No. 14-_____

In the
Supreme Court of the United States

STATE OF UTAH,
Petitioner,

vs.

EDWARD JOSEPH STRIEFF, JR.,
Respondent.

On Petition for a Writ of Certiorari
to the Utah Supreme Court

Petition for Writ of Certiorari

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QUESTION PRESENTED

Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?

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The State of Utah respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court.

OPINIONS BELOW

The opinion of the Utah Supreme Court is reported at 2015 UT 2, 778 Utah Adv. Rep. 48 (App. 1-36). That court reversed the opinion of the Utah Court of Appeals, which is reported at 2012 UT App 245, 286 P.3d 317 (App. 37-98). The order of the state district court in which the question presented was first decided is not published (App. 99-103).

JURISDICTION

The judgment of the Utah Supreme Court was entered on January 16, 2015. On April 6, 2015, an extension was granted to file the petition for a writ

of certiorari to and including May 18, 2015. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV:

> 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.

STATEMENT OF THE CASE

1. *Factual background*. A warrant was issued for respondent Edward Strieff's arrest on a traffic matter and remained outstanding until narcotics detective Doug Fackrell learned of the warrant during an investigatory stop on December 21, 2006. App. 5; R125:2.

* * *

In December 2006, an anonymous caller left a message on a police drug tip line reporting "narcotics activity" at a South Salt Lake residence. App. 4. To corroborate the tip, Detective Fackrell—an 18-year veteran with specialized training in drug enforcement—conducted intermittent surveillance of the home over the course of a week. App. 4; R125:2-3. He saw some "short term traffic" at the home (visitors would stay and then leave within a few minutes).

App. 4. Although not "terribly frequent," the short term visits were more than that at a typical house and, in the detective's experience, were consistent with drug sales activity. App. 4.

While watching the home on December 21st, Detective Fackrell saw Strieff leave the house—"the same as other people had done that [he'd] been watching"—but he had not seen when Strieff entered the home. App. 4; R125:8. After Strieff walked about a block, Detective Fackrell stopped him in a 7-Eleven parking lot. App. 4, 38.

Detective Fackrell identified himself, explained why he had been watching the house, and asked Strieff what he had been doing there. App. 5. Wanting to know who he was dealing with, the detective also asked Strieff for his identification and ran a warrants check. App. 5; R125:5-6. When dispatch notified Detective Fackrell of Strieff's preexisting warrant, he arrested him. App. 5. In a search of Strieff's person incident to arrest, Detective Fackrell found methamphetamine, a glass drug pipe, and a small plastic scale with white residue. App. 5, 101.

2. *Trial court proceedings*. Strieff was charged with unlawfully possessing methamphetamine and drug paraphernalia. App. 5. He moved to suppress the evidence seized in the search incident to his arrest, arguing that it was fruit of an unlawful investigatory stop. App. 5. The prosecutor conceded that Detective Fackrell was a fact or so shy of reasonable

suspicion to justify an investigatory stop, but argued that exclusion was not appropriate under the attenuation doctrine. App. 5. The district court agreed and denied the motion to suppress and a subsequent motion to reconsider. App. 6, 99-103.

Strieff pleaded guilty to possession of drug paraphernalia and an amended charge of attempted possession of a controlled substance, but reserved the right to appeal the order denying his motions to suppress and reconsider. App. 6.

3. *Intermediate appellate review*. The Utah Court of Appeals affirmed. App. 37-98. Relying on *Brown v. Illinois*, 422 U.S. 590 (1975), the court held that the arrest on "the preexisting warrant was an intervening circumstance that, coupled with the absence of purposefulness and flagrancy on the part of Officer Fackrell in detaining Strieff, sufficiently attenuated" the taint of the unlawful detention. App. 83-84. The court rejected Strieff's claim—espoused by the dissent (App. 84-98)—that because the inevitable discovery doctrine cannot provide relief, the attenuation doctrine cannot do so. *See* App. 43-49.

4. *Utah Supreme Court review*. The Utah Supreme Court granted certiorari and reversed. The court recognized that Strieff was lawfully arrested on the outstanding warrant and lawfully searched incident to that arrest. App. 32. But the court held that the evidence should nonetheless be suppressed because of the prior, unlawful stop. App. 34. The

Utah court conceded that in these circumstances, lower courts have widely treated a warrant-arrest as an intervening event that tends to attenuate the taint of prior illegality. App. 2-3. But the Utah court adopted a minority position—holding that the attenuation doctrine does not apply "at all" to the outstanding warrant scenario, but is instead limited to "intervening circumstances involving a defendant's independent acts of free will (such as a confession and perhaps a consent to search)." App. 25-27, 31.

The state supreme court noted that this Court has never addressed the attenuation doctrine's applicability to the preexisting warrant scenario. App. 2. Left with only "tea leaves," the Utah court identified three reasons for rejecting the doctrine's application in these circumstances. App. 36. First, the court opined that an arrest on a preexisting warrant would not be treated as an "intervening cause" under the tort theory of proximate causation—because the warrant is neither a "subsequent, independent occurrence" nor an "unforeseeable" event. App. 28-29. Second, the court surmised that this Court would not treat such an arrest as an intervening event, because all of this Court's attenuation cases have involved confessions, and the factors relevant in assessing attenuation in confession cases seem "ill-suited to the outstanding warrant scenario." App. 20 & n.4, 29-31. Finally, the court concluded that applying the doctrine in this context would "ultimately swallow the inevitable discovery exception." App. 31-34.

REASONS FOR GRANTING THE PETITION

The question in this case is whether evidence seized incident to a lawful arrest on a preexisting warrant should be suppressed because the warrant was discovered during an investigatory stop later found to have been unlawful. This question involves a longstanding, acknowledged conflict among lower courts over whether, or how, this Court's attenuation doctrine applies under these circumstances.

* * *

Because suppression "exacts a heavy toll on both the judicial system and society at large," *Davis v. United States*, 131 S.Ct. 2419, 2427 (2011), application of the exclusionary rule is the Court's "last resort, not [its] first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Suppression is appropriate only when the deterrent value of exclusion "outweigh[s] its heavy costs." *Davis*, 131 S.Ct. at 2427. The attenuation doctrine was born of this principal.

Under the attenuation doctrine, evidence acquired as a result of unlawful police conduct is not suppressed if the causal connection "has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint'" of the original illegality. *United States v. Crews*, 445 U.S. 463, 471 (1980). The question, then, is not one of but-for causality alone, but "whether, granting establishment of the primary illegality, the [tainted] evidence . . . has been come at by exploitation of that

illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1975) (quotation marks and citation omitted).

Beginning with *Wong Sun*, this Court has most often addressed the attenuation doctrine in the context of confessions following an illegal arrest. The relevant question in those cases is whether the defendant's decision to talk to the police "was sufficiently an act of free will" to break the causal connection between the illegality and the verbal evidence. *Id.* at 486. In *Brown v. Illinois*, the Court identified three factors necessary to answering that question: the "temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." 422 U.S. 590, 603-04 (1975).

But as the Utah court noted, "a gap of substantial significance" persists in this Court's attenuation jurisprudence. App. 35. This Court has never addressed whether, or how, the attenuation doctrine (and the *Brown* analysis in particular) applies to the preexisting warrant scenario—where, during a presumptively illegal stop, police discover a preexisting warrant, lawfully arrest the subject on that warrant, and seize contraband incident to that arrest. App. 35; *State v. Bailey*, 338 P.3d 702, 709-10 (Or. 2014) (en banc).

The Court's silence has bred widespread disagreement and confusion among the many lower courts that have addressed the issue. Review by the Court is necessary to resolve this intractable conflict on an important and frequently arising issue—and to prevent courts from needlessly "ignor[ing] reliable, trustworthy evidence." *Davis*, 131 S.Ct. at 2427.

A. Courts are deeply divided over whether and how the attenuation doctrine applies to the preexisting warrant scenario.

Although lower courts have grappled with the issue for years, they remain deeply divided—both as to the doctrine's applicability to preexisting warrant cases and as to the contours of its application. Depending on whether they apply the attenuation doctrine, or how they apply the doctrine, lower courts fall into one of three camps: (1) those that exclude the evidence only if the police engaged in flagrant misconduct (the majority); (2) those that always exclude the evidence; and (3) those that never exclude the evidence.

1. In most jurisdictions, evidence seized incident to a warrant-arrest will not be excluded unless the initial stop was flagrantly unlawful.

The Seventh Circuit in *United States v. Green*, 111 F.3d 515, 520-24 (7th Cir.), *cert. denied*, 522 U.S. 973 (1997), held that an arrest on a preexisting warrant is an intervening circumstance that purges the

taint of an unlawful investigatory stop, unless the stop was the product of flagrant police misconduct. *Green* explained that "'[b]ecause the primary purpose of the exclusionary rule is to discourage police misconduct, application of the rule does not serve this deterrent function when the police action, although erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights.'" *Id.* at 523 (citation omitted).

The majority of courts to address the issue have adopted *Green's* rationale, including the Eighth Circuit Court of Appeals and 11 state high courts. *See United States v. Simpson*, 439 F.3d 490, 495-96 (8th Cir. 2006) (holding warrant-arrest attenuated taint of nonflagrant, unlawful stop); *State v. Hummons*, 253 P.3d 275, 277-79 (Ariz. 2011) (same); *People v. Brendlin*, 195 P.3d 1074, 1078-81 (Cal. 2008) (same), *cert. denied*, 556 U.S. 1192 (2009); *State v. Frierson*, 926 So.2d 1139, 1143-45 (Fla.) (same), *cert. denied*, 549 U.S. 1082 (2006); *State v. Page*, 103 P.3d 454, 458-60 (Ida. 2004) (same); *State v. Hill*, 725 So.2d 1282, 1283-88 (La. 1998) (same); *Cox v. State*, 916 A.2d 311, 318-24 (Md. 2007) (same); *State v. Grayson*, 336 S.W.3d 138, 148 (Mo. 2011) (en banc) (holding warrant-arrest did not purge taint because stop was nothing more than "fishing expedition" based on hunch "in the hope that something might turn up"); *State v. Shaw*, 64 A.3d 499, 512 (N.J. 2012) (holding warrant-arrest did not purge taint because "random detention of an individual for the purpose of running

a warrant check . . . cannot be squared with values that inhere in the Fourth Amendment"); *Jacobs v. State*, 128 P.3d 1085, 1087-89 (Okla. Crim. App. 2006) (holding warrant-arrest attenuated taint of nonflagrant, unlawful stop); *State v. Bailey*, 338 P.3d 702, 715 (Or. 2014) (en banc) (holding warrant-arrest did not purge taint because "it should have been obvious to the officers that they had extended the detention without regard to defendant's right to be free from an unreasonable seizure"); *State v. Mazuca*, 375 S.W.3d 294, 306-10 (Tex. Crim. App. 2012) (holding warrant-arrest attenuated taint of nonflagrant, unlawful stop), *cert. denied*, 133 S.Ct. 1724 (2013).

Six intermediate state courts also land in this camp. *See McBath v. State*, 108 P.3d 241, 247-50 (Alaska App. 2005) (holding warrant-arrest attenuated taint of nonflagrant, unlawful stop); *People v. Mitchell*, 824 N.E.2d 642, 649-50 (Ill. App. 2005) (holding warrant-arrest did not purge taint because defendant stopped "for no apparent reason other than to run a warrant check"); *Quinn v. State*, 792 N.E.2d 597, 599-603 (Ind. App.), (holding warrant-arrest attenuated taint of nonflagrant, unlawful stop), *transfer denied*, 804 N.E.2d 753 (Ind. 2003); *Hardy v. Commonwealth*, 149 S.W.3d 433, 435-36 (Ky. App. 2004) (same); *People v. Reese*, 761 N.W.2d 405, 413-14 (Mich. App. 2008) (same); *State v. Soto*, 179 P.3d 1239, 1245 (N.M. App. 2008) (holding warrant-arrest did not purge taint because officers stopped defendant based on nothing more than

"vague notion that they would obtain [his] personal information"), *cert. quashed*, 214 P.3d 793 (N.M. 2009). Before its reversal below, Utah's intermediate appellate court also fell in this camp. *See* App. 49-84.

Courts in the *Green* camp treat the warrant-arrest as an intervening circumstance that triggers attenuation analysis. They generally treat *Brown's* temporal proximity factor as having little or no relevance in assessing whether the intervening warrant-arrest was sufficient to purge the taint of illegality. *See, e.g.*, *Simpson*, 439 F.3d at 495 (holding that courts "need not focus on the first *Brown* factor"); *Brendlin*, 195 P.3d at 1080 (holding temporal proximity was "outweighed" by other *Brown* factors). Instead, they focus on *Brown's* flagrancy factor: If the police illegality was flagrant, the evidence is suppressed; but if not, it is admitted. *See* cases cited, *supra*, at 8-10. Their focus on flagrancy aligns perfectly with this Court's precedent that exclusion is warranted only if it "serves to deter deliberate, reckless, or grossly negligent conduct." *Herring v. United States*, 555 U.S. 135, 144 (2009).

Had this case arisen in any of the 19 jurisdictions in this camp, the evidence would not have been excluded. As held by the intermediate appellate court, Detective Fackrell's conduct "amounted to a misjudgment," not "a deliberate or glaring violation of Strieff's constitutional rights or the result of official indifference to them." App. 71-72. The evidence

found on Strieff in the lawful search incident to arrest would therefore be admissible under the *Green* approach. *See* App. 57-84.

2. In several jurisdictions, evidence seized incident to a warrant-arrest will always be excluded.

In contrast, the Sixth Circuit and four state high courts—including the Utah Supreme Court—have treated (or effectively treated) a warrant-arrest as a circumstance that cannot save tainted evidence from exclusion. Three courts apply the attenuation doctrine to preexisting warrant cases, but treat the *Brown* factors in such a way that a warrant-arrest could never result in attenuation. The other two hold that the attenuation doctrine simply does not apply, reasoning that a warrant-arrest is not an intervening event.

The Sixth Circuit in *United States v. Gross*, 662 F.3d 393 (6th Cir. 2011), applied the attenuation doctrine, but refused to adopt the Seventh Circuit's *Green* analysis. *See id.* at 404 (emphasizing its "recent and express pronouncement" that it has "not adopted the Seventh Circuit cases"). The Sixth Circuit found that *Brown's* flagrancy factor was "a wash," weighing neither in favor of nor against exclusion, because the arresting officer in the case could not be charged with knowing that the stop was illegal. *Id.* at 406. Had the case been decided under *Green*, the nonflagrant nature of the stop would have

resulted in attenuation and admission of the evidence. But the Sixth Circuit held otherwise, concluding that the intervening warrant-arrest did "not suffsuffice to break the chain of causation," especially where the evidence was discovered shortly after the defendant's arrest, *id.*—a fact "in essentially every" preexisting warrant case. *McBath*, 108 P.3d at 248.[1]

Thus, unlike the Seventh and Eighth Circuits, an intervening warrant-arrest in the Sixth Circuit carries negligible weight in attenuation analysis—insufficient to purge the taint of even *nonflagrant* police illegality. The supreme courts of Kansas and Colorado have reached similar conclusions.

The Kansas Supreme Court in *State v. Moralez*, 300 P.3d 1090, 1103 (Kan. 2013), held that an intervening warrant-arrest was "essentially . . . neutral"—"neither weighing in favor of nor against suppression." It also treated the short time lapse between the illegality and the arrest as "weigh[ing] heavily in favor of suppression." *Id.* And the Colorado Supreme Court in *People v. Padgett*, 932 P.2d 810, 817 (Colo. 1997) (en banc), treated close temporal proximity as dispositive—holding that the tainted evidence was not attenuated because it was acquired

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[1] Although the evidence in *Gross* was not found in a search incident to arrest—Gross managed to conceal it—it was found "just a short time" after he was transported to the jail. 662 F.3d at 397, 406.

"in temporal and physical proximity" to an unlawful stop, "without sufficient intervening time and circumstances to carry the prosecution's burden of proof to demonstrate dissipation of the taint."

The high courts in two other states have also foreclosed a finding of attenuation in preexisting warrant cases, but for a different reason—holding that a warrant-arrest does not constitute an intervening event. On this point, the Utah Supreme Court held that the "attenuation doctrine is directed only at intervening circumstances involving a defendant's independent acts of free will." App. 31. Less than two weeks later, the Nevada Supreme Court rejected the doctrine's application for the same reason, holding that the attenuation doctrine did not apply because "there was no demonstration of an act of free will by the defendant to purge the taint." *Torres v. State*, 341 P.3d 652, 658 (Nev. 2015).[2]

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[2] The Sixth Circuit in *Gross*, 662 F.3d at 404, and the Nevada Supreme Court in *Torres*, 341 P.3d at 658, identified the Ninth and Tenth Circuits and Tennessee as also falling in this camp, citing *United States v. Luckett*, 484 F.2d 89, 90-91 (9th Cir. 1973), *United States v. Lopez*, 443 F.3d 1280, 1286 (10th Cir. 2006), and *State v. Daniel*, 12 S.W.3d 420 (Tenn. 2000). All three cases held that evidence discovered incident to a warrant-arrest following an unlawful stop should be suppressed. Although these cases may be read as rejecting attenuation in all preexisting warrant cases, it does not appear that the attenuation doctrine had been raised in any of them.

3. In a few jurisdictions, evidence seized incident to a warrant-arrest will never be excluded.

The third camp consists of courts that will always admit the evidence discovered in a lawful search incident to warrant-arrest—regardless of how flagrant the initial police illegality.

The Nebraska Supreme Court in *State v. Thompson*, 438 N.W.2d 131, 137 (Neb. 1989), held that a lineup identification of the defendant the day after he was randomly stopped was not subject to exclusion because "[t]he connection between the illegal stop and the outstanding robbery warrant was so attenuated as to dissipate the taint of the illegal stop."[3] In other words, the warrant-arrest "constitute[d] an intervening circumstance sufficient to break the causal connection between the stop and the lineup." *Id.* The Nebraska court considered neither *Brown's* temporal proximity nor flagrancy factors, but found attenuation on the sole ground that the arrest was "based on a source completely independent of and unrelated to" the circumstances leading to the stop, *i.e.*, the outstanding warrant. *Id.*

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[3] The police officer in *Thompson* testified that he had stopped defendant in response to a dispatch report that a car fitting the description of defendant's car was acting suspiciously, but a dispatch recording disclosed no such report. 438 N.W.2d at 135, 136-37.

The Georgia Court of Appeals in *State v. Cooper*, 579 S.E.2d 754, 755-58 (Ga. App. 2003), *cert. denied* (Ga. July 14, 2003), likewise found attenuation based on an intervening warrant-arrest—without considering temporal proximity or flagrancy. Like the Nebraska court, the Georgia court treated the intervening arrest as dispositive. "'To hold otherwise,'" the court explained, "'would effectively render the outstanding warrant invalid because of po-police conduct unrelated to its issuance, and would immunize [defendant] from arrest for past conduct already properly determined to constitute probable cause for his arrest.'" *Id.* at 757-58 (citation omitted).

The Seventh Circuit may now have joined this camp, but under a different rationale. In *Atkins v. City of Chicago*, 631 F.3d 823 (7th Cir. 2011), the Seventh Circuit considered a federal civil rights action in which Atkins was arrested and jailed (for 37 days) on a parole warrant discovered during an unlawful traffic stop. After addressing *Green* and its progeny, the court explained that "a simpler way to justify the result in those cases (and this one), without talking about 'taints' and 'dissipation' and 'intervening circumstances' . . ., is to note simply that the arrest was based on a valid warrant rather than on anything turned up in the illegal search." *Id.* at 826-27. The Seventh Circuit reasoned that "[i]f police stopped cars randomly, looking for persons against whom there were outstanding warrants, the drivers

and passengers not named in warrants would have good Fourth Amendment claims." *Id.* at 827. On the other hand, "a person named in a valid warrant *has no right to be at large, and so suffers no infringement of his rights when he is apprehended* unless some other right of his is infringed . . . ." *Id.* (emphasis added). Under *Atkins*, then, resort to the attenuation doctrine is unnecessary, and the evidence is admissible, because there is no infringement of a Fourth Amendment right to begin with.

* * *

In sum, courts addressing the attenuation doctrine in preexisting warrant cases have fractured into three different camps, depending on whether they apply the doctrine or how they apply the doctrine. The conflict is outcome-determinative in most cases in which the issue arises, including this one. It is time for this Court to resolve the conflict.

B. The Utah Supreme Court erred in excluding the evidence seized incident to arrest on the preexisting warrant.

The prosecutor in this case conceded that the facts known to Detective Fackrell were just shy of reasonable suspicion to justify an investigatory stop. App. 5; R125:12. The issue here, and in like cases, is whether for that reason, evidence discovered incident to an intervening warrant-arrest should be suppressed. The answer is no.

Operating on "the premise that the challenged evidence [was] in some sense the product of illegal government activity," *Crews*, 445 U.S. at 471—*i.e.*, an investigatory stop unsupported by reasonable suspicion—the Utah courts below turned to the question of attenuation. *See* App. 2, 41, 101. But for the reasons explained by the Seventh Circuit in *Atkins*, *supra*, at 16-17, exclusion was not warranted because there was no Fourth Amendment violation to begin with—Strieff's stop was justified at its inception under the outstanding warrant.[4]

But even assuming police illegality, suppression is not appropriate. The evidence seized in the lawful search incident to arrest did not come "by exploitation" of the challenged stop, but "by means sufficiently distinguishable to be purged of the primary taint," to wit, under the authority of the outstanding warrant. *See Wong Sun*, 371 U.S. at 488.

* * *

It is undisputed that even those who are illegally stopped may be "lawfully arrested on an outstanding warrant" and that a search incident to that arrest is "perfectly appropriate." App. 32; *accord Bailey*, 338 P.3d at 713. For this reason, suppression in a case like this one cannot be defended as deterring the ar-

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[4] Utah made this argument in the Utah Supreme Court as an alternative ground to affirm the court of appeals' decision. State's Brf. below, at 9-12.

rest or the search incident to arrest. Rather, the object of suppression is to deter investigatory stops that are unsupported by reasonable suspicion. Applying the exclusionary rule is unwarranted in these circumstances because it "'fails to yield 'appreciable deterrence.'" *Davis*, 131 S.Ct. at 2426-27 (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)). The exclusionary remedy is thus not "worth the price paid." *Herring*, 555 U.S. at 144.

The attenuation doctrine "'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its costs.'" *United States v. Leon*, 468 U.S. 897, 911 (1984) (quoting *Brown*, 422 U.S. at 609 (Powell, J., concurring in part)). That point is reached where—"because of time or other intervening factors"—applying the rule "can serve little purpose." *Brown*, 422 U.S. at 610 (Powell, J., concurring in part); *accord Herring*, 555 U.S. at 141 (holding that exclusionary rule "applies only where it 'results in appreciable deterrence'"). Under the circumstances presented here, that point was reached when Strieff was arrested under the preexisting warrant.

1. *Intervening warrant-arrest*. As the Seventh Circuit recognized in *Green*, a lawful arrest on a preexisting warrant—as occurred here—is an intervening circumstance of substantial significance. Compared to a confession or consent-to-search, a

warrant-arrest represents "an even more compelling case for the conclusion that the taint of the original illegality is dissipated." *Green*, 111 F.3d at 522. This is because unlike a confession or consent-to-search, "[a] warrant is not reasonably subject to interpretation or abuse." *Brendlin*, 195 P.3d at 1080 (citing *Green*). The validity of a preexisting warrant is "completely independent of the circumstances that led the officer to initiate" the stop. *Id.* And unlike a confession or consent, a warrant-arrest's validity does not turn on an evaluation of the complex "workings of the human mind." *Brown*, 422 U.S. at 603.

Even more to the point, suppressing the fruits of a lawful search incident to a warrant-arrest under these circumstances serves little purpose. The discovery of an outstanding warrant is a fortuitous event—one upon which an officer cannot safely rely. In the vast majority of stops, a preexisting warrant will not be found and the fruits of the unlawful stop will be suppressed. This represents a substantial and abiding deterrent. *See Mitchell*, 824 N.E.2d at 650 (observing that "possibility that the object of their endeavor will be suppressed if they engage in some unlawful practice is an effective deterrent").

In those relatively few cases where a preexisting warrant is discovered, suppression "'will not further the ends of the exclusionary rule in any appreciable way.'" *Leon*, 468 U.S. at 920 (citation omitted). As in this Court's good-faith cases, "the marginal or nonex-

istent benefits produced by suppressing [the] evidence . . . cannot justify the substantial costs of exclusion." *Id.* at 922. Accordingly, an arrest on an outstanding warrant represents a significant intervening event which disrupts the causal link between the illegality and the evidence.

The Utah Supreme Court held otherwise, concluding that the attenuation doctrine "is directed only at intervening circumstances involving a defendant's independent acts of free will (such as a confession and perhaps a consent to search)." App. 31. The state court's holding was largely premised on its observation that this Court's "attenuation cases have all involved *confessions* made by unlawfully detained individuals." App. 20. But that observation is incorrect. On at least two occasions this Court has applied the attenuation doctrine under circumstances not involving a defendant's free will. *See United States v. Ceccolini*, 435 U.S 268 (1978) (holding that trial testimony was sufficiently attenuated from unlawful police conduct that led to discovery of witness's knowledge); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (holding that intervening commitment by magistrate attenuated lineup identification tainted by unlawful arrest).

In sum, Strieff's warrant-arrest was a significant intervening event which served to substantially weaken, if not sever, the causal chain between the illegality and the discovery of the evidence. Simply

put, suppression is not "worth the price paid" in the relatively few cases where a preexisting warrant is discovered in the course of a stop, the subject is lawfully arrested on the warrant, and evidence is seized incident thereto. *Herring*, 555 U.S. at 144.

2. *Flagrancy*. *Green* and its adherents have pointed to one possible exception—when police make random, dragnet-type, or otherwise arbitrary stops. *See Hummons*, 253 P.3d at 278; *Grayson*, 336 S.W.3d at 148-49; *Shaw*, 64 A.3d at 512; *Mazuca*, 375 S.W.3d at 306. To deter such conduct, suppression might be appropriate when the illegality should have been "obvious" to police, *Brown*, 422 U.S. at 605, or when police otherwise acted in "reckless disregard of constitutional requirements," *Herring*, 555 U.S. at 147-48. But exclusion for conduct short of this "cannot pay its way." *Leon*, 468 U.S. at 908 n.6.

As held by the intermediate appellate court, the investigatory stop in this case was not so flagrant as to justify suppression of the evidence seized in the lawful search incident to the warrant-arrest. *See* App. 70 (holding that officer "did not target Strieff in knowing or obvious disregard of constitutional limitations"). The police had received an anonymous report on its drug tip line that "narcotics activity" was occurring in the home. App. 4. Had the stop been based on the tip alone, it might have been an obvious Fourth Amendment violation. *See Navarette v. California*, 134 S.Ct. 1683, 1688 (2014) (holding that

anonymous tip alone seldom creates reasonable suspicion). But Detective Fackrell acted on "more than the tip itself." *Alabama v. White*, 496 U.S. 325, 329 (1990).

Detective Fackrell conducted some three hours of intermittent surveillance over the course of a week. App. 4. And that surveillance corroborated the tip: Detective Fackrell observed short-term traffic that, in his experience as a trained narcotics detective, was consistent with drug sales activity. App. 4; R125:2-3. Under these circumstances, it was reasonable for Detective Fackrell to believe that he could lawfully stop Strieff to investigate. *See Navarette*, 134 S.Ct. at 1688 (holding that anonymous tip corroborated by police "can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion' ") (citation omitted). The prosecutor later conceded that Detective Fackrell was a fact or so shy of reasonable suspicion—having not seen Strieff enter the house, Detective Fackrell could not infer that he was a short term visitor there to buy drugs. *See* App. 5. But if not a short term visitor buying drugs, Strieff could have been a resident selling them.

In any case, the question is not whether reasonable suspicion existed. As in all attenuation cases, illegality is presumed. *Crews*, 445 U.S. at 471. The question is whether " 'a reasonably well trained officer would have known that the [detention] was illegal' in light of 'all of the circumstances.' " *Herring*,

555 U.S. at 145 (quoting *Leon*, 468 U.S. at 922 n.23). Given this Court's jurisprudence and Detective Fackrell's corroborative efforts, his decision to investigate was at worst a "reasonable but mistaken judgment[ ]." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011) (discussing § 1983 claim).[5]

3. *Temporal proximity.* As noted, *supra*, at 7, *Brown* identified the temporal proximity of the illegality and the defendant's statement as a relevant factor in assessing attenuation in confession cases. Temporal proximity is logically relevant in confession and consent-to-search cases because the shorter the interval between the illegality and confession or consent, the more likely the illegality "bolstered the pressures" to confess or consent and the less likely the confession or consent was "sufficiently a product

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[5] Some courts have also inquired into an officer's subjective motives in assessing *Brown's* flagrancy factor. *See, e.g.*, *Brendlin*, 195 P.3d at 1081 (concluding that record did not show officer "invented a justification for the traffic stop") (internal quotation marks and citation omitted); *Frierson*, 926 So.2d at 1144-45 (concluding that record did not show stop was "pretextual or in bad faith"). But the law is settled that "[t]he pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness [or motives] of arresting officers." *Herring*, 555 U.S. at 145. Thus, when assessing flagrancy, the inquiry "'is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the [stop] was illegal' in light of 'all of the circumstances.'" *Id.* (quoting *Leon*, 468 U.S. at 922 n.23).

of free will [to] break, for Fourth Amendment purposes, the causal connection." *See Brown*, 422 U.S. at 603, 605 n.12; *accord Green*, 111 F.3d at 522 (applying same reasoning); *Simpson*, 439 F.3d at 495 & n.3 (same); *Shaw*, 64 A.3d at 509-10 (same).

But the same cannot be said in preexisting warrant cases. In the case of a warrant-arrest, "consent (or any act for that matter) by the defendant is not required." *Green*, 111 F.3d at 522. Nothing a defendant does at the time of the stop affects the existence of the preexisting warrant. Thus, "[a]ny influence the unlawful stop would have on the defendant's conduct is irrelevant." *Id.* For that reason, *Brown's* temporal proximity factor is not relevant here.

* * *

In sum, because Detective Fackrell's investigatory stop was not flagrantly unlawful, the intervening warrant-arrest broke the causal chain between the stop and discovery of evidence on Strieff's person. Under these circumstances, the evidence did not come "by exploitation" of the challenged stop, but "by means sufficiently distinguishable to be purged of the primary taint," to wit, under the authority of the outstanding arrest warrant. *Wong Sun*, 371 U.S. at 488.

C. This case is an ideal vehicle for resolving this important and recurring issue.

The importance of this question is great. It is undisputed that in these cases, a warrant-arrest is

lawful and that a search incident to arrest is lawful. Evidence seized under these circumstances is thus the direct product of a *lawful* search. The exclusion of such evidence can only be justified in rare circumstances, if at all. *See Atkins*, 631 F.3d at 827 (explaining that "a person named in a valid warrant has no right to be at large, and so suffers no infringement of his rights when he is apprehended"). As evidenced by the numerous cases cited from both federal and state appellate courts, this is a recurring issue, and one which the lower courts have been unable to resolve with any sort of uniformity. For these reasons, there is a compelling need for this Court's intervention and guidance.

And this case represents an ideal vehicle for resolving this important and recurring issue: the parties agreed that the officer lacked reasonable suspicion to support an investigatory stop; the lawfulness of the warrant-arrest was unchallenged; the question presented is the only issue the Utah courts addressed; and those courts squarely decided that question under the Fourth Amendment. Additionally, there are no factual or procedural obstacles to this Court's resolving the issue. It is time for this Court to end the debate on this important and recurring issue.

CONCLUSION

For the reasons stated above, the Court should grant the State's petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Respondent,

v.

EDWARD JOSEPH STRIEFF, JR.,
Petitioner.

No. 20120854
Filed January 16, 2015

On Certiorari to the Utah Court of Appeals

Third District, Salt Lake
The Honorable Michele M. Christiansen
No. 071900011

Attorneys:

Sean D. Reyes, Att'y Gen., Jeffrey S. Gray, Asst. Att'y Gen.,
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JUSTICE LEE authored the opinion of the Court, in which
CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE NEHRING,
JUSTICE DURHAM, and JUSTICE PARRISH joined.

JUSTICE LEE, opinion of the Court:

¶1 In this case we are asked to determine the applicability of the "attenuation" exception to the exclusionary rule to a fact pattern addressed in a broad range of lower-court opinions but not by the United States Supreme Court. The essential fact pattern involves an unlawful detention leading to the discovery of an arrest warrant followed by a search incident to arrest. The attenuation inquiry is essentially a proximate cause analysis. It asks whether the fruit of the search is tainted by the initial, unlawful detention, or whether the taint is dissipated by an intervening circumstance. As applied to the outstanding warrant scenario, the question presented is whether and how to apply the attenuation doctrine in this circumstance.

¶2 The lower courts are in disarray in their application of the attenuation doctrine to the outstanding warrant scenario. In some courts the discovery of an outstanding warrant is deemed a "compelling" or dispositive "intervening circumstance," purging the taint of an initially unlawful detention upon a showing that the detention was not a "purposeful" or "flagrant" violation of the Fourth Amendment.[1] In other courts, by contrast, the outstanding warrant is a

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[1] *United States v. Green*, 111 F.3d 515, 522, 23 (7th Cir. 1997).

matter of "'minimal importance,'" and the doctrine's applicability is strictly curtailed.[2]

¶3 We adopt a third approach. We conclude that the attenuation exception is limited to the general fact pattern that gave rise to its adoption in the United States Supreme Court—of a voluntary act of a defendant's free will (as in a confession or consent to search). For cases arising in the context of two parallel acts of police work—one unlawful and the other lawful—we interpret the Supreme Court's precedents to dictate the applicability of a different exception (inevitable discovery).

¶4 Our holding is rooted in our attempt to credit the terms of the attenuation doctrine as prescribed in the Supreme Court's opinions, while also respecting the parallel doctrine of inevitable discovery. Thus, we read the Court's attenuation cases to define the conditions for severing the proximate causal connection between a threshold act of police illegality and a subsequent, intervening act of a defendant's free will. And in the distinct setting of both unlawful and then lawful police activity, we deem the inevitable discovery doctrine to control. Because this case involves no independent act of a defendant's free will and only two parallel lines of police work, we hold

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[2] *State v. Moralez*, 300 P.3d 1090, 1102 (Kan. 2013) (quoting *State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011)).

that the attenuation doctrine is not implicated, and thus reverse the lower court's invocation of that doctrine in this case.

I. Background

¶5 In December, 2006, an anonymous caller left a message on a police drug tip line reporting "narcotics activity" at a South Salt Lake City residence. Police officer Douglas Fackrell subsequently conducted intermittent surveillance of the residence for approximately three hours over the course of about one week. During that time, the officer observed "short term traffic" at the home. The traffic was not "terribly frequent," but was frequent enough that it raised Officer Fackrell's suspicion. In Officer Fackrell's view, the traffic was more than one would observe at a typical house, with visitors often arriving and then leaving within a couple of minutes. Thus, the officer concluded that traffic at the residence was consistent with drug sales activity.

¶6 During his surveillance of the residence, Officer Fackrell saw Edward Strieff leave the house—though he did not see him enter—and walk down the street toward a convenience store. As Strieff approached the convenience store, Officer Fackrell ordered Strieff to stop in the parking lot. Strieff complied. Officer Fackrell testified that he detained Strieff because "[Strieff] was coming out of the house that [he] had been watching and [he] decided that [he'd] like to ask somebody if [he] could find out

what was going on [in] the house." Officer Fackrell identified himself as a police officer, explained to Strieff that he had been watching the house because he believed there was drug activity there, and asked Strieff what he was doing there.

¶7 Officer Fackrell also requested Strieff's identification, which Strieff provided. Officer Fackrell then called dispatch and asked them to run Strieff's ID and check for outstanding warrants. Dispatch responded that Strieff had "a small traffic warrant." Officer Fackrell then arrested Strieff on the outstanding warrant and searched him incident to the arrest. During the search, the officer found a baggie of methamphetamine and drug paraphernalia in Strieff's pockets.

¶8 Strieff was charged with unlawful possession of methamphetamine and unlawful possession of drug paraphernalia. He moved to suppress the evidence seized in the search incident to his arrest, arguing that it was fruit of an unlawful investigatory stop. The State conceded that Officer Fackrell had stopped Strieff without reasonable articulable suspicion (given that Officer Fackrell had not seen Strieff enter the house, did not know how long he had been there, and knew nothing of him other than that he left the house). The State argued, however, that the exclusionary rule did not bar the evidence seized in the search because the attenuation exception to the exclusionary rule applied.

¶9 The district court agreed and denied Strieff's motion to suppress and subsequent motion to reconsider. First, the district court found that Officer Fackrell "believed he had seen enough short-term traffic at the house to create a reasonable suspicion that the house was involved in drug activity," and thus that the purpose of the stop "was to investigate a suspected drug house." Second, while acknowledging that Officer Fackrell's belief that he had sufficient suspicion to stop Strieff was incorrect, the court concluded that "the stop was not a flagrant violation of the Fourth Amendment" but a "good faith mistake on the part of the officer as to the quantum of evidence needed to justify an investigatory detention." Finally, "[w]eighing the factors in their totality," the court found "suppression to be an inappropriate remedy," concluding that "the search was conducted after discovering an outstanding warrant and arresting the Defendant on that warrant, an intervening circumstance that Officer Fackrell did not cause and could not have anticipated."

¶10 Strieff entered a conditional guilty plea to charges of attempted possession of a controlled substance and possession of drug paraphernalia, reserving his right to appeal the order denying his motions to suppress and reconsider. The court of appeals affirmed under the attenuation exception to the exclusionary rule recognized in *Brown v. Illinois*, 422 U.S. 590 (1975). *State v. Strieff*, 2012 UT App 245, 286 P.3d 317. Applying the factors set forth in *Brown*, a

majority of the court of appeals concluded that the discovery of an outstanding arrest warrant was a powerful "intervening circumstance" dissipating the taint of the unlawful detention, and that Officer Fackrell's detention of Strieff was not a "purposeful" or "flagrant" violation of the Fourth Amendment. *Id.* at ¶¶ 21, 27. And although the "temporal proximity" of the discovery of the warrant weighed against attenuation, the majority deemed that factor outweighed by the existence of an intervening circumstance and the lack of a purposeful or flagrant violation. *Id.* at 29–30, 37.

¶11 Judge Thorne dissented. He disagreed with the majority's analysis of the attenuation factors as applied to this case. *Id.* at ¶¶46, 48–50. And he expressed discomfort with what he saw as an inconsistency between the outcome of this case and that of *State v. Topanotes*, 2003 UT 30, 76 P.3d 1159, a case arising under similar facts but decided under the inevitable discovery exception. Strieff filed a petition for certiorari, which we granted.

¶12 On certiorari, we review not the underlying decision of the district court but the ultimate decision of the court of appeals—a decision that merits no deference in our analysis. *See State v. Verde*, 2012 UT 60, ¶ 13, 296 P.3d 673. "That said, [t]he correctness of the court of appeals' decision turns, in part, on whether it accurately reviewed the district court's decision under the appropriate standard of review."

Id. (alteration in original) (internal quotation marks omitted). And the deference, if any, we owe to the district court's decision varies depending on the nature of the determination in question.

¶13 First, any factual determinations made by the district court are entitled to substantial deference under a standard of review for clear error. *See Manzanares v. Byington (In re Adoption of Baby B.)*, 2012 UT 35, ¶ 40, 308 P.3d 382. Second, to the extent the district court's decision implicated pure legal questions regarding the terms and conditions of the attenuation exception, the court's resolution of those questions is reviewed for correctness. *See Hi-Country Prop. Rights Grp. v. Emmer*, 2013 UT 33, ¶¶ 13–14, 304 P.3d 851 (noting that threshold legal determinations embedded within mixed determinations are reviewed for correctness like any other determination of law). Finally, the district court's application of the attenuation exception to the facts of this case is likewise a determination that is reviewed for correctness. *See State v. Worwood*, 2007 UT 47, ¶¶ 11–12, 164 P.3d 397. Although that decision is a "mixed" determination of fact and law, it is one of those decisions that is "law-like" in that our resolution of it lends itself to "consistent resolution by a uniform body of appellate precedent." *In re Baby B.*, 2012 UT 35, ¶ 44.

II. The Exclusionary Rule and the Attenuation Doctrine

¶14 Although this case concerns a single exception to the exclusionary rule (attenuation), that exception is best conceptualized within the broader context of the rule and as one of a range of exceptions that define its limits. We accordingly start with first principles, explaining the basis for the rule and describing the contours of various exceptions that are related to the attenuation doctrine (independent source and inevitable discovery). From there we outline the elements of the attenuation exception as relevant to the disposition of this case. And we conclude this section by outlining the approaches that various lower courts (state and federal) have taken in cases involving the attenuation doctrine and the discovery of an outstanding arrest warrant.

A. The Rule and its Exceptions

¶15 The Fourth Amendment protects against unreasonable searches and seizures. *See* U.S. CONST. amend. IV. The exclusionary rule is a judicial remedy that gives life to that protection. In its most basic terms, the exclusionary rule suppresses the admission of evidence obtained in violation of the Constitution. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961). It is a prudential doctrine, created by courts to "compel respect for the constitutional guaranty." *Davis v. United States*, __ U.S. __, 131 S. Ct. 2419, 2426 (2011) (citations omitted). There is no constitutional

right to exclusion, nor is the doctrine designed to redress the injury occasioned by a Fourth Amendment violation. *Id.* (internal quotation marks omitted). The exclusionary rule's "sole purpose . . . is to deter future Fourth Amendment violations." *Id.*

¶16 While deterrent value is a "necessary condition for exclusion," it is "not a sufficient one." *Id.* at 2427 (internal quotation marks omitted). Exclusion of otherwise-relevant and probative evidence from criminal proceedings "exacts a heavy toll on both the judicial system and society at large." *Id.* at 2427. The rule, after all, often "suppress[es] the truth and set[s] the criminal loose in the community without punishment." *Id.* at 2427 (internal quotation marks omitted).

¶17 The terms and conditions of the exclusionary rule must appropriately account for these concerns. Thus, "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id.*

¶18 The exclusionary rule is far from absolute. In the simplest case for exclusion, evidence is "direct or primary in its relationship to the [police action]." 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, § 9.3(a) (3d ed. 2007) (internal quotation marks omitted). In those cases, the connection between the illegal police action and the evidence is clear and close. In other cases, the challenged evidence is less directly connected to the illegality, but is "secondary or de-

rivative in character." *Id.* (describing as "secondary" or "derivative," examples such as "physical evidence located after an illegally obtained confession, or an in-court identification . . . made following an illegally conducted pretrial identification"). In these cases, there is a disconnect—factual, legal, or temporal—between the unconstitutional conduct and the evidence. These disconnects give rise to a series of exceptions to the exclusionary rule.

B. Independent Source, Inevitable Discovery, and Attenuation

¶19 Evidence seized as a result of an illegal search or seizure may be admitted under three "closely related but analytically distinct" exceptions to the exclusionary rule: (1) the independent source exception, (2) the inevitable discovery exception, and (3) the attenuation exception. *United States v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990).

¶20 Under the independent source doctrine, the "taint" that is otherwise-attached to the fruit of police misconduct is removed when the same fruit is derived from lawful police activity. *See Murray v. United States*, 487 U.S. 533, 537 (1988). In the classic independent source scenario, "an unlawful entry has given investigators knowledge of facts *x* and *y*, but fact *z* has been learned by other means." *Id.* at 538. In *Segura v. United States*, 468 U.S. 796, 800–01 (1984), for example, drug enforcement agents unlawfully entered defendant's apartment and re-

mained there until a search warrant was obtained. The United States Supreme Court deemed the evidence acquired pursuant to the valid, untainted warrant admissible because it was discovered pursuant to an "independent source." *Id*. at 813–14.

¶21 This exception has also been extended to circumstances where the fruit obtained through an independent source was *itself* previously obtained unlawfully—"that is, in the example just given, to knowledge of facts *x* and *y*," and not just *z*. *Murray*, 487 U.S. at 538. In *Murray*, drug enforcement agents entered a warehouse unlawfully and observed burlap-wrapped bales of marijuana, but then subsequently seized the same evidence upon execution of a valid search warrant. Assuming the agents "would have sought a warrant [even] if they had not earlier entered the warehouse" (a matter not resolved on the record in *Murray* and thus meriting a remand), the Supreme Court held that the execution of the warrant would remove the taint of the earlier unlawful entry. *Id*. at 542–43 (noting that the search pursuant to the warrant would not have been a "genuinely independent source . . . if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant") (footnote omitted).

¶22 The independent source doctrine thus turns on cause-in-fact analysis. A source is *independent*—in a manner removing the taint arising from a prior act of police misconduct—if it actually led to the discovery of the evidence in question and would have done so even in the absence of police misconduct. Where that is the case, there is no longer a sufficient deterrence-based justification for exclusion:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse,* position that they would have been in if no police error or misconduct had occurred . . . .When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Nix v. Williams, 467 U.S. 431, 443 (1984) (emphasis added) (footnote omitted) (citations omitted).

¶23 The inevitable discovery doctrine is related. Here the classic case is *Nix*. In *Nix*, the defendant had made incriminating statements in response to police investigation impinging on the right to counsel—which statements led police to the discovery of a victim's dead body. *Id.* at 435. But the record also indicated that a search had been underway that in-

evitably would have led to the discovery of the victim's body but for the defendant's unlawfully obtained statements. *Id*. at 448–50. And the *Nix* Court upheld the admissibility of the fruit of the unlawful investigation based on an inevitable discovery rationale—holding that "when, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." *Id*. at 448.

¶24 Both the independent source doctrine and the inevitable discovery exception are rooted in cause-in-fact analysis. The former forecloses exclusion when tainted fruits are actually obtained through a truly independent source. The latter prescribes the same result if the tainted evidence inevitably *would have been discovered* by lawful means.

¶25 The attenuation exception is distinct. It turns not on cause-in-fact analysis but on a question of *legal* cause. Thus, under *Wong Sun v. United States*, 371 U.S. 471 (1963), and *Brown v. Illinois*, 422 U.S. 590 (1975), evidence that would not have been secured but for an unlawful search or seizure is nonetheless admissible if the legal nexus between the police misconduct and the challenged evidence is sufficiently attenuated that any tainting of the evidence is dissipated. *Wong Sun*, 371 U.S. at 487–88 (declining to "hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light

but for the illegal actions of the police") (emphasis added) (internal quotation marks omitted)).

¶26 In *Wong Sun*, federal drug agents arrested the defendant without probable cause, but he returned to the station house several days later and gave a voluntary confession. *Id.* at 491. The Court ruled that drugs seized pursuant to the unlawful arrest were properly excluded as fruit of a poisonous tree. *Id.* at 487 (noting that "this is not the case envisioned by this Court where the exclusionary rule has no application because the Government learned of the evidence 'from an independent source'"). As to the confession, however, the Court held that it might escape exclusion even if "it would not have come to light but for the illegal actions of the police." *Id.* at 488. Specifically, the Court held that the admissibility of the confession should turn on "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* (internal quotation marks omitted).

¶27 Ultimately, the *Wong Sun* Court held the confession admissible under this standard. "On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement," the Court held "that the connection be-

tween the arrest and the statement had 'become so attenuated as to dissipate the taint.'" *Id*. at 491.

¶28 The *Wong Sun* standard was extended in *Brown*. There, the defendant was also arrested without probable cause and gave a subsequent confession, but this time the confession came within two hours after the arrest. *Brown*, 422 U.S. at 604. The *Brown* Court found such a confession not to satisfy the fact-intensive, case-by-case analysis called for under the attenuation doctrine. *Id.* at 604–05. In so doing, however, the Court articulated three factors of relevance to the analysis: the "temporal proximity of the arrest and the confession"; the "presence of intervening circumstances"; and the "purpose and flagrancy of the official misconduct." *Id.* at 603–04. These factors weighed in favor of exclusion in *Brown* because the confession was given just two hours after the arrest without any intervening event of any significance, and the arrest was patently illegal and undertaken "in the hope that something might turn up." *Id*. at 605.

¶29 The Court reached a similar conclusion in *Kaupp v. Texas*, 538 U.S. 626 (2003). There the Court applied the *Brown* factors and found the defendant's confession to be the fruit of his prior illegal arrest. *Id.* at 633. In so doing the Court emphasized that (1) there was "no indication . . . that any substantial time passed between Kaupp's removal from his home in handcuffs and his confession after only

10 or 15 minutes of interrogation"; (2) at least some of the six officers involved in taking him into custody "were conscious that they lacked probable cause to arrest"; and (3) "the State ha[d] not even alleged 'any meaningful intervening event' between the illegal arrest and Kaupp's confession." *Id.* at 633.

¶30 Thus, the attenuation exception eschews the "but for" approach to causation that drives the independent source and inevitable discovery exceptions. *See United States v. Ceccolini*, 435 U.S. 268, 276 (1978) (noting that the Court has "declined to adopt a 'per se' or 'but for' rule that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest'). It instead endorses a more nuanced analysis akin to proximate causation. In asking whether the attenuation exception applies, we assess whether the causal chain has been broken by intervening circumstances.[3] And we do so in the light of the exclusionary rule's deterrence function. Thus, we "mark the point at which the detriment of illegal police action be-

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[3] *See* Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. OF CRIM. LAW 463, 478-79 (2009) (noting the Supreme Court's use of attenuation as "refer[ring] to situations in which the causal chain between a Fourth Amendment violation and the seizure of evidence ha[s] been broken.").

comes so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." LAFAVE ET AL., *supra* , § 9.3(c)).

C. The Attenuation Factors

¶31 The Supreme Court has set out (and we have applied) a three-factor test to guide the attenuation inquiry. The three factors are: (1) the "temporal proximity" of the unlawful detention and the discovery of incriminating evidence, (2) the presence of "intervening circumstances," and (3) the "purpose and flagrancy" of the official misconduct. *Brown*, 422 U.S. at 603–04 (1975); *State v. Arroyo*, 796 P.2d 684, 690 n.4 (Utah 1990).

¶32 The threshold inquiry for attenuation analysis concerns the existence of "intervening circumstances." Such circumstances are those that establish a break in the legal chain of events leading to the discovery of the evidence at issue. *See United States v. Green*, 111 F.3d 515, 522 (7th Cir. 1997). Thus, a circumstance is "intervening" if it is so distinct from the threshold Fourth Amendment violation that it can be said that the challenged evidence is not a product of "exploitation" of the illegality but instead the result of "'means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun*, 371 U.S. at 488 (internal quotation marks omitted).

¶33 A prototypical intervening circumstance involves a voluntary act by the defendant, such as a confession or consent to search given after illegal po-

lice action. A voluntary confession or consent to search might be the but-for product of an unlawful search or seizure, but exclusion is foreclosed where the defendant's voluntary act is sufficiently independent to break the legal connection to the primary violation. Under the caselaw, the independence of such voluntary acts is established, for example, where the confession or consent comes well after termination of a defendant's illegal detention, after defendant's consultation with counsel, or as a spontaneous comment not in response to any police interrogation. *See* LAFAVE, *supra*, § 9.4(a). Increasingly, courts have extended this principle to the discovery of an outstanding arrest warrant, *see infra* ¶ 38 n.5, a question to which we will turn shortly.

¶34 Under the governing standard set forth in *Brown*, the question whether a particular circumstance is sufficiently "intervening" to dissipate the taint associated with a primary Fourth Amendment violation "must be answered on the facts of each case." *Brown*, 422 U.S. at 603. And that analysis, in turn, depends on the relationship between the "intervening circumstance" factor, on one hand, and the "purpose and flagrancy" and "temporal proximity" considerations, on the other.

¶35 Conduct is "purposeful" if it is "investigatory in design and purpose and executed in the hope that something might turn up." *United States v. Simpson*, 439 F.3d 490, 496 (8th Cir. 2006) (internal quotation

marks omitted). "Flagrant" conduct is that which is obviously improper—so far beyond the bounds of the Fourth Amendment that law enforcement must have seen it as unlawful but chose to engage in it anyway. *See id*.

¶36 Generally, close "temporal proximity" between the illegality and discovery of the evidence weighs in favor of suppression. *See State v. Shoulderblade*, 905 P.2d 289, 293 (Utah 1995). Thus, a "brief time lapse" between a Fourth Amendment violation and the evidence obtained may "indicate[] exploitation because the effects of the misconduct have not had time to dissipate." *Id*.

D. Attenuation and Outstanding Arrest Warrants

¶37 To date, the United States Supreme Court's attenuation cases have all involved *confessions* made by unlawfully detained individuals.[4] Thus, the ques-

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[4] *See, e.g.*, *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (suppressing defendant's murder *confession* following unlawful arrest); *Taylor v. Alabama*, 457 U.S. 687, 694 (1982) (excluding a *confession* after finding insufficient attenuation); *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (excluding a *confession* obtained after an unlawful arrest); *Brown v. Illinois*, 422 U.S. 590, 605 (1975) (holding that a confession was sufficiently attenuated); *Wong Sun v. United States*, 371 U.S. 471, 478–79 (1963) (excluding evidence of narcotics obtained through unlawfully obtained and tainted *confession*).

This is a complete list of United States Supreme Court cases applying the attenuation *doctrine*. But it is certainly not

(continued . . .)

tion presented here—of the applicability of the attenuation doctrine to the discovery of an outstanding arrest warrant in the course of an unlawful arrest or detention—is a matter heretofore left to the lower courts.

¶38 Three principal approaches have emerged on this issue. One set of decisions, exemplified by *United States v. Green*, 111 F.3d at 522, concludes that an outstanding arrest warrant may qualify as "an even more compelling case" for an "intervening circumstance" than a voluntary confession. *Id.* [5] The

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an exhaustive list of cases in which the Court has employed the term "attenuation" in framing the exclusionary rule. That term has been used in reference to a general principle of causation, in connection with other principles of and exceptions to the exclusionary rule. *See Hudson v. Michigan*, 547 U.S. 586, 593 (2006) (holding that a violation of the knock-and-announce rule was sufficiently attenuated); *United States v. Leon*, 468 U.S. 897, 911 (1984) (stating that the police misconduct and the evidence of crime "may be sufficiently attenuated" to be admissible); *Segura v. United States*, 468 U.S. 796, 805 (1984) (explaining the inevitable discovery doctrine in general attenuation terms).

[5] *See United States v. Simpson*, 439 F.3d 490, 495 (8th Cir. 2006) (adopting *Green*'s "compelling case" language); *State v. Hill*, 725 So.2d 1282, 1287 (La. 2008) (stating that the discovery of outstanding warrants was a "significant intervening event"); *Hardy v. Commonwealth*, 149 S.W.3d 433, 436 (Ky. App. 2004) (holding that the intervening circumstance of the outstanding warrant "outweighed any possible [police] misconduct").

threshold basis for this determination in *Green* was the assertion that "[i]t would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.'" *Id*. at 521. In addition, the *Green* court suggested that an outstanding warrant is in some sense more independent of lawful police activity than a voluntary confession. The basis for that conclusion was the assertion that "[a]ny influence the unlawful stop would have on the defendant's conduct is irrelevant," and thus that "there is less 'taint' than in the cases already recognized by the Supreme Court and this and other circuits as fitting within the intervening circumstances exception. *Id*. at 522. Thus, the *Green* court extended the attenuation doctrine to a case involving the discovery of an outstanding warrant in the course of an unlawful arrest.[6] It did so on the basis of its conclu-

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[6] Within this first approach to attenuation, there appears to be two lines of cases. One line expressly characterizes the discovery of an outstanding warrant as a "compelling case" for an intervening circumstance (as in *Green*). *See, e.g.*, *Simpson*, 439 F.3d at 496 (holding that defendant's outstanding arrest warrant constituted an "extraordinary intervening circumstance"); *People v. Murray*, 728 N.E.2d 512, 516 (Ill. App Ct. 2000) (adopting *Green*'s analysis as "instructive"). A second line deems the outstanding warrant a dispositive consideration, but without any express characterization of the warrant as a "compelling" or "extraordinary" intervening circumstance. *See, e.g.,*

(continued . . .)

sion that the "purpose" of the stop in question was not to seek evidence against the defendant in question (Green) but "to obtain evidence against" a third party (Williams), and that there was "no evidence of bad faith on the part of the police," or any indication that "the police exploit[ed] the stop in order to search [Green's] automobile." *Id*. at 523.[7]

¶39 A second set of cases deems the discovery of an outstanding warrant a matter of "'minimal importance'" under the attenuation factors set out in *Brown*, and thus carefully limits the doctrine's ap-

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McBath v. State, 108 P.3d 241, 248–49 (Alaska Ct. App. 2005); *People v. Brendlin*, 195 P.3d 1074, 1080 (Cal. 2008); *People v. Hillyard*, 589 P.2d 939, 941 (Colo. 1979); *State v. Frierson*, 926 So. 2d 1139, 1144 (Fla. 2006); *State v. Cooper*, 579 S.E.2d 754, 758 (Ga. App. 2003); *State v. Page*, 103 P.3d 454, 460 (Idaho 2004); *Quinn v. State*, 792 N.E.2d 597, 602 (Ind. Ct. App. 2003); *State v. Martin*, 179 P.3d 457, 458–63 (Kan. 2008); *Hill,* 725 So.2d at 1285; *Cox v. State*, 916 A.2d 311, 323 (Md. 2007); *People v. Reese*, 761 N.W.2d 405, 412 (Mich. Ct. App. 2008); *State v. Grayson*, 336 S.W.3d 138, 147 (Mo. 2011) (en banc); *State v. Thompson*, 438 N.W.2d 131, 137 (Neb. 1989); *Jacobs v. State*, 128 P.3d 1085, 1089 (Okla. Crim. App. 2006); *State v. Dempster*, 434 P.2d 746, 748 (Or. 1967) (abrogated by *State v. Bailey*, 338 P.3d 702 (Or. 2014); *Lewis v. State*, 915 S.W.2d 51, 54 (Tex. Ct. App. 1995).

[7] *See also Page*, 103 P.3d at 459 (finding attenuation in conjunction with a conclusion that police conduct was neither flagrant nor motivated by an improper purpose); *Quinn*, 792 N.E.2d at 602 (finding "no evidence suggesting any impropriety as the purpose for stopping Quinn").

plicability in the warrant scenario. *See State v. Moralez*, 300 P.3d 1090, 1102 (Kan. 2013).[8] These cases are motivated by the concern that "[w]ere it otherwise, law enforcement officers could randomly stop and detain citizens, request identification, and run warrants checks despite the lack of any reasonable suspicion to support the detention." *Id.* at 1102.[9] And they narrowly circumscribe the applicability of the

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[8] *See also United States v. Gross*, 662 F.3d 393, 404–06 (6th Cir. 2011) (holding that the discovery of a valid warrant is a factor but is not "dispositive"); *State v. Bailey*, 338 P.3d 702, 704 (Or. 2014) (en banc) (overruling prior precedent establishing a *per se* rule that outstanding warrants attenuate taint and concluding that "the weight assigned to the discovery of the arrest warrant depends on the degree to which it was the direct consequence or objective of the unlawful detention"); *State v. Mazuca*, 375 S.W.3d 294, 306 (Tex. Crim. App. 2012) (holding that the discovery of an outstanding arrest warrant "should not be overemphasized to the ultimate detriment of the goal of deterrence that animates the exclusionary rule").

[9] *See also People v. Padgett*, 932 P.2d 810, 816–17 (Colo. 1997) (holding that the subsequent discovery of a possible warrant did not overcome the other factors favoring suppression); *People v. Mitchell*, 824 N.E.2d 642, 650 (Ill. App. Ct. 2005) (justifying the refusal to extend the attenuation doctrine on the ground that suppression "appears to be the only way to deter police from randomly stopping citizens for the purpose of running warrant checks"); *State v. Soto*, 179 P.3d 1239, 1244–45 (N.M. Ct. App. 2008) (relying on *Mitchell*, holding that an outstanding warrant did not sufficiently remove the taint of the initial unlawful conduct).

attenuation doctrine by concluding that (a) the short time between an unlawful detention and a search incident to an arrest on an outstanding warrant "weighs heavily" against attenuation,[10] and (b) an improper detention followed by a warrant search "often will[] demonstrate at least some level of flagrant conduct"—of an "investigatory detention[] designed and executed in the hope that something might turn up"—even if "the detention is brief and the officers are courteous," *id.* at 1103.

¶40 The third approach to the attenuation doctrine takes the second a step further. Under this third approach, an outstanding warrant is less than a factor of "minimal importance" under the attenuation doctrine; it is a matter that just doesn't implicate the doctrine at all. This approach was articulated in a dissenting opinion in *State v. Frierson*, 926 So.2d 1139 (Fla. 2006) (Pariente, C.J., dissenting). In the *Frierson* case, Chief Justice Pariente proposed to limit the attenuation doctrine to its original basis—to cases involving voluntary confessions resulting

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[10] *See also Padgett*, 932 P.2d at 816–17 (stating that the evidence was obtained directly as a result of the unlawful stop "without sufficient intervening time and circumstances to carry the prosecutions' burden of proof to demonstrate dissipation of the taint"); *Bailey*, 338 P.3d at 713 (stating that the short time between the unlawful detention and the discovery of the challenged evidence makes it "less likely" to "break . . . the causal chain").

from an independent act of a defendant's "free will"—and thus to decline to extend it to circumstances involving the discovery of an outstanding warrant. *Id.* at 1149–50 (relying on *Brown*'s articulation of the attenuation doctrine in terms of "whether a confession [that] is the product of a free will" can be deemed an "intervening event" cutting off the causal connection to the unlawful arrest). Because "the defendant's free will plays no role in the discovery of evidence in a search incident to arrest pursuant to an active warrant discovered during an illegal stop," Chief Justice Pariente asserted that the latter circumstance "bears little resemblance to that of a defendant who confesses or consents to a search for reasons that may be attenuated from the illegality of the stop." *Id.* at 1150. And the *Frierson* dissent accordingly would have declined to extend the attenuation doctrine to cases involving an unlawful detention leading to the discovery of an outstanding warrant, concluding that in this scenario "[t]here is no break in the chain of circumstances from the illegal detention to the discovery of evidence in the form of an act of free will on the part of the defendant." *Id.* at 1151.

III. Attenuation as Applied to This Case

¶41 The threshold question presented concerns the applicability of the attenuation doctrine to cases involving the discovery of an outstanding warrant in the course of an unlawful detention. Strieff urges a view of attenuation along the lines of the *Frierson* dissent described above, asking us to restrict the doctrine to circumstances involving an independent act of a defendant's "free will" in confessing to a crime or consenting to a search. And because the discovery of an outstanding warrant is not an independent act of free will but a direct result of an unlawful detention, Strieff asks us to deem the attenuation doctrine inapplicable.

¶42 We reverse on that basis. For a number of reasons, we conclude that attenuation is limited to the circumstances of the cases embracing this doctrine in the Supreme Court—involving a defendant's independent acts of free will. And in the distinct circumstance involving the discovery of an outstanding warrant, we conclude that a different doctrine—the inevitable discovery exception—controls.

¶43 The origins of attenuation are in cases involving independent acts of criminal defendants. *Wong Sun*, *Brown*, and *Kaupp* all involved a confession given by a defendant after an initial unlawful ar-

rest.[11] And the logic and terms of the attenuation doctrine developed in these cases are focused on separating the initial police illegality from the subsequent, independent acts of a defendant.

¶44 The seminal decision in *Brown* speaks in terms of whether a defendant's "statements (verbal acts, as contrasted with physical evidence) were of sufficient free will as to purge the primary taint of the unlawful arrest." 422 U.S. 590, 600 (1975). And the *Brown* Court quoted *Wong Sun*'s formulation of the central inquiry under the attenuation doctrine in parallel terms—of whether a defendant's voluntary statement was "'sufficiently an act of free will to purge the primary taint'" of the unlawful arrest. *Id.* at 602 (quoting *Wong Sun v. United States*, 371 U.S. 471, 486–87 (1963)).

¶45 The significance of a defendant's independent act of "free will" is also arguably inherent in the proximate cause premises of the *Brown* formulation. Attenuation is focused on *intervening circumstances* sufficient to break the proximate connection to the initial violation of the Fourth Amendment. An *intervening* cause is a "means sufficiently distinguishable" from the threshold illegality that the taint of the initial violation is purged. *Hudson v. Michigan*, 547 U.S. 586, 592 (2006) (internal quotation marks omit-

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[11] *See supra* ¶ 37, n.4.

ted). The terminology is significant. In proximate cause parlance, an *intervening cause* is a subsequent, independent occurrence that materially contributes to the result. *See McCorvey v. Utah State Dep't. of Transp.*, 868 P.2d 41, 45 (Utah 1993); RESTATEMENT (SECOND) OF TORTS § 442 (1965). Such a cause cuts off the legal causal connection to the act of an initial tortfeasor where the intervening cause is not foreseeable (and is thus a *superseding cause*). *See Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1257 (Utah 1996).

¶46 This concept cannot easily be extended to the discovery of an outstanding warrant. The discovery of an outstanding warrant is hardly an independent act or occurrence. It is part of the natural, ordinary course of events arising out of an arrest or detention. And in that sense, even if the warrant could be thought of as somehow intervening, it would hardly be unforeseeable. So to the extent the attenuation doctrine is about proximate cause, *see supra* ¶ 45, an outstanding warrant does not qualify, as it is not an independent act that is sufficiently removed from the primary illegality to qualify as *intervening*.

¶47 The attenuation factors articulated by the Supreme Court also seem to cut in the same direction. First, consideration of the "temporal proximity of the arrest and the confession," *Brown*, 422 U.S. at 603, reinforces the centrality of proximate cause analysis. If an extended time lapse is a plus factor for attenu-

ation—as it clearly is as the test has been formulated—the focus must necessarily be on independent acts removed from the primary act of police misconduct. Indeed, applying this factor to the discovery of an independent warrant would turn the inquiry on its head. In the context of an unlawful detention followed by a warrants check, temporal delay would logically count in favor of the government. The constitutional violation in a *Terry* stop, after all, is a product of the unreasonable delay associated with an individual's detention by the government. *See United States v. Sharpe*, 470 U.S. 675, 686 (1985). So the government could hardly assert the lack of "temporal proximity" in the discovery of a search warrant as a basis for attenuation (and thus avoidance of the exclusionary rule).

¶48 Second, the *Brown* Court's formulation of the "purpose and flagrancy" factor is also ill-suited to the outstanding warrant scenario. In *Brown*, the Court's application of this factor was focused on the "manner in which [the defendant's] arrest was affected," with particular attention to whether that "manner" gave "the appearance of having been calculated to cause surprise, fright, and confusion." 422 U.S. at 605. This, again, is an outgrowth of the inquiry into proximate causation, as a purposeful attempt at "surprise, fright, and confusion" could predictably yield a confession that would be entirely foreseeable (and thus connected to—and hardly independent of—the primary police misconduct). And that assessment

would have little application to the outstanding warrant scenario, where "surprise, fright, and confusion" are utterly irrelevant.

¶49 These are indications that the Supreme Court's attenuation doctrine is directed only at intervening circumstances involving a defendant's independent acts of free will (such as a confession and perhaps a consent to search). An even stronger signal appears in the terms of a parallel doctrine, the inevitable discovery exception. As noted above, this exception exempts from exclusion evidence that is the but-for result of police misconduct but that also would inevitably have been produced by untainted police work. *See Nix v. Williams*, 467 U.S. 431, 448–50 (1984). This doctrine is directly implicated in a case like this one, involving two parallel acts of police work—one a violation of the Fourth Amendment (detention without reasonable suspicion) and the other perfectly legal (execution of an outstanding arrest warrant). *See State v. Topanotes*, 2003 UT 30, ¶ 22, 76 P.3d 1159 (holding, in a case involving an unlawful detention leading to the discovery of an outstanding warrant, that evidence uncovered in a search incident to arrest on the warrant did not qualify under the inevitable discovery exception and thus was subject to suppression). And extension of the attenuation doctrine to the outstanding warrant scenario would eviscerate the inevitable discovery exception.

¶50 That prospect is troubling. Ordinarily, where lawful police work runs in tandem with an illegal parallel, the taint of the latter is tough to eliminate. Under *Nix*, our law does not lightly excuse an initial Fourth Amendment violation on the ground that it was paralleled by a lawful investigation. Instead we insist on exclusion unless the fruits of the lawful investigation would *inevitably* have come about regardless of the unlawful search or seizure. That approach would require exclusion in this case, as our decision in the *Topanotes* case indicates. *See Topanotes*, 2003 UT 30, ¶ 20–21. Granted, Strieff was lawfully arrested on an outstanding arrest warrant, and a search incident to arrest was thus also perfectly appropriate.[12] But given that that arrest and search came about as a but-for result of his unlawful detention, exclusion would still be required under *Nix* unless the contraband he possessed would *inevitably* have been discovered in the absence of the threshold unlawful detention. And such a showing would be difficult at best in a case like this one, as we cannot know whether Strieff might ultimately have had this contraband in his possession on any future date on

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[12] For this reason the professed concern about the lawfulness of the *arrest* on the outstanding warrant, *see Green v. United States*, 111 F.3d 515, 521 (7th Cir. 1997), is a red herring. The exclusionary rule (with its attendant exceptions) is about exclusion of evidence. No one is contesting—or even could reasonably contest—the arrest on the outstanding warrant.

which he may have been arrested on the outstanding warrant.

¶51 Extension of the attenuation doctrine to this scenario would blur the lines of the inevitable discovery exception. If attenuation is a free-wheeling doctrine unmoored from voluntary acts of a defendant's free will, then the limits of the *Nix* formulation of inevitable discovery would be substantially curtailed. If *Brown*, and not *Nix*, prescribes the standard for *lawful* police conduct removing the taint from *unlawful* acts, then *inevitability* would no longer be the standard. Instead, it would be enough for the prosecution to assert that an initial act of police misconduct was insufficiently "purposeful and flagrant" and lacking in "temporal proximity" to a lawful investigation to sustain exclusion.

¶52 No court has yet extended the attenuation doctrine this far. To date, the courts that have deemed the *Brown* factors to apply to the outstanding warrant scenario seem to treat a search incident to an arrest on an outstanding warrant as a unique form of lawful police work. But there is no logical reason to treat such a search any differently from any other form of police work. So the logic of the decisions extending *Brown* to the outstanding warrant scenario will, if taken seriously, ultimately swallow the inevitable discovery exception.

¶53 And even if these decisions are not taken to their logical end, the resulting legal landscape (as it

currently stands in many jurisdictions) is untenable. Under the prevailing law in an increasing number of jurisdictions, one form of lawful police work (a search incident to an arrest on an outstanding warrant) is favored above all others (such as the completion of an outstanding investigation, as in *Nix*). This is equally problematic. A search incident to arrest on an outstanding warrant has no favored status under the Fourth Amendment. It is entirely arbitrary to subject most lawful police work (pursued in tandem with *unlawful* activity) to the high bar of inevitable discovery while lowering the bar for arrests incident to an outstanding warrant.

¶54 We cannot adopt this premise without overriding the *Nix* formulation of the inevitable discovery exception. And because we construe the *Brown* formulation of attenuation to be limited to cases involving a defendant's independent acts of free will, we deem the attenuation doctrine inapplicable here, and reverse the court of appeals on that basis. We therefore hold that Strieff was entitled to suppression of the evidence secured in the search incident to his arrest in this case, as the attenuation doctrine advanced by the State in opposition to that motion was not a viable exception to the exclusionary rule in this case.

IV. Conclusion

¶55 The terms and conditions of the exclusionary rule have been meted out by the Supreme Court in a

piecemeal, common-law fashion.[13] On matters not yet addressed by that Court, the lower courts are left to fill in the gaps. This case implicates a gap of substantial significance. And the courts that have addressed it have come to substantially different conclusions.

¶56 The confusion, in our view, stems from a threshold misunderstanding of the scope of attenuation. Thus, the reason the courts have struggled to arrive at a consensus formulation of attenuation as applied to the outstanding warrant scenario is that the doctrine has no application in this circumstance. In the absence of guidance from the United States Supreme Court, courts such as ours are left with only tea leaves. We are mindful, in today's effort to fill this gap in Fourth Amendment law, of the distinct doctrines of attenuation and inevitable discovery. To preserve the analytical distinction between the two, attenuation should be limited to cases involving intervening acts of a defendant's free will. That holding, which we adopt today, avoids the analytical dilemmas that are currently troubling the lower courts (as to whether an outstanding warrant is of "compelling" or "minimal" importance, as to the significance of the "temporal proximity" factor, and as to the ap-

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[13] *See* Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on* Terry *"Stop and Frisk"*, 50 OKLA. L. REV. 451, 460 (1997).

plication of the "purpose and flagrancy" factors). Ultimately, the United States Supreme Court may chart a different course. Such is its constitutional prerogative. Ours is to make sense of and apply existing precedent, to fill in gaps by reading any and all tea leaves available to us.

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	OPINION
	)	
Plaintiff and Appellee,	)	Case No. 20100541-CA
	)	
v.	)	FILED
	)	(August 30, 2012)
Edward Joseph Strieff Jr.,	)	
	)	2012 UT App 245
Defendant and Appellant.)		

Third District, Salt Lake Department, 071900011

The Honorable Michele M. Christiansen

Attorneys: Elizabeth A. Lorenzo and Robert K. Engar, Salt Lake City, for Appellant

Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake City, for Appellee

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Before Judges Voros, Thorne, and Roth.

ROTH, Judge:

¶1 Edward Joseph Strieff Jr. appeals from his convictions for attempted possession of a controlled substance and possession of drug paraphernalia. Strieff contends that the district court erroneously denied his motion to suppress the evidence underlying these

convictions by applying an intervening circumstances exception not recognized by Utah law or the Utah Constitution. Because we conclude that the district court applied the proper test and correctly denied the motion to suppress, we affirm.

BACKGROUND

¶2 After receiving an anonymous tip that drug activity was occurring at a home in South Salt Lake, Utah, Officer Doug Fackrell conducted intermittent surveillance of the home for approximately three hours over a one-week period. In the course of his surveillance, Officer Fackrell observed short-term traffic at the house, which in his experience was consistent with drug sales activity. Consequently, Officer Fackrell decided he needed to "find out what was going on [in] the house."

¶3 Officer Fackrell then saw Strieff leave the home on foot. Although he had not witnessed Strieff's arrival at the house, Officer Fackrell believed, based on his observations of other short-term traffic at the location, that Strieff was a short-term visitor who might be involved in drug activity, so he followed Strieff in his unmarked vehicle. When Strieff approached a 7-Eleven, Officer Fackrell pulled alongside him, stepped out of his vehicle, and identified himself as a police officer. The officer then asked Strieff what he had been doing at the house. Officer Fackrell also requested identification, and Strieff produced an identification card, which the officer re-

tained while he ran a warrants check. That inquiry revealed a "small traffic warrant." As a result, Officer Fackrell arrested Strieff and, in the course of conducting a search incident to the arrest, discovered "a white crystal substance" that "tested positive for methamphetamine," "a small green plastic scale" covered with a "white powder residue," and a glass pipe. Strieff was subsequently charged with unlawful possession of a controlled substance and possession of drug paraphernalia.

¶4 Strieff moved to suppress the methamphetamine and paraphernalia evidence, asserting that it had been obtained as the result of an illegal seizure. The State conceded that Officer Fackrell had illegally detained Strieff[1] but argued that the evidence was nevertheless admissible because it "was discovered during a search incident to a lawful warrant-arrest. .

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[1] The parties agree that Officer Fackrell's detention of Strieff was a level two encounter that required reasonable, articulable suspicion that Strieff was engaged in criminal wrongdoing. *See generally State v. Hansen*, 2002 UT 125, ¶ 35, 63 P.3d 650 (recognizing three levels of encounters between police and the public and stating that a level two detention requires the officer to have "'specific and articulable facts and rational inferences [that] . . . give rise to a reasonable suspicion a person has [committed] or is committing a crime'" (quoting *United States v. Werking*, 915 F.2d 1404, 1407 (10th Cir. 1990))). The State has conceded that Officer Fackrell lacked the required degree of suspicion, and, for purposes of this decision, we assume that the initial detention was unlawful.

. . [and therefore] was not a product of the initial detention." *See generally Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (stating that "the more apt question" in determining whether evidence obtained from "the illegal actions of the police" should be suppressed is "whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint"); *State v. Arroyo*, 796 P.2d 684, 690 n.4 (Utah 1980) (employing a three-part test for determining whether evidence is obtained through exploitation of an illegal search or seizure, which requires consideration of the temporal proximity between the discovery of the evidence and the initial illegality, the presence or absence of intervening circumstances, and the purpose and flagrancy of the officer's misconduct).

¶5 The district court agreed with the State, concluding that although the illegal seizure and the search occurred in quick succession and their temporal proximity therefore weighed in favor of suppression, an intervening circumstance—the discovery of the warrant—and the officer's lack of purposefulness and flagrancy in detaining Strieff weighed against exclusion of the evidence. The district court concluded that, on balance, the attenuation factors supported a determination that the discovery of the evidence was not a result of exploitation of the initial illegality and denied Strieff's motion to suppress.

Strieff entered conditional guilty pleas[2] to attempted possession of a controlled substance and possession of drug paraphernalia. He now appeals, asserting that the district court applied a test not recognized by Utah law to deny his motion to suppress.

ISSUE AND STANDARD OF REVIEW

¶6 Strieff recognizes that both the United States Supreme Court and the Utah Supreme Court have applied the attenuation doctrine for the purpose of assessing whether evidence obtained during a search or seizure conducted in violation of the Fourth Amendment must be suppressed or whether it is sufficiently separate from the initial illegality to be purged of any taint. *See Wong Sun*, 371 U.S. at 487–88; *Arroyo*, 796 P.2d at 690 n.4. Strieff contends, however, that in considering the warrant as an intervening circumstance, the district court went beyond the bounds of the attenuation doctrine as it has been recognized under Utah law.[3] We review the

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[2] A conditional guilty plea reserves the defendant's right to appeal a denial of a motion to suppress and "allows withdrawal of the plea if [the] defendant's arguments in favor of suppression are accepted by the appellate court." *State v. Sery*, 758 P.2d 935, 938 (Utah Ct. App. 1988).

[3] Strieff purports to raise a challenge under both the Fourth Amendment to the federal constitution and its state constitution counterpart, article 1, section 14. While Strieff effectively develops the general notion that Utah courts have recognized that article 1, section 14 can provide greater protec-

(continued . . .)

district court's denial of a motion to suppress for correctness. *See State v. Tripp*, 2010 UT 9, ¶ 23, 227 P.3d 1251. We likewise review the court's interpretation of precedent in reaching its decision to suppress for correctness. *See generally Ellis v. Estate of Ellis*, 2007 UT 77, ¶ 6, 169 P.3d 441 (stating the standard for reviewing the district court's interpretation of precedent).

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tion than the Fourth Amendment, his criticism of the district court's attenuation analysis relies on Utah cases addressing application of the attenuation doctrine only in the context of the federal constitution. *See, e.g.*, *State v. Thurman*, 846 P.2d 1256 (Utah 1993); *State v. Arroyo*, 796 P.2d 684 (Utah 1990); *State v. Newland*, 2010 UT App 380, 253 P.3d 71. And neither those cases, nor any other Utah cases discussing the attenuation doctrine, suggest that its application would differ under the state constitution. Furthermore, Strieff does not explain how the state constitution might provide broader or different protections in this context than does the federal constitution. Strieff's claim is therefore more accurately viewed as a contention that the district court failed to properly apply the attenuation doctrine as it has been adopted by the Utah courts. Consequently, we must decline Strieff's invitation to separately analyze the attenuation doctrine under article I, section 14 of the Utah Constitution. *See generally State v. Van Dyke*, 2009 UT App 369, ¶ 17 n.4, 223 P.3d 465 (declining to engage in an independent analysis under the state constitution when the defendant did not supply any legal analysis or authority).

ANALYSIS

I. *State v. Topanotes*

¶7 As a threshold matter, we address Strieff's contention that the methamphetamine and paraphernalia evidence discovered by Officer Fackrell following the warrant arrest must be suppressed under the reasoning of the Utah appellate courts in *State v. Topanotes*, 2003 UT 30, 76 P.3d 1159, and a number of other cases. Unlike the dissent, we are not persuaded that *Topanotes* is controlling authority in this case. But, because of the similarity of the facts between the two cases and the dissent's thoughtful discussion of *Topanotes*, we engage in a separate analysis to explain how we distinguish it from the case before us.

¶8 The Fourth Amendment protects against unreasonable searches and seizures. *See* U.S. Const. amend. IV. The exclusionary rule is a judicial remedy that renders "evidence obtained by searches and seizures in violation of the Constitution . . . inadmissible in state court." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The exclusionary rule is not absolute, however; evidence seized as a result of an illegal search or seizure may be admissible under three "closely related but analytically distinct" exceptions: independent source, inevitable discovery, and attenuation. *See United States v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990). Under the independent source doctrine, challenged evidence is ad-

missible despite the constitutional violation "if it derived from a lawful source independent of the illegal conduct." *Id.* The inevitable discovery doctrine is an extension of the independent source doctrine and deems admissible evidence discovered during an illegal search or seizure "if it inevitably or ultimately would have been discovered by lawful means without reference to the police misconduct." *Id.* And the attenuation doctrine considers whether the "causal connection between the constitutional violation and the discovery of the evidence has become so attenuated as to dissipate the taint" of the initial illegality, making suppression unnecessary as a deterrent. *Id.*

¶9 Although *Topanotes* is nearly factually identical to the present case,[4] the Utah Supreme Court was analyzing whether drug evidence discovered pursuant to arrest on a warrant discovered following an illegal detention could be admitted under the inevitable discovery doctrine, not the attenuation doctrine. The dissent places emphasis on the "closely related" aspect of the relationship between the three exceptions, noting that it was unlikely that the "Utah Supreme Court would have allowed the evidence discovered in [*Topanotes*] if only the State had urged the attenuation doctrine instead of the 'closely related' inevitable discovery doctrine." *See infra* ¶

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[4] For a fuller discussion of the factual similarities between the two cases, see the dissenting opinion at paragraph 43.

56 (quoting *Terzado-Madruga*, 897 F.2d at 1113). However closely related these doctrines are, they are nevertheless "analytically distinct," and we believe that our treatment of the warrant discovery in this case as an issue of first impression under the attenuation doctrine is therefore justified. *Compare Topanotes*, 2003 UT 30, ¶ 16 (noting that "[a] crucial element of inevitable discovery is independence; there must be some 'independent basis for discovery'" (citation omitted)), *with State v. Newland*, 2010 UT App 380, ¶¶ 9, 11, 253 P.3d 71 (requiring a causal connection between the initial illegality and the challenged evidence for application of the attenuation doctrine and focusing on whether the evidence is obtained "'by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint'" (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963))).

¶10 Indeed,

> [t]he inevitable discovery doctrine allows the admission of evidence that was seized illegally if it would have been seized legally eventually. . . . In contrast, the attenuation doctrine admits evidence that is obtained with the authority of law provided that the evidence was not come at by the exploitation of a prior illegal act.

State v. Eserjose, 259 P.3d 172, 183 (Wash. 2011) (en banc) (emphasis and internal quotation marks omit-

ted). Using the inevitable discovery doctrine, courts therefore consider whether, given the facts and circumstances surrounding the discovery of evidence, the police would have discovered the evidence anyway in the absence of the initial illegality. *See Topanotes*, 2003 UT 30, ¶ 14. In such a case, the exclusionary rule is deemed inapplicable because "[t]he causal chain between the illegality and the discovered evidence [would have been] broken [by] the evidence [being] . . . discovered through independent and lawful activity—in other words through an independent source." *State v. Worwood*, 2007 UT 47, ¶ 43, 164 P.3d 397 (internal quotation marks omitted); *see also Nix v. Williams*, 467 U.S. 431, 459 (1984) (Brennan, J., dissenting) (noting that the inevitable discovery exception is a corollary of the independent source doctrine that requires a "hypothetical finding" that the evidence would have been discovered *despite* the illegality). If the evidence would not *necessarily* have been discovered, then it must be excluded to effect the primary purpose of the exclusionary rule: to deter unconstitutional police conduct. *See Topanotes*, 2003 UT 30, ¶ 19 ("Allowing the evidence [where it might not have been discovered absent the illegality] would provide no deterrent at all to future unlawful detentions."). With the attenuation doctrine, however, the illegality is not disregarded but instead is the lens through which the discovery of the evidence must be examined in order to determine whether suppression is appropriate. *See generally*

State v. Arroyo, 796 P.2d 684, 690 n.4 (Utah 1990) (identifying temporal proximity, intervening circumstances, and purpose and flagrancy of the officer's conduct as the factors a court must consider in determining whether the discovery of evidence is attenuated from the initial illegality). This is because the "attenuation analysis does not apply . . . absent an initial finding of at least *some* causal connection between the illegality and the testimony." *Terzado-Madruga*, 897 F.2d at 1116. Thus, "[e]ven if the illegality is the 'but for' reason for the evidence's discovery, it should still be admitted if it is sufficiently attenuated to dissipate the taint of the illegality." *Worwood*, 2007 UT 47, ¶ 44 (internal quotation marks omitted). Under this analysis, the degree to which the initial illegality was purposeful and flagrant and the degree to which the mechanism that led to discovery of the evidence (e.g., an apparently voluntary statement or consent to search or, as here, the discovery of an arrest warrant) was affected by the initial illegality are considered together in order to determine whether the evidence was so tainted that it ought to be suppressed. *See infra* ¶¶ 22, 30–33.

¶11 Which exclusionary rule exception is being applied not only affects how a court views the circumstances surrounding the illegality but might also result in the development of a factual record with a different focus on what is relevant, i.e., where certain facts are added or omitted or are given more or less

attention and weight. For example, in an inevitable discovery case, the court focuses on what would have happened if the police misconduct had not occurred. The purpose and flagrancy with which the officer acted—the central component of an attenuation analysis—is therefore of little, if any, consequence because the facts are viewed in a light where the illegality is disregarded. Indeed, the purpose and flagrancy of the officer's conduct in *Topanotes* is not even mentioned, much less assessed. In an attenuation analysis, on the other hand, the circumstances surrounding the illegality and discovery of evidence are at the heart of the inquiry, and little emphasis is placed on what might have occurred if the officer had not illegally seized or searched the defendant. Thus, although both exceptions strive to temper the harsh consequences of the exclusionary rule in circumstances where police misconduct is unlikely to be deterred by suppression, they employ "analytically distinct" methods for assessing whether apparently "tainted" evidence has been sufficiently cleansed. *See, e.g.*, *United States v. Fialk*, 5 F.3d 250, 251 (7th Cir. 1993) (declining to consider the attenuation doctrine when the government argued only inevitable discovery despite the attenuation doctrine being "better fitted" to the facts of the case); *Terzado-Madruga*, 897 F.2d at 1113, 1116 (admitting evidence pursuant to the inevitable discovery and independent source doctrines but not the attenuation doctrine). Because the analytical approaches of the

inevitable discovery and the attenuation doctrines are sufficiently distinct, we do not believe that *Topanotes*, which evaluates the admissibility of evidence discovered pursuant to a warrant arrest under the inevitable discovery doctrine, constrains our analysis under the separate attenuation doctrine.[5]

II. Attenuation Analysis

¶12 In the case before us, the district court applied an attenuation analysis to reach its conclusion that the evidence found in the search incident to arrest was admissible despite the unconstitutional stop

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[5] Strieff has directed us to a number of other cases in which evidence discovered during the search incident to an arrest on a valid warrant was suppressed. *See State v. Johnson*, 805 P.2d 761, 764 (Utah 1991); *State v. Swanigan*, 699 P.2d 718, 719 (Utah 1985) (per curiam); *State v. Chism*, 2005 UT App 41, ¶ 22, 107 P.3d 706; *State v. Valdez*, 2003 UT App 100, ¶¶ 20–21, 68 P.3d 1052; *State v. Sykes*, 840 P.2d 825, 829 (Utah Ct. App. 1992); *State v. Hansen*, 837 P.2d 987, 989 (Utah Ct. App. 1992); *State v. Munsen*, 821 P.2d 13, 16 (Utah Ct. App. 1991). None of these cases, however, involve an analysis of any of the exceptions to the exclusionary rule. Rather, they seem to support a conclusion that the determination of the admissibility of evidence after an initial illegality can vary depending on the legal theory that is applied. As we have noted, the independent source, inevitable discovery, and attenuation doctrines are often applied in factually analogous situations, but because they each focus on the facts from somewhat different legal perspectives, their results may differ.

that led to the discovery of the warrant.[6] "In cases involving the admissibility of evidence obtained as a consequence of police misconduct, the United States Supreme Court has eschewed a 'but for' test" in favor of the more nuanced attenuation analysis. *State v. Arroyo*, 796 P.2d 684, 688 (Utah 1990).

> We need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Wong Sun, 371 U.S. at 487–88. Thus, application of the rule must take into account its underlying justifications: the "exclusionary principle is driven by dual 'considerations of deterrence and of judicial integrity.'" *State v. Grayson*, 336 S.W.3d 138, 147 (Mo. 2011) (en banc) (quoting *Brown v. Illinois*, 422 U.S. 590, 599 (1975)). In this regard,

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[6] The State has not argued for the evidence's admissibility under the inevitable discovery or independent source doctrines.

> [the exclusionary rule's] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. But [d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons.

Brown, 422 U.S. at 599–600 (second alteration in original) (internal quotation marks omitted). When a warrant is discovered during the course of an illegal detention, as was the case here, "any analysis to determine whether the evidence seized . . . should be suppressed must involve a balancing of the mutual concerns of discouraging police conduct that results in the illegal detention of a citizen, while recognizing the legitimate interest of the state in enforcing outstanding arrest warrants." *State v. Frierson*, 926 So. 2d 1139, 1145–46 (Fla. 2006) (Anstead, J., concurring). Hence, where a warrant discovered after an initial illegality leads to the discovery of evidence of a crime, the underlying principle of the attenuation doctrine must be taken into account in determining whether that evidence ought to be suppressed: "'The notion of the "dissipation of the taint" attempts to [mark] the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost . . . [, i.e.,] to mark the point

of diminishing returns of the deterrence principle.'" *McBath v. State*, 108 P.3d 241, 248–49 (Alaska Ct. App. 2005) (first alteration and omission in original) (quoting 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.4(a) (4th ed. 2004)).

¶13 The United States Supreme Court and the Utah Supreme Court have applied a three-part test to determine whether evidence obtained following an unconstitutional police action is sufficiently attenuated from the initial illegality to dissipate any taint. This attenuation analysis requires the court to analyze and balance three factors: "[t]he temporal proximity of the [unlawful detention] and the [search], the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." *Brown*, 422 U.S. at 603–04 (citation and footnotes omitted); *accord State v. Arroyo*, 796 P.2d at 690 n.4.

A. The District Court Applied the Correct Attenuation Test.

¶14 Strieff contends that the district court failed to properly apply this three-part attenuation analysis, instead adopting a novel intervening circumstances exception from *United States v. Green*, 111 F.3d 515 (7th Cir. 1997), that permits a district court to treat the discovery of an outstanding warrant as conclusive evidence of attenuation. The encounter in *Green* began with two police officers driving behind a blue

Chevrolet that one of them recognized as having been parked the night before in front of a house belonging to a felon wanted on warrants. *See id.* at 517. The officers thought that the felon might be in the car or that, at the very least, the occupants might know where he was. *See id.* When the vehicle pulled into a driveway, the officers blocked its exit with their car, a move the Seventh Circuit later determined had resulted in the unconstitutional seizure of both its occupants. *See id.* at 517, 520. The officers discovered a warrant for the passenger in the course of confirming his identification. *See id.* at 517. A search of the vehicle incident to the passenger's arrest yielded crack cocaine and a gun belonging to the driver. *See id.* The officers then arrested the driver. *See id.* The driver moved to suppress the evidence, asserting that it was discovered as the result of a search tainted by the illegal seizure. *See id.* The district court disagreed, and the Seventh Circuit affirmed the denial of the driver's motion to suppress. *See id.* at 517–18.

¶15 According to Strieff, while the Seventh Circuit "ostensibly appl[ied] the [attenuation] factors to the facts in *Green*," the court actually "created what it termed the 'intervening circumstances exception,'" under which the discovery of a warrant automatically attenuates an illegal seizure from evidence discovered in the search incident to arrest. Although Strieff is correct that *Green* does refer to a warrant-focused "intervening circumstances exception," *see*

id. at 522–23, we do not read the decision as elevating the discovery of a warrant to a supervening circumstance that eliminates any attenuation analysis. Rather, the *Green* court considered all three prongs of the attenuation analysis and decided that, on balance, they weighed against exclusion. *See id.* at 521–23 (noting that although the illegal stop and the search were temporally proximate, the warrant constituted an intervening circumstance and the record did not reveal any bad faith on the part of the officers because, though inappropriate, "the purpose of the stop was not to seek evidence against the [occupants]" or "to search the automobile"). Its description of the rationale behind its decision to admit the evidence as an "intervening circumstance exception" therefore appears to be a form of shorthand used to describe a circumstance where the presence of a warrant tipped the balance against suppression.[7]

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[7] Some courts have employed a warrant-focused intervening circumstances exception in the manner Strieff contends that *Green* did, that is, by treating the discovery of a warrant as an independently sufficient basis to deny suppression in the face of an initial illegality. None of them relied on *Green* as a basis for such a decision, however. *See, e.g.*, *State v. Cooper*, 579 S.E.2d 754, 758 (Ga. Ct. App. 2003) (stating, without regard for the temporal proximity or the nature of the officers' misconduct, that the officers' intervening discovery of a warrant and arrest of the defendant attenuated the link between the illegal detention and the evidence obtained); *State v.*

(continued . . .)

¶16 Indeed, the district court in the case before us did not appear to rely on *Green* as the source of a new one-step approach that treated discovery of a warrant as a per se basis for denying the motion to suppress, as Strieff claims it did. Rather, the court employed the three-part attenuation analysis adopted by the Utah Supreme Court. In its findings of fact, conclusions of law, and order denying Strieff's motion to dismiss, the district court identified the three factors of the attenuation analysis and then separately considered each, assessing the relevant evidence and making a determination about whether that factor weighed for or against suppression. Although the court concluded that an arrest warrant constitutes an intervening circumstance, it did not

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Thompson, 438 N.W.2d 131, 137 (Neb. 1989) (determining, without considering the other two factors, that the immediate discovery of a warrant for the defendant attenuated the taint of the illegal stop and the identification of the defendant as a robbery suspect in a subsequent lineup); *cf. State v. Walker-Stokes*, 180 Ohio App. 3d 36, 2008-Ohio-6552, 903 N.E.2d 1277, at ¶ 40 ("[B]ecause as a matter of law, an outstanding arrest warrant operates to deprive its subject of the reasonable expectation of privacy the Fourth Amendment protects, the exclusionary rule does not apply to the search and seizure of that subject that would otherwise be illegal . . . ." (emphasis omitted)). *But see State v. Gardner*, 2d District No. 24308, 2011-Ohio-5692, at ¶¶ 37–38 (explaining that the discovery of the warrant must be "removed, unrelated, unforseen, and independent from the unlawful stop and seizure" for the evidence to be admissible), *appeal allowed*, 131 Ohio St. 3d 1483 (Ohio Mar. 21, 2012).

give this factor dispositive weight. Instead, the court, "[w]eighing the factors in their totality," determined "suppression to be an inappropriate remedy" because "Officer Fackrell did not exploit the initial unlawful detention to search [Strieff']s person." While the district court noted that Officer Fackrell "did not cause and could not have anticipated" the arrest warrant, we do not read this statement to indicate that the court believed that the warrant was sufficient on its own to attenuate the initial illegal detention from the methamphetamine and paraphernalia discovered during the search. Rather, it appears that the court considered the discovery of the warrant to be an intervening circumstance that did not arise as the result of purposeful or flagrant conduct by the officer and therefore provided a basis for the search that was not an exploitation of the illegal detention. In other words, in the district court's view, Officer Fackrell did not deliberately detain Strieff in violation of his constitutional rights in the hope of turning up a warrant that would then justify a search. Because we conclude that the district court employed the correct attenuation test, the question remaining is whether the court properly analyzed the three required factors and reached an appropriate conclusion.

B. The District Court Carried Out an Appropriate Attenuation Analysis.

¶17 In making its decision to deny Strieff's motion to suppress, the district court analyzed each of the required factors in the attenuation analysis and properly weighed and balanced them. We discuss each factor in turn.

1. Temporal Proximity

¶18 Neither party takes issue with the district court's finding that the time between Officer Fackrell's initial stop of Strieff and the search incident to arrest was "relatively short." Close temporal proximity generally favors suppression. *See State v. Shoulderblade*, 905 P.2d 289, 293 (Utah 1995) ("A brief time lapse between a Fourth Amendment violation and [the evidence obtained] often indicates exploitation because the effects of the misconduct have not had time to dissipate."). However,

> [u]nlike the intervening circumstances and the purpose and flagrancy factors, . . . temporal proximity does not directly address the relationship between the police misconduct and the . . . search but rather is a circumstance surrounding these events. As a result, its relative probative value expands and contracts depending on the particular facts of any given case.

State v. Newland, 2010 UT App 380, ¶ 14, 253 P.3d 71 (citation and internal quotation marks omitted). Here, the proximity between the illegal detention and the search was short because Officer Fackrell quickly became aware of a pending warrant, placed Strieff under arrest, and searched him incident to that arrest. The significance of that warrant as an intervening circumstance will ultimately affect how we view the relative weight of temporal proximity in this case. Thus, while the temporal proximity factor appears to weigh in favor of suppression, its effect on the overall balance among the factors must be assessed within the broader factual context.

2. Intervening Circumstances

¶19 The significance of a subsequently-discovered arrest warrant in attenuating the taint of an illegal detention presents an issue of first impression in Utah.

> Case law from other state and federal courts[, however,] uniformly holds that the discovery of an outstanding arrest warrant prior to a search incident to arrest constitutes an intervening circumstance that may—and, in the absence of purposeful or flagrant police misconduct, will—attenuate the taint of the antecedent unlawful [detention].

People v. Brendlin, 195 P.3d 1074, 1076 (Cal. 2008) (emphasis omitted).[8]

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[8] The California Supreme Court concludes that the jurisdictions that have considered the issue have universally treated the discovery of an arrest warrant as an intervening circumstance. Our independent research supports that conclusion, as none of the cases we have located from jurisdictions that have addressed this question appear to have adopted a contrary rule. *See, e.g.*, *United States v. Gross*, 662 F.3d 393, 404 (6th Cir. 2011)*; United States v. Simpson*, 439 F.3d 490, 495–96 (8th Cir. 2006)*; United States v. Green*, 111 F.3d 515, 522 (7th Cir. 1997); *McBath v. State*, 108 P.3d 241, 248 (Alaska Ct. App. 2005); *State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011); *People v. Brendlin*, 195 P.3d 1074, 1080 (Cal. 2008), *cert. denied*, 129 S. Ct. 2008 (2009); *People v. Hillyard*, 589 P.2d 939, 941 (Colo. 1979) (en banc), *questioned in dicta by People v. Padgett*, 932 P.2d 810, 816 (Colo. 1997) (en banc), *discussed by People v. Martinez*, 200 P.3d 1053, 1055 n.1 (Colo. 2009) (en banc) (recognizing tension between *Hillyard* and dicta in *Padgett* but neither "address[ing] nor resolv[ing] th[at] tension"); *State v. Frierson*, 926 So. 2d 1139, 1144 (Fla. 2006), *cert. denied*, 549 U.S. 1082 (2006); *State v. Cooper*, 579 S.E.2d 754, 758 (Ga. Ct. App. 2003); *State v. Page*, 103 P.3d 454, 459–60 (Idaho 2004); *People v. Mitchell*, 824 N.E.2d 642, 649 (Ill. App. Ct. 2005); *State v. Martin*, 179 P.3d 457, 462–63 (Kan. 2008), *cert. denied*, 555 U.S. 880 (2008); *Hardy v. Commonwealth*, 149 S.W.3d 433, 436 (Ky. Ct. App. 2004); *State v. Hill*, 97-2551, p. 8–9 (La. 11/6/98); 725 So. 2d 1282, 1287; *Cox v. State*, 916 A.2d 311, 323 (Md. 2007); *People v. Reese*, 761 N.W.2d 405, 412 (Mich. Ct. App. 2008); *State v. Grayson*, 336 S.W.3d 138, 147 (Mo. 2011) (en banc); *State v. Thompson*, 438 N.W.2d 131, 137 (Neb. 1989); *State v. Shaw*, 2011 WL 2622375, *5 (N.J. Super. Ct. App. Div. 2011) (per curiam), *cert. granted*, 34 A.3d 783 (N.J. 2011); *State*

(continued . . .)

¶20 To determine what role a subsequently-discovered warrant should play in an attenuation analysis under Utah law, we must first decide what constitutes an intervening circumstance. "Intervening circumstances are events that create a clean break in the chain of events" leading to the discovery of incriminating evidence. *Newland*, 2010 UT App 380, ¶ 15. "Typically, the intervening circumstance which dissipates the taint involves a voluntary act by the defendant, such as the voluntary confession or consent to search given after an illegal search or sei-

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v. Soto, 2008-NMCA-032, ¶¶ 26–27, 143 N.M. 631, 179 P.3d 1239, *cert. granted*, 143 N.M. 667 (N.M. Feb. 28, 2008) (No. 30,894), *cert. quashed*, 146 N.M. 728 (N.M. 2009); *Gardner*, 2011-Ohio-5692, at ¶ 37; *Jacobs v. State*, 2006 OK CR 4, ¶¶ 8–11, 128 P.3d 1085, 1088–89; *Reed v. State*, 809 S.W.2d 940, 947 (Tex. Ct. App. 1991); *cf. State v. Rothenberger*, 440 P.2d 184, 185–86 (Wash. 1968) (concluding that the causal link between a purportedly illegal arrest and discovery of evidence was broken by an outstanding warrant under the related independent source doctrine).

The Indiana Court of Appeals, however, has a split of authority that has not yet been reconciled, with one appellate court recognizing the discovery of a warrant as an intervening circumstance and another rejecting that approach. *Compare Quinn v. State*, 792 N.E.2d 597, 600–01 (Ind. Ct. App. 2003) (considering the warrant to be an intervening circumstance), *with Sanchez v. State*, 803 N.E.2d 215, 222–23 (Ind. Ct. App. 2004) (distinguishing *Quinn* and declining to treat the warrant as an intervening circumstance), *cert. denied*, 812 N.E.2d 804 (Ind. 2004).

zure." *United States v. Green*, 111 F.3d 515, 522 (7th Cir. 1997); *cf. United States v. Bailey*, 691 F.2d 1009, 1017–18 (11th Cir. 1982) ("[T]he police may legally arrest a defendant for a new, distinct crime, even if the new crime is in response to police misconduct and causally connected thereto."); *State v. Earl*, 2004 UT App 163, ¶¶ 24–25, 92 P.3d 167 (concluding that by giving a false name and birth date, the defendant committed the crime of false identification, which constituted an intervening illegal act justifying arrest). Strieff encourages us to draw from this historical pattern a proscription on treating anything other than a voluntary act by the defendant as an intervening circumstance. But the focus of concern in determining whether evidence obtained following an illegal detention ought to be suppressed is not necessarily the nature of the intervening circumstance but rather on whether there is a sufficient separation between the initial illegality and the subsequent discovery of the evidence to attenuate the discovery of the evidence from the effects of the earlier police misconduct. *See Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963). Often the circumstance that intervenes is some apparently voluntary action by the person detained, but voluntariness is not a logically necessary constraint on the attenuation doctrine; rather, any event that effectively breaks the chain between the possibly coercive effects of the illegal stop on the free will of the person detained and the discovery of the evidence can serve the pur-

pose. Because the discovery of a warrant sets in motion a legal process that can be entirely independent of the lingering effects of the illegal stop, a warrant can be such an attenuating circumstance.

¶21 "The discovery of an outstanding arrest warrant informs the law enforcement officer that a magistrate has found there is probable cause to believe that a crime has been committed and that the person subject to the warrant has committed the crime." *State v. Moralez*, 242 P.3d 223, 231 (Kan. Ct. App. 2010), *review granted* (Kan. 2011). In other words, a warrant provides cause for an arrest based on facts separate from the illegal detention and on the judgment of an official removed from the immediate circumstances. *See Reed v. State*, 809 S.W.2d 940, 947 (Tex. Ct. App. 1991); *accord Jacobs v. State*, 2006 OK CR 4, ¶ 9, 128 P.3d 1085, 1089 ("[D]iscovery of outstanding warrants is a significant intervening event which gives police probable cause to arrest a defendant independent from an illegal stop and seizure."). Indeed, the court in *United States v. Green*, 111 F.3d 515 (7th Cir. 1997), reasoned that there is "less 'taint'" when an outstanding arrest warrant intervenes than when the intervening circumstance is the defendant's voluntary act. *See id.* at 522. This is because once a warrant is discovered, there is a legal basis for a search that does not require any choice by the defendant, such as in the case of a confession or consent to search, that could be influenced by the lingering effects of the initial illegality. *See id.* And

while an illegal stop might create a situation that could result in an actual crime, such as resisting arrest or disobeying a police command, for which the person detained could be legally arrested and searched, a search incident to arrest on an outstanding warrant does not stem from an act that may have been provoked by the initial illegal detention. *See id.* Put differently, when the officer does not conduct a search of the person until after the discovery of the warrant, "[t]he challenged evidence [i]s thus the fruit of the outstanding warrant, and [i]s not obtained through exploitation of the unlawful . . . stop." *See generally Brendlin*, 195 P.3d at 1080. For these reasons, we agree with the courts of other jurisdictions that a warrant is an intervening circumstance that ought to be considered in the attenuation analysis.[9]

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[9] As Judge Thorne explains in his dissenting opinion, *see infra* ¶ 49 note 3, Utah courts have historically considered intervening circumstances involving events that occur after the initial police illegality and before the mechanism that leads to the discovery of the controverted evidence. In those cases, the evidence-producing mechanisms were volitional acts, such as a consent to search, a statement or confession, or the commission of a new crime. The dissent suggests that the warrant itself cannot be an intervening circumstance, as other jurisdictions have treated it, but rather is another type of mechanism by which evidence is discovered and is subject to taint by the initial illegality, unless there are circumstances that intervene to

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cleanse that taint. We believe that this criticism overlooks the function of the attenuation analysis in these circumstances.

In cases involving evidence-producing mechanisms that are volitional acts, the courts have necessarily been concerned with what circumstances might have intervened prior to the occurrence of the mechanism in order to be assured that the voluntary nature of the mechanism was not tainted by the initial illegality. Intervening circumstances, therefore, have traditionally included events that demarcate a separation between the defendant's voluntary act and any potential coercion stemming from the police misconduct, such as the passage of time (an indicator so effective in gauging the likelihood that the defendant's acts were truly the product of free will that it has taken its place as a separate factor in the attenuation analysis), a change of location, notification of the rights to remain silent or to consult an attorney, events that affect the dynamics of the relationship with law enforcement (such as an appearance before a magistrate, a release from custody, or retention of counsel), and so on. *See generally State v. Newland*, 2010 UT App 380, ¶ 15, 253 P.3d 71 (identifying some intervening circumstances).

But when the mechanism of discovery, by its nature, is not subject to the contaminating influence of unconstitutional police conduct, the taint analysis inherent in the temporal proximity and intervening circumstances factors becomes far less complicated. A warrant, for example, stands alone as a basis for an arrest and resulting search. Thus, the kind of intervening events (passage of time, notification of rights, release from custody, etc.) that are so important to assessing the validity of evidence-producing mechanisms that are the product of volitional acts are not particularly relevant. Hence, virtually all the attenuation cases in other jurisdictions refer to the discovery of a warrant as itself an "intervening circumstance" (as do we), simply recognizing that it establishes a valid basis for a

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¶22 The discovery of a warrant, however, cannot by itself dissipate the taint of an initial illegality because such a per se rule could "'create[] a new form of police investigation' by routinely illegally seizing individuals, knowing that the subsequent discovery of a warrant would provide after-the-fact justification for illegal conduct." *State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011) (alteration in original) (quoting *United States v. Gross*, 624 F.3d 309, 320–21 (6th Cir. 2010)). Thus, treating a warrant as an intervening circumstance does pose the potential for abuse, and we recognize that blanket exclusion of the evidence, the result Strieff urges us to adopt, would act as a deterrent to such conduct. The United States Supreme Court, however, has "never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." *Herring v. United States*, 129 S. Ct. 695, 700 (2009) (internal quotation marks omitted). Rather, "[t]o trigger the exclusionary rule, police conduct

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search incident to arrest that is inherently independent from the police illegality and therefore not subject to its taint. *See, e.g., Simpson*, 439 F.3d at 495–96; *Brendlin*, 195 P.3d at 1080. In other words, the discovery of a warrant is likely to resolve the contamination question—which is really the central focus of the first two factors in the attenuation analysis—against suppression. As we discuss next, where a valid arrest warrant is the intervening circumstance, the third factor in the attenuation analysis, purpose and flagrancy, takes on the greatest importance in determining whether suppression is appropriate.

must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *See id.* at 702. We believe the purpose and flagrancy factor of the attenuation analysis ensures that courts strike an appropriate balance in warrant discovery situations between the benefits of deterrence of police misconduct and the cost to the justice system when pertinent evidence is excluded. Thus, the third attenuation factor, the "purpose and flagrancy of the official misconduct, dovetails with the [intervening circumstances] factor," and the "officers' reasons for detaining the subject and the flagrancy of the invasion on the subject's privacy" are critical to the weight to be accorded to the discovery of a warrant. *State v. Martin*, 179 P.3d 457, 463 (Kan. 2008).

3. Purpose and Flagrancy

¶23 The purpose and flagrancy of the officer's unlawful conduct that began the encounter is the factor that most "'directly relates to the deterrent value of suppression.'" *State v. Newland*, 2010 UT App 380, ¶ 17, 253 P.3d 71 (quoting *State v. Thurman*, 846 P.2d 1256, 1263 (Utah 1993)). This factor requires a court to assess whether the officer's conduct was both purposeful, that is, "'the misconduct was investigatory in design and purpose and executed in the hope that something might turn up,'" and flagrant, meaning "'the impropriety of the offic[er]'s miscon-

duct was obvious or the offic[er] knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless.'" *See id.* ¶ 20 (quoting *United States v. Simpson*, 439 F.3d 490, 496 (8th Cir. 2006)).

¶24 According to Strieff, the evidence demonstrates a quality of purposefulness and flagrancy in Officer Fackrell's actions that weighs in favor of excluding the methamphetamine and paraphernalia evidence. In particular, he claims that Officer Fackrell "wanted to search Strieff . . . so he illegally stopped . . . Strieff and searched for [a warrant]." Thus, he asserts, the "opportunity to discover the warrant depended entirely on the illegal detention." The district court, however, found that Officer Fackrell stopped Strieff for the legitimate purpose of investigating a suspected drug house. It further found Officer Fackrell credible when he testified that he believed that the information known to him at the time was sufficient to support a reasonable, articulable suspicion to detain Strieff, a belief that later turned out to be mistaken. Strieff has challenged the denial of the motion to suppress on the basis that the district court applied the wrong legal standard but has not challenged these fact findings, and we therefore must accept them as the district court found them. *See generally C & Y Corp. v. General Biometrics, Inc.*, 896 P.2d 47, 52 (Utah Ct. App. 1995) (stating that where the party has not challenged the factual findings, appellate courts "must accept th[e] find-

ing[s] as true"). Furthermore, when the undisputed findings of fact are sufficient to support the district court's legal conclusions, the failure to challenge the findings is usually a basis for upholding the resulting conclusions—in this case, the court's conclusion that "[t]he stop was not a flagrant violation of the Fourth Amendment[; r]ather it was a good faith mistake on the part of the officer . . . ." However, the issue of what weight to give a warrant as an intervening circumstance in the attenuation analysis presents a novel question in Utah, and the purpose and flagrancy factor plays an integral role in that determination because it functions as an indispensable safeguard of the constitutional right to be protected from unlawful search and seizure. For these reasons, we think it worthwhile to examine the facts pertinent to the trial court's assessment of purposefulness and flagrancy in the context of applicable case law from other jurisdictions in order to clarify how the discovery of a warrant and the purpose and flagrancy factors interrelate.

¶25 While it is true, as Strieff contends, that Officer Fackrell's actions were "investigatory in nature," most detentions are, so the analysis cannot simply end there. Indeed, the purpose and flagrancy factor does not treat investigatory intent as presumptively weighing in favor of exclusion; rather, the focus is on the sort of investigation that began as or has morphed into a fishing expedition conducted in conspicuous disregard of constitutional boundaries, *see*

Newland, 2010 UT App 380, ¶ 20. In other words, for the initial illegality to be deemed purposeful and flagrant, Officer Fackrell's detention of Strieff must have been "'investigatory in design and purpose and executed in the hope that something might turn up'" and "'the impropriety of the . . . misconduct [must have been] obvious or [he must have known], at the time, that his conduct was likely unconstitutional but [he] engaged in it nevertheless.'" *See id.* (quoting *Simpson*, 439 F.3d at 496); *see also* Random House, Inc., *Dictionary.com Unabridged*, *available at* www.dictionary.reference.com/browse/flagrant (last visited August 27, 2012) (defining "flagrant" as "shockingly noticeable or evident; obvious; glaring").

¶26 That was not the case here. In detaining Strieff, Officer Fackrell was relying on information that appeared reliable. The anonymous tip about drug activity had been corroborated to some extent by the officer's personal observations. Officer Fackrell testified that, in his experience, short-term traffic at the frequency he observed during different times of day throughout the course of a week was "enough [to] raise[] . . . suspicion" about drug activity at the house. He further testified that "everybody [he] saw visiting the house" stayed "[j]ust a couple minutes" and he assumed that Strieff was one of those short-term visitors. Although this was a questionable assumption given that he did not see Strief arrive, unreasonableness alone is not the hallmark of purpose and flagrancy. "[A]ll Fourth Amendment

violations are by definition unlawful and therefore unreasonable. . . . '[U]nreasonableness itself does not suggest that [an officer's] conduct was obviously improper or flagrant or that he knew it was likely unconstitutional.'" *Newland*, 2010 UT App 380, ¶ 20 (second and third alterations in original) (quoting *United States v. Herrera-Gonzalez*, 474 F.3d 1105, 1113 (8th Cir. 2007)). In addition, Officer Fackrell testified that he stopped Strieff so that he could further investigate what was going on inside the house. There is no indication in the record that the officer stopped Strieff with the purpose of checking for outstanding warrants, and the district court found that he did not target Strieff in knowing or obvious disregard of constitutional limitations. *Cf. People v. Mitchell*, 824 N.E.2d 642, 650, 644 (Ill. App. Ct. 2005) (affirming the suppression of drug evidence because "the sole apparent purpose of the detention [wa]s to check for a warrant" where the officer "did not think [the defendant] was involved in anything criminal"); *State v. Soto*, 2008-NMCA-032, ¶¶ 1–2, 27, 143 N.M. 631, 179 P.3d 1239 (affirming the suppression of evidence because "[t]he purpose of the stop—to obtain information from [the d]efendant—was directly related to [the d]efendant's ultimate arrest"). Rather, the facts support the district court's conclusion that Officer Fackrell "did not cause and could not have anticipated" discovery of the arrest warrant.

¶27 The court's conclusion that Officer Fackrell's conduct was neither purposeful nor flagrant is further supported by the circumstances of the encounter as a whole. The officer's misconduct amounted to a misjudgment, one of constitutional proportion certainly, but a single misstep over the constitutional boundary rather than a deliberate transgression. *See generally Rawlings v. Kentucky*, 448 U.S. 98, 110 (1990) (stating that conduct premised on an error about the officer's authority "does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion" of evidence); *People v. Brendlin*, 195 P.3d 1074, 1080 (Cal. 2008) ("[A] mere 'mistake' with respect to the . . . law[] does not establish that the . . . stop was pretextual or in bad faith."). Moreover, from Strieff's perspective, the degree of intrusion upon his rights, though real, was relatively minor. Even without reasonable, articulable suspicion, Officer Fackrell could legally have stopped Strieff and asked to see his identification, noted his name and date of birth, and then run a warrants check while Strieff remained free to leave. *See, e.g.*, *State v. Hansen*, 2002 UT 125, ¶ 34, 63 P.3d 650 (stating that there is no Fourth Amendment seizure when an encounter is consensual, as evidenced by a person voluntarily responding to noncoercive police questioning); *State v. Deitman*, 739 P.2d 616, 618 (Utah 1984) (per curiam) (concluding that no detention occurs when an officer merely asks a defendant for identification and for an explanation of his or

her activities). Had a warrant then turned up, the officer would have had a constitutional basis for detaining Strieff as well as a professional obligation to arrest him. The situation that actually developed in this case is not so different as to suggest that the detention was either a deliberate or glaring violation of Strieff's constitutional rights or the result of official indifference to them. And, although we accept the State's concession that Strieff was not free to leave because Officer Fackrell retained his identification, we note that the furthest Officer Fackrell may have taken Strieff's identification was to the officer's nearby vehicle. Recognizing that such a minimal encroachment does not justify a Fourth Amendment violation, we nevertheless view the relatively slight intrusion as support for the district court's conclusion that Officer Fackrell was not acting purposefully or flagrantly in detaining Strieff. *See generally State v. Martin*, 179 P.3d 457, 463–64 (Kan. 2008) (taking into account all the circumstances surrounding the officers' encounter with the defendant, including the relatively minimal intrusion upon the defendant's privacy by engaging him in a brief conversation about his activities, to conclude that the officer's conduct was not purposeful). The purpose and flagrancy factor therefore weighs against suppression.

4. Balancing the Attenuation Factors

¶28 Finally, we address whether the district court correctly concluded that the methamphetamine and paraphernalia evidence discovered on Strieff was sufficiently attenuated from the initial illegal detention. "This balancing [test] necessitates consideration of all factors without giving any of them dispositive weight . . . [, but recognizes that t]he factors . . . are not of mathematically equal importance." *State v. Newland*, 2010 UT App 380, ¶ 26, 253 P.3d 71 (first alteration in original) (internal quotation marks omitted).

¶29 With respect to temporal proximity, we recognize that Strieff's illegal detention and the discovery of the drugs and paraphernalia in his possession occurred within a very short time period. As we have noted, however, the facts of a case affect the relative weight of the temporal proximity factor. Because temporal proximity is "a circumstance surrounding the[] events," its relative probative value contracts when the facts demonstrate that temporal proximity had little or no bearing on the subsequent conduct of the police or the defendant. *See generally id.* ¶ 14 (internal quotation marks omitted). "In routine police encounters that lead to warrants checks, there is almost always no temporal break between the initial detention and the subsequent discovery of the evidence." *State v. Moralez*, 242 P.3d 223, 231 (Kan. Ct. App. 2010), *review granted* (Kan. 2011); *accord*

Brendlin, 195 P.3d at 1079 ("[Short temporal proximity] is the typical scenario in essentially every case in this area." (internal quotation marks omitted)). And temporal proximity is less significant in the case where the intervening circumstance is discovery of a warrant because it "is not a voluntary act by the defendant" susceptible to exploitation or contamination by the recent illegality. *See United States v. Simpson*, 439 F.3d 490, 495 (8th Cir. 2006). We therefore conclude that the short time between the illegal detention and the discovery of the evidence is of relatively little weight under the circumstances of this case.

¶30 While temporal proximity has little effect on the analysis in cases involving discovery of a warrant, the intervening circumstance and purpose and flagrancy factors "dovetail" in a way that makes them mutually interdependent in the attenuation analysis. *See Martin*, 179 P.3d at 463 ("The third factor, the purpose and flagrancy of the official misconduct, dovetails with the second factor . . . ."). The Alaska Court of Appeals has distilled the relationship between the two factors in the following way:

> If, during a non-flagrant but illegal stop, the police learn the defendant's name, and the disclosure of that name leads to the discovery of an outstanding warrant for the defendant's arrest, and the execution of that warrant leads to the discovery of

> evidence, the existence of the arrest warrant will be deemed an independent intervening circumstance that dissipates the taint of the initial illegal stop vis-à-vis the evidence discovered as a consequence of a search incident to the execution of the arrest warrant.

McBath v. State, 108 P.3d 241, 248 (Alaska Ct. App. 2005). The Louisiana Supreme Court explained the relationship more directly: "Undoubtedly, had the officer[] not learned the defendant's name due to the initial stop, [he] would not have discovered the outstanding arrest warrant[]." *See State v. Hill*, 97-2551, p. 8–9 (La. 11/6/98); 725 So. 2d 1282, 1287. But, the court points out, reliance on this kind of simple "causal link . . . to suppress evidence [is] directly contrary to the dictates of the United States Supreme Court because a per se 'but for' causation test has been specifically rejected as a basis for a decision to suppress evidence." *Id.* (citing *Brown v. Illinois*, 422 U.S. 590, 603 (1975)). In other words, not only are the "officer['s] reasons for detaining [a defendant] and the flagrancy of the invasion on . . . privacy" critical to the determination of the weight to be given to the warrant, *see Martin*, 179 P.3d at 463, so too are the means by which it was discovered, *see McBath*, 108 P.3d at 248.

¶31 A number of jurisdictions have recognized this principle. In *Jacobs v. State*, 2006 OK CR 4, 128

P.3d 1085, the Oklahoma Court of Criminal Appeals held that such an approach "balances a defendant's right against illegal search and seizure with the community's expectation that a valid arrest warrant may be served upon a subject, even if police learned about the arrest warrant after an illegal stop." *Id.* ¶ 11. By taking into account the officer's intent and conduct in detaining the defendant as a meaningful factor in the analysis, the "rule [effectively] discourages police from flagrantly illegal, investigatory seizures" because at some point, the gravity of the misconduct will tip the balance in favor of suppression. *Id.* But, "[a]t the same time, [the approach] does not attempt to punish police for mistakes or errors made in good faith[because s]uch punishment would be unlikely to deter police misconduct." *Id.* The Florida Supreme Court has described the interrelationship of concerns in another way, reasoning that because a "search was incident to the outstanding warrant and not incident to the illegal stop," "[t]he illegality of the stop d[id] not affect the continuing required enforcement of the court's order that respondent be arrested" where the officer was mistaken in his justification for stopping the defendant and did not act in bad faith or under pretext. *State v. Frierson*, 926 So. 2d 1139, 1144 (Fla. 2006).

¶32 But, "[w]here the seizure is flagrantly or knowingly unconstitutional or is otherwise undertaken as a fishing expedition, the purpose and flagrancy factor will make it unlikely that the [state] would be

able to demonstrate an attenuation of the taint of the initial unlawful seizure" even when the officers discover a warrant. *People v. Brendlin*, 195 P.3d 1074, 1081 (Cal. 2008). For example, "[i]f the purpose of an illegal stop or seizure is to discover a warrant—in essence, to discover an intervening circumstance—the fact that a warrant is actually discovered cannot validate admission of the evidence that is the fruit of the illegality." *State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011); *see also Jacobs*, 2006 OK CR 4, ¶ 11 (stating that when officers engage in "flagrantly illegal, investigatory seizures," the discovery of a warrant does not attenuate the initial illegal detention). Such was the case in *People v. Mitchell*, 824 N.E.2d 642 (Ill. App. Ct. 2005), where the Illinois Appellate Court upheld a lower court ruling that suppressed evidence discovered pursuant to an arrest on an outstanding warrant found during an illegal detention because when the officers encountered the defendant walking around his neighborhood at 5:00 a.m., they were not "'really looking for anyone who committed a crime,'" nor did they believe that the defendant needed help or was involved in criminal activity. *See id.* at 644. The court reasoned that the evidence was not purged of the taint of the illegal detention because "the officers stopped defendant for no apparent reason other than to run a warrant check on him," evidencing a "complete disregard of citizens' rights to be 'secure in their person.'" *Id.* at 649; *see also State v. Soto*, 2008-NMCA-

032, ¶¶ 27–28, 143 N.M. 631, 179 P.3d 1239 (affirming the suppression of drug evidence where the officers "stopped [the d]efendant on the basis of nothing other than the vague notion that they would obtain [the d]efendant's personal information from him [in case any crimes were committed that night in that area], and without any further suspicion, . . . ran a warrant check on him" because the reason for the stop "was directly related to [the d]efendant's ultimate arrest").

¶33 In summary, the significance of a warrant discovered during an illegal detention depends upon the nature of the officer's intent and conduct in effecting the stop. The purpose and flagrancy factor thus acts as a mechanism to ensure that abusive police tactics are not legitimized by after-the-fact justification through the discovery of a valid warrant.

¶34 This conclusion and the analysis that leads to it to means that we must reject Strieff's argument that the remedy that most effectively deters unconstitutional police conduct while still permitting reasonable enforcement of the law is to allow a police officer to arrest a person on an outstanding warrant that is discovered during an illegal detention but to suppress any evidence seized during a search incident to that arrest. Strieff's proposal apparently arises from a statement in *United States v. Green*, 111 F.3d 515 (7th Cir. 1997), in support of treating a warrant as an intervening circumstance, that "[i]t would be

startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.'" *Id.* at 521. We agree with Strieff that this statement in *Green* proposes a rationale for considering the warrant as an intervening circumstance that makes little sense. It is simply unnecessary to invalidate the arrest itself in order to create a deterrence for police misconduct in effecting the initial detention. While deterrence would undoubtedly result, the societal cost clearly would be too high to justify such a rule. Rather, the approach we have adopted here of treating a warrant as an intervening circumstance that, in the absence of purposefulness or flagrancy, attenuates the evidence seized from the initial illegality, is a more nuanced and satisfactory approach that provides adequate deterrence while avoiding unnecessarily heavy societal burdens.[10]

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[10] In his dissent, our colleague articulately highlights how treating a preexisting warrant as an intervening circumstance that is free from the taint of the illegality creates the potential for abuse. *See infra* ¶ 52 note 7. As noted above, we share these concerns but respectfully disagree that exclusion is the only adequate remedy. As we explained, a per se exclusionary rule in the case of a warrant seems to turn the attenuation analysis on its head because it would always exclude evidence produced by a mechanism that is not subject to contamination by the illegality of the initial encounter—a valid arrest war-

(continued . . .)

rant—while treating in a more nuanced way mechanisms that are clearly susceptible to such taint, such as voluntary statements or consents to search. The dissent seems to see the more pristine status of a warrant as too much of a temptation to police, who would not have to clear the "taint" hurdle in the case of a warrant that complicates the path to admissibility of evidence produced by volitional mechanisms such as consent.

We do not dispute that the potential for abuse exists, but that potential exists in all circumstances that fall within the scope of the attenuation doctrine, which was created to more finely balance the costs and benefits of exclusion of evidence in just such complicated circumstances. Further, we believe that district court judges are capable of applying that doctrine in a way that will appropriately constrain the incentive and potential for abuse in the case of intervening warrants, just as we have trusted them to do where the evidence is discovered as a result of a voluntary act by the defendant. As we have explained, the purpose and flagrancy prong of the attenuation analysis is aimed directly at deterrence of illegal official conduct, and judges are aware of the potential for abuse and well positioned to scrutinize an officer's explanation of the basis of the stop and the attendant circumstances in order to make appropriate use of the exclusionary rule. Certainly other courts have managed to effectively police the boundaries established here. *See, e.g.*, *People v. Mitchell*, 824 N.E.2d 642, 650, 644 (Ill. App. Ct. 2005) (affirming the suppression of drug evidence because "the sole apparent purpose of the detention [wa]s to check for a warrant" where the officer "did not think [the defendant] was involved in anything criminal"); *State v. Soto*, 2008-NMCA-032, ¶¶ 27–28, 143 N.M. 631, 179 P.3d 1239 (affirming the suppression of evidence because "[t]he purpose of the stop—to obtain information from [the d]efendant—was directly related to [the d]efendant's ultimate arrest"). We believe the courts of this jurisdiction to be equally up to the task.

¶35 Moreover, we are not persuaded that there is sufficient justification for automatically separating the arrest from the evidence seized incident to that arrest under such circumstances. Rather, the general presumption is that if an arrest is lawful under the constitution, then any evidence that is discovered as a result of that arrest is admissible. *See generally United States v. Bailey*, 691 F.2d 1009, 1018 (11th Cir. 1982) (stating that even in the context of an illegal detention, the identification of a lawful reason to arrest a suspect is grounds for effecting the arrest and conducting a search incident to the arrest, the evidence of which may be used against the suspect). A rule of automatic suppression is no more desirable or necessary than a rule that automatically cleanses evidence found incident to arrest on a warrant from the taint of the initial illegality. Rather, the attenuation doctrine provides a sufficient mechanism for sorting through the circumstances so as to reach a principled conclusion as to whether suppression of evidence is appropriate under the facts of each case.

¶36 We now consider the interrelationship of the intervening circumstance and purpose and flagrancy factors in Strieff's case. The district court found that Officer Fackrell mistakenly believed he had reasonable, articulable suspicion to detain Strieff and that his discovery of the warrant was not a deliberate exploitation of the unlawful detention. The only information obtained from Strieff necessary to locate

the warrant was his name and date of birth. Although this information was learned during an encounter later deemed to be illegal, it was sought as a matter of course, rather than being the purpose of the stop itself. Most importantly, the search which yielded the methamphetamine and paraphernalia evidence occurred incident to a lawful arrest required by an outstanding arrest warrant. *See generally Brendlin*, 195 P.3d at 1080 (stating that where a search is not undertaken until a warrant is discovered, the discovered "evidence was . . . the fruit of the outstanding warrant, and was not obtained through exploitation of the" illegality). The discovery of the warrant and resulting discovery of the evidence thus were not the product of the officer's exploitation of the initial illegality. *See McBath v. State*, 108 P.3d 241, 248 (Alaska Ct. App. 2005) ("If, during a non-flagrant but illegal stop, the police learn the defendant's name, and the disclosure of that name leads to the discovery of an outstanding warrant for the defendant's arrest, and the execution of that warrant leads to the discovery of evidence, the existence of the arrest warrant will be deemed an independent intervening circumstance that dissipates the taint of the initial illegal stop vis-à-vis the evidence discovered as a consequence of a search incident to the execution of the arrest warrant."); *State v. Hill*, 97-2551, p. 8–9 (La. 11/6/98); 725 So. 2d 1282, 1287 (same, citing *Brown v. Illinois*, 422 U.S. 590, 603 (1975), for the proposition that the Supreme

Court has rejected a "but for" test as a basis for suppressing evidence).

¶37 Because the temporal proximity factor has relatively little weight and the other two factors weigh in favor of admitting the drug evidence discovered while conducting a search incident to Strieff's arrest, we conclude that the district court properly weighed and balanced the attenuation factors and appropriately denied Strieff's motion to suppress.

CONCLUSION

¶38 When a person is illegally detained, the discovery of a warrant is an intervening circumstance that may eliminate the taint of the initial illegality from the evidence discovered incident to the arrest on that warrant. The significance of the warrant, however, depends upon the nature of the officer's intent and conduct in effecting the stop. The purpose and flagrancy factor therefore acts as a mechanism to ensure that abusive police tactics are not legitimized by after-the-fact justification through the discovery of a valid warrant.

¶39 Here, the discovery of the preexisting warrant was an intervening circumstance that, coupled with the absence of purposefulness and flagrancy on the part of Officer Fackrell in detaining Strieff, sufficiently attenuated the initial illegal detention from the methamphetamine and drug paraphernalia found during the search incident to arrest on the

outstanding warrant. We therefore affirm the district court's denial of the motion to suppress.

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Stephen L. Roth, Judge

¶40 I CONCUR:

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J. Frederic Voros Jr.,
Associate Presiding Judge

THORNE, Judge (dissenting):

¶41 I respectfully dissent from the majority opinion. Although the majority opinion marshals an impressive body of case law from other jurisdictions in support of its analysis, I disagree with its ultimate conclusion that suppression of the evidence in this case is not necessary to deter police misconduct. I believe that this case is most appropriately analyzed under *State v. Topanotes*, 2003 UT 30, 76 P.3d 1159, a Utah Supreme Court case with remarkably similar factual underpinnings that strongly suggests that suppression is required here.

¶42 In *Topanotes*, two police officers had gone to the home of a recently-arrested prostitute to confirm her

actual residence. *See id.* ¶ 2. While there, the officers encountered a woman—Topanotes—who matched a description of someone else who allegedly lived at the house. *See id.* Although the officers had no reasonable suspicion or probable cause regarding Topanotes, they nevertheless "stopped her and asked for identification" and then "perform[ed] a warrants check as part of 'routine procedure' or 'common practice'" while retaining Topanotes's identification card. *See id.* When the warrants check revealed outstanding warrants for Topanotes, the officers arrested her, searched her incident to arrest, and discovered heroin on her person. *See id.* ¶ 3. The Utah Supreme Court ultimately held that the heroin should be suppressed despite the existence of the warrants. *See id.* ¶ 22.

¶43 I find the factual situations in the instant case and *Topanotes* to be indistinguishable for purposes of a Fourth Amendment attenuation analysis. In both cases, the defendants were on foot when they were stopped and asked for identification without reasonable suspicion or probable cause. In both cases, the police then illegally detained the individuals by retaining their identification cards while performing routine warrants checks.[1] And in both cases, the

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[1] The majority opinion states, "Even without reasonable, articulable suspicion, Officer Fackrell could legally have stopped Strieff and asked to see his identification, noted his (continued . . .)

police found outstanding warrants, arrested the defendants on the warrants, searched them incident to their arrests, and found contraband in their possession.

¶44 What does distinguish *Topanotes* from this case is the specific legal doctrine at issue. In *Topanotes*, the State argued for application of the inevitable discovery doctrine, which "enables courts to look to the facts and circumstances surrounding the discovery of the tainted evidence and asks whether the police would have discovered the evidence despite the illegality." *See id.* ¶ 14. In this case, we are called upon to apply the related doctrine of attenuation, whereby

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name and date of birth, and then run a warrants check while Strieff remained free to leave." *See supra* ¶ 27. So long as such a "stop" and request for identification was entirely voluntary on Strieff's part, I agree with the majority's statement. *See generally State v. Hansen*, 2002 UT 125, ¶ 34, 63 P.3d 650 (stating that there is no Fourth Amendment seizure when an encounter is consensual). Here, however, even if Strieff had been free to ignore Officer Fackrell's questions and request for identification, Fackrell clearly detained Strieff for Fourth Amendment purposes when he conducted a warrants check while retaining Strieff's identification card. *See generally Salt Lake City v. Ray*, 2000 UT App 55, ¶ 17, 998 P.2d 274 ("Consequently, although Ray was not seized by Officer Eldard's original request for identification, this level one encounter escalated into a level two stop when Eldard retained Ray's identification while running the warrant check. During this time a reasonable person would not have felt free to leave.").

evidence that is derivative of an illegal search or seizure will not be suppressed if obtained "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). These two exceptions to the exclusionary rule—along with a third exception, the independent source doctrine—are "closely related but analytically distinct." *See United States v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990).

¶45 Even in light of the distinct legal doctrines involved, however, *Topanotes*'s inevitable discovery analysis remains potent authority for the "closely related" attenuation analysis at issue in the present case, *see id.*, particularly considering the nearly identical factual circumstances in the two cases. Reviewing the *Topanotes* analysis, it is clear that the supreme court made rulings that are applicable to each of the three attenuation factors employed by the majority in this case. Examining those three factors in light of *Topanotes* leads me to the inevitable conclusion that the evidence in this case should be suppressed.

¶46 As noted above, the district court in this case relied on the doctrine of attenuation to determine that the evidence against Strieff need not be suppressed notwithstanding its discovery after Strieff's illegal detention. Utah courts have adopted a three-part test to determine when attenuating circumstances will purge evidence or statements from a

prior illegality by police. *See State v. Arroyo*, 796 P.2d 684, 691 n.4 (Utah 1990) (adopting "'temporal proximity of the arrest and the confession, the presence of intervening circumstances,'" and "'the purpose and flagrancy of the official misconduct'" as relevant factors in determining whether exploitation of police illegality has occurred (quoting *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)). In the context of a warrant discovered after an illegal detention, the attenuation test considers the temporal proximity of the initial illegality to the discovery of the warrant, the presence of intervening circumstances, and the purpose and flagrancy of the illegal misconduct. *Cf. State v. Newland*, 2010 UT App 380, ¶¶ 11–26, 253 P.3d 71 (applying the three-part attenuation test in the context of consent following an illegal search).

¶47 As to the first prong of this test, the majority opinion adopts the district court's finding that the time that had elapsed from Strieff's illegal detention to the discovery of the warrant and the resulting search incident to his arrest was "relatively short." Since the discovery of the warrant had actually occurred *during* Strieff's illegal detention, I would go further and characterize the warrant discovery and the illegal detention as contemporaneous. *Cf. State v. Topanotes*, 2003 UT 30, ¶ 19, 76 P.3d 1159 (stating that "the warrants check [was] performed contemporaneously with the illegal detention"). Nevertheless, the majority and I are in agreement that the

first prong of the attenuation test weighs in favor of suppression.

¶48 I do, however, disagree with the majority's conclusion that the contemporaneous nature of the detention and the discovery of Strieff's warrant is "of relatively little weight under the circumstances of this case." *See supra* ¶ 29. As a purely practical matter, the contemporaneous nature of the detention and the warrant check deprived Strieff of the opportunity to leave the scene or terminate the otherwise "voluntary" encounter.[2] *Cf. id.* ¶ 20 ("We find 'most unrealistic' the assumption that Topanotes would have waited for the police to check for warrants and arrest her with heroin in her possession even if she had not been unlawfully detained."). The temporal confluence of the illegal detention and the warrants check thus played a very direct role in the discovery of the warrant and the ultimate discovery of the contraband.

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[2] The law surrounding level one consensual encounters assumes that a person retains the right to terminate the encounter and thereby end his or her contact with police. *See Hansen*, 2002 UT 125, ¶ 34 ("A level one citizen encounter with a law enforcement official is a consensual encounter wherein a citizen voluntarily responds to non-coercive questioning by an officer. Since the encounter is consensual, and the person is free to leave at any point, there is no seizure within the meaning of the Fourth Amendment." (citation omitted)).

¶49 As to the second attenuation factor, I acknowledge that other courts have determined that the discovery of an arrest warrant constitutes an "intervening circumstance" for purposes of an attenuation analysis. *See, e.g.*, *People v. Brendlin*, 195 P.3d 1074, 1076 (Cal. 2008). However, under Utah law, there is nothing intervening about the discovery of Strieff's warrant. "Intervening circumstances are events that create a clean break in the chain of events between the misconduct and the [discovery of a warrant]." *Newland*, 2010 UT App 380, ¶ 15 (internal quotation marks omitted).[3] Officer Fackrell's

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[3] *State v. Newland,* 2010 UT App 380, 253 P.3d 71, like many other Utah attenuation cases, arose in the context of consent to search given after an initial illegality. In my utilization of the quotation of *Newland*, I have altered the original word "consent" to reflect the circumstances of this case, the "discovery of a warrant." My choice of these words is deliberate and, I believe, appropriate, but it does have substantive implications for the intervening circumstances determination—obviously, if the "discovery of a warrant" is the event that must be preceded by intervening circumstances, then that same discovery cannot itself be the intervening circumstance that satisfies the attenuation test. However, my formulation is consistent with *Newland* and Utah's other consent cases, which do not treat the consent as an intervening circumstance between the initial illegality and the ultimate search. Rather, those cases look for circumstances intervening between the illegality and the consent itself. *See, e.g.*, *Hansen*, 2002 UT 125, ¶ 68 ("Next, we consider whether there were any intervening factors between [the] misconduct and Hansen's consent that may have mitigated the

(continued . . .)

discovery of Strieff's warrant was no "clean break in the chain of events," *see id.*, but rather was the natural and immediate result of Officer Fackrell illegally detaining Strieff and calling in a warrants check during that detention. Under similar circumstances, the Utah Supreme Court has intimated as much. *See Topanotes*, 2003 UT 30, ¶ 19 ("There must be *some other circumstance*, something outside the warrants check performed contemporaneously with the illegal detention, supporting inevitable discovery 'to prevent the inevitable discovery exception from swallowing the exclusionary rule.'" (emphasis added)). In similar fashion, I see no intervening circumstances between the initial illegality here and the discovery of Strieff's warrant.[4]

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illegality. Intervening circumstances may include such events as an officer telling a person he or she has the right to refuse consent or to consult with an attorney."); *State v. Thurman*, 846 P.2d 1256, 1274 (Utah 1993) (addressing consent obtained via a form that informed the defendant of his "constitutional right not to have a search made of the premises described below without a search warrant" and his "right to refuse to such a search"); *Newland*, 2010 UT App 380, ¶ 15 (discussing the types of circumstances that can intervene "between the misconduct and the . . . consent" (omission in original) (internal quotation marks omitted)).

[4] There conceivably could be instances where a warrant would not have been discovered but for some police illegality and yet the resulting arrest is attenuated by intervening circumstances. Suppose, for example, that Officer Fackrell ille-

(continued . . .)

¶50 I also conclude that the third attenuation factor—whether Officer Fackrell's illegal conduct was "purposeful or flagrant," *see State v. Newland*, 2010 UT App 380, ¶ 20, 253 P.3d 71—favors suppression in this case. I simply cannot agree with the majority opinion that "[t]here is no indication in the record that the officer stopped Strieff with the purpose of checking for outstanding warrants." *See supra* ¶ 26. To the contrary, Fackrell detained Strieff by retaining his identification while Fackrell called in a warrants check. Fackrell's intent in conducting this warrants check was, presumably, to determine if Strieff had any outstanding warrants. *See generally State v. Sisneros*, 631 P.2d 856, 859 (Utah 1981) ("[A] person is presumed to intend the natural and probable consequences of his acts." (internal quotation marks omitted)). Thus, regardless of Fackrell's mo-

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gally detained Strieff for ten minutes of questioning but did not determine his identity or discover the warrant. Then suppose that, shortly thereafter, Strieff was waiting to cross a street and was recognized by a second officer who was driving by and was aware of Strieff's warrant. Strieff's release by Officer Fackrell and the happenstance of his subsequent encounter with the second officer would strike me as intervening circumstances between the illegal detention and the discovery of the warrant—even though, but for the illegal detention, Strieff would not have been waiting at that particular intersection when the second officer drove by and recognized him as wanted on a warrant.

tivation for initially approaching Strieff,[5] his detention of Strieff while conducting a warrants check was clearly purposeful behavior intended to discover the very warrant that led to Strieff's arrest and search.

¶51 Further, "'purpose and flagrancy' [is] the most significant factor in a suppression analysis because it 'directly relates to the deterrent value of suppression.'" *Newland*, 2010 UT App 380, ¶ 17. In *Topanotes*, the supreme court determined under similar circumstances that "[a]llowing the evidence in this situation would provide no deterrent at all to future unlawful detentions." *See* 2003 UT 30, ¶ 19. The clear import of this statement, taken in context, is that suppressing the evidence *would* deter similar future police misconduct.[6] Given the direct relationship between deterrence and the purposefulness and flagrancy of police misconduct, the supreme court's holding that suppression would serve a deterrent purpose under these circumstances seems to me to be an implicit recognition that this type of police

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[5] Officer Fackrell initially stopped Strieff because Strieff had just left a suspected drug house. This suggests to me that Fackrell's stop of Strieff was motivated not only by a desire to learn more about the activities occurring at the house but also by a desire to investigate Strieff personally as a potential drug purchaser.

[6] I note that the warrants check in *Topanotes* was conducted "as part of 'routine procedure' or 'common practice.'" *See State v. Topanotes*, 2003 UT 30, ¶ 2, 76 P.3d 1159.

misconduct is purposeful or flagrant for purposes of an attenuation analysis and is therefore a proper subject for deterrence. *See generally State v. Thurman*, 846 P.2d 1256, 1263–64 ("[I]f the police had no 'purpose' in engaging in the misconduct . . . suppression would have no deterrent value.").

¶52 The majority opinion does reflect a great effort to draw some line protecting the public from purposeful or flagrant police abuse of warrants checks, and I applaud that effort. However, I cannot agree with the majority's conclusion that whether suppression is appropriate in any given circumstance "depends upon the nature of the officer's intent and conduct in effecting the stop." *See supra* ¶ 33.[7] Warrants do not reveal themselves, and they are generally only discovered when the police affirmatively look for them. When such an intentional warrants check takes place during an illegal detention,

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[7] Indeed, such a standard seems to me to practically invite police officers to routinely make illegal stops and warrants checks so long as some other reason for the stop can be articulated. Under the majority's rule, the articulated reason need not satisfy the Fourth Amendment's requirements for a legal stop but must only establish some reason for the stop other than a bare desire to check for warrants. The ease with which this standard could be satisfied by all but the most unimaginative police officers would, as a practical matter, provide an incentive for police officers to make illegal stops and warrants checks as a matter of routine.

it is inevitably the case, at least in my opinion, that the detention has been purposefully exploited to discover the warrant and that evidence discovered in a contemporaneous search incident to arrest on the warrant should be suppressed to deter such a practice.

¶53 In sum, I would conclude that all three of the attenuation factors weigh in favor of suppression in this case and I would reverse the district court and suppress the evidence found during the search incident to Strieff's arrest. I reach this conclusion in the face of the many warrant-discovery cases from other jurisdictions, as cited in the majority opinion, that have decided to the contrary—not to mention the carefully constructed analysis of the majority opinion itself. Nevertheless, I just cannot get around the fact that the evidence in this case was discovered as a direct result of police misconduct and that, without suppression, there will be no deterrence of similar misconduct in future encounters between pedestrians and police.

¶54 Ultimately, I agree with the majority that the attenuation analysis in these circumstances involves a "balancing of the mutual concerns of discouraging police conduct that results in the illegal detention of a citizen, while recognizing the legitimate interest of the [S]tate in enforcing outstanding arrest warrants." *See State v. Frierson*, 926 So. 2d 1139, 1145–46 (Fla. 2006) (Anstead, J., concurring). However,

the State's primary and laudable interest in enforcing arrest warrants is to get those persons named therein into custody to answer for the charges underlying the warrants.[8] As to this primary interest, I see little room for balancing. Whenever an arrest warrant is discovered—however it is discovered—it is proper for police to arrest the person named in the warrant. *See, e.g.*, *United States v. Green*, 111 F.3d 515, 521 (7th Cir. 1997) ("It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of 'Olly, Olly, Oxen Free.'").

¶55 Many courts seem to end the attenuation analysis there, reasoning that because searches are allowed incident to arrest, then a valid arrest necessarily means a valid search. *See, e.g.*, *id.* ("Because the arrest is lawful, a search incident to the arrest is also lawful."). However, I am completely comfortable with decoupling the validity of the arrest from the admissibility of the resulting evidence for purposes of the Fourth Amendment analysis.[9] To me, the only

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[8] By contrast, searches incident to arrest are just that—incidental.

[9] In a sense, this situation is analogous to a double hearsay problem where an exception cures one instance of hearsay but not the other. *Cf. State v. Schreuder*, 726 P.2d 1215, 1231 n.1 (Utah 1986) ("[D]ouble hearsay is admissible if both aspects

(continued . . .)

question is whether suppression will reach back past the warrant to deter the police illegality that led to the warrant's discovery. In the instant case, suppression would give police an incentive to ensure that they have adequate grounds to stop citizens on the street and would ultimately deter similar illegal detentions. Under these circumstances, I have little trouble in concluding that the balancing of interests shifts squarely in favor of suppression of the evidence,[10] while leaving the validity of the arrest based upon the warrant untouched.

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qualify under an exception to the hearsay rule . . . ." (Stewart, J., concurring in result)). Officer Fackrell could neither detain Strieff without reasonable suspicion nor arrest him without probable cause. The warrant cures any probable cause problem, but we are left with the illegal detention. As with double hearsay, I would not allow the evidence unless both impediments to admissibility are removed.

[10] I note that certain types of evidence—e.g., a defendant's DNA, scars, or tattoos—are permanent enough in nature that they could reasonably be expected to be discovered whenever the defendant would eventually be arrested on a warrant. Such evidence is therefore not the sole product of the illegal discovery of the warrant at a particular time and place because it would inevitably be discovered whenever the warrant was executed. Accordingly, I would likely not suppress such evidence, even when a defendant is arrested on a warrant discovered through an illegal detention. The drug evidence at issue in this case is not this type of evidence.

¶56 In any event, I remain convinced that, for purposes of Utah law, my evaluation of the attenuation factors is supported by *State v. Topanotes*, 2003 UT 30, 76 P.3d 1159. I simply cannot read that case and surmise that the Utah Supreme Court would have allowed the evidence discovered in these circumstances if only the State had urged the attenuation doctrine instead of the "closely related" inevitable discovery doctrine. *See United States v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990). Unless and until the Utah Supreme Court revisits *Topanotes*, the nearly identical factual situations between that case and this one suggest that *Topanotes* is extremely persuasive, if not binding, authority on the suppression issue in this case. Accordingly, I must dissent from the majority opinion, and I would reverse the district court's suppression ruling and Strieff's convictions below.

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William A. Thorne Jr., Judge

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IN THE THIRD DISTRICT COURT
STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- EDWARD JOSEPH STRIEFF JR., Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND DEFENDANT'S MOTION TO RECONSIDER Case No. 071900011 Hon. Michele Christiansen

Before the Court is the Defendant's motion to suppress and motion to reconsider. The motions seek suppression of evidence discovered during a search incident to the arrest of the Defendant on an outstanding warrant. The parties conceded at argument that Officer Fackrell lacked reasonable suspicion to detain the Defendant and that the initial detention

thus violated the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Utah Constitution. The only question remaining for this Court is whether the discovery of the warrant during the detention attenuates the arrest and search from the unlawful detention and makes suppression an unwarranted remedy. For the reasons stated below, the Court rules that suppression is unwarranted in this case.

FINDINGS OF FACT

Based on the testimony taken at an evidentiary hearing on May 11, 2009, and on the briefing and argument of the parties, the Court makes the following Findings of Fact:

1. Sometime during the month of December ~~2007~~ 2006, the South Salt Lake City Police Department received an anonymous tip on its drug hotline that a house at 2681 South 360 East in Salt Lake County was receiving frequent short-term traffic consistent with drug activity.
2. Officer Doug Fackrell watched the house on and off for approximately three hours over a period of one week. During that time he witnessed some short-term traffic.
3. On December 21, 2006, Officer Fackrell was watching the house and saw the Defendant leave. He did not see when the Defendant entered the house.

4. Officer Fackrell believed that he had seen enough short-term traffic at the house to create a reasonable suspicion that the house was involved in drug activity. He therefore decided to stop the Defendant on suspicion of drug possession or distribution.

5. Upon stopping the Defendant, Officer Fackrell identified him by a Utah Identification Card and discovered that the Defendant had an outstanding warrant from the Salt Lake City Justice Court.

6. Officer Fackrell arrested the Defendant, and, during a search incident to arrest, discovered methamphetamine, a glass drug pipe, and a small green plastic scale with white residue on it.

CONCLUSIONS OF LAW

Based on the Findings of Fact, the Court enters these Conclusions of Law:

1. To determine whether a warrant attenuates a subsequent arrest and search from an illegal act, the Court looks at three factors: (1) the temporal proximity of the illegal act and the search; (2) the presence of an intervening circumstance; and (3) the purpose and flagrancy of the illegal act. *See Brown v. Illinois*, 422 U.S. 590 (1975); *United States v. Green*, 111 F.3d 515 (7th Cir. 1997).

2. In this case, the time between the illegal act and the search was relatively short and weighs in favor of suppressing the evidence.

3. The second factor, the intervening circumstance, weighs in favor of not suppressing the evidence. The Court agrees with other jurisdictions to consider this issue that the discovery of an arrest warrant is an "extraordinary intervening circumstance that purges much of the taint associated with [Officer Fackrell's] unconstitutional conduct." *United States v. Simpson*, 439 F.3d 490, 496 (8th Cir. 2006).

4. The last factor, the purpose and flagrancy of the illegal act, also weighs in favor of not suppressing the evidence. The purpose of the stop was to investigate a suspected drug house. And Officer Fackrell believed, albeit incorrectly, that he had sufficient suspicion of criminal activity to justify stopping the Defendant. The stop was thus not a flagrant violation of the Fourth Amendment. Rather, it was a good faith mistake on the part of the officer as to the quantum of evidence needed to justify an investigatory detention.

5. Weighing the factors in their totality, the Court finds suppression to be an inappropriate remedy. Officer Fackrell did not exploit the initial unlawful detention to search the Defendant's person. Rather, the search was

conducted after discovering an outstanding warrant and arresting the Defendant on that warrant, an intervening circumstance that Officer Fackrell did not cause and could not have anticipated.

6. The Court further concludes, based on the reasons articulated in point II of the State's Supplemental Memorandum Opposing Defendant's Motion to Reconsider, that there is no reason in this case to construe the protections afforded by Article I, Section 14 any broader than those afforded by the Fourth Amendment. The analysis is the same under either provision, and suppression is thus an inappropriate remedy.

ORDER

Based on this Court's findings and conclusions, Defendant's motion to suppress evidence and motion to reconsider are DENIED.

Dated this 4 day of ~~December 2009~~ January, 2010.

/s/
Judge Michele Christiansen

Approved as to form:

/s/
Robert K. Engar