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NORTH CAROLINA ADOPTS THE INEVITABLE DISCOVERY EXCEPTION TO THE EXCLUSIONARY RULE: — State v. Garner

INTRODUCTION

The exclusionary rule generally bars the admission of evidence obtained by government officials through unconstitutional means. The rule has long been criticized as too costly to justify its application. One of the main concerns regarding the exclusionary rule is that guilty criminals may go unpunished because evidence of their guilt was kept from the trier of fact. That is, criminals are afforded a windfall at the expense of law enforcement officials and society. To ameliorate its sometimes harsh results, a number of exceptions to the exclusionary rule have arisen over the years. In a recent case, the North Carolina Supreme Court followed the lead of a majority of the federal and state courts and adopted one of the more controversial of the growing list of the rule’s exceptions, the inevitable discovery doctrine. In sustaining a first-degree murder conviction in State v. Garner, the North Carolina Supreme Court adopted an exception to the exclusionary rule that allows evidence obtained in violation of the Fourth Amendment to be admitted at trial if the prosecution can demonstrate that the evidence was inevitably discoverable despite the constitutional violation. This doctrine, known as the inevitable discovery exception, is designed to balance the interests of law enforcement and the rights of criminal defendants.

1. See generally WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1 (1987) (discussion of origins and purposes of exclusionary rule); see also infra notes 12-41 and accompanying text.

2. See generally LAFAVE, supra note 1, § 1.2 (discussion of criticisms of exclusionary rule and proposed limitations on its application).

3. See, e.g., John Kaplan, The Limits of the Exclusionary Rule, 26 STAN. L. REV. 1027 (1974). Professor Kaplan wrote “[o]ne must acknowledge that the exclusionary rule often allows a criminal to escape punishment.” Id. at 1035.

4. This fear of an undue burden being placed upon society and the prosecution was enunciated in an often quoted passage from a Cardozo opinion: “The criminal is to go free because the constable has blundered.” People v. Defore, 150 N.E. 585, 587 (N.Y.), cert. denied, 150 U.S. 657 (1926) (suppression of illegally obtained evidence denied). But see Silas Wasserstrom & William J. Mertens, The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?, 22 AM. CRIM. L. REV. 85, 87-88 n.21 (1984) (no empirical evidence that abolition of exclusionary rule would result in increase in conviction rate); John W. Hall, Jr., In Defense of the Fourth Amendment Exclusionary Rule—A Reply to Attorney General Smith, 6 U. ARK. LITTLE ROCK L.J. 227, 239 (1983) (exclusion of illegally obtained evidence does not mean criminal goes free).

5. See infra notes 34-42 and accompanying text.


7. Id. The inevitable discovery doctrine is an exception to the exclusionary rule which is applied when the prosecution can demonstrate that illegally ob-
conviction in State v. Garner, the North Carolina Supreme Court held that illegally obtained evidence could be used in a defendant's criminal trial because the prosecution demonstrated by a preponderance of the evidence that the officers would have inevitably procured the same evidence by lawful means. The majority opinion relied primarily on Nix v. Williams, a case in which the United States Supreme Court recognized the inevitable discovery doctrine. The concurring opinion raised questions concerning the proper use of the exception, the quantum of proof required by the state constitution, and the justifications for North Carolina's exclusionary rule.

This Note will analyze the reasoning of the majority and concurring opinions in Garner, as well as Garner's relationship to prior North Carolina exclusionary rule cases. The author contends that the majority opinion is inconsistent with those prior cases and faults the majority for adopting an unacceptably lenient standard of proof as to inevitability, and for failing to delineate the parameters of the exception. The Note concludes that the concurrence more accurately reflects the court's past respect for the importance of the exclusionary rule in protecting individual privacy rights.

8. 331 N.C. at 504, 417 S.E.2d at 509.

9. 467 U.S. 431 (1984) (Williams II). The inevitable discovery doctrine had previously been adopted by all of the circuit courts. Id. at 440 n.2. Several circuits did so after the Supreme Court revealed in a footnote in Brewer v. Williams, 430 U.S. 387 (1977) (Williams I), that such evidence might be admissible. The Court stated:

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.

Id. at 406 n.12.


11. See State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988); see also infra notes 111-114 and accompanying text.
A. Origin and Development of the Exclusionary Rule

The common law rule, reaffirmed as late as 1904 by the United States Supreme Court in *Adams v. New York*,\(^\text{12}\) provided that all relevant evidence the government possessed was admissible regardless of how it had been obtained.\(^\text{13}\) In *Boyd v. United States*,\(^\text{14}\) the Court recognized, however, that exclusion of evidence was necessary in a self-incrimination case because of the close relationship between the Fourth and Fifth Amendments.\(^\text{15}\) The Court reasoned that compulsory production of an individual's private papers constituted, in essence, a forced confession, prohibited by the Fifth Amendment.\(^\text{16}\) The Supreme Court first grounded the exclusionary rule in whole upon the Fourth Amendment in *Weeks v. United States*.\(^\text{17}\) Both *Boyd* and *Weeks* involved the return of private papers that had been wrongfully seized. Thus, after *Weeks*, there existed a narrow rule of exclusion applying only to property that people were entitled to own.\(^\text{18}\) In *Silverthorne Lumber Co. v. United States*,\(^\text{19}\) the Court extended the exclusionary rule beyond the return of personal property and held that evidence unconstitutional-


\(^{13}\) *Adams*, 192 U.S. at 595. The Court stated:

> When papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfully, nor would they form a collateral issue to determine that question.

*Id.*

\(^{14}\) 116 U.S. 616 (1886).

\(^{15}\) *Id.* at 630-35.

\(^{16}\) *Id.* at 633-35.

\(^{17}\) 232 U.S. 383 (1914) (evidence obtained through an illegal search and seizure not admissible at trial in a federal prosecution).

\(^{18}\) *See* Stewart, *supra* note 12, at 1375.

\(^{19}\) 251 U.S. 385 (1921). In *Silverthorne*, federal agents conducted an illegal search of the offices of a lumber company. *Id.* After copying and photographing papers that had been seized during the illegal search, the agents returned all of the documents. *Id.* A federal grand jury then issued a subpoena duces tecum pursuant to which the lumber company was required to bring the original papers to the trial. *Id.* The Court held that the Fourth Amendment provided more protection than simply the return of illegally seized property. *Id.* at 392. Justice Holmes wrote:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.

*Id.*
ally obtained could not be used by the prosecution for any purpose. 20 Two cases decided after Silverthorne left no doubt that the common law rule of admission of all probative evidence had been rejected. 21

In Wolf v. Colorado, 22 the Supreme Court held the Fourth Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment, but it did not require the exclusion of evidence obtained by unlawful means in a state court prosecution for a state crime. 23 The Court, in declining to extend the exclusionary rule to the states, left each state free to experiment with alternative methods of protecting the constitutional rights of its citizens. 24

In Mapp v. Ohio, 25 the Court recognized that the failure to extend the exclusionary rule to the states in Wolf had resulted in inconsistent methods of enforcement among the states, and circumvention of the rule by federal officers in states that had not adopted the exclusionary rule as a remedy. 26 The Court overruled Wolf and held that evidence obtained by an illegal search and seizure was inadmissible in a state criminal trial. 27 Previously, the exclusionary rule had only been mandated as a remedy in the federal courts for constitutional violations by federal officers. 28 The

20. Id.
21. See Gouled v. United States, 255 U.S. 298 (1921). In an opinion announced the same day as Gouled, the Court held that whiskey seized unlawfully from defendant's home should have been excluded from evidence. Amos v. United States, 255 U.S. 313 (1921). See also The Search and Seizure Exclusionary Rule, REP. to ATTY'Y GEN., at 9 (Feb. 26, 1986) ("[Amos] began a trend of focusing on the manner in which the government obtained the evidence rather than on the nature of the evidence.").
23. Id. at 33.
24. Id.
26. Id. at 658. Justice Clark wrote:
In nonexclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated.
Id.
27. Id. at 653-55.
28. See, e.g., Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1921);
main concern of the Court in \textit{Mapp} was the protection of the fun-
damental right to privacy.\textsuperscript{29} Noting that the exclusionary rule is a 
constitutionally required right of the Fourth and Fifth Amend-
ments,\textsuperscript{30} the Court further justified its decision to apply the exclu-
sionary rule to the states upon the imperative of judicial integrity\textsuperscript{31} 
and the deterrence of police misconduct.\textsuperscript{32}

Two years after \textit{Mapp} the Supreme Court extended the exclu-
sionary rule to verbal statements that are the “fruits” of an unlaw-
ful search in \textit{Wong Sun v. United States}.\textsuperscript{33} Following \textit{Wong Sun},

\textit{see also The Search and Seizure Exclusionary Rule}, supra note 21, at 9-10.

\textsuperscript{29} \textit{Mapp}, 367 U.S. at 655-57. The Court stated:

[I]n extending the substantive protections of due process to all constitu-
tionally unreasonable searches—state or federal—it was logically and 
constitutionally necessary that the exclusion doctrine—an essential part 
of the right to privacy—be also insisted upon as an essential ingredient 
of the right newly recognized by the \textit{Wolf} case. In short, the admission of 
the new constitutional right by \textit{Wolf} could not consistently tolerate de-
nial of its most important constitutional privilege, namely, the exclusion 
of the evidence which an accused had been forced to give by reason of 
the unlawful seizure. To hold otherwise is to grant the right but in reality 
to withhold its privilege and enjoyment.

\textit{Id}. at 655-56.

\textsuperscript{30} \textit{Id}. at 656-57. \textit{See} Thomas S. Schrock & Robert C. Welsch, \textit{Up From 
Calandra: The Exclusionary Rule as a Constitutional Requirement}, 59 MINN. L. 
REV. 251 (1974); \textit{HALL}, supra note 7, \S 4:4 (discussion of \textit{Mapp} v. Ohio and its 
eyearly progeny). \textit{But see} David H. Mautel, Note, \textit{The Inevitable Discovery Excep-
tion to the Exclusionary Rule: What is Standing in the Way of Supreme Court 
Adoption?}, 16 SUFFOLK U. L. REV. 1043, 1044 n.9 (1982) (exclusion is not constitu-
tionally mandated; \textit{Mapp} Court held that exclusion of illegally obtained evidence 
was only implied from Fourth Amendment). Justice Stewart wrote, years after the 
\textit{Mapp} decision, that he believed the exclusionary rule to be constitutionally re-
quired, “not as a ‘right’ explicitly incorporated in the fourth amendment’s 
prohibitions, but as a remedy necessary to ensure that those prohibitions are ob-
erved in fact.” Stewart, \textit{supra} note 12, at 1389. Justice Black concurred in the 
result in \textit{Mapp} but stated that he found no express constitutional basis for the 
exclusionary rule. \textit{Mapp}, 367 U.S. at 662.

\textsuperscript{31} \textit{Mapp}, 367 U.S. at 657-59.

\textsuperscript{32} \textit{Id}. at 656. The Court stated that the purpose of the exclusionary rule “is 
to deter—to compel respect for the constitutional guaranty in the only effective 
available way—by removing the incentive to disregard it.” \textit{Id}. (quoting \textit{Elkins v. United States}, 364 U.S. 206, 217 (1960)).

\textsuperscript{33} \textit{371 U.S. 471} (1963). The “fruit of the poisonous tree” doctrine bars the 
use of derivative evidence discovered by exploitation of a prior police illegality. 
The phrase “fruit of the poisonous tree” was first used in \textit{Nardone v. United 
States}, 308 U.S. 338, 341 (1939). The doctrine is closely related to the attenuation 
document, as the focus in both involves the proximity of the unconstitutional police
the Court began to narrow the application of the exclusionary rule. As criticism of the exclusionary rule increased, the Supreme Court created exceptions and also limited the situations in which it would be applied. In addition, the Court has all but abandoned the judicial integrity argument and has increasingly grounded the rule on a deterrence principle.

activity to the evidence subsequently discovered. See Hall, supra note 7, §§ 7:1-7:17 (discussion of exceptions allowing use of derivative evidence in chapter on fruit of the poisonous tree doctrine). See also LaFave, supra note 1, § 11.4 (discussion of fruit of the poisonous tree doctrine).


35. The Court has specifically identified four situations in which exclusion of tainted evidence is not required. See generally Kevin J. Kehoe, Jr. et al., Project, Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-1990, 79 Geo. L.J. 591, 731-41 (1991) (discussion of exceptions to exclusionary rule). The Court created the first exception to the exclusionary rule in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The "independent source" exception allows the admission of illegally obtained evidence if it was also discovered through independent legal means. A second exception, "attenuation," was recognized in Nardone v. United States, 308 U.S. 338 (1939). This exception allows the admission of evidence when the connection between the illegal conduct and the acquisition of the challenged evidence is so attenuated that it dissipates the taint of the unlawful act. Thirdly, the Court recognized a "good faith" exception to the exclusionary rule in United States v. Leon, 468 U.S. 897 (1984). The Court held that evidence need not be suppressed when police obtain the evidence through objective good faith reliance on a facially valid warrant subsequently found to be lacking in probable cause. Id. at 913. The good faith exception was extended to admit evidence obtained by police who acted in objectively reasonable reliance on an unconstitutional statute. Illinois v. Krull, 480 U.S. 340 (1987). Lastly one of the more controversial exceptions to the exclusionary rule, the inevitable discovery doctrine, was adopted by the Court in Nix v. Williams, 467 U.S. 431 (1984). See infra notes 41-66 and accompanying text.

36. See United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule has no application in federal grand jury proceedings); I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (rule does not attach in deportation hearings); United States v. Havens, 446 U.S. 620 (1980) (rule cannot be invoked to exclude evidence sought to be admitted for impeachment purposes of witness testimony); Brown v. United States, 411 U.S. 223 (1973) (rule inapplicable to exclude evidence incriminating a party not actually subjected to the unconstitutional search); Stone v. Powell, 428 U.S. 465 (1976) (federal habeas corpus relief on ground that illegally obtained evidence was admitted at trial is unavailable to a state prisoner who has had full and fair state trial).

37. See United States v. Janis, 428 U.S. 433, 446 (1976) (primary, if not sole,
The clearest articulation of the heightened scrutiny under which the exclusionary rule is viewed came in *United States v. Calandra,* in which the Court refused to apply the rule to grand jury proceedings. The Court promulgated a cost-benefit analysis to determine if exclusion would serve the rule's primary purpose of deterrence in each particular case. With the deterrence principle as the sole remaining underpinning of the exclusionary rule, the Supreme Court had no difficulty adding the exception of inevitable discovery. It is against this background, that the Court assessed the constitutionality and parameters of the inevitable discovery doctrine in *Nix v. Williams:* (1) the deterrence principle was considered the preeminent justification for the exclusionary rule and (2) exclusion of illegally obtained evidence was no longer viewed as a constitutional right of the accused, but rather as a sanction to be applied under a cost-benefit analysis.

Stone v. Powell, 428 U.S. 465, 486 (1976) (exclusionary rule not a personal constitutional right but judicially created remedy; primary justification is deterrence of police conduct violative of Fourth Amendment rights). *But see* Hall, supra note 4, at 239 (advocating reemergence of personal right rationale for exclusionary rule).


40. Id. at 349-52. Under this approach, evidence is deemed inadmissible only when the benefits of deterrence will outweigh the social costs incurred by exclusion of probative evidence. *Id.* With the exclusionary rule viewed as a judicially created remedy, its application is to be "restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.* at 348.

41. See Daniel S. Schneider, Comment, *The Future of the Exclusionary Rule and the Development of State Constitutional Law,* 1987 Wis. L. Rev. 377, 383-84 (1987) (viewing the exclusionary rule as a judicially created remedy rather than as a constitutional right frees the court to engage in cost-benefit analysis to determine if evidence should be admitted in a particular case).

42. 467 U.S. 431 (1984) (*Williams II*).

43. See supra notes 36-40 and accompanying text; see also Hall, supra note 7, §§ 4:7-4:8, at 160 ("Calandra marks the demise of the judicial integrity rationale and the rise of deterrence as the primary modern justification for the exclusionary rule.").
B. The Inevitable Discovery Exception

The Supreme Court adopted the inevitable discovery exception\(^{44}\) to the exclusionary rule in *Nix v. Williams*.\(^{45}\) In *Nix*, the Court affirmed the murder conviction of a defendant who had murdered a ten-year-old girl and deposited her body in a shallow ditch.\(^{46}\) Evidence obtained from the girl's body was allowed to be admitted on the basis of the inevitable discovery doctrine\(^{47}\) as the Court concluded that a massive search would have found the victim's body within a short period of time.\(^{48}\) The Court concluded that the defendant's telling the officers of the location of the vic-

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44. See generally Harold S. Novikoff, Note, The Inevitable Discovery Exception to the Constitutional Exclusionary Rules, 74 COLUM. L. REV. 88 (1974). Judge Learned Hand is credited with first utilizing the inevitable discovery exception in *Somer v. United States*, 138 F.2d 790 (2d Cir. 1943). Police officers unlawfully entered Somer's apartment where he was operating a still. *Id.* at 791. After being informed by Somer's wife that he "would be back shortly," the officers waited outside for his return. *Id.* When Somer arrived, he was arrested and sugar and alcohol found in his car were seized. *Id.* Evidence seized from Somer's car and his person was suppressed as the result of the illegality. *Id.* at 792. The court remanded the case for further evidentiary hearings but stated that the illegally obtained evidence could be admitted if the prosecution could show it would have been found by lawful investigative procedures. *Id.*

45. 467 U.S. 431 (1984) (*Williams II*).

46. *Id.* While the defendant was being transported by police, an officer elicited incriminating statements from the defendant in violation of his Sixth Amendment right to counsel. *Id.* at 437. The defendant was interrogated in the police car despite an agreement between police and the defendant's attorney that no questioning would occur during the trip. *Brewer v. Williams*, 430 U.S. 387, 390-91 (1977) (*Williams I*). Williams' original murder conviction was overturned by the Supreme Court because of the Sixth Amendment violation. *Id.* at 387. The inculpatory statements were elicited by a detective in what has become known as the "Christian burial speech." The detective pleaded with the defendant for his assistance in locating the victim's body so her parents could give her a decent "Christian" burial to which she was entitled. See generally Yale Kamisar, *Brewer v. Williams--A Hard Look at a Discomforting Record*, 66 GEO. L.J. 209 (1977); Phillip E. Johnson, *The Return of the "Christian Burial Speech" Case*, 32 EMORY L.J. 349 (1983). The body was found in an area two and one-half miles from where a search was being conducted by approximately 200 volunteers. *Nix*, 467 U.S. at 448-49. The Court held that evidence as to the location and condition of the victim's body was admissible because it inevitably would have been discovered by the search. *Id.* at 449-50.


tim's body only hastened its eventual discovery. 49

The Court held that illegally obtained evidence can be admitted if the prosecution can prove by a preponderance of the evidence that the same evidence would have been eventually discovered through lawful means. 50 A requirement that police prove the absence of bad faith was deemed unnecessary because it would put police in a worse position than they would have been in had no illegality occurred. 51 Related to the notion that the police be put in no worse position is the reasoning that, since the evidence would have been obtained by lawful means eventually, the prosecution gains no benefit from the unlawful conduct, aside from hastening the investigatory process. 52 However, both these justifications for a low standard of proof of inevitable discovery presuppose good faith conduct on the part of investigating officers. 53 The Court's reasoning disregards the possibility that an officer may rationally decide to pursue an unconstitutional course of action. 54 In spite of these concerns, the Court determined that the societal costs of the exclusionary rule outweighed any possible benefits to deterrence that a good-faith requirement might produce. 55

In their dissent, Justices Brennan and Marshall took issue with the adoption of a preponderance standard as the prosecu-

49. Id.
50. Id.
51. Id. at 445-46. The principle that the prosecution be put in no worse position has been viewed critically by commentators, wary of its vagueness, rationale and possible implications. See Wasserstrom & Mertens, supra note 4, at 157-66; Steven P. Grossman, The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations, 92 DICK. L. REV. 313, 325-26 (1988).
52. Nix, 467 U.S. at 447.
53. The Court discounted the possibility of intentional police misconduct, stating: "A police officer who is 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." Nix, 467 U.S. at 445.
54. See Wasserstrom & Mertens, supra note 4, at 167-175; Grossman, supra note 51, at 332 n.101, 333-35 (officer could reasonably decide to pursue illegal course of action by way of an illegal shortcut or in a situation in which it is unlikely that evidence will ever be discovered except for illegal methods).
55. Nix, 467 U.S. at 446. The Court cited the case of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), for the proposition that there are already significant disincentives to obtaining evidence illegally, such as departmental discipline and civil liability. Nix, 467 U.S. at 446. But see Grossman, supra note 51, at 334 (neither departmental discipline nor civil liability has ever been shown to be an effective deterrent to police misconduct).
tion's burden of proof as to the issue of inevitability of discovery. The dissenters agreed that the inevitable discovery doctrine was constitutional but argued that the hypothetical nature of discovery in an inevitable discovery inquiry mandates that the prosecution satisfy a heightened burden of proof.

The inevitable discovery exception is closely related to and justified as a logical extension of the independent source exception, which provides that illegally obtained evidence need not be excluded if the same evidence was secured by independent lawful means. While it is true that the two doctrines are related and serve a similar function, there is one key distinction that mandates a higher burden of proof in the case of inevitable discovery. The difference between the two exceptions is that in the case of the independent source exception the evidence was actually found in the course of a legal investigation. However, in circumstances in which the inevitable discovery exception is applied, no legal investigation resulted in the discovery of the evidence. The dissenting opinion articulated this key distinction between the inevitable discovery doctrine and the independent source doctrine that necessi-

56. Nix, 467 U.S. at 459 (Brennan, J., dissenting).
57. Justice Brennan had previously authored an opinion in which the Court implied that the inevitable discovery doctrine is a constitutional exception to the exclusionary rule. United States v. Crews, 445 U.S. 463, 470 (1980).
58. Nix, 467 U.S. at 459 (Brennan, J., dissenting).
59. Id. at 441-44. Four years after Nix, the Supreme Court discussed the relationship between the two doctrines in Murray v. United States, 487 U.S. 533 (1988). The Court, comparing the aborted search in Nix to the situation where a legal search uncovered the same evidence previously obtained illegally, stated:

This "inevitable discovery" doctrine obviously assumes the validity of the independent source doctrine as applied to evidence initially acquired unlawfully. It would make no sense to admit the evidence because the independent search, had it not been aborted, would have found the body, but to exclude the evidence if the search had continued and had in fact found the body. The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.

Id. at 539.
61. Nix, 467 U.S. at 459 (Brennan, J., dissenting).
62. Id.
tates a higher burden of proof for the former. Justice Brennan reasoned that in cases involving the inevitable discovery doctrine, the evidence "has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed." A higher standard of proof of inevitability would ensure that the "hypothetical finding is narrowly confined to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule." The dissenters argued that a clear and convincing standard of proof was necessary because of the speculative nature of the evidence sought to be admitted and the hypothetical nature of the inquiry. The heightened burden was advocated additionally as a means of impressing upon the trial judge the importance of the decision.

THE CASE

On the evening of 27 October 1988, Daniel Garner, armed with a .25 caliber Beretta pistol, entered a Fayetteville convenience store located near his residence and demanded that the clerk give him money. The clerk, who knew the defendant as a regular customer, responded, "Danny, stop playing around. Put the gun away." The defendant told the clerk, "Listen bitch, I'm not playing." The defendant then shot her and took the money from the cash register. The defendant subsequently told an acquaintance, who testified for the State at trial, about the robbery of the convenience store.

63. Id.
64. Id.
65. Id.
66. Id. at 459-60.
68. Id.
69. Id.
70. Id.
71. The acquaintance, Brad Dickens, testified pursuant to a proposed plea-bargain arising from a first-degree burglary charge. Id. The break-in was committed by the two the same night the defendant told Dickens about his prior robbery of the convenience store. Id.
72. Id. Dickens, also testified that he had seen Garner in possession of the automatic handgun which Dickens identified at trial. Garner told Dickens, "they wouldn't suspect [Garner] because he lived right there and he came in all the time and they knew him." Id.
On 18 November 1988, law enforcement officers went to a residence at which the defendant was supposedly located and were given permission to enter and search. Officers found the defendant and arrested him. Officers then obtained a search warrant for the defendant's residence. A magistrate issued the warrant upon a finding of probable cause. However, the probable cause affidavit presented to the magistrate contained a false statement. The evidence seized from the defendant's residence included a box for a Beretta handgun, a receipt from Jim's Pawnshop for the purchase of a Beretta handgun, and five .25 caliber bullets. Law enforcement officers proceeded to Jim's Pawnshop in Fayetteville and obtained another copy of the Beretta handgun purchase receipt and the defendant's Alcohol, Tobacco and Firearms (hereinafter "ATF") application to purchase the pistol.

Prior to trial, the defendant moved to suppress all evidence, both primary and derivative, obtained as a result of the search of his residence. The trial court allowed the motion to suppress the

73. Id. at 497, 417 S.E.2d at 505.
74. Id. Among the evidence obtained at the residence were a bank bag similar to the one missing from the convenience store, a box of .25 caliber ammunition, and a .25 caliber Beretta handgun later established to be the weapon used in the convenience store killing. Id.
75. Id.
76. Id.
77. Id. at 498, 417 S.E.2d at 505. The State's firearms identification expert, S.B.I. Lab Technician, R.N. Marrs, told Cumberland law enforcement officers that the spent casings found at the convenience store and at the scenes of two other crimes of which the defendant was suspected were all fired from the same gun. Id. However, the handgun taken from the defendant's coat was not delivered to the S.B.I. until 21 November 1988. Id. Thus, Agent Marrs had no firearm available for ballistics comparison on 18 November 1988 and was unable to truthfully say that any specific pistol was the gun used in both crimes. Id.
78. Id. The serial number listed on the box and the receipt corresponded with the serial number on the handgun taken from the defendant's coat at the time of his arrest. Id.
79. Id.
80. Id. The defendant contended suppression of the evidence was required on the basis of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 20 and 23 of the North Carolina Constitution. Id. The primary evidence, the gun box and the purchase receipt, were the items obtained from the defendant's residence. Id. The derivative evidence, a duplicate copy of the purchase receipt and the ATF records of the purchase, consisted of the documents obtained by officers from Jim's Pawnshop. Id.

The defendant also filed a motion to suppress any evidence related to the discovery of the handgun in the pocket of his jacket. The defendant contended
primary evidence; that is, all items obtained directly from the defendant's residence. 81 The trial court ruled that this evidence must be excluded because the search warrant did not state sufficient facts to establish probable cause to search the residence. 82 The trial court did, however, except from the suppression orders, on the basis of the inevitable discovery doctrine, the derivative evidence from the pawnshop. 83 The trial court allowed the derivative evidence because the officers could have conducted a routine check and discovered the duplicate receipt and ATF records. 84 The trial court concluded as a matter of law that the State had proven by a preponderance of the evidence that the information at the pawnshop would have been discovered inevitably by lawful means. 85

At trial, the State introduced evidence obtained from the permissive search of the residence where the defendant was arrested, as well as the derivative evidence obtained from the pawnshop. 86 The State's firearms identification expert positively identified the spent casings and bullets recovered from the convenience store as having been fired from the handgun recovered from the defendant's coat at the time of his arrest. 87 A jury found the defendant guilty of robbery with a dangerous weapon and of first-degree murder on theories of both premeditation and deliberation and felony-murder. 88

On appeal, the defendant argued against the adoption of the inevitable discovery exception and in the alternative, the defend-

that the search of his jacket exceeded the scope of the permissive search of the residence at which he was arrested. See Record at 8-13.

82. Id.
83. Id. The trial court found that "but for" the fact the information was readily ascertainable by the pawnshop receipt found at the defendant's residence the officers would have conducted a routine check and discovered the duplicate receipt and ATF records by lawful means. Id. The court concluded the State had proven by a preponderance of the evidence that the information at the pawnshop would have been discovered inevitably by lawful means. Id.
84. Id.
85. Id.
86. Id.
87. Id.
88. Id. at 495, 417 S.E.2d at 503. The defendant was sentenced to consecutive terms of life imprisonment for the murder and twenty-five years imprisonment for the armed robbery. Id. The defendant appealed his murder conviction to the North Carolina Supreme Court as a matter of right. Id. The North Carolina Supreme Court allowed the defendant's motion to bypass the North Carolina Court of Appeals with regard to his appeal of the armed robbery conviction. Id.
ant urged the following restrictions on its application: (1) a clear and convincing standard of proof as to the inevitability of discovery; 89 (2) a requirement that there be an ongoing, independent investigation in progress at the time the illegal discovery occurs; 90 and (3) a requirement that the State prove the absence of bad faith on the part of the investigating officers. 91 The North Carolina Supreme Court adopted the exception without any of the constraints advocated by the defendant. 92 The court affirmed the defendant's murder conviction and "put its imprimatur on the inevitable discovery doctrine" as a "logical and meaningful extension of our law." 93

ANALYSIS

A. The Burden of Proof

The North Carolina Supreme Court followed the lead of the Nix Court and adopted a preponderance of the evidence standard as the prosecution's burden of proof as to the inevitability of discovery. 94 The majority engaged in very little independent analysis regarding the parameters of the inevitable discovery doctrine; a striking example of this abdication is the majority's approach to the burden of proof issue. The court relied solely on the Nix opinion for the justifications of the preponderance standard. 95 How-

89. Id. at 503, 417 S.E.2d at 508.
90. Id. at 502, 417 S.E.2d at 503.
91. Id. at 507, 417 S.E.2d at 510.
92. Garner, 331 N.C. at 507, 417 S.E.2d at 511.
93. Id. at 500, 417 S.E.2d at 507.
94. Id. at 502, 417 S.E.2d at 508. The court quoted from Nix:
If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. . . . Anything less would reject logic, experience, and common sense.

Id. (quoting Nix v. Williams, 467 U.S. 431, 444 (1984)). But see Note, Leading Cases of the 1983 Term, 98 Harv. L. Rev. 87, 129-30 (1984) [hereinafter Leading Cases] ("The Williams II Court . . . adopted an inappropriately lenient standard of proof for triggering the exception . . . . A standard of proof demanding clear and convincing evidence is thus essential to preclude undue speculation and overly generous deference to police testimony."); Vincent A. Nagler, Note, Nix v. Williams: Conjecture Enters the Exclusionary Rule, 5 Pace L. Rev. 657, 690 (1985) ("The choice of preponderance of the evidence as the burden of proof could lead to hypothetical findings that are erroneous.").
95. Garner, 331 N.C. at 503-04, 417 S.E.2d at 508-09.
ever, there are two factors that render this reliance faulty: (1) the Supreme Court decided on the preponderance standard because it is the traditional burden of proof employed at suppression hearings, an analogy that has been much maligned,96 and (2) North Carolina, at least before Garner, had relied on the principle of judicial integrity as a justification for its exclusionary rule.97

In Garner, the State presented testimony of three law enforcement officers that normal law enforcement procedure involved checking the Police Identification Network (hereinafter "PIN") records to determine whether a recovered weapon was stolen and

96. The Supreme Court in Nix justified the relatively low quantum of proof on the issue of inevitability of discovery as follows:

As to the quantum of proof, we have already established some relevant guidelines. In United States v. Matlock, 415 U.S. 164, 178 n.14, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974) . . . , we stated that "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." In Lego v. Twomey, 404 U.S. 477, 488 (1972), we observed "from our experience [that] no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence" and held that the prosecution must prove by a preponderance of the evidence that a confession sought to be used at trial was voluntary. We are unwilling to impose added burdens on the already difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries.

Nix, 467 U.S. at 444 n.5. In another area in which a defendant's rights could be violated by police wrongdoing the Supreme Court had required a heightened burden of proof. United States v. Wade, 388 U.S. 218 (1967) (prosecution must prove by clear and convincing evidence that in-court identifications were the product of a source independent of a line-up conducted in the absence of defense counsel). The Court, in distinguishing the speculative nature of a witness' in-court identification addressed in Wade, stated:

[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.

Nix, 467 U.S. at 444 n.5. Commentators have been critical of the Court's analogy to the standard of proof required at suppression hearings rather than that employed in the in-court identification situation. See Nagler, supra note 94, at 690 ("It is apparent that the rationale used in Wade to justify a clear and convincing standard could have been used to adopt the same burden of proof for the inevitable discovery exception: both determinations require a similar amount of conjecture."). Grossman, supra note 51, at 351-54 (advocating a clear and convincing standard of proof for same reasons as were relied upon in Wade).

the ATF records to find out the time and place of its sale if the
weapon had not been reported as stolen. The court was convinced
that an independent inquiry of the ATF records would have been
conducted as a matter of normal investigatory procedure and that
such a check would have resulted in the lead to the gun
merchant. Thus, the court concluded that the State had met its
burden of proving inevitable discovery of the information obtained
at the pawnshop, and that the trial court's application of the doc-
trine did not violate the defendant's Fourth Amendment rights.

The defendant conceded that the question of the use of the
inevitable discovery doctrine had been settled by Nix as regarded
the federal constitution. The defendant argued, however, that the
derivative evidence obtained from the pawnshop should have been
suppressed under the exclusionary rule arising from Article I, sec-
tion 20 of the North Carolina Constitution. The court flatly re-

98. Garner, 331 N.C. at 504, 417 S.E.2d at 509.
99. Id.
100. Id.
101. Id. See also Defendant's Brief at 27-32. Article I, section 20 is captioned
"General Warrants" and provides:
General warrants, whereby an officer or other person may be commanded
to search suspected places without evidence of the act committed, or to
seize any person or persons not named, whose offense is not particularly
described and supported by evidence, are dangerous to liberty and shall
not be granted.
N.C. CONST. art. I, § 20. The exclusion of evidence obtained by unconstitutional
means was provided for by statute in North Carolina in 1937 by enactment of
N.C. GEN. STAT. § 15-27. The current applicable statutory law is titled "Exclusion
or suppression of unlawfully obtained evidence" and provides:
Upon timely motion, evidence must be suppressed if:
(1) Its exclusion is required by the Constitution of the United States or
the Constitution of the State of North Carolina; or
(2) It is obtained as a result of a substantial violation of the provisions of
this Chapter. In determining whether a violation is substantial, the court
must consider all the circumstances, including:
a. The importance of the particular interest violated;
b. The extent of the deviation from lawful conduct;
c. The extent to which the violation was willful;
d. The extent to which exclusion will tend to deter future violations of
this Chapter.
N.C. GEN. STAT. § 15A-974 (1988). The North Carolina Supreme Court has had
occasion to require the exclusion of unconstitutionally obtained evidence and has
stated that the state constitution, "like the Federal Constitution, requires the ex-
clusion of evidence obtained by unreasonable search and seizure." State v. Carter,
322 N.C. 709, 712, 370 S.E.2d 553, 555 (1988); State v. Reams, 277 N.C. 391, 175

http://scholarship.law.campbell.edu/clr/vol15/iss3/4
jected the defendant's assertion that the North Carolina Constitution provides broader protection of individual rights than those based on the Fourth Amendment of the Federal Constitution. The court adopted a preponderance of the evidence standard as the quantum of proof by which the prosecution must demonstrate inevitability. As support for this standard of proof, the court quoted from a footnote in the \textit{Nix} opinion that justified the preponderance standard because it constituted the quantum of proof customarily applied in suppression hearings.

The concurring opinion disagreed with the majority's abandonment of the judicial integrity justification and the closely related issue of the standard of proof of inevitability. The United States Supreme Court in \textit{Nix} concluded that a preponderance of the evidence standard sufficiently served the deterrence rationale of the exclusionary rule. However, the concurring opinion explained that the exclusionary rule in North Carolina is designed to further two essential objectives: (1) the preservation of judicial integrity and (2) the deterrence of police misconduct. The major-

102. Garner, 331 N.C. at 506-07, 417 S.E.2d at 510-11. The court, after noting that the general warrants provision of the state constitution should not be "viewed as a vehicle for any inventive expansion of our law" held the defendant's contention that Article I, Section 20 "should be read as an extension of rights beyond those afforded in the Fourth Amendment is misplaced." \textit{Id.}
103. \textit{Id.} at 504, 417 S.E.2d at 509.
104. See supra note 96 and accompanying text.
105. Garner, 331 N.C. at 503, 417 S.E.2d at 508.
106. \textit{Id.} at 510, 417 S.E.2d at 512 (Frye, J., concurring).
107. \textit{Nix} v. \textit{Williams}, 467 U.S. 431, 443 n.4 (1984). The Supreme Court reached this conclusion by analogizing the purpose of the inevitable discovery exception to that of the harmless error rule:

The ultimate or inevitable discovery exception to the exclusionary rule is closely related in purpose to the harmless-error rule of \textit{Chapman v. California}, 386 U.S. 18, 22, 17 L. Ed. 2d 705, 87 S. Ct. 824, 24 ALR 3d 1085 (1967). The harmless-constitutional-error rule "serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct.

\textit{Id.}
108. Garner, 331 N.C. at 510, 417 S.E.2d at 512 (Frye, J., concurring). Also, in declining to adopt a good faith exception to the exclusionary rule in \textit{Carter}, the North Carolina Supreme Court stated:

North Carolina, however, justifies its exclusionary rule not only on deter-
ity dismissed the defendant’s argument that admission of illegally seized evidence serves to undermine the integrity of the judicial branch with a single quote from *Nix* regarding the public policy benefits of the inevitable discovery doctrine. With very little in the way of analysis, the majority disregarded the preservation of judicial integrity as an objective of North Carolina’s exclusionary rule.

The United States Supreme Court, in the years before *Nix*, had primarily grounded its exclusionary rule decisions on the deterrence rationale and had all but abandoned the judicial integrity principle. Thus, it came as no surprise that the *Nix* Court only addressed the judicial integrity argument in a cursory manner and as a secondary basis. The North Carolina Supreme Court, however, had extolled the importance of the exclusionary rule and its justifications only four years prior to the *Garner* decision. In *State v. Carter*, the court exercised its prerogative to interpret the state constitution differently than the United States Supreme Court had construed the Federal Constitution. In *Carter*, the court declined to follow the Supreme Court’s adoption of a good

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rence but upon the preservation of the integrity of the judicial branch of government and its tradition based upon fifty years’ experience in following the expressed public policy of the state. Under the judicial integrity theory, our constitution demands the exclusion of illegally seized evidence. The courts cannot condone or participate in the protection of those who violate the constitutional rights of others.


109. *Garner*, 331 N.C. at 508, 417 S.E.2d at 511. Justice Lake wrote:

> Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial... Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.

*Id.* (quoting *Nix*, 467 U.S. at 446-47).

110. See supra notes 34-41 and accompanying text.

111. Commentators have criticized the *Nix* Court for its failure to reconcile application of the inevitable discovery doctrine with the judicial integrity principle. See, e.g., *Leading Cases*, supra note 94, at 124-27.


113. *Id.* Justice Martin wrote:

> [W]e have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.

*Id.* at 713, 370 S.E.2d at 555.
faith exception to the exclusionary rule. The decision to exclude the evidence unconstitutionally seized was based on both the deterrence and judicial integrity rationales. While the majority opinion in Garner disregarded the dual basis for the Carter decision, Justice Frye, in his concurring opinion, addressed this abandonment of the judicial integrity justification.

Given that North Carolina had previously based its exclusionary rule on the principle of judicial integrity as well as the deterrence rationale, the court should have enacted a higher standard of proof of inevitability. The North Carolina Supreme Court, prior to the Garner decision, had given great deference to the judicial integrity basis for the exclusionary rule, rather than the lip-service paid it by the United States Supreme Court. This distinction, in view of the purpose and justifications of the exclusionary rule, compels an independent discussion and analysis of the inevitable discovery doctrine and its parameters. The need for a separate treatment is especially mandated with regard to the quantum of proof issue, since the standard now adopted undermines the prin-

114. Id. at 724, 370 S.E.2d at 561.
115. Id. at 722-23, 370 S.E.2d at 560-61.
116. State v. Garner, 331 N.C. 491, 511-12, 417 S.E.2d at 513-14 (Frye, J., concurring). Justice Frye quoted from Carter, concerning the societal importance of the exclusionary rule:
The exclusionary sanction is indispensable to give effect to the constitutional principles prohibiting unreasonable search and seizure. We are persuaded that the exclusionary rule is the only effective bulwark against governmental disregard for constitutionally protected privacy rights. Equally of importance in our reasoning, we adhere to the rule for the sake of maintaining the integrity of the judicial branch of government.
The preservation of the right to be protected from unreasonable search and seizure guaranteed by our state constitution demands that the courts of this state not condone violations thereof by admitting the fruits of illegal searches into evidence . . .

In determining the value of the exclusionary rule, we regard the crucial matter of the integrity of the judiciary and the maintenance of an effective institutional deterrence to police violation of the constitutional law of search and seizure to be the paramount considerations. We do not discount the implications of the failure to convict the guilty because probative evidence has been excluded in even one grave criminal case. The resulting injuries to victim, family, and society are tolerable not because they are slight but because the constitutional values thereby safeguarded are so precious.

Id. (quoting Carter, 322 N.C. at 719-22, 370 S.E.2d at 559-61).
117. See, e.g., State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988); see supra notes 112-115 and accompanying text.
ciple of judicial integrity. The *Nix* decision, even though based almost solely upon the deterrence rationale, has been repeatedly criticized for the inadequate burden of proof placed upon the prosecution.\(^{118}\) In addition to the commentators that have disapproved the preponderance standard, some courts prior to the *Nix* decision had enacted a more demanding standard of proof.\(^{119}\)

The concurring opinion, echoing Justice Brennan's sentiments in *Nix*, specifically advocated a requirement that the prosecution prove inevitability of discovery by clear and convincing evidence.\(^{120}\) Justice Frye wrote that only a higher burden of proof would "ensure that the exclusionary rule will continue to serve its historic function of protecting the people of North Carolina from unreasonable searches and seizures."\(^{121}\) Justice Frye also noted the inconsistency of a preponderance standard with the question of inevitability of discovery.\(^{122}\) Although he disagreed with the parameters of the exception as adopted, Justice Frye deemed the introduction of the derivative evidence harmless beyond a reasonable doubt and, therefore, concurred in the court's result.\(^{123}\)

\[118. \text{See supra note } 96 \text{ and accompanying text.}\
\[119. \text{The Fifth and Eleventh Circuits required that the inevitability of discovery be shown to a reasonable probability. United States v. Brookins, 614 F.2d 1037, 1048 (5th Cir. 1980); United States v. Roper, 681 F.2d 1354, 1358 (11th Cir. 1982). The Tenth Circuit's application of the exception required that there be "no doubt" as to the inevitability of lawful discovery. United States v. Romero, 692 F.2d 699, 704 (10th Cir. 1982). The Fifth Circuit originally rejected the inevitable discovery exception. Parker v. Estelle, 498 F.2d 625, 629-30 n.12 (5th Cir. 1974), cert. denied, 421 U.S. 963 (1975) ("This rule might minimize the number of times a guilty defendant could avoid conviction but is hard to square with the deterrent purposes of the various exclusionary rules."); United States v. Castellana, 488 F.2d. 65, 68 (5th Cir. 1973). At least one state court, following *Nix*, rejected the preponderance standard in favor of the clear and convincing standard. See State v. Sugar, 495 A.2d 90 (N.J. 1985).}
\[120. \text{Garner, 331 N.C. at 510, 417 S.E.2d at 512 (Frye, J., concurring).}\
\[121. \text{Id. at 514, 417 S.E.2d at 515.}\
\[122. \text{Id. at 510, 417 S.E.2d at 512. In a footnote, Justice Frye added: Inevitable means "unable to be avoided, evaded, or escaped; certain; necessary." Random House Webster's College Dictionary 688 (1991). It thus seems inconsistent to ask whether it is "more likely than not" that evidence would have been "inevitably" discovered.}\
\[123. \text{Garner, 331 N.C. at 514, 417 S.E.2d at 514. Justice Frye noted that, on the facts of the case, the State may have been able to prove inevitability of dis-}
B. No Requirement of an Independent, Ongoing Investigation

One of the proposed constraints, and the weakest of the three urged by the defendant, would require the prosecution to show that an independent, ongoing investigation was under way at the time the evidence was discovered illegally.\footnote{124}{Garner, 331 N.C. at 502, 417 S.E.2d at 508.} The flexible standard the court adopted in Garner as to the necessity of an independent, ongoing investigation is adequate to ensure inevitability if other constraints such as a higher burden of proof and a good faith requirement are imposed. This requirement would cause the inevitable discovery doctrine to more closely resemble the independent source doctrine because the police are required to show they were pursuing steps that, if allowed to continue, would have resulted in an actual independent source for the evidence.\footnote{125}{See Nix v. Williams, 467 U.S. 431, 459 (1984)(Brennan, J., dissenting).} It removes from the realm of the hypothetical the line of investigation that would have led to the tainted evidence.\footnote{126}{See Schrock & Welsch, supra note 30, at 1052-53 (lawful alternative method of discovery severs causal connection between the illegality and the otherwise tainted evidence).} Otherwise, it is argued, the police have the benefit of hindsight with which to show what investigatory steps would have been taken.\footnote{127}{See Mark P. Schnapp, Comment, Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule, 5 Hofstra L. Rev. 137, 155 (1976) ("'sophisticated argument' aided by hindsight can be used to show what the police would have done in a given situation"); see also State v. Williams, 285 N.W.2d 248, 259 (Iowa 1979) (proof of discovery may be fabricated).} Requiring an alternative line of investigation would act to counterbalance the great deference given to police testimony in criminal prosecutions.\footnote{128}{See Schnapp, supra note 127, at 155.}

Despite arguments to the contrary, the court was persuaded by the reasoning of the First Circuit in United States v. Silves-

covery by clear and convincing evidence but felt it unnecessary to reach that question because the admission of the derivative evidence was not prejudicial to the defendant. \textit{Id.} Justice Frye concluded the evidence showing the defendant had purchased the murder weapon was not crucial to the State’s case. Justice Frye though the State had met its burden of proving harmlessness beyond a reasonable doubt because of the following facts: (1) the State’s firearm identification expert positively identified the handgun legally seized from the defendant’s coat at the time of his arrest as the murder weapon; (2) the handgun established to be the murder weapon was seen in the defendant’s possession prior to the murder; and (3) the defendant confessed the murder to Brad Dickens. \textit{Id. See N.C. Gen. Stat. § 15A-1443(b) (1988) (harmless error statute).}

\textit{Id.}
and adopted an identical approach. The court declined to impose a requirement that there be evidence of an ongoing, independent investigation present in every case. Rather, the court will have the discretion to determine if that is a necessary element for the State to demonstrate inevitability on a case-by-case basis. The courts are split as to the requirement that the police possessed and were actively pursuing the leads that would have resulted in discovery.

The defendant argued for exclusion of the evidence, as no independent investigation into the ownership records for the murder weapon was under way. The defendant pointed out that the serial number of the handgun was not “run through” the PIN or ATF systems after the pawnshop receipt was found at the defendant’s residence. The defendant also contended that the trial court’s application of the inevitable discovery doctrine was erroneous because no evidence was presented concerning the reliability of those investigatory procedures.

The court justifiably rejected the requirement of an independent, ongoing investigation. The defendant’s argument in itself demonstrates the unwieldy constraints and useless effort that would result from such a requirement. In this case, the police had a purchase receipt for the gun in their hands and their next step, naturally, was to proceed to the pawnshop for confirmation of the sale of the handgun to the defendant. It is unreasonable to expect the police to pursue normal procedure to “find” information that they have already obtained from another source. This should not be seen as a sanction of an illegal shortcut but a realization of what

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131. Id.
132. Id.
133. The Court of Appeals for the Ninth Circuit applied the inevitable discovery doctrine without discussing the requirement of an ongoing investigation. See United States v. Merriweather, 777 F.2d 503 (9th Cir. 1985), cert. denied, 475 U.S. 1098 (1986). The Courts of Appeals for the Fifth, Tenth, and Eleventh Circuits have required an ongoing investigation at the time of the police misconduct. See United States v. Cherry, 759 F.2d 1196 (5th Cir. 1985); United States v. Owens, 782 F.2d 146 (10th Cir. 1986); United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984).
134. See Defendant’s Brief at 23-27.
135. See id. at 26.
136. Id.
law enforcement officers will next do in such a situation. The ille-
gal action would have already occurred and a requirement that
normal investigatory procedures be followed, nonetheless, would
merely be a meaningless formality. The question of the reliability
or accuracy of the investigatory steps can be adressed when the
trial judge makes a determination of the likelihood of eventual dis-
covery. The concern about overly generous reliance on police testi-
mony can also be effectively dealt with by enacting a higher bur-
den of proof.137 Requiring a higher burden of proof and good faith
conduct on the part of the police would render unnecessary any
requirement of an ongoing, independent investigation.

C. No Requirement that Prosecution Prove Absence of Bad
Faith

The most troubling aspect of the Garner decision, aside from
the burden of proof issue, is the court's refusal to impose a require-
ment that the prosecution prove the absence of bad faith on the
part of the investigating officers. The court again failed to distin-
guish prior exclusionary rule cases or offer any convincing justifica-
tions for such a sweeping exception to the rule of exclusion.

The defendant argued that, in the event the court adopted the
inevitable discovery doctrine, a requirement should be imposed
that the State prove the absence of bad faith on the part of the
investigating officers.138 The defendant relied mainly on the court's
decision in State v. Carter as support for the absence of bad faith
requirement.139 In Carter, the court held there is no good faith ex-
ception to the exclusionary rule under the North Carolina Consti-
tution.140 The defendant contended the element of absence of bad
faith is necessary to maintain "minimal safeguards against inten-
tional police misconduct."141 The court failed to discuss the con-
tention or the apparent contradiction with the court's holding in
Carter and dismissed the argument as having no merit.142 The

137. See Liana R. McCants, Comment, Should "Good Faith" Be An Element
of the Inevitable Discovery Exception to the Exclusionary Rule, 17 CREIGHTON L.
REv. 1123, 1136 (1984) (good faith requirement advocated as a way to combat
reasoning of police that they can later persuade a judge of eventual discovery by
lawful means).

139. Id.
141. Garner, 331 N.C. at 507, 417 S.E.2d at 511.
142. Id.
court affirmed the trial court's ruling that "the question of bad faith was irrelevant in the proper application of the inevitable discovery doctrine."\(^{143}\) Despite the court's summary dismissal of the question, it is significant that the court had previously rejected a good faith exception to the state constitution's exclusionary rule.\(^{144}\) In *Carter*, the court agreed with critics who were concerned that a good faith exception would consume the exclusionary rule.\(^{146}\)

The court, again, offered little analysis or justification for its refusal to adopt a requirement that the prosecution prove the absence of bad faith, but rather based its reasoning on a quote from *Nix*.\(^{146}\) As with the burden of proof issue, the court blindly followed the *Nix* Court's "no worse off" principle as a justification for providing a broad application to the inevitable discovery doctrine.\(^{147}\)

However, the court's reliance on *Nix* regarding the officer's good faith is unjustified for two reasons: (1) North Carolina had previously declined to adopt a good faith exception to the exclusionary rule; and (2) the good faith requirement is necessary to deter intentional violations of constitutional rights. It is inconsistent that the court would reject the good faith exception itself, for fear that such an exception would undermine the purpose of the exclu-

\(^{143}\) *Id.*

\(^{144}\) See supra notes 112-115 and accompanying text.

\(^{145}\) State v. Carter, 322 N.C. 709, 715-16, 370 S.E.2d 553, 557 (1988). The court quoted from a New Jersey opinion which articulated the same concern. According to Justice White's formulation, in suppression cases involving warrants the application of the exclusionary rule will be the exception, and recognition of the good-faith "exception" will be the prevailing standard.

*Id.* (quoting State v. Novembrino, 519 A.2d 820, 846 (N.J. 1987) (declining to follow the *Leon* good faith exception to exclusionary rule)).

\(^{146}\) *Garner*, 331 N.C. at 508, 417 S.E.2d at 511. The requirement that the prosecution must prove the absence of bad faith, imposed here by the Court of Appeals, would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a worse position than they would have been in if no unlawful conduct had transpired. And, of equal importance, it wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Nothing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach.

*Id.* (quoting *Nix* v. Williams, 467 U.S. 431, 445 (1984)).

\(^{147}\) *Garner*, 331 N.C. at 508, 417 S.E.2d at 511.
sionary rule, and yet, not require the proof of absence of bad faith when that concern is even more compelling. The failure of the Nix Court to impose a good faith requirement on the part of the investigating officers has been repeatedly criticized. Many commentators feel the rationale of the exclusionary rule is undermined by the failure to distinguish intentional or bad faith violations of constitutional rights. This same reasoning has been employed by numerous courts that have required good faith as an element of the inevitable discovery doctrine. The lack of a good faith requirement fails to distinguish the intentional violations that most need to be deterred, from the inadvertent violations that more


149. See LaFave, supra note 1, § 11.4(a), at 382; The Iowa Supreme Court, in affirming Robert Williams’ second murder conviction (which later made its way to the Supreme Court as Williams II), adopted a two-part test for application of the inevitable discovery exception. This approach had been advocated by Professor LaFave as a means of conforming the exception to constitutional mandates. The court articulated the requirements of the test as follows:

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

State v. Williams, 285 N.W.2d 248, 260 (Iowa 1979), cert. denied, 446 U.S. 921 (1980). The Supreme Court rejected the two-part test, concluding that an inquiry as to the officer’s state of mind was unnecessary. Nix, 467 U.S. at 445-46. On review of the defendant’s petition for habeas corpus relief, the Eighth Circuit Court of Appeals addressed the issue of the bad faith element as follows:

At the oral argument the question whether the bad-faith element of the test might be dispensed with was raised from the bench, but counsel for the State expressly disclaimed any such position. We agree with counsel and with the Supreme Court of Iowa that if there is to be an inevitable-discovery exception the State should not receive its benefit without proving that the police did not act in bad faith. Otherwise the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the exclusionary rule reduced too far.

Williams v. Nix, 700 F.2d 1164, 1169 n.5 (1983), rev’d, 467 U.S. 431 (1984). See also Macon, supra note 60, at 395; Schnapp, supra note 127, at 156-66 (exception should not operate where officers have acted in bad faith to accelerate discovery by use of illegal shortcuts); Jeffrey M. Bain & Michael K. Kelly, Comment, Fruit of the Poisonous Tree: Recent Developments as Viewed Through Its Exceptions, 31 U. Miami L. Rev. 615, 627 (1977) (“exception . . . based on conjecture”).

150. See, e.g., State v. Holler 459 A.2d 1143, 1147 (N.H. 1983) (“element of good faith on the part of police is inherent in the inevitable discovery exception”).
often deserve to be excused. This undermines the exclusionary rule even when it is primarily grounded on the deterrence principle because it is intentional misconduct that can be most effectively deterred. The need for a good faith requirement is even more compelling when the preservation of judicial integrity is among the objectives of the exclusionary rule, as has been the case in North Carolina.

CONCLUSION

The inevitable discovery doctrine can be utilized in a way that does not undermine the purpose of the exclusionary rule. However, to ensure that the constitutional rights protected by the exclusionary rule are not offended, the doctrine should be applied narrowly and with great care. The inevitable discovery doctrine, as applied by the North Carolina Supreme Court in State v. Garner, has not been clearly defined nor limited in scope. Consequently, the individual rights sought to be protected by the exclusionary rule may be sacrificed, in exchange for only minimal benefits with regard to the efficiency and effectiveness of criminal prosecutions.

The court blindly followed the Nix Court and imposed an unacceptably lenient burden of proof. The preponderance standard is not sufficient to serve the deterrent purpose of the exclusionary rule and ultimately sanctions intentional police misconduct. The preponderance standard will also have an adverse impact on the principle of judicial integrity because of the likelihood of false findings, in part due to the great deference given to police testimony. A requirement that the prosecution demonstrate an absence of bad faith on the part of the investigating officers is necessary to deter intentional misconduct. The lack of such a requirement diserves the objective of the preservation of judicial integrity and actually renders the court a party to the unconstitutional conduct. Application of the inevitable discovery doctrine can comport with the objectives of the exclusionary rule only if the prosecution dem-

151. The deterrent purpose of the exclusionary rule is frustrated by the absence of a good faith requirement because the inevitable discovery exception results in the excusal of unconstitutional "end runs and short cuts." Crews v. United States, 389 A.2d 277, 293 (D.C. 1978), rev'd, 455 U.S. 463 (1980).
onstrâtes: (1) the inevitability of discovery by clear and convincing evidence, and (2) the absence of bad faith on the part of police in hastening discovery of the evidence in question.

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