (1984). The “independent source” exception to the exclusionary rule was stated in Silverthorne Lumber Co., Inc. v. United States, 251 U.S. 385, 392 (1920), and the generalized “attenuation” exception in its current form was developed in Wong Sun v. United States, 371 U.S. 471, 488 (1963). See infra notes 98, 105, 112-14 and accompanying text.
Nix definitively addressed some issues of doctrinal limitation, but significant questions remained and have been discussed within the federal circuits over the years. Near unanimity has emerged on the potentially limiting issue of whether the inevitable discovery doctrine is applicable to “primary” evidence (evidence discovered during the course of the illegality) as well as “derivative” evidence subsequently obtained. But a very significant split among the circuits still exists concerning the question of whether a separate and independent investigation must be ongoing at the time of the constitutional illegality in order for the inevitable discovery doctrine to be applicable. This has been termed the issue of “active pursuit.”

This article will explore the differences among the circuits on this question. Before doing so it will address the other potential doctrinal limitations which have been considered by the courts. Criticism of an active pursuit requirement among the circuits that have rejected it will then be discussed, and the application of such a requirement by other courts of appeals will be examined. Surprisingly, this will reveal that while it is frequently characterized as a simple, uniform doctrine, the active pursuit requirement has significant variations when articulated and applied among those courts. Finally, this article will attempt to provide some perspective on the issue in light of this reality.

II. OTHER POTENTIAL LIMITATIONS ADDRESSED IN NIX V. WILLIAMS

A. The Background in Nix

The Supreme Court’s opinion in Nix v. Williams was its second relating to the application of the exclusionary rule and the violation of the Sixth Amendment rights of Robert Williams during what was later termed a “Christian burial speech” delivered by the police. The first opinion, Brewer v. Williams, was a highly publicized and striking opinion by any standard. The Court found that an intolerable interrogation had indeed occurred after the attachment of Williams’ Sixth Amendment right to counsel. In addition to Williams’ incriminating responses, one of the items of evidence obtained was the body of a murdered child, and the significance of the possible remedy of its exclusion was unmistakable.

Review of the factual details of Brewer, developed during the course of Williams’ initial prosecution, is essential to an examination of the issues subsequently

2. See infra notes 193-95 and accompanying text.
3. See infra notes 238-40 and accompanying text.
5. 467 U.S. at 431.
6. Id. at 437, 441, 453.
8. Id. at 401.
9. See infra notes 103-04 and accompanying text.
addressed in Nix. The facts of Brewer related here are as they were described by the Court in its opinion. The factual background set forth in Brewer has not been without controversy, see Yale Kamisar, Forward: Brewer v. Williams—A Hard Look at a Discomfiting Record, 66 GEO. L.J. 209, 215-16 (1977), but, as Justice Stevens noted in his opinion concurring in the judgment in Nix, neither party in Nix sought reexamination of Brewer's findings. Nix, 467 U.S. at 453 n.2 (Stevens, J., concurring).
fellow officer would ... bring [Williams] directly back to Des Moines [from Davenport] and that they would not question him during the trip.21

Before Detective Learning and the other officer arrived in Davenport, Williams was arraigned on the outstanding warrant.22 “The judge advised him of his Miranda rights” and Williams was committed to jail.23 “Before leaving the courtroom, Williams conferred with [an attorney,]” Kelly, and was advised by him to make no statements “until consulting with McKnight . . . in Des Moines.”24 When Detective Learning and the other officer arrived at about noon, “they met with Williams and Kelly.”25 Repeating the Miranda warnings, Detective Learning then said to Williams, “[W]e both know that you’re being represented here by Mr. Kelly and you’re being represented by Mr. McKnight in Des Moines, and . . . I want you to remember this because we’ll be visiting between here and Des Moines.”26 Then, Williams and Kelly conferred again alone, and “Kelly reiterated to Detective Learning that Williams was not to be questioned about the disappearance of Pamela Powers until after Williams had consulted with McKnight back in Des Moines.”27 Learning expressed reservations, and Kelly firmly repeated “that the agreement with McKnight” must be honored.28 Kelly then asked for permission to ride in the police car, and permission was denied.29

The detectives and Williams “set out on the [drive]” to Des Moines.30 The Court stated that Williams never expressed “a willingness to be interrogated” without the presence of an attorney.31 “Instead, he stated several times that ‘[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story.’”32 The Court also observed “that Detective Learning knew that Williams was a former mental patient, and that he was deeply religious.”33

Detective Learning and Williams soon engaged in conversation upon a wide range of topics, including religion.34 Shortly after leaving Davenport, “[a]ddressing Williams as ‘Reverend,’ the detective said,

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\text{21. } \text{Brewer, 430 U.S. at 391.} \\
\text{22. } \text{Id.} \\
\text{23. } \text{Id.} \\
\text{24. } \text{Id.} \\
\text{25. } \text{Brewer, 430 U.S. at 391.} \\
\text{26. } \text{Id.} \\
\text{27. } \text{Id. at 391-92.} \\
\text{28. } \text{Id. at 392.} \\
\text{29. } \text{Id.} \\
\text{30. } \text{Brewer, 430 U.S. at 392.} \\
\text{31. } \text{Id.} \\
\text{32. } \text{Id.} \\
\text{33. } \text{Id.} \\
\text{34. } \text{Id.}
\]
I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleet ing, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.  

Williams asked why Learning thought they would be driving past the child's body, and the detective replied that he knew that the victim was in the area of the town of Mitchellville.  

(He did not, in fact, know this.) Learning added, "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."  

About 100 miles from Davenport, as they approached the town of Grinnell, Williams asked if the police had located the girl's shoes. Detective Learning said "that he was unsure," and "Williams directed the officers to a service station where he said he had left [them]." No shoes were found at the station. As they proceeded on the trip, Williams asked if "the police had found the blanket, and [he] directed the officers to a rest area where he said he had disposed of [it]." Nothing was located there. The trip continued, and as they approached Mitchellville he told the officers that he would direct them to Pamela Powers' body. He then did so.  

Before Williams' trial for first-degree murder, "his counsel moved to suppress all evidence relating to or resulting from any statements Williams had made" in the car. The motion was denied, and the trial judge found that despite the agreement between defense counsel and the police, and despite the fact that the evidence had

35. Brewer, 430 U.S. at 392-93.  
36. Id. at 393.  
37. Id. at 393 n.1.  
38. Id. at 393.  
39. Id.  
40. Brewer, 430 U.S. at 393.  
42. Brewer, 430 U.S. at 393.  
43. Id.  
44. Id.  
45. Id.  
46. Id. at 393.
been obtained "during 'a critical stage in the proceedings requiring the presence of counsel on [Williams'] request.' . . . Williams had 'waive his right to have an attorney present[.]." The evidence was introduced at trial and Williams was convicted of murder. Affirming the conviction, the Iowa Supreme Court agreed that Williams had "waived his right to the presence of counsel" during the automobile trip.

Ruling upon Williams' subsequent petition for a writ of habeas corpus, the United States District Court concluded that the admission of the evidence at trial was erroneous. It based its conclusion on the following three grounds: (1) that Williams had been denied his constitutional right to the assistance of counsel; (2) that the state denied Williams the protection of Escobedo v. Illinois1 and Miranda v. Arizona; and (3) that his incriminating statements had been involuntary. The district court further noted "that there had been no waiver" of Williams' constitutional rights.

The Court of Appeals for the Eighth Circuit affirmed the judgment on the first two grounds.

On review, the Supreme Court concluded that only one ground needed consideration, for it was clear "that the judgment . . . must in any event be affirmed upon the ground that Williams was deprived of . . . the right to the assistance of counsel." The Court observed that the right, "guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice," It emphasized the "vital need" to afford a defendant that right before trial, reiterating Justice Sutherland's characterization of that period as "perhaps the most critical . . . of the proceedings against [the defendant], that is to say, from the time of [his] arraignment until the beginning of [his] trial, when consultation, thoroughgoing investigation and preparation [are] vitally important." "Judicial proceedings had been initiated against Williams before the [automobile ride]" to Des Moines, and the Sixth Amendment right had attached. The Court then addressed the deliberate nature of Detective Leaming’s actions:

47. Brewer, 430 U.S. at 394.
48. Id.
49. Id.
50. Id. at 394-395.
54. Id.
55. Id. at 395, 397.
56. Id. at 397-98.
57. Id. at 398.
58. Brewer, 430 U.S. at 398 (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932)).
59. Id. at 399, 401. Describing the attachment of the right to counsel, the Court quoted the plurality opinion in Kirby v. Illinois:

Whatever else it may mean, the right to counsel granted by the Sixth and
There can be no serious doubt, either, that Detective Learning deliberately and designedly set out to elicit information from Williams just as surely as and perhaps more effectively than if he had formally interrogated him. Detective Learning was fully aware before departing for Des Moines that Williams was being represented in Davenport by Kelly and in Des Moines by McKnight. Yet he purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible. Indeed, Detective Learning conceded as much when he testified at Williams' trial.  

The Court found these circumstances to be "constitutionally indistinguishable from those presented in Massiah v. United States," where an indicted defendant was deemed to have been interrogated in violation of the Sixth Amendment when agents deliberately and surreptitiously elicited incriminating responses in the absence of his counsel. "The clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." The Court also found that "Williams' consistent reliance upon the advice of counsel in dealing with the authorities refuted any suggestion that he waived that right." 

The Court concluded that, while it did "not lightly affirm the issuance of [the] . . . writ of habeas corpus, . . . so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned." As to the evidence excluded, it added in footnote 12:

The District Court stated that its decision "does not touch upon the issue of what evidence, if any, beyond the incriminating statements themselves must be excluded as 'fruit of the poisonous tree.'" We, too, have no occasion to address this issue, and in the present posture of the case there is no basis for the view of our dissenting Brethren, post, at 430 (White, J.); post, at 441 (Blackmun, J.), that any attempt to retry the respondent would probably be futile. While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the

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Footnotes:

60. Id. at 399.
61. Id. at 400.
63. Brewer, 430 U.S. at 401.
64. Id. at 404.
65. Id. at 406.
victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams. In the event that a retrial is instituted, it will be for the state courts in the first instance to determine whether particular items of evidence may be admitted.66

The Court thus invited consideration of inevitable discovery on retrial, and the facts which were later developed on that issue were extensive.67

At the second trial, while the state did not offer the evidence excluded by Brewer, it did seek to introduce "evidence of the condition of [the child's body when] it was found, articles and photos of her clothing, and the results of post mortem medical and chemical tests."68 As to whether the victim would have been located "in essentially the same condition" had the search not been suspended, the state's evidence at the suppression hearing included testimony from Agent Ruxlow of the Iowa Bureau of Criminal Investigation.69 Ruxlow had been the organizer of the search for Pamela Powers.70 He stated that he had divided maps of Poweshiek and Jasper Counties into grids, organized some 200 volunteers "into teams of four to six" people, "and assigned each team to... specific grid areas."71 The volunteers "were instructed to check all the roads, the ditches, [and] any culverts."72 In addition, "If they came upon any abandoned farm buildings, they were instructed to go onto the property and search those abandoned farm buildings or any other places where a small child could be secreted."73

The search began at about 10:00 a.m., "and moved westward through Poweshiek County into Jasper County."74 Ruxlow had obtained a map of Polk County, where the body was later located, and he said that had the search continued, "he would have marked [that map] off in the same manner."75 Five hours into the search, "Detective Leaming, who was in the police car with Williams, sent word to Ruxlow" that

66. Id. at 406-07 n.12 (citations omitted). The dissenters in Brewer vigorously disagreed with the Court's findings on the issue of waiver. See id. at 417-20 (Burger, C.J., dissenting); id. at 430-35 (White, J., dissenting). In addition, Justice Blackmun, joined by Justices White and Rehnquist, found Massiah inapposite. Id. at 438-40 (Blackmun, J., dissenting).
68. Id. at 437.
69. Id. at 438, 448.
70. Id. at 448.
71. Id. at 448-449.
72. Nix, 467 U.S. at 448.
73. Id. at 448-49.
74. Id. at 449.
75. Id.
Williams was cooperating. As a result of this information, the search was suspended. Ruxlow met Leaming at the Grinnell truck stop. He testified "that he was 'under the impression that there was a possibility' that Williams would lead them to the child's body." Williams led the police to the victim, who was located two and a half miles "from where the search had stopped, in what would have been the easternmost . . . grid in Polk County." There was also testimony that, had the search continued, it would have taken three to five hours to discover the body which had been located near a culvert—one of the specific kinds of places to which the searchers had been directed.

Noting the freezing temperatures at the time of the search and concluding that "tissue deterioration would have been suspended," the trial court found "that the body would have been discovered in essentially the same condition" as when it was located by Williams. After the introduction of the evidence, Williams was once again convicted of first-degree murder. The Supreme Court of Iowa affirmed the conviction. Applying what it called "a 'hypothetical independent source' exception to the exclusionary rule," it stated:

After the defendant has shown unlawful conduct on the part of the police, the State has the burden to show by a preponderance of the evidence that (1) the police did not act in bad faith for the purpose of hastening discovery of the evidence in question, and (2) that the evidence in question would have been discovered by lawful means.

With regard to the first requirement, the court reasoned that due to the close division of views among the appellate courts in the case "it cannot be said that the actions of the police were taken in bad faith." As to whether the evidence would have been discovered, it concluded that the child's body would have been found "before its condition had materially changed."

Williams again sought a writ of habeas corpus, and the United States District Court denied the petition, reaching the same conclusion as the state appellate court concerning the inevitable discovery of the body in a materially unchanged

76. Id.
77. Nix, 467 U.S. at 449.
78. Id. at 436.
79. Id. at 449.
80. Id.
81. Id.
82. Nix, 467 U.S. at 438.
83. Id.
84. Id.
85. Id. (quoting State v. Williams, 285 N.W.2d 248, 260 (Iowa 1979)).
86. Id. (quoting Williams, 285 N.W.2d at 261).
87. Nix, 467 U.S. at 431, 439.
condition. The Court of Appeals for the Eighth Circuit, reversing, explained that it assumed arguendo that there was "an inevitable discovery exception to the exclusionary rule and that the Iowa Supreme Court" had correctly set forth its requirements. It added, moreover, in footnote 5:

We agree with counsel and with the Supreme Court of Iowa that if there is to be an inevitable-discovery exception the State should not receive its benefit without proving that the police did not act in bad faith. Otherwise the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the exclusionary rule reduced too far.

The court held that "the State did not satisfy its burden of proving by a preponderance of the evidence that the police did not act in bad faith in obtaining Williams's statements that led them to the body." The Supreme Court granted certiorari. On appeal, Williams challenged the applicability of an inevitable discovery doctrine in the Sixth Amendment context, and asserted that, even were it permissible, "it must include a threshold showing of police good faith."

B. Good Faith

At the time of the litigation in Nix, some critical commentary had urged the adoption of a good faith requirement as a prerequisite to the application of the inevitable discovery doctrine. The court of appeals, with its "assumption" of the correctness and express endorsement of the Supreme Court of Iowa's standard, appeared to have had few doubts on the subject, and placed much of its emphasis upon the Supreme Court's comments in Brewer about the deliberate nature of Detective Learning's actions. The Supreme Court's observations in Brewer had of course been important to the issue of whether Learning had "deliberately elicited" Williams' responses and had therefore interrogated him within the meaning of

88. Id.
89. Id. (construing Williams v. Nix, 700 F.2d 1164, 1169 (8th Cir. 1983)).
90. Williams, 700 F.2d at 1169 n.5.
91. Id. at 1173.
92. Nix, 467 U.S. at 440.
93. Id. at 441.
94. In adopting its two-part approach, the Supreme Court of Iowa endorsed Professor Wayne LaFave's view—that the exception should be available only "when the police have not acted in bad faith"—as "the position... which conforms to the mandates of the Federal Constitution." State v. Williams, 285 N.W.2d 248, 258 (Iowa 1979) (citing 3 Wayne R. LaFave, Search and Seizure § 11.4, at 620-628 (1978)).
95. Williams, 700 F.2d at 1167.
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Massiah.96 The court of appeals also found them relevant to the question of whether a
good faith requirement of the inevitable discovery doctrine had been met:

The question is rather what was in Detective Leaming’s mind during that
car ride back to Des Moines. If he honestly thought he was not violating
Williams’ rights, then the deterrent purpose of the exclusionary rule would
arguably not be impaired by allowing proof of facts that would have come
to light in any event. . . . If Learning conversed with Williams in deliberate
violation of the Sixth Amendment, the evidence must be excluded.

We turn, then, to the factual question of Leaming’s state of mind at the
time. On this question the State concededly has the burden of proof. . . .
there is not a line of evidence in the record before us that Detective
Leaming thought he was within the Constitution.

The opinions of the Supreme Court and of the various concurring
Justices in Brewer v. Williams furnish some fairly strong clues as to how
that Court might resolve the bad-faith issue . . . Not only does the Court
refer to the Sixth Amendment violation as ‘clear,’ . . . It also describes
Learning’s course of conduct as undertaken ‘deliberately,’ ‘designedly,’
and ‘purposely,’ . . . and labels the situation before it as “constitutionally
indistinguishable from” a previous Supreme Court decision . . . The Court
did not think it was breaking new ground, or holding Detective Learning
to a standard of conduct not theretofore clearly established.

Not only has the State not borne its burden of proof; what evidence
there is on the subject strongly points in the direction of bad faith.97

In the Supreme Court, Williams argued in his brief that the “purpose and flagrancy”
of the official misconduct was already a factor to be considered under the Court’s
separate “attenuation” exception to the exclusionary rule, and should be important to
an inevitable discovery inquiry as well.98 “The factor of the ‘purpose and flagrancy’
of the offending officer’s conduct—which Brown [v. Illinois] and Dunaway [v. New
York] identify as being of particular importance—is simply the other side of the coin
of ‘good faith.’”99

96. Nix, 467 U.S. at 440.
97. Williams, 700 F.2d at 1170-72 (citations omitted).
98. Brief for Respondent at 22-23, Nix (No. 82-1651). The attenuation doctrine
focuses upon “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.” Wong Sun v.
(1959)). See Brief for Respondent at 22, Nix (No. 82-1651). The Supreme Court’s
generalized attenuation analysis was first articulated in Nardone v. United States, 308 U.S.
338, 341 (1939).
While the author of the Court’s opinion was Chief Justice Burger, a vigorous dissenter in Brewer,\textsuperscript{100} it is still somewhat surprising that in Nix the Court so definitively rejected the suggested requirement that the police act in good faith.\textsuperscript{101} The Court initially addressed the basic question of whether to adopt an inevitable discovery exception to the exclusionary rule by observing that the vast majority of courts, including all of the federal courts of appeals, had already done so.\textsuperscript{102} It noted that “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.”\textsuperscript{103} The Court noted that the exclusionary rule had its origins in Silverthorne Lumber Co. v. United States,\textsuperscript{104} where the Court had also recognized an independent source exception, observing that facts may be proven “[i]f knowledge of [such facts] is gained from an independent source.”\textsuperscript{105} It also reiterated the attenuation analysis of Wong Sun v. United States,\textsuperscript{106} permitting the admission of evidence acquired “by means sufficiently distinguishable [from the illegality] to be purged of the primary taint.”\textsuperscript{107} With regard to the question of good faith, it tersely added, “The Court thus pointedly negated the kind of good faith requirement advanced by the Court of Appeals in reversing the District Court.”\textsuperscript{108}

Further analysis of the issue of good faith followed the Court’s consideration of the relationship between the independent source and inevitable discovery doctrines.\textsuperscript{109} It stated that the independent source exception, allowing “admission of evidence that has been discovered by means wholly independent of any constitutional violation[,]”\textsuperscript{110} teaches that society’s interests in deterring police misconduct and in having juries receive all probative evidence “are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.”\textsuperscript{111} The Court added:

When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would

\textsuperscript{101.} Nix, 467 U.S. at 442-43.
\textsuperscript{102.} Id. at 440-41, 440 n.2.
\textsuperscript{103.} Id. at 442-43.
\textsuperscript{104.} 251 U.S. 385 (1920).
\textsuperscript{105.} Nix, 467 U.S. at 411 (quoting Silverthorne Lumber Co., 251 U.S. at 392) (emphasis omitted).
\textsuperscript{107.} Nix, 467 U.S. at 442 (quoting Wong Sun, 371 U.S. at 488).
\textsuperscript{108.} Id.
\textsuperscript{109.} Id. at 442-43.
\textsuperscript{110.} Id. at 443.
\textsuperscript{111.} Id.
have been in absent any error or violation. There is a functional similarity between [the independent source and inevitable discovery] doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place.\textsuperscript{112}

It therefore concluded that the rationale of the independent source exception justified the adoption of the inevitable discovery doctrine.\textsuperscript{113}

Turning again to the court of appeals' requirement of good faith, the Court observed emphatically,

The requirement that the prosecution must prove the absence of bad faith, imposed here by the Court of Appeals, would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a worse position than they would have been in if no unlawful conduct had transpired. And, of equal importance, it wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Nothing in this Court’s prior holdings supports any such formalistic, pointless, and punitive approach.\textsuperscript{114}

The Court then addressed footnote 5 of the court of appeals’ opinion, and rejected the view “that if an absence-of-bad-faith requirement were not imposed, ‘the temptation to risk deliberate violations . . . would be too great, and the deterrent effect of the Exclusionary Rule reduced too far.’"\textsuperscript{115} The Court stated that an officer facing an opportunity for illegality “will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered.”\textsuperscript{116} It added that “when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice” since there will be little to be gained from “dubious ‘shortcuts.’”\textsuperscript{117} The Court also found that “[s]ignificant disincentives” such as departmental discipline and civil liability also reduce the possibility that the inevitable discovery exception will promote illegality.\textsuperscript{118}

Examining the applicability of the exception to the facts before it, the Court concluded that volunteer search parties were approaching the location of the victim, and was satisfied “that the . . . teams would have resumed the search had Williams

\textsuperscript{112} Nix, 467 U.S. at 443-44.
\textsuperscript{113} Id. at 444.
\textsuperscript{114} Id. at 445.
\textsuperscript{115} Id. (quoting Williams v. Nix, 700 F.2d 1164, 1169 n.5 (8th Cir. 1983)).
\textsuperscript{116} Id.
\textsuperscript{117} Nix, 467 U.S. at 445-46.
\textsuperscript{118} Id. at 446.
not earlier led the police to the body and the body inevitably would have been found."\textsuperscript{119} The court of appeals' judgment was accordingly reversed.\textsuperscript{120} Justice Stevens, concurring in the judgment, agreed with the Court's conclusion on the issue of good faith:

Admission of the victim's body, if it would have been discovered anyway, means that the trial in this case was not the product of an inquisitorial process; that process was untainted by illegality. The good or bad faith of Detective Leaming is therefore simply irrelevant.\textsuperscript{121}

\textit{Nix}'s rejection of an inquiry into good faith as a limiting requirement of the inevitable discovery doctrine remains definitive. It is not without its critics, however. In 1988, professor Steven Grossman observed that examining the intent of the police had long been important to attenuation analysis, both in assessing the impact of the misconduct and in furthering the deterrent effect of the exclusionary rule.\textsuperscript{122} He found \textit{Nix}'s rejection of the comparison to the attenuation cases to be inappropriate, observing "As the Court has repeatedly asserted, the exclusionary rule best serves its goals when it is applied in situations of bad faith misconduct by police."\textsuperscript{123}

One might add today that, as the Court grounded its deterrence analysis in \textit{Nix} upon factual assumptions concerning calculated official decision making, some of those assumptions are debatable at best. One need only look to the current prominence of anticipated inventory searches in justifying the application of the inevitable discovery doctrine to realize that officers often are in a position to foresee the discovery of evidence. It may also be reasonable to conclude that an officer contemplating a "shortcut" may be emboldened by the prospect of the introduction of the evidence through the inevitable discovery exception.\textsuperscript{124} It is, however, safe to assume that in light of the Court's forceful language in \textit{Nix}, it will be some time before the adoption of a good faith requirement which the Court characterized previously as "a formalistic, pointless and punitive approach."\textsuperscript{125}

\begin{itemize}
\item \textsuperscript{119} \textit{Id.} at 449-50.
\item \textsuperscript{120} \textit{Id.} at 450.
\item \textsuperscript{121} \textit{Id.} at 456.
\item \textsuperscript{122} Steven P. Grossman, \textit{The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations}, 92 DICK. L. REV. 313, 328-29 (1988).
\item \textsuperscript{123} \textit{Id.} at 333. \textit{See also} Hon. John E. Fennelly, \textit{Refinement of the Inevitable Discovery Exception: The Need for a Good Faith Requirement}, 17 WM. MITCHELL L. REV. 1085, 1103-1104 (1991) ("good faith can accommodate the evolution of the law and insure that willful constitutional violations are not permitted").
\item \textsuperscript{124} For additional arguments that the Court's approach may provide incentives for the calculating officer to violate the Constitution, see Silas Wasserstrom & William J. Mertens, \textit{The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?}, 22 AM. CRIM. L. REV. 85, 167 (1984).
\item \textsuperscript{125} \textit{Nix}, 467 U.S. at 445.
\end{itemize}
The second potential limitation upon the inevitable discovery doctrine that was squarely addressed in *Nix* was the possibility of imposing a high standard of proof upon the government. The Iowa courts had required that the prospect of discovery be established by a preponderance of the evidence, and in *Nix* the Supreme Court endorsed this standard.

The importance of the issue was underlined by Justice Brennan's dissent, in which he and Justice Marshall discussed the nature of the judicial findings required by the exception:

The "inevitable discovery" exception... differs in one key respect from its next of kin [the "independent source" exception]: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed.

In my view, this distinction should require that the government satisfy a heightened burden of proof before it is allowed to use such evidence. The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule. To ensure that this hypothetical finding is narrowly confined to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule, I would require clear and convincing evidence before concluding that the government had met its burden of proof on this issue.

The Court addressed the question of heightening the burden of proof in its lengthy footnote. It noted that it had earlier established "some relevant guidelines," stating that "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence[.]" It stated, as it had in 1972, that "no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence[,]" and observed that it previously held that this standard was appropriate for determining the voluntariness of a confession. The Court added in *Nix* that it was "unwilling to impose added burdens on the already

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126. 467 U.S. at 437-38.
127. *Id.* at 444.
128. *Id.* at 459 (Brennan, J., dissenting).
129. *Id.* at 444 n.5.
130. *Id.* (quoting United States v. Matlock, 415 U.S. 164, 178 n.14 (1974)).
132. *Id.*
difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries.\textsuperscript{133}

The Court then addressed the heightening of the standard in \textit{United States v. Wade},\textsuperscript{134} which had required clear and convincing evidence to establish an independent source for an in-court identification after an uncounselled, post-indictment lineup.\textsuperscript{135} It stated that \textit{Wade} had noted the effect and potential unfairness that such a lineup poses in shaping an identification, and that it had "recognized the difficulty of determining whether an in-court identification was based on independent recollection."\textsuperscript{136} "By contrast," the Court added, "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment."\textsuperscript{137}

Significantly, Justice Stevens, concurring in the judgment, agreed with the Court on the appropriate standard of proof, but predicated his agreement upon the existence of active pursuit:

I agree with the majority's holding that the prosecution must prove that the evidence would have been inevitably discovered by a preponderance of the evidence rather than by clear and convincing evidence. . . . An inevitable discovery finding is based on objective evidence concerning the scope of the ongoing investigation which can be objectively verified or impeached. Hence an extraordinary burden of proof is not needed.\textsuperscript{138}

Justice Stevens' comment frames the "active pursuit" issue that continues to be debated today. If his view of "objective evidence" does convincingly illuminate the meaning of the Court's earlier reference in footnote 5 to a focus on "demonstrated

\begin{footnotes}
\item[133.] \textit{Id.}.
\item[134.] 388 U.S. 218 (1967).
\item[135.] See \textit{Wade}, 388 U.S. at 240.
\item[136.] \textit{Nix}, 467 U.S. at 444 n.5.
\item[137.] \textit{Id.} As noted earlier, the dissenters regarded an inevitable discovery finding as "necessarily . . . hypothetical[.]") \textit{Id.} at 459 (Brennan, J., dissenting). The Court's conclusion on the appropriate standard of proof has been the subject of much critical commentary. \textit{See}, e.g., William C Heffernan, \textit{Foreword, The Fourth Amendment Exclusionary Rule as a Constitutional Remedy}, 88 Geo. L.J. 799, 857 (2000) (finding clear and convincing evidence standard more appropriate in the overall framework of the exclusionary rule); Wasserstrom & Martens, \textit{supra} note 124, at 174 ("only when the idea of 'inevitability' is given real weight" can the prospect of intentional police misconduct be diminished); James Andrew Fishkin, Comment, \textit{Nix} v. Williams: \textit{An Analysis of the Preponderance Standard for the Inevitable Discovery Exception}, 70 Iowa L. Rev. 1369, 1377 (1985) (stating that the deterrence rationale is inadequately served); \textit{The Supreme Court}, 1983 Term, \textit{Exclusionary Rule—Inevitable Discovery Exception}, 98 Harv. L. Rev. 118, 129 (1984) (stating that the standard is "inappropriately lenient").
\item[138.] \textit{Nix}, 467 U.S. at 457 n.8 (Stevens, J., concurring in judgment).
\end{footnotes}
historical facts," then the active pursuit which was underway may be deemed to have been within both the language and the contemplation of the Court. In any event, the two dissenters agreed with Justice Stevens that the need for "an independent line of investigation that was already being pursued" was inherent in the Court's reasoning.  

III. A POTENTIAL LIMITATION ADDRESSED AFTER NIX: THE "PRIMARY EVIDENCE" DISTINCTION

In Nix, the Court was of course concerned with the issue of whether to suppress the body which had been derived from the information provided by Williams. The "direct" products of Detective Leaming's illegal interrogation, specifically Williams' responses themselves and testimony about them, had been summarily excluded in Brewer, perhaps because the Court could conceive of no plausible argument as to how they might be deemed untainted. It was argued after Nix, sometimes vigorously, that under the Court's approach the inevitable discovery exception should not be deemed applicable to "primary" evidence immediately derived from official illegality, but rather confined to so-called "derivative" evidence obtained through exploitation of the illegality.

The federal circuits are now nearly unanimous on the resolution of this issue. Ten circuits have concluded that the inevitable discovery doctrine is indeed applicable to primary evidence. Another circuit appears to have implicitly

139. Id.
140. Id. at 459 (Brennan, J., dissenting). Justice Marshall joined in this opinion. Id. at 458.
141. Id. at 434.
144. See United States v. Kimes, 246 F.3d 800, 804-05 (6th Cir. 2001) (inventory); United States v. Stanfield, 109 F.3d 976, 987-88 (4th Cir. 1997) (observation of evidence through car window); United States v. Kirk, 111 F.3d 390, 392-93 (5th Cir. 1997) (inventory); United States v. Baro-Salcedo, 107 F.3d 769, 772-74 (10th Cir. 1997) (inventory); United States v. Cotnam, 88 F.3d 487, 495-96 (7th Cir. 1996) (subsequent arrest inevitable); United States v. Zapata, 18 F.3d 971, 978-79 (1st Cir. 1994) (impoundment and inventory of car were inevitable); United States v. Pimentel, 810 F.2d 366, 368-69 (2d Cir. 1987) (audit); United States v. Hernandez-Canal, 808 F.2d 779, 783 (11th Cir. 1987) (private party airline search); United States v. Apker, 705 F.2d 293, 306-07 (8th Cir. 1983) (a pre-Nix opinion involving a valid state warrant).

The Court of Appeals for the Ninth Circuit has repeatedly permitted the application of
endorsed this position. Only the Court of Appeals for the District of Columbia maintains that *Nix* requires a contrary result.

While many courts, in discussing their rejection of a distinction between primary and derivative evidence, simply see the absence of an articulated basis for that approach in *Nix*, some have expressed additional reasons for their view. In *United States v. Pimentel*, the Court of Appeals for the Second Circuit addressed the applicability of the inevitable discovery exception to illegally obtained letters which would have been disclosed in an audit. The court initially observed that there was “nothing in the *Nix* opinion” that supported the district court’s view “that the *Nix* Court intended its holding to apply only to the “fruit of the poisonous tree” and not the immediate products of the illegality.” It then noted that among those cases cited by *Nix* with apparent approval were several applying the inevitable discovery doctrine to primary evidence. “A fair reading of *Nix* shows that the Court intended

the inevitable discovery doctrine to primary physical evidence. See, e.g., *United States v. Mancera-Londono*, 912 F.2d 373, 375-76 (9th Cir. 1990) (inventory); *United States v. Merriweather*, 777 F.2d 503, 506 (9th Cir. 1985) (independent warrant); *United States v. Cline*, No. 02-30078, 2003 WL 103022, at *1 (9th Cir. Jan. 10, 2003) (impoundment and inventory); *United States v. Burns*, Nos. 98-50771, 98-50772, 99-50025, 2000 WL 898739, at *4 (9th Cir. July 6, 2000) (inventory of rental car inevitable). Its language has not always been consistent, however. In *United States v. Polanco*, 93 F.3d 555, 561 (9th Cir. 1996), it stated that “[t]he inevitable discovery doctrine does not... allow admission of [an] unconstitutional inculpatory statement itself[,]” but rather evidence “derived from” it. For discussion of *Polanco*, see Golden, supra note 143, at 104-05, which viewed the recently decided *Polanco* as the then-current approach of the Ninth Circuit. The Ninth Circuit cases involving physical evidence, noted supra, clearly illustrate, however, that there has been no categorical exclusion of primary evidence from its application of the inevitable discovery doctrine.

145. In *United States v. Vasquez De Reyes*, 149 F.3d 192 (3rd Cir. 1998), while holding that the government had not sustained its burden of proving inevitable discovery, the Court of Appeals for the Third Circuit acknowledged the doctrine’s usual application to primary evidence, citing decisions so holding with apparent approval. “[T]he inevitable discovery doctrine has generally been applied in the context of acquiring physical evidence, such as drugs or weapons. Thus, when the government proves that its officers conduct a routine search in similar circumstances, a court is likely to adopt the government’s argument that the evidence would have been discovered in the course of that search.” *Id.* at 195. The court then cited the Tenth Circuit’s opinion in *Haro-Salcedo*, supra, and the Sixth Circuit case of *United States v. Kennedy*, 61 F.3d 494 (6th Cir. 1995) (cocaine in a misdirected suitcase would have been discovered when the airline sought to identify the owner). *Id.*


147. See, e.g., *United States v. Stanfield*, 109 F.3d 976, 987 n.7 (4th Cir. 1997); *United States v. Whitehorn*, 813 F.2d 646, 650 (4th Cir. 1987).

148. 810 F.2d 366 (2d Cir. 1987).

149. *Id.* at 368-69.

150. *Id.* at 369. The cases cited by the court of appeals were *United States v. Romero*, 692 F.2d 699 (10th Cir. 1982), *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983), and
its decision to conform to [those] holdings." The court added that other courts were in agreement, and later in *United States v. Whitehorn*, it again rejected an attempt "to engraft a direct-indirect products distinction" upon *Nix*.

The Court of Appeals for the First Circuit expressed a similar view in *United States v. Zapata*. Considering the admissibility of contraband discovered in an unregistered and uninsured car which "surely" would have been impounded and inventoried, it said:

> We decline to embrace the suggestion that courts should confine the inevitable discovery rule to cases in which the disputed evidence comprises a derivative, rather than primary, fruit of unlawful police conduct. See *United States v. $639,558 in United States Currency*. . . . Although the *Nix* case involved derivative evidence, we regard its rationale—that the exclusion of inevitably discovered evidence would "put the government in a worse position" than if no illegality had occurred . . .—to be fully applicable to cases involving primary evidence.

It added that it was "thrice fortified" in its conclusion: by *Nix*’s approving citation to the cases applying the rule to primary evidence; by the Court’s later endorsement "of the closely related ‘independent source’ exception in a case involving primary evidence" [*Murray v. United States*]; and by the approval of its approach in other circuits.

In *Murray*, the Supreme Court had considered the independent source doctrine and examined the question of whether to suppress evidence obtained under a separately-acquired search warrant when that evidence had been observed in plain view during an earlier illegal entry. The Court determined that a remand was necessary in order to determine whether the search pursuant to the warrant was truly independent, or whether either the decision to seek the warrant was prompted by what had been observed during the illegal entry, or the illegal observations were presented to and affected the magistrate. In its discussion, the Court noted that petitioner’s argument might be viewed as asserting that the independent source

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151. *Pimentel*, 810 F.2d at 369.
152. *Id.*
153. 829 F.2d 1225 (2d Cir. 1987).
154. *Id.* at 1232.
155. 18 F.3d 971 (1st Cir. 1994).
156. *Id.* at 978.
157. *Id.* at 979 n.7 (citations omitted).
158. *Id.* at 99 n.7; see *Murray v. United States*, 487 U.S. 533 (1988).
159. *Zapata*, 18 F.3d at 99 n.7
160. 487 U.S. at 535.
161. *Id.* at 542-44.
exception "does apply to independent acquisition of evidence previously derived indirectly from the unlawful search, but does not apply to what they call 'primary evidence,' that is, evidence acquired during the course of the search itself." The Court stated:

In addition to finding no support in our precedent, see Silverthorne Lumber... (referring specifically to evidence seized during an unlawful search), this strange distinction would produce results bearing no relation to the policies of the exclusionary rule.163

The Court also noted that, when information was obtained lawfully through an independent source, the suggested differentiation would require the exclusion of the government's knowledge of the existence and condition of a dead body discovered during an unlawful search, but would permit its introduction "if they had observed a notation that the body was buried in a certain location, producing consequential discovery of the corpse."164 As did the First Circuit, one must of course bear in mind that Murray's observation concerning primary evidence and the goals of the exclusionary rule appeared in the context of an independent source analysis. After discussing Murray, Professor Robert Bloom reminds us that "expansion [of the inevitable discovery exception to primary evidence] is beyond Nix, the only Supreme Court case dealing directly with the inevitable discovery exception."165

The Court of Appeals for the District of Columbia has articulated the only current view among the circuits that it is inappropriate to apply the inevitable discovery doctrine to primary evidence.166 In United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558) in United States Currency, it considered a question of the civil forfeiture of money illegally taken during the warrantless search of luggage which was not contemporaneous with an arrest and was out of the reach of the arrestee.167 The court rejected the government's argument that the luggage would have been searched during a subsequent lawful inventory.168 The court concluded that an inventory was not inevitable,169 adding, moreover, that a general principle concerning the exclusionary rule requires that "an article discovered or an observation made during the course of an illegal search or seizure—'primary evidence'—may not be admitted into evidence when a party with

162. Id. at 540-41.
163. Id. at 541 (citation omitted).
164. Id.
165. See Bloom, supra note 143, at 93.
167. Id. at 715-16.
168. Id. at 718-21.
169. Id. at 721.
standing objects to its introduction." According to the court, the inevitable discovery exception developed by Nix's reasoning had "relied heavily on the derivative nature of the evidence," and "[w]hatever one may think of the distinction [between primary and derivative evidence], the fact remains that Nix drew it." If the evidence stemming from the violation is nevertheless admissible on the basis that the bags inevitably would have been opened when they were later inventoried, the practical consequence is apparent. In the vast run of cases, there would be no incentive whatever for police to go to the trouble of seeking a warrant (or, we should add, of waiting for a lawful inventory to occur during normal processing). A vigorous concurrence objected to the majority's "lengthy detour" on the issue of primary evidence, viewing the discussion as unnecessary to the court's decision in light of its conclusion that discovery would not have been inevitable.

The near-unanimity of the federal circuits in applying the inevitable discovery doctrine to primary evidence appears to reflect the circuits' reluctance to impose a limitation upon the exception when such a policy is not reflected in the express reasoning or language of Nix. As noted in Pimentel and Zapata, Nix's citation and apparent approval of earlier court of appeals opinions which had involved primary evidence appears to be quite telling on the issue. Murray's dismissive treatment of a parallel question under the independent source rule seems to reinforce an impression that the argument for a primary evidence distinction was born of the notion that, if the deterrent value of the exclusionary rule is to be maintained, there simply must be some limitation upon an otherwise open-ended and potentially boundless exception.

The argument for an active pursuit requirement does not emerge in the same posture. In Nix, three justices, albeit two of them dissenters, saw the existence of an active search for the victim as critical to the application of the inevitable discovery doctrine. The Court's methodical review of the record documenting the volunteers' systematic and painstaking efforts was of undeniable importance to its

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170. Id. at 719.
171. Six Hundred Thirty Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558) in United States Currency, 955 F.2d at 720.
172. Id. at 720-21.
173. Id. at 721. Judge Silberman also stated that the issue was insufficiently raised in the case. Id. at 721.
174. 810 F.2d 366, 368 (2nd Cir. 1987); 18 F.3d 971 (1st Cir. 1994).
175. In a rare restriction under state constitutional doctrine, the New York Court of Appeals interpreted Article I, § 12 of the New York Constitution to preclude the application of the inevitable discovery doctrine to primary evidence. People v. Stith, 506 N.E.2d 911, 912 n.* (N.Y. 1987).
conclusion. The issue of whether an active pursuit requirement is a prerequisite to the application of the inevitable discovery rule is consequently a more tenable potential limitation on the doctrine than was the primary evidence distinction.

IV. CRITICISM OF AN ACTIVE PURSUIT REQUIREMENT AMONG THE CIRCUITS

Five courts of appeals have expressly rejected the view that \textit{Nix} imposes an active pursuit requirement. A sixth appears to have implicitly rejected it by its citation and apparent approval of such opinions. Four courts of appeals have employed an active pursuit approach. Another court has characterized the subject as "debatable," and a twelfth has not addressed the issue. Among those federal

\begin{itemize}
  \item \textbf{177.} \textit{Id.} at 434.
  \item \textbf{178.} See United States v. Larsen, 127 F.3d 984, 986-87 (10th Cir. 1997) (relating to traced bank records); United States v. Kennedy, 61 F.3d 494, 498-500 (6th Cir. 1995) (dealing with a lost suitcase at airport); United States v. Ford, 22 F.3d 374, 377-78 (1st Cir. 1994) (relating to a protective sweep); United States v. Thomas, 955 F.2d 207, 210 (4th Cir. 1992) (regarding illegal entry into hotel room); United States v. Boatwright, 822 F.2d 862, 864 (9th Cir. 1987) (involving a garage search).
  \item \textbf{179.} See United States v. Vasquez De Reyes, 149 F.3d 192, 195 (3rd Cir. 1998); see also supra note 143. As with the issue of primary evidence, the court's endorsement of the Sixth and Tenth Circuit views on active pursuit must be inferred from its citations to their opinions. At least one commentator has drawn this inference. See Stephen E. Hessler, Note, \textit{Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule}, 99 MICH. L. REV. 238, 245 n.38 (2000).
  \item \textbf{180.} See United States v. Connor, 127 F.3d 663, 667-68 (8th Cir. 1997) (finding evidence obtained from illegal entry into hotel room was properly excluded); United States v. Pimentel, 810 F.2d 366, 369 (2d. Cir. 1987) (allowing letters into evidence because an audit was ongoing); United States v. Drosten, 819 F.2d 1067, 1070 (11th Cir. 1987) (allowing witness' testimony because informant had provided information about the witness' location that would have led to discovery); United States v. Cherry, 759 F.2d 1196, 1204-05 (5th Cir. 1985) (distinguishing between evidence upon which the government failed to carry burden of proof and admissible evidence).
  \item \textbf{181.} In \textit{United States v. Espinoza}, 256 F.3d 718, 725 n.7 (7th Cir. 2001), when addressing a violation of the knock and announce requirement of the Fourth Amendment, the court argued that a case cited by the dissent had been misinterpreted. The court added that the dissent's view that "the Court has limited the use of the inevitable discovery idea to situations in which law enforcement was engaged, or did engage, in a violation-free investigation that would have yielded or did yield the disputed evidence" was "a debatable subject." \textit{Id.} at 725 n.7. Before \textit{Espinoza}, a district court had observed that the Seventh Circuit had not explicitly required the government's active pursuit of an alternative investigation. See United States v. Warren, 997 F.Supp. 1188, 1193 (E.D. Wis. 1998).
  \item \textbf{182.} The Court of Appeals for the District of Columbia has not addressed this question. Despite the opinion of one writer, see Hessler, \textit{supra} note 179, at 245 n.39, that it implicitly adopted an active pursuit requirement in the unpublished opinion of \textit{United States v. May}, No.93-3002, 1995 WL 35296 (D.C. Cir. Jan. 18, 1995), the court did not discuss the
circuits which have criticized an active pursuit requirement, there is a consensus that it would constrict the inevitable discovery doctrine far too narrowly. It is also frequently stated that the doctrine in *Nix* included no express limitation to ongoing investigations.

This was noted by the Court of Appeals for the Tenth Circuit in *United States v. Larsen*, when it rejected an active pursuit rule. Larsen had entered a conditional plea of guilty to one count of bank fraud and one count of money laundering, after his motion to suppress bank records acquired by authorities through an unlikely series of events was denied. A stolen vehicle had been removed from Larsen’s property, and after an officer observed another vehicle with no vehicle identification number (VIN) plate, a warrant was issued authorizing a search of the property for vehicles with VIN’s removed, detached VIN plates, and titles to vehicles. The execution of the first search warrant yielded three vehicles within its scope along with many other items outside of the scope of the warrant, including bank records, on the suspicion that they might be stolen. Based on the evidence obtained during the search, officers then obtained a second search warrant.

On August 5, after the first search, Mike Weigel, one of the state troopers who had executed the warrant, visited a bank on personal business and mentioned to the bank’s vice president that he had removed stolen vehicles from Larsen’s property. The banker became concerned because the bank had loaned money to Larsen for a vehicle, and after a check of bank records he sent a Report of Apparent Crime to the FDIC. Meanwhile, Kansas Bureau of Investigation agent William Pettijohn reviewed the seized bank records and, suspecting that Larsen had fraudulently obtained loans, subpoenaed records from several banks on August 8. The next day he contacted FBI agent Scott Crabtree, who reviewed the records obtained by Pettijohn. In addition, since the FDIC routinely sent Reports of Apparent Crime to the FBI, that report was also received by Crabtree. “Based on the bank records and [the bank officer’s] report,” Crabtree issued subpoenas, examining Larsen’s banking simultaneous investigation by another officer as a prerequisite for the applicability of the inevitable discovery doctrine.

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183. 127 F.3d 984, 986 (10th Cir. 1997).
184. Id. at 986.
185. Id. at 985.
186. Id. at 985. These items included tools, videocassette recorders, exercise equipment, lawn mowers, furniture, blankets, a microwave oven, bank records, and credit cards. Id.
187. Id. The evidence seized in the second search is not specified in the opinion, but it was later suppressed by the district court. Id. at 985-86.
188. *Larsen*, 127 F.3d at 985.
189. Id.
190. Id. at 985.
191. Id. at 985.
192. Id.
transactions. "This led to issuance of subpoenas by a grand jury and discovery of the bank records on which Larsen’s prosecution for federal bank fraud and money laundering was based." Larsen moved to suppress all evidence seized from his property and all evidence discovered as a result of the searches, including the bank records subpoenaed by the grand jury.

At the suppression hearing, Agent Crabtree testified that the FDIC report would have been forwarded to him "regardless of the other investigation and by itself would have resulted in the same course of action to trace Larsen’s funds." Because the evidence seized pursuant to the first search warrant exceeded the scope of the warrant, the district court suppressed all evidence seized during both searches. It ruled, however, that the records obtained by Agent Crabtree’s investigation "would have been discovered in the absence of any illegality." Finding that state trooper Weigel’s remarks to the banker were not intended to exploit the illegal search, it concluded that the banker’s report to the FDIC “was sufficiently attenuated from the illegal search” to dissipate the taint of its illegality.

On appeal, Larsen argued that the inevitable discovery doctrine required the active pursuit of a separate investigation at the time of a constitutional violation. Affirming the denial of the motion to suppress, the court of appeals responded that “the inevitable discovery exception applies whenever an independent investigation inevitably would have led to discovery of the evidence, whether or not the investigation was ongoing at the time of the illegal police conduct.” Discussing Nix, the court noted that it was true that there the search was already being pursued, and that Justice Brennan’s dissent had regarded that fact as inherent in the Supreme Court’s holding. It added, “However, neither the majority opinion in Nix nor our cases limit the inevitable discovery exception to lines of investigation that were already underway.” The court stated that the fact that an independent investigation is underway is “strong proof” it is independent of an illegal investigation. Further noting, “However, it is possible for an investigation that begins after the violation to be independent.”

193. Larsen, 127 F.3d at 985.
194. Id.
195. Id. at 985-86.
196. Id. at 986.
197. Id.
198. Larsen, 127 F.3d at 986.
199. Id.
200. Id.
201. Id.
202. Id. at 987.
203. Larsen, 127 F.3d at 987.
204. Id.
205. Id. at 986. Larsen’s approach continues to be followed in the Tenth Circuit. See United States v. Sanders, No. 00-5215, 2002 WL 1644097, at *5 (10th Cir. July 24, 2002).
In *United States v. Ford*, the Court of Appeals for the First Circuit elaborated upon its earlier view in *United States v. Silvestri*\(^{206}\) that an active pursuit requirement is too inflexible to accommodate the broad issue of inevitability.\(^{207}\) In *Ford*, the defendant had been convicted of several drug offenses, and had sought to suppress evidence obtained during the warrantless search of his house.\(^{208}\) On several occasions, postal authorities had observed that Dr. Ford had purchased postal money orders and sent them by Express Mail to an address in Arizona, from which he received an Express Mail package in return a few days later.\(^{209}\) The package from Arizona bore a fictitious California return address.

A postal inspector was informed, and when another such package arrived he removed it from the mail and subjected it to an examination by a narcotics detection dog.\(^{210}\) The dog indicated the presence of narcotics, and the inspector obtained a search warrant for the package.\(^{211}\) Laboratory tests then indicated that it contained more than 27 grams of 80% pure cocaine.\(^{212}\) The inspector returned the package to the mail to be delivered to Ford, and both the post office and Ford's house were placed under surveillance.\(^{213}\) Ford picked up the package, returned home, and after he entered his house a postal inspector and police sergeant knocked on the door.\(^{214}\) They stated that they were from the water company, and asked Ford to step outside.\(^{215}\) He did so, "assisted by [an inspector's] hand on his shoulder," was handcuffed, and placed under arrest.\(^{216}\)

According to the government witnesses whose testimony was credited by the district court, Ford was given his *Miranda* warnings and a postal inspector asked for his consent to search the house.\(^{217}\) Ford refused, and was told that he would be brought before a federal magistrate for arraignment and the setting of bail.\(^{218}\) The defendant, who was wearing a tee shirt, shorts, and no shoes, then asked about his dog in the house, whether he could change his clothes and use the bathroom, and if he

\(^{206}\) 787 F.2d 736 (1st Cir. 1986).
\(^{207}\) *United States v. Ford*, 22 F.3d 374, 377 (1st Cir. 1994).
\(^{208}\) *Id.* at 375.
\(^{209}\) *Id.*
\(^{210}\) *Id.*
\(^{211}\) *Ford*, 22 F.3d at 375.
\(^{212}\) *Id.*
\(^{213}\) *Id.*
\(^{214}\) *Id.* at 375.
\(^{215}\) *Id.* A number of officers, including the inspector who had intercepted the package, were present on the scene. *Id.* at 376.
\(^{216}\) *Id.* at 375.
\(^{217}\) *Ford*, 22 F.3d at 376.
\(^{218}\) *Id.*
could bring money with him.\textsuperscript{219} He was told that he could change and use the bathroom if accompanied by the police, and that the officers "would have to satisfy themselves that there was no one else on the premises who might pose a threat to them."\textsuperscript{220} Four officers then entered the house with the defendant, and "performed a sweep of each floor to ensure that no one else was present."\textsuperscript{221}

On a bed on the second floor of the three-story house, the officers saw an opened package of cocaine, a plate, a sifter, a knife, and a Penthouse magazine.\textsuperscript{222} The officers and Ford proceeded to the third floor so that the defendant could dress.\textsuperscript{223} Several doors on that floor were closed, and when Ford was told that "the agents were going to open the doors to make sure that no one else was present," he replied, "I wish you wouldn't."\textsuperscript{224} When the agents opened the doors, they saw marijuana growing in two rooms.\textsuperscript{225} Defendant asked about bail and indicated that he had a substantial amount of cash.\textsuperscript{226} He produced $13,000 which was confiscated by the agents.\textsuperscript{227}

Ford was then brought before a magistrate and a search warrant was issued for the house.\textsuperscript{228} The warrant was executed and the agents seized the marijuana plants, packaged marijuana, a scale, a pistol, items for cultivating marijuana, and several postal receipts for Express Mail packages from Ford "to his contact in Arizona."\textsuperscript{229} When Ford moved to suppress the evidence seized from his house, including that obtained during the execution of the warrant, "the district court did not decide whether the search was a lawful protective sweep," as the government had argued.\textsuperscript{230} It stated instead that the evidence was admissible under the inevitable discovery doctrine.\textsuperscript{231} Discussing the initial warrantless entry of the house, the court of appeals reviewed the broad parameters of \textit{Nix} and turned to an earlier case, \textit{United States v. Silvestri}, which had "established the analytical framework for the inevitable discovery rule" in the First Circuit.\textsuperscript{232}

\begin{flushleft}
\begin{enumerate}
\item Id. at 376.
\item Id.
\item Id.
\item \textit{Ford}, 22 F.3d at 376.
\item Id.
\item Id.
\item Id.
\item \textit{Ford}, 22 F.3d at 376.
\item Id.
\item Id.
\item Id. at 377.
\item Id. at 376-77.
\item \textit{Ford}, 22 F.3d at 377 (citing \textit{United States v. Silvestri}, 787 F.2d 736, 742 (1st Cir. 1986)).
\end{enumerate}
\end{flushleft}
Silvestri had also directly addressed the question of an active pursuit requirement.\textsuperscript{233} There, an unlawful search of a house and garage had occurred while two officers, who were unaware of the search, prepared a search warrant application and affidavit.\textsuperscript{234} (The search occurred between 3:00 and 3:30 a.m., and the warrant did not arrive until 11:30 a.m.)\textsuperscript{235} Upon the execution of the warrant, the premises were searched and a large quantity of drugs was seized.\textsuperscript{236} Defendant’s motion to suppress the evidence was denied on the basis of inevitable discovery, and as noted in Ford, the court of appeals considered three questions before affirming the lower court: “[A]re the legal means truly independent; are both the use of the legal means and the discovery by that means truly inevitable; and does the application of the inevitable discovery exception either provide an incentive for police misconduct or significantly weaken fourth amendment protection?”\textsuperscript{237} In Ford, the court noted that in Silvestri the defendant had specifically argued “that, in order to be truly independent, the legal means (i.e. the search warrant) must be underway at the time of the discovery; in other words, the warrant process must be ongoing at the time of the alleged police misconduct or illegal search.”\textsuperscript{238} Silvestri had rejected “such a strict approach.”\textsuperscript{239} Ford reaffirmed that conclusion with its quotation of Silvestri’s reasoning:

Rather than setting up an inflexible [sic] “ongoing” test such as the Fifth Circuit’s, we suggest that the analysis focus on the questions of independence and inevitability and remain flexible enough to handle the many different fact patterns which will be presented. . . . In cases where a warrant is obtained, however, the active pursuit requirement is too rigid. On the other hand, a requirement that probable cause be present prior to the illegal search ensures both independence and inevitability for the prewarrant search situation.\textsuperscript{240}

The court in Ford added that “[u]nder this flexible standard, independence and inevitability remain the cornerstones of the analysis. The specific facts of each case

\begin{itemize}
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Id.
\item \textsuperscript{235} Silvestri, 787 F.2d at 737-38.
\item \textsuperscript{236} Id. at 738-39. Specifically, “the police seized 99 bales of marijuana from the garage, a truck registered to defendant containing 1489 pounds of hashish, a block of hashish in his house, and various documents.” Id. at 738.
\item \textsuperscript{237} Id. at 744.
\item \textsuperscript{238} Ford, 22 F.3d at 377.
\item \textsuperscript{239} Id.
\item \textsuperscript{240} Id. (quoting Silvestri, 787 F.2d at 746).
\end{itemize}
will determine the requirements necessary to prove independence and inevitability.\textsuperscript{241}

The court then went on to address specific objections raised by Ford under the Silvestri analysis.\textsuperscript{242} The first was concerned with the decision to seek a warrant, and was reminiscent of one of the questions posed by the Supreme Court when it remanded for a determination of the independent source issue in Murray.\textsuperscript{243} (Murray had been decided after Silvestri.)

[Defendant] argues that the search warrant was not sufficiently independent of the warrantless entry into his home. He argues that while Silvestri held that the warrant process did not have to be ongoing, "it is implicit that Silvestri establishes as at least a minimum requirement, the decision to seek a warrant [must] be made prior to the time that the illegal search took place and that the decision in no way be influenced or accelerated by information gained from the illegal search."\textsuperscript{244}

The government did not dispute this reading of Silvestri, but argued that a decision was made prior to the search.\textsuperscript{245} Somewhat puzzling was the court's response that, "We have carefully reviewed Silvestri and find no language to support Dr. Ford's argument. Indeed, Silvestri rejected a bright line rule in favor of a flexible analysis."\textsuperscript{246} It later noted, however, that the record demonstrated that the decision to request a warrant was made before the warrantless entry occurred.\textsuperscript{247} Ford unsuccessfully argued that the warrant was insufficiently independent because the affidavit contained references to the findings made during the protective sweep of his home.\textsuperscript{248} The court concluded that, despite the tainted information in the affidavit, probable cause existed.\textsuperscript{249} Finally, in affirming the denial of the motion to suppress, the court of appeals concluded that application of the inevitable discovery doctrine did not threaten the Fourth Amendment's protection or encourage police misconduct.\textsuperscript{250}

While Silvestri and Ford represent a strong view on the undesirability of a stringent active pursuit requirement and continue to be influential in that area, a separate aspect of both cases appears to be contrary to an emerging trend. Increasingly, it is noted that permitting the introduction of the fruits of a warrantless

\textsuperscript{241} Id.
\textsuperscript{242} Id. at 378.
\textsuperscript{243} Ford, 22 F.3d at 377.
\textsuperscript{244} Id. at 378 (quoting Appellant's Brief at 10).
\textsuperscript{245} Id. at 378 n.3.
\textsuperscript{246} Id. at 378.
\textsuperscript{247} Id.
\textsuperscript{248} Ford, 22 F.3d at 378-79.
\textsuperscript{249} Id. at 379-80.
\textsuperscript{250} Id. at 380-81.
search upon probable cause, on the ground that a warrant would have been issued later, threatens to undermine the warrant requirement.\textsuperscript{251} Courts have become more reluctant to permit police to rely on a prospective search warrant as a source of inevitable discovery.\textsuperscript{252}

Other circuits have been more terse in their criticism of an active pursuit requirement. In \textit{United States v. Boatwright},\textsuperscript{253} in an opinion written by then judge, now Justice, Kennedy, the Ninth Circuit expressly rejected that prerequisite. Defendant Rickie Boatwright was convicted for possession of two unregistered sawed-off shotguns which had been seized during a warrantless search at his brother's residence.\textsuperscript{254} His brother, Rocky, who was on probation for producing methamphetamine, had been subjected to a search pursuant to the terms of his probation agreement. The probation officer, accompanied by police, went to Rocky's residence at 1024 Maple Drive.\textsuperscript{255} Upon their arrival they noticed two other structures near the house: a converted garage bearing the address 1024A Maple Drive and a trailer which was unattached to either the house or the former garage.\textsuperscript{256}

The officers called for Rocky, who exited the converted garage at 1024A and walked towards the house.\textsuperscript{257} The visitors noticed a strong chemical smell emanating from him, but lacked the experience to identify its nature.\textsuperscript{258} The officers decided to search the converted garage because the same odor was detected in that area.\textsuperscript{259} When the officers entered, they discovered a partial laboratory and a closed door.\textsuperscript{260} They exited 1024A, asked Rocky if anyone else was inside, “reentered, opened the rear door and discovered a small room where Rickie Boatwright was stacking items on top of two sawed-off shotguns.”\textsuperscript{261} The weapons were seized and the defendant was arrested.\textsuperscript{262}

After the arrest, the officers lawfully conducted a probation search of the house at 1024, resulting in the discovery of papers pertaining to the purchase of chemicals,

\begin{footnotes}
\item[251] Golden, \textit{supra} note 143, at 115-16 (characterizing \textit{Ford} as an approach which gives wide deference to the police).
\item[252] \textit{Id.} at 116. On the problem posed by reliance upon a prospective warrant, see generally \textit{Inevitable Discovery Doctrine Today}, \textit{supra} note 143, at 112-119, where the author characterizes \textit{Ford} as representing an approach on this issue which gives extreme deference to the police, \textit{Id.} at 113, and further concludes that “[b]ecause the police ... never applied for a warrant before searching, it is difficult to call the reasoning ... anything but mere speculation.” \textit{Id.} at 116.
\item[253] 822 F.2d 862 (9th Cir. 1987).
\item[254] \textit{Id.} at 863-64.
\item[255] \textit{Id.}
\item[256] \textit{Id.} at 863.
\item[257] \textit{Boatwright}, 822 F.2d at 863.
\item[258] \textit{Id.}
\item[259] \textit{Id.}
\item[260] \textit{Id.}
\item[261] \textit{Id.}
\item[262] \textit{Boatwright}, 822 F.2d at 863.
\end{footnotes}
materials on drug formulas, and ammunition. A subsequent search of the trailer revealed a working methamphetamine lab. The officers then informed the Drug Enforcement Administration, and a special agent responded. That same agent later stated in his affidavit that, based upon the previous discoveries in the house and trailer, he would have also sought a search warrant for the converted garage. The government's inevitable discovery argument was predicated upon this assertion, but the court squarely rejected this argument. It first addressed whether the inquiry required active pursuit:

At the outset, however, we reject the restriction on the inevitable discovery doctrine offered by the appellant. He asserts that the doctrine applies only if two independent investigations or searches were in progress, one of which was lawful and would have uncovered the information...

[T]hough the existence of two independent inquiries in progress comports with the facts of Nix v. Williams ... the rationale of Nix is not so limited.

There will be instances where, based on the historical facts, inevitability is demonstrated in such a compelling way that operation of the exclusionary rule is a mechanical and entirely unrealistic bar, preventing the trier of fact from learning what would have come to light in any case. In such cases, the inevitable discovery doctrine will permit introduction of the evidence, whether or not two independent investigations were in progress. The existence of two independent investigations at the time of discovery is not, therefore, a necessary predicate to the inevitable discovery exception.

Here, however, the court reasoned that no facts making discovery inevitable arose from circumstances other than those disclosed by the illegal search, and no independent basis for discovery was established. Moreover, the court added it was "most unrealistic" to assume that Rickie and the shotguns would have remained while the police awaited a warrant.

263. Id.
264. Id. at 863-64.
265. Id. at 864.
266. Id.
267. Boatwright, 822 F.2d at 864.
268. Id. In United States v. Ramirez-Sandoval, 872 F.2d 1392, 1399 (9th Cir, 1989) (citations omitted), recalling Boatwright's approach to active pursuit, the court added, "The government can meet its burden by establishing that, by following routine procedures, the police would inevitably have uncovered the evidence."
269. Boatwright, 822 F.2d at 864-65.
270. Id. at 865.
The Court of Appeals for the Fourth Circuit, in *United States v. Thomas*, adopted Boatwright’s approach to active pursuit as its own, stating that its rejection of a “blanket” rule constituted “the most sensible examination of inevitable discovery....” In *Thomas*, the court declined to accept the government’s claim of inevitable discovery, holding that a hotel’s observations of suspicious behavior would not have provided an independent basis for discovering the illegally obtained proceeds of a bank robbery. Trying to determine the hotel’s actions and whether the hotel would have investigated the behavior further was too speculative.

The Sixth Circuit, while certainly among those which have rejected an active pursuit requirement, has nevertheless taken an interest in examining what independent actions the authorities have actually performed. The first case in the circuit to directly address the issue of active pursuit, *United States v. Kennedy*, remains the starting point for any discussion of its treatment of the question. In *Kennedy*, two locked pieces of luggage owned by the defendant had been mislabeled and misdirected by Northwest Airlines. Kennedy’s destination was Miami, and when his suitcases appeared at National Airport in Washington, D.C. it was soon discovered that they did not belong to the Washington passenger for whom they were tagged. The airline’s policy was to search lost luggage for identification. Because of its combination lock, an employee was unable to open the black suitcase, but was successful in opening the blue suitcase, which contained $176,000. The employee promptly notified the airport police.

Two police officers responded, one of whom was suspicious of the black locked suitcase because it exuded a strong odor of perfume. Concerned that the luggage contained explosives, the officer x-rayed the bag—only to see unidentifiable objects inside. While arrangements were being made to transport the suitcases to the police station, the airline employee decided to open the black suitcase after obtaining permission from her supervisor to do so. It was, however, the officer who opened the bag with a hammer and screwdriver after obtaining permission from his sergeant. The suitcase contained rectangular packages wrapped in duct tape which

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271. 955 F.2d 207 (4th Cir. 1992).
272. Id. at 210.
273. Id. at 209-11.
274. Id. at 210.
275. 61 F.3d 494 (6th Cir. 1995).
276. Id. at 495-96.
277. Id.
278. Id. at 496.
279. Id.
280. *Kennedy*, 61 F.3d at 496.
281. Id. at 496.
282. Id.
283. Id.
284. Id.
the officer did not open.\textsuperscript{285} The Drug Enforcement Administration (DEA) agents suspected from the packages' appearance and perfumed odor that they contained drugs, and they conducted a field test on the contents of one package, determining that it contained 17 kilograms of cocaine and 77 grams of cocaine base.\textsuperscript{286}

When the airline learned that defendant had arrived in Miami and was looking for his suitcases, DEA agents set up a "controlled delivery" for the next day.\textsuperscript{287} Kennedy was arrested when he picked up the suitcases and acknowledged ownership.\textsuperscript{288} He also confessed that he had been trafficking in drugs for several months.\textsuperscript{289} Another $225,000 was later found in his home when it was searched with his consent.\textsuperscript{290} Kennedy was indicted on drug charges, and moved to suppress the cocaine taken from the locked black suitcase, as well as any evidence obtained as a result of that search.\textsuperscript{291} The motion was denied on the ground of inevitable discovery, and he entered a conditional guilty plea to conspiracy.\textsuperscript{292}

On appeal, Kennedy argued that the government had failed to meet its burden in establishing that the cocaine would lawfully have been discovered.\textsuperscript{293} He argued that "his motion to suppress should have been granted because, at the time of the search, there was no independent investigation underway nor [were] there historical facts demonstrating that a private search was inevitable."\textsuperscript{294} The court noted that the latter issue had divided the federal circuits, and concluded:

\begin{quote}
the inevitable discovery exception to the exclusionary rule applies when the government can demonstrate either the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence or other compelling facts establishing that the disputed evidence inevitably would have been discovered. Therefore, we hold that an alternate, independent line of investigation is not required for the inevitable discovery exception to apply.\textsuperscript{295}
\end{quote}

The court then stated that while there had been no ongoing independent investigation at the time of the illegal search of the black suitcase, there were "compelling facts" to

\begin{itemize}
\item \textsuperscript{285} \textit{Kennedy}, 61 F.3d at 496.
\item \textsuperscript{286} \textit{Id}.
\item \textsuperscript{287} \textit{Id}.
\item \textsuperscript{288} \textit{Id}.
\item \textsuperscript{289} \textit{Id}.
\item \textsuperscript{290} \textit{Kennedy}, 61 F.3d at 496.
\item \textsuperscript{291} \textit{Id}.
\item \textsuperscript{292} \textit{Id} at 496-97.
\item \textsuperscript{293} \textit{Id} at 497.
\item \textsuperscript{294} \textit{Id} at 498 (footnote omitted).
\item \textsuperscript{295} \textit{Kennedy}, 61 F.3d at 499-500 (emphasis in original).
\end{itemize}
uphold the district court’s conclusion that the cocaine would inevitably have been
 discovered by Northwest Airlines’ routine identification search. 296

In United States v. Ford, 297 the Court of Appeals for the Sixth Circuit had
 occasion to address the manner in which it would examine the “compelling facts”
discussed in Kennedy as an alternative to an independent investigation. 298 Don Ford
had been convicted for filing a false income tax return, and he and his wife had been
 convicted for gambling and money laundering offenses. 299 The inevitable discovery
issue arose from the seizure of documents obtained during an improper search for
evidence of an illegal bingo operation, and those documents had provided the basis
for the tax conviction. 300 The search was conducted pursuant to a state warrant,
which was based upon an affidavit alleging that the police had observed violations of
the statutory requirements for charitable gambling, and which also revealed facts
indicating that the couple had diverted the proceeds from allegedly charitable bingo
games. 301 The warrant was challenged for lack of particularity with regard to the
items to be seized and because the documents were included within its
overbreadth. 302 When Ford moved to suppress the papers, the government argued:

that it needed all Ford’s financial documents in order to determine his
‘overall financial picture’. . . . This could require law enforcement
officials to go back ‘ten years or more.’ Therefore [the warrant] . . .

296. Id. at 500.
297. 184 F.3d 566 (6th Cir. 1999).
298. Id. at 577.
299. Id. at 571.
300. Id. at 573.
301. Id. at 574.
302. Ford, 184 F.3d at 574. A narrowing construction of the warrant which would not
 have included the documents was unsuccessfully argued in the alternative. Id. According to
the court of appeals:

The warrant contained ten clauses listing items to be seized. Some of the
 clauses were expressly limited by reference to illegal gambling or bingo.
 However, some clauses had no such limitation, in particular the category
authorizing seizure of: ‘Books, records, receipts, bank statements and records,
 money drafts, letters of credit, money orders and cash checks, money wrappers,
 passbooks, bank checks, automatic teller machine receipts, Western Union
 receipts, safety deposit box keys, and other items evidencing the obtaining,
 secreting, transfer and/or concealment of assets and the obtaining, secreting,
 transfer, concealment and or expenditure of money.’

The police executing the warrant seized several file cabinets and eleven
 boxes of documents. The officer in charge testified at the suppression hearing that
they seized ‘basically most of the documents’ at 2902 South Seventh. Another
 officer agreed that they ‘pretty much took everything.’

Id.
properly permitted seizure of all financial documents in the buildings whether or not related to the bingo operations in time or subject matter.\textsuperscript{303}

The district court held that the affidavit ""implicitly established"" that defendant's establishment was ""permeated with fraud,"" and that the warrant was valid.\textsuperscript{304} The court of appeals disagreed.\textsuperscript{305} The court found that the warrant authorized ""a broader search than was reasonable given the facts of the affidavit...""\textsuperscript{306}

The government also argued that, although the warrant may have been overbroad and consequently illegal, the incriminating documents would inevitably have been discovered in the course of the investigation of Ford's 1988 tax return.\textsuperscript{307} Citing Kennedy, the court observed that the government ""can satisfy its burden by showing that routine procedures that police would have used regardless of the illegal search"" would have uncovered the evidence.\textsuperscript{308} It added: ""However, if the defendant shows that the police were not in fact following these routine procedures in the particular case, the government's evidence about what the police would have done must bow to contrary evidence about what they actually did.""\textsuperscript{309}

Unlike the district court, which had credited an uninvolved IRS attorney's testimony that she would have eventually sought out the documents that had been seized, the appellate court concluded that the IRS would not have done so.\textsuperscript{310} Rather, when, before the search, the IRS had issued a notice of deficiency for the tax year of 1988, Ford petitioned for relief from the U.S. Tax Court and contended that the IRS had incorrectly disallowed a ""net operating loss carryforward.""\textsuperscript{311} The IRS had then filed an answer conceding the case.\textsuperscript{312} Finding the testimony as to what the IRS investigation would have pursued was inconsistent with what it actually did, the court of appeals concluded that ""the record [did] not substantiate the government's claim that it was hot on the trail of the disputed evidence.""\textsuperscript{313}

The facts relied upon by the Sixth Circuit in Ford were compelling, to be sure. Nevertheless, Ford also represents a heightened awareness in the Sixth Circuit that so-called ""routine"" procedures must be closely examined under the facts of each case to determine whether the application of the inevitable discovery doctrine can truly be

\begin{itemize}
\item \textsuperscript{303} Id. at 574-75.
\item \textsuperscript{304} Id. at 575.
\item \textsuperscript{305} Id. at 576.
\item \textsuperscript{306} Id.
\item \textsuperscript{307} Ford, 184 F.3d at 577.
\item \textsuperscript{308} Id. (citing United States v. Kennedy, 61 F.3d 494, 499 (6th Cir. 1995)).
\item \textsuperscript{309} Id. (emphasis in original).
\item \textsuperscript{310} Id. at 577-78.
\item \textsuperscript{311} Id.
\item \textsuperscript{312} Ford, 184 F.3d at 578. The government's answer stated: ""[R]eview of taxpayer's records, not available to respondent's agent at the time notice was issued, has persuaded respondent that petitioner's 1988 return was substantially correct when filed."" Id.
\item \textsuperscript{313} Id.
\end{itemize}
justified. In examining governmental assertions in light of what the authorities were actually doing at the time of the illegality, Ford represents the court's unwillingness to greet the suspension of the exclusionary rule with a wink and a nod. Indeed, it constitutes a recognition that the need for the "demonstrated historical facts" referred to in Nix is to be taken seriously, even in light of an official assertion that a procedure is predictable.\textsuperscript{314} The inclination on the part of some other circuits to implement an active pursuit requirement appears to be motivated by the same goal. This will be discussed in the following section.

V. ENDORSEMENT OF AN ACTIVE PURSUIT REQUIREMENT AMONG THE CIRCUITS

An examination of the discussion of active pursuit among those circuits employing such an approach reveals considerably more variety in the description and application of their requirements than the other circuits acknowledge. They treat the issue in several ways, and their approaches range from stating that an ongoing pursuit is a fixed prerequisite for a finding of inevitable discovery to an express or implied policy which occasionally may permit its avoidance.

The Second and Eleventh Circuits have been in the former category. The Second Circuit's grounding of its active pursuit doctrine in the language of Nix, as well as in its facts, is set forth most clearly in United States v. Eng.\textsuperscript{315} In Eng, defendant had been convicted of three counts of tax evasion, based upon detailed and complex records that Eng claimed had been derived from the products of an unlawful search.\textsuperscript{316} His motion to suppress the evidence had been denied on grounds of inevitable discovery, and while the disposition in the court of appeals was to remand the case for particularized findings on each piece of evidence, the court articulated its policy concerning both the broad inevitable discovery exception and the question of an ongoing investigation.\textsuperscript{317}

Before the unlawful search, in early 1989, Eng was investigated by the DEA and the IRS for suspected money laundering and narcotics offenses.\textsuperscript{318} IRS Agent Interdonato, who was in charge of the case, employed a method of inquiry which based a tax evasion prosecution "on a comparison between the taxpayer's income and non-taxable resources, such as gifts and loans, and the taxpayer's expenditures."\textsuperscript{319} This required a thorough search of assets and cash flows.\textsuperscript{320} Before the unlawful search, Interdonato had ascertained the existence of the following assets: four bank

\textsuperscript{314} Id. at 577.
\textsuperscript{315} 971 F.2d 854 (2d Cir. 1992).
\textsuperscript{316} Id. at 855.
\textsuperscript{317} Id. at 856.
\textsuperscript{318} Id.
\textsuperscript{319} Id.
\textsuperscript{320} Eng, 971 F.2d at 856.
accounts (without account numbers); a residence in Staten Island with accompanying title and mortgage information; a condominium in New York City; and a complex interest in a restaurant and real estate at 26 Bowery in New York City.\textsuperscript{321}

Pursuant to an indictment charging him with operating a continuing criminal enterprise, money laundering, and narcotics offenses, Eng was arrested on October 18.\textsuperscript{322} On the same day, the building at 26 Bowery and another of Eng’s businesses, the French Ice Cream Parlor, were seized.\textsuperscript{323} Eng had not, as yet, been charged with tax evasion.\textsuperscript{324} In a warrantless search, Eng’s personal safe in the French Ice Cream Parlor was searched and items were seized.\textsuperscript{325} The items included documents revealing Eng’s bank account numbers, documents relating to the location, purchase, and ownership of Eng’s real estate and other holdings (including a house and boat in Florida), and other financial records including the checkbook of a corporation called World Express International, Inc.\textsuperscript{326} As a result of this material, Interdonato subpoenaed bank records, documents, and financial records from the principals and attorneys of Eng’s business enterprises, performed title searches, and investigated the boat purchase.\textsuperscript{327} One subpoena, based upon the World Express checkbook, revealed transfers of about $1 million into the account, and subsequent subpoenas revealed that the sources of the money were parties in Hong Kong and “that World Express . . . was the ultimate principal behind the 26 Bowery building.”\textsuperscript{328}

The evidence led to three additional tax evasion charges for 1986 through 1988.\textsuperscript{329} At trial, the government introduced evidence which included information obtained prior to the illegal search, records obtained during the search, and documents obtained by post-search subpoenas.\textsuperscript{330} Eng moved to suppress the evidence and the district judge denied the motion, resting his ruling upon inevitable discovery.\textsuperscript{331} At trial, Eng was convicted of tax evasion, but was acquitted of the other charges.\textsuperscript{332}

Before remanding for particularized findings concerning each item of evidence, the court of appeals discussed its view of the inevitable discovery doctrine. It focused at first upon \textit{Nix’s} reference to “demonstrated historical facts.”

\begin{itemize}
\item \textsuperscript{321} \textit{Id.} at 856-57.
\item \textsuperscript{322} \textit{Id.} at 857.
\item \textsuperscript{323} \textit{Id.}
\item \textsuperscript{324} \textit{Id.}
\item \textsuperscript{325} \textit{Eng}, 971 F.2d at 857.
\item \textsuperscript{326} \textit{Id.}
\item \textsuperscript{327} \textit{Id.} at 857-58.
\item \textsuperscript{328} \textit{Id.} at 858.
\item \textsuperscript{329} \textit{Id.}
\item \textsuperscript{330} \textit{Eng}, 971 F.2d at 858.
\item \textsuperscript{331} \textit{Id.}
\item \textsuperscript{332} \textit{Id.} at 859.
\end{itemize}
The Supreme Court has stated that proof of inevitable discovery "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings." Nix, 467 U.S. at 444 n.5 (emphasis added). Indeed, the facts of cases applying the inevitable discovery doctrine suggest that proof of inevitability is made more convincing when the areas of the search or investigation are well-defined, the government effort is planned and methodical, and a direct causal relationship and reasonably close temporal relationship exist between what was known and what occurred prior to the government misconduct and the allegedly inevitable discovery of the evidence. See, e.g., Nix... 

The court rejected Eng's assertion that the government should be foreclosed from relying upon its subpoena power as the basis for a successful inevitable discovery claim. It stated that "where the government can demonstrate a substantial and convincing basis for believing that the requisite information would have been obtained by subpoena... it might meet the burden of proving inevitable discovery." 

The court then addressed the requirements of inevitable discovery to be examined on remand, and returned to the above-quoted language of Nix:

[I]nevitable discovery analysis logically must begin with the progress of the investigation at the time of the government misconduct. This point of departure is fixed by the requirement that an inevitable discovery inquiry focus on "demonstrated historical facts" so as to keep speculation to an absolute minimum, see Nix, 467 U.S. at 444 n.5, although by its nature

333. Id. (citations omitted) (emphasis in original).
334. Id. at 860.
335. Eng, 971 F.2d at 860. The court did not deviate from the standard of proof by a preponderance of the evidence. Id. It urged caution in the assessment of the government's argument, however:

[S]pecial care is required on the part of a district court when the government relies on the subpoena power. While we decline to draw a bright line, it is essential that there be a substantial degree of directness in the government's chain of discovery argument, rather that a hypothesized "leapfrogging" from one subpoena recipient to the next until the piece of evidence is reached. Further, the government must show that both issuance of the subpoena, and a response to the subpoena producing the evidence in question, were inevitable. Particular care is appropriate where, as here, subpoenas are issued after or at the time of the unlawful search.

Id. For a thoughtful discussion of this aspect of Eng, see Anthony J. Girese, They Would Have Found It Anyway: United States v. Eng and the "Inevitable Subpoena," 59 BROOK. L. REV. 461, 492-502 (1993), viewing the opinion as "break[ing] new ground." Id. at 502.
inevitable discovery analysis inevitably involves some degree of speculation. 336

The court then expressed its concern that the "tax evasion investigation was not sufficiently active or developed" before the search of the safe, and emphasized the need for an independent and untainted investigation that has not been "trigger[ed]" or "catalyzed" by unlawfully obtained information. 337 The court then observed that in United States v. Pimentel, 338 discussed above in conjunction with the issue of primary evidence, it had taken "specific note that the audit of the contractor's files was active and ongoing at the time of the government misconduct." 339 It added that it "[had] declined to adopt a 'flexible test' allowing the government to meet its burden of proof without showing that an alternate line of investigation [was] being actively sought or pursued at the time of the government misconduct." 340 (Specifically, Pimentel had said that because of the active audit there was "no need to reach out and adopt" that approach. 341) Eng then squarely endorsed an active pursuit requirement:

We agree with the Fifth Circuit's observation that:
[T]he alternate means of obtaining the evidence must at least be in existence and, at least to some degree, imminent, if yet unrealized. If the inevitable discovery exception can be applied only on the basis of the [government's] mere intention to use legal means subsequently, the focus of the inquiry would hardly be on historical fact. 342

The Second Circuit thus regards the active pursuit requirement as a means of implementing Nix's assertion that an inevitable discovery finding is the product of demonstrable circumstances, reflecting an untainted course of investigation. The adoption of the requirement reflects its judgment that the shaping of the inevitable discovery exception requires some grounding in a concrete prerequisite that can effectively be implemented. Accordingly, in Eng, the court added that "[i]f the evidence demonstrates that an active and ongoing investigation of Eng of the kind we have required was in progress at the time of the unlawful search, the district court's next task must be to consider each piece of evidence challenged by Eng." 343 On remand, the district court's lengthy findings led it to conclude that, with few

336. Eng, 971 F.2d at 861 (citation omitted).
337. Id.
338. 810 F.2d 366 (2d Cir. 1987).
339. Eng, 971 F.2d at 861.
340. Id. (quoting Pimentel, 810 F.2d at 369).
341. Pimentel, 810 F.2d at 369.
342. Eng, 971 F.2d at 861 (quoting United States v. Cherry, 759 F.2d 1196, 1205 n.10 (5th Cir. 1985)).
343. Id. at 862.
exceptions, the items of evidence were admissible, and its order was affirmed. As thus developed in the Second Circuit, the active pursuit requirement is unqualified, and while a few post-Eng opinions, in their failure to address the issue, present some questions concerning the rigor of its implementation, the doctrine articulated in Eng is straightforward.

The Eleventh Circuit has expressed a similar view requiring active pursuit, finding the origins of its approach in its opinions that preceded Nix. United States v. Satterfield, decided shortly after Nix, interpreted the Supreme Court’s opinion in light of the circuit’s earlier formulation of the inevitable discovery doctrine. It should be noted that the facts of the case involved an unsuccessful governmental argument that a subsequent warrant rendered a seizure inevitable, prompting the court to state that it was unwilling to “destroy the requirement that a warrant for the search of a home be obtained before the search takes place.” The court’s discussion of its earlier cases and the breadth of its statement of an active pursuit requirement make it clear that its endorsement of the rule extended well beyond its misgivings about official reliance upon a subsequent warrant.

Three defendants had been convicted of kidnapping during a trial in which they were accused of abducting the girlfriend of their murder victim in Georgia and forcing her to accompany them to Alabama. The government’s case indicated that the victim had escaped and called the police from the house of Satterfield’s neighbor,

344. See United States v. Eng, 997 F.2d 987, 994-95, 998 (1993). While money orders used to pay fines for Eng’s parking and building violations and the information concerning his ownership of the boat would not inevitably have been discovered, the admission of that evidence was harmless. Id.

345. In United States v. Mendez, 315 F. 3d 132 (2d Cir. 2002), for example, the court expressed doubts about whether an initial search of an automobile was a valid inventory search, but found it unnecessary to address the issue since it concluded that a subsequent inventory pursuant to standard, unwritten police policy would have revealed the presence of a handgun. The defendant had been arrested in a nearby store before the questionable search, and no one was available to take custody of his car which was parked in a high traffic area. Id. at 134. Yet the police officer did not order that the car be towed and impounded until after the search. Id. at 139. While the basis for a routine impoundment might have been present at the time of the search, the court did not address the question of active pursuit. Id. at 134, 139.

In United States v. Malik, 16 F. 3d 45, 51 (2d Cir. 1994), after concluding that it was questionable whether the defendant had expectations of privacy in his jail cell which would support his Fourth Amendment challenge to its search, the court added in dictum that the seized handwriting samples could in any event have been “compelled to be produced,” implicitly employing an inevitable discovery analysis. No mention was made of an ongoing effort to do so.

346. 743 F.2d 827, 846 (11th Cir. 1984).

347. Id. at 846. For discussion of the potential for undermining the warrant requirement posed by reliance upon a warrant as a basis for inevitable discovery, see supra note 258 and accompanying text.

348. Satterfield, 743 F.2d at 831-32.
and that she had told the responding deputy that before her abduction she had witnessed a murder in which the killers had used a shotgun. The deputy also testified that she stated that one of the kidnappers was next door with a woman, and another was no longer present. The deputy contacted Georgia authorities to verify the killing, called for police backup, and about thirty minutes later three deputies went to Satterfield’s house. When there was no response to the knock and announcement of their presence, they entered the house without a warrant. The deputy testified that he did not seek a search or arrest warrant because the warrant process would probably have taken several hours, and by then the occupants might have escaped.

The police discovered Satterfield and his girlfriend in the bedroom. They arrested him and a brief search of the room resulted in the seizure of a pair of trousers with shotgun shells in the pockets, a bloodstained pillow, and a torn bloody shirt. The two were taken outside, and after the officers confirmed that no other suspects were present they continued to search the house. About ten minutes later they found a shotgun beneath the cushions of a sofa in a room adjacent to the bedroom. A search warrant for the house was issued later, and the two co-defendants were arrested within days.

Before trial, Satterfield’s motion to suppress the shotgun was denied. Examining the issue, the court of appeals stated that probable cause existed to believe that a shotgun was in the house because of the victim’s statement and the discovery of bloodstained items on the premises. An immediate search without a warrant was not justified by exigent circumstances, and the shotgun was illegally seized. The court went on to respond to the government’s position “that the shotgun would have been found in any event because the police obtained a valid warrant for the search of Satterfield’s residence several hours after the illegal search was made.” The warrant authorized a search for “bloodstained sheets and clothing,” based upon the victim’s earlier observations. The government contended that the executing

349. *Id.*
350. *Id.* at 843.
351. *Id.* at 832, 843.
352. *Id.*
353. *Satterfield*, 743 F.2d at 843.
354. *Id.* at 832.
355. *Id.* at 832, 843.
356. *Id.* at 832.
357. *Id.* at 832, 843.
358. *Satterfield*, 743 F.2d at 832, 845.
359. *Id.* at 843.
360. *Id.*
361. *Id.* at 843-45.
362. *Id.* at 845.
officers would have looked for such items under the sofa cushions and discovered the shotgun.\textsuperscript{364} 

The court stated that "[b]ecause the Nix decision is consistent with the previous case law of this circuit, we look to our earlier decisions for guidance" in determining whether the exception is applicable.\textsuperscript{365} The court reiterated the requirements set forth in a former Fifth Circuit opinion, \textit{United States v. Brookins}.\textsuperscript{366} There, an illegal interrogation of the defendant had revealed the identity of an important prosecution witness, and the court held that the testimony of the witness was nevertheless admissible.\textsuperscript{367} In \textit{Satterfield}, the court characterized the standard used in \textit{Brookins} with approval:

To qualify for admissibility, there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued \textit{prior} to the occurrence of the illegal conduct.\textsuperscript{368}

The Eleventh Circuit noted that in \textit{Brookins}, "police inquiries that were already 'set in motion' probably would have disclosed the witness' identity."\textsuperscript{369} Likewise, in another early case discussed approvingly, \textit{United States v. Roper},\textsuperscript{370} the Court of Appeals for the Eleventh Circuit had held the active pursuit requirement to be satisfied when the defendant had been arrested in a motel hallway and he told police of a gun's location in his room after he had been interrogated in violation of \textit{Miranda}.\textsuperscript{371} The gun's admission was permissible because the room could immediately be searched incident to arrest, after exigent circumstances justified the defendant's return to his room.\textsuperscript{372} That search was imminent when the location of the gun was learned during the interrogation.\textsuperscript{373} In \textit{Satterfield}, the court distinguished the case from \textit{Brookins} and \textit{Roper}:

[T]he Government had not yet initiated the lawful means that would have led to the discovery of the evidence. Unlike both \textit{Brookins} and \textit{Roper}, at the time the Government violated Satterfield's fourth amendment right, it did not possess the legal means that would have led to the discovery of the

\begin{thebibliography}{9}
\bibitem{364} Id.
\bibitem{365} Id. at 846.
\bibitem{366} 614 F.2d 1037 (5th Cir. 1980).
\bibitem{367} \textit{Satterfield}, 743 F.2d at 846; \textit{Brookins}, 614 F.2d at 1044-49.
\bibitem{368} \textit{Satterfield}, 743 F.2d at 846 (citing \textit{Brookins}, 614 F.2d at 1042 n.2, 1048).
\bibitem{369} Id. at 846.
\bibitem{370} 681 F.2d 1354 (11th Cir. 1982).
\bibitem{371} \textit{Satterfield}, 743 F.2d at 846; \textit{Roper}, 681 F.2d at 1357-59.
\bibitem{372} \textit{Satterfield}, 743 F.2d at 846.
\bibitem{373} Id.
\end{thebibliography}
shotgun. That means did not exist until several hours later when the warrant was obtained.\footnote{Id.}

While the inevitable discovery doctrine did not authorize the introduction of the shotgun, the court found that the error had been harmless.\footnote{Id. at 847.} Since Satterfield, the Eleventh Circuit has continued to articulate a policy requiring the ongoing pursuit of evidence at the time of constitutional illegality. In United States v. Drosten, it found the testimony of a witness who was discovered during the illegal entry of an apartment to be improper.\footnote{819 F.2d 1067, 1071 (11th Cir. 1987).} Before the entry, the police had no information connecting him with the investigation, and were not pursuing leads which would have led to his identity and testimony.\footnote{Id.} The government argued that the surveillance of the defendant’s apartment would have led to the witness’s detention and questioning when he left, but the court stated that this “mere surveillance” was insufficient.\footnote{Id. at 1072.} In United States v. Khoury, the court also rejected the possibility of an inevitable discovery claim, finding reversible error in the introduction of the contents of a notebook illegally searched at a time when no lawful means of ascertaining its contents were underway.\footnote{United States v. Khoury, 901 F.2d 948, 960-61 (11th Cir. 1990).} The search occurred after an inventory, and the court suggested that the seeking of a search warrant might have constituted sufficient active pursuit.\footnote{Id.} This suggestion concerning an active warrant application at the time of an illegal search provides a clear contrast with the Eleventh Circuit’s view of a warrant sought only after a warrantless search has occurred.\footnote{Id.}

\footnote{374. Id.}  
\footnote{375. Id. at 847.}  
\footnote{376. 819 F.2d 1067, 1071 (11th Cir. 1987).}  
\footnote{377. Id.}  
\footnote{378. Id. The improper testimony was, however, found to be merely cumulative and corroborative of the other evidence of guilt, and its introduction was held to be harmless. Id. at 1072.}  
\footnote{379. United States v. Khoury, 901 F.2d 948, 960-61 (11th Cir. 1990).}  
\footnote{380. Id.}  
\footnote{381. The Court of Appeals for the Second Circuit has had occasion to address the impact upon an active pursuit analysis when police are in the process of obtaining a warrant at the time of an illegal search. In United States v. Cabassa, 62 F.3d 470 (2d Cir. 1995), it observed:}  

In cases in which a claim of inevitable discovery is based on expected issuance of a warrant, the extent to which the warrant process has been completed at the time those seeking the warrant learn of the search is of great importance. First, the extent of completion relates directly to the question of whether a warrant would in fact have issued; ultimate discovery would obviously be more likely if a warrant is actually obtained. Second, it informs the determination of whether the same evidence would have been discovered pursuant to the warrant. If the process of obtaining a search warrant has barely begun, for example, the inevitability of discovery is lessened by the probability, under all the circumstances of the case, that the evidence in question would no longer have been at the location of the illegal search when the warrant actually issued.
While the Court of Appeals for the Eighth Circuit has articulated an active pursuit requirement which is described in terms similar to those of the Second and Eleventh Circuits, it has also made it clear that an expression of the police’s intention to pursue an alternative investigation can be sufficient to satisfy the prerequisite. Its basic policy concerning active pursuit is set forth in *United States v. Conner*, in which the court affirmed an order suppressing evidence which had been obtained after a warrantless entry into a motel room.  

Rejecting the government’s argument that the evidence would inevitably have been discovered during the execution of independent search warrants, the court stated that the government must prove by a preponderance of the evidence both “that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct” and “that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation.”  

It affirmed the district court’s finding that the officers would not have sought a search warrant in the absence of their observations after the illegal entry. A year later, the court’s discussion in *United States v. Hammons* indicated that this active pursuit requirement may be satisfied when the alternative means of investigation is at an embryonic stage.

In *Hammons*, defendant and his wife were stopped by a highway patrol officer while they were improperly driving in the passing lane of an interstate highway. The defendant was behind the wheel of the rental car, and when he was asked for identification he “admitted that his California driver’s license had been suspended.” The officer took him to the patrol car while his wife waited in the vehicle, and the rental agreement indicated that the car had been rented to Mrs. Hammons in Las Vegas. The patrolman wrote a ticket and summons for Mr. Hammons for driving without a valid license, and asked him why, while living in California, they had rented a car in Las Vegas. Hammons replied that flying to Las Vegas and renting a car was less expensive than a car rental in California.

The officer then walked back to speak with Mrs. Hammons while her husband remained near the police car. He “told Mrs. Hammons that she would have to drive,” and noticed that “she seemed very nervous” as she slid into the driver’s seat. He motioned for Mr. Hammons to return to the car and said that he was free.

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382. 127 F.3d 663, 668 (8th Cir. 1997).
383. Id. at 667 (citing United States v. Wilson, 36 F.3d 1298, 1304 (5th Cir. 1994)).
384. Id. at 668.
385. 152 F.3d 1025, 1030 (8th Cir. 1998).
386. Id. at 1026.
387. Id.
388. Id.
389. Id.
390. Hammons, 152 F.3d at 1026.
391. Id.
392. Id.
The officer then turned back to Mrs. Hammons and asked if there were any drugs or guns in the vehicle. When she said no, he asked “if he could search the vehicle to make sure that she was telling the truth.” She agreed to the search and handed the officer the car keys. In the trunk, along with luggage and other items, the highway patrolman found a brown garment bag. He felt its outside, and after detecting a “hard, rectangular object,” he opened the bag and removed a jacket. Inside the jacket was a large manila envelope which was stapled closed. The officer asked “what it was,” and Mr. Hammons replied that he did not know. The highway patrolman “who by now had realized that the garment bag contained men’s clothing—asked Hammons if the garment bag belonged to him.” Hammons stated that it did.

Hammons was then asked twice if the officer could open the package. Hammons said nothing, and when he “simply stared at the ground” the officer said that he could answer “yes” or “no.” Hammons replied that “he did not want to say ‘yes.’” The officer then told him that he believed that the package contained drugs “and that he would call a drug dog to conduct a sniff test of the package.” Hammons said that he did not want his wife in trouble, and eventually admitted that there was contraband in the package. The highway patrolman gave Hammons his Miranda warnings and for the second time asked if he could open the envelope. At this point Hammons said “go ahead,” and four packages of cocaine were found inside. The couple was arrested and transported to the police station where Mr. Hammons made several incriminating statements. Only Mr. Hammons was subsequently charged.

393. Id.
394. Id.
395. Hammons, 153 F.3d at 1026.
396. Id.
397. Id.
398. Id.
399. Id.
400. Hammons, 152 F.3d at 1026.
401. Id.
402. Id.
403. Id. The court regarded these as repetitions of an earlier request. See id. (“the officer asked . . . twice again”).
404. Id.
405. Hammons, 152 F.3d at 1026.
406. Id.
407. Id. at 1026-27.
408. Id. at 1027.
409. Id.
410. Hammons, 152 F.3d at 1027.
411. Id.
Before trial, Hammons moved to suppress both the cocaine and the statements he had made.\textsuperscript{412} The district court found that Mrs. Hammons' consent to search the trunk extended to the garment bag, and that while Mr. Hammons' consent to open the envelope was involuntary, "the cocaine was admissible because of the inevitable discovery doctrine."\textsuperscript{413} Hammons entered a conditional guilty plea to possession of cocaine with intent to distribute.\textsuperscript{414}

The court of appeals found that the initial search of the garment bag was lawful because of the officer's objectively reasonable belief in Mrs. Hammons' ownership and apparent authority to consent.\textsuperscript{415} The court regarded the opening of the envelope as a more difficult issue, because by that time the officer knew that the defendant, rather than his wife, owned the garment bag.\textsuperscript{416} To search the envelope, the officer needed to obtain defendant's consent, and the district court concluded that it was not given voluntarily.\textsuperscript{417} Endorsing the district court's conclusion on this point,\textsuperscript{418} the court of appeals focused on the question of inevitable discovery by a drug-trained canine unit.\textsuperscript{419}

The court of appeals stated, "Based on the district court's factual findings, a reasonable view of the evidence is that the officer called the drug dog after the officer had opened the envelope."\textsuperscript{420} The court cited the analysis of Conner and observed, with regard to the issue of active pursuit:

\begin{quote}
In this case, the officer did not actually call the drug-canine unit before the misconduct occurred, but the officer did tell Hammons that he would call a drug-canine unit if Hammons did not consent to the search. The officer's assertion that he would call a drug dog indicates that the officer had initiated an alternative plan at the time of the constitutional violation: if Hammons did not consent, the officer was prepared to walk back to his patrol car and radio the drug-canine unit.

In short, the only event that stopped the officer from calling the drug-canine unit before the officer opened the envelope was the defendants' consent. . . . We therefore find that a substantial, alternative line of
\end{quote}

\begin{footnotes}
412. Id.
413. Id. Hammons' statements made while he was standing next to the car were suppressed, but those made at the police station were not. Id. Neither party appealed the trial court's rulings concerning the statements. Id. at 1027 n.2.
414. Id. at 1026.
415. Hammons, 152 F.3d at 1028.
416. Id.
417. Id.
418. See id.
419. Id. at 1028-29.
420. Hammons, 152 F.3d at 1028-29.
\end{footnotes}
investigation was underway which would have led to the inevitable discovery of the cocaine absent the police misconduct.\footnote{421}

The court's willingness to regard a mere expression of intent to use legal means as sufficient "active" pursuit stands in stark contrast with the explicit policy of the Second Circuit\footnote{422} as well as the statement of the Fifth Circuit which was quoted in Eng.\footnote{423}

The Court of Appeals for the Fifth Circuit has developed an approach of its own on the issue of active pursuit, and its most significant post-\(\text{Nix}\) statement of policy is in \textit{United States v. Cherry}.\footnote{424} While a small portion of the reasoning in \textit{Cherry} was quoted with approval by the Second Circuit in \textit{Eng}\footnote{425}—and the Fifth Circuit's rationale in adopting an ongoing pursuit rule is much like the Second Circuit's—\textit{Cherry} sets forth a singular active pursuit doctrine that is characterized by a potentially significant exception that has evolved within the circuit.\footnote{426} In \textit{Cherry}'s view, articulated shortly after \(\text{Nix}\), while the government must as a general rule demonstrate that it "was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation[,"]\footnote{427} the court added,

In certain circumstances, however, such as when the hypothetical independent source comes into being only after the misconduct, the absence of a strong deterrent interest may warrant the application of the inevitable discovery exception without a showing of active pursuit by the government in order to ensure that the government is not unjustifiably disadvantaged by the police misconduct.\footnote{428}

The facts of \textit{Cherry} afford an opportunity to see the application of this principle to a source that "came into being" after the misconduct.

\textit{Cherry} involved an appeal following the retrial of a defendant whose initial federal murder conviction had been reversed because of the erroneous admission of statements obtained in violation of \textit{Miranda}.\footnote{429} He was convicted a second time, and

\footnotesize{\begin{itemize}
\item \footnote{421} Id. at 1029-30.
\item \footnote{422} See supra note 350 and accompanying text.
\item \footnote{423} See \textit{id}. For a recent opinion which appears to follow the view of \textit{Hammons}, see United States \textit{v. Alvarez-Gonzalez}, 319 F.3d 1070, 1072 (8th Cir. 2003) (reiterating active pursuit requirement, but stating that anticipated towing and inventory of car is sufficient for application of inevitable discovery doctrine).
\item \footnote{424} 759 F.2d 1196 (5th Cir. 1985).
\item \footnote{425} See supra note 349 and accompanying text.
\item \footnote{426} \textit{Cherry}, 759 F.2d at 1203-05.
\item \footnote{427} \textit{id}. at 1206.
\item \footnote{428} \textit{id}.
\item \footnote{429} \textit{id}. at 1198. The opinion reversing defendant's initial conviction is reported as United States \textit{v. Cherry}, 733 F.2d 1124 (5th Cir. 1984) [hereinafter \textit{Cherry I}].
\end{itemize}}
appealed the denial of his motion to suppress physical evidence which he argued was tainted by that error.\textsuperscript{430} On the grounds of inevitable discovery, the district court had permitted the introduction of a gun, pistol case, bullets, and a set of fingerprints.\textsuperscript{431}

On December 6, 1982, the body of a taxi driver was found in a school parking lot on the military reservation at Fort Bliss, Texas.\textsuperscript{432} The Army's Criminal Investigations Detachment (CID) and the FBI were notified of the death, and the cause of death was determined to be three gunshot wounds to the back and neck.\textsuperscript{433} The victim's taxi was found the next morning, and an FBI search of the top of its sun visor revealed a military identification card and a Virginia driver's license, both in the defendant's name.\textsuperscript{434} Agents of the CID and FBI located defendant at battalion headquarters.\textsuperscript{435} After being placed in an FBI vehicle with four agents, Cherry was driven to CID headquarters where he was given his Miranda warnings.\textsuperscript{436} He signed a form indicating that he understood his rights, and was questioned while in custody by FBI agents for about an hour.\textsuperscript{437} He denied involvement in the murder, and after the interrogation Cherry consented to the search of his barracks.\textsuperscript{438} They took him there, conducted a search, and found a billfold in a trashcan in the latrine area.\textsuperscript{439} The billfold was identified as the victim's later that afternoon.\textsuperscript{440}

During the same search the agents saw a sneaker footprint on top of Cherry's dresser and noticed that the ceiling of the barracks was constructed of removable acoustical tiles.\textsuperscript{441} The agents removed a ceiling tile and tried to examine the area above, but were unable to do so because of its darkness.\textsuperscript{442} After the search, Cherry was returned to CID headquarters where the FBI learned that Cherry's barracks was the last destination to which the victim's taxi had been dispatched.\textsuperscript{443} The CID was informed, and Cherry was confined until the following day.\textsuperscript{444} The next morning, before interrogation by the FBI, the defendant was again informed of his Miranda rights and signed a written waiver.\textsuperscript{445} He began to answer the agents' questions, but then expressed reservations and said, "Maybe I should talk to an attorney before I

\textsuperscript{430} Cherry, 759 F.2d at 1198, 1202.
\textsuperscript{431} Id. at 1198, 1206-07.
\textsuperscript{432} Id. at 1198-99.
\textsuperscript{433} Id.
\textsuperscript{434} Id. at 1199.
\textsuperscript{435} Cherry, 759 F.2d at 1199.
\textsuperscript{436} Id.
\textsuperscript{437} Id.
\textsuperscript{438} Id.
\textsuperscript{439} Id.
\textsuperscript{440} Cherry, 759 F.2d at 1199.
\textsuperscript{441} Id.
\textsuperscript{442} Id.
\textsuperscript{443} Id.
\textsuperscript{444} Id. at 1200.
\textsuperscript{445} Cherry, 759 F.2d at 1200.
make a further statement. 446 The agents continued to speak with him and attempted to locate a sergeant whom Cherry requested. 447 Another agent entered the room and stated that he had learned from Cherry's fellow soldiers that he had recently purchased and been seen in possession of a .32 caliber revolver. 448 Cherry then asked, "Haven't you found the gun yet?" and stated its location above the ceiling in his barracks. 449 He gave both oral and written consent to a second search of the barracks, and confessed soon afterwards. 450 "With the additional directions Cherry provided, the agents were able to find a .32 caliber pistol, thirteen .32 caliber bullets, and a pistol case secreted away in the space above Cherry's ceiling." 451 Cherry was fingerprinted and later charged with second degree murder. 452

On the defendant's first appeal, the court held that the agents had deprived Cherry of his Miranda rights when they failed to limit his questioning to clarification of his ambiguous request for counsel. 453 It consequently found that his consent to the second search was tainted. 454 On remand before his second trial, Cherry moved to suppress the physical evidence discovered during the search, as well as the set of fingerprints obtained after his confession. 455 The fingerprints had been positively compared to a fingerprint found in the taxi. 456 The district court found Cherry's statements to be inadmissible and that the Miranda violation had tainted his consent to the second search. 457 The gun, holster, and bullets were nevertheless found to be admissible under the inevitable discovery doctrine. 458 The court stated that by the time of their seizure "FBI agents had obtained so much independent evidence that a search warrant for the area would inevitably have been obtained." 459 The district court also ruled that the fingerprints were admissible because a set was independently available from army records, and because Cherry's arrest for murder and subsequent fingerprinting were inevitable. 460 After the admission of the evidence, Cherry was again convicted of second degree murder. 461

446. Id.
447. Id.
448. Id.
449. Id. at 1200-01.
450. Cherry, 759 F.2d at 1200-01.
451. Id. at 1201.
452. Id.
453. Id.; Cherry I, 733 F.2d at 1132.
454. Cherry, 759 F.2d at 1201; Cherry I, 733 F.2d at 1132 n.15.
455. Cherry, 759 F.2d at 1201.
456. Id.
457. Id. at 1201-02.
458. Id. at 1202.
459. Id. at 1202. In addition to the information discussed earlier, the district court added that the FBI had located the soldier who admitted selling the gun to Cherry. Id.
460. Cherry, 759 F.2d at 1202.
461. Id.
The court of appeals discussed Fifth Circuit precedent in considering the inevitable discovery doctrine of Nix. As had the Court of Appeals for the Eleventh Circuit, it endorsed its pre-Nix inevitable discovery policy stated in 1980 in United States v. Brookins, requiring that the active pursuit of an alternative line of investigation be underway in order to permit the admission of the tainted testimony of a witness. The court characterized the requirements of Brookins as “three-prong[ed]:”

[T]he prosecution had to demonstrate (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct, and (3) that the police also prior to the misconduct were actively pursuing the alternate line of investigation.

The court then added that the Brookins rule had its exceptions. The Fifth Circuit stated that in its 1982 opinion in United States v. Miller it had subsequently articulated an exception to the Brookins approach when there was an after-acquired basis for an independent investigation. There, testimony which was the product of an illegal seizure of a diary later became available by means of a confession. In Cherry the court observed,

Although the Brookins prerequisites were not met in [Miller], we held that the inevitable discovery exception applied since the alternate means for obtaining the evidence was an intervening and independent event occurring subsequent to the misconduct.... Under such circumstances, the interest in deterrence that gave rise to the Brookins rule is not so much implicated since the police at the time of the misconduct necessarily are not able to know that independent discovery of the evidence is inevitable and thus cannot rely on a broad application of the inevitable discovery rule to render admissible evidence actually obtained illegally.

462. Id. at 1204.
463. 614 F.2d 1037 (5th Cir. 1980).
464. Cherry, 759 F.2d at 1204; see supra notes 366-69 and accompanying text.
465. Cherry, 759 F.2d at 1204 (citing United States v. Brookins, 614 F.2d 1037, 1042 n.2 (5th Cir. 1980)).
466. Id.
467. Id. at 1205.
468. 666 F.2d 991 (5th Cir. 1982).
469. Cherry, 759 F.2d at 1205.
470. Id.
471. Id. (citation omitted) (emphasis in original).
On the facts before it, the court of appeals held that the pistol, the bullets, and the pistol case were improperly admitted. There had been no finding that officials "were actively pursuing a warranted means of searching the ceiling," and agents had not even begun to take notes for the drafting of an affidavit. As the inevitable discovery exception was not applicable, the gun and related items should have been suppressed.

The set of fingerprints was another matter. While Cherry had asserted that it had been obtained through exploitation of his illegal arrest, the district court had found that he would inevitably have been lawfully arrested upon probable cause, and his fingerprints would have then been obtained. The court of appeals concluded that the fingerprints were properly admitted under Miller. "Because the hypothetical independent source... could only have been used after the police misconduct, the government was not required to show active pursuit or the possession of leads under Brookins."

While the court's references in Cherry to exceptions to its active pursuit requirement are potentially broad enough to encompass situations where the basis for inevitable discovery is not after-acquired—its use of the plural and general reference to "certain" other circumstances are certainly intriguing—it has thus far employed this analysis only in a situation paralleling Cherry. In United States v. Evans, it endorsed the admission of items which it viewed as coming "into existence" only after an illegal search had occurred. The Fifth Circuit continues to apply its basic active pursuit requirement to situations not involving after-acquired grounds with

472. Id. at 1206.
473. Id. at 1206. The court also rejected the government's argument that Cherry's lack of reasonable expectations of privacy in the area above the ceiling precluded his Fourth Amendment objection. Id. at 1206-07. It found that the government had failed to carry its burden of proof on this issue. Id.
474. Cherry, 759 F.2d at 1206-07.
475. Id.
476. Id.
477. Id. The court indicated that the basis for a later lawful arrest upon probable cause consisted of the following facts obtained independently of the misconduct: Cherry's military identification and driver's license were in the taxi; the cab's last dispatch was to Cherry's barracks; the victim's wallet was found in a trash receptacle in the barrack's latrine area; and members of Cherry's unit had seen him with a .32 caliber pistol. Id. at 1208 n.16.
478. Id. at 1206.
479. 848 F.2d 1352 (5th Cir. 1988).
480. Id. at 1358.
It is tempting to try to evaluate these positions from a perspective which focuses principally upon whether an active pursuit requirement is desirable as a matter of policy. Such a discussion would bear upon only one aspect of the current debate among the circuits, for the lower federal courts clearly do not perceive themselves to be architects of innovative policy in this area. Whatever the merits of the view that some limitations should be placed upon judicial assessments of "inevitability," the circuits have been reluctant to impose their own constraints upon the inevitable discovery rule when the Supreme Court has provided no doctrinal basis for a particular restriction. The notably unsuccessful efforts to foreclose the application of the rule to primary evidence—a potential limitation which found no source in the language of Nix—were in part a reflection of this hesitation. In all likelihood, it is for this reason that the circuits endorsing an active pursuit approach have emphasized that their analysis is grounded in the express "demonstrated historical fact" reference in Nix as well as in the circumstances there considered by the Court. The persuasiveness of their position hinges in large part upon that reliance, and the phrase and its context in Nix should be the starting point for a determination of whether the "active pursuit" opinions are at least partially on target.

As discussed earlier, Nix spoke of the inevitable discovery doctrine's concern with "demonstrated historical facts capable of ready verification or impeachment" in a footnoted portion of the opinion which addressed the reasons why the Court did not find it appropriate to heighten the standard of review. In contrast with its earlier

481. See, e.g., United States v. Wilson, 36 F.3d 1298, 1305 (5th Cir. 1994) (finding insufficient active pursuit); United States v. Lamas, 930 F.2d 1099, 1104 (5th Cir. 1991) (stating that active pursuit existed as officers were in process of obtaining warrant); United States v. Webb, 796 F.2d 60, 62 (5th Cir. 1986) (observing search for victim's body underway). In one rare departure, the court of appeals appeared to have overlooked the active pursuit requirement. In dictum in Wicker v. McCotter, 783 F.2d 487 (5th Cir. 1986), although defendant's Fourth Amendment claim was not cognizable on federal habeas corpus, the court stated that the planning of a search for a victim's body would have been sufficient to provide the basis for an inevitable discovery finding. Id. at 498. Active pursuit was not discussed. Id.

482. Cherry, 759 F.2d at 1206.

483. This view is of course not universal. See Akhil Reed Amar, Against Exclusion (Except to Protect Truth or Prevent Privacy Violations), 20 HARV. J.L. & PUB. POL'Y 457, 462 (1997), in which it is asserted that the inevitable discovery exception is employed only sparingly. "[U]nless [the] likelihood [of inevitably discovering the evidence] is ninety-nine percent, judges tend to say that the government can never use that evidence." Id.


485. See supra notes 129-37.
treatment of the more abstract question of an independent basis for an eyewitness identification (which requires a higher standard of proof), the Court stated in a somewhat reassuring tone that proof by a preponderance of the evidence was adequate because inevitable discovery is determined by those less speculative, objectively determined "historical facts." Thus, at the very least, the passage was intended to convey the need for some sort of circumstances limiting unbridled speculation. Even in Nix, the question of the breadth of that limitation was no insignificant issue, as the views of Justices Stevens, Brennan and Marshall on active pursuit illustrated. But, at least for the time being, the circumstances of Nix and the methodical search for the victim that occurred in that case afforded the Court the opportunity to leave the phrase largely undefined.

Turning to the wording itself, the words "demonstrated" and "historical" are not redundant. The Court clearly intended both that the existence of some factual circumstances be proven by a preponderance of the evidence ("demonstrated") and that they be of such a nature as to earn the appellation "historical." In the context of Nix the latter term suggested the occurrence of an event or activity occurring over some period of time. The ongoing search amply satisfied this meaning, and of course became central to the view of some that the Court was contemplating a requirement of active pursuit. Thus viewed, the Second Circuit's position that its active pursuit requirement represents a straightforward implementation of the need for historical fact seems logical.

The problem which seems to permeate the controversy in this area is that, in the view of those circuits which have been critical of what they perceive to be an unqualified active pursuit requirement, the imposition of an absolute prerequisite of an ongoing investigation is too inflexible, constricting, and ultimately inconsistent with the overall tenor of the inevitable discovery doctrine. This observation, which of course squarely implicates the question of the rule's desirability, has some merit as well, for as those circuits have been quick to point out, the prospect of even certain discovery of evidence might exist in fact without independent investigative steps having previously been undertaken by authorities. The overall approach of Nix, with the value it places upon presenting probative evidence to the finder of fact, does weigh in favor of the admission of evidence in such cases.

Reconciliation of these divergent concerns—one placing a premium upon the restraining influence of an objective prerequisite and the other taking into account varying forms of inevitability—may not be impossible, however. If one were to look at the variations of active pursuit among the circuits as manifestations of the need for "demonstrated historical fact," there appears to be no good reason why active pursuit must be seen as the exclusive means by which this requirement may be implemented. Even the Fifth Circuit, recognizing the value of active pursuit over many years, has expressly stated in Cherry that it need not always be present under some, thus far

486. See supra notes 129-37.
undefined, conditions when a strong deterrent interest may be absent.487 Three years ago, Professor William C. Heffernan, who surprisingly did not appear to view any active pursuit approach as grounded in the language of Nix,488 nevertheless suggested that as a matter of sound policy it might be desirable to impose a requirement that there either be an ongoing investigation or that "standard investigative procedures" be the basis for an inevitable discovery finding.489 It is perhaps time for the courts to explore the articulation of specific alternatives which, along with active pursuit, may be recognized as effective and manageable standards for determining when, within the meaning of Nix, "demonstrated historical facts" have been established.

Professor Hefferman's reference to "standard" procedures may provide an appropriate starting point for this inquiry, although a procedure that is simply repetitive enough to be called "standard" may not be sufficiently predictable to provide a sound basis for an inevitable discovery finding. With regard to police procedures, one should avoid intermingling the frequent, the less frequent, and the clearly routine. Professor Wayne LaFave, in examining those situations in which an inevitable discovery argument has been most persuasive, has spoken of an "inevitable procedure."490

The possibility of employing a constitutional standard which requires a truly inevitable routine procedure where active pursuit is not present would implement Nix's reference to "historical" facts no less logically than may an absolute active pursuit requirement. It would, in effect, be saying that the phrase "historical facts" lends itself to an interpretation which includes a procedure which has sufficient vintage and regularity in past practice to fall within that description.

Truly inevitable procedures should be so regarded only where official discretion has not, in that jurisdiction, intervened to undermine such a characterization. This issue would become particularly important in the area of a potential inventory search, where the range of official discretion can vary so considerably. Of course, it remains to be seen whether courts favoring the active pursuit requirement might regard an approach recognizing this alternative constitutional prerequisite as an adequate safeguard in implementing the view of Nix's footnote 5. It would also be interesting to see whether such an approach might commend itself to those courts which have as yet imposed no preconditions to the employment of inevitable discovery analysis. Nevertheless, even if this suggested approach is adopted by some, the debate is certain to continue over whether an active pursuit requirement is an appropriate precondition to the implementation of the inevitable discovery doctrine.

487. See supra note 423 and accompanying text.
489. Id. at 857.
490. See 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 9.3 notes 53-55 and accompanying text.