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They Would Have Found it Anyway: *United States v. Eng* and the "Inevitable Subpoena"

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THEY WOULD HAVE FOUND IT ANYWAY: *UNITED STATES v. ENG*[*] AND THE "INEVITABLE SUBPOENA"

Anthony J. Girese[**]

INTRODUCTION

It is the day after Christmas, 1968.[1] The body of a young girl lies near a culvert in a rural area.[2] Desperately attempting to locate the missing child, police unconstitutionally obtain a confession from an escaped mental patient, who leads them to the corpse.[3] It is found less than three miles from the perimeter of an aborted massive search conducted by 200 volunteers and police officers.[4] Years later, in a decision that the Chief Justice of the United States Supreme Court labels an affront to "any society which purports to call itself an organized society,"[5] the confession and the evidence derived from it is suppressed.[6] The possibility of retrial appears to depend on whether medical evidence which emanates from the body will be admitted into evidence. Can there be a retrial?

Now, it is February 1989.[7] An IRS agent begins to investigate a suspected narcotics dealer.[8] Over the course of months, he reviews tax records, sends out some subpoenas, locates some public records and listens to a confidential informant.[9] In October, the target is arrested and a search of one of his busi-

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[*] 971 F.2d 854 (2d Cir. 1992).

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[1] Brewer v. Williams, 430 U.S. 387 (1976).

[2] Iowa v. Williams, 285 N.W.2d 248, 262 (Iowa 1979).

[3] 430 U.S. at 393.

[4] 285 N.W.2d at 261-62.

[5] 430 U.S. at 415 (Burger, J., dissenting).

[6] *Id.* at 403-06.

[7] United States v. Eng, 971 F.2d 854, 856 (2d Cir. 1992).

[8] *Id.*

[9] *Id.* at 856-57.

ness addresses produces a plethora of records which identify numerous bank accounts, real estate holdings and business transactions.[10] Using information obtained in the search, the agent now issues numerous subpoenas which produce information establishing that the defendant has expended millions of dollars of unreported income.[11] But subsequently the search is determined to be illegal and the jury acquits on everything except the tax evasion charge.[12] Can the conviction stand?

In both cases, the answer is yes, and properly so. The reason is a theory of attenuation analysis, born in fury and still accepted with uneasiness in many quarters, known as "the inevitable discovery doctrine." Part I of this Article explains the origins of the doctrine, traces its development, and details the Supreme Court's acceptance of it in the former illustration.[13] Part II then describes the Second Circuit's recent holding in the latter illustration, *United States v. Eng*.[14] Part III explores the difficulties, dangers and implications of applying the inevitable discovery doctrine to the circumstances in *Eng*, but argues that in the main, *Eng* was a proper case for the application of the doctrine. This Article concludes by suggesting factors that might be helpful in judging whether to apply the doctrine in future *Eng*-like cases.

I. THE INEVITABLE DISCOVERY DOCTRINE

A. *The Genesis of the Doctrine*

The inevitable discovery doctrine is an exception to the exclusionary rule, which bars from admission into evidence at criminal trials material that has been unconstitutionally obtained.[15] It derives from an earlier theory, the "independent

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[10] *Id.* at 857.

[11] *Id.* at 857-58.

[12] *Id.* at 859.

[13] Brewer v. Williams, 430 U.S. 387 (1976).

[14] 971 F.2d 854 (2d Cir. 1992).

[15] For example, the Fourth Amendment to the Federal Constitution generally proscribes "unreasonable searches and seizures." In Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court created the exclusionary rule as a remedy for federal violations of the Fourth Amendment. That remedy was extended to state violations via the Fourteenth Amendment's Due Process Clause in Mapp v. Ohio, 367 U.S. 643 (1961). For a description of the origins and development of the

source" exception, and may be considered to be a special variety of attenuation or "taint" analysis. By way of background, in attenuation or "taint" cases courts decide whether to admit evidence that flows in some derivative way from illegal police conduct. The classic situation, and perhaps the one most frequently encountered in practice, occurs when police make an arrest lacking the requisite probable cause, after which the defendant makes an otherwise proper confession.[16] The question, then, is whether the confession is the "tainted fruit" of the illegal arrest. This was the situation in the seminal cases *Wong Sun v. United States*[17] and *Brown v. Illinois*.[18] In *Wong Sun*, the Supreme Court enunciated the general standard applicable to such questions:

> [w]e need not hold that all evidence is "fruit of the poisonous tree"[19] simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[20]

In *Brown*, after rejecting a *per se* rule that the administration of the now-required *Miranda* warnings was sufficient to purge the taint of an unlawful arrest upon the subsequent confession, the Court held that multiple factors must be applied to the circumstances of each case.[21] The factors are "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and particularly, the purpose and flagrancy of the official misconduct."[22] Although the Court included the administration of proper *Miranda* warnings as an "important factor," this is of little practical significance, as an

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exclusionary rule, see 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.1, at 3 (2d ed. 1987).

[16] That is to say, the confession is voluntarily given after administering the proper warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), so that the only illegality is the initial arrest without probable cause.

[17] 371 U.S. 471 (1963).

[18] 422 U.S. 590 (1975).

[19] The celebrated phrase was coined by Justice Frankfurter in an earlier case, Nardone v. United States, 308 U.S. 338 (1939).

[20] 371 U.S. 471, 488 (1963) (quoting JAMES MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

[21] 422 U.S. at 603-04.

[22] *Id.* (citations omitted).

absence of the warnings leads to suppression of the confession on other grounds.[23]

There are many different species of attenuation,[24] resulting in a body of law considerable in size and complexity.[25] The theory most frequently identified as the progenitor of "inevitable discovery" is the "independent source" exception.[26] In *Silverthorne Lumber Co. v. United States*,[27] for example, federal agents arrested and detained two indicted individuals, and illegally searched their business and seized certain records. Following the seizure, subpoenas were issued for the same documents. When the targets of the seizure demanded that the papers be returned, the government repudiated the illegal seizure, but claimed that "it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form (*i.e.*, the subpoenas) to produce them . . . ."[28] In an opinion by Justice Holmes, the Court rejected the argument with considerable asperity,[29] but left open the possibility that illegally obtained facts might nevertheless be admissible under certain circumstances:

> Of course, this does not mean that the facts thus [illegally] obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.[30]

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[23] *Id.* at 603.

[24] Other attentuation rules include those which govern the situation where an illegal seizure leads to witness testimony, United States v. Ceccolini, 435 U.S. 268 (1978); where the illegal arrest of a defendant leads to an identification by the victim, United States v. Crews, 445 U.S. 463 (1980); and where a warrantless intrusion into premises leads to the taking of a statement outside the premises, New York v. Harris, 495 U.S. 14 (1990). Suppression was denied in each of the above cases.

[25] For a thorough overview, see 4 LAFAVE, *supra* note 15, § 11.4(a), at 372.

[26] *See* Stephen H. LaCount & Anthony J. Girese, *The "Inevitable Discovery" Rule, an Evolving Exception to the Constitutional Exclusionary Rule*, 40 ALB. L. REV. 483 (1976); Judd Burstein, *The Inevitable Discovery Doctrine*, 11 Search & Seizure L. Rep. 9 (1984).

[27] 251 U.S. 385 (1920).

[28] *Id.* at 391.

[29] The Court characterized the seizure as "an outrage" and the government's argument as a proposition that "could not be presented more nakedly." *Id.*

[30] *Id.* at 392.

From this suggestion, there developed a body of "independent source" cases.[31]

The independent source theory enjoys widespread support,[32] at least in the many situations where its application presents a compelling simplicity. For example, imagine that authorities learn a particular fact from two different and wholly independent documents, one illegally seized, but the other coming to official attention when it appears in a local newspaper. Suppression of the fact would be absurd, and tantamount to the creation of a sort of evidentiary transactional immunity.[33] Difficulty arises, however, when the illegal discovery and the independent source are more closely connected. In a 1988 decision, *Murray v. United States*,[34] the Supreme Court reaffirmed the validity of the independent source exception to the exclusionary rule, and, in the view of some commentators, extended it. The case dealt with the question of whether the exception could be applied where the initial revelation of the evidence in question had occurred in an illegal manner, but the evidence was subsequently legally "rediscovered" through an independent source—one generated by the *same* investigators who had initially obtained the evidence illegally.[35]

In *Murray*, federal authorities who had been alerted by informants watched a group of persons drive vehicles in and

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[31] *See* 4 LAFAVE, *supra* note 15, § 11.4(a), at 372.

[32] *Id.* § 11.4(a), at 374 ("So stated, the 'independent source' limitation upon the taint doctrine is unquestionably sound.").

[33] The United States Constitution requires that a witness compelled to testify before a grand jury or otherwise be given "use immunity"—meaning that the witness nevertheless can be prosecuted for a crime relating to the subject matter of his or her testimony, so long as the immunized testimony and any evidence derived therefrom is not used in the prosecution. Kastigar v. United States, 406 U.S. 441 (1972). However, some states such as New York provide the much more comprehensive "transactional immunity," which entirely precludes prosecution of the witness for any offense (other than perjury or contempt) "on account of any transaction, matter or thing concerning which he gave evidence." N.Y. CRIM. PROC. LAW § 50.10 (McKinney 1992). In practice, the former is a sort of exclusionary rule while the latter is a strict liability bar to prosecution. *See* People v. Williams, 56 N.Y.2d 916, 438 N.E.2d 1146, 453 N.Y.S.2d 430 (1982) (witness who testified in the Grand Jury that he had been present in the apartment of a murder victim but had left before the killing cannot be prosecuted when he is subsequently implicated in the homicide).

[34] 487 U.S. 533 (1988).

[35] *Id.* at 541.

out of a warehouse in South Boston.[36] The vehicles were then lawfully seized and found to contain marijuana.[37] Subsequently, the agents made an unlawful warrantless entry into the warehouse and discovered bales of marijuana.[38] They left and applied for a search warrant, without mentioning or relying upon any information obtained during the illegal entry.[39] After obtaining the warrant, they then re-entered the warehouse and seized the marijuana and other evidence.[40]

The defendants argued that the failure to suppress the evidence "rediscovered" through the use of the warrant would create a positive incentive for law enforcement to violate the Fourth Amendment, because police would always be tempted to make a penalty-free initial illegal entry to spare themselves the trouble of getting a warrant if no evidence was found. However, a majority of the Court, in an opinion by Justice Scalia, saw "the incentives differently,"[41] reasoning that the police would not risk attempting to convince a court reviewing the propriety of a warrant that "no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it."[42] The Court then remanded the case for further fact-finding on those questions.[43]

This decision represented a significant theoretical change in the theory of the independent source exception. Prior to *Murray,* some commentators had suggested that the sequence of events was of critical importance in assessing whether an alleged independent source was truly independent.[44] There is much to be said for this viewpoint. The *Murray* majority was undoubtedly correct in holding that, as a matter of theory, there should be no *per se* bar to applying the exception to situations where the initial discovery of evidence is illegal.[45] But

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[36] *Id.* at 535.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 535-36.
[40] *Id.* at 536.
[41] *Id.* at 540.
[42] *Id.*
[43] *Id.* at 543-44.
[44] *See* Robert M. Pitler, *"The Fruit of the Poisonous Tree" Revised and Shepardized,* 56 CAL. L. REV. 579, 626 (1968).
[45] Notably, even the *Murray* dissenters, writing in favor of evidentiary suppres-

as a practical matter, it will often be extremely difficult to establish the independence of subsequent official action.[46]

The case usually identified as containing the first suggestion of inevitable discovery[47] is *Somer v. United States*.[48] Somer operated an illegal still in his Brooklyn apartment. Tax agents, tipped by a confidential informant, made an illegal entry into the apartment, searched it, found the still and interviewed Somer's wife, who told them, among other things, that Somer would be home soon. Accordingly, they waited outside. Twenty minutes later, the hapless Somer pulled up in a car that contained a five pound bag of granulated sugar in plain view. The vehicle also smelled of alcohol. Agents promptly arrested Somer and seized jugs found in his trunk. The trial court suppressed the evidence obtained as a result of the search of the apartment, but upheld the evidence flowing from Somer's arrest on the street. The Second Circuit reversed the district court's partial denial of suppression. Writing for the panel, Judge Learned Hand first noted that it was possible that the agents might have had a sufficient basis for the arrest of Somer and seizure of his car before they entered the apartment. Thus, had they based their actions solely on the prior information, the evidence would have been admissible, as it was obtained through an independent source. However, because Somer's whereabouts were unknown until this information was gleaned from his wife in the course of the illegal entry and search, in fact "it was the information unlawfully obtained

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sion under the facts therein, noted that

> [t]he clearest case for the application of the independent source exception is when a wholly separate line of investigation, shielded from information gathered in an illegal search, turns up the same evidence through a separate, lawful search. Under these circumstances, there is little doubt that the lawful search was not connected to the constitutional violation. The exclusion of such evidence would not significantly add to the deterrence facing the law enforcement officers conducting the illegal search, because they would have had little reason to anticipate the separate investigation leading to the same evidence.

487 U.S. at 545 n.1 (Marshall, J., dissenting). In this example, the sequence of the separate investigations would make no difference to the outcome.

[46] This same concern was highlighted in *Eng*. *See infra* notes 166-71 & 212-18 and accompanying text.

[47] 4 LAFAVE, *supra* note 15, § 11.4(a), at 379 (quoting Harold S. Novikoff, Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88, 90 (1974)).

[48] 138 F.2d 790 (2d Cir. 1943).

which determined [the agents'] course. Since therefore the seizure must be set down to information which the officers were forbidden to use, it was itself unlawful . . . ."[49] The Court, however, added a siginificant caveat:

> It follows that we must reverse the order; but it does not follow that the seizure was inevitably invalid. Possibly, further inquiry will show that, quite independently of what Somer's wife told them, the officers would have gone to the street, have waited for Somer and have arrested him, exactly as they did. If they can satisfy the court of this, so that it appears that they did not need the information, the seizure may have been lawful. The proceeding will therefore be remanded with leave to the prosecution to retry the issue . . . .[50]

Somer arguably contained the first intimation that the independent source exception could logically be extended to encompass inevitable discovery. That is, if evidence will be admitted when there is in fact an independent source that brings it to light, why should the evidence not be admissible when law enforcement can demonstrate that such a source would have inevitably arisen? In 1963, future Chief Justice and then-Circuit Judge Warren Burger made this leap of logic in *Wayne v. United States*.[51] Deciding to admit evidence concerning the body of the victim of an illegal abortion that had been discovered in the course of an arguably illegal police entry after the victim's sister had reported the crime, the court noted that

> [i]t was inevitable that, even had the police not entered appellant's apartment at the time and in the manner they did, the coroner would sooner or later have been advised by the police of the information reported by the sister, would have obtained the body, and would have conducted the postmortem examination prescribed by law.[52]

In its formative years, the inevitable discovery doctrine generated considerable controversy. Many commentators felt that the theory had dangerous implications which might adversely impact upon the central purpose of the exclusionary rule (deterrence of future official misconduct) or even swallow the rule entirely.[53] Others, however, favored the doctrine when applied

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[49] *Id.* at 791 (citations omitted).
[50] *Id.* at 792.
[51] 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).
[52] *Id.* at 209.
[53] *See* Pitler, *supra* note 44, at 630 ("The preservation of the exclusionary rule

with appropriate safeguards.[54] Initially, the reaction of courts was similarly mixed.[55] Indeed, even within the Second Circuit, which had conceived of the original suggestion, acceptance of the doctrine was inconsistent and often varied.[56]

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as a viable deterrent to illicit police activity requires the spotlight to focus on 'actualities not probabilities.'") (quoting United States v. Paroutain, 299 F.2d 486, 489 (2d Cir. 1962)); Burstein, *supra* note 26, at 13 ("Assuming the need for this [exclusionary] remedy for Fourth Amendment violations, it is hard to dispute that the inevitable discovery exception is inconsistent with the exclusionary rule's purposes."); Novikoff, *supra* note 47, at 99 ("[acceptance of the doctrine] can only encourage short cuts").

[54] LaCount & Girese, *supra* note 26, at 505; *see also* LAFAVE, *supra* note 15, § 11.4(a), at 381 ("The concerns expressed by the opponents of the inevitable discovery rule are legitimate and ought not be dismissed out of hand. A careful assessment of their arguments, however, indicate that they are directed not so much to the rule itself as to its application in a loose and unthinking fashion.").

[55] *Compare* United States v. Houltin, 525 F.2d 943 (5th Cir. 1976) (circuit has "unambiguously rejected" the inevitable discovery doctrine), *vacated on other grounds sub nom.* Croucher v. United States, 429 U.S. 1034, *modified on remand,* 553 F.2d 991 (5th Cir. 1977), *cert. denied,* 439 U.S. 826 (1978) *and* United States v. Griffin, 502 F.2d 959 (6th Cir.) (narcotics were inadmissible when police entered defendant's apartment without a warrant; government could not argue that discovery was inevitable on the ground that "the processes of obtaining the warrant had been set in motion" before the police illegally entered the apartment), *cert. denied,* 419 U.S. 1050 (1974) *with* United States v. Apker, 705 F.2d 293 (8th Cir. 1983) ("inevitable discovery" exception applied to guns discovered at defendants' residence in an illegal search, because a legal search warrant for controlled substances ensured that the guns would have been discovered) *and* United States v. Romero, 609 F.2d 699 (10th Cir. 1982) (marijuana seized from defendant's pockets was admissible although officers "transgressed permissible limits" of pat-down search for weapons) *and* United States v. Huberts, 637 F.2d 630 (9th Cir. 1980) (business card found in illegal search was admissible when the information was both available from an independent source and inevitably would have been discovered), *cert. denied,* 451 U.S. 975 (1981) *and* United States v. Bienvenue, 632 F.2d 910 (1st Cir. 1980) (not error to admit evidence obtained from an illegal search when a routine police investigation based on the government's independent information would have revealed the evidence) *and* Owens v. Twomey, 508 F.2d 858 (7th Cir. 1974) (photograph of accused obtained in an illegal search did not affect a witness' in-court identification of the accused when the witness had previously been with the accused for six and one-half hours) *and* United States v. Soehnlein, 423 F.2d 1051 (4th Cir.) (defendant's confession and stolen money were admitted when they resulted from a search of defendant's wallet during a detention following an arrest for driving with an invalid license, and when police would have learned of warrants against defendant even without searching his wallet), *cert. denied,* 399 U.S. 913 (1970).

[56] *Compare* United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962) (refusing to apply the doctrine) *with* United States v. Ceccolini, 542 F.2d 136 (2d Cir. 1976), *rev'd on other grounds,* 435 U.S. 268 (1978) (accepting it) *and* United States v. Falley, 489 F.2d 33 (2d Cir. 1973) (same); *see also* United States v. Alvarez-Porras, 643 F.2d 54 (2d Cir.) (warning against too broad an application), *cert. denied,* 454

B. *Acceptance of the Inevitable Discovery Doctrine by the Supreme Court*

The Supreme Court first faced the inevitable discovery doctrine in an extraordinary case that reached the Court in two stages, the first of which was *Brewer v. Williams*.[57] On the afternoon of Christmas Eve, 1968, ten-year-old Pamela Powers was abducted from a YMCA in Des Moines, Iowa.[58] She had gone with her family to watch her brother in a wrestling match. She consumed a snack and went to wash her hands, but failed to return from the restroom.[59] Robert Williams, a recently escaped mental patient who had been staying at the YMCA, quickly became implicated in the crime.[60] Williams had been seen carrying a bundle from the facility to his car.[61] A 14-year-old boy who had helped Williams with this burden later told police that he had seen two skinny white legs protruding from the bundle.[62] After obtaining an arrest warrant, police arrested Williams in the city of Davenport, where Williams had abandoned his car.[63] There, he was arraigned on the warrant, thus commencing judicial proceedings against him.[64] A lawyer advised both Williams and the Des Moines police who had been assigned to transport him not to engage in any questioning, and the police agreed not to do so.[65] Nevertheless, in the course of the trip back to Des Moines a detective persuaded a somewhat hesitant Williams to confess by playing on Williams's religious fears.[66] Williams led the police to the body of the girl.[67] Williams eventually was tried and convicted for the murder.

As is evident, *Brewer* presents one of the stickiest situations to be found in the criminal law—where a defendant who

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U.S. 839 (1981).

[57] 430 U.S. 387 (1976).

[58] *Id.* at 390.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 390-91.

[64] *Id.* at 391.

[65] *Id.* at 391-92.

[66] *Id.* at 392-93.

[67] *Id.* at 393.

is unquestionably guilty of a horrendous crime is the victim of a blatant and inescapable constitutional deprivation involving critical evidence. The procession of the case through the courts reflected that difficulty. Although Iowa courts recognized that Williams had been denied his Sixth and Fourteenth Amendment rights to the assistance of counsel by the initiation of questioning after formal judicial proceedings had commenced,[68] they found he had validly waived those rights based upon what had occurred in the car. The federal courts, including the Supreme Court, disagreed and held that the conviction could not stand.[69] The Court, however, did not come easily to that result, as is amply revealed by the number of opinions[70] as well as the language employed therein. Justice Stewart, writing for the Court, expressed the holding with a good deal of reluctance,[71] while Chief Justice Burger's dissent began with a wail of outrage: "[t]he result in this case ought to be intolerable in any society which purports to call itself an organized society."[72] The opinions of the other justices also contain striking language.[73]

The justices then considered the possibility of a retrial. Although the dissenters suggested that a subsequent convic-

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[68] That is, at the arraignment, which initiated formal judicial proceedings, Williams' Sixth Amendment rights attached. *Id.* at 399.

[69] *Id.* at 404-05.

[70] Justice Stewart delivered the opinion of the Court and Justices Marshall, Powell and Stevens filed separate concurrences. Dissenting opinions were filed by Chief Justice Burger and Justices White and Blackmun.

[71] "The crime of which Williams was convicted was senseless and brutal, calling for swift and energetic action by the police to apprehend the perpetrator and gather evidence with which he could be convicted. No mission of law enforcement officials is more important . . . . Although we do not lightly affirm the issuance of a writ of habeas corpus in this case, so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned . . . .

Id. at 406.

[72] *Id.* at 415.

[73] Among the concurrences, Justice Marshall accused the dissenters of having "lost sight of the fundamental constitutional backbone of our criminal law." *Id.* at 407 (Marshall, J., concurring). Justice Stevens noted the "strong language" of the dissenting opinions, and spoke of "[t]he emotional aspects of the case [which] make it difficult to decide dispassionately, but do not qualify our obligation to apply the law with an eye to the future as well as with concern for the result." *Id.* at 415 (Stevens, J., concurring). Among the dissenters, Justice White asked, "A mentally disturbed killer whose guilt is not in question may be released. Why?" *Id.* at 437 (White, J., dissenting).

tion would be impossible,[74] Justice Stewart opined that the inevitable discovery doctrine might apply and save some of the evidence:

> While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the 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.[75]

Predictably, Williams was subsequently tried again. The prosecution did not attempt to introduce his statements or the events of the discovery of the body, but did adduce evidence about the body's condition, including photographs of clothing and the results of postmortem testing. The state courts decided that there was an inevitable discovery doctrine having *two* components: (1) that the police must not have acted in bad faith; and (2) that the evidence in question would have been discovered by lawful means.[76]

Applying the first of these elements, the Iowa Supreme Court held that because the propriety of police conduct had been the subject of such diverse views among the numerous judges of the reviewing courts, the police conduct, even if improper, must not have been the result of bad faith.[77] As to the

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[74] *See id.* at 430 (White, J., dissenting) ("impossible to retry him"); *id.* at 441 (Blackmun, J., dissenting) ("With the exclusionary rule operating as the Court effectuates it, the decision today probably means that, as a practical matter no new trial will be possible . . . .").

[75] *Id.* at 407 n.12 (citation omitted); State v. Williams, 285 N.W.2d 248 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980). After *Brewer*, the Court declined at least one opportunity to review the doctrine. *See* People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *cert. denied*, 414 U.S. 1050 (1973), where Justice White, dissenting from the denial of *certiorari*, noted that the issue of whether the "independent source" exception could be so extended was a "significant constitutional question." 414 U.S. at 1051.

[76] *Williams*, 285 N.W.2d at 259. The Iowa Supreme Court reasoned that a bad faith component was necessary to answer criticism that acceptance would impact adversely on the deterrent function of the exclusionary rule by sanctioning "end runs and shortcuts." *Id.* (citing United States v. Crews, 389 A.2d 277 (D.C. 1978)). The court also noted that "[o]bviously, bad faith means something more than just acting unlawfully, for if the police action was lawful the issue would never have arisen in the first place." *Id.* at 259 (citations omitted).

[77] The court noted:

> While there can be no doubt that the method upon which the police

second part of the test, several factors led the court to conclude that it, too, had been satisfied. The court noted that by December 25, 1968—the day after the crime—the police were aware that Williams had fled by car from Des Moines to Davenport, which are linked by an interstate highway.[78] At a rest stop along this road, the authorities found an army blanket like the one in which Williams had been seen carrying the body, and some articles of the child's clothing.[79] Following that discovery, on December 26 a massive search involving some 200 volunteers as well as numerous police officers was initiated in the general area of the rest stop. That search was discontinued at 3:00 p.m.[80] Williams thereafter led the police to the body.[81]

The child's body was discovered frozen to the side of a cement culvert in a ditch beside a gravel road, about two and one-half miles from the point where the search had been called off.[82] According to police, had the body not been found with Williams's help, the search would have resumed and the body would have been located within a few hours.[83] Further testimony established that: (1) the body was visible to a searcher; (2) the body would not have been concealed by snowfall; and (3) local temperatures were such that its condition would have been preserved for an extended period.[84] After reviewing this

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> embarked in order to gain Willliams's assistance was both subtly coercive and purposeful, and that its purpose was to discover the victim's body . . . we cannot find that it was in bad faith. The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

Id. at 260-61.

[78] *Id.* at 261.

[79] *Id.*

[80] Following the discontinuance of the search, Williams led the police to the body. It is unclear precisely why the search was originally called off. As noted by the Iowa Supreme Court: "The cancellation was ordered because no officers remained to direct the search. In response to questions by the trial judge, the officer in charge of the search stated that he was 'under the impression that there was a possibility that we could be led to the body at that time.'" *Id.*

[81] *Id.* at 262.

[82] *Id.*

[83] *Id.*

[84] *Id.*

evidence, the Iowa Supreme Court concluded that

> [a]s a result of the search which was underway, and which would have been continued, the body of Pamela Powers would have been found even in the absence of assistance by defendant. Further, that body would have been found in essentially the same condition it was in at the time of the actual discovery, so that all of the evidence which it actually yielded would have been available to the police.[85]

In subsequent federal *habeas corpus* proceedings, the district court, in denying relief, also concluded that the body would inevitably have been discovered.[86] The Eighth Circuit, however, reversed, concluding that there was a "lack of bad faith" component to the hypothetical doctrine of inevitable discovery which the State had not met.[87] The case, *Nix v. Williams*,[88] again reached the Supreme Court, which accepted both the inevitable discovery doctrine and the validity of its application to the facts in the record.[89]

Chief Justice Burger, writing for the Court, began his analysis by accepting the validity of extending the rationale underlying the pre-existing independent source doctrine:

> The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse* position that they would have been in if no police error or misconduct had occurred .... When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two 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. Thus, while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule.[90]

On the question of whether the doctrine would apply in the

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[85] *Id.*

[86] Williams v. Nix, 528 F. Supp. 664 (S.D. Iowa 1981), *rev'd*, 700 F.2d 1164 (8th Cir. 1983), *rev'd*, 467 U.S. 431 (1984).

[87] 700 F.2d at 1164.

[88] 467 U.S. 431 (1984).

[89] *Id.* at 441-50.

[90] *Id.* at 443-44 (citations and footnote omitted).

case at hand, the Court began by entirely discarding the absence-of-bad-faith requirement employed by both the Iowa Supreme Court and the Eighth Circuit.[91] The Court was not impressed with the argument that this requirement was necessary to preserve the deterrent effect of the exclusionary rule. It reasoned that as a practical matter, in most situations a police officer would not be able to calculate that a piece of evidence would have inevitably come to light and, hence, would not risk suppression, which is the usual consequence of an illegal act, on this basis.[92] On the other hand, a police officer who was aware of an inevitable discovery would have no incentive to take an illegal "shortcut," particularly in the face of other disincentives such as civil suits or departmental discipline.[93] As such, the Court found that "[i]n these circumstances, the societal costs of the [application of] the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce."[94]

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[91] *Id.* at 445-48.

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

[93] *Id.* at 446. It might be noted that this analysis ignores the considerable pressure toward shortcuts which the police may face in many serious investigative situations. The impetus towards immediate action may spring from the highest of motives, such as the desire to locate an injured victim, or may be the result of unfavorable publicity or political interference.

[94] *Id.* Note the reference to "good faith" in the quotation, as opposed to the Court's earlier characterization of the Court of Appeals' requirement: "that the prosecution must prove the absence of bad faith." *Id.* at 445. While these terms are used interchangeably throughout the opinion, it is by no means clear that they mean the same thing. The Supreme Court indeed has recognized a "good faith" exception to the exclusionary rule in some situations. *See* Massachusetts v. Sheppard, 468 U.S. 981 (1984) (police reasonably relied on invalid search warrants issued by neutral magistrate); Illinois v. Krull, 480 U.S. 340 (1987) (police reasonably relied on invalid statutes); United States v. Leon, 468 U.S. 897 (1984); Michigan v. Defillipo, 443 U.S. 31 (1979). Some have also argued for "bad faith" suppression, such as the exclusion of evidence in situations where police conduct, judged objectively, is reasonable, but where the police themselves thought that their actions were improper. *See* 1 LAFAVE, *supra* note 15, § 1.4, at 80. In any event, as the conflicting opinions of the Iowa Supreme Court and the Eighth Circuit well illustrate, the elimination of any such requirement in the context of inevitable discovery, which applies only in situations where there was illegal police conduct, has certainly saved many reviewing courts a good deal of difficulty. Despite *Nix*, however, some courts and commentators continue to urge that a "good faith" component is necessary to preserve deterrence. *See* Commonwealth v. O'Conner, 546 N.E.2d 336 (Mass. 1989); State v. Wahl, 450 N.W.2d 710 (N.D. 1990); John E. Fennelly, *Refinement of the Inevitable Discovery Doctrine: The Need For a Good Faith Requirement*, 17 WM. MITCHELL L. REV. 1085 (1991).

The Court then agreed with the conclusion reached by "three courts independently reviewing the evidence," that the body of the child would inevitably have been discovered during a resumed search.[95]

The new exception to the exclusionary rule did not receive enthusiastic support from the entire Court. Justices Brennan and Marshall found that acceptance of the rule was not constitutionally offensive where the evidence "inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred." However, because the "hypothetical" character of inevitability justified a heightened burden of proof on the prosecution,[96] and because no such requirement was imposed below, they dissented.[97]

C. *The Inevitable Discovery Doctrine in New York*

Despite ratification by the United States Supreme Court, the inevitable discovery doctrine still generates uneasiness because of a perceived potential clash with the exclusionary rule under some circumstances. Illustrative is the treatment that the theory has received in the New York Court of Appeals. That court first accepted the doctrine in 1973, in the pre-*Nix v. Williams* decision of *People v. Fitzpatrick*.[98] In *Fitzpatrick*, the court applied the doctrine to justify the admission into evidence of a gun that was found in a closet in which the murderer of two police officers had been hiding.[99] After receiving defective *Miranda* warnings, the defendant revealed the location of the weapon to the arresting officers.[100] However, Judges

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[95] *Nix*, 467 U.S. at 448. The Eighth Circuit did not reach this question.

[96] *Id.* at 459 (Brennan, J., dissenting).

[97] *Id.* The majority agreed that the burden of proof was on the prosecution, but rejected the imposition of a standard greater than that of preponderance-of-the-evidence, which is applicable to most suppression questions. The Court also disagreed with the view that the finding of inevitability would be particularly difficult or speculative: "[I]nevitable 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." *Id.* at 444 n.5.

[98] 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793 (1973).

[99] *Id.* at 504-05, 300 N.E.2d at 140, 346 N.Y.S.2d at 795.

[100] *Id.* at 504, 300 N.E.2d at 139, 346 N.Y.S.2d at 795.

Wachtler and Jones, while concurring in the result,[101] questioned both the wisdom of adopting the rule[102] and the practicality of making the findings necessary for its application.[103] Nevertheless, insofar as the inevitable discovery doctrine is concerned, *Fitzpatrick* is an archetypical decision possessing many of the usual elements: a heinous crime which suggests a high level of police activity; evidence derived and somewhat separated from the primary illegality; discussion of the potential impact of acceptance of the doctrine upon deterrence; and significant reservations by some judges on both theoretical and practical grounds.

The New York Court of Appeals next faced the issue in the well-known case of *People v. Payton*.[104] An unlawful search of defendant's apartment produced a sales receipt for the murder weapon, a gun that was never recovered.[105] This receipt, in turn, led to a gunshop located in Peekskill, New York. The proprietor, called as a prosecution witness at the murder trial, testified that he had sold a rifle to the defendant. Other testimony linked this weapon to shell casings found at the crime scene.[106] A federally required record of the transaction bear-

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[101] The concurring judges believed that the receipt of the gun into evidence was error, but harmless in the light of the other proof. *Id.* at 516, 300 N.E.2d at 148, 346 N.Y.S.2d at 805.

[102] "However, allowing 'poisoned' evidence in on the ground that some hypothetical police search would have uncovered the evidence anyway results in a speculative theory with no discernable limits." *Id.* at 513, 300 N.E.2d at 146, 346 N.Y.S.2d at 803.

[103] The decision states that the scope of the doctrine is coextensive with what "the normal course of police investigation" would have inevitably turned up. *Id.* at 506, 300 N.E.2d at 141, 346 N.Y.S.2d at 797.

> "The normal course of police investigation" differs greatly from one police department to another and even within departments, so theoretically at least the constitutional standard would differ from locale to locale. In addition, defining what "the normal course of police investigation" would *inevitably* have turned up could prove most difficult.

Id. at 514, 300 N.E.2d at 146, 346 N.Y.S.2d at 803 (Wachtler, J., concurring).

[104] 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395 (1978), *rev'd on other grounds sub nom.* Payton v. New York, 445 U.S. 573, *on remand,* 51 N.Y.2d 169, 412 N.E.2d 1288, 433 N.Y.S.2d 261 (1980). The United States Supreme Court held that in the absence of exigent circumstances, a warrant was necessary to make a nonconsensual entry into private premises for purposes of making an arrest therein. *Payton*, 445 U.S. at 573.

[105] *Payton*, 45 N.Y.2d at 305, 380 N.E.2d at 226, 408 N.Y.S.2d at 397.

[106] *Id.*

ing the defendant's signature was also placed in evidence.[107] Based on testimony by the investigating detective that, without the receipt found in the apartment, he would have put out an alarm to all gunshops which would have included the Peekskill dealer, buttressed by testimony from the gun dealer that he would have appropriately responded, the court decided that the evidence would have "inevitably" come to light. Accordingly, the court concluded that the doctrine was applicable: "The doctrine does not call for certitude as the literal meaning of the adjective 'inevitable' would suggest. What is required is that there be a very high degree of probability that the evidence in question would have been obtained independently of the tainted source."[108] This apparent willingness to loosen the definition of inevitability sparked a vigorous dissent.[109]

Payton constitutes the high water mark of inevitable discovery as defined by the New York Court of Appeals.[110] What followed were two cases in which the doctrine was rejected. The first, *People v. Knapp*,[111] involved a series of warrantless searches of the defendant's house, which was being used for the production of illegal drugs.[112] An undercover police officer

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[107] *Id.*

[108] *Id.* at 313, 380 N.E.2d at 231, 408 N.Y.S.2d at 401-02.

[109] Three of the court's seven judges dissented, in separate opinions. Judge Wachtler wrote:

> [T]his type of reasoning can only serve to erode the exclusionary rule. In many, if not most cases, the police will undoubtedly be able to point to some lead which if pursued with fanatical devotion would have ultimately led them to the evidence which was actually obtained unlawfully. Unfortunately it is in cases where the evidence could be obtained through lawful, but time consuming methods that the exclusionary rule is most needed to discourage the police from resorting to the unconstitutional short cut.

Id. at 317, 380 N.E.2d at 233, 408 N.Y.S.2d at 404 (citation omitted). Judge Fuchsberg seemingly accepted the validity of the doctrine, but warned "that the shift the majority today makes to one which talks only in terms of a *degree* of 'probability' undermines (the doctrine's) reliability." *Id.* at 319, 380 N.E.2d at 234, 408 N.Y.S.2d at 405. The remaining dissent focused largely on other grounds.

[110] In reversing the first *Payton* decision, the United States Supreme Court did not consider the inevitable discovery aspect of the holding of the New York Court of Appeals, which accordingly did not review the issue on remand. People v. Payton (II), 51 N.Y.2d 169, 173 n.1, 412 N.E.2d 1288, 1289 n.1, 433 N.Y.S.2d 61, 62 (1980). The reversal involved the admissibility of evidence other than that which had been the subject of the doctrine's application.

[111] 52 N.Y.2d 689, 422 N.E.2d 531, 439 N.Y.S.2d 871 (1981).

[112] *Id.* at 693, 422 N.E.2d at 533, 439 N.Y.S.2d at 873.

was permitted to enter the house for the ostensible purpose of consummating a drug transaction. The defendant was then arrested inside the kitchen. Drugs were seized from the kitchen at the time of his arrest.[113] Thereafter, additional drugs and other evidence were found in defendant's bedroom and basement.[114] The court sustained the seizure of drugs from the kitchen, but held that the subsequent warrantless searches of the bedroom and basement were improper.[115] Responding to the argument that the police would have inevitably obtained a warrant which would have authorized the search of these areas, the court held that the flawed search

> could not be reincarnated as a hypothetical untainted one. Were the rule otherwise, every warrantless nonexigent seizure automatically would be legitimatized by assuming the hypothetical alternative that a warrant had been obtained. Without the deterrment [sic] effect of the exclusionary rule, in such circumstances the constitutional warrant procedure for shielding Americans from unreasonable searches and seizures would be a shambles.[116]

In one other case, *People v. Stith*,[117] the lower New York courts had invoked the inevitable discovery doctrine to render admissible a gun which had been found in the course of an illegal search of a portfolio in the cab of a truck. The truck had been stopped for speeding, and later was found to have been stolen.[118] The rationale for applying the doctrine was that the weapon would have come to light in the course of the routine inventory search, which is normally done when a vehicle is taken into police custody.[119] While not disputing that the weapon would have been found in the course of such a procedure, the New York Court of Appeals unanimously held that application of the doctrine to "primary" rather than "secondary" evidence[120] would be "an unacceptable dilution of the

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[113] *Id.*

[114] *Id.*

[115] *Id.* at 698, 422 N.E.2d at 536, 439 N.Y.S.2d at 876.

[116] *Id.*

[117] 69 N.Y.2d 313, 506 N.E.2d 911, 514 N.Y.S.2d 201 (1987).

[118] *Id.* at 319, 506 N.E.2d at 914, 514 N.Y.S.2d at 204.

[119] *See* People v. Gonzalez, 62 N.Y.2d 386, 465 N.E.2d 823, 477 N.Y.S.2d 103 (1984) (inventory of vehicle may include contents of containers found therein).

[120] By the court's definition, primary evidence is "evidence illegally obtained during or as the immediate consequence of the challenged [i.e., improper] police conduct," while "secondary evidence" is "evidence obtained indirectly as a result of

exclusionary rule. It would defeat a primary purpose of that rule, deterrence of police misconduct."[121]

Thus, despite general acceptance of the core concept of the doctrine by the Supreme Court and many state and federal courts, inevitable discovery remains controversial, particularly at the outer limits of its application. As Professor LaFave notes: "Despite *Nix*, it is still true . . . that the inevitable discovery doctrine simply is inapplicable in those situations where its use would, as a practical matter, operate to nullify important Fourth Amendment safeguards."[122] Some of the situations in which the courts have rejected application of the doctrine or expressed Professor LaFave's concern have already been addressed. These include an attempt to argue that evidence produced by an illegal warrantless intrusion can be admitted on the basis of an "inevitable search warrant,"[123] the continuing concern over whether considerations of deterrence require that there be a "lack of bad faith" as a prerequisite for the application of the rule,[124] and the limitation of the doctrine to secondary evidence.[125] There are other troublesome areas as well.[126] One of these is the situation presented

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leads or information gained from that primary evidence." 69 N.Y.2d at 318, 506 N.E.2d at 914, 514 N.Y.S.2d at 204. In People v. Herman, 144 A.D.2d 485, 553 N.Y.S.2d 971 (2d Dep't), *appeal denied*, 73 N.Y.2d 855, 534 N.E.2d 340, 537 N.Y.S.2d 502 (1988), the *Stith* restriction on the inevitable discovery doctrine was applied to deny summarily a prosecution argument that bank statements uncovered in an unlawful search inevitably would have been subpoened.

[121] *Stith*, 69 N.Y.2d at 319, 506 N.E.2d at 914, 514 N.Y.S.2d at 204 (citation omitted).

[122] 4 LAFAVE, *supra* note 15, § 11.4., at 383.

[123] People v. Knapp, 52 N.Y.2d 589, 422 N.E.2d 531, 439 N.Y.S.2d 871 (1981); *accord* United States v. Buchanan, 904 F.2d 349 (6th Cir. 1990); United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); United States v. Griffin, 502 F.2d 959 (6th Cir. 1974); State v. Ault, 724 P.2d 545 (Ariz. 1986); Commonwealth v. Ghee, 607 N.E.2d 1005 (Mass. 1993); State v. Handtmann, 437 N.W.2d 830 (N.D. 1989) (all rejecting the argument that a search warrant would have produced the evidence); *cf.* United States v Apker, 705 F.2d 293 (8th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); State v. Butler, 676 S.W.2d 809 (Mo. 1984) ("inevitable search warrant" argument accepted under some circumstances).

[124] *See supra* notes 76-77 and accompanying text.

[125] People v. Stith, 69 N.Y.2d 313, 506 N.E.2d 911, 514 N.Y.S.2d 201 (1987); *accord* State v. Crossen, 536 P.2d 1263 (Or. App. 1975); *cf.* People v. Burola, 848 P.2d 958 (Colo. 1993) (specifically rejecting this limitation). In an earlier article, a much younger author argued that the theory could be applied to both forms of evidence. La Count & Girese, *supra* note 26, at 507.

[126] *See, e.g.*, *Handtmann*, 437 N.W.2d at 830 (rejecting inevitable discovery

in *United States v. Eng*, in which the government argued that the illegally obtained evidence in question would have come to light as the result of an "inevitable subpoena."

II. THE SECOND CIRCUIT'S APPLICATION OF INEVITABLE DISCOVERY TO SUBPOENAS IN *UNITED STATES V. ENG*

A. *Eng (I) and Its Predecessors*

Generally speaking, a subpoena is a "process, or a writ, of an essentially judicial nature"[127] used for the purpose of compelling the attendance of a person as a witness or for the production of documentary evidence.[128] In federal criminal cases, government authority to issue subpoenas is found principally in the Federal Rules of Criminal Procedure.[129]

The subpoena and the inevitable discovery doctrine apparently first met squarely in the 1988 case of *United States v. Roberts*.[130] In *Roberts*, the Second Circuit considered a motion for the return of business records that had been seized pursuant to an invalid search warrant.[131] In response, the government argued, *inter alia*, that the property did not have to be returned because the records in question would have been

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where search warrant was based on insufficient probable cause); Commonwealth v. Rudisill, 622 A.2d 397 (Pa. 1993) (rejecting inevitable discovery where execution requirement of search warrant violated). Of course there are also many situations that do not implicate the theoretical limits of the doctrine, but where the prosecution has simply failed to establish the necessary degree of "inevitability." *See, e.g.*, People v. Ursini, 614 N.E.2d 969 (Ill. App. 1993); Commonwealth v. Germann, 621 A.2d 589 (Pa. Super. 1993) (failure to prove that vehicles in which evidence was found would have been taken into police custody and inventoried).

[127] 97 C.J.S. *Witnesses*, § 20, at 370 (1957) (citations omitted).

[128] Historically, the former was a *subpoena ad testificandum*, while the latter was known as a *subpoena duces tecum*.

[129] FED. R. CRIM. P. 17.

[130] 852 F.2d 671 (2d Cir.), *cert. denied*, 488 U.S. 993 (1988). Prior to *Roberts*, an argument that the inevitable discovery doctrine could apply in such circumstances had been advanced, but was rejected on other grounds. *See* United States v. Guarino, 610 F. Supp. 371, 380 (D.R.I. 1984) ("The record fails to indicate, however, that the Government had sufficient knowledge, prior to the illegal search, regarding the various companies apparently controlled by Defendant, to be able to subpoena those particular documents."); *see also* People v. Herman, 144 A.D.2d 485, 553 N.Y.S.2d 971 (2d Dep't) (argument rejected on the basis of the State's limitation of inevitable discovery to "secondary" evidence), *appeal denied*, 73 N.Y.2d 855, 534 N.E.2d 340, 537 N.Y.S.2d 502 (1988).

[131] *Roberts*, 852 F.2d at 672.

produced pursuant to a (supposedly) lawfully issued subpoena.[132] The court had little difficulty in rejecting this claim:

> The government contends that it inevitably would have discovered the documents under a subpoena that it had issued several months before the search of the premises. The mere fact that the government serves a subpoena, however, does not mean that it will obtain the documents it requests. A subpoena can be invalid for a variety of reasons, as when it is unduly burdensome, . . . when it violates the right against self-incrimination, . . . or when it calls for privileged documents . . . . Moreover, we can deplore but not ignore the possibility that the recipient of a subpoena may falsely claim to have lost or destroyed the documents called for, or may even deliberately conceal or destroy them after service of the subpoena. Thus, the government cannot show that its subpoena would have inevitably resulted in the discovery of the suppressed documents.[133]

The *Roberts* rejection is practical, not philosophical. Standing alone, a subpoena is simply not a powerful enough tool to produce the required showing of inevitability.

The Second Circuit's reasoning and result in *Roberts* were echoed by the Ninth Circuit in *Center Art Galleries-Hawaii, Inc. v. United States*,[134] another proceeding for the return of property seized pursuant to an invalid warrant. Relying on and quoting from *Roberts*, the court rejected the government's inevitable discovery argument: "The argument is based on the premise that by service of the subpoenas the government inevitably would have received the items the subpoenas sought. This is not so."[135] Interestingly, though, the pragmatic rejection of the inevitable discovery argument in *Roberts* perhaps caused the Ninth Circuit, which had followed the rule of that decision, to overlook a significant difference between the two cases. In *Roberts* the government had issued the subpoena "several months" before the search. In *Center Art Galleries*, however, the government argued that "it inevitably would have obtained the items when [the gallery] responded to subpoenas which the government served *after* it executed the warrants."[136] As demonstrated below, the latter situation pres-

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[132] *Id.* at 673.
[133] *Id.* at 676.
[134] 875 F.2d 747 (9th Cir. 1989).
[135] *Id.* at 754.
[136] *Id.* (emphasis added).

ents a very different sort of problem.[137]

Then came *United States v. Eng*.[138] Eng was convicted of tax evasion. The case against him began in the Summer of 1989, when government informants identified Eng as a narcotics dealer and money launderer.[139] The IRS launched a tax evasion investigation using a tactic called the "expenditures method," which in essence involves proving that a potential defendant, in any given tax year, made expenditures far in excess of his or her reported taxable income.[140] Following the usual procedure in such cases, an agent reviewed Eng's personal tax returns.[141] The returns listed personal bank accounts—but not account numbers—at four New York banks, as well as the address of Eng's Staten Island residence.[142] A title search on the latter revealed the identity of the bank that held Eng's mortgage, which in turn led to Eng's mortgage application and the financial information revealed therein.[143]

In addition to the information derived from Eng's tax returns, government informants provided further insight into Eng's financial affairs. They identified him as the owner of a Manhattan condominium, and indicated that he was the president of a Chinatown restaurant.[144] A title search on the property housing the restaurant revealed that Eng was also the president of the corporation that had recently bought the property. The tax returns of the restaurant and the corporation, in turn, revealed the existence of a bank account for the restaurant.[145]

During this period of the investigation, only two subpoenas were issued. The first was issued to the Bowery Savings bank, where the tax returns had indicated that one of Eng's personal bank accounts was located. The second was issued to the National Westminster bank, which was one of the four banks Eng's tax returns had listed as holding a personal account in

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[137] *See infra* notes 222-26 and accompanying text.

[138] 971 F.2d 854 (2d Cir. 1992) [hereinafter *Eng (I)*].

[139] *Id.* at 856.

[140] *Id.*; *see* United States v. Bianco, 534 F.2d 501, 503-04 (2d Cir.) (explaining the theory), *cert. denied*, 429 U.S. 822 (1976).

[141] *Eng (I)*, 971 F.2d at 856.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 856-57.

addition to the restaurant account.[146] Although the Bowery Bank had erroneously reported that it had no account for Eng, the National Westminster subpoena produced records of large cash deposits from an account at the Hang Seng Bank, another of the institutions identified in Eng's tax records.[147] United States Treasury Department records revealed further large cash deposits into the restaurant account.[148]

Two months after the commencement of the investigation, Eng was arrested for narcotics and money laundering crimes, as well as for administering a continuing criminal enterprise.[149] He was not, however, arrested for tax evasion at that time.[150] On the date of his arrest, federal agents seized certain of Eng's businesses and conducted an illegal, warrantless search of a safe in one such location.[151] The illegal search revealed a great variety of business records, including the following: canceled checks bearing the account numbers of the personal bank accounts at the four banks identified in Eng's tax returns; money orders payable to yet another bank, the Long Island Savings bank, which Eng used to make mortgage payments on his Staten Island residence; documents relating to the Manhattan condominium which confidential information had previously linked to Eng; documents relating to the purchase of the property containing the restaurant, which included further details such as the identity of the owners of the corporation which had sold the property to Eng's corporation; a checkbook of another corporation with an account at National Westminster Bank; documents revealing Eng's ownership of a boat and house in Florida; and records of other money orders used by Eng.[152]

Following the search of the safe and the seizure of the records, the government pursued the leads obtained therefrom in various ways. First, subpoenas were issued—in one case, reissued—to the four banks holding Eng's personal ac-

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[146] *Id.* at 857.
[147] *Id.* at 857-58.
[148] *Id.* at 857.
[149] *Id.*
[150] *Id.* at 858.
[151] *Id.* at 857.
[152] *Id.*

counts.[153] Although these banks had been identified by examining Eng's tax returns before the illegal seizure, the fruits of that seizure included the account numbers, which presumably were helpful.[154] The banks, including the Bowery Savings Bank, which had erroneously replied in the negative to the pre-search subpoena, produced statements and records of the accounts.[155] Next, a title search on the Manhattan condominium revealed the identity of the seller and seller's attorney.[156] Subpoenas to them revealed that Eng had bought the property for $200,000 in cash.[157] Another set of subpoenas was issued to various individuals involved in the sale of the restaurant, revealing that Eng's corporation, which had bought the property, had paid half of the $1.7 million dollar price in cash.[158]

Other subpoenas were directed to the Hang Seng Bank. The pre-seizure subpoena directed to National Westminster had identified Hang Seng as the source of checks deposited to the restaurant account. The source of these funds eventually was traced to Hong Kong.[159] Further subpoenas directed to National Westminster Bank for the records of the corporation named in the checkbook illegally obtained from the safe ultimately revealed that transfers totalling about one million dollars had been deposited into this corporation's accounts from sources in Hong Kong, and that this corporation was the principal behind the restaurant property.[160] Finally, a title search on the Florida house and a check of Florida boating records led to the issuance of subpoenas to various Florida financial institutions, revealing that Eng had spent almost $200,000 for these items.[161]

Eng was tried for and convicted of tax evasion.[162] The charge, premised on the claim that Eng was spending money far in excess of his reported taxable income, was evidenced by many of the documents set forth above, including documents

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[153] *Id.*
[154] *Id.*
[155] *Id.* at 857-58.
[156] *Id.* at 856.
[157] *Id.* at 857.
[158] *Id.*
[159] *Id.*
[160] *Id.* at 857-58.
[161] *Id.* at 858.
[162] Eng was acquitted of the narcotics and laundering charges. *Id.* at 859.

and information obtained by both pre-search and post-search subpoenas, as well as some records obtained in the search itself.[163] Prior to trial, Eng moved to suppress, arguing that the evidence was either the direct or secondary fruit of the illegal search of the safe.[164] The government responded by invoking the inevitable discovery doctrine, which the district court summarily found applicable.[165] Eng appealed the court's decision.

In assessing the validity of the "inevitable subpoena" argument, the first hurdle the Second Circuit faced was its own precedent. Eng argued that *Roberts* established a *per se* rule which "forbids the government from using the subpoena power to make its inevitable discovery case."[166] The government apparently attempted to distinguish *Roberts* on its facts, arguing that the particular subpoena therein was suspect.[167] The Second Circuit chose a middle course:

> The circumstances revealed in *Roberts*, which made it unlikely that the subpoena would produce any evidence, must be contrasted with a situation where the government can demonstrate a substantial and convincing basis for believing that the requisite information would have been obtained by subpoena. Where the government is able to make such a demonstration, there is no reason why the government may not rely upon the subpoena power as one way it might meet the burden of proving inevitable discovery by a preponderance of the evidence. However, the various factors that might prevent a positive response to a subpoena must also be considered.[168]

This distinction is couched in practical terms. The subpoena in *Roberts,* which was issued to the target of the investigation months prior to the illegal search and which apparently produced no actual evidence, standing alone was simply not powerful enough to support a finding of inevitability. Multiple subpoenas, however, served in the context of an intensive investigation and pursued with zeal, might be a different story. Furthermore, many of the *Eng* subpoenas were directed to third-

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[163] *Id.* at 857-58.

[164] *Id.* at 858.

[165] After initially promising a "lengthy opinion" on the matter, the district court judge, indicating that the conclusion that the doctrine applied was "compelled," declined further elaboration. *See id.* at 858-59.

[166] *Id.* at 860.

[167] *Id.*

[168] *Id.*

party financial institutions upon which the government might rely to respond truthfully. Thus, the possibility of predicating an inevitable discovery argument upon government-issued subpoenas correctly was not foreclosed.

Having left open this possibility, the Second Circuit noted that other considerations were now in play:

> In view of the need to prevent the inevitable discovery exception from swallowing the exclusionary rule, special care is required . . . 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 than 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 . . . . [S]ubpoenas must not serve as an after the fact "insurance policy" to "validate" an unlawful search under the inevitable discovery doctrine.[169]

Applying these principles to the case at hand, the Second Circuit held that the factual record was not sufficiently detailed.[170] Accordingly, Eng's conviction was vacated and the appeal was held in abeyance while the case was remanded for a hearing so that the district court could make "particularized findings."[171]

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[169] *Id.* (citations omitted).

[170] *Id.* at 864.

[171] *Id.* The Second Circuit listed various concerns and unanswered questions to be addressed by the district court on remand. These ranged from the fairly general to the extremely specific. As to the former, the court questioned whether the tax investigation of Eng was "sufficiently active or developed" prior to the illegal search, and noted that the government's argument that it had delayed pursuit of most sources of information prior to the arrest of Eng to avoid alerting him did not explain why there were only two pre-arrest subpoenas. *Id.* at 861. As to the latter, the Second Circuit considered each piece of information, asking questions such as "to what extent possession of an account number makes more likely a satisfactory response to a bank subpoena," and whether a unit number was required for a title search on Eng's Manhattan condo. The court also indicated that the circumstances surrounding some portions of the contested evidence, such as the series of Hang Seng Bank cashier's checks, seemingly presented a good case for the application of the doctrine, while in other instances, such as the Florida properties, the opposite conclusion seemed likely.

B. *Eng (II)*

Following the hearing on remand, the District Court for the Eastern District of New York returned an opinion containing extensive "particularized findings."[172] After a review of the theory of inevitable discovery, the court first considered the nature of the investigation, finding that proving tax evasion through the expenditures method "requires the government to amass detailed information concerning all of an accused's expenditures and to conduct a methodical, routine examination of all of those expenditures together with any available resources," and that the method is normally "time consuming," and "necessarily [one] . . . of . . . complexity and duration."[173] The court then found that the government's investigation of Eng fit that pattern, and was "active and ongoing" at the time of the illegal search.[174] Following a detailed item-by-item review of each piece of challenged evidence, the court concluded that the inevitable discovery doctrine applied to the vast majority of evidence that had been admitted at trial.[175]

On appeal, the Second Circuit accepted the district court's findings, reinstating and affirming Eng's conviction.[176] Initially, on the question of the scope and status of the pre-illegality investigation, Eng challenged the lower court's methodology, claiming that the reliance on "the customary practices and standard procedures of tax investigations" was improperly speculative.[177] The court rejected his contention with little consideration, summarily approving the district court's review of the "demonstrated historical facts" of the agent's investigation, and noting that "Eng was charged with importing and distributing more than 800 pounds of heroin and deriving substantial income from those activities."[178] Accordingly, the government was motivated to obtain additional evidence of Eng's narcotics activities and to seek forfeiture of the proceeds de-

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[172] United States v. Eng, 819 F. Supp. 1198 (E.D.N.Y.), *aff'd*, 997 F.2d 987 (2d Cir. 1993).

[173] 819 F. Supp. at 1209-10.

[174] *Id.* at 1210.

[175] *Id.* at 1226.

[176] United States v. Eng, 997 F.2d. 987 (2d Cir. 1993) [hereinafter *Eng (II)*].

[177] *Id.* at 991.

[178] *Id.*

rived from his distribution of heroin."[179] The Second Circuit also agreed that information gleaned from the illegal search of Eng's safe did not "trigger" or "catalyze" the tax evasion investigation.[180]

The court then reviewed each piece of challenged evidence. As to Eng's four personal bank accounts, the existence of which were known before the illegal seizure—excepting the account numbers, the court agreed that subpoenas would have been issued, which ultimately would have produced the information in question.[181] For its conclusion that the agent would have issued the subpoenas, the court relied on:

> (1) [the agent's] notes and testimony [that he intended to issue them] ; (2) the fact that one subpoena to Bowery Bank was served prior to the search and one subpoena to Manhattan Savings Bank was drafted prior to the search; (3) the nature of narcotics and tax investigations; and (4) the facts already uncovered in this particular investigation.[182]

The court also found that the account numbers were not essential and that the fact that the Bowery Bank had erroneously responded in the negative to the pre-search subpoena was a fluke, owing to "isolated and unique circumstances."[183]

As to Eng's Staten Island residence, which the agent discovered in Eng's tax returns, a pre-search subpoena and title examination had revealed the seller's identity and that the Long Island Savings Bank held the mortgage. The illegal search added records of money orders payable to that bank, although these had not been introduced into evidence. But post-search subpoenas to the seller revealed further documents, including a closing statement.[184] The court found the doctrine applicable to the latter, since the fact "[t]hat [the agent] did not issue these subpoenas until after the search does not negate the fact that his use of the expenditures method of proof would have led him to subpoena these sources so that he could determine how Eng paid for the property."[185]

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[179] *Id.*
[180] *Id.* at 991-92.
[181] *Id.* at 993.
[182] *Id.* at 992.
[183] *Id.* at 993.
[184] United States v. Eng (II), 997 F.2d 987, 993 (2d Cir. 1993).
[185] *Id.* at 994.

The court then turned to various money orders which had been found in the course of the illegal search. Eng had used these for various personal expenses, including mortgage and tax payments, insurance and tuition bills, car payments and bills for parking and building code violations.[186] Although the documents found in the safe were not offered into evidence themselves, post-search subpoenas to the banks which had deposited the money orders for their recipients produced records as well as copies of the money orders themselves, which ultimately were accepted into evidence.[187] The Court held that the money orders concerning parking and building violations should have been suppressed, because prior to the search, the agent had no way of knowing that Eng would have incurred these liabilities and, thus, would not have looked further, even in the course of an expenditures investigation.[188] As to the other records, however, the court ruled that their discovery was inevitable because the agent had general knowledge from a confidential informant that Eng tended to pay expenses by money order, because the agent had Eng's credit card and checking records before the search and because he was in the early stages of actively pursuing an expenditures investigation, which would routinely involve obtaining information about cars, taxes, utilities and the like.[189]

The court next examined Eng's Manhattan condominium. Prior to the search, the agent knew of this property from a confidential informant. The subsequent illegal search revealed documents that confirmed Eng's ownership, added the unit number and identified the seller and the attorneys who had participated in the sale. This information was confirmed by a later title search, and a post-search subpoena produced the details of the transaction, including the fact that Eng had paid $200,000 for the property.[190] The court found that its original hesitation in applying the doctrine, which was based upon doubts as to the weight the agent had accorded to the confidential information as well as uncertainty as to whether a unit number was necessary to conduct a title search, had been

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[186] *Id.*
[187] *Id.*
[188] *Id.* at 995.
[189] *Id.*
[190] *Id.*

unfounded.[191] Accordingly, the court affirmed the district court's ruling that this evidence was admissible.[192]

The court then turned to Eng's restaurant and the property on which it was situated. The illegal search uncovered the names of the parties to the sale of the property and their attorneys. Post-search subpoenas revealed that Eng's corporation had purchased the property for 1.7 million dollars, half of it in cash, and half through a back mortgage provided by the sellers.[193] In *Eng (I)*, the court had expressed considerable doubt as to whether this important evidence would be admissible under the doctrine.[194] The court had hypothesized that because much of information had been provided by the sellers, whose identities were uncovered by the search, alternate routes to the discovery of those parties might be difficult to show.[195] On the remand, however, the district court found that other evidence, principally the filing of an *in rem* forfeiture complaint against the property, indicated governmental awareness of the seller's identities prior to the illegality.[196] Accordingly, the court similarly found the evidence to be admissible.[197]

Next, a checkbook naming a particular corporation found in the course of the illegal search had led to the issuance of subpoenas and to the discovery that very substantial fund transfers totalling about one million dollars had been made from sources in Hong Kong.[198] The court found the evidence admissible, based upon the agent's pre-search knowledge of the existence of the corporation as well as "the district court's

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[191] United States v. Eng (II), 997 F.2d 987, 995 (2d. Cir. 1993).

[192] *Id.*

[193] *Id.*

[194] *Id.* at 996.

[195] *Id.*

[196] An *in rem* forfeiture action is a proceeding against the property, not an individual. *See* Waterloo Distilling Corp. v. United States, 282 U.S. 577 (1931). Accordingly, for forfeiture purposes it is both crucial and routine to identify and serve all parties having an interest in the property that is the subject of the forfeiture action. Because of the back mortgage, the seller had retained an interest in the property. The district court found that the agent, through pre-search title searches and other means, had uncovered the identity of the sellers and named them in the forfeiture complaint. *Eng (II)*, 997 F.2d at 996.

[197] *Id.* at 996.

[198] United States v. Eng, 819 F. Supp. 1198, 1221 n.9 (E.D.N.Y.), *aff'd*, 997 F.2d 987 (2d Cir. 1993).

findings that investigations of this nature involve a thorough analysis of all expenditures and receipts of funds into business accounts."[199]

Finally, as to the evidence concerning Eng's Florida house and boat, the court ruled the former admissible but suppressed the latter.[200] The illegal search had produced a real estate tax bill and cancelled checks used to pay expenses for the house, and a registration for the boat. However, whereas Eng's checking account records also showed utility and tax payments for the house—evidence already known to the government, the boat's existence was unknown prior to the search. Again, essentially relying on the thorough nature of an expenditures investigation, the court determined that the post-search title search and subpoenas for the house would have inevitably have ensued, but that the argument that the boat would have been located simply because the house had a marina was "too speculative."[201]

III. ANALYSIS

After a great deal of hard work, the Second Circuit's decision in *Eng (II)* is for the most part correct. Although some of the court's conclusions as to specific portions of the evidence appear to be on firmer ground than others, the main thrust of the opinions—that under appropriately rigorous conditions the inevitable discovery doctrine may be applied to evidence obtained pursuant to pre-or post-illegality subpoenas, or even to evidence that *would* have been subpoenaed—is on the mark. It is important to note, however, that *Eng (II)* did not involve some considerations which may be crucial to a determination of admissibility. Below is a description of various factors which might bear on such a determination. But before proceeding to that discussion, a few general comments are in order.

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[199] *Eng (II)*, 997 F.2d at 997.
[200] *Id.* at 998.
[201] *Id.*

A. *Distinguishing the Inevitable Subpoena From the Inevitable Warrant*

It is interesting to compare arguments concerning the inevitable subpoena to those dealing with the inevitable search warrant. As noted above, the *Eng (I)* court showed a certain uneasiness in applying the inevitable discovery doctrine to subpoenaed evidence, particularly where the subpoenas were issued *after* the illegality. That concern is justified. In the independent source case of *Murray v. United States*,[202] an unlawful, warrantless government entry into a warehouse was followed by a reentry and seizure pursuant to a search warrant obtained without reference to the illegally obtained information.[203] The Supreme Court upheld the admission of the evidence in the face of petitioners' objections that such a holding would create an incentive for law enforcement officials to violate the Fourth Amendment. The Court reasoned that the danger to the deterrent purpose of the exclusionary rule would be obviated by a requirement that the government convince a warrant-reviewing court that both the decision to seek a warrant and the warrant itself were truly independent of the illegality.[204] In the context of inevitable discovery, however, arguments that evidence that was initially illegally seized in a warrantless entry inevitably would have been the subject of search warrants have usually failed because acceptance would retroactively legitimize every probable-cause based, yet warrantless, search. This, in turn, eviscerates the warrant requirement and permits the inevitable discovery exception to swallow the exclusionary rule.[205]

The application of the inevitable discovery doctrine to subpoenas implicates this legitimate concern. Both the search warrant and the subpoena are forms of process aimed at uncovering evidence. The warrant, however, is initiated by government application, but must be authorized by an independent judge or magistrate, while the issuance of a subpoena is,

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[202] 487 U.S. 533 (1988).

[203] *Id.* at 536.

[204] *Id.* at 539.

[205] People v. Knapp, 52 N.Y.2d 689, 422 N.E.2d 531, 439 N.Y.S.2d 871 (1981). *See supra* note 111 and accompanying text; *see also supra* note 123 and cases cited therein.

in reality, largely at the government's unfettered discretion.[206] There are other practical differences between the two instruments, such as the fact that the subpoena can be resisted and its legality challenged after its issuance:[207]

> Subpoenas are not search warrants. They involve different levels of intrusion on a person's privacy. A search warrant allows the officer to enter the person's premises, and to examine for himself the person's belongings. The officer, pursuant to the warrant, determines what is seized (and may seize contraband or evidence in plain view.) The person to be searched has no lawful way to prevent execution of a warrant. Service of a forthwith subpoena does not authorize entry into a private residence. Further, the person served determines whether he will surrender the items identified in the subpoena or challenge the validity of the subpoena prior to compliance.[208]

In one sense, it might be argued that the need for the interposition of the magistrate's judgment renders it less likely that illegally discovered evidence would be inevitably uncovered than a similar argument applied to a subpoena. This is because the issuance decision for the warrant rests with a third party, who, if told about the initial illegality, might react in an unpredictable way and, in any event, might have a different opinion as to the existence of probable cause. Where a search warrant independent of the illegality *has* been issued, however, the untainted judgment of the magistrate and the burden on the government to show that both the warrant itself and the decision to seek it were free of taint sufficiently protect the deterrent purpose of the exclusionary rule. In the inevitable discovery situation, where no actual warrant is issued, this showing becomes impossible to make under all but the most extraordinary circumstances.[209] Accordingly, most courts to date have wisely rejected that argument.[210]

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[206] While many government subpoenas are issued in the name of bodies such as a grand jury, in practical terms the decision to issue is chargeable to the government. *See* Glenn A. Guarino, *What Actions of United States Attorney Constitute Usurpation of Authority of Federal Grand Jury, Thus Warranting Exclusion of Evidence Obtained Thereby*, 65 A.L.R. FED. 957 (1983).

[207] *See In re* Grand Jury Subpoenas Dated Dec. 10, 1987, 926 F.2d 847 (9th Cir. 1991).

[208] *Id.* at 854.

[209] It is possible to imagine a hypothetical exception, perhaps where one police agency was in the process of preparing a search warrant application for evidence which was independently and illegally seized by another agency.

[210] *See supra* notes 116, 123 & 204 and accompanying text.

If courts frequently hold that it is too dangerous to principles of deterrence inherent in the exclusionary rule to conclude that an officer who illegally seizes certain evidence inevitably would have caused a magistrate to issue a warrant authorizing a seizure of that evidence, why should an argument that the government would have obtained it by the inevitable issuance of a subpoena prevail? There are several possible answers. First, because the government-issued subpoena does not require the interposition of a magistrate's judgment, concluding that such a subpoena would inevitably have been issued and produced the illegally seized evidence does not amount to sanctioning a direct short-cut around the requirement that a magistrate's approval be obtained. Thus, there is less constitutional danger here; that is, the danger of encouraging Fourth Amendment violations is more remote.[211] Second, there seems to be both a greater practical difficulty and an inappropriate presumption in making a finding about whether an independent magistrate *would* have issued a warrant. No such considerations apply to the lowly subpoena, which may be viewed, as it was in *Eng*, as no different than any other form of governmental investigative technique, such as the massive search that was conducted in *Nix*. Perhaps also the "inevitable search warrant" argument should be accepted in an appropriately rare instance.

B. Eng's *Resolution of the Inevitable Discovery Doctrine's Conflict with the Exclusionary Rule*

In spite of its ultimate holding, the *Eng* court expressed a concern for the preservation of the exclusionary rule, principally in *Eng (I)*. There, the court warned that "subpoenas must not serve as an 'insurance policy' to 'validate' an unlawful search."[212] The court held that the danger must be met in

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[211] An objection may be that the illegal act in *Eng* was a warrantless entry and that acceptance of the inevitable subpoena argument therefore encourages such illegal actions. The same argument, however, can be made in any inevitable discovery case. The difference is that the relationship between the constitutional violation and the evidence-producing document is more attenuated, so it is less likely that an officer will be tempted to engage further in constitutionally offensive conduct.

[212] United States v. Eng (I), 971 F.2d 854, 861 (2d Cir. 1992) (citations omit-

three ways. First, "the government must show that both issuance of the subpoena, and a response to the subpoena producing the evidence in question, were inevitable."[213] Second, *Eng (I)* seemingly insisted on a very high showing of "inevitability;" that is, a tight chain of causal connections between untainted sources and ultimate evidence, and the avoidance of "leapfrogging."[214] Third, the court held that "particular care" was required where, as here, most of the evidence-producing subpoenas were issued after the illegality had occurred.[215]

The first of these precautions—the need to show inevitability in both the decision to issue the subpoena and in the receipt of evidence in response to it—is the key safeguard for the exclusionary rule. It is similar to the showing required by the Supreme Court in *Murray* for "independent source" search warrants—"no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it."[216] The second device—the need for tight causal connections and the avoidance of "leapfrogging" in judging inevitability—is more problematical. While *Eng (I)* was explicit in requiring this, there is no evidence in *Eng (II)* that any special standard was used. In any event, such a caution should apply in *any* inevitable discovery case. The third requirement of "particular care" where the issuance of subpoenas follows the illegality does touch upon a legitimate consideration, but amounts to nothing but a vague warning.

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ted).

[213] *Id.* at 860.

[214] *Id.*

[215] *Id.* at 861. Where a subpoena was issued before the illegality and does not produce the evidence, a *Roberts*-type practical issue is presented. *See supra* note 133 and accompanying text.

[216] 487 U.S. 533, 540 (1988). Indeed, regarding that portion of the *Eng* evidence which was actually produced pursuant to government-issued subpoenas, it appears that the case might have been analyzed per *Murray's* "independent source" rule without affecting either the key standard or the result. The question then turns on whether the subpoena was a source independent of the illegal search. In this sense, *Murray* may be viewed as blurring the line between the two closely related doctrines. However, because *Eng*-type subpoenas, unlike search warrants, are instruments that do not bear the independent authority of a court, it perhaps is more appropriate to view them, as the *Eng* courts did, as government investigatory steps rather than as potential "independent sources" of the evidence. Perhaps a different analysis might apply to subpoenas for which prior judicial approval is required.

Some of the court's conclusions in *Eng (II)* as to the admissibility of portions of the disputed evidence do not sit well in light of some of the cautions of *Eng (I)*. For example, if it is not "leapfrogging" to conclude that an agent with some canceled checks for Florida utility and tax bills would have done a title search followed by subpoenas in the routine course of an expenditures investigation, why did the court conclude that the same agent, who knew Eng owned several vehicles and lived in New York City, would not have simply checked with the New York City Parking Violations Bureau to find evidence concerning Eng's unpaid summonses? The answer is twofold. First, the *Eng* court was dealing with a form of investigation which is highly structured and which presumes as an essential part of that structure a very high degree of investigative thoroughness.[217] Accordingly it was easier to accept the inevitability of each stage of the investigation and the specific steps taken therein; indeed, it was probably crucial to the holding. Second, for fact-finding purposes, the courts apparently were willing to place great reliance on the agent's extensive testimony about the way in which an expenditures investigation normally proceeds, the way in which the *Eng* investigation proceeded and the actions that the agent would have taken absent the illegal search. Thus, the district court simply accepted the agent's testimony that without benefit of the documents illegally obtained from the search, he nevertheless would have investigated the cancelled checks and found the Florida properties, but that he had never routinely sought information from the Parking Violations Bureau.[218] In other words, the court took the agent's word on what was a normal step in such an investigation and what was not.

While there is nothing in any of the *Eng* opinions to sug-

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[217] Because the method involves proving that a defendant spent more than he or she could legally account for (a case built largely on circumstantial evidence), it obviously puts a premium on the uncovering of every possible bit of financial evidence, since the prosecution's case becomes that much stronger as each additional expenditure is uncovered. Of course, in a sense this is true of all criminal cases, but unlike, say, a homicide, where an investigator might be expected to stop when he or she is satisfied that there is sufficient proof of each of the elements of the crime, the expenditures method appears open-ended, or at least has a very high point of diminishing returns.

[218] United States v. Eng, 819 F. Supp. 1198, 1226 (E.D.N.Y.), *aff'd*, 997 F.2d 987 (2d Cir. 1993).

gest that the court's reliance on the agent's testimony was unfounded, in the context of inevitable discovery such reliance appears to be a very dangerous method of proof. However, there are only a limited number of prophylactic remedies available. In future cases involving such particular methods of investigation, it would be desirable to have testimony from uninvolved experts as to what is routine and what is not. Manuals or memoranda describing the techniques at issue are also obviously relevant. Similarly, care must be taken to avoid the sort of bootstrapping which presumes that, because a particular investigative technique in theory requires thoroughness, thoroughness is what inevitably occurs. Also, courts should view an investigator's opinions as to what he or she would have done, or would have ultimately uncovered, with great skepticism lest they be seduced by the esoterica of exotic investigative techniques.

C. *Giving Content to the Dual Inevitability Requirement*

With these caveats in mind, *Eng* has successfully broken new ground by applying the inevitable discovery doctrine to evidence obtained by post-illegality investigative subpoenas and other procedures without unduly undermining the exclusionary rule. As *Eng* holds, the key question to be answered in such cases is whether, absent the illegality, the government inevitably would have issued a subpoena or subpoenas which inevitably would have produced the evidence in question. These showings might be called "inevitability of issuance" and "inevitability of production." In making this determination, the following would seem to be a non-exhaustive list of relevant considerations.

1. The Pattern and Structure of the Investigation

Some investigations into criminal activity are structured in certain ways, and impose a pattern of routinely-followed steps. In *Eng*, the highly structured nature of an expenditures investigation made it much easier for the court to find that subpoenas would have been issued absent the illegality. Other sorts of financial investigations may present similar patterns involving the routine issuance of subpoenas. It may be that

similar structures may be discerned in investigations concerned with organized criminal activity, RICO and other crimes. Crime-related civil forfeiture, which played a significant role in *Eng*, should also be considered.

In proving the above, the prosecutor should, if possible, refer to official guidelines, investigative manuals and testimony of experts other than those involved in the investigation at bar. Contrary to the defense argument in *Eng*, there is nothing improper about reference to unrelated cases employing the same investigative techniques, although few judicial opinions—with the exception of *Eng* itself—will be detailed enough to be useful.

2. The Scope of the Investigation

All investigations are not equal, even when the same crime is involved. The argument for inevitability of the discovery of the body of the missing child in *Nix* required proof of a massive commitment of police resources that would not have been employed in many other murder cases. Similarly, the investigation of a major terrorist group might involve investigative steps which would not be taken in many conspiracy cases. As the scope of the particular investigation broadens, the argument for inevitability of issuance naturally grows stronger.

The scope of the particular investigation at issue should be a mixed objective-subjective question. Emphasis should be on the "demonstrated historical facts" of the investigation, such as the number and experience of officers assigned, number of investigatory steps actually taken and degree of criminal activity and/or amount of potential forfeiture involved. Also relevant, but more subjective in nature and hence more difficult to prove, is the zeal with which the investigation is pursued. Finally, the investigator's own opinions as to what he or she would have done or would have found absent the illegality should be relevant, but afforded little weight.

3. The Nature and Target of the Subpoenas

The practical point made in *Roberts* and *Center Art Galleries* is well-taken: a subpoena is not a particularly powerful law enforcement weapon when its target is a person suspected of

serious criminal activity or a business entity effectively controlled by such a person. The subpoena, of course, can be fought in court. More importantly, however, the person involved can simply destroy or conceal the requested records. While there are sanctions for such actions, they may be difficult to prove and less severe than the charges which production of the subpoenaed material sought to establish. By contrast, *Eng* involved subpoenas issued to third parties such as financial institutions and government agencies. This made it much easier to meet the second part of the court's test—that the response to the subpoena would inevitably have produced the evidence. As to this inevitability of production, *Eng* was concerned only with such mundania as whether a bank could locate a subpoenaed account without an account number. While such concerns are entirely legitimate, the identity of the target, his or her knowledge of the existence of the subpoena and the degree and exclusivity of the target's control over the requested records appear to be the crucial factors.[219]

Another consideration is the degree of the issuing agency's control over the decision to issue the subpoena. As previously noted, discretion to issue a subpoena is often largely unfettered, but there are different kinds of subpoenas and various rules concerning their issuance in different jurisdictions. If, for example, the issuance of an investigatory subpoena requires judicial approval,[220] this should be taken into account, and

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[219] Another potential consideration is the question of whether the existence of a subpoena will be revealed to the potential defendant by an institutional recipient. Some forms of investigative subpoenas impose a legal requirement that the existence of the subpoena not be disclosed. *See, e.g.*, N.Y. CIV. PRAC. L. & R. § 1311-a(4) (McKinney Supp. 1993) (forfeiture investigative subpoena). There are also instances where no such legal requirement exists, but common practice is for the issuing agency to request secrecy. In still other cases, disclosure may be routine pursuant to institutional practice or legal duty. *See* 12 U.S.C. § 3409 (1989) (providing a mechanism for delay of customer notice required by various other provisions of law). If a financial or other institution discloses the receipt of a subpoena to the account holder, then this might become a relevant fact in judging the inevitability of locating other evidence. Absent a legal basis for the customer to resist the subpoena, such a disclosure would not affect the response to the subpoena by the institution and, thus, the records of the potential defendant's financial activity in that particular institution still would inevitably be produced. However, putting the potential defendant on notice of the existence of the investigation might lead to a successful concealment of other records.

[220] *See, e.g.*, N.Y. CIV. PRAC. L. & R. § 1311-a (McKinney 1976 & Supp. 1993) (establishing a mechanism for application to a court to obtain a subpoena duces

analysis might be more appropriately conducted along other lines. Where the argument is that the government would have obtained a judicially authorized subpoena, the situation is closer to that of the search warrant. Acceptance of such an argument not only entails greater practical difficulties, but also effectively sanctions a short-cut around the judicial signature requirement.[221]

4. The Chronology of Events and the Existence of Subpoenas

As noted above, a case in which a subpoena was issued before the illegality but failed to produce the evidence in question[222] differs profoundly from one in which the subpoenas are issued after the illegality.[223] While the former may present practical problems with proving the inevitability of production, as was the case in *Roberts*, the danger of adverse impact on the exclusionary rule is far less. Some of this danger may be obviated when some subpoenas are in fact issued before the illegality, which occurred in *Eng*. Under appropriate circumstances this may constitute some proof of inevitability of issuance of evidence-producing subpoenas. However, when subpoenas are exclusively issued after the illegality, and to the very targets of that illegality,[224] the danger of the exception swallowing the exclusionary rule is at its highest and it should be very difficult to make the required showings.

A question remains as to whether the inevitable discovery doctrine should apply when no subpoena is actually ever issued. In one portion of the *Eng* remand, the district court noted that, "[a]s defendant acknowledged, the presence or absence of a post-search subpoena is irrelevant to the question of whether the government inevitably would have discovered the

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tecum in crime-linked civil forfeiture actions).

[221] *See supra* notes 111, 205 & 216 and accompanying text; *see also supra* note 123.

[222] *See* United States v. Roberts, 852 F.2d 671 (2d Cir.), *cert. denied*, 488 U.S. 993 (1988).

[223] *See* United States v. Eng (I), 971 F.2d 854 (2d Cir, 1992); Center Art Galleries-Hawaii, Inc. v. United States, 875 F.2d 747 (9th Cir. 1989).

[224] *Center Art Galleries*, 875 F.2d at 747.

evidence absent the primary illegality."[225] This is perfectly true, and it is important to note that although the government did issue many post-illegality, evidence-producing subpoenas in *Eng*, *actual* issuance is not a prerequisite for the application of the inevitable discovery doctrine. Sufficient proof that such subpoenas *would* have issued will demonstrate inevitability.[226]

CONCLUSION

Eng is a significant decision that breaks new ground and applies the inevitable discovery doctrine to evidence that would have been the subject of government issued subpoenas. The decision is likely to lead to expanded use of the doctrine in an area where its application has been sparse—financial and white collar crimes, as well as other types of complex and lengthy investigations. Application of the inevitable discovery doctrine to evidence produced by subpoenas or potential subpoenas does pose significant constitutional risks, which can be minimized by a dual requirement. The government must show (1) that absent the illegality, the authorities would inevitably have issued a subpoena or subpoenas—"inevitability of issuance"—which (2) inevitably would have produced the evidence in question—"inevitability of production." In making this determination, among other things that a reviewing court should consider are the pattern and structure of the investigation, the scope of the investigation, the nature and target of the subpoenas and the chronology of events. Strict adherence to the dual requirement should protect the deterrent purpose of the exclusionary rule while allowing for the admissibility of relevant and truthful evidence in criminal trials.

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[225] 819 F. Supp. 1198, 1224 (E.D.N.Y.), *aff'd*, 997 F.2d 987 (2d Cir. 1993).

[226] The above is not meant to be exhaustive, and focuses on cases involving subpoenas or potential subpoenas. Of course, in appropriate cases more general concerns, such as the nature, location, and permanence of the requested evidence may have a role to play in establishing inevitability.