

Under the Independent Source Doctrine, Evidence Uncovered in a Search Will Not Be Suppressed When the Search Warrant, Excised of Any Previously Illegally Obtained Evidence, Contains Probable Cause: *United States v. Price*

FEDERAL CRIMINAL LAW – INDEPENDENT SOURCE DOCTRINE – SEARCHES – PROBABLE CAUSE – The Court of Appeals of the Third Circuit held that police would have applied for a search warrant even absent the information obtained through a warrantless search, and that the application for a search warrant contained probable cause even if the illegally obtained evidence was excluded; thus, the independent source doctrine applied, and the evidence obtained from the search warrant was not suppressed.

United States v. Price, 558 F.3d 270 (3d Cir. 2009).

On April 5, 2002, Agent Randall Schirra (“Agent Schirra”) purchased methamphetamine from John Joseph Price, Jr. (“Price”).¹ The Commonwealth issued a warrant for Price’s arrest, which he managed to avoid for over two years.²

Officers from the Attorney General’s office and the Pennsylvania State Police finally arrested Price at work on October 5, 2004.³ During the agents’ search of Price, they found items indicative of methamphetamine trafficking.⁴ Agent Schirra left Price with a state trooper and went to Price’s residence.⁵ At Price’s residence, his two children answered the door and said that no adult was home.⁶ The officers called Debbie Fischer (“Fischer”), Prices’ common law wife, and she came home.⁷

Additional officers arrived on the scene but stayed away from Fischer so as to not make her feel outnumbered.⁸ Agent Schirra told Fischer that Price had been arrested and that they had information that Price synthesized methamphetamine in his home.⁹ The officers wanted Fischer to consent to a search of the residence so they could determine whether it was safe for her and the children.¹⁰ The officers did not tell Fischer that no consent was required, did not tell her that what they found could implicate her, and did not give her a written consent form.¹¹ Fischer did not hesitate in consenting to a search.¹² Agent Schirra entered the house with Fischer to commence the search.¹³

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1. *United States v. Price*, 558 F.3d 270, 273 (3d Cir. 2009).
 2. *Price*, 558 F.3d at 273.
 3. *Id.* A source told Schirra that Price was at work. *Id.*
 4. *Id.* These items include plastic baggies with methamphetamine residue and pH papers. *Id.*
 5. *Id.*
 6. *Id.*
 7. *Price*, 558 F.3d at 273. On her way home, Fischer ran out of gas. *Id.* An officer drove to pick Fischer up and drove her home. *Id.*
 8. *Id.* at 273-74.
 9. *Id.*
 10. *Id.* The officers also wanted to search for a reportedly stolen ATV. *Id.*
 11. *Id.* Schirra did not have a consent form at this point in time. *Id.*
 12. *Price*, 558 F.3d at 274.
 13. *Id.* Trooper Wilson searched around the outside and eventually found the stolen ATV. *Id.*

Fischer and Agent Schirra came across a locked room, and Fischer explained that this was her and Price's bedroom.¹⁴ Fischer had a key, however, and unlocked the door to the room.¹⁵ While unlocking the door, Fischer indicated that there might be pipes because she and Price smoked but did not produce methamphetamine.¹⁶ Once in the bedroom, Agent Schirra found two pipes and a baggie of sodium hypophosphite.¹⁷ Fischer then asked him to stop the search,¹⁸ so Agent Schirra immediately discontinued his search, and they left the house.¹⁹

As the two left the house, Agent Schirra recalled that his sources reported that Price made the methamphetamine in the garage or basement area of the house.²⁰ Agent Schirra asked Fischer how to enter the basement, and she told him the entrance was outside of the house.²¹ Agent Schirra asked for consent to search the basement, and Fischer replied that the basement was locked and she did not possess a key.²² Agent Schirra asked once more if he could have permission, and Fischer told him that if he could get in without damaging the door, the authorities could search the basement.²³

Trooper Ron Wilson ("Trooper Wilson") picked the lock and entered to make sure no one was hiding inside the basement.²⁴ Agent Schirra entered and saw a bag with Sudafed packets and other chemicals used to manufacture methamphetamine.²⁵ Agent Schirra exited the basement and told Fischer that she and the children needed to leave due to the presence of potentially hazardous chemicals.²⁶ He also suggested that they should seek medical treatment.²⁷ By this time other officers with consent forms had arrived, so Agent Schirra asked Fischer if she would sign one.²⁸ Fischer refused to sign a consent form.²⁹

Because Fischer did not consent to Agent Schirra's further search of the basement, Agent Schirra had other officers watch over the house and he left to obtain a search warrant.³⁰ A search warrant was issued for Price's residence and basement/garage area regarding items related to methamphetamine storage, production, and consumption.³¹ The police returned to Price's residence, executed the search warrant, and seized chemicals used to manufacture methamphetamine.³²

A grand jury, on November 9, 2004, indicted Price on seven counts relating to methamphetamine manufacture and possession.³³ At a suppression hearing on May 4, 2006, the

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14. *Id.*
 15. *Id.*
 16. *Id.*
 17. *Price*, 558 F.3d at 274.
 18. *Id.* at 275
 19. *Id.*
 20. *Id.*
 21. *Id.*
 22. *Price*, 558 F.3d at 275.
 23. *Id.*
 24. *Id.*
 25. *Id.*
 26. *Id.*
 27. *Price*, 558 F.3d at 275.
 28. *Id.*
 29. *Id.*
 30. *Id.* at 275-76
 31. *Id.* at 276.
 32. *Price*, 558 F.3d at 276.
 33. *Id.*

District Court of the Western District of Pennsylvania granted in part and denied in part Price's motion to suppress evidence.³⁴ On June 16, 2006, Price entered a plea of guilty to Count One, but reserved his right to appeal the portion of his suppression motion that the district court denied.³⁵ The district court sentenced Price to 115 months of imprisonment.³⁶ Price appealed the district court's decision to the Third Circuit Court of Appeals.³⁷

The issue before the Third Circuit was whether the authorities violated Price's Fourth Amendment rights when searching his residence.³⁸ Price argued that the authorities did not have voluntary consent from Fischer to search his house, so the items found in that search should be suppressed.³⁹ Price also argued that the authorities' warrant application did not have probable cause because the defective evidence from the bedroom and the findings from the warrantless search of the basement should not be included in the warrant application.⁴⁰ Without probable cause, Price argued, the evidence seized from the basement after execution of the warrant should be suppressed.⁴¹

The court began with a discussion that the Fourth Amendment protects citizens against unreasonable searches and seizures⁴² and that the standard is reasonableness.⁴³ Although there are exceptions,⁴⁴ entering a home without a warrant is unreasonable by definition.⁴⁵ One such exception is a search with consent.⁴⁶ The government has the burden to prove that consent was given in order to justify a search with permission.⁴⁷ A determination of whether consent is freely given is based on the totality of the circumstances⁴⁸ rather than having a "talismanic definition."⁴⁹ The Supreme Court has suggested factors for consideration, but not definitive factors that must be taken into account.⁵⁰

34. *Id.* A bag of sodium hypophosphite that was found by police in Price's jacket was suppressed by the District Court. *Id.* at 275 n.4. This evidence was not later used in the application for a search warrant for Price's residence. *Id.*

35. *Id.*

36. *Id.*

37. *Price*, 558 F.3d at 276.

38. *Id.* at 277. Another issue before the Third Circuit was whether the government abused its discretion by not moving, pursuant to U.S.S.G. § 3E1.1(b), to reduce Price's base offense level by one point for acceptance of responsibility. *Id.* at 283. The Third Circuit rejected Price's claim that the government abused its discretion, because he waived the right to appeal this issue in his plea agreement. *Id.* at 283-84.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Price*, 558 F.3d at 277.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

43. *Price*, 558 F.3d at 277 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)).

44. *Id.* (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)).

45. *Id.*

46. *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)).

47. *Id.* at 277-78 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).

48. *Price*, 558 F.3d at 278.

49. *Id.* (quoting *Schneckloth*, 412 U.S. at 224).

50. *Id.* at 278. The factors a court is to consider are: "the age, education, and intelligence of the subject; whether the subject was advised of his or her constitutional rights; the length of the encounter; the repetition

Price contended that the search was invalid, because the authorities did not inform Fischer that she could refuse.⁵¹ He also argued that the search was invalid because the authorities were lying about their reasoning to search the property; Price alleged they were truly looking for a methamphetamine laboratory rather than being concerned for Fischer's and the children's safety.⁵² The court of appeals held, however, that in light of the totality of the circumstances, the district court properly determined that the consent to search was voluntary.⁵³ The Third Circuit also explained that *Schneckloth*⁵⁴ and *Kim*⁵⁵ disprove Price's assertion.⁵⁶

The court also did not agree with Price's contention that the authorities were not concerned with Fischer's and the children's safety.⁵⁷ The Third Circuit agreed with the district court that although the authorities may have had two reasons for the search, that fact did not affect the reality that Fischer's consent was voluntary.⁵⁸

Additionally, Price contended that the warrant applicant should not have included the evidence found in the bedroom, because the authorities lacked consent to search,⁵⁹ and the evidence in the basement because the initial search was warrantless.⁶⁰ Price argued that the additional information in the warrant did not amount to probable cause.⁶¹ The Third Circuit held that even if the evidence from the initial search of the basement was not included in the warrant application, the warrant application contained probable cause from independent sources.⁶²

or duration of the questioning; and the use of physical punishment." *Id.* The Third Circuit has also added: "the setting in which the consent was obtained [and] the parties' verbal and non-verbal actions." *Id.* (quoting *United States v. Givan*, 320 F.3d 452, 459 (3d Cir. 2003)). The Third Circuit noted that the district court found that Fischer's consent was voluntary under these factors. *Id.*

51. *Id.*

52. *Id.*

53. *Price*, 558 F.3d at 278. The district court found Fischer's consent to be voluntary because: [S]he was an adult, apparently of average intelligence, who had previous experience with the criminal justice system. Moreover, 'the atmosphere surrounding the encounter was not hostile,' since the officers drove her to [Price's] residence after her car ran out of gas, the officers did not have their guns drawn when they asked for Fischer's consent, Fischer was not verbally or physically threatened, and only two officers, Schirra and Wilson, discussed Fischer's initial consent with her in the driveway.

Id.

54. *Schneckloth*, 412 U.S. 218 (1973).

55. *United States v. Kim*, 27 F.3d 947 (3d Cir. 1994).

56. *Price*, 558 F.3d at 279. In *Schneckloth*, the Supreme Court held that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the [G]overnment need not establish such knowledge as the *sine qua non* of an effective consent." *Id.* (alteration in original)(quoting *Schneckloth*, 412 U.S. at 227). The Third Circuit found that the facts of the instant case were analogous to *Kim*, where two DEA agents knocked on Kim's sleeper car on a train and asked if they could search his luggage. *Price*, 558 F.3d at 279. Kim readily responded that they could. *Id.* at 279 (quoting *Kim*, 27 F.3d at 950). This court also noted that the "circumstances of the encounter were low-key", even more so than in *Kim*. *Id.* at 279 (citing *Kim*, 27 F.3d 947).

57. *Id.* at 280.

58. *Id.* The Third Circuit stated: "No doubt, the police certainly were looking for a methamphetamine lab. But the agents—indisputably—also wanted to make sure that Fischer and the two children were not placed in danger by the chemicals associated with any such operation." *Id.* The Third Circuit supports its conclusion with the fact that Agent Schirra told her and the children to leave and to seek medical attention. *Id.*

59. *Id.* The Court notes that it already considered and rejected this argument. *Id.*

60. *Id.*

61. *Price*, 558 F.3d at 280.

62. *Id.* The Court noted three issues that the parties disputed on appeal that need not be answered: First, did Fischer withdraw the initial consent to search that she had provided to Schirra and Wilson in the driveway, and if so, what was the extent of the revocation? Second, even if Fischer

The Third Circuit looked to the independent source doctrine which allows evidence to be used that was initially obtained illegally but was acquired without regard to the tainted search.⁶³ The Supreme Court had previously decided that a court should not put the police in a worse position, but should put them in the same position had the misconduct not occurred.⁶⁴ Excluding evidence that had an independent source would put the police in a worse position, which the court does not want to do.⁶⁵ The court explained that it must determine whether the police would have applied for a search warrant even absent the information from the original search.⁶⁶ The Third Circuit clarified that it must also decide if there was probable cause for the warrant to be issued.⁶⁷

The Third Circuit decided in this case that the police would have applied for a warrant even without the evidence from the warrantless search.⁶⁸ The court also agreed with the district court that probable cause existed even if the evidence from the basement was not included in the warrant application.⁶⁹ Therefore, the court affirmed the district court's decision to deny Price's motion to suppress the evidence from the basement pursuant to the executed search warrant.⁷⁰

The independent source doctrine is invoked when the Fourth Amendment is violated.⁷¹ However, the government can use the evidence obtained if the warrant contained sufficient untainted information to establish probable cause.⁷² In *Silverthorne Lumber Co. v. United States*,⁷³ Justice Holmes noted in dicta that if evidence is not supposed to be acquired in a certain way, the evidence should not be used at all.⁷⁴ He continued, however, that if the evidence is

revoked her consent to search the house, and even if that revocation applied to the basement as well, did Fischer later consent voluntarily to a search of the basement? Third, even if Fischer voluntarily consented to the basement search, did she have the authority to consent to such a search?

Id.

63. *Id.* at 281 (quoting *Murray v. United States*, 487 U.S. 533, 537 (1988)).

64. *Id.* (quoting *Murray*, 487 U.S. at 537).

65. *Id.*

66. *Price*, 558 F.3d at 281. (quoting *United States v. Herrold*, 962 F.2d 1131, 1134 (3d Cir. 1992)).

67. *Id.* (quoting *Herrold*, 962 F.2d at 1134).

68. *Id.* at 282. The Third Circuit believed that the instant case was very similar to *Herrold*. *Id.* The Third Circuit disbelieved that the police would not have requested a search warrant, with the knowledge that:

1) confidential informants told the police that Price was operating a methamphetamine laboratory in the basement of [his] residence; 2) Price had sold [Agent] Schirra methamphetamine in the past; 3) when arrested, Price had pH papers and baggies containing methamphetamine residue; and 4) Price's bedroom contained glass pipes with methamphetamine residue and a baggie of sodium hypophosphate.

Id.

69. *Id.* The warrant application would contain three key pieces of evidence, even if it did not refer to the evidence found in the warrantless basement search:

1) that Price sold [Agent] Schirra ¼ gram of methamphetamine on April 5, 2002; 2) that [Agent] Schirra arrested Price on October 5, 2004, and that when searched, Price possessed 'items indicative of methamphetamine trafficking, including plastic baggies with methamphetamine residue and pH papers used to gauge the acidity of the methamphetamine production process'; and 3) that after searching Price's bedroom, [Agent] Schirra found two glass pipes that were consistent with the ingestion of methamphetamine.

Id.

70. *Id.* at 283.

71. 79 C.J.S. *Searches* § 206.

72. *Id.*

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

74. *Silverthorne Lumber*, 251 U.S. at 392.

gained from an “independent source” it could be proved like any other evidence.⁷⁵ The Court did not explore this idea further for sixty-eight years until *Murray v. United States*.⁷⁶

In *Murray*, the United States Supreme Court was concerned with whether the independent source doctrine, as applied to the Fourth Amendment, “applies . . . to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality.”⁷⁷ The Court determined that if law enforcement later acquired evidence during a lawful entry that was not the result of an initial unlawful entry, then the independent source doctrine may apply.⁷⁸ In *Murray*, federal law enforcement agents were conducting surveillance on Murray based on information from a confidential informant regarding a conspiracy to possess and distribute illegal drugs.⁷⁹ The agents witnessed Murray and his co-conspirators drive a truck and a camper into the warehouse.⁸⁰ Not long later, other persons drove away from the warehouse with the truck and the camper.⁸¹ Those in the truck and camper were later lawfully arrested and the vehicles, which contained marijuana, were seized.⁸² The agents received this information and forced entry into the warehouse.⁸³ No one was present, but there were bales wrapped in burlap in plain view.⁸⁴ The agents later determined that the bales were marijuana.⁸⁵ The agents did not include information regarding their prior entry and did not rely on their observations during the entry when they later applied for a search warrant.⁸⁶ The agents again entered after obtaining a warrant, and seized 270 bales of marijuana and notebooks listing the marijuana customers.⁸⁷ The Court ultimately concluded that the case must be sent back to the district court so it could decide whether the warrant search was independent of the unlawful entry.⁸⁸ Nonetheless, the case established the scope of the independent source doctrine.

Four years later, the Third Circuit Court of Appeals decided *United States v. Herrold*⁸⁹ and used the independent source doctrine in its analysis. The issue that the Third Circuit decided in *Herrold* was “whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here.”⁹⁰ The court asked two questions: would the police “have applied for the search warrant” without the information from the original entry and was there probable cause to issue the warrant?⁹¹ The court explained that “under the

75. *Id.*
76. *Murray*, 487 U.S. 533.
77. *Id.* at 537.
78. *Id.* at 541.
79. *Id.* at 535.
80. *Id.*
81. *Murray*, 487 U.S. at 535.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Murray*, 487 at 536.
87. *Id.*
88. *Id.* at 543-44.
89. *Herrold*, 962 F.2d 1131.
90. *Id.* at 1140.
91. *Id.*

independent source doctrine, evidence that was *in fact* discovered lawfully, and not as a direct or indirect result of illegal activity, is admissible.”⁹²

Herrold was known to the police as a drug dealer with a record of violent crimes.⁹³ Additionally, the police knew that Herrold had a large quantity of cocaine, some of which he sold to an informant.⁹⁴ A police surveillance team witnessed the informant buy drugs from Herrold.⁹⁵ They also saw Herrold go back into his trailer after selling drugs to the informant.⁹⁶ The police inferred that the rest of the cocaine was in Herrold’s trailer.⁹⁷ The informant also notified the police that Herrold had a gun and was planning on leaving the trailer soon that night.⁹⁸ The court reasoned that had Herrold left the trailer, the police would have arrested him and obtained a search warrant.⁹⁹ The court also reasoned that there was sufficient probable cause to issue the warrant.¹⁰⁰ The affidavit supporting the application for a search warrant explained that the drugs that the informant bought from Herrold tested positive for cocaine from a field test.¹⁰¹

Knowing all of these facts, the court determined that although the police unlawfully entered the trailer, the police were going to apply for a search warrant prior to actually seeing what was inside Herrold’s trailer.¹⁰² The court also concluded that the application for the search warrant contained enough information to establish probable cause without the information from the officers’ prior entry into Herrold’s trailer.¹⁰³

Ten years later, the Third Circuit Court of Appeals once again applied the independent source doctrine in *United States v. Burton*.¹⁰⁴ The court was faced with the issue of whether there was “sufficient information to support a finding of probable cause to search [Burton’s] residence.”¹⁰⁵ The court followed the rule that “the search warrant need not be invalidated if the other evidence in the search warrant application affidavit independently would have established probable cause to search the house.”¹⁰⁶

The application affidavit included the information that an informant saw Burton and Santiago, a known drug dealer, counting a large amount of money and hearing that they were conducting a “five brick” deal.¹⁰⁷ Law enforcement believed a “five brick” to mean 1000 grams of cocaine.¹⁰⁸ The court also believed that a canine sniff of Burton’s car was a permissible component of the affidavit.¹⁰⁹ The affidavit also provided sufficient information that the

92. *Id.* (emphasis in original).

93. *Id.* at 1141.

94. *Herrold*, 962 F.2d at 1141.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Herrold*, 962 F.2d at 1141.

100. *Id.* at 1141.

101. *Id.*

102. *Id.* at 1143.

103. *Id.* at 1141.

104. *United States v. Burton*, 288 F.3d 91 (3d Cir. 2002).

105. *Burton*, 288 F.3d at 103.

106. *Id.*

107. *Id.* at 104.

108. *Id.*

109. *Id.* The canine signaled that there were illegal drugs in Burton’s car. *Id.*

residence in question belonged to Burton based on several factors.¹¹⁰ The affidavit also stated that Burton did not want to tell the authorities his address, which suggested that he wanted to trick the authorities and supported an inference that contraband was in his house.¹¹¹

The court concluded that “the Government proffered sufficient evidence in the [warrant application] affidavit that there was a ‘fair probability that contraband’ would be found” at Burton’s residence and that “the warrant was validly sought and approved.”¹¹²

The Third Circuit’s analysis of the independent source doctrine fits squarely within the framework of the Supreme Court’s analysis in *Murray*. The Third Circuit continued to follow *Murray*’s holding that if law enforcement later acquired evidence during a lawful entry that was not the result of an initial unlawful entry, then the independent source doctrine can be applied and the evidence need not be suppressed.¹¹³ Agent Schirra may have discovered Sudafed packets, along with other chemical known to be used in methamphetamine production, when he first entered Price’s basement,¹¹⁴ but the warrant application included sufficient additional evidence to support a finding of probable cause.¹¹⁵

This case does not change police procedure when applying for a warrant effective after *Murray*, *Herrold*, or *Burton*. The police will continue to need probable cause above and beyond any evidence obtained through a tainted search. Likewise, trial judges will continue to review a magistrate’s grant of a warrant application by analyzing whether the police would have applied for the warrant even without the knowledge they gained from a tainted search and if the warrant application achieved a level of probable cause even when excluding the evidence derived from a tainted search.¹¹⁶ Trial judges had a clear standard to follow under *Murray*, *Herrold*, and *Burton*, and this case is no exception to the previously established rules.

The Third Circuit clearly came to the correct conclusion by following precedent set not only within the Third Circuit, but also by precedent of the Supreme Court of the United States.¹¹⁷ The Third Circuit thoroughly analyzed whether the police would have applied for a warrant had Agent Schirra not discovered the Sudafed and other chemicals in Price’s basement¹¹⁸ and established that probable cause existed in the application for a search warrant absent the evidence that Agent Schirra uncovered in Price’s basement.¹¹⁹ The independent source doctrine continues to balance protecting the defendant’s Fourth Amendment rights, while also alleviating the police from being placed in a worse position than it would have been in before a tainted search.

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110. *Burton*, 288 F.3d at 104. Burton told law enforcement that he lived there with his grandmother. *Id.* Another person who was questioned told law enforcement that the house was “Marco’s.” *Id.* Marco is Burton’s first name. *Id.* at 94. Additionally, Burton parked his car close to the house, which indicated that it was his residence. *Id.* at 104.

111. *Id.* at 104-05.

112. *Burton*, 288 F.3d at 105.

113. *Murray*, 487 U.S. at 541.

114. *Price*, 558 F.3d at 275.

115. *Id.* at 282-83.

116. *See Herrold*, 962 F.2d at 1140.

117. *See Murray*, 487 U.S. 533.

118. *Price*, 558 F.3d at 282.

119. *Id.* at 282-83.