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 Utah Supreme Court

REPLY BRIEF FOR PETITIONER

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
LAURA B. DUPAIX
Deputy Solicitor General
THOMAS B. BRUNKER
Criminal Appeals Director
JEFFREY S. GRAY
Search & Seizure Section
Director
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@utah.gov
Counsel for Petitioner

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER AUTHORITIES

INTRODUCTION

Both parties agree that Detective Fackrell lawfully arrested Strieff on a valid outstanding warrant. (Resp. Br. 25.) Because the arrest was lawful, the search incident to that arrest was lawful. *United States v. Robinson*, 414 U.S. 218, 235 (1973). The sole question here is whether the exclusionary rule should be extended to the lawfully seized evidence from that search because the detective first learned about the warrant during an investigatory stop later judged unlawful. Under this Court's settled attenuation analysis, the answer is no.

The exclusionary rule exists solely to deter police from violating constitutional rights. Because suppression exacts a heavy toll on the truth-finding process, it "is 'clearly . . . unwarranted'" unless it "yield[s] '*appreciable* deterrence.'" *Davis v. United States*, 131 S. Ct. 2419, 2426-27 (2011) (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)) (emphasis added) (ellipses in original).

Suppressing evidence lawfully seized incident to a warrant-arrest—even when the warrant was discovered during an unlawful investigatory stop—will not appreciably deter future unlawful investigatory stops unless the predicate stop was flagrantly unlawful. Because Detective Fackrell's initial stop here was not flagrantly unlawful, suppression is unwarranted.

Strieff wants this Court to replace the existing attenuation inquiry with one that looks to whether the intervening event was foreseeable. But shifting

attenuation's focus from the conduct to be deterred to whether an intervening event is foreseeable will not serve the exclusionary rule's purpose of achieving appreciable deterrence. And Strieff has not shown that foreseeability is a workable way to assess deterrence value; he gives no way for law enforcement officers or judges to determine when any particular intervening event—including an arrest on a preexisting warrant—becomes sufficiently probable as to be reasonably foreseeable.

ARGUMENT

I. THE COURT'S EXISTING ATTENUATION ANALYSIS ALREADY DETERS FLAGRANT MISCONDUCT, INCLUDING THE FLAGRANT MISCONDUCT THAT STRIEFF WARNS AGAINST.

Strieff now agrees that the Utah Supreme Court's holding "restrict[ing]" the attenuation exception "to circumstances involving an independent act of a defendant's 'free will' in confessing to a crime or consenting to a search," App. 27, is "too narrow," Resp. Br. 29 n.4.

But the parties still disagree on what the correct rule should be. Utah asks the Court to apply the analysis that has long governed attenuation cases—an inquiry that, in the context of a warrant-arrest, requires suppression only when the predicate unlawful conduct was flagrant.

In contrast, Strieff's newly proposed attenuation rule asks that any evidence seized as a "foreseeable consequence" of police misconduct be suppressed. Resp. Br. 22. Strieff's rule conflicts with this Court's existing attenuation inquiry. And it is unnecessary to deter the misconduct he warns against because this Court's inquiry already does that.

1. The exclusionary rule does not require suppressing everything "which deters illegal searches." *United States v. Leon*, 468 U.S. 897, 910 (1984) (internal quotation marks omitted). Thus, under the Court's attenuation exception, evidence obtained following unlawful police conduct may still be admissible if it was not "come at by exploitation of that illegality" but "instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (internal quotation marks and citation omitted). The attenuation inquiry tries "'to mark the point at which the detrimental consequences of illegal police action become so attenuated'" by time or other intervening circumstances "'that the deterrent effect of the exclusionary rule no longer justifies its cost.'" *Leon*, 468 U.S. at 911 (quoting *Brown v. Illinois*, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part)).

That fact-specific inquiry ensures that suppression yields appreciable deterrence by focusing on the nature of the intervening

circumstance and the culpability of the police misconduct. (*See* Petr. Br. 14-20.)

The Court has found attenuation when the intervening circumstance was an event arising from the judicial process—such as an arraignment (*Wong Sun*, 371 U.S. at 491) or a commitment (*Johnson v. Louisiana*, 406 U.S. 356, 365 (1972))—or from the decisions or actions of a third-party witness (*United States v. Ceccolini*, 435 U.S. 268, 276-78 (1978)) or the defendant himself (in confession cases).

An arrest on a preexisting warrant is just as capable of purging the taint of prior unlawful conduct. A warrant represents a judicial finding before the stop that all constitutional requirements for arresting the suspect have been satisfied on facts unrelated to the stop. An "officer has a sworn duty to carry out" the warrant's "provisions," *Leon*, 468 U.S. at 920 n.21 (internal quotation marks and citation omitted), and "the fact of the lawful arrest . . . establishes the authority to" perform a "full search," *Robinson*, 414 U.S. at 235. (Petr. Br. 21-28.)

Suppression might nevertheless be appropriate despite those intervening events if the predicate "official misconduct" was "flagran[t]," *Brown*, 422 U.S. at 604—*i.e.*, evinces "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights," *Davis*, 131 S. Ct. at 2427-28 (internal quotation marks and citations omitted).

The majority of courts that have analyzed attenuation in the outstanding-warrant scenario have concluded that a warrant-arrest is an intervening circumstance that attenuates the taint of a prior nonflagrant unlawful stop. (*See* Pet. for Cert. 8-12.) Strieff cites nothing to show that the majority's conclusion has proven unworkable or led to systemic flagrantly unlawful investigatory stops in those jurisdictions.

2. Strieff nevertheless cites news reports and legal scholarship to raise the specter of irresistible incentives leading to an unconstrained police state if this Court applies its longstanding attenuation inquiry to hold, like the majority of courts, that a warrant-arrest can be an intervening circumstance that attenuates the taint of prior misconduct. (Resp. Br. 1-13.) His argument misunderstands that inquiry. Because the existing inquiry hinges on the culpability of an officer's predicate act, it already accounts for—and thus will appreciably deter—the police misconduct that Strieff incorrectly suggests would necessarily follow from applying it.

Take Strieff's example of the encounter between the Ferguson police officer and a man waiting for a bus. (*See* Resp. Br. 7.) On Strieff's recitation of that encounter, suppression would be appropriate under this Court's existing inquiry if the officer had found a warrant, executed it, and discovered contraband in a search incident to that arrest. Because the

predicate stop was obviously unlawful—police may not detain a person without *any* basis—suppressing the seized evidence would appreciably deter similar future stops.

Indeed, several of the cases Strieff cites in support of his proposed foreseeability test (Resp. Br. 50-52) are from jurisdictions that apply the Court's traditional attenuation analysis to warrant-arrests. Rather than justifying a change in the existing rule, these cases show why the rule works—they suppressed the evidence because the predicate stop was flagrantly unlawful.[1]

The exclusionary rule is not the only tool to deter such flagrant police misconduct in any event. "[C]ivil liability is an effective deterrent," as is "the

---

[1] *See, e.g.*, *People v. Mitchell*, 824 N.E.2d 642, 644, 649-50 (Ill. App. Ct. 2005) (finding predicate stop to be flagrantly unlawful because officer stopped defendant who had "[no]thing suspicious" about him—he "was just walking"); *State v. Grayson*, 336 S.W.3d 138, 148 (Mo. 2011) (finding predicate stop to be flagrantly unlawful because officer "had no basis for continuing the detention of [driver] but detained him anyway exclusively based on a hunch"); *State v. Shaw*, 64 A.3d 499, 511-12 (N.J. 2012) (finding predicate stop to be flagrantly unlawful because officers trying to execute warrant stopped defendant even though "only discernible features" he shared with man named in warrant "were that both were black men"); *State v. Bailey*, 338 P.3d 702, 714 (Or. 2014) (finding predicate stop to be flagrantly unlawful because purpose of stop was completed after five minutes but officers extended stop for thirty more minutes).

increasing professionalism of police forces, including a new emphasis on internal police discipline" and "the increasing use of various forms of citizen review." *Hudson v. Michigan*, 547 U.S. 586, 598-99 (2006). "[I]t is not credible to assert" that these mechanisms do not also deter flagrant misconduct. *Id.* at 599. Department of Justice investigations—like the one in Ferguson (Resp. Br. 7-8)—provide additional deterrence when necessary. (U.S. Br. 32.)

3. Strieff fails to show that foreseeability is a workable way to assess culpability in the context of warrant-arrests because he does not prove that officers can reasonably foresee finding a warrant in any given stop.

Strieff asserts that finding an outstanding warrant during a stop is nearly always foreseeable because police routinely check for warrants during their "encounter[s]" with the public, and "[a]rrest warrants exist for a large fraction of the population." (Resp. Br. 49.) Thus, Strieff reasons, "police know that if they routinely stop people and check for warrants, a substantial percentage of the checks will yield 'hits.'" *Id.*

Strieff's statistics do not prove that "a large fraction of the population" have outstanding arrest warrants. He cites only raw numbers of outstanding warrants—most from a decade or more ago—in places such as Florida, Washington, California, and

Ferguson, Missouri. *Id.* at 1-5. His contention that these numbers represent a "large fraction of the population" rests on two premises: that each warrant names a separate person (rather than one person being named in multiple warrants), and that each person named in a warrant resides in the cited state or city. Strieff cites nothing to show that either premise is true. His conclusion thus cannot logically be confirmed.

Even assuming his two premises are true, the numbers Strieff cites correspond to only a small fraction of the total adult population. For example, if Florida's 323,000 outstanding warrants correspond to the number of *people* with warrants, *id.* at 2, that amounts to only 2.2% of Florida's total adult population of 14.7 million.[2] Likewise, Washington's 370,000 warrants would come to only 7.2% of its adult population and California's 2.5 million warrants would reach only 8.9% of its adult population. When 90% or more of the adult population does *not* have a warrant, police cannot have confidence that "a *substantial* percentage of the people they meet on the street will have an outstanding arrest warrant." (Resp. Br. 4) (emphasis added).

---

[2] The population numbers used to calculate these percentages are taken from the United States 2010 Census at www.census.gov/2010census/.

Superficially, Strieff's warrant numbers for cities, particularly for Ferguson, appear to yield a higher probability of finding a warrant in any stop. *Id.* at 1-5. Strieff calculates that over 75% of Ferguson's total 21,000 residents have an outstanding warrant. His calculation is based on 16,000 outstanding warrants from Ferguson's courts. *Id.* at 1-4.

But Strieff's calculations again rest on the two premises discussed above—that Ferguson's warrants name only Ferguson residents and that each warrant names a different Ferguson resident. But according to the 2010 U.S. Census, Ferguson's total adult population is roughly 15,000 people. That means Ferguson has roughly 1,000 more warrants than individual adult residents who could be named in them.

Probability—or reasonable foreseeability—of a warrant's existence therefore cannot be proven merely by comparing the number of warrants to the total number of residents. That is especially true if, as Strieff says, most of the outstanding warrants are for failing "to pay a traffic ticket." (Resp. Br. 4.) Traffic violators are an inherently mobile population just as likely to reside elsewhere. That is particularly so when a city, like Ferguson, is part of a greater metropolitan area (St. Louis) that sees pass-through traffic from contiguous communities.

In any event, Ferguson is an extreme example that does not accurately represent municipalities throughout the country. First, the principal problem that the Department of Justice reported was that the municipal court system was issuing too many arrest warrants for failing to appear or failing to pay a fine. U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 42 (2015) ("Our review of police and court records suggests that much of the harm of Ferguson's law enforcement practices in recent years is attributable to the court's routine use of arrest warrants to secure collection and compliance when a person misses a required court appearance or payment."). Strieff cites no evidence of similar egregious overuse of arrest warrants in other communities.

In fact, the available evidence suggests an absence of such problems. A 2004 report to the Department of Justice found that between March and August of 2001, there were 11,464 warrants outstanding in Montgomery County, Maryland. Science Applications Int'l Corp., *Un-served Arrest Warrants: An Exploratory Study* 13 (Apr. 22, 2004), at http://www.ilj.org/publications/docs/Unserved_Arrest_Warrants.pdf (last visited Feb. 8, 2016). And between July and December 2000, there were 25,411 warrants outstanding in Hennepin County, Minnesota. *Id.* at 23. Based on 2000 U.S. Census data reporting a total population of 873,341 in

Montgomery County (*id.* at 8) and 1,116,200 in Hennepin County (*id.* at 7), those warrants represent only 1.3% and 2.3% of the total population, respectively—assuming that no one person was subject to more than one warrant, *see id.* at 25 ("an arrestee may have multiple warrants outstanding"). It is therefore misleading to suggest that Ferguson is representative of national trends.

In short, Strieff's numbers do not prove a significant probability that any person stopped by police will have an outstanding warrant. Strieff ultimately seems to agree: "It bears emphasizing that most of the people protected by the exclusionary rule against these unlawful stops will be people *without* outstanding arrest warrants." (Resp. Br. 57.) Without such a probability, Strieff cannot show that finding a warrant during a stop is foreseeable enough to create an irresistible incentive for officers to conduct stops that they know are unlawful.

II. TORT FORESEEABILITY NEITHER ANIMATES NOR CONSTRAINS THE ATTENUATION EXCEPTION.

Strieff's invitation to move attenuation's "focus" from deterrence to "the foreseeability of the alleged intervening circumstance," Resp. Br. 30, contravenes longstanding Fourth Amendment and exclusionary rule jurisprudence. It would cause the judicial administrability problems that led this Court to reject a foreseeability test in other Fourth Amendment contexts. And applying Strieff's test

would not affect the outcome here because his intervening warrant-arrest was not reasonably foreseeable.

A. This Court Has Never Held That Only Unforeseeable Intervening Events Can Attenuate The Taint Of Prior Illegality.

1. Strieff contends that this Court's attenuation cases have "focused on whether the alleged intervening circumstance was an unforeseeable event unrelated to the officer's unlawful conduct (in which case the Court has found attenuation), or whether the alleged intervening circumstance was itself foreseeably caused by the officer's unlawful conduct (in which case the Court has found no attenuation)." (Resp. Br. 29-30) (citing *Rawlings v. Kentucky*, 448 U.S. 98, 108 (1980); *Ceccolini*, 435 U.S. at 276; *Wong Sun*, 371 U.S. at 491; *Kaupp v. Texas*, 538 U.S. 626, 633 (2003); *Taylor v. Alabama*, 457 U.S. 687, 691 (1982); *Dunaway v. New York*, 442 U.S. 200, 218 (1979); *Brown*, 422 U.S. at 604)).

The seven cases he cites, however, do nothing of the sort. Not one of them contains the word "foreseeable," let alone relies on foreseeability to determine attenuation.

Unable to cite an attenuation case from this Court discussing foreseeability, Strieff suggests that *Brown* borrowed attenuation's "intervening circumstance[]" inquiry (422 U.S. at 603-04) from "proximate cause analysis in tort law." (Resp. Br. 28)

(citing, *inter alia*, *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876), three tort treatises, and a Restatement). He reasons that because an intervening circumstance must be unforeseeable under tort law to free a tortfeasor from liability, it must also be unforeseeable under a Fourth Amendment attenuation analysis before it can attenuate the taint of an unlawful predicate act. *Id.* at 28-31.

Nothing in this Court's attenuation precedent supports Strieff's suggestion that the tort doctrine of intervening cause—complete with its unforeseeability component—has been imported into, and now applies coextensively to, attenuation analysis. If anything, the Court's precedent suggests the opposite.

First, as stated, the word "foreseeable" is notably absent from this Court's attenuation cases. As Strieff implicitly acknowledges, the concept of foreseeability existed in tort law long before this Court created the attenuation exception. *Id.* at 28. Given the venerable role that foreseeability and proximate cause have played in tort law, it seems unlikely that the Court would make these concepts the touchstone of its attenuation jurisprudence without calling them by name.

Second, this Court has consistently refused to make foreseeability a component of the Fourth Amendment's reasonableness analysis. *See, e.g.*,

Kentucky v. King, 563 U.S. 452, 464-66 (2011) (refusing to consider foreseeability of defendant's response to lawful police conduct in assessing reasonableness of officers' actions under exigent-circumstances exception); *Horton v. California*, 496 U.S. 128, 138-42 (1990) (holding that reasonableness of plain-view seizure does not depend on whether officers' discovery of evidence in plain view was inadvertent, but on whether officers reasonably arrived at place where evidence was seized). Strieff gives no reason for this Court to adopt foreseeability in the attenuation context after rejecting it in other Fourth Amendment contexts.

Because the reasonableness of police conduct does not depend on whether an officer is "interested in an item of evidence and fully expects to find it in the course of a search," *Horton*, 496 U.S. at 138, suppression following a predicate unlawful search or seizure cannot logically depend on whether the discovery of the evidence was foreseeable. Just as the predicate for warrantless searches is reasonableness (not foreseeability), the predicate for attenuation is that the evidence "has been come at" through a non-flagrant violation. *Wong Sun*, 371 U.S. at 488 (internal quotation marks and citation omitted). Neither inquiry turns on whether officers could have foreseen that they would discover the evidence.

Just as *King* declined to apply foreseeability to the exigent-circumstances inquiry, *see* 563 U.S. at 464, the Court should decline Strieff's proposal to shift attenuation's focus from flagrancy and appreciable deterrence to foreseeability.

B. *Brown* Disavows Strieff's Suggestion That Its Factors Are Exclusive In Every Attenuation Case.

Strieff' contends that courts must decide every attenuation case under three factors that *Brown* found relevant to assessing whether a confession is attenuated from a prior unlawful arrest because "each captures part of the proximate cause inquiry." (Resp. Br. 26. n.3.) Not so.

Brown itself disavows that contention: *"[n]o single fact is dispositive*" to deciding "whether *a confession*" is sufficiently attenuated from an unlawful arrest to be admissible. 422 U.S. at 603 (emphases added). Under *Brown*, attenuation "must be answered on the facts of each case," and evaluated "in light of the [deterrence] policy served by the exclusionary rule," *id.* at 603-04. *Ceccolini* further confirms that the attenuation inquiry "can consistently focus" on different case-specific "factors," including "the differences between live-

witness testimony and inanimate evidence." 435 U.S. at 278-79.[3]

What is more, *Brown* identified a fourth factor that Strieff disregards: the giving of "*Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of the illegal arrest." 422 U.S. at 603; *see also Rawlings*, 448 U.S. at 107 (applying the "*Miranda* warnings" factor as "important, although not dispositive"). By omitting *Brown*'s fourth factor, Strieff impliedly (though perhaps inadvertently) admits that the attenuation inquiry cannot be limited to any particular set of rigid factors.

Utah thus does *not* ask this "Court to pay no mind" to *Brown*'s factors. (Resp. Br. 26 n.3.) Utah instead asks the Court to apply *Brown* and its

---

[3] Strieff places great weight on *Brown*'s temporal proximity factor. (Resp. Br. 26-27.) This factor, however, "is at best neutral" in the context of a warrant-arrest because defendants "cannot credibly argue" that they "would have benefitted by a longer rather than shorter detention before" being arrested on a valid warrant. *Shaw*, 64 A.3d at 509-10. In any event, the Court has found attenuation when only a "relatively short period of time" elapsed between the predicate unlawful conduct and the discovery of evidence. *Rawlings*, 448 U.S. at 108. Strieff's own hypothetical examples suggest that a short temporal proximity does not preclude attenuation—a bystander accusing a detainee of theft and a detainee striking an officer (Resp. Br. 31) occur temporally proximate to the stop's inception yet, in his view, support attenuation.

progeny as written—to suppress evidence only when, given the facts of the case, suppression will yield appreciable deterrence. This view of *Brown*—which the United States (U.S. Br. 13) and more than 30 other States (Br. Michigan, et al. 8, 13) share—harmonizes this Court's attenuation cases in a way that Strieff's proposed test does not.

C. Strieff's Hypothetical Examples Illustrate Why Tort Foreseeability Is Ill-Suited To Achieving Appreciable Deterrence.

Adopting "a reasonable foreseeability test" for attenuation would introduce the same "unacceptable degree of unpredictability" that led this Court to reject that test in the exigency context. *King*, 563 U.S. at 465. If the test were foreseeability, judges would be required in *every* attenuation case "to quantify the degree of predictability that must be reached," *id.,* before *any* intervening event could be reasonably foreseeable.

Strieff's hypothetical examples (Resp. Br. 30-32) applying his foreseeability rule underscore those administrability problems. Nothing but his *ipse dixit* explains why the intervening event is foreseeable in some circumstances but not in others. He offers no standard by which judges can distinguish possibilities from probabilities. Nor does he identify

the level of probability required before a theoretically possible event becomes foreseeable.

For instance, Strieff contends it is unforeseeable—and therefore a possible intervening event—that a detained person would "commit[] a new crime such as striking the officer." (Resp. Br. 31.) But he cites nothing to show that a detainee's striking an officer or committing another crime is so unusual that such an event would be unforeseeable. He certainly cites nothing comparing the incidence of detainees' striking an officer to the incidence of officers' finding a warrant to prove that the first is unforeseeable but the second is not.

Additionally, the number of this Court's cases addressing whether confessions are admissible under the attenuation exception undermines Strieff's claim that confessions are unforeseeable. *Id.* at 31. This Court has analyzed attenuation in the confession context at least six times—in *Kaupp*, *Taylor*, *Dunaway*, *Rawlings*, *Brown*, and *Wong Sun*. Yet it is only now analyzing a warrant-arrest under the exception. This suggests that a confession is at least as likely to follow unlawful police conduct as is a warrant-arrest.

Strieff's rule would produce a conflicting maze of judicial determinations on what intervening events are so foreseeable that they can purge the taint of an initial illegality. *King*'s prescient rejection of this test for the exigent-circumstances exception has

spared judges the "unacceptable and unwarranted difficulties," 563 U.S. at 466, attendant to such analysis. The circumstances here call for the same outcome.

III. THE EVIDENCE SEIZED FROM STRIEFF IS ADMISSIBLE UNDER A STRAIGHTFORWARD APPLICATION OF THIS COURT'S EXISTING ATTENUATION EXCEPTION.

The lawful warrant-arrest here was an intervening circumstance that purged the taint of the unlawful predicate stop. Because Detective Fackrell's stop was not flagrantly unlawful, the costs of suppressing the lawfully seized evidence far outweigh any negligible deterrence that suppression might yield.

1. Strieff's contention that "[a]ny reasonably well trained officer would know that the stop in this case was *utterly* lacking in reasonable suspicion" (Resp. Br. 38 (emphasis added)) bespeaks a flawed treatment of the reasonable-suspicion standard, a misreading of the record, or both.

Reasonable suspicion exists when, under "the totality of the circumstances," the "detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotation marks omitted). But "the concept of reasonable suspicion is somewhat abstract," *id.* at 274 (citations omitted), and cannot be reduced "to 'a neat set of

legal rules,'" *id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)) (additional citation omitted). As a result, knowing precisely when the facts amount to reasonable suspicion is often an "elusive" endeavor, *United States v. Cortez*, 449 U.S. 411, 417 (1981)—especially for law enforcement officers who, unlike courts, do not enjoy "the luxury of armchair reflection," *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1999) (citation omitted); *accord King*, 563 U.S. at 466 (recognizing that police "must make quick decisions in the field").

The totality of the circumstances in this case supports the Utah Court of Appeals' conclusion—undisturbed by the Utah Supreme Court—that Detective Fackrell's stop of Strieff "amounted to a misjudgment" resulting in "a single misstep over the constitutional boundary rather than a deliberate transgression." App. 71.

Here, an anonymous tip on a police line reported drug-sales activity, including a description of short-stay traffic, at a particular house. Detective Fackrell did not stop the first person to exit the house. Instead, he watched the house for about three hours over the course of about one week. *Id.* at 4; J.A. 16. Relying on his specialized training and 18 years of experience, he concluded that what he observed during the surveillance corroborated the tip: He saw an amount of short-stay traffic at the house that, though "not terribly frequent," "was more than [he

would] see at a regular house." J.A. 15-16. The "duration" of the short stays was important—"people would come, stay and then leave" within "[j]ust a couple of minutes." *Id.* at 16-17.

So when Detective Fackrell saw Strieff leave the house, "the same as other people had done that [he had] been watching," J.A. 21, he stopped him to ask "a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling [his] suspicions," *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). He stopped Strieff, "told him who I was, told him that I had been watching the house and that I believed there might be drug activity there and asked him if he would tell me what *he* was doing there." J.A. 18 (emphasis added).

The prosecutor conceded that these facts fell just short of reasonable suspicion to stop Strieff. In particular, Detective Fackrell did not know when Strieff had entered the house or how long he had been in it. *See* App. 5. But in light of governing Fourth Amendment precedent, it would not have been obvious to an objectively reasonable well-trained officer that this missing fact so *clearly* eliminated reasonable suspicion as to make the stop unlawful.

It has long been settled that an anonymous tip, "standing alone, would not 'warrant a man of reasonable caution in the belief that [a stop] was appropriate.'" *Alabama v. White*, 496 U.S. 325, 329

(1990) (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). But it is equally settled that if "an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." *Id.* at 331 (citation omitted); *accord Navarette v. California*, 134 S. Ct. 1683, 1688 (2014) (holding that anonymous tip may be sufficient to establish reasonable suspicion when combined with sufficient corroboration, which may include the confirmation of predicted behavior or even innocent details).

It is also objectively reasonable for an officer to infer that occupants of a home, like occupants of a car, are engaged in a common enterprise. *Cf. Wyoming v. Houghton*, 526 U.S. 295, 304-05 (1999) (recognizing the reasonable inference that "a car passenger . . . will often be engaged in a common enterprise with the driver"). And *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), upon which Strieff relies (Resp. Br. 35), does not compel a different conclusion. The objective facts supporting reasonable suspicion to stop Strieff did not include his "mere propinquity" to someone else in a public place. *Ybarra*, 444 U.S. at 91. Instead, they included Strieff's leaving a private residence that Detective Fackrell reasonably suspected was a site of drug activity.

Under those precedents, this is a close case. There was an objectively reasonable basis to believe that the house was a site of drug sales—Fackrell got a tip that he corroborated by watching the house for about three hours over a week. During those three hours, every person he saw connected to the house would arrive, enter, and leave within a few minutes, which in his experience was consistent with drug-sale activity. (Petr. Br. 2.) At the end of all that, he saw Strieff leave the house.

A "'reasonably well-trained officer'" in Detective Fackrell's shoes could have reasonably misjudged that the totality of these circumstances amounted to reasonable suspicion that Strieff was either a short-term visitor buying drugs or a resident selling them. *Herring v. United States*, 555 U.S. 135, 145 (2009) (quoting *Leon*, 468 U.S. at 922 n.23). The fact that Detective Fackrell did not know whether Strieff was a short- or long-term visitor to (or resident of) the house does not decrease the suspicion that, as someone walking out of a house involved in drug sales, he was involved in that activity. It was at worst a reasonable mistake "involv[ing] only simple, isolated negligence." *Davis*, 131 S. Ct. at 2427-28 (internal quotation marks omitted). In these circumstances, "the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* at 2428 (internal quotation marks omitted).

2. Strieff further erroneously asks this Court to "consider the officer's *purpose* in violating the Fourth Amendment" when assessing flagrancy. (Resp. Br. 32 (citing *Brown*, 422 U.S. at 604)). The officer's subjective intent is foreign to the "pertinent analysis of deterrence and culpability." *Herring*, 555 U.S. at 145. Courts do not "inquir[e] into the" officer's "subjective intent" because the flagrancy assessment 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 the circumstances." *Id.* at 145-46 (internal quotation marks and citation omitted); *accord Brown*, 422 U.S. at 605 (observing that "impropriety of the arrest was obvious"). (*See* Petr. Br. 24-26.)

Each of the four cases on which Strieff relies to argue otherwise addressed the flagrancy of an arrest made in the absence of probable cause. (*See* Resp. Br. 33 (citing *Kaupp*, 538 U.S. at 633; *Taylor*, 457 U.S. at 691; *Dunaway*, 442 U.S. at 218; *Brown*, 422 U.S. at 605)). Because an arrest must be supported by probable cause, *see United States v. Sharpe*, 470 U.S. 675, 691 (1985), and probable cause to arrest follows (rather than precedes) a preliminary investigation, the officers' "investigatory purposes" there merely confirmed why those specific predicate acts were "obvious[ly]" unlawful, *Brown*, 422 U.S. at 605—reasonable officers would have known that they could not arrest the suspects merely to

investigate so that they could create the very probable cause needed for the arrests.

In contrast, investigatory stops need be supported only by an objectively reasonable suspicion that criminality "may be afoot," *Terry*, 392 U.S. at 30, and officers are allowed to detain a suspect "briefly in order *to investigate* the circumstances that provoke suspicion," *Berkemer*, 468 U.S. at 439 (internal quotation marks and citation omitted) (emphasis added). This Court's "decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops." *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 186 (2004). There is nothing objectively improper about a police officer having an "investigatory purpose" during a *Terry* stop. Rather, an investigatory purpose is the reason for the stop itself.

IV. ADOPTING STRIEFF'S RULE WOULD UPSET OTHER SETTLED FOURTH AMENDMENT PRECEDENT.

Strieff's theory conflates lawful and unlawful conduct in ways that subvert important governmental interests and undermine 40 years of precedent in the law governing arrests.

1. Strieff's overarching objection is that "[t]he police in some jurisdictions run routine warrant checks on the people they encounter, regardless of whether the police have particularized suspicion

that the person being stopped is involved in criminal activity, and regardless of whether they have any reason to believe that the person being stopped has any outstanding warrants." (Resp. Br. 1.) Strieff has not, however, pointed to compelling evidence that officers routinely illegally stop people for the purpose of checking for outstanding warrants.

To the extent that Strieff challenges the practice of running routine warrants checks, officers do not need reasonable suspicion that a person is named in a warrant or involved in criminal activity before running a warrants check. "The Fourth Amendment 'indicates with some precision the places and things encompassed by its protections': persons, houses, papers, and effects." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *Oliver v. United States*, 466 U.S. 170, 176 (1984)). Because neither a warrant nor the government's own databases fall within that list of protected items, the Fourth Amendment does not require officers to have reasonable suspicion before they check for warrants. And a person has no reasonable expectation of privacy in information accessible to the public, *see California v. Greenwood*, 486 U.S. 35, 40-41 (1988), such as the existence of a warrant, *see* Utah Statewide Warrants Search, https://secure.utah.gov/warrants/index.html (last visited Feb. 8, 2016).

Furthermore, as noted, "questions concerning a suspect's identity are a routine and accepted part of

many *Terry* stops." *Hiibel*, 542 U.S. at 186 (citing, *inter alia*, *United States v. Hensley*, 469 U.S. 221, 229 (1985)). The Fourth Amendment permits such questions because they "serve[] important government interests": The answers can "inform an officer that a suspect is *wanted for another offense*," or maintain officer safety by disclosing a suspect's "record of violence or mental disorder," or "help clear a suspect and allow the police to concentrate their efforts elsewhere." *Id.* (emphasis added). Accordingly, this Court has repeatedly *approved* the questioning and follow-up activity—including warrants checks—about which Strieff complains. (*See* Resp. Br. 6-8.)

2. Strieff's conception of an intervening warrant-arrest portends troubling consequences for the law governing searches incident to lawful arrests. He contends that "[w]here the police make a wrongful stop, run a warrant check, and conduct a search, the entire episode is one continuous transaction. The search takes place *during* the unlawful detention." (Resp. Br. 27.)

But the search here did not take place during the unlawful detention. It took place after an arrest that Strieff concedes was lawful. (*See id.* at 25.) By that concession, he necessarily concedes that his detention had become constitutional by the time Fackrell searched him. And the arrest "being lawful, a search incident to the arrest" was lawful and

"require[d] no additional justification." *Robinson*, 414 U.S. at 235. In other words, an officer's "authority to search the person incident to a lawful custodial arrest" exists irrespective of "what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.*

This Court previously refused to apply the exclusionary rule when a flagrantly unlawful arrest (an in-home warrantless arrest) preceded officers' later obtaining a defendant's confession at the police station. *See New York v. Harris*, 495 U.S. 14, 19-20 (1990). The confession "was admissible because" the defendant "was in legal custody"—police *did* have probable cause to arrest him—"and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else." *Id.* at 20.

If suppression was inappropriate in *Harris*, it is certainly inappropriate here. Not only was Strieff admittedly in legal custody when he was searched, but unlike in *Harris*, the predicate act—Detective Fackrell's investigatory stop—was not flagrantly unlawful. To the best of Utah's knowledge, this Court has never excluded evidence seized in such circumstances. This case is not the time to break that new ground.

CONCLUSION

This Court should reverse the judgment of the Utah Supreme Court.

Respectfully submitted.

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
LAURA B. DUPAIX
Deputy Solicitor General
THOMAS B. BRUNKER
Criminal Appeals Director
JEFFREY S. GRAY
Search & Seizure Section Director
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@utah.gov
Counsel for Petitioner

**Counsel of Record*