LETTING THE END JUSTIFY THE MEANS: THE CONTINUING DISSOLUTION OF THE FOURTH AMENDMENT'S REQUIREMENT FOR SEARCH WARRANTS

[*STATE OF KANSAS V. WEAS*, 992 P.2D 221 (KAN. APP. 2D 1999)]

Sherri Schuck[†]

I. INTRODUCTION

Where there is a rule, there have always been those who find ways to make exceptions to those rules, and the warrant requirement of the United States Constitution's Fourth Amendment is no different.[1] In *State of Kansas v. Weas*,[2] the Kansas Court of Appeals reversed the district court's order that suppressed all physical evidence discovered by law enforcement officers pursuant to a search warrant obtained after an initial warrantless entry. The court of appeals' ruling was premised on the exigent circumstances exception to the warrant requirement.[3] The court further decided that even if the entry made by law enforcement officers was not justified by exigent circumstances, the evidence would still be allowed under the independent source exception to the exclusionary rule.[4]

In determining exigent circumstances, the court of appeals applied a "nonexclusive list of factors"[5] to the facts of the case, and held that the

---

† B. A. 1994 from Kansas State University; J.D. Candidate December, 2001. I would like to thank Professor Kaye for his comments and suggestions. I would also like to dedicate this article to my husband, Bill, in recognition of his faith, love, and support.

1. *See* State of Kansas v. Platten, 594 P.2d 201, 204-05 (Kan. 1979).
2. 992 P.2d 221 (Kan. App. 2d 1999).
3. *See Weas*, 992 P.2d at 222; *see also* State of Arizona v. Fisher, 686 P.2d 750 (Ariz. 1984). The exigent circumstances exception is applicable when there is a reasonable belief that waiting to get a warrant "threatens the destruction of evidence," or "a crime is in progress or has just been committed" and delaying to get a warrant "endangers the safety or life of a person therein." *Fischer*, 686 P.2d at 763.
4. *See Weas*, 992 P.2d at 222. The state also posited a "good faith" argument, which the court of appeals rejected as inapplicable. *Id.*
5. *Id.* at 223.

initial entry by the officers was justified without a warrant.[6] However, there were two problems with the court's finding of exigent circumstances. First, the court interpreted the facts of the case too broadly. The second problem was the method the court used to determine whether exigent circumstances in fact existed. The list of factors used by the court in this case is not uniform among the courts.[7] This inconsistency creates the danger of unlimited application of the exception as courts compile their own laundry lists to determine exigent circumstances. In short, the exception then becomes the rule.

The court also held that even if the initial entry had been unlawful, the independent source doctrine allows the evidence to be admitted.[8] Essentially, the doctrine operates to insulate unlawful behavior from review, in that the conduct is forgiven since the evidence is still admissible. Therefore, the exception undermines a principle purpose of the exclusionary rule, which is to deter illegal conduct.[9] The only way to enforce the Fourth Amendment's warrant requirement is to maintain the integrity of the exclusionary rule. The integrity can be maintained by disallowing the use of the independent source doctrine in those situations where officers have: (1) probable cause to obtain a warrant; (2) the ability to obtain a warrant; but (3) choose not to obtain a warrant.

II. CASE DESCRIPTION

On October 25, 1998, law enforcement officers responded to a 911 call referencing a possible kidnap and battery.[10] Deputy Jason Boyer and Conservation Officer[11] John Purvis arrived at the victim's location[12]

---

6. *See id.* at 226.

7. *See*, *e.g*., United States of America v. Shively, 2000 WL 249300, at *3 (D. Kan. 2000) (stating "[e]xigent circumstances typically include: '(1) hot pursuit of a fleeing felon; (2) threatened destruction of evidence inside a residence before a warrant can be obtained; (3) a risk that the suspect may escape from the residence undetected; or (4) a threat, posed by a suspect, to the lives or safety of the public, the police officers, or to an occupant"); *see also* United States v. D'Armond, 80 F.Supp.2d 1157, 1167 (D. Kan. 1999) (listing general factors for exigent circumstances as "(1) pursuant to clear evidence of probable cause, (2) available only for serious crimes and in circumstances where the destruction of evidence is likely, (3) limited in scope to the minimum intrusion necessary to prevent the destruction of evidence, and (4) supported by clearly defined indications of exigency that are not subject to police manipulation or abuse"); *see also* United States v. Gray, 71 F.Supp.2d 1081 (D. Kan. 1999).

> Exigent circumstances will justify a warrantless search . . . when there is probable cause for the search and seizure and there is an imminent danger that someone will destroy evidence . . .; when the safety of law enforcement officers or the general public is threatened . . .; or when a suspect is likely to flee before the officer can obtain a warrant . . . There is, however, no absolute test . . .

Id. at 1084.

8. *See Weas*, 992 P.2d at 225.

9. *See* Wong Sun v. United States, 371 U.S. 471, 484-87 (1963).

10. *See* Brief of Appellee at 2, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

11. A Conservation Officer is a certified law enforcement officer who works for the state of Kansas' Department of Parks and Wildlife. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000).

12. *See* Brief of Appellee at 2, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-

within five minutes of the dispatch.[13] The officers met with a partially-clothed female who appeared to have been beaten.[14] The woman pointed to a residence about three houses away and said that she had run from there, leaving the front door unlocked.[15] The woman told the officers she had been abducted the night before by two men she had met in a bar in Lawrence, Kansas.[16] The victim stated that immediately after she left the bar, the men grabbed her in the parking lot.[17] She was beaten and forced into a vehicle.[18] The woman reported she had been beaten throughout the night, but did not know if she had been raped.[19] The woman said the men threatened to kill her; however, she did not report any weapons being used.[20] Finally, the woman reported that as she fled the house she saw a man sleeping in a bedroom.[21]

During the interview, Sergeant George Welch of the Jefferson County Sheriff's Office arrived at the victim's location.[22] Sgt. Welch conversed briefly with the two officers present.[23] After speaking with each other, Officer Purvis and Sgt. Welch walked to the residence while Deputy Boyer remained with the victim.[24] A vehicle matching the victim's description of the suspect car was parked in the driveway.[25] The officers believed the suspects were in the residence for two reasons. First, the woman had seen a man sleeping when she fled the house.[26] Second, it was unlikely anyone had left the residence after the victim

---

82843-A). The victim, Theresa Vanderblomen, was from Topeka, but had been abducted from outside a bar in Lawrence, Kansas. *See id.* Her abductors had brought her to a residence located in Lakeridge Estates on Lake Perry in Jefferson County, Kansas. *See id.* After Theresa had run out of the house of her abductors, she ran a few houses down to another residence to call the police. *See id.* at 3.

13. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000).

14. *See id.*; *see also* Brief of Appellant at 3, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

15. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000).

16. *See id.*; *see also* Brief of Appellee at 2, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

17. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000).

18. *See id.*

19. *See id.*; *see also* Brief of Appellant at 5, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

20. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000); *see also Weas*, 992 P.2d at 224.

21. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000); *see also* Brief of Appellant at 4, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

22. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000).

23. *See id.*

24. *See id.*

25. *See id.* Officer Purvis stated that the victim was very disoriented and they believed the vehicle parked in the driveway was the suspect vehicle. *See id.* However, it subsequently turned out not to be the suspect vehicle. *See id.*; *see also* Brief of Appellee at 3-4, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

26. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000).

fled because the officers had arrived within minutes of the 911 call.[27] While one officer approached the front of the residence, the other officer went to the rear of the house.[28] The officers knocked and announced their presence, but received no answer.[29] The officers reported that both doors were locked and they could not hear any movement inside the residence.[30]

The officers determined that an immediate entry into the home was necessary because of the seriousness of the crime, the possible destruction of evidence, and the need to apprehend the suspects.[31] An unlocked window was located and Officer Purvis crawled through, and opened the front door for Sgt. Welch.[32] The officers searched the residence for the suspect(s) and found no one home.[33] During the search for occupants of the home, the officers observed drugs and drug paraphernalia in various rooms of the residence.[34] Marijuana and "magic mushrooms"[35] were seen on a tray in the kitchen area.[36] After determining no one was in the residence, the officers left to obtain a search warrant.[37]

While waiting for the Jefferson County Attorney to return to complete the affidavit for the search warrant, the victim was re-interviewed.[38] During this second interview, the victim said that after the abduction, she had been taken to several unknown locations and made to undress and dance.[39] The woman also described the bedroom in the house where she had awakened.[40] Officer Purvis was able to

---

27. *See id.*

28. *See id.*; *see also* Brief of Appellant at 7, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

29. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000).

30. *See* Brief of Appellee at 4, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

31. *See Weas*, 992 P.2d at 223; *see also* Brief of Appellant at 5-6, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

32. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000); *see also* Brief of Appellant at 7, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

33. *See* Brief of Appellant at 7, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99 -82843-A).

34. *See id.* at 7-8; *see also* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000). Officer Purvis related that he immediately recognized the narcotics on a tray in the kitchen, but also stated that he found several jars throughout the residence that had a fung us growth and he was unsure what was growing. *See id.*

35. Brief of Appellee at 5, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99 -82843-A). The term "magic mushrooms" is often used as slang to describe hallucinogenic mushrooms.

36. *See id*.

37. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000). Officer Purvis stated that the Jefferson County Attorney was out of town when they sought the search warrant, so they waited several hours for his return home to obtain the search warrant. *See id.* When the county attorney did return, Officer Purvis stated that it was a "matter of driving time" from application of the search warrant to the issuance of the warrant. *Id.*

38. *See id.*

39. *See id.*

40. *See id.*

confirm her description of the room because of his entry into the residence.[41] During the search for occupants, Officer Purvis observed several jars throughout the residence.[42] The jars contained an unknown growth and were found in the bedroom[43] and in several closets.[44] Prior to the arrival of the search warrant, different law enforcement officers entered the residence to determine what was growing in the jars.[45] It was determined the jars contained hallucinogenic mushrooms.[46] The information provided in the application for the search warrant contained not only what the victim advised, but also what the various officers had observed while in the residence.[47]

Michael Weas, the current occupant,[48] was charged with various drug violations.[49] He filed a motion to suppress the evidence seized from the home.[50] The district court reasoned that the initial search of the residence was unlawful because there were no exigent circumstances that justified a warrantless entry by the officers.[51] Since the entry was unlawful, the district court applied the exclusionary rule's fruit of the poisonous tree doctrine,[52] and granted Weas' motion to suppress.[53] The state brought an interlocutory appeal[54] from the district court's order

---

41. *See id.*

42. *See id.*

43. *See* Brief of Appellee at 5, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

44. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000). The narcotics observed in plain view were included in the search warrant affidavit; however, Officer Purvis did not know if the jars located in the closets had been. *See id.*

45. *See id.* The fact that several officers had entered the residence to try to determine what was growing in the jars was not included in the affidavit. *See id.* The officers' conduct was not known by either the district court or the appellate court as far as Officer Purvis knew. *See id.*

46. *See id.* Officer Purvis related that the growth was described to a narcotics agent who then looked up the description on the Internet and determined the fungus was hallucinogenic mushrooms. *See id.* Officer Purvis advised that he had recognized the dried mushrooms on the tray with the marijuana, but had never seen growing mushrooms. *See id.* The information obtained from the Internet regarding the mushrooms was attached to the affidavit for the search warrant. *See id.*

47. *See* State of Kansas v. Weas, 992 P.2d 221, 225 (Kan. App. 2d 1999).

48. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000). It was discovered that the residence belonged to a local doctor and that Michael Weas was the house-sitter. *See id.* No charges were brought against the owner of the residence. *See id.*

49. *See* Amended Complaint, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (Case No. 98CR253). Michael Weas was charged only with the narcotics violations in Jefferson County. *See id.* The original complaint against Michael Weas contained narcotics charges, as well as possession of a firearm charge. *See* Complaint, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (Case No. 98CR253); *see also* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000). Officer Purvis believed that Michael Weas had been charged with aggravated kidnapping in Douglas County, as the victim had been abducted from a bar located in that county. *See id.*

50. *See Weas*, 992 P.2d at 223.

51. *See id.*

52. The "fruit of the poisonous tree" doctrine is applied to evidence obtained "as a result . . . of a fourth amendment primary illegality committed by police." Jeffrey M. Bain & Michael K. Kelly, *Fruit of the Poisonous Tree: Recent Developments as Viewed Through its Exceptions*, 31 U. MIAMI L. REV. 615, 617 (1976).

53. *See Weas*, 992 P.2d at 223.

54. *See* KAN.STAT.ANN. § 22-3603 (1977):

> When a judge of the district court, prior to the commencement of trial of a criminal action, makes an order quashing a warrant or a search warrant, suppressing evidence . . . an appeal may be taken

suppressing the evidence, contending the district court erred and arguing: (1) exigent circumstances justified the warrantless entry; "(2) the independent source rule is applicable; or (3) the officers acted in good faith."[55]

The court of appeals found the controlling facts to be undisputed.[56] However, they did not agree with the district court's finding that no exigent circumstances existed for the immediate entry of officers without a search warrant.[57] The appellate court used a list of factors in determining that exigent circumstances did exist to allow the warrantless entry of officers.[58] The court also held the exclusionary rule was erroneously applied because the warrant affidavit contained information sufficient to allow a neutral magistrate to issue a search warrant for the sexual assault.[59] Even without the additional observations by officers after they entered the house, there existed probable cause to support an affidavit for the sexual assault.[60] The drug evidence would then have been subject to the plain view doctrine.[61]

The appellate court considered the state's argument on the good faith exception and found it to be inapplicable.[62] "The good faith exception" saves warrants later "found to be unsupported by probable cause," but reasonably believed at the time to be valid by the executing officers.[63] In this case, probable cause was not an issue. The appellate court reversed the lower court's order suppressing the evidence based on the finding of exigent circumstances to justify the initial warrantless entry.[64] In the alternative, the court found the independent source doctrine precluded the application of the exclusionary rule even if the initial entry was unlawful.[65] The case was remanded back to the district court. The Kansas Supreme Court denied a review of the appellate

> by the prosecution from such order . . . [f]urther proceedings in the trial court shall be stayed pending determination of the appeal.

Id.

55. *Weas*, 992 P.2d at 223.
56. *See id.*
57. *See id.* at 224.
58. *See id.* at 223-24 (citing *United States v. Reed*, 572 F.2d 412, 424 (2d Cir.) (1978)).

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause; (4) strong reasons to believe that the suspect is in the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended and (6) the peaceful circumstances of the entry. It is also recognized that the possible loss or destruction of evidence is a factor to be considered.

Id.

59. *See id.* at 225.
60. *See id.*
61. *See id.* at 226; *see e.g.*, Horton v. California, 496 U.S. 128, 136-38 (1990) (discussing when the plain view doctrine has "legal significance").
62. *See Weas*, 992 P.2d at 226.
63. *Id.*
64. *See id.*
65. *See id.*

decision.[66]

III. BACKGROUND

The background of the warrant requirement of the Fourth Amendment and its enforcement through the exclusionary rule will be discussed in separate sections. Part I will set forth the history and application of the Fourth Amendment's warrant requirement, and discuss the exigent circumstances exception and its current application by the courts. Part II will set forth the rationale of the exclusionary rule and the independent source exception to that rule.

Part I – The Fourth Amendment's Warrant Requirement and the Exigent Circumstances Exception

When the United States Constitution was drafted, it did not contain the Bill of Rights.[67] The Bill of Rights, which is composed of the first ten amendments, was not ratified until 1791.[68] In its initial draft, the Fourth Amendment contained only one clause, which imposed restrictions on the issuance of warrants.[69] This was in response to the general warrants, known as "writs of assistance," that the colonists had been subjected to by England.[70] These writs had given officials carte blanche authority to "break and enter houses, shops, and any 'other [p]lace'," to unearth contraband.[71] Further, an English statute enacted in 1702 allowed the writs to be enforceable "throughout the life of the sovereign and for six months thereafter."[72] It was obvious that "warrants and writs were in the forefront of the colonial mind" at the time of the Fourth Amendment's framing.[73]

When the Fourth Amendment was adopted, it contained two clauses.[74] The first protected the right to be free from unreasonable searches and seizures, while the second clause required that warrants be particular[75] and supported by probable cause.[76] The two clauses working

66. *See id.* at 221.

67. *See* DANIEL A. FARBER & WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY § 1.1 (2d ed. 1998).

68. *See id.*

69. *See* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 42-3 (1967).

70. *See id.* at 35. In 1660, the English Parliament authorized the use of particular warrants that required an oath that "specific goods would be found in such-and-such a place." *Id.* In 1662, the Parliament authorized the general warrants that allowed the bearer "to enter any house or other place" to look for unlawful goods. *Id.* In 1696, Parliament extended "the same powers and authorities" of English officials to customs officials in the American colonies. *Id.*

71. *Id.* at 26.

72. *Id.* at 35.

73. *Id.* at 38.

74. *See id.* at 43.

75. The colonists had been subjected to writs of assistance by England. *See Boyd v. United States*, 116 U.S. 616, 625 (1886). These general warrants allowed government officials to search anywhere for contraband. *See id.* Modern warrants must specify not only what is to be seized, but also where a search is to take place. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.5

in tandem signaled that the amendment was not only designed to eliminate the abuse of the general warrants, but also to "apply to all invasions on the part of the government . . . of the sanctity of a man's home and the privacies of life."[77]

At the inception of the Bill of Rights, the only "government" subject to the provisions of the Fourth Amendment was the federal government.[78] However, prior to 1886, the Fourth Amendment was "largely unexplored territory."[79] This changed with the United States Supreme Court's holding in *Boyd v. United States*.[80] In *Boyd*, two New York merchants were charged with illegally importing goods.[81] To prove this, the district attorney offered evidence of invoices obtained from the merchants.[82] The merchants were compelled to produce the invoices pursuant to a court order.[83] The merchants were convicted and the conviction was affirmed by the circuit court.[84] The Boyds appealed to the Supreme Court on Fourth Amendment grounds that the "forced production of papers was a search within the meaning of the Fourth Amendment, . . . the protections of the Fourth Amendment extended to forfeiture proceedings, . . . [and] illegally obtained evidence must be excluded."[85] In a controversial opinion, the Supreme Court concurred with the Boyds.[86]

After *Boyd*, the Fourth Amendment was no longer a "dead letter in the federal courts."[87] However, since the Bill of Rights "was designed as a limitation on the federal government . . . the [Fourth] Amendment had no application to state process."[88] The protection of the Fourth Amendment did not apply to the states until the adoption of the Fourteenth Amendment.[89] The Fourteenth Amendment sparked an on-

---

& § 4.6 (3d ed. 1996).

76. *See* Payton v. New York, 445 U.S. 573, 584-87 (1980).

77. *Id.* at 585 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

78. See WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(D) (3d ed. 1996).

79. *Id.* at § 1.1(B).

80. *See id.* (citing an analysis of *Boyd* as the "leading case on the subject of search and seizure"); *see also* Boyd v. United States, 116 U.S. 616 (1886) (holding that compelled production of personal papers was a search under the Fourth Amendment and the notice to produce the papers was unconstitutional, as was the law that allowed the notice).

81. *See Boyd*, 116 U.S. at 616.

82. *See id.* at 618.

83. *See id.*

84. *See id.*

85. LAFAVE, *supra* note 78, at § 1.1(b).

86. *See Id.*

87. *Id.* at § 1.1(b) (quoting Abel v. United States, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting)).

88. *Id.* at § 1.1(d) (quoting Smith v. Maryland, 59 U.S. 71, 76 (1855)).

89. *See* U.S.CONST. amend. XIV § 1:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

going debate over what extent the Bill of Rights applied to the states.[90] The Supreme Court began to answer this by using the "fundamental rights interpretation of the due process clause."[91] In *Wolf v. Colorado*,[92] the Court concluded "[t]he security of one's privacy against arbitrary intrusion by the police . . . the core of the Fourth Amendment . . . is . . . implicit in 'the concept of ordered liberty' . . . [and] enforceable against the states through the Due Process Clause."[93] Following *Wolf*, the states were subject to the purview of the Fourth Amendment through the Fourteenth Amendment.[94]

Each state has adopted its own constitution that resembles, if not mirrors, the United States Constitution and embodies some form of the Fourth Amendment's warrant requirement.[95] The warrant requirement of the Fourth Amendment "has drawn a firm line at the entrance to the house,"[96] and warrantless searches and seizures inside a home are presumed unreasonable.[97] Although the threshold of the home presumptively may not be crossed absent a warrant, there are exceptions to this rule.[98] Currently, the federal courts, as well as the state courts, recognize many of the common exceptions to the warrant requirement, including: consent,[99] search incident to an arrest,[100] the plain view doctrine,[101] and exigent circumstances.[102]

The courts have created clear boundaries to guide law enforcement

---

Id.

90. *See* LAFAVE, *supra* note, at 88.

91. *Id.*

92. 338 U.S. 25 (1949). Here, the defendant was convicted in state court for conspiring to commit abortions. *See* Wolf v. Colorado, 338 U.S. 25, 25 (1949). The evidence had been obtained unlawfully. *See id.* The issue in the case was whether the state court should be bound by the exclusionary rule like the federal court so as not to deprive the defendant of due process of law. *See id.* at 25-6. The court held the states were bound by the Fourth Amendment, but were not bound by the exclusionary rule as they had other remedies. *See id.* at 29.

93. Wolf v. Colorado, 338 U.S. 25, 27-8 (1949).

94. *See id.* at 28.

95. *See* KAN. CONST. § 15:

> The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized.

Id.

96. Payton v. New York, 445 U.S. 573, 590 (1980).

97. *See id.* at 589.

98. *See* Jacqueline J. Warner, *The Exigent Circumstance Exception to the Warrant Requirement of the Fourth Amendment: What Criteria Must be Met?*, 33 HOW. L.J. 425, 435 (1991) (listing some generally recognized exceptions to the warrant requirement).

99. *See* United States v. Gray, 71 F.Supp.2d 1081, 1083 (1999) (discussing that consent may be expressed or implied).

100. *See* State v. Anderson, 910 P.2d 180, 182 (Kan. 1996) (following a lawful arrest, an officer may "reasonably search the person arrested and the area within such person's immediate presence.")

101. *See* Horton v. California, 496 U.S. 128, 138-40 (1990) (stating the plain view doctrine is applicable when officers are in a lawful position to see evidence and the incriminating nature of the evidence is apparent).

102. *See* State v. Jones, 947 P.2d 1030, 1037 (Kan. App. 2d 1997) (stating exigent circumstances can be triggered when police have a reasonable belief evidence is being destroyed or a crime is in progress and delaying for a warrant threatens the preservation of evidence or the safety of another).

officials with all the exceptions,[103] except the exigent circumstances exception. In Kansas, the courts vary on how they determine exigent circumstances, often using a "nonexclusive list of factors" to determine whether these conditions exist.[104] This list differs slightly from court to court.[105] Nationally, courts tend to follow varying examples of the lists used by Kansas courts,[106] or determine exigent circumstances on a "case-by-case basis."[107] Without clearer guidelines established to determine the parameters of exigent circumstances, this exception can easily become the rule, limited only by the imaginations of the courts in its application.

Part II – The Exclusionary Rule and the Independent Source Exception

On its face, the warrant requirement of the Fourth Amendment guarantees citizens the right to be secure in their homes from unreasonable searches and seizures;[108] however, without a way of enforcing the principles of the law, it has little effect.[109] Thus, the Supreme Court held in *Weeks v. United States*[110] that evidence obtained by government officials during an unlawful search could not be used against the victim in court.[111] The Court stated that to allow evidence obtained through unlawful conduct to be admissible would be "to affirm by judicial decision . . . an open defiance, of the prohibitions of the Constitution."[112] The Court's holding, however, was limited to the "[f]ederal government and its agencies."[113]

The Court in *Weeks* did not extend the exclusionary rule to the states because the Fourth Amendment itself did not apply to the states.[114] In 1948, however, the Supreme Court in *Wolf v. Colorado*[115]

---

103. *See generally* Chimel v. California, 395 U.S. 752 (1969) (holding that a warrantless search incident to a lawful arrest extended to the arrestee's person and the "area from within which he might have obtained either a weapon or something that could have been used as evidence against him." To go beyond this area held no "constitutional justification.") *See also* Horton v. California, 496 U.S. 128 (1990) (holding the plain view doctrine applied where officers were (1) in a lawful position to view the evidence and (2) the incriminating nature of the evidence is immediately apparent).

104. State of Kansas v. Weas, 992 P.2d 221, 223 (Kan. App. 2d 1999).

105. *See* United States v. Gray, 71 F.Supp.2d 1081, 1084 (1999). Following is a list of exigent circumstances that may justify a warrantless entry: probable cause, imminent danger of evidence destruction, the threatened safety of officers or the public, or the likelihood the suspect will flee. *See id.* Although the list is similar to that used by the court in *Weas*, it does not include the "gravity or violent nature" factor, or the "peaceful circumstances of the entry" factor. *Weas*, 992 P.2d at 223.

106. *See* United States v. Anderson, 154 F.3d 1225, 1233 (10th Cir. 1998).

107. *Gray*, 71 F. Supp.2d at 1084.

108. *See* Payton v. New York, 445 U.S. 573, 585 (1980).

109. *See* Robert A. Messina, *Anticipatory Search Warrants: Striking A Balance Between Privacy Rights and Police Action*, 22 S. ILL. U. L.J. 391, 391 (1998) (analyzing anticipatory and general search warrants).

110. 232 U.S. 383 (1914).

111. *See* Weeks v. United States, 232 U.S. 383 (1914).

112. *Id.* at 394.

113. *Id.* at 398.

114. *See id.*

115. 338 U.S. 25 (1949) (holding that allowing state courts to admit evidence obtained in violation of the Fourth Amendment did not violate the due process clause of the Fourteenth Amendment).

stated the states were subject to the Fourth Amendment via the due process clause of the Fourteenth Amendment.[116] At the same time, the Court declined to extend the exclusionary rule to the states.[117] The Court set forth two reasons for not subjecting the states to the exclusionary rule. First, the exclusionary rule was a "matter of judicial implication," and was not "derived from the explicit requirements of the Fourth Amendment."[118] Second, the states had other remedies available to citizens who were victims of unlawful government conduct.[119] The dissenting opinions of Justices Douglas,[120] Murphy[121] and Rutledge,[122] however, expressed the prophetic view that without the sanction of exclusion, the Fourth Amendment "might as well be stricken from the Constitution."[123]

Although the Justice's dissenting view in *Wolf* would not come into fruition for another thirteen years, the Court seemed inclined to move in that direction.[124] The Court's willingness to subject the states to the exclusionary rule became apparent in *Mapp v. Ohio.*[125] When the Court decided *Mapp* in 1961, the exclusionary rule was not the issue before the Court.[126] In fact, during oral arguments, counsel for Dollree Mapp "expressly disavowed" any desire to have *Wolf* overruled.[127] Nevertheless, the Court in *Mapp* did overrule *Wolf*, holding that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court."[128] The Court reasoned that "[s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States . . . it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."[129] Unlike the Court in *Wolf*, the *Mapp* Court characterized the exclusionary rule as "part and parcel of the Fourth

---

116. *See* Wolf v. Colorado, 338 U.S. 25, 27-8 (1949).
117. *See id.* at 28.
118. *Id.*
119. *See id.* at 29-32.
120. *See id.* at 40-1 (stating that unlawfully obtained evidence should be excluded or the Fourth Amendment had no effective deterrent).
121. *See id.* at 41-7 (disagreeing with both reasons the majority posited in declining to extend the exclusionary rule to the states).
122. *See id.* at 47-8 (stating that the Fourteenth Amendment encompassed the Bill of Rights and the states were subject to the Fourth Amendment, but needed the exclusionary rule to make the amendment effective).
123. *Id.* at 47 (Rutledge, J., dissenting) (quoting Weeks v. United States, 232 U.S. 383, 393 (1914)).
124. *See* LAFAVE, *supra* note 78, § 1.1(d). The Court did exclude evidence that was obtained by "conduct that shocks the conscience." Rochin v. California, 342 U.S. 165 (1952). Also, the "silver platter" doctrine found its demise. *See generally* Elkins v. United States, 364 U.S. 206 (1960).
125. 367 U.S. 643 (1961). Defendant was convicted under Ohio's obscenity statute for having pornographic material in her possession, which was discovered by police after a forceful entry and unlawful search. *See* Mapp v. Ohio, *367 U.S. 643, 643 (1961).*
126. *See* LAFAVE, *supra* note 78, at § 1.1(e).
127. *Id.*
128. *Mapp*, 367 U.S. at 655.
129. *Id.*

Amendment's limitation upon federal encroachment of individual privacy."[130] The constitutional characterization of the rule compelled its application to the States.[131]

At both the state and federal level, the exclusionary rule has received a "great deal of criticism."[132] Most of the criticism has centered around the "high social costs of letting persons obviously guilty go unpunished."[133] Proponents of the exclusionary rule concede that sometimes "the most immediate and direct consequence of exclusion may be to benefit an individual defendant."[134] However, society benefits overall because the objective of the exclusionary rule is to "prevent, not to repair."[135] As the dissent stated in *Segura v. United States*:

> [E]very time a court holds that unconstitutionally obtained evidence may not be used in a criminal trial it is acutely aware of the social costs that such a holding entails. Only the most compelling reason could justify the repeated imposition of such costs on society. That reason, of course, is to prevent violations of the Constitution from occurring.[136]

Although deterrence remains the primary purpose of the exclusionary rule,[137] the Court recognized that "strict adherence to the Fourth Amendment exclusionary rule impose[d] greater cost on the legitimate demands of law enforcement than [could] be justified by the rule's deterrent purposes."[138] Consequently, the Supreme Court created exceptions to the exclusionary rule.[139]

One of the first exceptions to develop was the independent source doctrine.[140] In *Silverthorne Lumber Company, Inc. v. United States*,[141] the Court held that "knowledge gained by the Government's own wrong cannot be used . . ." as the basis by which evidence is lawfully seized.[142]

---

130. *Id.* at 651. The Court also dispelled Wolf's second basis, stating "such other remedies have been worthless and futile." *Id.* at 652. *But see generally* United States v. Calandra, 414 U.S. 338 (1974). The Court in *Calandra* did not see the exclusionary rule as being constitutionally mandated, but rather as a judicial remedy. *See id.* at 348.

131. *See Mapp*, 367 U.S. at 651-52.

132. Troy E. Golden, *The Inevitable Discovery Doctrine Today: the Demands of the Fourth Amendment, Nix, and Murray, and the Disagreement Among the Federal Circuits*, 13 BYU J. PUB. L. 97, 97 (1998) (exploring the exclusionary rule's inevitable discovery exception).

133. *Id.* (quoting Nix v. Williams, 467 U.S. 431, 443 (1984)).

134. LAFAVE, *supra* note 78, at § 1.2(a).

135. Elkins v. United States, 364 U.S. 206, 217 (1960).

136. 468 U.S. 796, 827-28 (1984) (Stevens, J., dissenting).

137. *See* LAFAVE, *supra* note 78, at § 1.1(f). The exclusionary rule also serves to maintain "judicial integrity" so courts are not "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Id.* at 19 (quoting Elkins v. United States, 364 U.S. 206, 223 (1960)). The exclusionary rule ensures that the government does not "profit from its lawless behavior" thus "undermining popular trust in government." *Id.* (quoting United States v. Calandra, 414 U.S. 338, 357 (1973) (Brennen, J., dissenting)).

138. Brown v. Illinois, 422 U.S. 590, 609 (1975).

139. *See* Golden, *supra* note 132, at 97-8.

140. *See id.* at 98.

141. 251 U.S. 385 (1920).

142. Silverthorne Lumber Co. Inc. v. United States, 251 U.S. 385, 392 (1920).

However, if "knowledge of [the facts] is gained from an independent source, they may be proved like any others."[143] After *Silverthorne*, the question the Court needed to answer to determine if illegally obtained evidence had an independent source was whether the evidence was obtained "by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[144] In *Segura v. United States*,[145] the independent source doctrine covered evidence that was first discovered through a lawful warrant, so long as the information used to get the warrant was unconnected to the prior unlawful activity.[146] The doctrine was greatly extended four years later in *Murray v. United States*.[147] The Supreme Court in *Murray* expanded the independent source doctrine to not only include evidence that was first discovered during a lawful search, but also to include evidence "initially discovered during, or as a consequence of, an unlawful search."[148] It was still necessary, however, to show the warrant was obtained with information independent of the illegal conduct.[149]

After *Murray*, the independent source doctrine allowed the admission of any evidence that had been ascertained by methods outside the constitutional violation.[150] The Court's reasoning for this exception was the state should not be put in "a worse [sic] position [than] they would have been in if no police error or misconduct had occurred."[151] However, the primary purpose of the exclusionary rule is to deter government officials from violating citizens' rights "against unreasonable searches and seizures."[152] Therefore, the rationale behind the independent source doctrine is in direct contrast to the main principle of the exclusionary rule.[153] The state is not only allowed to use the tainted evidence, but the officers' conduct also goes unreviewed. The immunity that the exception provides to unlawful government conduct undermines the justification for the exclusionary rule.

143. *Id.*

144. Wong Son v. United States, 371 U.S. 471, 488 (1963).

145. 468 U.S. 796 (1983) (finding police officers unlawfully entered apartment of defendant and remained there overnight while a search warrant was being obtained).

146. *See* Segura v. United States, 468 U.S. 796, 799 (1983).

147. 487 U.S. 533 (1987). Federal agents entered a warehouse unlawfully and o bserved several bales of marijuana which were later seized during the execution of a valid warrant obtained from information officers had prior to the illegal entry. *See* Murray v. United States, 487 U.S. 533, 535-36 (1987).

148. Murray v. United States, 487 U.S. 533, 537 (1987).

149. *See id.* at 538-39.

150. *See* Nix v. Williams, 467 U.S. 431, 442-44 (1984).

151. *Id.* at 443.

152. LAFAVE, *supra* note 78, at § 1.1(f).

153. *See* Golden, *supra* note 132.

IV. ANALYSIS

A. Issue

The issue before the Kansas Court of Appeals in *State of Kansas v. Weas* was whether the district court had erred in suppressing evidence obtained during a warrantless search of the defendant's home.[154]

B. Arguments

The state filed an interlocutory appeal from the district court's order to suppress drug evidence obtained from Weas' residence during a warrantless entry.[155] The state posited three arguments as to why the evidence should not be suppressed.[156] The first argument contended that officers did not need a search warrant to enter Weas' home because exigent circumstances existed, making an immediate entry necessary to "apprehend violent suspects and to prevent the destruction of evidence."[157] To support this position, the state relied primarily on *State of Kansas v. Huff*.[158] In *Huff*, officers responded to a convenience store after a robbery.[159] After obtaining the descriptions of the four suspects, officers canvassed the immediate area.[160] Approximately forty-five minutes later, a citizen informed officers that four men matching the suspects' descriptions had run into an apartment building.[161] Officers heard voices in an apartment and knocked on the door.[162] When the occupants of the apartment opened the door, the officer could see a ski mask lying on the floor.[163] Officers made an immediate entry into the residence and apprehended two suspects.[164] The residence was then searched for the remaining suspects, and evidence in plain view was seized.[165]

---

154. *See* State of Kansas v. Weas, 992 P.2d 221, 223 (Kan. App. 2d 1999).

155. *See id.*

156. *See id.* The state posited a good faith argument as well as exigent circumstances and independent source. *See id.* The court determined that the good faith argument was not applicable as it pertained to warrants that are executed by officers in good faith of being valid, when in fact they are not. *See id.* at 226.

157. Brief of Appellant at 2, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

158. 551 P.2d 880 (1976). The court upheld the robbery conviction of defendant where officers had entered into an apartment without a warrant after observing a mask similar to the suspect's laying on the floor in plain view. *See State of Kansas v. Huff*, 551 P.2d 880, 885 (1976). The court held the officer had probable cause to believe that the suspects inside were armed, and exigent circumstances allowed the warrantless entry. *See id.* The subsequent search for the remaining suspects was also upheld under a protective sweep analysis. *See id.* at 885-86.

159. *See id.* at 883.

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.* at 883-84.

165. *See id.* at 884.

The state distinguished *Huff* from *State of Kansas v. Schur*,[166] which Weas cited as support for invoking the exclusionary rule in reference to evidence seized in plain view by officers.[167] In *Schur*, the court disallowed a marijuana cigarette seized by an officer who had seen it through a glass door.[168] The court determined that "[p]lain view alone is never enough to justify the warrantless seizure of evidence . . . absent 'exigent circumstances.'"[169] The court in *Huff*, found the facts known to the officer "at the time he observed the ski mask, were ample to constitute exigent circumstances."[170] The state contended that *Huff* and *Weas* were parallel, in that, the officers in *Weas* were investigating a violent offense.[171] However, there were minor exceptions, specifically that the officers in *Huff* encountered the suspects forty-five minutes after the robbery;[172] as opposed to the suspects in *Weas*, who had been reported at the scene within minutes of officers' arrival.[173] The state believed that the "nexus between the crime and the entry" in the *Weas* case was "stronger and fresher" and "as violent or more" than in *Huff*.[174]

The second argument presented by the state involved omitting the drug evidence from the ambit of the exclusionary rule.[175] This argument was three-fold. First, the officers had obtained a valid search warrant after "seizing the residence to preserve the sexual assault evidence[176] and to apprehend the suspects."[177] Second, even if the initial entry was unlawful, the "sexual assault evidence should not be suppressed" because officers had "probable cause to obtain a search warrant for [that] evidence . . . prior to the unlawful entry."[178] "Finally, because the sexual assault evidence should not be suppressed," then the drug evidence should not be suppressed under the inevitable discovery doctrine.[179]

To support their position, the state distinguished its case from *State of Kansas v. Reno*.[180] The state believed their case was more like

166. 538 P.2d 689 (1975) (holding the plain view doctrine alone did not allow an officer to make a warrantless entry into an apartment absent any exigent circumstances).

167. *See* Brief of Appellee at 20, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. Ap p. 1999) (No. 99-82843-A).

168. *See* State of Kansas v. Schur, 538 P.2d 689, 691-92 (1975).

169. *Id.* at 693.

170. *Huff*, 551 P.2d at 885.

171. *See* Brief of Appellant at 13, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99 - 82843-A).

172. *See id.* at 14.

173. *See id*.

174. *Id.* at 15.

175. *See id.* at 16.

176. *See id*. Although the appellant's brief indicates that "evidence of *the* sexual assault should not be suppressed" because that evidence had an independent source prior to the unlawful entry, it is not clear that there was any evidence seized in regard to a sexual assault. *Id.* (emphasis added).

177. *Id*.

178. *Id*.

179. *Id.* at 16-7.

180. 918 P.2d 1235 (1996) (holding that the plain view doctrine and independent source doctrine were

Murray v. United States[181], which the *Reno* court had cited.[182] The court in *Reno* found the entry by officers to be unlawful, therefore rendering the plain view doctrine inapplicable.[183] However, in *Murray* the "Supreme Court vacated the suppression of evidence" and remanded the case back to the trial court to determine if the officers "would have sought a warrant" based on the information they had prior to the unlawful entry.[184] The Court advised there would be no independent source "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry."[185]

The state argued the facts in *Weas* were "parallel to *Murray*," and "easily distinguished from *Reno*."[186] The officers in *Weas* had probable cause to believe that a sexual assault had occurred in the Weas residence and their entry into the home was to secure the scene and apprehend the suspects.[187] When they applied for the warrant, the application included information on the sexual assault, as well as the controlled substances observed by the officers.[188] The state argued the search warrant was issued for evidence pertaining to the sexual assault and the narcotics.[189] The dual offenses noted on the warrant indicated that an independent basis supported the probable cause to believe that evidence for both crimes would be located in the residence.[190] Therefore, with a lawful entry via the search warrant, the plain view doctrine would apply, making the exclusionary rule moot.[191]

Conversely, the defendant presented three issues in arguing that the lower court's ruling should be upheld: "(1) no exigent circumstances existed to eliminate the need for a search warrant . . . (2) the plain view doctrine [did] not apply, and (3) the exclusionary rule should [be applied]."[192] To support the first argument, the defendant distinguished the exigent circumstances doctrine from the emergency doctrine[193] and

---

not applicable where officers made an illegal entry and the application for a warrant was sought due to what was observed upon that entry).

181. 487 U.S. 533 (1988).

182. *See* Brief of Appellant at 19, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99 - 82843-A).

183. *See id* at 18.

184. *Id*. at 19.

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

186. Brief of Appellant at 19, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

187. *See id*.

188. *See id*.

189. *See id.*

190. *See id.* at 19-20.

191. *See id.* at 20.

192. Brief of Appellee at 2, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99 -82843-A).

193. *See id.* at 8. *See also* State v. Jones, 947 P.2d 1030, 1037 (1997):

> The exigent circumstances exception is triggered when the police, with probable cause but no warrant, enter a dwelling in the reasonable belief that the delay necessary to obtain a

concluded the emergency doctrine could not be applied as the victim was no longer in danger.[194]

The defendant then relied on various cases to examine the exigent circumstances doctrine. *Monroe v. Darr*[195] stated "[p]robable cause alone was not sufficient to justify a warrantless . . . entry into a private residence . . . [i]n addition to probable cause it is necessary . . . to show exigent circumstances . . ."[196] The facts of the case were then applied to the list of factors from *State of Kansas v. Platten*.[197] The defendant argued that using the *Platten* factors, the facts did not support exigent circumstances.[198] First, it could not be confirmed that a sexual assault had occurred in the residence.[199] Second, the victim did not advise that the suspect(s) were armed.[200] Third, the perimeter of the house was secured by the officers.[201] Last, the officers entered the home through an open window with their weapons displayed.[202] The seriousness of the crime or the possible destruction of evidence do not in and of themselves create an exigency.[203] Moreover, in procuring the search warrant, the officers used the narcotic information gained from the entry, coupled with information provided by the victim.[204] The defendant argued there was no independent source for the narcotics evidence because the unlawful entry produced the information.[205] Since

---

> warrant threatens the destruction of evidence, or when they have a reasonable belief that a crime is in progress or has just been committed in a dwelling and the delay attendant to obtaining a warrant endangers the safety or life of a person therein. Conversely, the emergency aid doctrine is triggered when the police enter a dwelling in the reasonable, good-faith belief that there is someone within in need of immediate aid or assistance. In cases in which this doctrine applies there is no probable cause which would justify issuance of a search warrant . . . , and the police are not entering to arrest, search, or gather evidence.

Id.

194. *See* Brief of Appellee at 8, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

195. 559 P.2d 322 (1977).

196. Brief of Appellee at 9, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99 -82843-A) (quoting Monroe v. Darr, 559 P.2d 322, 328 (1977)).

197. 594 P.2d 201 (1979); *see also* Brief of Appellee at 9, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A) (citing United States v. Reed, 572 F.2d 412, 424 (2d Cir. 1978):

> 1. the gravity or violent nature of the offense with which the suspect is to be charged;
> 2. whether the suspect is reasonably believed to be armed;
> 3. a clear showing of probable cause;
> 4. strong reasons to believe that the suspect is in the premises;
> 5. a likelihood that the suspect will escape if not swiftly apprehended and
> 6. the peaceful circumstances of the entry.
>
> It is also recognized that the possible loss or destruction of evidence is a factor to be considered.

Id.

198. *See* Brief of Appellee at 9, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

199. *See id.*

200. *See id.*

201. *See id.* at 10

202. *See id*.

203. *See id.* at 12.

204. *See id.* at 10.

205. *See id.* at 14.

there was no independent source for the evidence, it should be suppressed as "fruit of the poisonous tree."[206]

The defendant also argued that since the initial entry was unlawful, the plain view doctrine is not applicable.[207] The rationale in support of the second issue presented by the defendant is that in order to trigger the plain view doctrine, the officer must have some "prior justification under the Fourth Amendment."[208] This satisfies the first prong of a two-part test used by the court in *Horton v. California*.[209] The facts of *Weas* show that the responding officers did not have a lawful reason to enter the house without a warrant, and therefore they were not justified under the Fourth Amendment.[210] Finally, where there is evidence gained from an illegal search, that evidence becomes "fruit of a poisonous tree" and triggers the exclusionary rule.[211]

C. Findings of the Court of Appeals

Part I – Exigent Circumstances

To determine whether the exigent circumstances exception applied to this case, the court considered a "nonexclusive list of factors":[212]

> (1) the gravity or violent nature of the offense . . . ; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause; (4) strong reasons to believe the suspect is in the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended and (6) the peaceful circumstances of the entry . . . also . . . the possible loss or destruction of evidence.[213]

In applying the facts of the case to the list, the court held that there were exigent circumstances. First, since kidnapping was a severe person felony that carried with it a presumptive sentence of imprisonment, it is construed as a violent crime.[214] Second, although the victim had not reported the use of weapons, she did relate that the suspects threatened to kill her.[215] Third, there was probable cause to believe the woman had been sexually assaulted due to her appearance and statements.[216]

---

206. *See* State of Kansas v. Platten, 594 P.2d 201, 206 (1979).
207. *See* Brief of Appellee at 14-15, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).
208. *Id.* at 15 (citing Texas v. Brown, 460 U.S. 730, 738 (1983)).
209. 496 U.S. 128 (1990). The second prong of the test requires that the "incrim inating character" of the evidence be "immediately apparent." Horton v. California, 496 U.S. 128, 136 (1990).
210. *See* Brief of Appellee at 9-10, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).
211. *Id*. at 22 (citing State of Kansas v. McBarron, 585 P.2d 1041, 1045 (1978)).
212. State of Kansas v. Weas, 992 P.2d 221, 223 (Kan. App. 2d 1999).
213. *Id.* at 223-24 (quoting United States v. Reed, 572 F.2d 412, 424 (2d Cir. 1978)).
214. *See id.* at 224.
215. *See id.*
216. *See id.*

Fourth, the victim had seen someone in the house as she escaped.[217] Fifth, it was beneficial to the officers and the general public to apprehend the suspects quickly.[218] Sixth, the officers entered quietly through an open window in the middle of the day.[219] Last, it was not unreasonable to believe the suspects would destroy evidence after discovering the victim was gone.[220] Upon the finding that exigent circumstances existed, the court held the warrantless entry by the officers was justified and reversed the district court.[221]

Part II – Independent Source Test

The court of appeals considered an alternative theory in allowing the evidence seized by officers. The court held that even if the initial entry by officers was illegal, the evidence would still be admitted because the independent source doctrine applied.[222] To make this determination, the court reviewed the affidavit in support of the search warrant.[223] The affidavit contained information provided by the victim, the officers' observations of the victim, and the narcotics observed by officers during the initial entry.[224] The court excluded the narcotics information from the affidavit, and concluded "beyond a reasonable doubt" that the information provided by the victim created enough probable cause to support the warrant.[225] As an independent source existed to sustain a valid warrant, the drug evidence would have been discovered pursuant to the plain view doctrine, thus the exclusionary rule was erroneously applied.[226]

D. Discussion

"Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so."[227]

Part I – Exigent Circumstances

The court of appeals found that the facts in *Weas* supported the

217. *See id.*
218. *See id.*
219. *See id.*
220. *See id.*
221. *See id.*
222. *See id.* at 225.
223. *See id.*
224. *See id.*
225. *Id.*
226. *See id.* at 226.
227. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757-58 (1994).

exigent circumstances exception to the warrant requirement based on a "nonexclusive list of factors."[228] This same list of factors, however, could easily have reached the opposite conclusion and affirmed the district court's opinion. For instance, in examining the first factor — "the gravity or violent nature of the offense"[229] — the victim claimed she was abducted from Lawrence, Kansas after leaving a bar.[230] On its face, this statement indicates a serious offense of kidnapping. However, upon further inquiry, the facts do not necessarily uphold this allegation. In addition, the victim also related that she had met the defendant and another man in the bar earlier in the evening.[231] After she had been forced into the car, the woman was taken to several locations where other people were present.[232] The victim does not indicate that she tried to get away from her "abductors," nor does she report that she tried to summon help. There was no report of restraint used on the victim. In fact, the next morning when she awoke, she was alone in the bedroom, walked freely to the bathroom, and then left the residence on her own.[233] Thus, this bright-line kidnapping becomes smudged with very little effort.

A second offense considered was a possible sexual assault. The victim was unable to tell officers if she had been raped.[234] She could recall that she was beaten on several different occasions.[235] At one point, she had lost consciousness.[236] The victim had been told to remove her clothes, and her breasts and buttocks were fondled.[237] Although the woman's clothes were on inside out, she told the officers she had dressed herself.[238] Furthermore, the second factor of the list — "whether the suspect is reasonably believed to be armed"[239] — is also unsupported. The victim did not report any weapons used by her assailants.[240]

The third factor requires "a clear showing of probable cause."[241]

---

228. *Weas*, 992 P.2d at 223-24 (citing United States v. Reed, 572 F.2d 412, 424 (2d Cir. 1978)).

229. *Id.* at 223.

230. *See* Brief of Appellee at 2, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).

231. *See id.*

232. *See id.* at 3.

233. *See id.*

234. *See Weas*, 992 P.2d at 223.

235. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000).

236. *See* Brief of Appellant at 4, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99 - 82843-A)

237. *See Weas*, 992 P.2d at 225.

238. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000). Officer Purvis could not recall when the woman said she had dressed herself, but she thought it had been while she was still intoxicated as the clothing was inside out. *See id.*

239. *Weas*, 992 P.2d at 223.

240. *See id.* at 224.

241. *Id.* at 223.

The physical appearance of the victim gave rise to the belief that a crime had been committed. The woman was beaten and partially clothed when officers met with her.[242] Although there was probable cause to believe that she had been the victim of a kidnapping and sexual assault, that alone is not enough to allow a warrantless entry.[243] In *Mincey v. Arizona*,[244] the Court stated, "We decline to hold that the seriou sness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search."[245]

The fourth factor — "strong reasons to believe the subject is in the premises"[246] — initially appeared to be supported by the facts. The victim reported she had seen a man in the residence as she ran out the front door.[247] The state contended that the officers responded to Weas' home shortly after speaking with the victim.[248] When they arrived, the officers noticed a vehicle in the driveway that matched the description given by the victim.[249] One officer approached the front of the house and another approached the back of the home.[250] The officer at the back door knocked and received no answer.[251] No movement was heard from inside the house and both doors were locked.[252] At this time, no further facts existed to support the contention that someone was in the residence. The officers had knocked, received no answer, and heard no movement. Even if someone was in the residence, refusing to answer, the officers lack "the right to walk in uninvited merely because there is no response to a knock or a ring."[253]

Instead of securing the perimeter, the officers determined that immediate entry was necessary to apprehend the suspects and prevent the destruction of evidence.[254] The officers located an open window and entered the residence.[255] The court considered the entry by the officers

242. *See id.*
243. *See* Brief of Appellee at 9, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).
244. 437 U.S. 385 (1978).
245. Mincey v. Arizona, 437 U.S. 385, 394 (1978).
246. *Weas*, 992 P.2d at 223.
247. *See id.*
248. *See* Brief of Appellant at 14, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99 - 82843-A).
249. *See Weas*, 992 P.2d at 223. The appellee's brief stated the victim was forced into a small pa ssenger vehicle. *See* Brief of Appellee at 3, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).
250. *See Weas*, 992 P.2d at 223.
251. *See id.*
252. *See* Brief of Appellee at 4, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).
253. State of Maine v. Crider, 341 A.2d 1, 4 (Me. 1975) (citing People v. Haven, 381 P.2d 927 (1963) (holding officers cannot enter an "integral part" of a home without probable cause or a search warrant).
254. *See Weas*, 992 P.2d at 223.
255. *See id*.

to have been done "peaceably,"[256] in keeping with the sixth factor — "peaceful circumstances of the entry" — of the list.[257] The reality of the entry however, indicates the officers' firearms were drawn,[258] which belies a "peaceful circumstance."[259] The court also found it was reasonable for officers to believe the suspect might destroy evidence of the sexual assault.[260] The information known to the officers however, does not necessarily support this belief. The victim reported being abducted from Lawrence, Kansas, and driven to several unknown locations.[261] If evidence existed concerning the kidnapping, it would most likely be in the vehicle used to abduct the victim. The victim herself was the best source of evidence in reference to a sexual assault. Thus, using the same facts and the same list, it would have been easy for the court to issue a ruling in favor of the defendant.

Similar lists of factors are used by the courts,[262] as well as a case-by-case approach,[263] however, neither method is applied consistently. To illustrate, the *Weas* case was decided in November 1999.[264] Then, in February 2000, the District Court of Kansas heard *United States of America v. Shively*,[265] and stated there was no "absolute test"[266] for determining exigent circumstances because the determination ultimately depends on the "unique facts of each controversy."[267] However, the court in *Shively* did recognize another list of exigent factors[268] which varied from the one used by the court in *Weas*.[269] Also in *Weas*' aftermath, the Tenth Circuit used a different list in *United States v. Anderson*,[270] which differed from both the *Weas* list and the *Shively* list.[271] The inconsistent application of assessing exigent circumstances can produce opposite results between the courts. As illustrated in the paragraphs proceeding, it is easy to see how the same facts of a case can be used to support the factors relating to exigent circumstances in opposite ways. The result is an unlimited application of the exception.

---

256. *Id.* at 224.
257. *Id*.
258. *See* Brief of Appellee at 10, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99 - 82843-A).
259. *Weas*, 992 P.2d at 224.
260. *See id.*
261. *See* Brief of Appellee at 3, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).
262. *See* United States v. Gray, 71 F.Supp.2d 1081, 1084 (D. Kan. 1999).
263. *See id.*
264. *See Weas*, 992 P.2d at 223.
265. 2000 WL 249300, *1.
266. *See id.* at *3.
267. *Id.*
268. *See id.*
269. *See Weas*, 992 P.2d at 223.
270. 154 F.3d 1225, 1233 (10th Cir. 1998).
271. *See* United States v. Anderson, 154 F.3d 1225, 1233 (10th Cir. 1998).

Part II – Independent Source Doctrine

In *Weas*, the district court applied the exclusionary rule and disallowed the evidence obtained by the subsequent search warrant to be suppressed as "fruits of the poisonous tree" of the initial unlawful warrantless entry.[272] Conversely, the court of appeals held that even if the initial entry had been unlawful, the evidence seized pursuant to the later obtained search warrant was admissible where the warrant could have been supported on information known to officers prior to the illegal entry.[273] The lower court's position was the proper holding because there was no independent source for the narcotics evidence. In *Silverthorne*, the Court's holding emphasized the importance of the exclusionary rule in the enforcement of the Fourth Amendment:[274]

> 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.[275]

The holding, however, also recognized that if knowledge of the evidence was "gained from an independent source they may be proved like any others."[276] The caveat was the information gained from the illegal activity could not be used to procure a warrant.[277] This holding was restated in *Segura*,[278] and *Murray*.[279] The *Murray* opinion expanded the independent source doctrine "[b]y allowing the admission of evidence first discovered during a warrantless search."[280] However, the Court still required there be "no causal link whatever between the illegal entry and the discovery of the challenged evidence."[281] This link could occur if "the agents decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained . . . was presented to the Magistrate."[282] In *Weas*, the "causal

272. *See Weas*, 992 P.2d at 223.
273. *See id.*
274. *See* Silverthorne Lumber Co. Inc., v. United States, 251 U.S. 385, 390-91 (1920).
275. *Id.* at 392.
276. *Id.*
277. *See id.* at 390-91. The prosecutor had received illegally obtained documents from police and photocopied pertinent papers and used that information to obtain a subpoena to compel the defendant to produce the original documents. *See id.* at 391.
278. 468 U.S. 796, 805 (1984). "In short, it is clear from our prior holdings that 'the exclusionary rule has no application [where] the Government learned of the evidence from an independent source.'" Wong Sun v. United States, 371 U.S. 471, 487 (1963) (quoting Silverthorne Lumber Co. Inc., v. United States, 251 U.S. 385, 392 (1920)).
279. 487 U.S. 533 (1988). "Thus, where an unlawful entry has given investigators knowledge of facts *x* and *y*, but fact *z* has been learned by other means, fact *z* can be said to be admissible because derived from an 'independent source.'" *Id.* at 538.
280. Bradley C. Graveline, *Supreme Court Review: Fourth Amendment—An Acceptable Erosion of the Exclusionary Rule*, 79 J. CRIM. L. & CRIMINOLOGY 647, 647 (1988).
281. Murray v. United States, 487 U.S. 533, 543 (1987).
282. *Id.* at 542.

link" between the officers' illegal entry, and the narcotics evidence subsequently seized, cannot be severed.

In its brief, the state compared the police officers' actions in *Murray* to the officers' actions in *Weas*.[283] The state posited that the officers' motivation for entering the Weas residence was to "apprehend the suspects and to secure the scene to prevent the destruction of evidence."[284] Therefore, the narcotics were not the motivating factor. It is true the officers entered Weas' residence because they believed that someone, who had just committed a crime, was in the residence.[285] However, it is not the motivation to *enter* a residence that is important to the causal link analysis, but rather it is the motivation *"to seek the warrant"* that establishes the link.[286]

After the officers entered the residence, they observed several jars in the bedroom and closets.[287] They also observed marijuana on a tray in the kitchen.[288] The officers did not know what was growing inside the jars they found in the residence.[289] After determining the occupant of the residence was gone, the officers contacted narcotics detectives to determine what was growing inside the jars.[290] Several officers entered the residence to look at the jars in an effort to ascertain what drugs were being cultivated.[291] Finally, the contents of the jars were described to a narcotics agent, who believed the plants were hallucinogenic mushrooms.[292] While officers were establishing what type of drugs were growing in the residence, the victim was re-interviewed.[293] Much of the information provided in the warrant regarding the sexual assault was not obtained until after entry had been made and the drugs discovered.[294] Although the officers' motivations in entering the residence were noble, their motivations to seek a warrant are less clear. Considering the lack of information available prior to the entry, it is hard to determine if the officers would have sought a warrant without the narcotics evidence.

283. *See* Brief of Appellant at 19, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99 - 82843-A).
284. *Id.*
285. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000).
286. *Murray*, 487 U.S. at 542 (emphasis added).
287. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000).
288. *See* Brief of Appellee at 5, State of Kansas v. Weas, 992 P.2d 221 (Kan. Ct. App. 1999) (No. 99-82843-A).
289. *See* Interview with John Purvis, former Conservation Officer, State of Kansas, in Topeka, Kan. (Oct. 12, 2000).
290. *See id.*
291. *See id.*
292. *See id.*
293. *See id.*
294. *See id.*

The court of appeals also posited that the narcotic evidence had an independent source because the information pertaining to the sexual assault was enough to support an affidavit for a search warrant.[295] The question, however, is not whether the sexual assault evidence stands on its own, but rather whether the judge that issued the warrant was influenced by the narcotics evidence. Prior to the entry of the residence, the officers had ascertained the victim was abducted from a bar.[296] She had visible bruises to her person, and her clothes were inside out, however, she was unable to say if she had been raped.[297] Nothing in the information known to officers before the entry into the home necessarily indicated there would be evidence of a sexual assault and kidnapping in the residence. The best source of evidence for either crime was the victim herself. It cannot be said "beyond a reasonable doubt" a warrant would have been issued on what was known prior to the unlawful entry.[298] Therefore, the district court was correct in excluding the evidence obtained by officers after their initial illegal entry. To hold otherwise allows the independent source doctrine to be used as a shield of immunity to unlawful government conduct.

V. CONCLUSION

In *State of Kansas v. Weas*, the Kansas Court of Appeals held that the exigent circumstances exception to the warrant requirement applied, and that a warrantless entry by law enforcement officers in defendant's home was lawful.[299] In the alternative, the court held that even if the officers' initial entry was unlawful, the evidence was still admissible under the independent source doctrine.[300] The lack of clear standards in determining when exigent circumstances exist creates differing results among the courts. This variance allows an unlimited application of the exception by courts seeking to find a means to justify the ends. The use of the independent source exception to the exclusionary rule has created an imbalance of interests in favor of the state and places it in a better position than if no constitutional violation had occurred.[301]

295. *See* State of Kansas v. Weas, 992 P.2d 221, 225 (Kan. App. 2d 1999).
296. *See id.* at 223.
297. *See id.*
298. *See id.* at 225.
299. *See id.* at 226.
300. *See id.*
301. *See* Nix v. Williams, 467 U.S. 431, 443-45 (1984).