RESOLVING THE *TOLENTINO* QUESTION: WHY COURTS SHOULD SUPPRESS POLICE OBSERVATIONS AND OTHER "IDENTITY-RELATED" EVIDENCE FLOWING FROM ILLEGAL TRAFFIC STOPS

INTRODUCTION

What if police officers stop a motorist in violation of the Fourth Amendment and see drugs in plain view inside the car? No one doubts that we would suppress the drugs under the exclusionary rule as the fruit of the illegal stop. We do that for one simple but important reason: To deter police from making illegal traffic stops. But what if police stop the same motorist, observe him in the car, learn his name, run a computer check of DMV records, determine that the motorist's driver's license has been suspended, and then arrest the motorist for driving without a license? Should we suppress this "identity-related" evidence proving the motorist was driving without a valid license? One might think the answer is clear here as well, that everyone agrees that we must suppress the evidence to deter the police from making illegal stops. In fact, many courts confronting this question have rejected this common-sense view grounded in the law and policy of the Fourth Amendment. These courts have failed to address whether the police officers' observations should be suppressed and have concluded (i) the motorist's name is admissible as "identity" evidence and (ii) the DMV records are admissible as "pre-existing" government records.

In *People v. Tolentino*, the New York Court of Appeals held that a "defendant may not invoke the fruit-of-the-poisonous-tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name," thus a defendant's identity and preexisting records could not be suppressed even if the evidence was obtained by way of an illegal traffic stop.[1]

The Supreme Court was presented with an opportunity to rule on *Tolentino* when they heard oral arguments in March 2011. While the Court addressed many of the issues, the Court dismissed the case because it had not been properly adjudicated by the lower courts and was not ripe for review. Thus, there was

[1] People v. Tolentino, 926 N.E.2d 1212, 1216 (N.Y. 2010).

no decision on the merits, and the question of what "identity-related" evidence is suppressible fruit of a Fourth Amendment violation in a criminal prosecution remains unanswered.[2]

This Comment addresses this question and explains why police observations, a defendant's identity, and pre-existing records that flow from an illegal traffic stop are suppressible fruit of a Fourth Amendment violation.

I. ILLEGAL TRAFFIC STOPS AND "IDENTITY-RELATED" EVIDENCE

A. People v. Tolentino *in the N.Y. Court of Appeals*

In *People v. Tolentino*, Jose Tolentino was driving a car down a New York City street when the police stopped him for allegedly playing his music too loudly.[3] Subsequently, the officers learned his name and ran a computer check of Department Motor Vehicles (DMV) records, looking up his driving record.[4] This check revealed that Mr. Tolentino had been driving with a suspended license; he was arrested and charged with aggravated unlicensed operation of a motor vehicle.[5] Mr. Tolentino sought to suppress the DMV records and any statements made after the arrest as fruit of a Fourth Amendment violation.[6]

The New York Supreme Court held that "[a]n individual does not possess a legitimate expectation of privacy in files maintained by the [DMV] and such records do not constitute evidence which is subject to suppression under the *fruit of the poisonous tree* analysis." Therefore, the court sentenced Mr. Tolentino to five years' probation, which he appealed.[7]

The appellate division unanimously affirmed the supreme court's decision but for different reasons.[8] First, the court concluded that the identity of a defendant is never suppressible as the fruit of an unlawful arrest, and "because the defendant's identity led to the discovery of his DMV records, those records

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[2] Tolentino v. New York, 131 S. Ct. 1387, 1388 (2011).
[3] *Tolentino*, 926 N.E.2d at 1213.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.* at 1214.
[8] *Id.*

were likewise not suppressible."[9] Secondly, the court noted that the records had been compiled independently, and therefore were not susceptible to suppression.[10]

On appeal, the New York Court of Appeals affirmed the appellate division's decision.[11] The court's reasoning was based on the rationale of the U.S. Supreme Court in *I.N.S v. Lopez-Mendoza*, as interpreted by some federal circuit courts, holding that a defendant's identity and preexisting records could not be suppressed even if obtained by way of a Fourth Amendment violation. [12] However, two members of the court dissented, choosing to follow the view taken by other federal circuit courts, finding that DMV records "are subject to suppression if obtained by the police through the exploitation of a Fourth Amendment violation, namely an unlawful traffic stop."[13]

B. U.S. Supreme Court Oral Arguments on Appeal

Following the decision of the New York Court of Appeals, Mr. Tolentino sought review by the U.S. Supreme Court.[14] The Court granted writ of certiorari and heard oral arguments on March 21, 2011.[15] The Court dismissed the writ of certiorari as improvidently granted after determining that the case had not been properly adjudicated below. Primarily, that the trial court never adjudicated the matter of whether Mr. Tolentino had in fact been illegally stopped. However, the Court did address issues raised by the defendant involving the circumstances and offered suppressing police observations as a possible solution.

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 1214-15.
[13] *Id.* at 1216-17.
[14] Tolentino v. New York, 2010 WL 4597727 *1 (2010).
[15] Tolentino v. New York, U.S., No. 09-11556, R. at 1 (March 2011).

C. Supreme Court Precedent

1. The Fourth Amendment Governs Both Tangible and Intangible Evidence: *Katz v. United States*

In *Katz v. United States*, the Court reversed a district court's decision to allow the State to introduce evidence of the defendant's end of telephone conversations, which were overheard by the use of an electronic listening device attached to the outside of a public telephone booth. [16]

The Court in reaching their conclusion, rejected the view "that surveillance without any trespass and without the seizure of any material object" falls outside the Constitution.[17] They instead "held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under local property law.'"[18] Thus, the Court purposively chose not to limit Fourth Amendment protection to just tangible evidence, but alternatively decided to offer Fourth Amendment protection to intangible evidence as well.

2. A Defendant's Identity and Body is Never Suppressible as to Defeat a Court's Jurisdiction: *I.N.S. v. Lopez-Mendoza*

In *I.N.S. v. Lopez-Mendoza*, the Court heard two consolidated cases involving the alleged unlawful arrest of suspected illegal aliens by the Immigration and Naturalization Service.[19] In the first of the two cases, Adan Lopez-Mendoza moved to terminate his deportation proceeding because he had been arrested illegally.[20] In contrast, Elias Sandoval-Sanchez did not seek to have his deportation proceeding terminated but instead sought

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[16] Katz v. United States, 389 U.S. 347, 348 (1967). Mr. Katz was charged and convicted under an eight-count indictment involving transmitting and wagering information by telephone from Los Angeles to Miami and Boston in violation of a federal statute. *Id.*

[17] *Id.* at 353.

[18] *Id.*

[19] *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984).

[20] *Id.* at 1035.

the suppression of the evidence offered by the I.N.S. as the fruit of an unlawful arrest.[21]

The Court quickly rejected Mendoza's contention that his deportation proceeding should be terminated because he had been arrested illegally, finding that "[t]he 'body' or identity of a defendant . . . is never itself suppressible as a fruit of an unlawful arrest . . . ."[22]

Alternatively, the Court gave much more consideration to Sanchez's objection not to his "presence at [the] deportation proceeding, but to evidence offered at [the] proceeding."[23]

First, the Court applied the cost/benefit analysis formulated in *United States v. Janis*[24] to determine whether evidence obtained by an unlawful arrest should be suppressed at a deportation hearing.[25] After weighing "the likely social benefits of excluding unlawfully seized evidence against the likely costs," the Court concluded that the costs outweighed the social benefits because such a small percentage of arrests of aliens actually lead to criminal prosecutions.[26]

Second, the Court concluded that because the I.N.S. has its own procedures for deterring Fourth Amendment violations,[27] the application of the exclusionary rule to civil deportation hearings "is unlikely to provide significant . . . additional deterrence."[28]

Finally, the Court focused on the practical effect of applying the exclusionary rule to deportation hearings, finding that its application would compel courts to release defendants who would immediately resume their commission of a crime.[29] Thus, the Court determined that this result would create too great a barrier to law enforcement, and their ultimate goal of administering the law. [30]

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[21] *Id.* at 1037.
[22] *Id.* at 1039-40.
[23] *Id.* at 1040.
[24] United States v. Janis, 428 U.S. 433 (1976).
[25] I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984).
[26] *Id.* at 1043.
[27] *Id.* at 1044.
[28] *Id.* at 1046.
[29] *Id.* at 1050.
[30] *Id.*

3. The "Independent Source" and "Inevitable Discovery" Doctrines Require an Independent Pathway to the Evidence: *Murray v. United States*

In *Murray v. United States*, federal law enforcement agents unlawfully forced entry into a South Boston warehouse after receiving information that the defendants had been previously found elsewhere carrying large quantities of marijuana.[31] Upon entering, the agents observed numerous burlap-wrapped bales that were later found to contain marijuana, but did not disturb the bales, keeping the warehouse under surveillance until they had a search warrant.[32] The agents did not mention their prior entry into the warehouse, and did not rely on any observations made during their entry in obtaining the search warrant.[33]

After receiving the warrant, the agents reentered the warehouse and seized the bales of marijuana and other incriminating materials.[34] Before trial, the defendants moved to suppress the evidence found in the warehouse because the agents failed to inform the magistrate of their original unlawful entry.[35] The district court denied the motion and the First Circuit affirmed. Subsequently, the defendants filed petitions for certiorari to the U.S. Supreme Court.[36]

The Court granted certiorari for the apparent reason of clarifying the legal effect of both the "independent source" doctrine and the "inevitable discovery" doctrine with relation to the exclusionary rule.[37] Writing for the Court, Justice Scalia first describes the doctrines as previously applied.[38]

First, addressing the "independent source" doctrine, Scalia discusses the Court's opinion in *Segura v. United States*, where agents unlawfully entered the defendant's apartment and remained there until obtaining a search warrant.[39] The Court held there that "where an unlawful entry has given investigator's

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[31] Murray v. United States, 487 U.S. 533, 535 (1988).
[32] *Id*.
[33] *Id.* at 536.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *See id.* at 533.
[38] *Id.* at 538-39.
[39] *Id.* at 538 (citing Segura v. United States, 468 U.S. 796, 803-04 (1984)).

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.'"[40] Thus, the evidence discovered for the first time during the execution of the valid search warrant was admissible because it was found based on an "independent source," not the prior illegal entry.[41]

Next, looking at the "inevitable discovery" doctrine, Justice Scalia examines the Court's analysis in *Nix v. Williams*.[42] In *Nix*, incriminating statements were obtained in violation of a defendant's Sixth Amendment right to counsel.[43] The statements, which led the police to the victim's body, had not been obtained by way of an independent source; however, the Court held that the evidence was admissible because a search had been under way which would have discovered the body, had it not stopped because of the unlawfully obtained statements.[44] Thus, the Court reasoned that "[t]he inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered."[45]

Finally, the Court applied the discussed doctrines to the facts present in *Murray*, holding that the "[k]nowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry."[46] But nevertheless, "it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply."[47]

D. Tolentino*'s Dismissal Leaves the Circuit Split Unresolved*

As illustrated in *Tolentino*, a split among the circuits has developed with regard to the proper interpretation of the effects of

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[40] *Id.*
[41] *Id.* at 538 (citing Segura v. United States, 468 U.S. 796, 813-814 (1984)).
[42] *Id.* at 539.
[43] *Id.* at 539 (citing Nix v. Williams, 467 U.S. 431, 448-50 (1984)).
[44] *Id.*
[45] *Id.*
[46] *Id.* at 541.
[47] *Id.*

the *Lopez-Mendoza* decision. The Third, Fifth, and Ninth Circuits have interpreted *Lopez-Mendoza* very broadly, finding that even in criminal proceedings a defendant's identity could not be suppressed as a result of an unlawful arrest.[48] In contrast, the Eighth, Tenth, and Fourth Circuits, have held that a defendant's identity is suppressible evidence in all criminal proceedings.[49] Unfortunately, the Court's decision to dismiss *Tolentino* has left the circuit split unresolved. This Comment addresses this split, and proposes the proper interpretation that should be applied.

II. THREE REASONS WHY COURTS SHOULD SUPPRESS IDENTITY EVIDENCE IN THE TYPICAL *TOLENTINO* CASE

Because most *Tolentino* type traffic stop cases are premised on the police officer being able to identify the defendant, almost all of these cases could be resolved by suppressing police observations. In those cases where suppression of police observations does not resolve the case, courts could look further and determine whether suppressing one's identity would be the proper solution. Finally, if a case is not resolved after suppressing police observations or suppressing one's identity, the court could consider suppressing pre-existing records. This order follows the usual sequence of events surrounding unlawful traffic stops, such as the scenario in *Tolentino*, and leads to the optimal solution in conformity with the exclusionary rule.

A. Police observations are Suppressible

1. No Exception for Intangibles: *Katz v. United States*

The U.S. Supreme Court had the opportunity to limit Fourth Amendment protection to tangible evidence in *Katz v. United States*.[50] However, the Court chose not to do so, but instead said that "the Fourth Amendment governs not only the seizure of

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[48] *See* United States v. Guzman-Bruno, 27 F.3d 420, 422 (9th Cir. 1994); United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999); United States v. Bowley, 435 F.3d 426, 430-31 (2006).

[49] *See* United States v. Guevara-Martinez, 262 F.3d 751, 755-56 (8th Cir. 2001); United States v. Olivares-Rangel, 458 F.3d 1104, 1112 (10th Cir. 2006); United States v. Oscar-Torres, 507 F.3d 224, 228 (4th Cir. 2007).

[50] *See* Katz v. United States, 389 U.S. 347 (1967).

tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under loca property law.'"[51]

The Court's holding in *Katz* establishes that there is no exception to the exclusionary rule for intangible evidence. But Fourth Amendment protection extends to intangible evidence such as what police see and hear.

2. The Application of Katz to Observation Evidence: *United States v. Crews*

In *United States v. Crews*[52], the defendant, suspected of robbing three women near the Washington Monument, was unlawfully taken into custody so the police could obtain his picture to show the victims. Subsequently, the victims identified the defendant as the perpetrator.[53] Following a pretrial motion to suppress all identification testimony, the trial court concluded that the photographic and lineup identifications could not be introduced at trial. However, the court provided that the victims' court room identification of the defendant was based upon "independent recollection untainted by the intervening identifications" and therefore admissible.[54] The District of Columbia Court of Appeals reversed such conviction based on the court's analysis of the "fruit of the poisonous tree" doctrine, finding "that but for respondent's unlawful arrest, the police would not have obtained the photograph that led to his subsequent identification by the complaining witnesses and, ultimately, prosecution of the case."[55]

In reversing the Court of Appeals decision, the Supreme Court reaffirmed that the exclusionary rule does apply to intangibles, such as observations or statements, stating, "the exclusionary sanction applies to any 'fruits' of a constitutional violation—whether such evidence be tangible . . . [or] items *observed* or words overheard in the course of the unlawful activity

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[51] *Id.* at 353.
[52] United States v. Crews, 445 U.S. 463 (1980).
[53] *Id.* at 467.
[54] *Id.* at 468.
[55] *Id.* at 469.

. . . ."[56] However, the Court held that the witness' identity was not discovered only as a result of an unlawful search or arrest, but the victim's "identity was known long before there was any official misconduct, and her presence in court is thus not traceable to any Fourth Amendment violation."[57]

Unlike the circumstances in *Crews*, where "the police both knew the respondent's identity and had some basis to suspect his involvement in the very crimes with which he was charged,"[58] in many unlawful traffic stops such as alleged in *Tolentino*, there are no witnesses or police officers with prior knowledge to suspect illegality. Under *Crews*, intangible evidence – including police observations – that does not "antedate" the unlawful traffic stop must be considered "tainted" and suppressed.[59]

3. Lower Courts Routinely Suppress Police-Observation Evidence

Courts routinely allow suppression of intangible evidence obtained through illegal police activity. Consider *People v. Rossi*,[60] where officers executed a valid search warrant after making an unlawful arrest. Subsequently, the defendant made an omnibus motion to suppress all tangible and intangible evidence flowing from his arrest, which the lower court denied.[61]

On appeal, the New York Court of Appeals reversed, holding that while the tangible evidence "was properly admitted in evidence as the product of the warrant execution the necessary connecting evidence was supplied by the arresting officer's testimony concerning defendant's conduct upon his concededly unlawful arrest" and thus should be suppressed.[62] Accordingly, the Court of Appeals of New York chose to suppress all intangible evidence stemming from the defendant's unlawful arrest because

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[56] *Id.* at 470 (emphasis added).

[57] *Id.* at 471-72.

[58] *Id.* at 475.

[59] *See id.* at 477. The Court concluded that "even if respondent's argument be accepted, because the police's knowledge of respondent's identity and the victim's independent recollections of him both antedated the unlawful arrest and were thus untainted by the constitutional violation." *Id.*

[60] People v. Rossi, 80 N.Y.2d 952 (1992).

[61] *Id.* at 954.

[62] *Id.* (citation omitted).

of the "direct link" between the legally obtained evidence and the evidence that was only obtained through the unlawful arrest.[63]

Similarly, in *People v. Washburn*,[64] the defendant was unlawfully stopped and later charged with driving while intoxicated.[65] The county court denied the defendant's motion to suppress all police observations subsequent to his unlawful arrest.[66] The New York Supreme Court, finding that the police did not "rely upon any observed traffic violation prior to the stop, . . . conclude[d] that defendant's motion to suppress the evidence arising from that stop should have been granted . . . ."[67] Thus, the court vacated the defendant's guilty plea.

Finally, in *Michigan v. Fisher*,[68] a defendant was charged with assault after an officer, who allegedly illegally entered his home, observed the defendant pointing a gun at him.[69] The lower court held that the officer violated the Fourth Amendment when he entered the defendant's house without a search warrant, and therefore granted the defendant's motion to suppress all testimony regarding the officer's observations made after entering the house.[70]

The Michigan Court of Appeals ultimately affirmed the lower court's decision and the State filed a petition for certiorari, which the U.S. Supreme Court granted.[71] The Court reversed the lower court's decision because the officer's actions fell under the emergency aid exception.[72] However, the Court did not question the defendant's right, had there been no exigency, to have the police officer's observation evidence suppressed.[73]

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[63] *Id.*

[64] People v. Washburn, 309 A.D.2d 1270 (N.Y. App. Div. 2003).

[65] *Id.* at 1271.

[66] *Id.*

[67] *Id.*

[68] Michigan v. Fisher, 130 S. Ct. 546 (2009).

[69] *Id.* at 547.

[70] *Id.* at 548.

[71] *Id.*

[72] *Id.* at 549. Prior to entering the home, officers observed through a window the defendant bleeding. The Court determined that this gave rise to an "emergency aid exception" which made the entry into the home reasonable under the circumstances. *Id.* at 548-49.

[73] *See id.*

4. There is No Policy Basis for an Intangible Evidence Exception

i. Protection of Privacy Thought Behind Katz

Over the objections of the prosecution,[74] the Supreme Court in *Katz v. United States*[75] held that electronic eavesdropping in a phone booth by the government constitutes a "search and seizure" within the meaning of the Fourth Amendment.[76] In reaching this conclusion, the Court stated "that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements *overheard* without any 'technical trespass under * * * local property law.'"[77] Further stating that, "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."[78] Under *Katz*, police observations must be considered suppressible. To hold otherwise, would offend the holding in *Katz* and compromise the promise of the Fourth Amendment that people will be free from unreasonable searches and seizures.[79]

ii. Suppressing Police Observations Promotes the Primary Purpose of the Exclusionary Rule

Suppressing police observations promotes the primary purpose of the exclusionary rule by removing an incentive for officers to violate the Fourth Amendment. This would substantially affect illegal traffic stops because the vast majority of traffic stops are prosecuted based solely on the officer's observations. Thus, if an officer knows that any observation evidence resulting from a violation will be suppressed, they are less likely to take their chances with hopes of discovering evidence of further illegalities. Accordingly, this will lead to more privacy

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[74] Katz v. United States, 389 U.S. 347, 358 (1967).
[75] *Id.* at 347.
[76] *Id.* at 353.
[77] *Id.* (emphasis added).
[78] *Id.* at 359.
[79] *Id.*

protection and less police interference for the public, which is the ultimate goal of the exclusionary rule.[80]

iii. Suppressing Police Observations is a "Simpler Solution" to the Tolentino *Question*

One common overarching theme when implementing a new rule of law is efficiency. Suppressing police observations stemming from a Fourth Amendment violation is a "simpler solution"[81] that would resolve a majority of cases where there are disputes over what evidence should and should not be considered suppressible. Thus, suppressing police observations would decrease the energy spent litigating which specific objects should be suppressed and increase the efficiency of courts.

5. Supreme Court Justices Recognized that Police Observations Should be Suppressed During Oral Arguments of *Tolentino*

In March 2011, during oral arguments of *Tolentino,* Justice Scalia offered the following solution to the dispute between the prosecution and the counsel for the defense, regarding whether declaring preexisting records immune from suppression would create an incentive for police officers to make suspicionless stops:

> Not—not if you allow the *suppression of the policeman's identification of the individual driving the car*. I mean, that—nobody's contending that that can't be suppressed. So if you can't bring in the policeman to say, yes, this fellow Smith, whose record we have here, was the fellow driving the car. Once that's out, what incentive is there to make these suspicionless stops? . . . What I'm saying is, you're getting at it from the wrong end. *What should have been suppressed was the policeman's identification of the person who was driving the car*.[82]

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[80] *See generally* Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

[81] Oral Arg. at 21, Tolentino v. New York, 131 S. Ct. 1387 (2011) (No. 09-11556) 2011 WL 972574. (Justice Alito felt that the simpler solution to cases like *Tolentino*, is suppressing the police officer's observations rather than focusing on suppressing matters that are in government records) *Id.*

[82] *Id.* at 20.

Justice Scalia's comments were further supported by Justice Alito who said that rather than suppressing matters that are in the government record, "suppress observations by the police on the scene that flow directly from the illegal stop[.]"[83] These comments are in line with the Court's holdings in *Katz* and *Crews* and show that the justices recognize that police observations flowing from a Fourth Amendment violation must be suppressed.

6. Possible Reasons Why so Many Lower Courts Overlook Suppressing Police Observations

Courts have overlooked suppressing police observations for several reasons: First, the exclusionary rule is routinely applied in cases involving tangible evidence. Notably, the cases that implemented the exclusionary rule, *Weeks v. United States* and *Mapp v. Ohio*, both dealt with tangible evidence. Secondly, in many cases where a defendant is seeking suppression of evidence, there is suppressible tangible evidence, which leads to the dismissal of the charge against the defendant. For example, if a police officer stops a vehicle illegally and sees drugs in the car, and those drugs are subsequently suppressed, that is the end of the case. Thus, there is no need to suppress the officer's observations of the defendant in proximity to drugs. Accordingly, this has led to few cases where the suppression of intangible evidence is an issue being disputed.

B. Lopez-Mendoza *Refers Only to Identity Evidence with Regard to a Defendant Defeating Jurisdiction, Therefore Identity Evidence is Suppressible*

It has long been established that a defendant's "body" or "identity" cannot be suppressed to defeat a court's jurisdiction over that defendant.[84] However, some courts relying on *Lopez-Mendoza* have mistakenly extended this doctrine too far, even holding that "identity-related" evidence flowing from a Fourth Amendment violation is not suppressible. while other courts have correctly interpreted *Lopez-Mendoza* to suggest that one's identity is

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[83] *Id.* at 21.

[84] I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (citing Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Frisbie v. Collins, 342 U.S. 519, 522 (1952)).

suppressible evidence. Therefore, even if police observations are not suppressable, a defendant's identity may be.

1. Courts Misinterpreting *Lopez-Mendoza*

Relying on the interpretation of *Lopez-Mendoza*[85] in the cases of *United States v. Roque-Villanueva*,[86] and *United States v. Guzman-Bruno*,[87] the Court of Appeals of New York in *People v. Tolentino* held "that a defendant may not invoke the fruit-of-the-poisonous-tree doctrine when the only link between improper police activity and the disputed evidence is that the police learned the defendant's name."[88] Examining *Lopez-Mendoza* through its more recent interpretations among the circuits, it is argued that this holding is improper.

2. Courts Correctly Interpreting *Lopez-Mendoza*

i. Lopez-Mendoza *Refers to Jurisdiction and the* Ker-Frisbie *Doctrine*

In the case of *United States v. Oscar-Torres*,[89] the Fourth Circuit determined for several reasons, that *Lopez-Mendoza* "does not prohibit suppression of evidence of a defendant's identity."[90]

First, the court reviewed the cases cited in support of *Lopez-Mendoza*, finding that all of the authority refers to a "court's jurisdiction over a defendant himself, *not* suppression of unlawfully obtained evidence relating to his identity."[91] Moreover, the court determined that the so called "identity statement" merely references "the long-standing rule, known as the *Ker-Frisbie* doctrine, that illegal police activity affects only the admissibility of evidence; it does not affect the jurisdiction of the

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[85] *Lopez-Mendoza,* 468 U.S. at 1032.

[86] United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999) (holding that neither a person's identity nor his INS file are suppressible in a § 1326 criminal proceeding, even if the defendant was unlawfully stopped).

[87] *See* United States v. Guzman-Bruno, 27 F.3d 420 (9th Cir. 1994) (indicating that a defendant's statement of identity need not be suppressed in a § 1326 criminal proceeding merely because it was obtained as the result of an unlawful arrest). *Id.*

[88] People v. Tolentino, 14 N.Y.3d 382, 388 (N.Y. App. Div. 2010).

[89] United States v. Oscar-Torres, 507 F.3d 224 (4th Cir. 2007).

[90] *Id.* at 228.

[91] *Id.*

trial court or otherwise serve as a basis for dismissing the prosecution."[92]

Second, looking at the context of both of the suppression claims present in *Lopez-Mendoza*, the court likewise determined that the Supreme Court intended only to restate the established *Ker-Frisbie* doctrine.[93] Finally, after reviewing other Supreme Court precedents both before and after the *Lopez-Mendoza* decision, the court concluded that the precedents support their interpretation of the "identity statement" in question.[94]

ii. Lopez-Mendoza *Contains No language Distinguishing "Identity-Related" Evidence From Any Other Type of Evidence*

The Eighth Circuit in *United States v. Guervara-Martinez*, analyzed whether fingerprint evidence obtained as the result of an unlawful arrest and detention requires suppression under *Lopez-Mendoza*.[95] Looking at the absence of any language distinguishing "identity-related" evidence from any other type of evidence, and the ease in which the Supreme Court could have said that "identity-related" evidence was exempt from the "general rule,"[96] the court concluded "that *Lopez-Mendoza*'s statement about the suppression of identity only refers to jurisdictional challenges, not to fingerprint evidence challenged in a criminal proceeding."[97]

Additionally, the court rejected "the government's contention that *Davis* and *Hayes* are inapposite because the police did not detain [the defendant] for the sole purpose of getting his fingerprints."[98] Rather the court chose to apply the exclusionary rule to suppress any evidence obtained "by exploitation" of the

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[92] *Id.*

[93] *Id.* The court reached this conclusion by examining the detail in which the Supreme Court considered Sandoval-Sanchez's objection to identity evidence being admissible. Finding that the Supreme Court "considered this contention at length, deeming it 'more substantial' than Lopez-Mendoza's contention and apparently not settled by the 'identity statement.'" *Id.* at 229.

[94] *Id.* at 228; *see* Hayes v. Florida, 470 U.S. 811, 816 (1985); Davis v. Mississippi, 394 U.S. 721, 727 (1969). Determining that in both these cases "the Court has specifically held that in some circumstances the exclusionary rule *requires* suppression of . . . identity evidence…."[.]507 F.3d at 229.

[95] United States v. Guervara-Martinez, 262 F.3d 751, 753 (8th Cir. 2001).

[96] *Id.* at 754.

[97] *Id.*

[98] *Id.* at 755.

primary constitutional violation instead of "by means sufficiently distinguishable to be purged of the primary taint."[99]

Finally, for the same reasons offered, in *United States v. Oliverares-Rangel*[100], the Tenth Circuit chose not to read *Lopez-Mendoza* as excluding suppression of all evidence that shows a defendant's identity, but "[r]ather, [that] the Supreme Court's statement that the 'body' or identity of a defendant are 'never suppressible' applies only to cases in which the defendant challenges the jurisdiction of the court over him . . . , not to cases in which the defendant only challenges the admissibility of the identity-related evidence."[101] Thus, the court used the exclusionary rule as generally applied to determine whether a defendant's identity should be suppressed under the circumstances.[102]

These courts' holdings and reasoning for those holdings demonstrate that the exclusionary rule should be generally applied to identity evidence, and therefore a defendant's identity should be suppressed if it was obtained by way of a constitutional violation.

C. Pre-Existing Records are Suppressible Despite the "Independent Source" and "Inevitable Discovery" Doctrines

The prosecution in *Tolentino* argued that pre-existing records are immune to suppression because of the "independent source" and "inevitable discovery" doctrines.[103] Quite the contrary, pre-existing records that are obtained through information gained as a result of an unlawful search or seizure still should be considered suppressible evidence under *Nix* and *Murray*.

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[99] *Id.* (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

[100] United States v. Olivares-Rangel, 458 F.3d 1104 (10th Cir. 2006).

[101] *Id.* at 1111. The court premised this reasoning by looking at the cases the Supreme Court cited in support of their proposition. *See* Frisbie v. Collins, 342 U.S. 519, 522 (1952); Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

[102] *Olivares-Rangel*, 458 F.3d at 1112.

[103] Br. for Resp't at 27, Tolentino v. New York, 131 S. Ct. 1387 (2011) (No. 09-11556), (2011) WL 661700.

1. The "Independent Source" Doctrine Requires an Actual Path to the Source Independent the Illegality, Which is not Present in Typical *Tolentino* Type Cases

In *Nix v. Williams*, the Supreme Court explained that when determining what evidence should be suppressed as fruit of unlawful police conduct, police are not to be put in a better or worse position than they would be had no violation occurred.[104] This is the ultimate notion behind the independent source rule, which the court says, "allows admission of evidence that has been *discovered by means wholly independent* of any constitutional violation."[105]

To illustrate, in *State v. Starr*,[106] a police officer unlawfully stopped the defendant and asked for his driver license, subsequently arresting the defendant for driving with a suspended license. The trial court held that all evidence obtained as a result of that stop be suppressed including pre-existing records.[107] The state appealed, arguing that the officer was entitled to know the defendant's name, and therefore the officer had an *independent source* from which he could have discovered the status of defendant's license.[108]

The Court of Appeals of Oregon rejected this argument and affirmed the trial court's ruling, finding that defendant's identity was obtained as a result of the unlawful stop, and thus the officer did not have any "authority to compel defendant to do anything, including giving his name."[109] Simply put, there was no source independent of the unlawful violation, which led the officer to the pre-existing records, therefore the records were suppressed.

Applying the independent source rule, as understood in *Nix* and as applied in *Starr*, to the scenario in *Tolentino*, it is apparent that the police did not seek the pre-existing records by means independent of the unlawful seizure, but chose that path only after the unlawful violation occurred. Granted, if an eyewitness had told the officers that Tolentino was driving the car before

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[104] Nix v. Williams, 467 U.S. 431, 443 (1984).
[105] *Id.* (emphasis added).
[106] State v. Starr, 91 Or. App. 267 (1988).
[107] *Id.* at 269.
[108] *Id.* at 270.
[109] *Id.*

stopping Tolentino, then the evidence would have been discovered by means wholly independent of any constitutional violation. However, the police officers had no such "independent source" but only sought the evidence of illegality from the DMV after unlawfully stopping Tolentino and asking for his name. It is not enough that government officials "independent" of the unlawful stop compiled the records, but rather the investigating officers' path to discovery of the records must be wholly independent of the unlawful stop.

2. The "Inevitable Discovery" Doctrine Requires a Hypothetical Path Independent of the Illegality, Which is also not Present in Typical *Tolentino* Type Cases

Similarly, the "inevitable discovery" doctrine provides that the exclusionary rule should not be applied if the evidence "would have been obtained inevitably" by lawful means.[110] Police officers do not possess DMV records. They only obtain them after they learn a defendant's identity as a result of the illegal stop. Without the illegal stop, officers not have the defendant's name and would not obtain the records from the DMV.

In such a scenario, there is no hypothetical path to the DMV records officers would have actually pursued absent the traffic stop because they would 1) not know what name to run, and 2) they would not have any reason to run an individual's name. Accordingly, circumstances surrounding unlawful traffic stops, where one's identity leads to the officer searching pre-existing records for evidence of criminal conduct, advocates suppression of pre-existing records stemming from an unlawful seizure. Without the illegal traffic stop, officers would not have the defendant's name and no reason to obtain the records from the DMV.

CONCLUSION

Courts should suppress police observations, a defendant's identity, and pre-existing records that flow from an illegal traffic stop. This is so for several reasons: First, the U.S. Supreme Court has rightly chosen not to make an exception for intangibles

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[110] United States v. Crews, 445 U.S. 463, 471 (1980).

including observations and statements. Second, as two Supreme Court justices have recognized, suppressing police observations is the "simplest solution" for resolving the *Tolentino* question. Third, as several circuits' more recent interpretation of *United States v. Lopez-Mendoza* demonstrate, it is clear that *Lopez-Mendoza* refers only to a court's exercise of jurisdiction over a defendant, not their identity as evidence. Fourth, suppressing pre-existing records discovered fully comports with both the "independent source" and "inevitable discovery" doctrines because they each require an *independent path* to the evidence, which is not present in typical illegal traffic stops. Finally, allowing police to make illegal traffic stops and avoid the exclusion flowing from the illegality would undercut the privacy and liberty interests the Fourth Amendment was intended to protect. Therefore, the courts, as guardians of our constitutional rights, should vindicate the Fourth Amendment and suppress police observations and all other "identity-related" evidence flowing from illegal traffic stops.

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