FOURTH AMENDMENT — EXCLUSIONARY RULE — SEVENTH CIRCUIT HOLDS THAT EVIDENCE GATHERED THROUGH AN UNLAWFUL SEARCH OF A HOME MAY BE ADMISSIBLE UNDER THE INDEPENDENT SOURCE DOCTRINE EVEN IF TAINTED EVIDENCE IS DESCRIBED IN THE WARRANT APPLICATION. — *United States v. Huskisson*, 926 F.3d 369 (7th Cir. 2019).

The Supreme Court established the exclusionary rule under the Fourth Amendment to deter police misconduct by prohibiting the introduction of evidence seized during an unlawful search.[1] But the Court, wary of leaving the prosecution worse off at trial than it would have been if no misconduct had occurred,[2] has chipped away at this rule since its inception through exceptions like the independent source doctrine.[3] In *Murray v. United States*,[4] the Supreme Court held that evidence initially uncovered during an unlawful search could be admitted under the independent source doctrine as long as it was later rediscovered through some legal channel — such as a search conducted pursuant to a valid search warrant — that was "*genuinely* independent" from the original, unconstitutional search.[5] Recently, in *United States v. Huskisson*,[6] the

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[1] *See* Weeks v. United States, 232 U.S. 383, 398 (1914); Jennifer Yackley, Note, Hudson v. Michigan*: Has the Court Turned the Exclusionary Rule into the Exclusionary Exception?*, 30 HAMLINE L. REV. 409, 427–29 (2007).

[2] *See* Nix v. Williams, 467 U.S. 431, 443 (1984).

[3] *See, e.g.*, Marsha A. Quintana, *The Erosion of the Fourth Amendment Exclusionary Rule*, 17 HOW. L.J. 805, 809 (1973); James R. Pierre, Casenote, *The Independent Source Doctrine's Application in* Murray v. United States*: Has the Pendulum Swung Too Far in Diminishing an Individual's Constitutionally Protected Rights*, 16 S.U. L. REV. 427, 428–29 (1989) (acknowledging, as exceptions to the exclusionary rule, the doctrines of independent source, attenuation, inevitable discovery, and good faith). The independent source doctrine allows for the introduction of evidence that was originally discovered through a violation of the Fourth Amendment if the government also discovers that evidence by lawful means. *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[4] 487 U.S. 533 (1988). In *Murray*, police officers entered a warehouse without a warrant and saw bales in plain view that they believed contained drugs. *Id.* at 535. Hours later, the officers returned with a search warrant for the premises and seized the bales. *Id.* at 536. The Court decided that evidence of drug activity that was observed during the second search could be admissible even if the officers had gained knowledge about the existence of this evidence through the initial, unlawful entry, *id.* at 541–42, because the independent source doctrine covers "evidence acquired by an untainted search which is identical to the evidence unlawfully acquired," *id.* at 538 (emphasis omitted). The Court then remanded so the lower court could determine whether the source was genuinely independent. *Id.* at 543–44.

[5] *Id.* at 542 (emphasis added). The Court clarified that the warrant would not have been a "genuinely independent source" if (1) the initial observation of the evidence prompted the agents' decision to seek the search warrant, or (2) the magistrate was told about the unconstitutionally obtained information and that knowledge affected their determination about the existence of probable cause. *Id.* Lower courts, like the Seventh Circuit, have distilled a two-prong test for an "independent source" from this guidance. *See, e.g.*, United States v. Huskisson, 926 F.3d 369, 374 (7th Cir. 2019).

[6] 926 F.3d 369.

Seventh Circuit affirmed a district court's refusal to suppress drug evidence discovered during an unlawful warrantless search of a home because officers later obtained that evidence pursuant to a search warrant, even though the warrant application referenced the evidence at issue.[7] *Huskisson* illustrates the tension between the Seventh Circuit's expansive interpretation of the independent source doctrine and the Fourth Amendment's guarantee of protection from warrantless searches of the home. The court's sweeping application of the independent source exception weakens the deterrent effect of the exclusionary rule.[8]

Anthony Hardy was arrested on February 5, 2016, for his role in a drug conspiracy.[9] In an attempt to obtain a favorable plea deal, Hardy identified two local drug dealers, one of whom was Paul Huskisson.[10] Hardy claimed that he had purchased methamphetamine from Huskisson on multiple occasions and agreed to participate in a controlled drug sale so that federal agents could arrest Huskisson.[11] Hardy arranged a transaction with Huskisson, and federal agents from the Drug Enforcement Agency (DEA) listened to and recorded a series of nine phone calls between the men as they discussed the logistics of the sale.[12] The sale was scheduled to take place at Huskisson's home on the evening of February 6.[13] The agents did not attempt to obtain a search warrant before the deal because they assumed that they needed to confirm the presence of drugs in Huskisson's home first.[14]

Hardy went to Huskisson's house, as scheduled, with a team of federal and local law enforcement officers in tow.[15] After about an hour, Hardy alerted the officers that he had seen methamphetamine in the home.[16] Officers then descended upon Huskisson's residence, arresting Huskisson and the other two men inside, despite the fact that they still had not obtained a search warrant.[17] Huskisson refused to consent to a search of his residence, but officers claimed that they saw an open cooler that contained "ten saran-wrapped packages" in plain view.[18] The contents of the packages field-tested positive for methamphetamine.[19]

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[7] *See id.* at 376–77.

[8] *See* Yackley, *supra* note 1, at 412 (hypothesizing that the exclusionary rule might be more aptly described as an "exclusionary exception").

[9] *Huskisson*, 926 F.3d at 371.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 371–72.

[15] *Id.* at 372.

[16] *Id.*

[17] *Id.* The other people arrested were Jezzar Terrazas-Zamarron and Fredi Aragon. *Id.*

[18] *Id.*

[19] *Id.*

After the unlawful entry,[20] DEA agents applied for a warrant to search Huskisson's home.[21] In addition to describing Hardy's past interactions with Huskisson, the multiple phone calls between Hardy and Huskisson, and Hardy's account of the events he observed while inside of Huskisson's house, the search warrant application included information about the open cooler and the packages that the officers observed in Huskisson's house.[22] Based on the application, a magistrate judge issued a warrant to authorize a search approximately four hours after officers unlawfully entered Huskisson's home.[23]

After his arrest, Huskisson was indicted in the United States District Court for the Southern District of Indiana for possession of methamphetamine with the intent to distribute.[24] The defense moved to suppress the drugs as the product of an unconstitutional search.[25] Because the affidavit referenced tainted evidence, the defense argued that the search warrant could not constitute an "independent" source.[26]

The district court denied the motion to suppress, despite inconsistent testimony from an Indiana State Police detective about the plan for seeking a warrant application.[27] Detective Noel Kinney first suggested that the agents planned to seek a search warrant regardless of whether they found drug evidence,[28] but he later implied that the team would have applied for a warrant only if they found methamphetamine in Huskisson's home first.[29] The district court credited the former testimony and found that the evidence in the warrant application would have constituted probable cause even without the description of the drugs discovered during the initial search.[30]

At trial, three DEA agents from the entry team testified that their intention had been to secure the residence and wait for a search warrant.[31] Huskisson was found guilty and given a twenty-year mandatory minimum sentence.[32] He appealed his conviction, challenging the denial

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[20] The government conceded at trial that the warrantless entry violated the Fourth Amendment and was therefore illegal. *Id.* at 373.

[21] *Id.* at 372.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *See id.*

[27] *See id.* at 372–73.

[28] *Id.* at 373.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

of his motion to suppress on the grounds that the warrantless entry violated the Fourth Amendment and the search warrant was not an independent source.[33]

The Seventh Circuit affirmed.[34] Writing for the panel, Judge Brennan[35] acknowledged that law enforcement officers entered Huskisson's home and gained knowledge about the drug evidence illegally[36] but reasoned that the independent source doctrine rendered the evidence admissible.[37] To reach this conclusion, the court applied the two-part test developed in *Murray v. United States* for deciding whether a warrant constitutes an independent legal source of evidence.[38] Under the Seventh Circuit's interpretation of the *Murray* framework, a warrant is an independent source if (1) the illegally obtained information did not affect the magistrate's determination that probable cause existed to justify the search, and (2) the illegal search did not affect the government's decision to pursue a search warrant.[39]

With regard to the first question, the court found that the illegally obtained evidence had not meaningfully affected the magistrate's decision to issue the warrant.[40] Relying on earlier Seventh Circuit decisions interpreting *Murray*,[41] the court concluded that a warrant based on an application that included illegally obtained information could be upheld "if the other information in the application establishe[d] probable cause."[42] Judge Brennan then reviewed the facts of the case and determined that the search warrant application contained enough "untainted evidence of probable cause" to justify a search warrant.[43]

Having resolved the first question in the *Murray* analysis, the Seventh Circuit turned to the second and determined that the illegal search did not affect the government's decision. Despite Detective Kinney's contradictory testimony, the district court found that the officers would have applied for a warrant to search Huskisson's home regardless of whether drug evidence was found during the initial entry.[44] Because the lower court made a "well-reasoned and well-supported"

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[33] *Id.*

[34] *Id.* at 377.

[35] Chief Judge Wood and Judge St. Eve joined this opinion.

[36] *Huskisson*, 926 F.3d at 373.

[37] *Id.* at 376–77.

[38] *Id.* at 374.

[39] *Id.*; *see* Murray v. United States, 487 U.S. 533, 542 (1988). While the Seventh Circuit addresses the two *Murray* inquiries in this order, other circuits have reversed the sequence. *See, e.g.*, United States v. Dessesaure, 429 F.3d 359, 365 (1st Cir. 2005).

[40] *Huskisson*, 926 F.3d at 376.

[41] The panel identified *United States v. Markling*, 7 F.3d 1309 (7th Cir. 1993), and *United States v. Etchin*, 614 F.3d 726 (7th Cir. 2010), as relevant circuit-level cases. *Huskisson*, 926 F.3d at 374.

[42] *Huskisson*, 926 F.3d at 375 (quoting *Markling*, 7 F.3d at 1316).

[43] *Id.* at 376.

[44] *Id.*

conclusion, the Seventh Circuit refused to declare that it had committed clear error.[45] After answering both questions in the *Murray* framework, Judge Brennan concluded that the drug evidence was admissible.[46] "All agree[d]" that the first entry into Huskisson's house without a warrant was unlawful, but the evidence did not have to be suppressed "because the government had so much other evidence of probable cause, and had already planned to apply for a warrant before the illegal entry."[47] The opposite conclusion would have placed the government "in a worse position than it would otherwise have occupied."[48]

Huskisson reveals the deep tension between the Seventh Circuit's broad interpretation of the independent source exception to the exclusionary rule and the Fourth Amendment's substantive protection against warrantless searches of the home. The Seventh Circuit has interpreted *Murray*'s first prong broadly, admitting unlawfully observed evidence under the independent source exception even when the affidavit for the later-obtained search warrant refers to that evidence, as long as the other information in the warrant application provides probable cause. This approach is derived from the Supreme Court's conclusion in *Franks v. Delaware*,[49] but the *Franks* standard is inconsistent with both the language of *Murray* and the constitutional injury at issue in *Huskisson*. Additionally, *Huskisson* illustrates the ease with which government agents can circumvent the barrier articulated in the second prong of the *Murray* test: the subjective standard of intent is unlikely to provide any meaningful safeguard against constitutional violations. In effect, the Seventh Circuit's broad reading of *Murray* transforms the Fourth Amendment's warrant requirement into a probable cause requirement, as police officers may now conduct confirmatory searches of criminal defendants' homes without the fruits of those searches being suppressed. Expansion of the independent source doctrine in this way removes a vital disincentive to unconstitutional searches of homes and erodes the protections of the Fourth Amendment.

The Seventh Circuit has held that the first prong of the *Murray* test is satisfied even when the warrant application contains evidence obtained during the illegal search if the application contains other information sufficient to demonstrate probable cause. In *United States v. Markling*,[50] the Seventh Circuit concluded that search warrants based

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[45] *Id.* at 377. In reaching this conclusion, the Seventh Circuit acknowledged that the district court had a "superior vantage point" from which to make the necessary credibility determination. *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] 438 U.S. 154 (1978).

[50] 7 F.3d 1309 (7th Cir. 1993).

on applications that included evidence tainted by unlawful search methods may still constitute independent sources.[51] The first prong of the *Murray* test would be satisfied whenever the information in the warrant application established probable cause without regard to the unlawfully obtained observations.[52] To reach this conclusion, the court drew guidance from the *Franks* decision,[53] in which the Supreme Court held that a search warrant must be set aside if a criminal defendant establishes that it was based on information that the officer knew was false or given with reckless disregard for the truth, and that the defendant must be granted a hearing to determine if the remaining information in the warrant application is sufficient by itself to establish probable cause.[54] The *Markling* court reasoned: "If we may uphold a warrant based on an application including knowingly false information if the other information in the application establishes probable cause, it is logical to conclude that we may uphold a warrant based on an application including illegally obtained information under the same circumstances."[55]

But the *Franks* approach adopted by the Seventh Circuit is inconsistent with *Murray*'s emphasis on the effect of the illegal search on the warrant application. The Seventh Circuit construed the word "affect" in the first prong of the *Murray* test narrowly in order to conclude that illegally obtained information does not "affect" the magistrate's decision to issue a search warrant when there is other evidence sufficient to establish probable cause.[56] This narrow interpretation of the word "affect" allowed the court to incorporate the *Franks* reasoning into the *Murray* test.[57] But "affect" also has a broader meaning. The court could have concluded that tainted information "affect[ed]" the magistrate's decision any time that it had an actual effect, meaning that it was presented to the judge and "affect[ed] the decision of th[at] particular magistrate judge to issue the warrant."[58] Courts that have incorporated the *Franks* standard into the

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[51] *Id.* at 1316.

[52] *Id.*

[53] *Id.*

[54] *Franks*, 438 U.S. at 171–72.

[55] *Markling*, 7 F.3d at 1316. Other circuits have come to similar conclusions. *See Huskisson*, 926 F.3d at 375–76 (citing cases from the First, Third, and Sixth Circuits).

[56] *See Markling*, 7 F.3d at 1316–17. The Seventh Circuit decided that the best understanding of "affect" as used in *Murray* was to "affect in a substantive manner," meaning that the evidence *changed* the magistrate's decision by pushing the probable cause determination from no to yes. *Id.* at 1317 ("[T]he fact that an application for a warrant contains information obtained through an unlawful entry does not perforce indicate that the improper information 'affected' [the magistrate's] decision to issue the warrant and thereby vitiate the applicability of the independent source doctrine." (second alteration in original) (quoting United States v. Restrepo, 966 F.2d 964, 970 (5th Cir. 1992))).

[57] *See id.* at 1316.

[58] *Restrepo*, 966 F.2d at 970 (describing the district court's reasons for accepting the broader definition of "affect" before adopting the more limited definition). The broader interpretation of the term "affect" would require suppression of evidence seized through tainted searches unless the

Murray test have had to acknowledge the "considerable tension" between the two cases.[59] As the Seventh Circuit conceded in *Markling*, "[t]aken literally, [*Murray*'s] language indicates that the relevant inquiry focuses not on whether the warrant application establishes probable cause absent the tainted information, but rather on 'the *actual* effect of the illegally acquired information upon a *particular* magistrate.'"[60]

Further, *Franks* is not a good fit for the constitutional injury at issue in *Huskisson*. The Seventh Circuit, like other circuits that have incorporated the *Franks* standard into *Murray*'s first prong, saw no meaningful distinction between inclusion of false evidence and unlawfully obtained evidence in a warrant application.[61] But *Huskisson* and similar cases involve *more* potential constitutional injuries than *Franks* did. In *Franks*, there was one potential Fourth Amendment violation: a search based on a warrant that — absent the false information — might not have been supported by probable cause.[62] By contrast, in *Markling* and *Huskisson*, there were two potential Fourth Amendment violations: an initial warrantless search and a search that, without the tainted information, might not have been supported by probable cause.[63] The *Franks* standard protects against only the second injury.[64] This difference between the *Franks* scenario and *Huskisson* matters because, as Chief Justice Burger once noted, government agents should not be allowed to "exploit[] their presence" in a potential defendant's house,[65] and the use of unconstitutionally obtained information in a warrant application could be considered exploitative.[66] If the warrant that authorized the second search is linked to the

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government could provide subjective proof that the unlawfully obtained information did not affect the decision of that particular magistrate. *Id.*

[59] United States v. Dessesaure, 429 F.3d 359, 366 (1st Cir. 2005); *see, e.g.*, *id.* at 366–67.

[60] *Markling*, 7 F.3d at 1316 (quoting 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4, at 82 (Supp. 1992)).

[61] *See id.*; *see also* United States v. Swope, 542 F.3d 609, 614 (8th Cir. 2008) (collecting cases from other circuits and concluding that the difference is "insufficient to justify a departure" from *Franks*).

[62] Franks v. Delaware, 438 U.S. 154, 157–58 (1978).

[63] *See Huskisson*, 926 F.3d at 371–73; *Markling*, 7 F.3d at 1311–12.

[64] *See* United States v. Madrid, 152 F.3d 1034, 1040–41 (8th Cir. 1998) ("Whatever balance is to be achieved by the inevitable discovery doctrine, it cannot be that police officers may violate constitutional rights the moment they have probable cause to obtain a search warrant." *Id.* at 1041.); Luke M. Milligan, *The Source-Centric Framework to the Exclusionary Rule*, 28 CARDOZO L. REV. 2739, 2770 (2007) ("A rule that two-illegal-searches-is-better-than-one presents obvious underdeterrence issues.").

[65] Segura v. United States, 468 U.S. 796, 812 (1984) (opinion of Burger, C.J.).

[66] In keeping with this idea, a previous Seventh Circuit panel had suggested that there should be *some* limit to the type of illegally obtained information that may be included in a warrant application if that warrant is to constitute an independent source as defined in *Murray*. In *United States v. Etchin*, 614 F.3d 726 (7th Cir. 2010), the Seventh Circuit held that a warrant could constitute an independent source for information when, among other factors, the "information that was obtained in the illegal entry and then mentioned in [the] affidavit was not necessary to the determination that probable cause supported the warrant." *Id.* at 737; *see also Huskisson*, 926 F.3d at 375. But the

initial unconstitutional search, then the warrant should not constitute an independent source. Nothing in *Murray* suggested that a warrant based on an affidavit containing references to evidence discovered through an unlawful search can be considered a genuinely independent source, and the independent source doctrine was not at issue in *Franks*. Therefore, even though the Seventh Circuit characterized its decision in *Markling* as a natural conclusion flowing from the Supreme Court's guidance in *Franks*,[67] this holding constituted an unjustified expansion of the independent source doctrine. If they have probable cause, agents in the Seventh Circuit are now free to include unlawfully gathered information from warrantless initial searches in search warrant applications without fear that the evidence will later be suppressed at trial.

Huskisson also demonstrates that the second prong of the *Murray* test offers little additional protection for individuals who have been injured by an illegal search. The second question in the *Murray* framework requires the court to determine whether the government agents' illegal entry affected the decision to apply for the warrant.[68] But "[t]he testimony of the officers . . . is the only direct evidence of intent," and officers have little incentive to admit that evidence discovered during an unlawful search affected their decision to pursue a warrant.[69] Then, if an officer does admit that evidence observed during a warrantless search affected the decision to seek a warrant, as Detective Kinney did in this case,[70] the trial court is still free to credit other testimony in order to avoid suppressing the evidence.[71] Because officers are the only source of information about

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court included a caveat with its decision, noting that it "would have a much different case if, for example, [the] affidavit revealed that [the detective] observed marijuana in plain view. But that information was correctly excluded from the warrant affidavit and the probable cause analysis." *Etchin*, 614 F.3d at 737–38.

67 *Markling*, 7 F.3d at 1316.

68 Murray v. United States, 487 U.S. 533, 542 (1988).

69 *Id.* at 547–48 (Marshall, J., dissenting); *see also id.* at 549 (arguing for a standard that depends on objective evidence of the government's intent); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992) ("[T]he majority of judges and public defenders [in Cook County, Illinois], and almost half of the state's attorneys, believe that police lie more often than they are disbelieved. When asked to estimate how often police officers lie in court to avoid suppression, 92% responded that the police lie at least 'some of the time' and 22% reported that police lie more than half of the time they testify in relation to Fourth Amendment issues." (footnotes omitted)); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 884 (1991) ("[T]he lack of a credible opponent (the defendant has, after all, been found with incriminating evidence) invites the police to subvert the governing legal standard by testifying falsely at suppression hearings."); Steven Zeidman, Essay, *Policing the Police: The Role of the Courts and Prosecution*, 32 FORDHAM URB. L.J. 315, 325 (2005) ("Although there is no hard data, the anecdotal evidence indicates that police officers 'testily' with relative impunity." (footnotes omitted)).

70 *Huskisson*, 926 F.3d at 373.

71 *See id.*

their subjective intent, the practical effect of the second prong of the independent source test is that government agents have broad latitude to conduct illegal searches and then rationalize these searches ex post.

The *Huskisson* court's interpretation of the *Murray* test essentially reduces the Fourth Amendment's requirement that the government obtain a warrant before invading a person's privacy to a probable cause requirement.[72] Before *Huskisson*, no case in the Seventh Circuit had authorized government agents to conduct an unconstitutional search of someone's home, describe material evidence from that illegal search in a subsequent warrant application, and still introduce evidence discovered during the initial search at trial because the later-issued warrant constituted an independent source of the evidence.[73] But now, police officers in the Seventh Circuit are further relieved from "the burden of inconvenience" that the warrant requirement places upon them.[74] If they have probable cause to justify a search, officers may engage in an initial search to confirm their suspicion and even include that information in the affidavit to justify a search warrant later;[75] the court will simply excise the improper information for them, as long as the officers say that they had always intended to secure a warrant. This new paradigm means that officers need not seek permission from a magistrate before conducting home searches because the court has lowered the cost of seeking forgiveness for unauthorized searches. Suppression is no longer the normal penalty.

But the Fourth Amendment generally requires more than probable cause alone to justify a search of a home; it requires a search warrant.[76] The home occupies a uniquely privileged space in the Fourth Amendment context.[77] The warrant requirement serves an important function: it forces

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[72] *See Murray*, 487 U.S. at 544 (Marshall, J., dissenting) ("The Court today holds that the 'independent source' exception to the exclusionary rule may justify admitting evidence discovered during an illegal warrantless search that is later 'rediscovered' by the same team of investigators during a search pursuant to a warrant obtained immediately after the illegal search. I believe the Court's decision . . . emasculates the Warrant Clause and undermines the deterrence function of the exclusionary rule."); *see also* Pierre, *supra* note 3, at 433 ("To allow officers to engage in confirmatory searches without placing a great emphasis on a possible violation of constitutionally protected rights would obliterate one of the most fundamental rights of American citizens.").

[73] *Huskisson*, 926 F.3d at 374–75 (recognizing *Markling* and *Etchin* as relevant cases and acknowledging that circuit precedent did not address the situation where material information gathered through an unlawful search of a home is included in a warrant application).

[74] *The Supreme Court, 1987 Term — Leading Cases*, 102 HARV. L. REV. 143, 170 (1988) (quoting Texas v. Brown, 460 U.S. 730, 750 (1983) (Stevens, J., concurring)).

[75] *See id.* at 168 (describing the history of the exclusionary rule in California and articulating the reasoning behind the state supreme court's decision to overturn a state holding similar to *Murray*).

[76] *See, e.g.*, Steagald v. United States, 451 U.S. 204, 212 (1981) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." (quoting Payton v. New York, 445 U.S. 573, 590 (1980))).

[77] *See id.*

judges to find (and police officers to demonstrate) probable cause before knowing whether the search will produce valuable evidence.[78] An officer cannot constitutionally invade the sanctity of a home without first obtaining authorization from a magistrate judge based on an independent assessment of the evidence presented in an affidavit.[79] And the search warrant serves not only as an assurance that officers will not invade a person's privacy without a sufficiently high level of suspicion, but also as a check on the power of the executive branch.[80] Therefore, the fact that the Seventh Circuit now allows officers to admit evidence discovered through unconstitutional forays into the home is a significant development. The Seventh Circuit's unwillingness to deter confirmatory searches by mandating suppression of evidence when illegally obtained information was used in the affidavit to justify the search aggrandizes police power at the expense of the magistrate's judicial power.[81]

In *Huskisson*, the Fourth Amendment's commitment to the privacy of the home conflicted with the *Markling* court's expansive interpretation of the independent source doctrine, and the independent source doctrine prevailed. Commentators have worried since *Murray* that decisions expanding the scope of the independent source doctrine have "allow[ed] the pendulum of justice to swing too far to the right and diminish[ed] one's constitutional[ly] protected rights[,] which are the foundations upon which our society is built."[82] The fact that the independent source doctrine has now been expanded in the Seventh Circuit to the point that officers can violate the Fourth Amendment first and ask for authorization later, and the unlawfully obtained evidence can still be admitted at trial, weakens the deterrent effect of the exclusionary rule. This leaves potential criminal defendants vulnerable and further erodes the protections that the Constitution affords to the home through the Fourth Amendment.

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[78] *See* Stuntz, *supra* note 69, at 884 ("Warrants . . . forc[e] the necessary judicial decision to be made, and the police officer's account of the facts to be given, before the evidence is found.").

[79] Andrew Z. Lipson, Note, *The Good Faith Exception as Applied to Illegal Predicate Searches: A Free Pass to Institutional Ignorance*, 60 HASTINGS L.J. 1147, 1155 (2009).

[80] Edieth Y. Wu, *Domestic Spying and Why America Should Avoid the Slippery Slope*, 16 S. CAL. REV. L. & SOC. JUST. 3, 11 (2006); Michael Simitz, Note, Wilson v. Layne*: All the World's a Stage, but Your Home Is Not*, 30 SETON HALL L. REV. 922, 924 n.11 (2000).

[81] *See The Supreme Court, 1987 Term — Leading Cases*, *supra* note 74, at 167. In dissent, Justice Marshall argued that the *Murray* two-part test was not a sufficient barrier to unlawful police conduct because an officer could easily make the decision to seek a warrant seem "independent" by not including results of the illegal search in the warrant application and by simply stating that he had planned to seek a warrant. Murray v. United States, 487 U.S. 533, 547–48 (1988) (Marshall, J., dissenting); *The Supreme Court, 1987 Term — Leading Cases*, *supra* note 74, at 165–66. *Huskisson* has lowered this bar even further because an officer no longer needs to keep information that was initially obtained unlawfully away from the magistrate.

[82] Pierre, *supra* note 3, at 442; *see also* Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 391 (2013) ("Short of outright abolition of the rule, the pendulum has swung as far as it can in favor of admitting evidence found to be in violation of the Fourth Amendment.").