I. INTRODUCTION

In a Seattle middle school, a young student went to her principal's office to report the sale of drugs on campus. The student told the principal that she was not feeling well due to smoking marijuana. The principal called for a police officer to investigate. When the officer arrived, the student explained that she bought the marijuana from a classmate. The classmate was found, and admitted that he and another classmate were selling drugs on campus. The other suspected seller was found soon after. Before placing the second suspect under formal arrest, the officer searched his pockets, finding a baggie containing twenty bindles of cocaine powder. In addition to any charges that developed from an investigation of sales of marijuana on campus, the suspect was additionally charged with the crime of possession of cocaine with the intent to deliver.

Under a traditional application of the exclusionary rule, the baggie of marijuana would be suppressed as the product of an unreasonable...
able search. Because the officer had not yet arrested the suspect, but merely detained him, the officer had no authority to extract nontreating objects from the suspect's pockets. Without the cocaine evidence, of course, the trial court would likely dismiss the possession with intent to deliver charge.

Is the above outcome the only one possible? Under the U.S. Supreme Court's inevitable discovery exception to the exclusionary rule, the evidence could still be admitted. The prosecutor would need to show that, prior to the search of the suspect, probable cause existed to arrest him, that the officer was well aware of it, and that the officer had already determined that he was going to arrest the suspect. The prosecutor would also need to establish that the officer would have ultimately searched the suspect after placing him under formal arrest, and that the search would have produced the same evidence. If the prosecutor can show, by a preponderance of the evidence, that such a course of events would have inevitably occurred, then the evidence, which would otherwise be suppressed, will be admitted.

Inevitable discovery is a newcomer to Washington, having only been applied since 1995.\(^4\) The history of the inevitable discovery doctrine in Washington, however, can be traced back to an important dissent written by Justice James Dolliver of the Washington Supreme Court in 1982,\(^5\) as well as to the United States Supreme Court decision of \textit{Nix v. Williams}\(^6\) in 1984. Beginning with an examination of Dolliver's dissent and the U.S. Supreme Court's holding in \textit{Nix}, this Comment will analyze the gradual acceptance of inevitable discovery by the Washington courts. While the Washington Supreme Court has adopted the federal version of the exception, Division One of the Washington Court of Appeals has expanded its reach while adding another element. Division One (and all other courts that follow its rule) requires that the prosecution establish that the investigating officer did not act unreasonably when discovering the evidence, even though the discovery was made during an illegal search. The Washington Supreme Court has yet to address Division One's addition, denying review in every case.\(^7\)

This Comment will examine the substantial differences between Division One’s current version of inevitable discovery and that adopted by the U.S. Supreme Court in Nix, which is still the only version affirmatively accepted by the Washington Supreme Court. Having distinguished the differences, this Comment ultimately suggests an amalgamation of the most desirable parts of each version of the inevitable discovery exception. The author proposes that the “reasonableness” element demanded by Division One is duplicative and unnecessarily burdensome on the prosecution. The version proposed by this Comment recognizes the potential benefits to the search for truth and to the societal interest in effective enforcement of its laws to be realized in inevitable discovery. To counter concerns that the exclusionary rule will be destroyed without the “reasonableness” requirement, the proposed version requires a sufficient quantum of proven facts to prevent careless application of the inevitable discovery doctrine.

II. STATE V. BROADNAX—INEVITABLE DISCOVERY IN DISSENT

The discussion of inevitable discovery in Washington courts began in an impassioned 1982 dissent. In State v. Broadnax, the Supreme Court of Washington reversed the conviction of Steven Thompson for possession of heroin on the grounds that he had been improperly detained and searched during the execution of a search warrant of a residence, resulting in the impermissible collection of contraband from Thompson’s person. Officers obtained the search warrant upon an affidavit of a narcotics detective of the Seattle Police Department. The detective did not name any individuals in his affidavit, but stated that he had received information that drugs had been offered for sale at the location by a man named “Clifford” within the past twenty-four hours. Following entry into the home to conduct the search, Seattle Police officers detained Thompson, along with the occupant of the home, Clifton Broadnax. The two men were told to put their hands on their heads, and neither was frisked. A short time later, the detective who had sworn out the affidavit entered the resi-

had occasion to review the inevitable discovery exception applied by the court of appeals in its decision, 76 Wash. App. 801, 888 P.2d 169 (1995). However, the supreme court held that the search at issue was reasonable, and, thus, did not call for analysis of the inevitable discovery exception. See White, 129 Wash. 2d at 112-13, 915 P.2d at 1102.

9. Id. at 291, 654 P.2d at 98.
10. Id.
11. Id. at 292, 654 P.2d at 99.
12. Id. at 292-93, 654 P.2d at 99 (noting that a sergeant at the scene testified at Thompson’s trial that he felt no need to frisk the men for weapons so long as their hands were visible).
dence.13 Apparently due to the mistaken presumption that Thompson had already been arrested, the detective performed a cursory search of Thompson’s person, and when he felt a small object in Thompson’s shirt pocket, he extracted it.14 The object turned out to be a balloon containing a small amount of heroin.15 Soon after, other officers reported that a quantity of controlled substances were found in plain view in a bedroom.16 Thompson was arrested,17 although his conviction resulted solely from the heroin found in his pocket.18

The Supreme Court of Washington held that no reasonable suspicion existed to justify even a limited “patdown” search of Thompson for weapons.19 Even assuming, for the sake of argument, that a cursory search had been permissible, the detective exceeded the scope of that search when he extracted the balloon from Thompson’s pocket, because the officer had determined that the object he felt was not a weapon.20 Finally, the court held that neither the tactile “discovery” of the still-unknown object inside Thompson’s pocket nor the discovery of other controlled substances in the bedroom substantiated probable cause for Thompson’s arrest.21 Because the prosecution could offer no justification for the discovery of the heroin in Thompson’s

13. Id. at 292, 654 P.2d at 99.
14. Id. at 293, 654 P.2d at 99. The court noted that the detective testified at Thompson’s trial that the object, while in Thompson’s pocket, did not feel like a gun or any other weapon. Id.
15. Id.
16. Id.
17. Id.
18. Id. at 291, 654 P.2d at 98.
19. Id. at 295, 654 P.2d at 100.
20. Id. at 297, 654 P.2d at 101.
21. Id. at 297-98, 654 P.2d at 102. The court rejected the State’s argument for probable cause on the basis of a “plain feel” discovery of incriminating evidence. The court held that the detective had no justification for searching Thompson, and that feeling a soft bulge in his shirt pocket did not satisfy the “plain feel” doctrine’s requirement that the object felt be immediately recognizable as evidence of a crime. Id.
22. Id. at 300-04, 654 P.2d at 103-05. The court held that the discovery of the controlled substances in the bedroom only provided probable cause under the reasoning of Ybarra v. Illinois, 444 U.S. 85 (1979) and Michigan v. Summers, 452 U.S. 692 (1981), for the detention and arrest of the occupant of the residence, Broadnax. The court noted that only Broadnax had constructive control over the residence, which could connect him to criminal activity conducted there. To connect Thompson, a visitor to the residence, to the drugs found in the bedroom, the State would have had to show “independent factors” tying Thompson to them. However, the State only charged Thompson with possession of the heroin found in his shirt pocket. Thus, the court’s discussion of whether probable cause for his arrest existed due to the discovery of other drugs would seem to be immaterial, as the heroin on Thompson was found prior to the discovery, and not incident to an arrest for possession of the other drugs. The court likely intended this portion of its opinion to serve as a counter-argument to Justice Dolliver’s argument, in dissent, for the application of the inevitable discovery exception to the exclusionary rule in this case, discussed infra.
son's pocket, that evidence should have been suppressed by the trial court due to the violation of Thompson's federal and state constitutional rights to be free from unreasonable searches and seizures.

Justice James Dolliver, in his dissenting opinion, did not dispute the court's conclusion that the detective performed an unconstitutional search of Thompson, resulting in the discovery of evidence tainted by illegality. Dolliver contended, however, that probable cause to arrest Thompson was established when the controlled substances were found in the bedroom. Referring to the undisputed testimony that the discovery of contraband in the bedroom occurred "5 or 10 seconds" after the detective discovered the heroin in Thompson's shirt pocket, Justice Dolliver suggested that the court should adopt the inevitable discovery rule and apply it to this case. Under the version of the doctrine described by Dolliver, the prosecution could avoid suppression of tainted evidence if it proved that "(1) The police did not act unreasonably or to accelerate the discovery of evidence in question; (2) proper and predictable investigatory procedures would have been utilized; and (3) those procedures would have inevitably resulted in the discovery of the evidence in question." Beyond a description of the elements of the inevitable discovery doctrine itself, Dolliver did not elaborate on the practical implications.

23. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ..." U.S. CONST. amend IV, quoted in Broadnax, 98 Wash. 2d at 293, 654 P.2d at 99.

24. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. 1, § 7, quoted in Broadnax, 98 Wash. 2d at 293, 654 P.2d at 99.

25. Id. at 304, 654 P.2d at 105.

26. Id. at 307-08, 654 P.2d at 107. Justice Dolliver contended that the court's reliance on the U.S. Supreme Court's decision in Ybarra, in conjunction with Summers, was based on a misinterpretation of those cases. Dolliver argued that the present case could be distinguished from Ybarra because the affidavit for the search warrant in Ybarra did not indicate that the premises to be searched were used for drug trafficking, and, indeed, no contraband was found at the location except on Ybarra's person. In contrast, according to Justice Dolliver:

[W]e have "presence" (of Thompson) plus a validly executed search warrant to enter premises where drug trafficking was suspected and the subsequent discovery of the contraband in plain view in a bedroom of the house.

Given these circumstances, to hold Thompson was not subject to arrest is to make one wonder what, if any, additional "independent factors" would prompt the majority to find probable cause for arrest.

98 Wash. 2d at 307, 654 P.2d at 107 (emphasis in original). Justice Dolliver disagreed with the court's ruling that Summers would only allow the arrest of Broadnax, as the only person with constructive control of the premises. Justice Dolliver likened Summers to Thompson, because both were arrested after contraband was discovered in plain view during a lawful search of premises suspected of drug traffic. Id.

27. 98 Wash. 2d at 308, 654 P.2d at 107.

28. Id. at 308-09, 654 P.2d at 107-08.

29. Id. at 309, 654 P.2d at 108.
of its adoption. He did not indicate what level of proof would be the State's burden. Nor did Justice Dolliver feel a need to distinguish, as other courts had,30 between the doctrine's applicability to primary evidence (that evidence recovered during the commission of an unreasonable search or seizure) versus derivative evidence (by-product evidence that resulted from, but was not found during, the unreasonable search or seizure).31 Regarding the frequency and circumstances of using the inevitable discovery exception, Dolliver simply noted that "[i]n carving out the 'inevitable discovery' exception to the taint doctrine, courts must use a surgeon's scalpel and not a meat axe."32

Dolliver applied the rule of inevitable discovery he had described to the facts of the present case, holding that the detective did not act unreasonably given the circumstances. The detective knew that the house had been suspected of drug trafficking, and he had first seen Thompson inside with his hands on top of his head after other officers had explored much of the house.33 It would not have been unreasonable for the detective to conclude that Thompson was under arrest, and subject to a full search of his person.34 Furthermore, because the

30. See, e.g., State v. Crossen, 536 P.2d 1263 (Or. Ct. App. 1975), discussed in 5 WAYNE R. LAFAVE, SEARCH & SEIZURE § 11.4, at 241 n.55 (3d ed. 1996). In Crossen, one officer unreasonably searched the defendant and recovered drugs while a radio check was being run to determine whether the defendant was wanted by the police. Crossen, 536 P.2d at 1264. The officers quickly learned over their radios that there were outstanding felony warrants for the defendant's arrest. Id. The State, attempting to invoke the inevitable discovery rule, argued that the defendant would have been arrested for the warrants and then properly searched incident to arrest, resulting in the recovery of the drugs on his person. Id. The court rejected the State's argument, holding that application of the inevitable discovery doctrine to primary evidence would weaken the deterrent effect of the exclusionary rule, and "would encourage unlawful searches in the hope that probable cause would be developed after the fact." Id.

31. In Broadnax, for example, the evidence used against the defendant, Thompson, was "primary," because it was discovered during the unreasonable search. In contrast, if Thompson had been arrested for the drugs found in the bedroom, and then searched, the heroin would have been "derivative" tainted evidence. According to the court, the evidence was tainted, because probable cause did not exist to arrest Thompson, and his seizure was therefore unreasonable. Broadnax, 98 Wash. 2d at 295, 654 P.2d at 101. Another example of the distinction between primary and derivative evidence is found in Nix v. Williams, 467 U.S. 431 (1984), discussed infra. In Nix, an officer obtained incriminating statements from the defendant during an illegally conducted interrogation. The statements themselves, obtained during the course of the interrogation, were primary evidence resulting from illegal police conduct. Information contained in the defendant's statements led police to the discovery of the victim's body. The body itself was derivative evidence resulting from the police illegality, as it was not found during the illegal police conduct, but later, as a by-product of the misconduct. Id. at 443.

32. 98 Wash. 2d at 310, 654 P.2d at 108, quoting 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 11.4, at 624 (3d ed. 1996). Dolliver further contended that careful application of the inevitable discovery rule would protect societal interests in effective law enforcement while still deterring official misconduct. Id.

33. Broadnax, 98 Wash. 2d at 309, 654 P.2d at 108.

34. Id.
officers were lawfully in the house to search for illegal drugs, it was proper and predictable that the drugs would have been found in plain view in the bedroom, and that Thompson would have then been arrested.\textsuperscript{35} Finally, Dolliver concluded that the detective would have properly searched Thompson incident to his arrest, and that the detective would have \textit{inevitably} discovered the heroin in Thompson’s pocket, albeit a few seconds later than the detective actually did.\textsuperscript{36}

### III. \textit{Nix v. Williams}—\textit{Inevitable Discovery} Gets U.S. Supreme Court Approval

At the appellate level, Washington courts did not discuss \textit{inevitable} discovery for the next two years. In the interim, the U.S. Supreme Court announced its acceptance of a different version of \textit{inevitable discovery} in \textit{Nix v. Williams}.\textsuperscript{37} In \textit{Nix}, the Court refused to

\begin{quote}
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} 467 U.S. 431 (1984). This case is often referred to as “Williams II,” in reference to Brewer v. Williams, 430 U.S. 387 (1977). Williams had been suspected of abducting a ten-year-old girl in Des Moines, Iowa, on December 24, 1968. \textit{Nix}, 467 U.S. at 434. The abductee had not been seen since her disappearance on that date. Information provided by a witness and through the discovery of the girl’s clothing in Williams’ abandoned car, found the following day, led police to direct their investigation toward Williams. \textit{Id.} at 435. On December 26, the Iowa Bureau of Criminal Investigation began a statewide search for the girl. \textit{Id.} After speaking with an attorney, Williams surrendered to police in Davenport, Iowa, on December 26. \textit{Id.} He was promptly arraigned on child abduction charges, although the victim’s body had not been found. Des Moines police detectives arrived in Davenport to transport Williams back to Des Moines, having promised Williams’ attorney that they would not interrogate Williams during the trip. \textit{Id.} However, while en route to Des Moines, one of the detectives spoke to Williams, saying that snow was expected, which would make discovery of the girl’s body difficult. \textit{Id.} The detective told Williams to think about the fact that Williams was “the only person that knows where this little girl’s body is” and “that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered . . . [A]fter a snow storm [we may not be] able to find it at all.” \textit{Id.} at 435-36. The detective told Williams of his belief that the body was in an area that was en route to Des Moines. \textit{Id.} at 436. The detective did not explicitly ask for any information from Williams, stating “I do not want you to answer me . . . Just think about it . . .” \textit{Id.} Williams then made several incriminating statements and, a short while later, directed the officers to the body. A search team was two and one-half miles from where the body was found, “essentially within the area to be searched.” \textit{Id.} The officers who had been conducting the search in the area had called off their own search and joined the Des Moines detectives transporting Williams. \textit{Id.} at 436.

During Williams’ first trial for first-degree murder, his attorney moved to suppress evidence of the incriminating statements, the body, and all related evidence, such as autopsy results, on the grounds that such evidence was the “tainted fruit” of Williams’ statements in the police car, obtained in violation of his Sixth Amendment right to counsel. \textit{Id.} at 437-38. The motion was denied; during the trial, the detective who elicited the statements admitted that he had been trying to get as much information from Williams as possible before Williams could speak with his attorney again. \textit{Id.}, citing Brewer v. Williams, 430 U.S. 387 (1977). Williams was convicted, and his conviction was affirmed by the Iowa Supreme Court. \textit{Nix}, 467 U.S. at 437. The U.S. Supreme Court, however, upheld a federal district court’s habeas corpus ruling that the evidence was tainted by the defendant’s interrogation in violation of his right to counsel. \textit{Nix}, 467 U.S. at
reverse an Iowa state court's murder conviction of Robert Williams, who had been convicted of killing a young girl and disposing of her body in a ditch beside a gravel road. The trial court admitted evidence from the victim's body, despite objection that the evidence was derived from a police officer's violation of Williams' Sixth Amendment right to counsel. The trial court concluded that the State had proved by preponderance of the evidence that, had Williams not led the police to the body, the police would have discovered her body within a short period of time in largely the same condition. Williams was convicted and sentenced to life imprisonment.

The Supreme Court of Iowa affirmed the conviction. The court held that the evidence of the body and its condition could be admitted under a "hypothetical independent source" exception to the exclusionary rule, essentially equivalent to the inevitable discovery doctrine. Under the Iowa rule, the State would be required to prove by preponderance of the evidence that the police did not act "in bad faith for the purpose of hastening discovery of the evidence in question," and that the evidence "would have been discovered by lawful means." The state supreme court concluded that, despite evidence of the interrogating detective's express admission that he was trying to provoke Williams into providing information out of the presence of his counsel, such police behavior did not constitute bad faith conduct for the purpose of hastening the discovery of the body. The court also found that the body would have been discovered lawfully, in the course of a statewide search then being conducted under the supervision of the Iowa Bureau of Criminal Investigation.

The U.S. District Court for the Southern District of Iowa rejected Williams' writ for habeas corpus relief, agreeing with the Iowa Supreme Court's conclusions regarding the applicability of inevitable discovery. However, the Eighth Circuit of the U.S. Court of

437, citing Brewer, 430 U.S. at 387. The Court noted that while the incriminating statements could not be admitted at the retrial, evidence of the body and its condition could be admissible "on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams." Nix, 467 U.S. 437, quoting Brewer, 430 U.S. at 407 n.12. The retrial of the case formed the basis for the decision in Nix.

38. Id.
39. Id. at 437-38.
40. Id.
41. Id. at 438.
42. Id. at 438, citing Iowa v. Williams, 285 N.W.2d 248 (Iowa 1979).
43. Id. at 438, citing Williams, 285 N.W.2d at 260.
44. Williams, 285 N.W.2d at 260.
45. Nix, 467 U.S. at 438, citing Williams, 285 N.W.2d at 260-61.
46. Id. at 439.
47. Id.
Appeals reversed,\(^48\) on the grounds that the State had provided insufficient proof that the detective had not acted in bad faith, thus failing to meet the standards of the state for shielding improperly obtained evidence.\(^49\)

The Supreme Court elected to take a different approach to the case. As the Court noted in its discussion of the case, "[The Eighth Circuit] assumed, without deciding, that there is an inevitable discovery exception to the exclusionary rule. . ."\(^50\) The Court observed that the "vast majority of all courts, both state and federal, recognize an inevitable discovery exception to the exclusionary rule."\(^51\) Tracing the history of the exclusionary rule as it applied to derivative evidence, or "tainted fruit,"\(^52\) the Court reached several important conclusions. First, the Court identified that neither of the two then-existing exceptions to the exclusionary rule—the "independent source" and "attenuation" exceptions—required that the prosecution prove that the officers acted in "good faith" when performing the illegal search or seizure that led to the derivative evidence.\(^53\) Second, the Court observed that the existing exceptions to the exclusionary rule applied to violations of the Fourth, Fifth, and Sixth Amendments.\(^54\) Finally, the Court noted the purpose of extending the exclusionary rule to derivative evidence:

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\(^{48}\) Id. at 439, citing Nix v. Williams, 700 F.2d 1164 (8th Cir. 1983).

\(^{49}\) Id. at 440, citing Nix v. Williams, 700 F.2d at 1169-70.

\(^{50}\) Id. at 439.

\(^{51}\) Id. at 440. By 1984, when the Court decided Nix, every U.S. Court of Appeals had endorsed the inevitable discovery doctrine. Nix, 467 U.S. at 441 n.2. Although Washington had not yet adopted the doctrine, many other states already had put it into practice. See, e.g., People v. Madson, 638 P.2d 18 (Colo. 1981); State v. Compton, 293 N.W.2d 372 (Minn. 1980); State v. Bonuchi, 636 S.W.2d 338 (Mo. 1982); State v. Ercolano, 397 A.2d 1062 (N.J. 1979); People v. Arnau, 444 N.E.2d 13 (N.Y. 1982); State v. Lowry, 667 P.2d 996 (Or. 1983).

\(^{52}\) Nix, 467 U.S. at 441-43. The Court examined the development of the application of the exclusionary rule in two other cases, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), and Wong Sun v. United States, 371 U.S. 471 (1963). To the Court, Silverthorne represented the genesis of the "derivative evidence" exclusion whereby illegally obtained evidence led to discovery of other incriminating evidence. Nix, 467 U.S. at 441. However, the Court noted that the holding of Silverthorne was limited, and not automatic. The Silverthorne decision left open an "independent source" exception. "If knowledge of [such facts] is gained from an independent source, they may be proved like any others." Id. at 441, quoting Silverthorne, 251 U.S. at 392 (emphasis in original). Wong Sun extended the exclusionary rule to instances where illegal police conduct led to discovery of evidence that was the "indirect product or 'fruit'" of the unlawful conduct.

\(^{53}\) Id. at 442.

\(^{54}\) Nix, 467 U.S. at 442, citing United States v. Wade, 388 U.S. 218 (1967) (Sixth Amendment violation); Murphy v. Waterfront Comm'n of New York, 378 U.S. 52 (1964) (Fifth Amendment violation of privilege against self-incrimination). Wong Sun involved a violation of the Fourth Amendment's protection against unreasonable searches and seizures. See Wong Sun, 371 U.S. at 484.
The core rationale... has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.55

Although the exclusionary rule operated to deter police misconduct, the rule’s reach was limited. Rather than punish police officers by imposing fines or otherwise holding them criminally or civilly liable for the violation of the defendant’s constitutional rights, the courts simply refused to recognize the officers’ ill-gotten gains. The independent source exception recognized that the prosecution should not be put in a worse position due to some earlier police error or misconduct.56 While the independent source exception was not applicable to the present case,57 the idea behind it—that exclusion of evidence should serve only to return the police to the identical position in which they would have been without the misconduct—was relevant.58 In this case, the Court reasoned that returning the police to the same position that they would have been in without their misconduct would mean that the Des Moines detectives would have never called off the search, and that the search party would have soon discovered the body. To exclude the evidence of the body would be to act as if a lawful search effort—one that, according to the Court, would have inevitably led to discovery of the body—had never existed. Thus, exclusion of the evidence would have put the police and the prosecution in a worse position than they would have been in even if the detective’s misconduct had never occurred. They would be deprived of the inevitable result of perfectly legal investigative techniques that were otherwise at their disposal. Thus:

55. Nix, 467 U.S. at 442-43.
56. Id. at 443. Under the independent source doctrine, derivative evidence that bears the taint of illegality will not be suppressed if the prosecution can show that it had an “independent, legitimate source for the disputed evidence.” Id. at 442 n.2, citing Murphy, 378 U.S. 52.
57. Id. at 443. Under the independent source exception, the prosecution must show an existing lawful investigation through which the police would have discovered the derivative evidence, which occurred simultaneously with, yet separate from, the actions of misbehaving officers. In Nix, while there was a search party within fairly close proximity to the victim’s body, that search had been called off after notice by the Des Moines detectives that Williams was ready to talk. There was no actual and simultaneous independent source for the discovery of the victim’s body. The discovery was solely due to Williams’ improperly obtained statements. Id. at 448-49.
58. Id. at 443-44.
If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here, the volunteers' search—then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.  

The Court refused to add a good-faith element to the inevitable discovery exception, rejecting the contention, raised by the Eighth Circuit, that refusal to require a good-faith showing would encourage police misconduct. The Court, citing United States v. Ceccolini, noted that the deterrent power of the exclusionary rule is only effective when a police officer realizes the likely consequences of engaging in misconduct. The Court reasoned that most officers knowingly "faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered." In situations where an officer is aware that the evidence will be inevitably discovered, an officer has few incentives (and many disincentives, such as departmental discipline and exposure to civil liability) to take "dubious 'shortcuts' to obtain the evidence."

IV. NIX AND BROADNAX COMPARED

It would be a mistake to read Nix as putting the U.S. Supreme Court's stamp of approval on Justice Dolliver's definition of the inevitable discovery exception in State v. Broadnax, as the two cases feature versions of the exception that differ both in theory and in application.

First, Nix limited itself to derivative evidence—the fruit of the poisonous tree, as opposed to the immediate products of the illegal search or seizure. Dolliver, on the other hand, would have extended

59. Id. at 444. In adopting a preponderance of the evidence standard of proof, the Court rejected Williams' argument that a higher standard, such as clear and convincing evidence, was called for by United States v. Wade, 388 U.S. 218 (1967). Nix, 467 U.S. at 444 n.5. While Wade required the higher standard of proof due to the difficulty of determining whether an in-court identification was based on permissible or impermissible line-up procedures, inevitable discovery "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.

60. Nix, 467 U.S. at 445.
63. Id.
64. Id. at 446. As will be discussed infra, under a system of appropriately careful application of the inevitable discovery exception, perhaps the greatest obstacle to an officer would be the difficulty of establishing a sufficient showing of "inevitability."
65. Id. at 444.
the exception to reach the primary evidence found in Thompson's shirt pocket.  

Second, the Supreme Court in Nix approved of inevitable discovery to prevent the suppression of evidence obtained in violation of a defendant's Sixth Amendment right to counsel. The Supreme Court did not rule on the exception's applicability to violations of the Fourth and Fifth Amendments. Dolliver, in contrast, would have applied the inevitable discovery exception to avoid suppression of evidence obtained in violation of the Fourth Amendment's protection against unreasonable searches and seizures.

Finally, Nix explicitly rejected the requirement that the prosecution show good faith on the part of the officers. Justice Dolliver would have required that the prosecution show not merely that the police acted in good faith, but rather that the officers did not act "unreasonably or to accelerate the discovery of the evidence in question." While Justice Dolliver's reasonableness requirement certainly would appear to limit application of the inevitable discovery exception, his use of the exception expands its range significantly, bringing all violations that trigger the exclusionary rule into its reach and allowing inevitable discovery to prevent suppression of primary evidence.

V. INEVITABLE DISCOVERY IN WASHINGTON POST-NIX: THE EARLY YEARS

Twelve days after the U.S. Supreme Court decided Nix, Division One approved, in dicta, of the inevitable discovery exception in State v. Reid. Reid involved an appeal from a first-degree murder conviction on the grounds that key pieces of evidence were the "tainted fruit" of earlier illegal seizures committed by police. Although the

67. Nix, 467 U.S. at 446.
68. In Nix, the Court did observe that it allowed the admissibility of illegally obtained evidence under the attenuation exception in situations where the police had violated the Fourth, Fifth, or Sixth Amendments. Id. at 442. The Court did not, however, expressly rule that the inevitable discovery exception had a similarly broad reach.
69. Broadnax, 98 Wash. 2d at 309-10, 654 P.2d at 108.
70. Nix, 467 U.S. at 446.
71. Broadnax, 98 Wash. 2d at 309, 654 P.2d at 108.
73. Reid, 38 Wash. App. at 207, 687 P.2d at 865. In Reid, the defendant and his wife had been involved in a shotgun murder the previous evening. Based on information gathered at the scene of the killing, officers traced Reid to an apartment building. Id. at 205, 687 P.2d at 864. Because the officers did not know which apartment belonged to Reid, they waited outside, watching a parked car that they believed belonged to Reid. Id. When Reid came out of his apartment and started his car, the officers arrested him and placed him in a patrol car. Id. One of the officers removed the keys from the car. Id. at 205-06, 687 P.2d at 864. Believing that
appellate court upheld the allegedly illegal initial seizure, the court determined, for the sake of argument, that even if the initial seizure were illegal, the attenuation doctrine still would have allowed admission of the questioned derivative evidence. In a footnote, the court noted that, although the prosecution did not argue for an inevitable discovery exception, it would certainly have applied. "Accordingly," the court stated, "suppression was not required even if the evidence was otherwise tainted by illegality."

Following Reid, Washington courts declined to address, for over a decade, whether they would accept inevitable discovery. In the course of argument in several appellate cases, prosecutors advanced the inevitable discovery exception as an alternative ground for the

Reid's wife was in the apartment, had likely witnessed his arrest, and was likely in possession of the shotgun, the officers felt that they were in physical danger. Id. at 206, 687 P.2d at 864. The officers claimed that they felt unable to secure the apartment building without putting other officers in danger. Id. After learning from Reid's neighbors that he lived in a particular apartment, one officer used one of Reid's keys to open the apartment door. Id. The officers announced their entry, and found Reid's wife hiding behind a door. Id. The officers placed her under arrest and secured the apartment. Id. They later obtained a search warrant for the apartment and discovered incriminating photographs and other evidence. Id. Reid argued, both pretrial and on appeal, that photographs and other evidence were the fruit of an illegal seizure of his car keys and should have been suppressed.

74. Id. at 208-09, 687 P.2d 865-66. Division One held that the keys, even if impermissibly seized, were not used to locate the apartment so as to exploit the seizure, but to "facilitate access" to the apartment and to confirm Reid's relationship with the apartment. Id. at 209, 687 P.2d at 866. The seizure of the photographs and other evidence during execution of a later lawful search warrant was sufficiently attenuated from the seizure of the keys to be admissible. Id.

75. Id. at 209 n.6, 687 P.2d at 866 n.5, citing both Nix v. Williams, 467 U.S. 431 (1984), and State v. Broadnax, 98 Wash. 2d 289, 308, 654 P.2d 96, 107 (1982) (Dolliver, J., dissenting). Division One did not indicate whether it was adopting the Nix approach to inevitable discovery or Justice Dolliver's approach as outlined in Broadnax.

76. Id. at 209 n.6, 687 P.2d at 866 n.5. If, assuming arguendo, the initial seizure was unreasonable, the court has taken great liberties with the doctrine of inevitable discovery. The court seemed to reason, without stating directly, that a warrant would have been inevitably obtained following Reid's arrest. By extension, the court appears to argue that the execution of a search warrant would have inevitably resulted in discovery of the photographs at a later time. Furthermore, to apply inevitable discovery, the court would first have "returned" the officers to their status prior to seizing the keys. At that point in time, Reid's wife would still be inside the apartment and, without the keys, the police would have had to find some other means of getting her out of the apartment, in order to assure their safety. The court refers to this possibility by noting that the police would have been justified in forcibly entering the apartment. Id. at 209 n.5, 687 P.2d at 866 n.4. Thus, the court indicates that application of inevitable discovery would be appropriate in two distinct situations.

In the first, the officers would have inevitably obtained a warrant and then would have inevitably discovered photographs at a later date. Alternatively, the police, returned to a preseizure status, would have inevitably made a forced entry into the apartment, removed the wife before she destroyed any incriminating evidence, inevitably obtained a search warrant, and then inevitably discovered the photographs. In either of these situations, it is difficult to find the "demonstrated historical facts capable of ready verification or impeachment," Nix, 467 U.S. at 444 n.5, necessary for application of the inevitable discovery exception.
admissibility of questioned evidence, but the courts declined to consider whether to accept the exception.\footnote{See, e.g., State v. Coates, 107 Wash. 2d 882, 735 P.2d 64 (1987). In Coates, the State conceded, on appeal, that evidence found pursuant to a search warrant was illegally obtained, because the warrant had been issued upon an affidavit containing information gathered in violation of the defendant’s Miranda rights. Coates, 107 Wash. 2d at 886, 735 P.2d at 67. The State argued for the adoption and application of the inevitable discovery exception. \textit{Id.} The Washington Supreme Court declined to rule on inevitable discovery at all, holding instead that because there was sufficient probable cause to issue the warrant even without the illegally obtained information, the evidence in question had not in fact been illegally seized. \textit{Id.} at 888-89, 735 P.2d at 68. \textit{See also} State v. Feller, 60 Wash. App. 678, 806 P.2d 776 (1991) (denying State’s argument for consideration of inevitable discovery, on grounds that the exception had not been adopted in Washington, citing \textit{Coates}); State v. Smith, 119 Wash. 2d 675, 835 P.2d 1025 (1992) (declining to address State’s argument for inevitable discovery, on alternate grounds that the evidence was not illegally seized nor had inevitable discovery been adopted in the state, citing \textit{Feller}).}

VI. \textit{STATE V. WHITE AND STATE V. WARNER: TWO SHIPS PASSING IN THE NIGHT?}

In the span of three weeks in February 1995, inevitable discovery began to take shape in Washington. In \textit{State v. White},\footnote{76 Wash. App. 801, 888 P.2d 169 (1995), \textit{aff’d}, 129 Wash. 2d 105, 915 P.2d 1099 (1996). The supreme court affirmed the legality of the disputed search, while not discussing inevitable discovery.} decided on February 6, the defendant sought reversal of his conviction for possession of cocaine with intent to deliver on the grounds that the evidence of cocaine and cash used to convict him was the product of an illegal search.\footnote{White, 76 Wash. App. at 802, 888 P.2d at 170.} A Seattle Police Department officer observed White appearing to engage in a street-sale narcotics transaction and then walking into a nearby restaurant.\footnote{\textit{Id.} at 803, 888 P.2d at 170.} The observing officer radioed another officer on the “arrest team” to apprehend White.\footnote{\textit{Id.} at 803, 888 P.2d at 170-71.} The arresting officer learned from the restaurant manager that White was in the restroom.\footnote{\textit{Id.} at 803, 888 P.2d at 171.} The officer proceeded to the restroom, observing that only one stall was occupied and that the occupant was wearing pants and shoes matching White’s description.\footnote{\textit{Id.} at 804, 888 P.2d at 171.} The officer looked over the door of the stall and observed White sitting on the toilet with his pants down and cash lying on his underwear.\footnote{\textit{Id.}} The officer ordered White to exit the stall and to leave his
pants down. After handcuffing White, the officer performed a complete search incident to arrest, removing the currency from White’s underwear, along with sixteen rocks of cocaine, a pager, and more money from his jacket. The trial court denied White’s motion for suppression of each of these items.

Division One upheld the legality of the officer’s search of the toilet stall. Nevertheless, the court argued that even had the search been unreasonable, all of the evidence would have been admitted under the inevitable discovery exception. The court referred to the Supreme Court’s recognition of inevitable discovery in Nix and noted that the exception had not been formally adopted in Washington. The court then proceeded to apply Justice Dolliver’s version of inevitable discovery as discussed in his dissent in Broadnax. The court explained:

[T]he circumstances in this case illustrate why this jurisdiction should adopt [inevitable discovery]—had the initial search of the toilet stall been unconstitutional, the evidence recovered from the lawful search incident to arrest potentially would have been subject to suppression under the exclusionary rule. We do not consider this a result required by the Fourth Amendment.

Less than three weeks later, the Washington Supreme Court, in State v. Warner, recognized the inevitable discovery exception in a case involving an alleged violation of the defendant’s Fifth Amendment privilege against self-incrimination. In Warner, the prosecution appealed the trial court’s dismissal of four of five counts of first-degree rape of a child. The trial court had determined that the counts were based on statements made by the defendant while participating in

85. Id.
86. Id.
87. Id.
88. Id. at 807, 888 P.2d at 172-73. The court held that although the search did not fall under the exigent circumstances exception to the warrant requirement, where “the police have probable cause to believe that a crime has been, is being, or is about to be committed and that the suspect is in a toilet stall, it is reasonable to search the stall for that person notwithstanding the warrant requirement.” Id. at 807, 888 P.2d at 173.
89. Id.
90. Id. at 808, 888 P.2d at 173.
91. Id. at 809, 888 P.2d at 173-74, citing Broadnax, 98 Wash. 2d 289, 304, 654 P.2d 96, 108 (1982). Applying the Broadnax standard, the court found that all of the requisite findings would have been met had inevitable discovery been argued, that is, that (1) the officer did not act unreasonably in searching the stall; (2) the defendant would have been lawfully searched incident to arrest even if the officer had not looked into the stall; and (3) the search incident to arrest would have led to the discovery of the same evidence. Id. at 809, 888 P.2d at 174.
92. Id. at 808-9, 888 P.2d at 173 (emphasis added).
court-ordered sex offender treatment, in violation of the *Miranda* protection against custodial interrogation.\(^{94}\)

The Supreme Court of Washington held, in part, that the trial court made insufficient factual determinations as to whether Warner's Fifth Amendment privilege against self-incrimination had been violated.\(^{95}\) Remanding to the trial court, the supreme court advised that if Warner's privilege were in fact abused, the proper remedy would be suppression of the incriminating statements rather than dismissal of the counts.\(^{96}\) Noting that any evidence found as a direct result of the incriminating statements must also be suppressed as "fruit of the poisonous tree," the supreme court advised the trial court to consider the inevitable discovery exception on remand.\(^{97}\) Citing to *Nix*, the *Warner* court defined inevitable discovery in pure *Nix* terms,\(^{98}\) without any reference to Justice Dolliver's dissent in *Broadnax* or to any of the later cases that had cited to *Broadnax*, including *White*. Furthermore, the Supreme Court of Washington failed to elaborate on application of the inevitable discovery exception to admit evidence obtained in violation of the defendant's Fifth Amendment rights, even though the *Nix* Court affirmatively approved its use only in Sixth Amendment situations. Because the supreme court was remanding, it did not explain how inevitable discovery would apply to the facts of the instant case.\(^{99}\)

\(^{94}\) *Id.* at 881-82, 889 P.2d at 481.

\(^{95}\) *Id.* at 888, 889 P.2d at 484.

\(^{96}\) *Id.* at 888, 889 P.2d at 483, citing United States v. Blue, 384 U.S. 251 (1966).

\(^{97}\) *Id.* at 888-89, 889 P.2d at 484-85.

\(^{98}\) *Id.* at 889, 889 P.2d at 485. The *Warner* court defined inevitable discovery as approved in *Nix* as limited to derivative evidence. In the instant case, while the incriminating statements must be suppressed, any evidence that was discovered as a result could be subject to the inevitable discovery exception. *Id.* The *Warner* court did not require a showing of reasonableness as to the behavior of the violating officers—the prosecution need only prove that the "challenged evidence would have been discovered eventually by lawful means." *Id.*, citing *Nix*, 467 U.S. at 444. Finally, the *Warner* court, citing United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980), held that absolute inevitability was not required; it required only a "reasonable probability" that the disputed evidence would have been discovered from other than the tainted source. *Warner*, 125 Wash. 2d at 889, 889 P.2d at 485.

\(^{99}\) The trial court would have had a difficult time properly applying inevitable discovery to the facts of the case. While participating in the sex offender program, Warner admitted to committing various crimes against different individuals. *Warner*, 125 Wash. 2d at 886-81, 889 P.2d at 480. Warner was "apparently told" by his counselors that Child Protective Services (CPS) would be informed of his revelations, although it was unclear whether he was told before he made his disclosures that they could be used against him. *Id.* at 881, 889 P.2d at 480. Warner phoned the parents of one of his victims to inform them that he had abused their child. *Id.* It was unclear whether the counselors or the victim's family made the initial referral to CPS; nevertheless, CPS began an investigation that led to Warner's charge in the instant case. *Id.* at 881, 889 P.2d at 481.

By noting the potential applicability of inevitable discovery, the state supreme court seemed to suggest that either (1) notification of CPS by the victim's family would have been an inevitable result of Warner's decision to phone his victims, thus removing the taint if it turned out that
Thus, within the span of a month, inevitable discovery had been adopted by two Washington courts in markedly different ways, reflecting the differences between Nix and Justice Dolliver's approach in Broadnax. Despite the deference that would seem to be due to the Nix/Warner approach to inevitable discovery, Justice Dolliver and the White decision have, so far, commanded much of the attention of the few appellate courts considering inevitable discovery.100

VII. STATE V. RICHMAN—INEVITABLE DISCOVERY WITHSTANDS STATE CONSTITUTIONAL ANALYSIS

State v. Richman,101 decided in 1997, provides a good example of a judicially accepted application of the inevitable discovery rule as currently formulated by Division One. Richman was apprehended by the manager of a clothing store upon suspicion of shoplifting.102 As the police officers entered the office where Richman was being detained, Richman was removing his coat, revealing a suit jacket and other clothes belonging to the store.103 Additional stolen clothing found in Richman's briefcase became the subject of dispute at trial. The officer who searched the briefcase could not recall whether he had

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CPS had been notified by the counselors of the treatment program, in violation of Miranda, or (2) that the victims would have inevitably come forward even without Warner's intervention. See id. at 889, 889 P.2d at 485 (stating that "[t]here is a very long statute of limitations in these cases . . . which allows the victims until they reach 21 years of age to come forward. This statute, therefore, increases the likelihood of eventual discovery.").

In either of these potential situations, it is difficult to find the "demonstrated historical facts capable of ready verification or impeachment," Nix, 467 U.S. 431, 445 n.5 (1984), that are required for a finding of inevitable discovery. Particularly compared to White, where it was essentially clear that the defendant was going to be arrested prior to the officer's illegal search and that the incident search would have discovered the same evidence, the Warner court's understanding of inevitable discovery seems strained.


102. Richman, 85 Wash. App. at 570, 933 P.2d at 1089. The manager observed price tags and an empty suit hanger in the dressing room just after Richman left it. Id. at 570, 933 P.2d at 1090. After chasing Richman down in a parking garage, the store manager brought Richman to the garage office. Id. When the manager began to phone the police, Richman told him, "If you hang up, I will give you the merchandise back." The manager continued his call to the police.

103. Id. at 571, 933 P.2d at 1090.
arrested Richman before he opened the briefcase or afterward, incidental to Richman's arrest.104

Division One upheld the trial court's refusal to suppress the items found in the briefcase under the doctrine of inevitable discovery. The appellate court examined the inevitable discovery exception as elucidated in White. First, the officer's search of the briefcase, even if performed prior to Richman's arrest, was reasonable, given that the officer had probable cause to arrest Richman before discovering the contents of the briefcase.105 Also, because probable cause had existed to support the arrest without the evidence found in the briefcase, Division One affirmed the trial court's conclusion that Richman would inevitably have been arrested regardless of the briefcase search.106 Finally, because searches of objects within the immediate control of the arrestee are routine, and because the briefcase was within Richman's control, it inevitably would have been searched incident to Richman's arrest.107

The Richman court determined that the inevitable discovery exception did not violate federal Fourth Amendment rights or privacy rights protected by article 1, section 7 of the state constitution.108 The court paid particular attention to the possibility, alleged by Richman, that guarantees of article 1, section 7 would be destroyed if courts were to engage in hypothetical analysis that would, according to Richman, "reward" the police for improper seizures.109

The Richman court undertook state constitutional analysis of inevitable discovery under the premise that the exclusionary rule's rationale is the deterrence of unlawful police conduct.110 The court

104. Id.
105. Id. at 579, 933 P.2d at 1093-94. Division One held that Richman's privacy interest had been compromised by the probable cause that the officer had to arrest him. According to the court, an officer can lawfully search objects within an arrestee's control immediately before the moment of arrest. Id. at 578, 933 P.2d at 1093, citing State v. Smith, 119 Wash. 2d 675, 682-83, 835 P.2d 1025 (1992). Thus, the court implied that even if the officer had opened the briefcase prior to placing Richman under arrest, the officer essentially had probable cause to do so in any case. Why then, if the search was a justifiable warrantless search, did the court decide it needed to engage in an inevitable discovery analysis? The Richman court did not articulate its motivation for providing alternate grounds for admission of this type of evidence. This strained scrutiny, necessitated by the "reasonableness" or "good faith" requirement, highlights the weakness of the formulations of inevitable discovery that employ those requirements, as discussed infra.
106. Id. at 579, 933 P.2d at 1094.
107. Id. at 579, 933 P.2d at 1093.
108. Id. at 576-77, 933 P.2d at 1092-93.
109. Id. at 574, 933 P.2d at 1091.
110. Richman, 85 Wash. App. at 575, 933 P.2d at 1092. Cf. State v. Rife, 133 Wash. 2d 140, 148, 943 P.2d 266, 270 (1997) (stating that the "primary objectives" of the exclusionary rule are the protection of the individual's privacy interests, deterrence of police misconduct, and preservation of judicial integrity, in descending order of importance.)
paid heed to the argument that the exclusionary rule also serves to protect individual rights, not merely to curb governmental action. Even accepting this additional basis for the exclusionary rule, the Richman court decided that individual rights would not be jeopardized by inevitable discovery, because the prosecution would have to show that the same evidence would have been discovered by constitutionally permissible means. Finally, the Richman court noted that requiring reasonableness on the discovering officer’s part was of particular import to state constitutional analysis.

A court considering whether privacy rights protected by the Washington Constitution have been improperly infringed must consider whether the expectation of privacy is reasonable. “[B]y analyzing the reasonableness of the officer’s actions in light of the privacy interest at stake,” the Richman court held, “courts can ensure that application of the inevitable discovery doctrine does not erode the protection of article 1, section 7.”

Thus, on these bases, the Richman court—the most recent Washington court to fully discuss or apply inevitable discovery in a published opinion—accepted inevitable discovery as articulated in White. The Richman court did not explain why the inevitable discovery doctrine could reach beyond the guidelines of Nix to prevent suppression of primary evidence, or why it was applicable to violations of the Fourth and Fifth Amendments.

VIII. Where Should Inevitable Discovery Go?

Inevitable discovery, as it has developed in Washington, can be described in the following terms: where any evidence, primary or derivative, would ordinarily be suppressed pursuant to the exclusionary rule, it will be admitted so long as the prosecution can show, by a preponderance of the evidence, that the same evidence would have been inevitably discovered by lawful police procedures. Furthermore, the evidence that would have been inevitably discovered will be admitted only if the officers who violated the defendant’s constitutional rights did so reasonably or without the intent to accelerate discovery of the evidence.

The courts have not elaborated on general rules governing the types of facts that are required to make such showings of inevitability, nor have they had many opportunities to elaborate on the “reasonableness” requirement. The courts have never addressed the reason-

112. Id. at 577-78, 933 P.2d at 1093.
113. Id.
The expansion of inevitable discovery to allow the admission of primary evidence—evidence discovered during and as a direct result of the police illegality—is foremost in need of explication. Allowing admission of primary evidence has been the subject of much debate among commentators and courts outside Washington. Several states, including New York and Texas, have expressly recognized the difference between primary and derivative evidence. These courts believe that although the taint of illegality can be erased from derivative evidence without jeopardizing the Fourth Amendment and/or a state constitutional cognate, primary evidence must be suppressed. As one New York Court of Appeals opinion noted:

We hold that applying the inevitable discovery rule [to primary evidence]... would amount to a post hoc rationalization of the initial wrong... and would be an unacceptable dilution of the exclusionary rule. It would defeat a primary purpose of that rule, deterrence of police misconduct. [To admit such evidence] would encourage unlawful searches in the hope that probable cause would be developed after the fact.

The strongest argument for the admission of primary evidence under the inevitable discovery exception can be found in its close relative, the independent source doctrine. The independent source doctrine allows admission of evidence that is "actually found by legal means through sources unrelated to the illegal search." Under the independent source doctrine, evidence is admitted because it was

114. See Robert M. Bloom, Inevitable Discovery: An Exception Beyond the Fruits, 20 AMERICAN JOURNAL OF CRIMINAL LAW, 79, 87-88 (1992) (noting that "[t]he expansion to primary evidence of the inevitable discovery exception... has great ramifications on the continued vitality of the exclusionary rule.")


118. United States v. Ramirez-Sandoval, 872 F.2d 1392, 1396 (9th Cir. 1989).
acquired by legal means and therefore does not fall under the exclusionary rule's umbrella. The evidence was not found as a result of any unlawful conduct, but rather independently from it. The independent source doctrine does not distinguish between primary and derivative evidence, because the rationale for admission of each is identical.

The similarity to the inevitable discovery rule is clear. Inevitable discovery asks a question that has already been answered in an independent source analysis: but for the misconduct, would the same evidence have been discovered by lawful means? If so, then the exclusionary rule need not apply, because independent grounds justify admission of the evidence.

Of course, when applying an independent source test, the lawful source exists in fact. Inevitable discovery, on the other hand, relies on speculation. This reality does not prohibit admission of primary evidence. Instead, it demands that courts be rigorous when conducting an inevitable discovery analysis, demanding a sufficient demonstration of inevitability that does not rely too heavily on wishful thinking by the prosecutor. Such rigor will discourage misconduct, as police will not assume judicial approval. However, once a court determines the inevitability of lawful discovery of the same evidence, there is little reason to prohibit admission of evidence on the basis of whether it is derivative or primary.

The Richman decision allowed admission of primary evidence, but it insisted that the state constitution required the prosecution to show the inherent "reasonableness" of the officer's illegality. The Richman court's discussion was circular. The Richman approach requires that, after the difficult process of demonstrating historical facts that prove inevitability, the officer's conduct must be examined in the context of the reasonableness of the individual's expectation of privacy. This approach unnecessarily revisits the initial determina-

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119. See id.
120. See id.
121. See Murray v. United States, 487 U.S. 533, 540-41 (1988). In Murray, the U.S. Supreme Court noted that such a distinction "would produce results bearing no relation to the policies of the exclusionary rule." Murray, 487 U.S. at 541. See also United States v. Zapata, 18 F.3d 971, 979 n.7 (1st Cir. 1994) (adapting the Murray Court's rejection of the distinction between primary and derivative evidence under the independent source exception to permit admission of primary evidence under the inevitable discovery exception.)
123. See id.
124. See supra note 113 and accompanying text.
tion of exclusion. When initially determining whether the police performed an illegal seizure, the individual’s reasonable expectation of privacy is examined. As the individual’s expectation of privacy becomes less reasonable, under the Richman/White doctrine, the officer’s conduct becomes more reasonable, and less likely, therefore, to have implicated the individual’s constitutional protections in the first place.

A redetermination of the reasonableness on the part of the officer is unnecessary. The exclusionary rule’s deterrent effect prevents the police from using the benefits of their misconduct—it returns the police to the position they would have been in before their misbehavior. Requiring the prosecution to prove reasonableness in addition to inevitability, however, would impose burdens unrelated to the rationale behind the exclusionary rule.

There are two steps of analysis in a proper inevitable discovery application. First, is the evidence the product of an improper search or seizure? If so, then the exclusionary rule is triggered, resulting in the suppression of the evidence because of police misconduct. In that situation, the police are returned to the position they occupied prior to engaging in misconduct. Second, having returned to the premisconduct status quo, would the police have inevitably discovered the same evidence by lawful means? The prosecution must overcome a formidable obstacle—proving inevitability—to prevent suppression. If the answer to the second question is affirmative, then the exclusionary rule has not lost its impact. The police still have not gained from their misconduct. If there was no proof that the evidence would have been inevitably discovered, it still would not be admitted. If the prosecution is successful, the police have simply not been put in a worse position than they otherwise would have been due to the application of the exclusionary rule. The quality of the misconduct does not diminish the inevitability of discovery.

The Richman court noted that article 1, section 7 of the state constitution provides broader protections than the U.S. Constitution. Are Washington courts now prepared to rule that the quality of the misconduct requires primary and secondary exclusionary rules—the first determining application of the exclusionary rule, and the second determining whether the quality of misconduct prohibits inevitable discovery, and, very likely, the independent source exception? To

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128. This Comment does not suggest that the nature of the misconduct should not be con-
do so would allow the court to twice punish the police and the prosecution, first by returning them to the position they would be in without misconduct, and then by putting them in a worse position. The deterrent power of the exclusionary rule has thus been geometrically increased, to the detriment not only of prosecutors and police interested in obtaining convictions, but to the general public as well. It is worth repeating that very often the evidence that is subject to suppression clearly indicates the defendant's guilt. The police misconduct bears no relation to the probative value of the evidence, which is often most damning.

The protection of the rights of the individual from unreasonable governmental action, mentioned in Richman and more directly asserted in State v. Rife, would be better served by a rigorous definition of "inevitability" than by a requirement of "reasonableness." Because the extent to which liberal application of the inevitable discovery doctrine affects the strength of constitutional guarantees, careful application of inevitable discovery should stress "inevitability" over "eventuality." Because the preponderance of evidence standard is applied, any lesser likelihood than near-certainty of discovery would render the deterrent and protective effects of the exclusionary rule meaningless. If the exclusionary rule is to deter police misconduct, police officers must know that inevitable discovery is not an "easy out"—they must be aware that courts will demand a significant showing to override the implications of their misconduct.

For instance, application of inevitable discovery as a means of avoiding the warrant requirement would almost never be appropriate. A court should not, in hindsight, rule that another court would have inevitably issued a warrant. To do so would render the warrant requirement of the Fourth Amendment meaningless, because police judgment as to the inevitability of the issuance of a warrant would replace the independent analysis of a neutral judge. Thus, inevi-

130. See State v. Handtmann, 437 N.W.2d 830 (N.D. 1989), cited in 5 WAYNE R. LAFAVE, SEARCH & SEIZURE § 11.4, at 246 (3d ed. 1996). In Handtmann, the State sought admission of evidence obtained during search authorized under a warrant later found lacking in probable cause. Handtmann, 437 N.W.2d at 836. The State argued that if the invalid warrant had not been obtained when it was, additional evidence would have been presented that would have, according to the State, inevitably resulted in the issuance of a valid warrant. Id. The North Dakota Supreme Court held that:

[T]he inevitable-discovery doctrine may not be applied to encourage shortcuts for law
ble discovery should only apply when the evidence would have been discovered in the course of a lawful warrantless search.

Furthermore, as the Ninth Circuit requires, the factual support that makes discovery inevitable must "arise from circumstances other than those disclosed by the illegal search itself." Also, a court determining suppression should pay close attention to the inherent unpredictability of the defendant and outside actors (such as, in State v. Reid, the presence of Reid's wife). Where actors outside of police control could have predictably had an effect on the location or existence of evidence that was discovered by unlawful police procedure,

enforcement officials which eliminate a neutral and detached magistrate's probable-cause determination. . . . Application of the inevitable-discovery doctrine in this case would encourage law-enforcement shortcuts whenever evidence may be more readily obtained by unlawful means—a result at odds with the purpose of the exclusionary rule to deter police from obtaining evidence in an illegal manner. Moreover, judicial sanctioning of the doctrine in this case would also encourage incomplete police investigations in the hope that information subsequently discovered would cure a defective warrant.

_Handtmann_, 437 N.W.2d at 838.

Nevertheless, Division One appears ready to officially take this leap. _See_ State v. Roush, No. 40178-5-I, 1999 WL 211851 (Wash. Ct. App. Apr. 12, 1999) (unpublished opinion). In _Roush_, an officer discovered a gun inside the defendant's lunchbox, which he had left at his workplace. _See_ _Roush_, 1999 WL 211851 at *2. The officer did not have a search warrant. _Id_. at *3. At the same time that the officer was searching the workplace, the defendant disclosed the location of the pistol to detectives at the police station. _Id_. at *2. One of the interviewing detectives testified that he would have sought a search warrant had the offending officer not found the gun. _Id_.

The trial court ruled that the defendant had no expectation of privacy in his lunchbox, but even if he had, the pistol would have been inevitably discovered. _See id_. at *4. Division One upheld the admission of the gun solely on the basis of inevitable discovery. The appellate court held that the police would indeed have sought a search warrant, and the warrant "would have issued." _Id_.

Circumstances such as these, where an important piece of evidence in the prosecution of a serious violent crime could be excluded, might seem to call for application of the inevitable discovery exception and abandonment of the warrant requirement. However, as the _Handtmann_ court observed, it may lead to unwanted results. The Fourth Amendment recognizes the buffer role that a neutral magistrate serves. Officers could foreseeably be tempted to engage in warrantless searches with the expectation that courts would be unwilling to suppress damning evidence on the basis of the lack of a warrant. The courts would lose their protective role, and the frequency of unconstitutional and unnecessary searches would predictably increase. The value of the exclusionary rule would decrease.

In contrast, application of inevitable discovery in the context of exceptions to the warrant requirement is appropriate. Very often, an officer will mistakenly believe that a warrant is always unnecessary under the circumstances, and only later discover his or her error. The deterrent power of the exclusionary rule has no effect in such cases. However, as in _Roush_, at least one detective recognized the need for a warrant. Time was not a factor, as the defendant was in custody. Where such detachment and lack of exigency is present, failure to enforce the Fourth Amendment's warrant requirement unreasonably diminishes the role of the neutral and detached magistrate.

131. United States v. Ramirez-Sandoval, 872 F.2d 1392, 1396 (9th Cir. 1989), quoting United States v. Boatwright, 822 F.2d 862, 864-65 (9th Cir. 1987).

132. _See supra_ note 73.
inevitability will be almost impossible to prove. If a prosecutor can show that a hypothetical independent source would have led to the discovery of the same evidence, but at a time distant from when the actual, illegal discovery occurred, courts would be rightly dubious as to the "inevitability" of discovering the same evidence in the same condition.

IX. CONCLUSION

As Wayne R. LaFave notes, the arguments of critics of the inevitable discovery rule "are directed not so much to the rule itself as to its application in a loose and unthinking fashion."133 The proper use of the inevitable discovery exception is a judicial statement that the exclusionary rule should not be imposed arbitrarily, but with regard to the rationales underlying it. An inevitable discovery doctrine that is strictly regulated does not do injustice to the constitutional protections that Washington citizens hold dear. Rather, the exception, sparingly used due to its demanding requirements, simply affirms that there are instances where, if proper investigatory procedures would have inevitably led to discovery of incriminating evidence, society's interest in obtaining justice should not be defeated by one officer's misconduct.

133. 5 WAYNE R. LAFAVE, SEARCH & SEIZURE § 11.4, at 243-44 (3d ed. 1996).