No. 14-1373

In The Supreme Court of the United States

STATE OF UTAH, PETITIONER,
v.
EDWARD JOSEPH STRIEFF, JR., RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

BRIEF OF SOUTHWESTERN LAW STUDENT TRACY E. LABRUSCIANO, AND PROFESSORS NORMAN M. GARLAND AND MICHAEL M. EPSTEIN, IN ASSOCIATION WITH THE AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL, AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

NORMAN M. GARLAND
Counsel of Record
MICHAEL M. EPSTEIN
AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL
3050 WILSHIRE BLVD.
LOS ANGELES, CA 90010
(213) 738-6774
amicusproject@swlaw.edu

QUESTION PRESENTED

Whether the evidence seized from respondent incident to his arrest on a minor traffic warrant discovered during an unconstitutional detention is inadmissible under the "attenuation" exception to the exclusionary rule.

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Respondent. Norman M. Garland is a professor of law at Southwestern Law School. He teaches Evidence and Constitutional Criminal Procedure and has authored numerous publications on both Evidence and Criminal Law. Michael M. Epstein is a professor of law and the Director of the pro bono Amicus Project at Southwestern Law School. Amicus Tracy E. Labrusciano is an upper-division J.D. candidate at Southwestern Law School with extensive academic and professional interest in Criminal Law.

Amici have neither interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in the Court's interpretation of the Exclusionary Rule.

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[1] All parties have received timely notice and have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

If the Fourth Amendment right of the people to be secure in their persons is not to be reduced to a mere form of words, then the exclusionary rule must apply in this case. Suppression of evidence is the appropriate remedy when no exclusionary rule exception exists to render the evidence admissible. The attenuation exception cannot apply in this case. No other exception is applicable either.

Three reasons support the conclusion that the attenuation exception does not apply in this case. First, exclusion of the physical fruit of a Fourth Amendment violation protects citizens from the unreasonable searches and seizures proscribed by the Constitution and feared by its Framers. Second, proper application of this Court's three-pronged attenuation test squarely favors suppression. Third, application of the exclusionary rule in this case would strongly deter law enforcement misuse of ubiquitous outstanding warrant databases to violate citizens' privacy rights in the manner of the general warrants so condemned by the Framers.

The attenuation exception need not be limited to independent acts of a defendant's free will, as the Utah Supreme Court found in this case. Rather, this exclusionary rule exception may be applied to unlawfully seized inanimate objects provided either of two situations exists: the constitutional guarantee implicated would not be served by suppression, or, in considering the totality of the circumstances, the taint of the constitutional violation has been sufficiently

purged from the contested evidence. Neither of those situations exists in this case; hence, the attenuation exception should not apply and the illegally seized evidence should be excluded as the court below held.

ARGUMENT

I. THE EXCLUSIONARY RULE SHOULD APPLY IN THIS CASE.

Detective Fackrell had no legal basis for initially stopping and detaining Mr. Strieff. The physical evidence discovered was thus the byproduct of Detective Fackrell's violation of Mr. Strieff's basic Fourth Amendment rights. Accordingly, that evidence should have been suppressed by the trial court. Detective Fackrell had no justification under the law for seizing and detaining Mr. Strieff. No search or arrest warrant existed. No probable cause existed. No reasonable suspicion existed. Detective Fackrell's seizure of Mr. Strieff lacked an objectively reasonable basis, and the initial seizure itself was a clear Fourth Amendment violation, as conceded by the State of Utah.

The Fourth Amendment exclusionary rule, while an extreme remedy, has significantly evolved since its inception. See *Weeks v. United States*, 232 U.S. 383, 292 (1914) (announcing the exclusionary rule as a remedy for Fourth Amendment violations); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (applying the exclusionary rule to the states). Recently, This Court stated that exclusion "has always been our last resort, not our first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Justice Kennedy's concurrence in

Hudson, however, pointed out that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt." *Id*. at 603 (Kennedy, J., concurring). This Court has established numerous exceptions to the exclusionary rule. Yet, the vitality of the exclusionary rule has been continually recognized in situations where the exceptions are inapplicable. This case, involving an egregious violation of Mr. Strieff's rights, presents a classic situation for application of the exclusionary rule because no exceptions apply.

A. The Threshold Inquiry For Exclusionary Rule Analysis Asks Whether Exclusion Of The Evidence Serves Individual Freedom From Unreasonable Seizure And Detention Proscribed By The Fourth Amendment.

Writing for the majority in *Hudson*, Justice Scalia made clear that "but-for causality is only a necessary, not a sufficient, condition for suppression." *Hudson*, 547 U.S. at 592. In dictum, Justice Scalia seemed to provide a new qualification for attenuation, remarking that it "also occurs when even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Id*. at 593. This Court has often stated that the "ultimate touchstone of the Fourth Amendment is reasonableness." *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (quoting *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). Accordingly, the Court's jurisprudence has established clear guidelines for determining what is "reasonable" law enforcement conduct in safeguarding Fourth Amendment rights.

The initial inquiry when deciding the application of the exclusionary rule necessarily is whether the party seeking suppression has "standing" to do so. The correct analysis "forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment." *Rakas v. Illinois*, 439 U.S. 128, 139 (1978). A further requirement that the interest protected by the violated constitutional guarantee would be served by suppression would reasonably be a second threshold inquiry.

Fourth Amendment precedent has further limited the exclusionary rule's contextual use to criminal trials. See, e.g., *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 359 (1998) (exclusionary rule not applied in parole revocation hearings); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984) (exclusion of reliable evidence not subject to suppression in civil deportation proceeding where Fourth Amendment violation was not egregious); *Stone v. Powell*, 428 U.S. 465, 481-82 (1976) (exclusionary rule not extended to federal habeas corpus proceedings where defendant had full and fair opportunity to litigate Fourth Amendment claim at trial). Even within the criminal trial context, the exclusionary rule does not bar introduction of tainted evidence to impeach a defendant's own testimony. *Walder v. United States*, 347 U.S. 62, 65 (1954). Each of the foregoing limitations are reasonable because the interest against unlawful search and seizure would not be vindicated by suppression; in each instance, additional evidence exists against the defendant such that only marginal deterrence would result from exclusion.

Within a criminal trial, evidence will not be subject to suppression if its inclusion is objectively reasonable. The "good faith" exception is now well-settled, permitting "the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment. *United States v. Leon*, 468 U.S. 897, 909 (1984) (quoting *Illinois v. Gates*, 462 U.S. at 255 (White, J., concurring in judgment)). When considering why additional exceptions to the exclusionary rule allow tainted evidence to be used during a criminal trial, this Court has discussed whether the interest protected by the constitutional guarantee violated would be served by suppression.

The "independent source" doctrine provides for admission of "evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality." *Murray v. United States*, 487 U.S. 533, 537 (1988). If no connection exists, then any search and seizure is plainly reasonable under the Fourth Amendment. On the other hand, when illegal government activity is involved, evidence is only admissible if inevitably discovered or attenuated from the initial illegality. Inevitable discovery allows for introduction of tainted evidence if it "ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 431, 444 (1984). In such an instance, the evidence is considered untainted, thus its introduction is reasonable. When an attenuated connection exists, the contested evidence is discovered "by means sufficiently distinguishable to be purged of the primary taint."

Wong Sun v. United States, 371 U.S. 471, 488 (1963), quoting Maguire, Evidence of Guilt, 221 (1959). Admission of evidence when its causal link to illegal government conduct is remote is therefore reasonable under the Fourth Amendment. In these instances, the protected Fourth Amendment interest would not be served by suppression of evidence.

Hudson inquired whether a violation of the knock-and-announce rule required suppression of evidence seized inside a home pursuant to a valid search warrant. *Hudson* at 593. This Court characterized the interests protected by the knock-and-announce rule as "human life and limb," "property," and "privacy and dignity of the sort that can be interrupted by a sudden entrance." *Id*. Because a valid search warrant existed in *Hudson*, the privacy interest in one's home mandated by the Fourth Amendment was protected by the existence of the warrant. Accordingly, in *Hudson*, the citizen's basic privacy rights were not violated by the knock-and-announce violation.

Thus, *Hudson* established a second threshold inquiry required before the exclusionary rule can be applied, in addition to the "standing" inquiry. Recognizing this second threshold inquiry would save courts time in deciding whether evidence should be suppressed because there would be no need to delve into a nuanced analysis of any exclusionary rule if it is not met. The Ninth Circuit has applied this inquiry in deciding whether a defendant, not presented with a copy of a valid search warrant for his home, was entitled to suppression of evidence seized therein. *United States v. Hector*, 474 F.3d 1150, 1151-52 (9th

Cir. 2008), *cert. denied*, 552 U.S. 1104 (2008). The court ruled in favor of suppression, proclaiming: "Without deciding whether the failure to provide a copy of the warrant was a constitutional violation, we conclude that even if it were, it was not a 'but-for cause' of seizure of the evidence." *Id*. Further analysis utilized the proposed second threshold inquiry; the court reasoned that "[r]egardless of whether police officers had actually shown [the defendant] the search warrant, they would have executed it and recovered the drugs and firearms inside his apartment. *Id*.

Applying the same rationale to the instant case, the Fourth Amendment right of the people "to be secure in their persons…against unreasonable searches and seizures…" would plainly be served by suppression of the evidence against Mr. Strieff. Detective Fackrell testified that he stopped and detained Strieff because he "was coming out of the house that I had been watching and I decided that I'd like to ask somebody if I could find out what was going on [in] the house." J.A. at 17. After following Strieff as he walked to a nearby convenience store, Fackrell stopped and detained him with no legal basis and subsequently "had dispatch run a warrants check, normal warrants check" while retaining Strieff's identification card. J.A. at 18.

This case is unlike *Hudson* because Detective Fackrell's illegal stop and detention of Mr. Strieff, violating his right to be let alone, directly led to the evidence sought to be suppressed. Fackrell detained Mr. Strieff by retaining his identification card for the purpose of conducting a warrant check; the discovery of physical evidence flowed directly and immediately

from those actions. The execution of the arrest warrant and search of Mr. Strieff were not mere but-for results of the illegal stop and detention. Hence, Mr. Strieff's basic privacy interests, to be let alone and go on his way, were trampled by Detective Fackrell's random stop and detention. The proposed second threshold question for suppression is thus met in this case.

B. The Proper Attenuation Inquiry Is Whether The Evidence Has Been Sufficiently Purged Of The Taint Of Government Misconduct.

When the connection between a Fourth Amendment violation and derivatively acquired evidence has become so strained as to "dissipate the taint" of the initial illegality, attenuation occurs. *Nardone v. United States*, 308 U.S. 338, 341 (1939). Determination of whether the disputed evidence remains "fruit of the poisonous tree" or has become attenuated turns upon whether the evidence was obtained through "exploitation of the illegality" or "instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

The proper attenuation inquiry, then, is whether the evidence has been discovered by "exploitation of" an illegal stop and detention or other Fourth Amendment violation, or by means "sufficiently distinguishable" from the official misconduct to be constitutionally acceptable. Unless the means employed to acquire physical evidence can be meaningfully separated from the unconstitutional violation, the interest protected

by the Fourth Amendment guarantee to be free from "unreasonable searches and seizures" will be served by exclusion of the evidence. Without a doubt the search of Mr. Strieff immediately followed the unlawful stop and detention that led to discovery of an outstanding minor traffic warrant. Detective Fackrell exploited the illegality of the unjustified stop and detention in order to search the outstanding warrant database. Nothing of the order of any factors this Court has found to attenuate intervened. There was no attenuating circumstance present in this case.

1. The Three Factor Attenuation Test Adopted By This Court Should Be Clarified With Regard To Suppression Of Physical Evidence.

This Court has rejected a "but-for" test in determining the application of the attenuation exception. Instead the Court has weighed and applied three relevant factors: the "temporal proximity" of illegal government conduct and the discovery of evidence, the presence or absence of "intervening circumstances", and the "purpose and flagrancy" of the official misconduct. *Brown v. Illinois*, 422 U.S. 590 (1975). No one factor is alone dispositive; analysis requires weighing the factors in light of the totality of the circumstances. *Id*. Practical application of the *Brown* factors to an outstanding arrest warrant scenario has proven controversial, causing disagreement among lower courts.[2] However,

[2] *See* Petition for Writ of Certiorari, *Strieff*, (2015) (No. 14-1373), categorizing three distinct approaches followed by the lower courts – (i.) courts applying *Brown* but treating the temporal proximity factor as irrelevant, instead primarily relying on the

applying the *Brown* factors in their totality, while considering their application to the discovery of physical evidence, should produce an answer: a rule that physical evidence discovered by exploitation of the illegality is not readily subject to attenuation without, at the very least, a meaningful "intervening circumstance." Further, discovery of the existence of an outstanding warrant by exploitation of the illegal stop and detention alone must not be treated as an intervening circumstance.

The *Brown* analysis is a true totality of the circumstances test rather than one whose factors may be individually disregarded depending on the situation. Moreover, the presence or absence of an intervening circumstance should carry stronger weight in an outstanding warrant scenario because it aids in determining whether the constitutional guarantee protected would be vindicated by suppression.

This Court has drawn a distinction between physical and verbal evidence for exclusionary rule purposes. In *Ceccolini* the Court held "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." *United States v. Ceccolini*, 435 U.S. 268, 280 (1978). Thus, as

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flagrancy of the officer; (ii) courts seeming to always exclude evidence, which Petitioner contends places too much emphasis on the "temporal proximity" factor; (iii) courts never suppressing evidence, effectively creating a *per se* rule without analyzing *Brown*'s attenuation factors.

a preliminary matter in determining but-for causality, the discovery of physical evidence should be treated as separate and distinct from independent acts of an individual's free will. Moreover, a bright-line application of the exclusionary rule to "inanimate objects" in the attenuation context, absent an intervening overt act by the suspect, is appropriate.

2. All Three Factors Must Be Considered In Their Totality, With Due Regard Given To The Type Of Evidence At Issue.

If the *Brown* factors are to be weighed in their totality, no single factor should be discarded as inapplicable. Applying those factors to this case plainly leads to the conclusion that the sole evidence against Mr. Strieff is not attenuated from Detective Fackrell's misconduct.

The Kansas Supreme Court's recent decision in *State v. Moralez*, 300 P.3d 1090 (Kan. 2013) dealt with a case strikingly similar to Mr. Strieff's. In *Moralez*, a voluntary encounter between two officers and the defendant began while the officers were investigating potential criminal activity at an apartment complex in Topeka; the defendant was not a suspect at the time. *Id*. At some point during the encounter, one of the officers obtained Mr. Moralez's identification card in order to document his identity, and continued to retain his identification while running a warrant check. *Id*. After concluding that Mr. Moralez was seized within the meaning of the Fourth Amendment when the officer checked for outstanding warrants while retaining the defendant's identification card,

the court determined the seizure was unlawful because of the lack of individualized reasonable suspicion. *Id*. The decision in the case turned on whether discovering the warrant attenuated the taint of the illegal detention so that marijuana discovered in a search incident to Mr. Moralez's lawful arrest on the warrant should not be suppressed. *Id*. The *Moralez* court properly applied the *Brown* three-factor analysis to physical evidence according to the totality of the circumstances of the case and held that the physical evidence should have been suppressed.[3]

The "temporal proximity" factor refers to the time elapsed between the initiation of unlawful police conduct and the discovery of incriminating evidence. In *Brown*, this analysis turned upon the amount of time between Richard Brown's unlawful arrest and his subsequent confessions. In this case, the temporal proximity should be measured by the lapse of time between Detective Fackrell's misconduct in stopping and detaining Mr. Strieff and the discovery of physical evidence pursuant to a search incident to lawful arrest on a minor outstanding traffic warrant. Where a warrant is discovered nearly concurrent with the misconduct, unlike the matter of hours that elapsed

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[3] Cf. *State v. Hummons*, 253 P.3d 275, 278 (Ariz. 2011), concluding the physical fruit of a Fourth Amendment violation was admissible while noting "if 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." The Arizona court went on to emphasize the "purpose and flagrancy" factor without giving due weight to the absence of an intervening circumstance, and additionally characterizing the temporal proximity factor as "the least important." *Id*. at 277-279.

in *Brown*, this factor squarely weighs in favor of suppression but is unlikely alone to be determinative of the outcome.

The presence or absence of an "intervening circumstance" when physical evidence is discovered should be viewed in light of whether the circumstance may meaningfully break the chain of causation stemming from an officer's misconduct. When the concurrent and direct result of the officer's misconduct is the discovery of an outstanding warrant, leading to the nearly immediate acquisition of disputed evidence, an additional independent occurrence must be present in order to be considered "intervening." The absence of any such meaningful intervening occurrence weighs very strongly in favor of suppression.

A meaningful intervening circumstance, such as an attempt by the individual to flee, may break the chain of causation so that suppression of subsequently discovered physical evidence would no longer protect that individual's violated Fourth Amendment rights. In this case, Detective Fackrell testified that nothing gave him suspicion that Mr. Strieff was committing a crime other than leaving a home that was under surveillance. J.A. at 21. Detective Fackrell testified that he had never before seen Mr. Strieff; he had no idea whether Mr. Strieff was a resident of the home he was seen leaving, nor did he know how long he had been there. J.A. at 21. Detective Fackrell then followed Mr. Strieff as he walked a few short blocks to a 7-Eleven before stopping and detaining him, during which time Mr. Strieff did not commit any act to arouse the Detective's suspicion. J.A. at 21. Thus,

when Detective Fackrell ran a warrant check on Mr. Strieff without any suspicion of criminal activity and subsequently discovered a minor traffic warrant, no meaningful intervening event occurred to break the causal connection between the conceded illegal detention and the ensuing search.

Consideration of the "purpose and flagrancy" of official misconduct has been inconsistently applied in lower courts with regard to outstanding warrants and its proper analysis should be clarified by this Court. This case presents an opportunity for the Court to do so. "Purpose and flagrancy" may require consideration of the objective reason for the violation, or the degree to which the officer reasonably should have known his or her conduct was in violation of an individual's rights. What may be most appropriate for cases involving physical evidence is inquiry into whether the officer's purpose was with the hope that such evidence could be discovered. This Court's opinion in *Herring* emphasizes the importance of the "purpose and flagrancy" factor: "suppression of evidence is only appropriate where it will serve to deter flagrant, intentional police misconduct." *Herring v. United States*, 555 U.S. 135, 147-48 (2009). The Kansas Supreme Court's articulation of the "flagrancy" factor of attenuation as applied to an outstanding warrant circumstance in the *Moralez* case aids in clarifying the point: "Regardless of whether a suspicionless detention to identify a citizen and check that citizen for outstanding arrest warrants is characterized as a standard practice, a field interview, a pedestrian check, or a 'fishing expedition,' such a detention can, and often will, demonstrate at least some level of flagrant police conduct." *Moralez*, 300 P.3d at 1103.

The illegal conduct, then, must include a reasonable, objective purpose, aside from effecting a Fourth Amendment violation, in order to weigh in favor of attenuation. Where an investigatory stop is an unlawful seizure because it lacked any individualized suspicion, some other purpose must be served by the illegality if the resulting evidence is to be purged of the taint; one such example is an exigent circumstance. In the detention of a pedestrian, protection of the public in the wake of disaster would be such a distinct purpose; in the context of a vehicle stop, highway safety has consistently been recognized as this type of legitimate, separate purpose. There is nothing in the record to suggest that in this case, Detective Fackrell had any other objective reason for violating Mr. Strieff's Fourth Amendment rights than to check for warrants, or hope that he would discover something incriminating, without the required individualized suspicion. Therefore, the "purpose and flagrancy" factor of the *Brown* analysis also weighs in favor of suppression. In short, it is hardly likely that an 18-year veteran officer of the law, one who has attained the rank of detective, could objectively mistakenly believe that his action in randomly stopping and detaining a citizen with no individualized suspicion was not a violation of the Fourth Amendment. That is a flagrant Fourth Amendment violation.

Proper application of the *Brown* factors compels the conclusion that attenuation should not be found in this case. The temporal proximity of Detective Fackrell's misconduct and the seizure of the contested evidence was immediate. There was no meaningful

intervening circumstance between the initial illegal seizure and detention of Mr. Strieff and the discovery of the contested evidence. Even if this Court treats the discovery of an outstanding warrant as an intervening circumstance, the purpose and flagrancy of Detective Fackrell's misconduct weighs heavily in favor of suppression.

II. THE DETERRENCE BENEFITS OF EXCLUSION SIGNIFICANTLY OUTWEIGH THE MINIMAL COST TO SOCIETY

Suppression is not a necessary consequence of a Fourth Amendment violation, but may apply where it results in meaningful deterrence outweighing the substantial cost to society of excluding relevant, probative evidence. "The principal cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends the basic concepts of the criminal justice system.'" *Herring*, 555 U.S. at 141, quoting *Leon*, 468 U.S. at 908. The exclusion of relevant incriminating evidence necessarily entails that adverse consequence. But where the loss of physical evidence – the derivative, unattenuated fruit of officer misconduct – would lead to no basis for a case against the defendant, the privacy and freedom the Fourth Amendment aims to protect must be respected. In this case, that balancing favors exclusion.

A. Lower Courts Have Demonstrated That Exclusion Is The Only Viable Remedy When There Are No Independent Intervening Circumstances.

The Kansas Supreme Court found it necessary to hear and decide *Moralez* based largely on the undesirable effects from two of its previous decisions regarding the effect of discovery of an outstanding warrant during an unlawful detention. *See State v. Martin*, 179 P.3d 457 (Kan. 2008), *cert. denied*, 555 U.S. 880 (2008) and *State v. Jones*, 17. P.3d 359 (Kan. 2001). In *Jones*, the court held the outstanding warrant was sufficient to purge the taint of the unlawful detention because there was "no evidence of bad faith" on the part of the officer and the search occurred incident to a lawful warrant arrest. *Jones* at 361. In *Martin*, the court noted the "minimal nature and extent of the official misconduct" despite the officer requesting identification to run a warrant check because nothing suggested "that the officers' ultimate goal in making contact with Martin…was to search his person for drugs." 179 P.3d at 463. The court characterized the warrant as an intervening circumstance attenuating the taint of the unlawful detention, and thereby not suppressing physical evidence discovered in a search incident to arrest. *Id*. at 464. Acknowledging the unintentional consequences of these decisions, the Kansas court in *Moralez* expressly disapproved of interpreting either *Martin* or *Jones* to suggest an outstanding arrest warrant always attenuates the taint of an unlawful detention. *Moralez* at 1102.

The Kansas court summarized the effects of its decisions in *Martin* and when stating its reasoning in *Moralez*:

> Were 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, knowing that if the detention leads to discovery of an outstanding arrest warrant, any evidence discovered in the subsequent search will be admissible against the defendant in a criminal proceeding unrelated to the lawful arrest.

Moralez, 300 P.3d at 1102.

Several other jurisdictions have emphasized the deterrent value of exclusion in similar situations, where a search incident to arrest on an outstanding warrant is preceded by an initial Fourth Amendment violation. *See*, *e.g.*, *State v. Bailey*, 338 P.3d 702, 711-715 (Or. 2014) (en banc) (finding error in the circuit court's denial of suppression where the officers "purposefully" unlawfully detained the defendant in his vehicle, absent any actual or implied knowledge justifying defendant's detention prior to the discovery of an arrest warrant.); *Gordon v. United States*, 120 A.3d 73, 86 (D.C. 2015) (holding both the defendant's statements to police and tangible evidence must be suppressed, and emphasizing in the *Brown* analysis that the officer's purpose at the time he initially seized defendant was to "utilize computer databases that

include information about warrant status."); *People v. Mitchell*, 824 N.E.2d 642, 650 (Ill. App. Ct. 2005) (noting that suppression "appears to be the only way to deter the police from randomly stopping citizens for the purpose of running warrant checks.")

The New Jersey Supreme Court has clearly delineated similar circumstances where attenuation may apply because appreciable deterrence will result. In *State v. Williams*, 926 A.2d 340, 342-43 (N.J. 2007), officers attempted to conduct an investigatory stop of an individual based upon a vague dispatch description of a "black man wearing a black jacket" possibly selling drugs at a particular residence. When the officers approached a "suspect" matching the description, he pushed one of the officers and fled; when the suspect was subsequently apprehended the search incident to arrest produced a handgun. *Id*. at 343. Despite the New Jersey Supreme Court's finding that the dispatch report did not give rise to reasonable suspicion of this individual, the suspect's actions amounted to obstruction. *Id*. at 342. His resistance and flight provided a meaningful "intervening circumstance" breaking the chain of causation of the unlawful detention – accordingly, attenuation was found. *Id*. at 345-346. In this instance, deterrence would clearly not result from suppression because the officers were attempting to reasonably respond to an escalating situation.

Contrasting *Williams* with *State v. Shaw*, 64 A.3d 499, 513 (N.J. 2012) provides insight as to how attenuation will not be found when appreciable deterrence would result. In *Shaw*, several officers, as part of a task force, were attempting to execute an

arrest warrant on one particular resident of a public housing complex. *Id*. at 501-502. The officers stopped a "suspect" but the only characteristics this man shared with the wanted fugitive were his race and gender. *Id*. Despite the suspicionless stop, the suspect's name was checked against a list from another task force at the same public housing unit naming persons wanted on parole warrants. *Id*. at 502. When a parole warrant was discovered, he was subsequently searched and physical fruits were found on his person. *Id*. After concluding that the defendant was the subject of an impermissible investigatory detention in violation of the Fourth Amendment, the court remarked: "There is a difference between an unlawful motor vehicle or investigatory stop in which, incidental to the stop, the police learn about an outstanding warrant and, as here, an unlawful stop executed for the *specific purpose* of ascertaining whether a suspect is the subject of an arrest warrant." *Id*. at 511 (emphasis added). In granting the defendant's motion to suppress in *Shaw*, the New Jersey Supreme Court cited its contrary finding in *Williams*, reasoning: "Suppressing evidence sends the strongest possible message that constitutional misconduct will not be tolerated and therefore is intended to encourage fidelity to the law." *Williams*, 926 A.2d at 340.

Even when finding attenuation in certain circumstances, the courts routinely dealing with cases such as Mr. Strieff's have been clear that deterrence is necessary to prevent widespread misconduct.

B. Where An Objectively Reasonable Belief That An Officer's Conduct Was Lawful Does Not Exist, Deterrence Is The Only Appropriate Solution.

The exclusionary rule solely exists to deter official misconduct that is "deliberate, reckless, or grossly negligent…or in some circumstances recurring or systemic negligence." *Herring v. United States*, 555 U.S. 135, 144 (2009). Deterrence analysis requires an objective inquiry into "whether a reasonably well trained officer would have known" that the seizure was illegal in light of "all of the circumstances." *United States v. Leon*, 468 U.S. 897, 922 (1987). When law enforcement activity is not found to be reasonable under the circumstances, the taint must be sufficiently purged in order to avoid exclusion of derivative evidence.

As noted by this Court in *Hudson*, "the value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson*, 547 U.S. at 596. Strength of incentive is high when an officer is rewarded with probative, relevant evidence while evading proper investigatory procedures. Mr. Strieff's arrest pursuant to the "minor traffic warrant" is not contested. Neither is a properly conducted search incident to lawful arrest. With regard to the search incident exception, *United States v. Robinson*, 414 U.S. 218, 235-36 (1973) is still binding precedent. But the principles behind the search incident exception, grounded in *Chimel v. California*, 395 U.S. 752, 764 (1969), are alive and well.[4] Where a police officer

[4] Justifications for search incident to arrest are officer safety and preventing destruction of evidence. *See Arizona v. Gant*, 556

conducts a warrant check, it is foreseeable that a warrant may be discovered. If the exclusionary rule were not applied in this instance, and a person illegally detained had an outstanding warrant for an unpaid parking ticket, failure to appear, or, like Mr. Strieff, a minor traffic violation, the Fourth Amendment violation would become irrelevant because any evidence seized upon arrest would be purged of the taint of the initial illegality. Moreover, in each of the aforementioned instances, no evidence of the crime of arrest would be discovered by a search. Unless *Robinson* were to be amended in a similar manner to *Gant*, inasmuch as an officer may only conduct a limited pat-down for weapons or search for evidence of the crime of arrest within the arrestee's immediate control, the only viable deterrence mechanism is suppression.

While he was a law student, Myron Orfield, currently the Director of the Institute on Metropolitan Opportunity at the University of Minnesota Law School, performed an empirical study of Chicago Narcotics officers examining the deterrent effects of successful suppression motions. Myron Orfield, Jr., Comment, The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers, 54 U. Chi. L. Rev. 1016, 1017-18 (1986). He chose the Narcotics Section because of frequent motions to suppress and the percentage of cases lost due to suppression was statistically more significant than with other crimes. *Id.* at 1024-1025. One of his

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U.S. 332, 335 (2009) (holding that the search incident to arrest exception in vehicle searches is limited to a pat-down for weapons; a vehicle may only be re-entered for evidence of the crime of arrest.)

findings was that due to the exclusionary rule's power in the 1960s and 1970s, the local departments began to introduce institutional reforms, including an officer rating system by which the officers were insured that "suppressions negatively affected [the] officer's ability to retain her assignments and, to a lesser extent, to obtain promotions." *Id*. at 1027-1028. Supervisors in the Narcotics Section implemented procedural reforms designed to educate officers, but Orfield's survey demonstrated that the individual officers believed "the lessons of training did not firmly take hold until the officers faced real-life situations in the courtroom." *Id*. at 1037. Sixty-one percent of the responding officers believed they learned about Fourth Amendment legal requirements "very frequently" or "every time" evidence was suppressed. *Id*. Moreover, the reaction these officers had to their peers having evidence suppressed indicated "that an officer's pattern of suppression would engender a reputation for laziness, incompetence, or dishonesty." *Id*. at 1048. Thus, institutional reforms based upon the response to suppression were commonly effective at educating officers about their legal limits with respect to Fourth Amendment rights and continual reinforcement of proper tactics was thought to have a deterrent effect.

The Petitioner's brief seeks to advance the argument that Detective Fackrell "did not exploit the unlawful detention to search" Mr. Strieff because the warrant was an "intervening circumstance" that Detective Fackrell "did not cause and could not have anticipated." Pet. Merits Brief, p. 4. But the ubiquity of outstanding warrants, particularly in lower-income communities, compels a contrary finding. Using

Ferguson, Missouri as an example, in 2013 the city's municipal court issued over twice as many arrest warrants per capita than any other town in Missouri. *Development in the Law – Policing*, 128 Harv. L. Rev. 1723, 1724 (2015). In discussing local municipal practices of heavy-handed fines on the town's residents with Professor Jelani Cobb, one female resident remarked: "We have people who have warrants because of traffic tickets and they are effectively imprisoned in their homes…[t]hey can't go outside because they'll be arrested." *Id*. at 1724-25. The potential for abuse is worrisome not just for those wanted on minor infractions, but innocent, private persons who expect to be to be free from unreasonable searches and seizures under the Fourth Amendment. Deterrence is the only viable remedy.

This case does not present a situation where the initial illegality was due to a reasonable mistake. [5] On the contrary, it presents a deliberate violation of both the Fourth Amendment and Utah state law. Basic Fourth Amendment principles are well-settled; the Utah Code of Criminal Procedure is almost identical,

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[5] In *Leon*, the Court remarked that the exclusionary rule is designed to punish unlawful police action, not "objectively reasonable reliance on a subsequently invalidated search warrant." 468 U.S. at 922. *Arizona v. Evans*, 514 U.S. 1, 15-16 (1995), similarly noted that exclusion of evidence due to negligent error on the part of the court's clerk, and not the arresting officer, would not result in deterrence. In both of these cases, the error was made by non-police personnel. While in *Herring*, the Court noted that even police errors that are negligent and non-reckless do not warrant suppression, the case dealt with a recordkeeping error rather than deliberate conduct by the arresting officer, as in this case. *Herring*, 555 U.S. at 146.

providing in pertinent part "a peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions." Utah Code Ann., § 77-7-15 (1999). In *Salt Lake City v. Ray*, 998 P.2d 274, 278 (Utah Ct. App. 2000), the Utah Court of Appeals held that a seizure occurred when officers approached a woman standing in a convenience store parking lot, then retained her identification while running a warrant check. Further, the Utah Supreme Court in 2005 assumed that, during a street encounter, an officer's act of retaining an individual's state identification card to check for warrants is a level-two detention, requiring reasonable suspicion at its inception. *State v. Markland* 112 P.3d 507, 511 (Utah 2005). Reasonable suspicion has been consistently defined as more than an "inchoate and unparticularized suspicion or 'hunch.'" *Terry v. Ohio*, 392 U.S. 1, 27 (1968). *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) cited to *Terry* for the proposition that "[p]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks.

When Detective Fackrell admittedly decided to stop the next person leaving the house he was monitoring, regardless of who that person was, no objective reasonable suspicion existed. J.A. at 17. Fackrell did not see Mr. Strieff enter the house. J.A. at 20. He had never seen Strieff at the house before. J.A. at 20. He did not even know who Strieff was. J.A. at 20. Having no articulable, particularized suspicion that Mr. Strieff was involved in an illegal activity, Detective

Fackrell should not have even demanded his name, address, or explanation of his actions. Further, because Detective Fackrell's interaction with Mr. Strieff that led to the evidence with this case took place in December 2006, he should have been well aware of the settled federal and state jurisprudence affecting his day-to-day interactions with citizens.

Though Petitioner concedes that Detective Fackrell's conduct was indeed a Fourth Amendment violation, Petitioner's articulation of the significance of his illegal conduct misses the mark. Characterization of the illegal seizure of Mr. Strieff as a "stop that turned out to be illegal" ignores that, objectively viewed, a reasonable officer would have known his conduct was unlawful. An 18-year veteran of the police force with significant training and experience should be expected to know whether reasonable suspicion exists. The violation of Respondent's rights was both substantial and deliberate such that deterrence would meaningfully alter behavior in preventing future misconduct.

C. Where The Sole Evidence Of A Previously Uncharged Crime Is A Direct Result Of Police Misconduct, The Cost Of Exclusion Is Negligible.

Deference to the inherent probative value of reliable physical evidence should cease when the benefit afforded to the government in ignoring the law is what should "offend the basic concepts of the criminal justice system." *Leon*, 468 U.S. at 908. Where the interest protected is as fundamental as "the right of the people to be secure in their persons…against

unreasonable searches and seizures…" and the violation is a direct intrusion upon the sanctity of the individual and freedom of movement in public spaces, the Fourth Amendment guarantee would certainly be served by suppression. As one appellate judge has remarked:

> Courts protect Fourth Amendment rights through the exclusionary rule by denying the government the use of evidence obtained as a result of an illegal search or seizure. In turn, government agents should then be deterred from initiating conduct violating the Fourth Amendment, since they would lose the benefit of any evidence they might uncover. The real point, however, is to spare law-abiding citizens that conduct by discouraging law enforcement officers from acting in unconstitutional ways.

State v. Moralez, 242 P.3d 223, (Kan. Ct. App. 2010), (Atcheson, J., dissenting).

By throwing out the evidence Detective Fackrell obtained from Mr. Strieff the courts safeguard the Fourth Amendment with a result that will dissuade police officers from detaining other people (who might be a next door neighbor or a teacher who works at the elementary school around the corner) without a proper legal basis.

Where an officer is tasked with enforcing the law, he is also tasked with upholding laws of the state and of the U.S. Constitution. To excuse the officer's flagrant

violation in this case, in the name of "investigation," does not serve the societal interest in maintaining law and order. Moreover, when the sole physical evidence for an entirely new charge against a suspect would not have been brought to light but-for the illegal conduct of law enforcement, that evidence must be suppressed.

CONCLUSION

This Court should affirm the Utah Supreme Court's ruling that the attenuation doctrine does not apply when there is no separate, cognizable intervening circumstance between an unlawful seizure of a person and a search incident to arrest on an unlawfully discovered valid warrant. While the lawful arrest pursuant to a valid warrant remains untainted, suppression of the physical fruits of police misconduct will result in appreciable deterrence and will ensure that individuals' Fourth Amendment right to be free from unreasonable searches and seizures remains intact.

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Respectfully submitted,

Norman M. Garland
Counsel of Record
Michael M. Epstein
Amicus Project at Southwestern Law School
3050 Wilshire Blvd.
Los Angeles, CA 90010
(213) 738-6774
amicusproject@swlaw.edu