DISCOVERING ARREST WARRANTS DURING ILLEGAL TRAFFIC STOPS: THE LOWER COURTS' WRONG TURN IN THE EXCLUSIONARY RULE ATTENUATION ANALYSIS

INTRODUCTION

Suppose that a police officer illegally stops a vehicle based on the officer's mistaken belief that the driver failed to use his turn signal. Throughout the stop, the driver cooperates with the officer, submitting his name and driver's license. Upon searching his database, the officer learns that the driver has an arrest warrant for an unpaid traffic ticket. The officer arrests the driver, places

him in his squad car, and proceeds to perform a lawful search of the driver's vehicle. As the officer rummages through the vehicle, he discovers two grams of marijuana. Should this evidence be admissible under the theory that the discovery of an outstanding arrest warrant attenuates the taint of the illegal traffic stop?

The answer should be "no." Under the exclusionary rule, evidence seized in violation of the Fourth Amendment is inadmissible and considered "fruit of the poisonous tree."[1] Evidence gathered as a result of an illegal traffic stop typically falls under this rule. However, in *Nardone v. United States*, the Supreme Court held that evidence seized in violation of the Fourth Amendment can be admissible if the connection between the illegality and the seizure of the evidence has "become so attenuated as to dissipate the taint."[2] Some argue that the discovery of an arrest warrant attenuates the taint of an illegal traffic stop; however, this view is incorrect under the application of *Brown v. Illinois*.[3] Furthermore, the admission of such evidence would have startling public policy implications.

Despite the importance of this issue to Fourth Amendment rights, courts continue to disagree about the application and results of the analysis. The Seventh and Eighth Circuit Courts of Appeal have held that the evidence is admissible because the discovery of an arrest warrant is a superseding event that attenuates the taint of the illegal act.[4] However, the Sixth, Ninth, and Tenth Circuits have held that the discovery of an arrest warrant is not a superseding cause that breaks the chain of causation and removes the "taint" from the illegal traffic stop.[5] None of these courts have engaged in a comprehensive attenuation analysis.

This Comment is the first to provide an in-depth analysis of this issue on a broad scale and to propose how courts should apply the exclusionary rule in these cases. This Comment not only critiques the lower courts' analysis, but also proposes a workable

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[1] Nardone v. United States, 308 U.S. 338, 341 (1939).

[2] *Id.*

[3] Brown v. Illinois, 422 U.S. 590 (1975).

[4] *See* United States v. Faulkner, 636 F.3d 1009 (8th Cir. 2011); United States v. Johnson, 383 F.3d 538 (7th Cir. 2004).

[5] *See* United States v. Gross, 624 F.3d 309 (6th Cir. 2010); United States v. Lopez, 443 F.3d 1280 (10th Cir. 2006); United States v. Luckett, 484 F.2d 89 (9th Cir. 1973).

solution designed to protect our vital Fourth Amendment rights by applying attenuation principles provided by the United States Supreme Court. In addition, this Comment provides a comprehensive examination of the United States Federal Circuit Court split. Therefore, this Comment fills a substantial gap in scholarship regarding this essential issue.

This Comment advocates that courts should apply the traditional *Brown v. Illinois* attenuation analysis, because the discovery of an arrest warrant is not a special circumstance. This analysis has three prongs: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) "the presence of intervening circumstances"; and (3) "the purpose and flagrancy of the official misconduct."[6] First, the discovery of an arrest warrant typically occurs in a very short time frame between the illegal stop and the discovery of evidence. This brief amount of time weighs heavily against attenuation. Second, discovering an arrest warrant is a foreseeable, even probable, result of a traffic stop and is part of a related chain of events that are neither coincidental nor accidental. Third, the flagrancy of the police officer's violation should only serve to further weigh the analysis against attenuation. Based upon these factors, the taint of the illegal traffic stop is not attenuated. Evidence found as the result of an illegal traffic stop, regardless of the discovery of an arrest warrant, should not be admissible.

The courts should also adopt this position for public policy reasons. The Fourth Amendment protects the vital, fundamental right to be free from unreasonable searches and seizures.[7] Allowing for the admission of tainted evidence places this right in grave peril. According to the Sixth Circuit in *United States v. Gross*, this admission "would result in a rule that creates a new form of police investigation."[8] If police officers are aware that they may perform illegal traffic stops and seize evidence with virtually no adverse consequence, officers will be encouraged to make more illegal traffic stops, especially in high crime areas where they feel

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[6] *Brown*, 422 U.S. at 603-04.

[7] U.S. CONST. amend. IV.

[8] United States v. Gross, 624 F.3d 309, 320-21 (6th Cir. 2010), *amended on other grounds*, 662 F.3d 393 (6th Cir. 2011).

the discovery of an arrest warrant is likely.[9] The allowance of this behavior will only erode the scope of Fourth Amendment protections.

Part I of this Comment describes the evolution of the Fourth Amendment exclusionary rule and the development of the attenuation exception. Part II outlines cases from the United States Federal Circuit Court split dealing with the discovery of search warrant attenuation. Part III argues that the basic attenuation analysis utilized in *Brown v. Illinois* should be strictly applied to this issue and demonstrates the correct application. Part IV offers counterarguments to courts that either do not, or incorrectly, apply *Brown*. Part V analyzes the public policy implications of each side of this debate.

I. THE EVOLUTION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE

A. The History of the Exclusionary Rule

1. The Fourth Amendment: The Foundation

The Fourth Amendment is a cornerstone of both English and American jurisprudence and is deeply rooted in the historical events flowing from the American Revolutionary War.[10] The Framers placed such importance on the freedom from unreasonable searches and seizures that the omission of protections from such in the original draft of the Constitution caused substantial objection to ratification.[11] At the urging of George Washington, James Madison proposed the clause that is

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[9] *Id.* at 321.

[10] JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 19 (1966) ("[T]he Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England."); *see also* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 49-50 (1937) [hereinafter LASSON] ("The poorest man may, in his cottage, bid defiance to all the forces of the Crown . . . but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.") (quoting William Pitt in THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 611 (8th ed. 1927)).

[11] LASSON, *supra* note 10, at 92-96.

known today as the Fourth Amendment.[12] In 1791, the Fourth Amendment, as part of the Bill of Rights, was ratified, reading:

> 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.[13]

The form of the Fourth Amendment has been touted for "both the virtue of brevity and the vice of ambiguity."[14] While the Fourth Amendment guarantees the vital right to be free from "'unreasonable' searches" and seizures, it does not define "reasonable" or provide a remedy for the violation of this right, leaving the courts with the incredible responsibility of creating tests and rules to enforce the Fourth Amendment and prevent its violation.[15]

2. Supreme Court Jurisprudence: The Exclusionary Rule Creation

In 1914, the Supreme Court first addressed the exclusionary rule as a remedy for Fourth Amendment violations in the landmark case of *Weeks v. United States*[16] and began "the process through which the Fourth Amendment, by means of the exclusionary rule, has become more than a dead letter in the federal courts."[17] In *Weeks* local police officers, and later a United States marshal, performed two warrantless searches of defendant Weeks' home, seizing various private papers paramount in convicting Weeks of using the mail to transport lottery tickets in

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[12] 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(a) (5th ed. 2012).

[13] U.S. CONST. amend. IV.

[14] LANDYNSKI, *supra* note 10, at 42.

[15] *Id.*

[16] Weeks v. United States, 232 U.S. 383 (1914) (holding that evidence seized by federal government officials in violation of the Fourth Amendment cannot be admitted into evidence at a criminal trial).

[17] Abel v. United States, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting).

violation of federal criminal law.[18] In a unanimous decision, the Supreme Court held that to allow the use of such illegally seized evidence would sanction conduct that is in direct "defiance" of the Constitution. [19] However, the Court refused to expand this exclusion of evidence to include the fruits of the initial illegal search performed by state and local officers, "as the 4th Amendment is not directed to individual misconduct of such officials."[20]

Nearly fifty years later, in *Mapp v. Ohio*, the Supreme Court finally extended the exclusionary rule as a mandatory Fourth Amendment remedy in state courts as well.[21] In *Mapp*, defendant Dollree Mapp was convicted for possession of obscene material after such materials were seized in a warrantless search of her home by state police officers.[22] The Court held that because the right of privacy founded in the Fourth Amendment was enforceable against the states by incorporation through the Fourteenth Amendment Due Process Clause, the exclusionary rule was enforceable against both state and federal courts. [23] Therefore, the Court concluded that state courts must also exclude evidence obtained in violation of the Fourth Amendment.[24]

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[18] *Weeks*, 232 U.S. at 386-90. The police unlawfully seized "all of [Weeks'] books, letters, money, papers, notes, evidences of indebtedness, stock, certificates, insurance policies, deeds, abstracts, and other muniments of title, bonds, candies, clothes, and other property in said home . . . ." *Id.* at 387.

[19] *Id.* at 394 ("To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.").

[20] *Id.* at 398. The Court refused to address the illegal actions of the local police officers. *Id.*

[21] Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court").

[22] *Id.* at 644-45. *See* Wolf v. Colorado, 338 U.S. 25 (1949) (incorporating the Fourth Amendment right to privacy into the Due Process Clause of the Fourteenth Amendment and holding it as enforceable against the states but continuing to omit the exclusionary rule).

[23] *Mapp*, 367 U.S. at 655. The court also discussed the startling discrepancy that resulted from excluding evidence illegally seized by federal officials but not evidence illegally seized by state officials. *Id.* at 657. Justice Clark explained, "Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment." *Id.*

[24] *Id.* at 655.

In *Mapp*, the Court supported its application of the exclusionary rule using three major rationales: (1) implicit constitutional privilege, (2) judicial integrity, and (3) deterrence.[25] Justice Clark referred to the exclusionary rule as the Fourth Amendment's "most important constitutional privilege"[26] and explained that without such a remedy the rights guaranteed by the Fourth Amendment are merely "a form of words."[27] Justice Clark further stated the exclusionary rule was necessary to preserve judicial integrity and to prevent the breeding of contempt for the law.[28] Finally, the Court discussed its strongest rationale and primary purpose for the exclusionary rule: deterrence.[29] The Court reasoned that the exclusionary rule would deter police misconduct by removing the incentive to violate the Fourth Amendment through illegal searches and seizures.[30] Through its decision in *Mapp*, the Court recognized the importance of imposing adverse consequences for police misconduct in order to foster a greater level of respect for the Fourth Amendment, the Constitution, and the judicial system as a whole.[31]

B. The Supreme Court's Development of the Attenuation Doctrine

1. *Nardone v. United States*: The Origin

In 1939, the Supreme Court established the beginnings of the doctrine of attenuation in *Nardone v. United States*.[32] In this case, the Court introduced the idea that evidence may be admissible,

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[25] *Id.* at 656-60.

[26] *Id.* at 656.

[27] *Id.* at 648 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

[28] *Id.* at 659 ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.").

[29] *Id.* at 656. The Court noted, "Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" *Id.* (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

[30] *Id.* The Court also explained that despite the holding in *Wolf*, half of the states had passed laws through either the legislature or judicial decisions enacting the exclusionary rule for its deterrent effects. *Id.* at 651.

[31] *Id.* at 656.

[32] Nardone v. United States, 308 U.S. 338 (1939).

even though it is the result of a Fourth Amendment violation, if the connection between the police misconduct and the discovery of the challenged evidence has "become so attenuated as to dissipate the taint." [33] This ideology led to the development of the attenuation doctrine, one of three exceptions to the exclusionary rule.[34] The Court metaphorically refers to this "tainted" evidence, resulting from an illegal search and seizure, as the "fruit of the poisonous tree."[35]

For an example of this doctrine in its simplest form, if the police officer from the introductory hypothetical makes the illegal traffic stop, spots marijuana in the vehicle, and conducts a search and seizure without discovering the arrest warrant, such evidence is tainted by the poison of the unlawful search and is deemed inadmissible. If the officer undertakes a second search using the tainted evidence, any additional discovered evidence is also tainted and considered the fruit of the poisonous tree.[36] The illegal search, thereby, taints any evidence directly or indirectly flowing from that search.[37] However, *Nardone* provides that this taint can be attenuated, and the evidence can become admissible, if the connection between the original unlawful act and the seizure of the evidence has been sufficiently weakened.[38]

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[33] *Id.* at 341.

[34] 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 374-79 (6th ed. 2013). The remaining two exceptions to the exclusionary rule are the independent source doctrine and the inevitable discovery rule. *Id.* The independent source doctrine established in *Murray v. United States* provides that evidence seized through police misconduct may be admissible if it is later obtained lawfully in a manner that is independent from the initial illegal activity. *Id.* at 375. *See* Murray v. United States, 487 U.S. 533 (1988)). *Nix v. Williams* created the inevitable discovery rule, which provides illegally obtained evidence may be admissible if it can be proven that the evidence would have been inevitably lawfully discovered. *Id.* at 378; *see also* Nix v. Williams, 467 U.S. 431 (1984).

[35] 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4 (5th ed. 2012) [hereinafter 6 LAFAVE, SEARCH AND SEIZURE]. The phrase "fruit of the poisonous tree" was coined by Justice Frankfurter in *Nardone* but has its origins in *Silverthorne Lumber Co. v. United States*. 251 U.S. 385, 392 (1920) (finding illegally obtained information does not "become sacred and inaccessible").

[36] 29 AM. JUR. 2D *Evidence* § 643 (Supp. 2015).

[37] *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 484 (1963) ("The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.") (citing *Silverthorne*, 251 U.S. 385).

[38] Nardone v. United States, 308 U.S. 338, 341 (1939).

2. *Wong Sun v. United States*: The Expansion

Twenty-three years after *Nardone*, the Supreme Court revisited the attenuation doctrine in *Wong Sun v. United States*.[39] In this decision regarding the admissibility of defendant Wong Sun's confession, the Court examined the causation surrounding attenuation and held that "but for"[40] causation alone is not sufficient, but rather "whether . . . 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."[41] Although Wong Sun's confession would not have occurred but for the illegal actions of the police officers, the Supreme Court determined that it was admissible because the three-day lapse of time and Wong Sun's independent actions broke the causal connection between the illegal arrest and Wong Sun's voluntary confession.[42]

Wong Sun, thereby, establishes a causation analysis that is very similar to tort law proximate causation as a prerequisite for attenuation.[43] "But for" causation must still be analyzed.[44] In order for the exclusionary rule to apply, the illegal actions of the police must be the "but for" cause of the seizure of evidence.[45] However, *Wong Sun* adds the element of proximate cause.[46] The seizure must not only be the "but for" result of the officer's actions,

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[39] *Wong Sun*, 371 U.S. 471.

[40] *Id.* at 487-88 ("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.").

[41] *Id.* at 488.

[42] *Id.* at 491.

[43] 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 4:5 (2d ed. 2015). Tort causation analysis consists of both "but for" and "legal cause." *Id.* The "but for" test provides that the injury in question must be one that would not have occurred "but for" the wrongful act. *Id.* In addition, there must be legal or proximate cause "which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred." *Id.*; *see also* Hudson v. Michigan, 547 U.S. 586, 615 (2006) (Breyer, J., dissenting) (citing the fifth edition of Prosser and Keeton on Torts and the Restatement Second of Torts in his argument for conduct-based "but for" application).

[44] 6 LAFAVE, SEARCH AND SEIZURE, *supra* note 35, § 11.4(a). "[B]ut for causation . . . is essential for invocation of the exclusionary rule" because it demonstrates the direct connection between illegal behavior and the consequences. *Id.*

[45] *Id.* The appropriate analysis considers the question: "But for" the illegal actions of the police, would the evidence have been discovered?

[46] *Wong Sun*, 371 U.S. at 487-88.

but also the "direct and natural result."[47] If the evidence is considered too unnatural or remote from the officer's actions, the exclusionary rule will not apply.[48]

In addition to considering the "direct and natural result" of the action, proximate cause examines intervening acts between the officer's misconduct and the discovery of the evidence.[49] If the intervening acts sufficiently break the chain of causation proceeding from the unlawful conduct and become superseding, the taint can be attenuated despite the establishment of proximate cause.[50] The standard for determining whether an intervening act has become superseding is typically reasonable foreseeability.[51] If the intervening acts were reasonably foreseeable, then proximate cause exists, and the taint is not attenuated.[52]

Therefore, if the challenged evidence is the "but for" result and the "direct and natural result" of the officer's illegal actions without unforeseen superseding acts, the taint is not attenuated, and the evidence is not admissible. The combination of these factors explains the *Wong Sun* attenuation causation analysis and establishes it as a proximate cause analysis.

3. *Brown v. Illinois*: The Test

It was not until *Brown v. Illinois* in 1975 that the Supreme Court established a more formalized analysis for determining

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[47] WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 35 (1972); ROLLIN M. PERKINS, CRIMINAL LAW 687-88 (2d ed. 1969); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 26 (15th ed. 1993).

[48] Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 640 (1920) ("The rule that requires the exclusion of remote consequences is therefore a fundamental principle of law, based on the necessity of doing justice to all . . . .").

[49] *Wong Sun*, 371 U.S. at 487-88. The Court suggests that the intervening act of the defendant's free will may result in attenuation. *Id.*

[50] Hudson v. Michigan, 547 U.S. 586, 618-27 (2006) (Breyer, J., dissenting) (referencing "an independent causal chain of events" as necessary for attenuation to occur).

[51] People v. Schaefer, 703 N.W.2d 774, 785 (Mich. 2005); *see also* Taylor v. Alabama, 457 U.S. 687, 694 (1982); United States v. Crews, 445 U.S. 463, 471 (1980); Dunaway v. New York, 442 U.S. 200, 219 (1979); Brown v. Illinois, 422 U.S. 590, 605 (1975); Johnson v. Louisiana, 406 U.S. 356, 365 (1972).

[52] *Schaefer*, 703 N.W.2d at 786 ("The linchpin in the superseding cause analysis, therefore, is whether the intervening cause was foreseeable based on an objective standard of reasonableness.").

whether attenuation has been sufficient to remove the taint from unlawfully seized evidence.[53] In this case, the defendant, Richard Brown, was arrested at gunpoint without probable cause or a warrant in connection to a murder.[54] The police officers involved later admitted that the arrest was made solely for investigatory purposes.[55] During the course of being aggressively questioned for fourteen hours, Brown made incriminating statements, which were later introduced at trial, leading to his conviction.[56]

On appeal, the Supreme Court examined the admissibility of these statements using a multi-factor test, giving consideration to the intervening Miranda warnings that were read to the defendant before he made his statements.[57] The factors utilized by the *Brown* court include: (1) the length of time between the illegal action and the seizure of evidence; (2) the presence of intervening factors; and (3) "the purpose and flagrancy of the official misconduct."[58] Because Brown's statements were separated from the illegal arrest by only two hours, no significant intervening events occurred, and the official misconduct was flagrant,[59] the Court determined that the taint of the illegal police conduct was not attenuated. [60] In conducting this analysis, the Court determined that these factors must be weighed together in light of the totality of the circumstances, while respecting the fundamental policies surrounding the exclusionary rule.[61]

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[53] *See generally Brown*, 422 U.S. 590.

[54] *Id.* at 592-96. "The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Id.* at 605.

[55] *Id.* at 592.

[56] *Id.* at 595-96.

[57] *Id.* at 603-05.

[58] *Id.* at 603-04.

[59] *Id.* at 604-05. "The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning.'" *Id.* at 605.

[60] *Id.* at 604 ("[T]he Illinois courts failed to undertake the inquiry mandated by *Wong Sun* to evaluate the circumstances of this case in the light of the policy served by the exclusionary rule . . . .").

[61] Keith A. Fabi, Comment, *The Exclusionary Rule: Not the "Expressed Juice of the Woolly-Headed Thistle*," 35 BUFF. L. REV. 937, 948 (1986) (citing *Brown*, 422 U.S. at 603).

While the *Brown* decision has been touted as "well grounded in both law and policy," the malleable factors leave much room for interpretation and are consequently "subject to misconstruction or manipulation."[62] Some fear that by failing to articulate a clear standard, the Supreme Court unwittingly added an additional factor: the discretion of the lower courts.[63] With the application of the lower courts' discretion regarding this complex issue comes a substantial discrepancy in both analysis and decisions, resulting in very inconsistent court opinions. [64] Despite these inconsistencies, the *Brown* factors continue to be the controlling test to determine whether attenuation has occurred.[65]

II. THE ARREST WARRANT ATTENUATION CIRCUIT COURT SPLIT

In the situation of an illegal traffic stop with the intervening discovery of an arrest warrant, the lower courts are at a sharp disagreement as to how attenuation should be applied.[66] Although this issue has been addressed by five federal Circuit Courts of

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[62] 6 LAFAVE, SEARCH AND SEIZURE, *supra* note 35, § 11.4(b), at 378 (quoting Note, 25 Emory L.J. 227, 236, 240 (1976)).

[63] *Id.* ("But the fact remains that 'the "relevant factors" listed by the Supreme Court in *Brown* are subject to misconstruction or manipulation,' and thus there is reason to fear that 'by leaving such a determination in the hands of trial judges without more precise guidance, the Court might well have added "a factor of discretion to the operation of the exclusionary rule impossible for the appellate courts effectively to control."'") (quoting Note, *supra* note 62, at 240, 244).

[64] *See* discussion *infra* Part III.

[65] *See* Golphin v. State, 945 So. 2d 1174 (Fla. 2006); Myers v. State, 909 A.2d 1048 (Md. 2006).

[66] *Compare* United States v. Gross, 624 F.3d 309, 321-22 (6th Cir. 2010), *amended on other grounds*, 662 F.3d 393 (6th Cir. 2011) (holding that "where an officer engages in an illegal stop and then discovers through his own investigation or prompting that the individual or individuals he has illegally stopped have outstanding warrants, the evidentiary fruits of the subsequent arrest are tainted as fruit of the poisonous tree and must be suppressed") *and* United States v. Lopez, 443 F.3d 1280, 1286 (10th Cir. 2006) ("Because the government concedes [the police officer] did not have probable cause or reasonable articulable suspicion to detain [the defendant] until the warrants check was completed, we conclude the seizure violated the Fourth Amendment."), *with* United States v. Green, 111 F.3d 515, 524 (7th Cir. 1997) (holding that evidence obtained through an unconstitutional search to be admissible because "any taint from this unconstitutional seizure was dissipated by the subsequent legal arrest of Avery pursuant to an outstanding warrant").

Appeals[67] and twenty-two different state courts,[68] these courts have failed to reach a consensus on how intervening arrest warrants should be treated. This discrepancy is leading to conflicting rulings based on very different rationales that have yet to be addressed by the United States Supreme Court.[69]

A. Courts Viewing Arrest Warrants as Superseding Interveners

The Seventh and Eighth Circuits, as well as thirteen state courts including Alaska, California, Florida, Idaho, Louisiana, and Maryland, apply *Brown* in determining that the discovery of an outstanding arrest warrant attenuates the taint of illegal police conduct.[70] However, instead of strictly applying *Brown* and balancing the factors equally, these courts place great emphasis on the presence of intervening factors, specifically the discovery of

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[67] *See* United States v. Faulkner, 636 F.3d 1009 (8th Cir. 2011); *Gross*, 624 F.3d 309; *Lopez*, 443 F.3d 1280; *Green*, 111 F.3d 515; United States v. Luckett, 484 F.2d 89 (9th Cir. 1973).

[68] *See* McBath v. State, 108 P.3d 241 (Alaska Ct. App. 2005); State v. Hummons, 253 P.3d 275 (Ariz. 2011); People v. Brendlin, 195 P.3d 1074 (Cal. 2008); People v. Padgett, 932 P.2d 810 (Colo. 1997) (en banc); McDonald v. State, 947 A.2d 1073 (Del. 2008); State v. Frierson, 926 So. 2d 1139 (Fla. 2006); State v. Page, 103 P.3d 454 (Idaho 2004); Quinn v. State, 792 N.E.2d 597 (Ind. Ct. App. 2003); State v. Moralez, 300 P.3d 1090 (Kan. 2013); Birch v. Commonwealth, 203 S.W.3d 156 (Ky. Ct. App. 2006); State v. Hill, 725 So. 2d 1282 (La. 1998); Myers v. State, 909 A.2d 1048 (Md. 2006); People v. Reese, 761 N.W.2d 405 (Mich. Ct. App. 2008); State v. Grayson, 336 S.W.3d 138 (Mo. 2011) (en banc); State v. Shaw, 64 A.3d 499 (N.J. 2012); State v. Soto, 179 P.3d 1239 (N.M. Ct. App. 2008); Jacobs v. State, 128 P.3d 1085 (Okla. Crim. App. 2006); State v. Bailey, 338 P.3d 702 (Or. 2014) (en banc); Sikes v. State, 448 S.E.2d 560 (S.C. 1994); State v. Daniel, 12 S.W.3d 420 (Tenn. 2000); State v. Mazuca, 375 S.W.3d 294 (Tex. Crim. App. 2012); State v. Strieff, 286 P.3d 317 (Utah Ct. App. 2012), *cert. granted*, 298 P.3d 69 (Utah 2013), *and rev'd*, 357 P.3d 532 (Utah 2015), *cert. granted*, 136 S. Ct. 27 (2015).

[69] *See* discussion *infra* Part III. However, the United States Supreme Court recently granted Utah's petition for a writ of certiorari in *Utah v. Strieff*. *See* 286 P.3d 317 (Utah Ct. App. 2012), *cert. granted*, 298 P.3d 69 (Utah 2013), *and rev'd*, 357 P.3d 532 (Utah 2015), *cert. granted*, 136 S. Ct. 27 (2015). In this case, which will be decided in the upcoming 2016 term, the Court will determine whether evidence seized incident to a lawful arrest on an outstanding warrant should be suppressed because the warrant was discovered during an illegal investigatory stop. *Id.* This case will finally settle this longstanding Circuit Court split.

[70] *See Faulkner*, 636 F.3d 1009; *Green*, 111 F.3d 515; *McBath*, 108 P.3d 241; *Hummons*, 253 P.3d 275; *Brendlin*, 195 P.3d 1074; *Frierson*, 926 So. 2d 1139; *Page*, 103 P.3d 454; *Quinn*, 792 N.E.2d 597; *Birch*, 203 S.W.3d 156; *Hill*, 725 So. 2d 1282; *Myers*, 909 A.2d 1048; *Reese*, 761 N.W.2d 405; *Jacobs*, 128 P.3d 1085; *Mazuca*, 375 S.W.3d 294; *Strieff*, 286 P.3d 317.

an outstanding arrest warrant. Although police illegality is not remote from the seizure of evidence, these courts hold an outstanding arrest warrant to be "an independent intervening circumstance" that breaks the chain of causation and attenuates the taint of the official misconduct.[71]

In emphasizing the importance of the intervening circumstances, the majority of these courts significantly diminish the temporary proximity and flagrancy factors of *Brown*.[72] Nearly, all of these courts admit that the temporal proximity factor weighs against attenuation but dismiss it as "not 'dispositive on the question of taint.'"[73] In addition, this group of courts generally only uses the flagrancy factor as a means to offset the intervening circumstances.[74] Thereby, these courts will virtually always hold that the discovery of an arrest warrant is an intervening circumstance resulting in attenuation unless there is substantial evidence of official misconduct.[75]

This type of analysis is clearly illustrated in the Seventh Circuit case *United States v. Green*.[76] In *Green*, two officers stopped a vehicle because they thought they had seen it parked in front of a wanted felon's home the day before and suspected the felon might be in the vehicle.[77] After blocking the vehicle in a driveway, the officers approached the driver and passenger and obtained their identifications.[78] Although neither man was the wanted felon in question, the officers ran a warrant search and discovered an outstanding arrest warrant for passenger Avery

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[71] *Jacobs*, 128 P.3d at 1089.

[72] *See, e.g.*, *Green*, 111 F.3d at 521.

[73] *Id.* (quoting United States v. Fazio, 914 F.2d 950, 958 (7th Cir. 1990)); *see also* United States v. Simpson, 439 F.3d 490, 495 (8th Cir. 2006) ("[T]he time elapsed between the initial illegality and the acquisition of the evidence—is less relevant because the intervening circumstance is not a voluntary act by the defendant."); *Frierson*, 926 So. 2d at 1144 ("The brief amount of time that elapsed between the illegal stop and the arrest of respondent weighs against finding the search attenuated, but this factor is not dispositive.").

[74] *Green,* 111 F.3d at 521 ("The intervening circumstances of this case, because they are not outweighed by flagrant official misconduct, dissipate any taint caused by the illegal stop . . . .").

[75] *Id.*

[76] *Green*, 111 F.3d 515. The remaining eight courts on this side of the split all rely upon, and extensively cite to, the decision in *Green*.

[77] *Id.* at 517.

[78] *Id.*

Green.[79] The officers proceeded to arrest Green and search the vehicle, and during this search they discovered cocaine.[80]

After determining that the detention of the Greens while the officers conducted the warrant search violated the Fourth Amendment, the court considered whether the discovery of the outstanding arrest warrant was sufficient to attenuate the taint of the violation.[81] After dismissing the short temporal proximity between the misconduct and seizure of evidence,[82] the court moved on to examine the intervening circumstances of the case.[83] As in *United States v. Gross*, the court in *Green* did not perform a proximate cause analysis in correlation to examining the intervening acts, but rather simply stated:

> 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." Because the arrest is lawful, a search incident to the arrest is also lawful. The lawful arrest of Avery constituted an intervening circumstance sufficient to dissipate any taint caused by the illegal automobile stop.[84]

In considering the flagrancy of the officer's misconduct, the court determined that because there was "no evidence of bad faith on the part of the police," flagrancy was not relevant to the analysis.[85] The court supported its holding by stating that although it did not condone the actions of the officers, it also did "not want to deter the police from arresting fugitives they discover, or from conducting a search incident to such an arrest."[86]

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[79] *Id.*

[80] *Id.* David Green, the driver, denied that he permitted the officers to search the vehicle. *Id.*

[81] *Id.* at 521.

[82] *Id.* The court acknowledged that only five minutes had passed. *Id.*

[83] *Id.*

[84] *Id.* The court applied a bit of circular reasoning in stating that because the arrest was lawful, the search was lawful despite the illegal conduct leading to the arrest.

[85] *Id.* at 523. Admittedly, the officers never questioned the Greens about the wanted felon they allegedly suspected might be in the vehicle but rather immediately obtained their identification and began running a warrants search. *Id.* at 519.

[86] *Id.* at 523.

B. Courts Applying Standard Attenuation Analysis

1. Rigorous *Brown* Application

The Sixth Circuit, as well as five state courts in Kansas, Missouri, New Jersey, New Mexico, and Oregon, have determined that the discovery of an outstanding arrest warrant is not sufficient to attenuate the taint of illegal police behavior.[87] Like the superseding intervener courts, these courts also apply the *Brown* factors.[88] However, they perform a very different analysis by employing a relatively strict application of *Brown* that attempts to weigh all three of the factors equally against the circumstances.[89]

This strict *Brown* application is illustrated in *United States v. Gross*.[90] In this case, a police officer was patrolling a high-crime area when he observed Gross slumped in the passenger seat of a legally parked, running vehicle.[91] The officer blocked the vehicle with his patrol car and shined his spotlight on it before approaching Gross. [92] After obtaining Gross's personal information, the officer conducted a warrant check, which revealed an outstanding arrest warrant.[93] Gross was subsequently arrested and an illegal handgun was discovered through a subsequent search at the police station.[94]

In examining whether the discovery of Gross's arrest warrant constituted an intervening circumstance, the court flatly held that it did not.[95] After providing a categorization of the circuit split, the court decided that it agreed with the outcomes in *United States v. Luckett* and *United States v. Lopez*, Ninth and Tenth Circuit Court

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[87] *See* United States v. Gross, 624 F.3d 309 (6th Cir. 2010); State v. Moralez, 300 P.3d 1090 (Kan. 2013); State v. Grayson, 336 S.W.3d 138 (Mo. 2011) (en banc); State v. Shaw, 64 A.3d 499 (N.J. 2012); State v. Soto, 179 P.3d 1239 (N.M. Ct. App. 2008); State v. Bailey, 338 P.3d 702 (Or. 2014) (en banc).

[88] *See* cases cited *supra* note 87.

[89] *See* cases cited *supra* note 87.

[90] *Gross*, 624 F.3d 309.

[91] *Id.* at 312-13.

[92] *Id.* at 313. The officer also ran a warrant search using the vehicle's license plate, which revealed no warrants on the owner. *Id.*

[93] *Id.* Gross did not have any identification with him but provided the officer with his name, date of birth, and social security number after repeated questioning. *Id.*

[94] *Id.*

[95] *Id.* at 319.

cases, respectfully, in which illegally obtained evidence was not admitted.[96] Rather than conducting a proximate cause analysis, the *Gross* court relied heavily on a public policy rationale in supporting its intervening cause determination.[97] The court determined that to allow an outstanding arrest warrant to dissipate the taint of illegal conduct would create "a new form of police investigation, whereby an officer patrolling a high crime area may, without consequence, illegally stop a group of residents where he has a 'police hunch'. . . ."[98]

Lastly, the court examined the flagrancy of the officer's misconduct, the third *Brown* factor.[99] While the court noted that the officer did not have a "lawful purpose for his stop," the court determined that there was not sufficient evidence that the officer acted flagrantly.[100] Therefore, flagrancy was not a significant factor in the court's determination.[101]

2. Perfunctory Attenuation Analysis

Comparatively, the Ninth and Tenth Circuits, along with five state courts—Colorado, Delaware, South Carolina, Texas, and Tennessee—also hold that the discovery of a search warrant does not attenuate police misconduct.[102] However, these courts do not

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[96] *Id.* at 320.

[97] *Id.* at 320-21.

[98] *Id.* ("Essentially, we will have created a system of post-hoc rationalization through which the Fourth Amendment's prohibition against illegal searches and seizures can be nullified.").

[99] *Id.* at 322.

[100] *Id.* ("While [the officer's] actions could be interpreted to have been 'in the hope that something might turn up,' . . . there is not sufficient evidence in the record to show that [the officer] 'knew [he] did not have probable cause.'") (citation omitted).

[101] *Id.*

[102] *See* United States v. Lopez, 443 F.3d 1280, 1286 (10th Cir. 2006) (holding that because "[the officer] did not have probable cause or reasonable articulable suspicion to detain [the defendant] until the warrants check was completed, we conclude the seizure violated the Fourth Amendment"); United States v. Luckett, 484 F.2d 89, 91 (9th Cir. 1973) (holding that "[b]ecause [the officers] had no reasonable grounds to be suspicious that there might be a warrant outstanding against [the defendant], this continued detention was unreasonable, and its fruits, therefore, were properly suppressed"); People v. Padgett, 932 P.2d 810, 817 (Colo. 1997) (en banc) (holding the suppressed evidence "was obtained directly as a result of the illegal investigatory stop in temporal and physical proximity to the stop"); McDonald v. State, 947 A.2d 1073, 1079-80 (Del. 2008) (holding that "[a]ll of the police action taken after the traffic stop was a direct result of the improper traffic stop that violated [the defendant]'s Fourth

utilize the *Brown* factors in their analysis.[103] They simply perform a cursory attenuation analysis and find the defendant's detention to be unlawful, thereby, poisoning any evidence flowing from it.[104] These courts generally dismiss the discovery of the arrest warrant as being the fruit of the police misconduct without considering it as an intervening circumstance or examining proximate causation.[105]

An example of this perfunctory analysis is demonstrated in *State v. Daniel*.[106] In this case, a police officer was patrolling when he observed four individuals standing around a legally parked vehicle in a market parking lot.[107] The officer approached them because he wanted "to see what the individuals were doing."[108] He proceeded to obtain identification for the four individuals and performed an outstanding arrest warrant search.[109] The warrant search revealed an outstanding warrant for Brian Daniel.[110] The officer arrested Daniel and seized a bag of marijuana from his pocket.[111] Daniel was subsequently charged with possession of a controlled substance.[112]

After determining that Daniel was illegally seized while the police officer conducted the warrant search, the court briefly concluded "that the drugs discovered as a result of the illegal seizure must be suppressed as 'fruit of the poisonous tree' since no intervening event or other attenuating circumstance purged the

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Amendment rights"); Sikes v. State, 448 S.E.2d 560, 563 (S.C. 1994) (holding that "[t]he detention and arrest of the Petitioner was unlawful; therefore, the evidence of the Petitioner's possession of crack cocaine would have been inadmissible as fruit of the poisonous tree"); State v. Daniel, 12 S.W.3d 420, 428 (Tenn. 2000) (holding the evidence resulting from "the illegal seizure must be suppressed as 'fruit of the poisonous tree'"); St. George v. State, 237 S.W.3d 720, 723 (Tex. Crim. App. 2007) (holding that because detention was unreasonable, the admission of resulting evidence "violated the 'fruits of the poisonous tree' doctrine").

[103] *See, e.g.*, *Luckett*, 484 F.2d at 91. *Luckett* is a pre-*Brown* case; however, it remains the controlling authority in the Ninth Circuit.

[104] *See Lopez*, 443 F.3d at 1286.

[105] *Id.*

[106] State v. Daniel, 12 S.W.3d 420 (Tenn. 2000).

[107] *Id.* at 423.

[108] *Id.* The officer thought it was suspicious to see a group of individuals gathered around a vehicle in the dark. *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

taint of the initial illegal seizure."[113] In reaching this decision, the court did not consider the discovery of the outstanding arrest warrant as anything other than a fruit of the illegal detention.[114] This type of simplified attenuation analysis is seen in each of these courts' decisions.[115]

The Tenth Circuit and the Supreme Court of Delaware are even more dismissive in their essentially implied attenuation analyses.[116] These courts have held that evidence seized as the result of an illegal traffic stop with an intervening arrest warrant must be suppressed simply because the illegal detention violated the Fourth Amendment.[117] Although these courts reach a result that is only obtainable through the application of an attenuation-based analysis, they do not reference attenuation or perform an explicit analysis of it in their decisions.[118]

The Tenth Circuit's decision in *United States v. Lopez* is an excellent example of this highly perfunctory attenuation analysis. In *Lopez*, an officer was patrolling a high-crime area when he observed two men standing next to a legally parked running vehicle.[119] The officer approached the men and asked them for identification.[120] Upon performing a warrant search, the officer discovered that defendant Lopez had an outstanding warrant for a misdemeanor.[121] The officer subsequently arrested Lopez and searched both Lopez and his vehicle, discovering drug paraphernalia in Lopez's pocket and inside the vehicle.[122]

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[113] *Id.* at 428 (footnote omitted).

[114] *Id.*

[115] *See* United States v. Gross, 624 F.3d 309 (6th Cir. 2010); State v. Moralez, 300 P.3d 1090 (Kan. 2013); State v. Grayson, 336 S.W.3d 138 (Mo. 2011) (en banc); State v. Shaw, 64 A.3d 499 (N.J. 2012); State v. Soto, 179 P.3d 1239 (N.M. Ct. App. 2008); State v. Bailey, 338 P.3d 702 (Or. 2014) (en banc).

[116] *See* United States v. Lopez, 443 F.3d 1280, 1286 (10th Cir. 2006); McDonald v. State, 947 A.2d 1073, 1079-80 (Del. 2008).

[117] *See* cases cited *supra* note 116.

[118] *See* cases cited *supra* note 116.

[119] *Lopez*, 443 F.3d at 1282. Before approaching the car, the officer searched the vehicle's license plate, revealing the car was not stolen and listing the owner's address. *Id.*

[120] *Id.* Defendant Lopez identified himself as the owner of the car and the address on his identification matched that of the officer's license plate search. *Id.*

[121] *Id.*

[122] *Id.* The officer discovered a handgun, plastic sandwich bags, and an electronic scale in Lopez's vehicle, leading to his charge of possession with intent to distribute. *Id.*

The *Lopez* court determined that because the retention of Lopez's license and his subsequent detention were a violation of his Fourth Amendment rights, the evidence resulting from his detention was inadmissible.[123] Based only on an analysis of the lawfulness of the officer's actions, the Tenth Circuit upheld the lower court's decision to suppress the evidence without ever addressing attenuation.[124]

III. APPLYING *BROWN* TO ARREST WARRANT ATTENUATION: THE CONTINUED POISON OF ILLEGAL SEARCHES

The circuit split on this important Fourth Amendment issue illustrates the lower courts' difficulties in determining how attenuation and *Brown* should be applied, leading to very different judicial decisions in cases with strikingly similar fact patterns. Consequently, a defendant may not receive the Fourth Amendment protection to which he is entitled simply because he was illegally stopped in Indiana instead of Ohio. In addition, police officers are not provided with a consistent rule to use while conducting traffic stops. It is this type of glaring constitutional inconsistency that Justice Clark cautioned might breed contempt for the law in *Mapp*,[125] and it demands a much clearer analysis.

A. Why Brown *Applies to Illegal Traffic Stops*

Brown v. Illinois provides the fundamental attenuation analysis, which the Supreme Court has touted as "designed to vindicate the 'distinct policies and interests of the Fourth Amendment.'"[126] Courts have consistently applied the attenuation doctrine to determine the admissibility of evidence that is "the product of illegal governmental activity."[127] The *Brown* test is well tailored to examine the scenario of an illegal traffic stop with an intervening discovery of an arrest warrant and has been used for this purpose by at least twenty-one courts.[128] Therefore, the three

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[123] *Id.* at 1286.

[124] *Id.*

[125] *See generally* Mapp v. Ohio, 367 U.S. 643, 659 (1961).

[126] Dunaway v. New York, 442 U.S. 200, 217 (1979).

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

[128] *See* United States v. Faulkner, 636 F.3d 1009 (8th Cir. 2011); United States v. Gross, 624 F.3d 309 (6th Cir. 2010); United States v. Simpson, 439 F.3d 490 (8th Cir.

factors found in *Brown* should be weighed together against the circumstances with no single factor being dispositive in support of attenuation.[129]

B. The Application of the Brown *Factors*

The correct application of the *Brown* factors can best be illustrated through the analysis of the facts of a case, such as *State v. Frierson*.[130] In *Frierson*, the defendant Anthony Frierson was illegally stopped for failing to use a turn signal.[131] After the police officer ran Frierson's name, he discovered that Frierson had an outstanding arrest warrant for failure to appear in traffic court.[132] The officer arrested Frierson and proceeded to search his vehicle where he found an illegal firearm.[133] Frierson was charged and later convicted for possession of this firearm despite the police later learning that the warrant was erroneously issued based on another individual's illegal conduct.[134]

2006); United States v. Johnson, 383 F.3d 538 (7th Cir. 2004); United States v. Green, 111 F.3d 515 (7th Cir. 1997); McBath v. State, 108 P.3d 241, 248 (Alaska Ct. App. 2005); State v. Hummons, 253 P.3d 275 (Ariz. 2011); People v. Brendlin, 195 P.3d 1074 (Cal. 2008); State v. Frierson, 926 So. 2d 1139 (Fla. 2006); State v. Page, 103 P.3d 454 (Idaho 2004); Quinn v. State, 792 N.E.2d 597 (Ind. Ct. App. 2003); State v. Martin, 179 P.3d 457 (Kan. 2008); Birch v. Commonwealth, 203 S.W.3d 156 (Ky. Ct. App. 2006); State v. Hill, 725 So. 2d 1282 (La. 1998); Myers v. State, 909 A.2d 1048 (Md. 2006); State v. Grayson, 336 S.W.3d 138 (Mo. 2011) (en banc); State v. Shaw, 64 A.3d 499 (N.J. 2012); State v. Soto, 179 P.3d 1239 (N.M. Ct. App. 2008); Jacobs v. State, 128 P.3d 1085 (Okla. Crim. App. 2006); State v. Bailey, 338 P.3d 702 (Or. 2014) (en banc); State v. Strieff, 286 P.3d 317 (Utah Ct. App. 2012), *cert. granted*, 298 P.3d 69 (Utah 2013), *and rev'd*, 357 P.3d 532 (Utah), *cert. granted*, 136 S. Ct. 27 (2015).

[129] *Strieff*, 286 P.3d at 331 (citing State v. Newland, 253 P.3d 71 (Utah Ct. App. 2010)).

[130] *See generally Frierson*, 926 So. 2d 1139.

[131] *Id.* at 1141. The officer stated he observed "white light emanating from a crack in the plastic lens covering the tail light" and that he was not adversely affected by the failure to signal. *Id.* Under the Florida Traffic Code, "the failure to signal a turn is not an infraction" unless other drivers are adversely affected. *Id.* at 1152.

[132] *Id* at 1141.

[133] *Id.*

[134] *Id.* Another individual provided Anthony Frierson's information, instead of his own, when he was issued a notice to appear for driving with a suspended license. Frierson v. State, 851 So. 2d 293, 294-95 (Fla. Dist. Ct. App. 2003). This individual was also fingerprinted, and it is undisputed that the fingerprints provided did not match those of Frierson. *Id.*

1. Temporal Proximity Analyzed as Substantial

In applying the first prong of *Brown*, the temporal proximity between the illegal act and the seizure of the evidence must be analyzed.[135] The shorter the period of time, the more likely the taint will not be attenuated.[136] In the situation of an illegal traffic stop, the discovery of an arrest warrant, the arrest of the driver, and the acquisition of evidence usually occur within mere minutes of one another.[137] In *Frierson*, the court acknowledged this time period as "brief."[138] Five minutes, ten minutes, or even two hours (as in *Brown*) is simply not enough time to support attenuation.[139] Even courts that have held in favor of attenuation admit that temporal proximity weighs heavily against attenuation.[140]

2. Intervening Acts Considered Through *Wong Sun*

In examining the presence of intervening circumstances, the second prong of *Brown*, the Court looks for occurrences that break the chain between the illegal stop and the seizure of the evidence.[141] However, to correctly examine the intervening acts in *Frierson*, both "but for" and the *Wong Sun* proximate cause analysis must first be applied.

First, in scrutinizing the "but for" causation surrounding an illegal traffic stop with an intervening arrest warrant, the police officer's illegal stop will nearly always be the "but for" cause of the seizure of evidence. In *Frierson*, but for the illegal traffic stop, the officer would not have discovered the arrest warrant and ultimately seized the illegal gun. This evidence would not have been discovered through inevitable discovery or the independent

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[135] Brown v. Illinois, 422 U.S. 590, 603-04 (1975).

[136] 1 DRESSLER & MICHAELS, *supra* note 34, at 381.

[137] *See* United States v. Green, 111 F.3d 515, 521 (7th Cir. 1997). This scenario was examined in *Green* where the court acknowledged that "only about five minutes elapsed between the illegal stop of the [defendants] and the search of the car." *Id.*

[138] *Frierson*, 926 So. 2d at 1144.

[139] *Brown*, 422 U.S. at 604.

[140] *See Green*, 111 F.3d at 521; McBath v. State, 108 P.3d 241, 248 (Alaska Ct. App. 2005) ("In McBath's case, as in essentially every case in this area, there is little elapsed time between the illegal investigative stop and the discovery of the outstanding arrest warrant."); Jacobs v. State, 128 P.3d 1085, 1089 (Okla. Crim. App. 2006).

[141] *Brown*, 422 U.S. at 604-05.

source rule.[142] It is solely the result of the police officer's illegal actions.

In addition to "but for" causation, proximate cause—or the casual connection between the illegal traffic stop and the seizure of evidence—must also be examined. Because searching the driver's name in a database and discovering a search warrant is customary practice by police officers conducting a traffic stop,[143] the subsequent search and seizure of evidence is the "direct and natural result" of the officer's initial illegal act in stopping the driver. Therefore, the officer's illegal act is the proximate cause of the discovery of evidence.

Finally, the intervening acts between the unlawful traffic stop and the seizure of the evidence should be examined. Although *United States v. Green* provides that the intervening act in attenuation cases is usually a voluntary act by the defendant, because the time frame between the illegal stop and the seizure is so brief, usually the only potential intervening circumstance in this scenario is the discovery of the arrest warrant.[144] In order to determine if the discovery of an arrest warrant sufficiently breaks the chain of causation and becomes a superseding cause, the reasonable foreseeability of such a discovery must be examined.[145]

In *Frierson*, as with most routine traffic stops, it is typical police procedure to enter the driver's name in the database in search of outstanding warrants.[146] It is also common to discover an active arrest warrant. Although national statistics are currently unavailable, city and state-specific statistics clearly demonstrate the high frequency of outstanding arrest warrants.[147] For example, approximately one in three Cincinnati residents has an active arrest warrant for failure to appear in court.[148] In

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[142] *See supra* note 34.

[143] Golphin v. State, 945 So. 2d 1174, 1202 (Fla. 2006) (Pariente, J., concurring) ("[P]olice officers in some jurisdictions view a warrants check as a routine feature of almost any citizen encounter.").

[144] *Green*, 111 F.3d at 522.

[145] *See Brown*, 422 U.S. at 592-97.

[146] State v. Frierson, 926 So. 2d 1139, 1141 (Fla. 2006). *See supra* note 116 and accompanying text.

[147] Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93, 98-99 (2004).

[148] *See* Michael Kimberly, Comment, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 YALE L.J. 177, 183 n.29 (2008).

Baltimore, this ratio is one-to-twelve.[149] In the state of Massachusetts, approximately one in eight citizens has an active arrest warrant.[150] Based on these statistics, it is reasonably foreseeable that a police officer might discover an arrest warrant pursuant to an illegal traffic stop. Therefore, the discovery of an arrest warrant during an illegal traffic stop is not a superseding event breaking the chain of causation.

3. Flagrancy Extending the Time Frame

The flagrancy of the police officer's violation, the third factor of *Brown*, is used to determine the extent of the taint of the illegal act of the officer. Evidence seized in violation of the Fourth Amendment is considered "poisoned."[151] However, if the illegal act was flagrant, the poison is even stronger, and a greater length of time is necessary to attenuate the taint of the flagrant act.[152] Factors used to determine whether police misconduct constitutes flagrancy include "evidence that police actions were purposefully investigatory in nature; that an arrest was obviously illegal; and that an arresting officer was aware the arrest was illegal."[153]

In *Frierson*, the majority held that despite the fact the officer made a clear mistake in the enforcement of the law, there was no apparent evidence that the traffic stop was purposeful and flagrant.[154] In making this relatively cursory determination, the majority used purpose and flagrancy dependently.[155] However, many courts and scholars favor a disjunctive analysis, in which if either improper purpose *or* flagrancy exists, this prong of the analysis weighs against attenuation.[156] In *Brown* itself, the

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[149] *Id.*

[150] *Id.*

[151] *See* 1 DRESSLER & MICHAELS, *supra* note 34, at 382.

[152] *Id.*

[153] Jacobs v. State, 128 P.3d 1085, 1087 (Okla. Crim. App. 2006).

[154] State v. Frierson, 926 So. 2d 1139, 1144-45 (Fla. 2006) (holding that there was no evidence of "bad faith" by the officer). *But see id.* at 1154 (Pariente, C.J., dissenting) ("Given that the officer's actions in this case after stopping Frierson were disconnected from the ostensible rationale for the stop, I . . . conclude that the stop was pretextual.").

[155] *Id.* at 1144 ("[W]e do not find that the purpose and flagrancy of misconduct in illegally stopping respondent was such that the taint of the illegal stop required that the evidence seized incident to the outstanding arrest warrant should be suppressed.").

[156] 6 LAFAVE, SEARCH AND SEIZURE, *supra* note 35, § 11.4(b), at 386 (quoting United States v. Crawford, 323 F.3d 700, 721 (9th Cir. 2003)); *see Crawford*, 323 F.3d at 721

Supreme Court references only "purposefulness" when conducting its analysis.[157] In many cases involving an illegal traffic stop, the police officer often acts with improper purpose by focusing on a warrant search rather than the issue for which the driver was originally stopped or by unreasonably continuing contact with the driver in order to conduct a warrant search.[158]

Chief Justice Pariente's dissent in *Frierson* relied on the Supreme Court opinion in *Florida v. Royer*, arguing that this kind of exploitation constitutes the element of purposefulness described in *Brown*.[159] The Chief Justice emphasized the difficulty and the courts' reluctance in examining the motives of police behavior and argued that this traffic stop was "unquestionably invalid."[160] He further countered that the officer's misconduct was flagrant because the officer abused the stop to immediately run an arrest warrant search, instead of focusing on the violation for which he supposedly stopped Frierson.[161] The dissent in *State v. Strieff* similarly argued that the act of searching for arrest warrants

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("In reciting the *Brown* factors, courts usually choose a conjunctive phrasing ('purpose *and* flagrancy'), but the same courts then find in favor of taint if there is evidence of *either* improper purpose *or* flagrant illegality. We also find the disjunctive analysis more persuasive, and explicitly clarify that either improper purpose or flagrant illegality will support a determination that the third prong of the test weighs against attenuation.") (citations omitted); *see also* Taylor v. Alabama, 457 U.S. 687, 693 (1982); Dunaway v. New York, 442 U.S. 200, 218-19 (1979).

[157] Brown v. Illinois, 422 U.S. 590, 605 (1975) (determining that the police misconduct had "a quality of purposefulness").

[158] *See generally Frierson*, 926 So. 2d 1139; *Jacobs*, 128 P.3d 1085.

[159] *Frierson,* 926 So. 2d at 1154 (Pariente, C.J., dissenting) ("A detention must be tailored in scope to its underlying justification, and 'last no longer than is necessary to effectuate the purpose of the stop.'") (quoting Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion)).

[160] *Id.* at 1148. ("It is often difficult to determine when a traffic stop is pretextual or in bad faith, and we are justifiably reluctant to question the motives of our law enforcement officers. Nonetheless, because this traffic stop was unquestionably invalid, and because the officer immediately deviated from the purpose for the stop, this is a scenario in which the deterrent purpose of the exclusionary rule would be well served by suppression.").

[161] *Id.* at 1154 ("[I]t appears that the officer exploited the stop by focusing on the warrants check. A detention must be tailored in scope to its underlying justification, and 'last no longer than is necessary to effectuate the purpose of the stop.'") (quoting *Royer*, 460 U.S. at 500).

alone establishes flagrancy because it is an exploitation of the illegal action of the police office.[162]

In the *Frierson* case, if flagrancy were, in fact, present, it would result in more extensive suppression and lengthen the time frame affected by the taint of the illegal police conduct. For example, if the police officer had waited an hour to arrest Frierson, instead of mere minutes, the flagrancy of his misconduct would extend to this longer period of time.[163] However, if misconduct were not present, the good faith mistake would not result in immediate attenuation, and the original period of time would be used in the attenuation analysis.

When applying the three factors from *Brown* to the facts of *Frierson*, it is clear that the illegally obtained evidence against him should be suppressed under the exclusionary rule. The short period of time and the lack of significant intervening circumstances both strongly weigh toward not attenuating the taint of the police officer's actions. The court in *Frierson* reached a very different conclusion.[164] Despite the fact that the traffic stop was illegal and the intervening arrest warrant was faulty, the court in *Frierson* persisted in ruling that the taint of the ill-gotten evidence was attenuated, illustrating the problematic rationale used by many of the lower courts in examining this issue.[165]

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[162] State v. Strieff, 286 P.3d 317, 338 (Utah Ct. App. 2012) (Thorne, J., dissenting) ("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, 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."), *cert. granted*, 298 P.3d 69 (Utah 2013), *and rev'd*, 357 P.3d 532 (Utah), *cert. granted*, 136 S. Ct. 27 (2015).

[163] As previously established, the time frame between an illegal traffic stop and seizure of evidence is very short. *See* United States v. Gross, 624 F.3d 309 (6th Cir. 2010); State v. Moralez, 300 P.3d 1090 (Kan. 2013); State v. Grayson, 336 S.W.3d 138 (Mo. 2011) (en banc); State v. Shaw, 64 A.3d 499 (N.J. 2012); State v. Soto, 179 P.3d 1239 (N.M. Ct. App. 2008); State v. Bailey, 338 P.3d 702 (Or. 2014) (en banc).

[164] *See generally Frierson*, 926 So. 2d at 1144-45.

[165] *Id.*

IV. WHY THE LOWER COURTS ARE GETTING THE *BROWN* ARREST WARRANT ATTENUATION ANALYSIS WRONG

A. Errors in the Superseding Intervener Courts' Analysis

1. Why Ignoring Temporal Proximity Is Ignoring the Purpose of the Exclusionary Rule

A frequent error arising in lower courts is the admitted minimization of the first *Brown* factor, temporal proximity.[166] Although the length of time between an unlawful traffic stop and the seizure of evidence is nearly always very short, clearly weighing against attenuation, these courts hastily dismiss it.[167] The Eighth Circuit attempts to explain that "the time elapsed between the initial illegality and the acquisition of the evidence—is less relevant because the intervening circumstance is not a voluntary act by the defendant."[168]

Respecting the underlying policies of the exclusionary rule, temporal proximity should be an equally considered, if not substantial, factor in the *Brown* analysis. According to the Supreme Court, the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[169] In *Dunaway v. New York*, the Supreme Court explained the importance of the nexus between the *Brown* temporal proximity factor and deterrent effects: "When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but also use of the evidence is more likely to compromise the integrity of the

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[166] Myers v. State, 909 A.2d 1048, 1063 (Md. 2006) ("[T]he Seventh Circuit minimized the importance of the first factor—time—noting that the short five-minute time period between the primary illegality and acquisition of the evidence was 'not dispositive on the question of taint.'") (quoting United States v. Green, 111 F.3d 515, 521 (7th Cir. 1997)).

[167] *See supra* note 70.

[168] United States v. Simpson, 439 F.3d 490, 495 (8th Cir. 2006) (citing *Green*, 111 F.3d at 522).

[169] United States v. Calandra, 414 U.S. 338, 347 (1974).

courts."[170] Therefore, placing a more appropriate weight upon the proximity factor better serves the deterrence goal of the exclusionary rule.

2. Why Arrest Warrants Are Not an "Independent Intervening Cause"

A number of lower state courts have begun adopting the theory that the discovery of an arrest warrant is a kind of "independent intervening cause" that automatically breaks the chain of causation.[171] In *State v. Page*, the court reasoned,

> Clearly, once the officer discovered that there was an outstanding warrant, . . . he did not have to release Page and was justified in arresting him at that point. Once he had effectuated a lawful arrest, he was clearly justified in conducting a search incident to that arrest for the purpose of officer or public safety or to prevent concealment or destruction of evidence.[172]

Page, along with its contemporaries, relied upon a rule articulated in *McBath v. State*:

> 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.[173]

This rule is contrary to the traditional *Brown* analysis and is instead based upon the idea that there is a special coincidental or

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[170] Dunaway v. New York, 442 U.S. 200, 217-18 (1979) ("*Brown*'s focus on 'the causal connection between the illegality and the confession,' reflected the two policies behind the use of the exclusionary rule to effectuate the Fourth Amendment.") (citation omitted).

[171] *See* McBath v. State, 108 P.3d 241 (Alaska Ct. App. 2005); State v. Page, 103 P.3d 454 (Idaho 2004); Jacobs v. State, 128 P.3d 1085 (Okla. Crim. App. 2006).

[172] *Page*, 103 P.3d at 459-60 (citing Chimel v. California, 395 U.S. 752 (1969)).

[173] *McBath*, 108 P.3d at 248.

accidental element behind the discovery of an arrest warrant that alone breaks the causal chain and removes the taint of the illegal traffic stop.

The discovery of an outstanding arrest warrant during a traffic stop is not coincidental or accidental, but rather is a foreseeable result of an illegal stop. As previously established, outstanding arrest warrants are relatively common. [174] Statistically, if a police officer conducts an unlawful traffic stop, particularly in higher crime areas, it is foreseeable that he may discover an outstanding arrest warrant. Because discovering an arrest warrant is not only a foreseeable result of a traffic stop, but also part of a related chain of events, it is not a coincidental or accidental discovery. Therefore, the discovery of an outstanding arrest warrant does not constitute an intervening event within the context of *Brown*.

3. Why the Lower Courts Are Misapplying Flagrancy

Another frequent error that arises in the lower courts' application of the *Brown v. Illinois* attenuation analysis is the misapplication of the flagrancy factor.[175] These courts rely heavily on the third factor of the attenuation analysis, the purpose and flagrancy of the violation, to determine whether the taint is attenuated.[176] In *United States v. Green*, after the court dismissed the first factor of temporal proximity as "not 'dispositive on the question of taint,'" the court quickly concluded that because the intervening circumstances of this case "are not outweighed by

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[174] *See supra* notes 147-50 and accompanying text. As of October 1, 2014, in the state of Connecticut, there were approximately 38,000 active arrest warrants, just for failure to appear. FAILURES TO APPEAR, VIOLATIONS OF PROBATION, STATE OF CONN. JUDICIAL BRANCH, http://www.jud.ct.gov/statistics/FTAs_VOPS.pdf [http://perma.cc/HA9T-B3RH] (last visited Apr. 4, 2016). In Florida, as of January 15, 2015, there were approximately 20,500 males with active arrest warrants. *Absconder/Fugitive Information List*, FLA. DEP'T OF CORR., http://www.dc.state.fl.us/Absconder/List.asp?DataAction=Filter [http://perma.cc/CUF5-2QB6] (last visited Apr. 4, 2016) (search narrowed by sex).

[175] *See* United States v. Faulkner, 636 F.3d 1009 (8th Cir. 2011); United States v. Green, 111 F.3d 515 (7th Cir. 1997); State v. Frierson, 926 So. 2d 1139 (Fla. 2006); State v. Hill, 725 So. 2d 1282 (La. 1998).

[176] *See Faulkner*, 636 F.3d at 1016 (referring to the flagrancy of police conduct as "the most important factor because it is directly tied to the purpose of the exclusionary rule—deterring police misconduct").

flagrant official misconduct," the taint of the illegal traffic stop had dissipated.[177] Although the court noted that it did not "condone" the behavior of the police officer, it determined that the misconduct was not so shocking as to "tilt the scales against attenuation."[178]

A number of lower courts have relied on the erroneous flagrancy rationale in *Green* to support similar decisions.[179] The Supreme Court of Florida determined that because there was "no evidence that the stop was pretextual or in bad faith," the taint of the illegal stop did not "require" that the seized evidence be suppressed.[180] Similarly, the Supreme Court of Idaho held that the misconduct of the police officer "was certainly not flagrant, nor was his purpose improper," despite acknowledging that there was no justification for the continued contact by the officer.[181]

This reasoning and application is incorrect because good faith mistakes do not result in immediate attenuation, but rather bad faith mistakes result in more extensive suppression. Therefore, the flagrancy of the violation should be examined in correlation with the amount of time between the violation and the seizure of the evidence.[182] The more flagrant the violation, the greater the taint, and the longer amount of time that must elapse in order for the taint to dissipate.[183] Due to both the nature of the flagrancy element and the intrinsic difficulties in proving that a police officer acted with an improper purpose, illegally obtained evidence

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[177] *Green*, 111 F.3d at 521 (quoting United States v. Fazio, 914 F.2d 950, 958 (7th Cir. 1990)).

[178] *Id.* at 523 (quoting United States v. Boone, 62 F.3d 323, 325 (10th Cir. 1995)).

[179] *See* McBath v. State, 108 P.3d 241 (Alaska Ct. App. 2005); State v. Frierson, 926 So. 2d 1139 (Fla. 2006); State v. Page, 103 P.3d 454 (Idaho 2004); People v. Reese, 761 N.W.2d 405 (Mich. Ct. App. 2008).

[180] *Frierson*, 926 So.2d at 1144-45 ("In this case, we do not find that the purpose and flagrancy of misconduct in illegally stopping respondent was such that the taint of the illegal stop required that the evidence seized incident to the outstanding arrest warrant should be suppressed.").

[181] *Page*, 103 P.3d at 459-60 ("However, once there was no longer a justification for contact between Page and the officer, it was not reasonable for the officer to seize Page's driver's license and go back to his patrol vehicle to run a record check.").

[182] 1 DRESSLER & MICHAELS, *supra* note 34, § 20.07, at 382.

[183] 6 LAFAVE, SEARCH AND SEIZURE, *supra* note 35, § 11.4(b), at 386 ("[I]t will 'take more to attenuate a causal chain that has had as its impetus a flagrant and purposeful violation of the fourth amendment.'") (quoting Comment, 31 U. MIAMI L. REV. 615, 648 (1977)).

should not be admitted simply because there has been no showing of flagrant and purposeful misconduct.[184]

Furthermore, although flagrancy is undoubtedly an important factor in the *Brown* analysis, it is not the controlling factor, despite how many lower courts apply it, and should be weighed accordingly.[185] Just because an illegal traffic stop was not a flagrant violation does not indicate that this factor "outweighs" the other factors of the *Brown* analysis. This line of rationale is a cause for concern in particular because it virtually excuses pretextual police misconduct.

B. Errors in the Perfunctory Courts' Analysis

Although courts performing a perfunctory attenuation analysis are typically getting the "right" answer, their failure to perform comprehensive *Brown* attenuation analysis is a concerning error for both sides of this debate. By failing to use the *Brown* factors, these courts do not consider temporal proximity and virtually ignore the discovery of an outstanding arrest warrant, leading to questionable decisions.[186]

This erroneous analysis is especially problematic in jurisdictions such as the Tenth Circuit in *United States v. Lopez*, where courts essentially perform an implied attenuation analysis.[187] This type of cursory analysis can lead to the suppression of evidence that should otherwise be admissible. For example, in cases in which the length of time between the illegal police conduct and the seizure of evidence has been extended, these courts would still likely suppress the evidence because their superficial analysis fails to consider this factor.[188] Because these courts also do not complete an in-depth causation analysis, they also typically ignore significant intervening factors, much how

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[184] *Id.*

[185] *Id.* ("This is *a* factor, not the controlling factor, under *Brown* . . . .").

[186] *See* United States v. Lopez, 443 F.3d 1280, 1286 (10th Cir. 2006); United States v. Luckett, 484 F.2d 89, 91 (9th Cir. 1973); People v. Padgett, 932 P.2d 810, 817 (Colo. 1997) (en banc); McDonald v. State, 947 A.2d 1073, 1079-80 (Del. 2008); Sikes v. State, 448 S.E.2d 560, 563 (S.C. 1994); State v. Daniel, 12 S.W.3d 420, 428 (Tenn. 2000); St. George v. State, 237 S.W.3d 720, 723, 726 (Tex. Crim. App. 2007).

[187] *See Lopez*, 443 F.3d 1280.

[188] *Id.* at 1285-86.

they ignore the discovery of an arrest warrant.[189] This perfunctory attenuation analysis can thereby lead to an increased risk of judicial error.

V. FREEDOM V. SAFETY: THE TROUBLING PUBLIC POLICY IMPLICATIONS OF ALLOWING ARREST WARRANT ATTENUATION

A. The Importance of the Fourth Amendment and Deterrence

One of the most important reasons the taint of illegal traffic stops should not be attenuated based only on the discovery of an arrest warrant is the public policy rationale. Nearly all of the attenuation cases emphasize the significance of deterring illegal police conduct, but not all recognize the constitutionally disastrous results that could occur from the implementation of attenuation based on discovering an arrest warrant. These results are strongly accentuated in *United States v. Gross*.[190] The court here points out that holding this evidence is admissible would "result in a rule that creates a new form of police investigation, whereby an officer patrolling a high crime area may, without consequence, illegally stop a group of residents where he has a 'police hunch' that the residents may . . . have outstanding warrants."[191] Allowing police officers to act on mere "hunches" severely erodes the principles of the Fourth Amendment and completely eliminates the requirement that officers have reasonable suspicion of probable cause to conduct traffic stops.[192] In this context, this rule would essentially nullify the protections of the Fourth Amendment.[193]

Elkins v. United States provides that the purpose of the exclusionary rule is "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[194] If police officers are permitted to conduct illegal traffic stops without consequence, they have a strong incentive to disregard the Fourth Amendment

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189 *Id.* at 1282-83.

190 United States v. Gross, 624 F.3d 309, 320-21 (6th Cir. 2010), *amended on other grounds*, 662 F.3d 393 (6th Cir. 2011).

191 *Id.*

192 *Id.*

193 *Id.*

194 Elkins v. United States, 364 U.S. 206, 217 (1960).

constitutional right. The exclusion of evidence is more likely to produce a deterrent effect and protect judicial integrity because there is a close causal connection seen between the illegal traffic stop and the seizure of evidence.[195] However, if police officers are aware that evidence gained by a constitutional violation, regardless of the discovery of an arrest, will likely be inadmissible, they will be less likely to make illegal traffic stops. The lack of attenuation will, thereby, serve as an effective deterrent and foster respect for the Constitution.

B. The Deterrent Value of Exclusion in this Context Outweighs Any Social Costs

The primary purpose of the attenuation doctrine is "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."[196] In order to achieve this purpose, the Supreme Court advocates a cost-benefit analysis when considering the exclusion of evidence.[197] In this type of analysis, the Court typically considers the social cost of excluding evidence against its deterrent benefits, as well as alternative "extant deterrences."[198]

The court in *United States v. Green* voiced concerns about the social costs of not allowing the arrest and search of an individual with an outstanding search warrant only because of illegal police action.[199] The idea supporting this concern is that the court will be "releasing dangerous criminals into society."[200] However, this theory is statistically unrealistic because the most serious offenses

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[195] Dunaway v. New York, 442 U.S. 200, 218 (1979) ("When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but also use of the evidence is more likely to compromise the integrity of the courts.").

[196] Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring).

[197] Hudson v. Michigan, 547 U.S. 586, 594 (2006) ("Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except 'where its deterrence benefits outweigh its "substantial social costs."'") (quoting Penn. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)).

[198] *Id.* at 599.

[199] 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 . . . .").

[200] *Hudson*, 547 U.S. at 595.

receive priority and are actively served.[201] As a result, in some jurisdictions only about five percent of outstanding warrants relate to major crimes.[202] This point is illustrated in related case law in which the majority of the outstanding arrest warrants are for relatively trivial matters.[203] Therefore, the cost of not arresting someone who failed to pay a traffic ticket is not sufficient to outweigh the deterrent effects nor to merit the infringement on Fourth Amendment rights.

While the social costs of not allowing attenuation based on outstanding arrest warrants are relatively low, the deterrent value is high. *Hudson v. Michigan* provides that "the value of deterrence depends upon the strength of the incentive to commit the forbidden act."[204] In the issue of arrest warrant attenuation, police officers have a great incentive to violate the Fourth Amendment through illegal traffic stops if they are aware that the only potential consequences for them are positive: an arrest and the seizure of evidence. If the illegal stop leads to the discovery of an outstanding arrest warrant, the officer can make the arrest and seize evidence. If a warrant does not exist, the officer can simply continue on his way and is not penalized for using illegal means to search for an outstanding warrant. Suppression here is vital to deter officers from using warrant checks as a proverbial loophole around the Fourth Amendment to obtain and admit evidence at trial against individuals when the officers do not otherwise have constitutionally sufficient suspicion.

CONCLUSION

The issue of whether the discovery of an outstanding arrest warrant during an illegal traffic stop attenuates the taint of the illegal police conduct and allows the admission evidence seized in a search incident to arrest is a crucial Fourth Amendment rights

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[201] *See* Randall Guynes & Russell Wolff, *Un-Served Arrest Warrants: An Exploratory Study*, INST. OF L. & JUST. 24 (2004), http://www.ilj.org/publications/docs/Unserved_Arrest_Warrants.pdf [http://perma.cc/NB68-R3TD] (examining data from Montgomery County, Maryland and Hennepin County, Minnesota to illustrate the relationship between outstanding arrest warrants and violent crimes).

[202] *Id.*

[203] *See* State v. Frierson, 926 So. 2d 1139, 1141 (Fla. 2006) (failure to appear for driving with a suspended license).

[204] *Hudson*, 547 U.S. at 596.

question that is the subject of conflicting decisions and analyses by both state and federal courts. This question should be resolved through a strict application of the attenuation factors in *Brown v. Illinois*: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.[205] Using the *Brown* analysis, in a typical illegal traffic stop, the fruit of an illegal traffic stop should be suppressed despite the discovery of an arrest warrant due to the short time period, the foreseeability of discovering the arrest warrant, and the potential for flagrancy. The failure to correctly apply *Brown* leads to grave public policy concerns and threatens to erode Fourth Amendment protections. Without the protection of *Brown* in this scenario, the rights guaranteed by the Fourth Amendment are reduced to a mere "form of words."[206]

Merry C. Johnson[*]

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[205] Brown v. Illinois, 422 U.S. 590, 604-05 (1975).

[206] Mapp v. Ohio, 367 U.S. 643, 648 (1961) (citation omitted).

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