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UTAH V. STRIEFF AND THE FUTURE OF THE EXCEPTIONS TO THE EXCLUSIONARY RULE

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INTRODUCTION

The Fourth Amendment to the U.S. Constitution protects people's rights against "unreasonable searches and seizures."[1] To enforce this protection, the Supreme Court created the exclusionary rule, which precludes from trials evidence obtained in violation of the Fourth Amendment.[2] However, the Court has recognized that the exclusionary rule takes a heavy toll on the judicial system and society, including potentially "setting the guilty free and the dangerous at large."[3] To alleviate such social cost, the Court has created a series of exceptions to this rule to save certain evidence from exclusion, in spite of the illegality in obtaining the evidence.[4]

In the recent case *State v. Strieff*, the Supreme Court of Utah held that police's discovery of a lawful outstanding warrant during an unlawful investigatory stop cannot save the evidence obtained during that arrest from suppression under the attenuation doctrine.[5] To reach that decision, the court reasoned that the inevitable discovery doctrine, instead of the attenuation doctrine, is appropriate for this situation.[6] However, the court failed to address whether the inevitable discovery doctrine can ultimately save the evidence from suppression.[7]

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1. U.S. CONST. amend. IV.
2. *See* Mapp v. Ohio, 367 U.S. 643, 656 (1961).
3. Hudson v. Michigan, 547 U.S. 586, 591 (2006) (citing United States v. Leon, 468 U.S. 897, 907 (1984)).
4. *See, e.g.*, Murray v. United States, 487 U.S. 533, 537 (1988); Nix v. Williams, 467 U.S. 431, 443 (1984).
5. *See* State v. Strieff, 357 P.3d 532, 546 (Utah 2015), *cert. granted*, 136 S. Ct. 27 (2015).
6. *Id.*
7. *Id.*

The theoretical foundation of how the Fourth Amendment guaranty gives rise to the exclusionary rule has never been steadfast; in fact, it is subject to constant academic debate.[8] Some scholars have even predicted the abolishment of the exclusionary rule, in light of the recent developments and expansions of the exception doctrines.[9] This commentary will argue that, given the Court's policy justification for the exclusionary rule[10] and the recent trend towards curbing its scope,[11] the Court will likely reverse the Supreme Court of Utah's decision and further narrow the application of the exclusionary rule. In Part I, this commentary lays out the facts of this case; in Part II, it discusses the legal background of the exclusionary rule leading up to this case; in Part III, it examines the Supreme Court of Utah's holding and the reasoning behind it; and in Part IV, it provides an analysis on how the Supreme Court will rule in this case.

I. FACTS

In December 2006, Officer Douglas Fackrell received an anonymous drug tip reporting "narcotics activity" at a South Salt Lake City residence.[12] Subsequently, Officer Fackrell initiated intermittent surveillance over the residence totaling three hours over the course of a week, during which he observed "short term traffic" at the residence, with visitors arriving and leaving within a few minutes.[13] The traffic was not very frequent but was more than that of a typical household and enough to raise the officer's suspicion of ongoing drug sales activity.[14]

During the surveillance, Officer Fackrell saw defendant Edward Strieff leaving the residence and walking towards a convenience store.[15] Although he did not see Strieff entering the residence, Officer Fackrell decided to

8. *See, e.g.*, Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 478 (2011); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Rhett DeHart, *Is the Exclusionary Rule Doomed?*, 26-Mar. S.C. LAW. 40 (2015); William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193 (1989).

9. *See* Matthew Allan Josephson, *To Exclude or Not to Exclude: The Future of the Exclusionary Rule After* Herring v. United States, 43 CREIGHTON L. REV. 175, 176 (2009) (citing *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183 (2012)); DeHart, *supra* note 8; Candace C. Kilpinen, Herring v. United States*: A Threat to Fourth Amendment Rights?*, 44 VAL. U. L. REV. 747 (2010).

10. *See* Davis v. United States, 564 U.S. 229 (2011) ("The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.").

11. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586 (2006); Herring v. New York, 422 U.S. 853 (1975); Davis v. United States, 564 U.S. 229 (2011).

12. *Strieff*, 357 P.3d at 536.

13. *Id.*

14. *Id.*

15. *Id.*

"ask someone [to] find out what was going on [in] the house."[16] He confronted Strieff and ordered him to stop in a parking lot near the convenience store.[17] After identifying himself and checking Strieff's identification, Officer Fackrell asked dispatch to run a warrant check on Strieff, which revealed an outstanding traffic warrant.[18] Pursuant to that warrant, Officer Fackrell arrested Strieff, searched him and found a bag of methamphetamine and drug paraphernalia in his pockets.[19]

Strieff was later charged with unlawful possession of methamphetamine and unlawful possession of drug paraphernalia.[20] In moving to suppress the evidence, Strieff argued that the evidence was uncovered during the initial investigatory stop, which was unlawful because the official lacked reasonable articulable suspicion—Officer Fackrell did not see Strieff entering the house, and thus did not know how long he stayed there or anything other than the fact that he left the house at one point.[21] The state conceded the unlawfulness of the stop, but argued that the evidence should nevertheless be admitted pursuant to the attenuation exception.[22]

The district court denied Strieff's motion, reasoning that: (1) the surveillance had created reasonable suspicion for drug activity, so the stop "was to investigate a suspected drug house;" (2) the police officer's conduct was not a flagrant violation of the Fourth Amendment but a good faith mistake; and (3) weighing all evidence together, suppression of the evidence would be an "inappropriate remedy."[23] The Utah Court of Appeals affirmed the lower court's decision on the ground that the discovery of a valid warrant is a powerful intervening circumstance that would dissipate the taint of the unlawful stop, and that the violation by the police officer was not flagrant or purposeful.[24]

II. LEGAL BACKGROUND

The Fourth Amendment to the U.S. Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, *against*

16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*.
21. *See id*.
22. *Id*. at 536–37.
23. *Id*.
24. *See* State v. Strieff, 286 P.3d 317, 335 (Utah Ct. App. 2012).

unreasonable searches and seizures, shall not be violated . . . ."[25] In simple terms, the exclusionary rule dictates that evidence obtained in violation of the Constitution is inadmissible in court. However, instead of being a constitutional mandate or personal right, the exclusionary rule is a judicially-created remedy to enforce the Fourth Amendment.[26] In 1914, the Court held in *Weeks v. United States* that the exclusionary rule is enforceable in all federal courts.[27] In *Mapp v. Ohio*, the Court held that this rule is enforceable against the States through incorporation of the Fourth Amendment into the Fourteenth Amendment.[28]

The early cases on the exclusionary rule did not lay out its theoretical basis,[29] and the rule has since been shrouded by debate and criticism. Some scholars have even gone as far as calling its jurisprudence a total mess.[30] The justifications provided by the Court for the rule have changed over the years.[31] Initially, the Court justified the rule in two ways: first, to "discourag[e] police misconduct" and second, as "the imperative of judicial integrity."[32] But in the following decades, through multiple landmark cases, the Court has clarified that the sole justification for the exclusionary rule today is to deter law enforcement officers from engaging in potentially unconstitutional conduct.

Recognizing the undesirable effects of the exclusionary rule, the Court developed a series of exceptions when the deterrent value of the rule cannot be realized: (1) the independent source exception, (2) the inevitable discovery exception, and (3) the attenuation exception.[33]

The first two exceptions are closely related, and they utilize a cause-in-

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25. U.S. CONST. amend. IV (emphasis added).

26. United States v. Calandra, 414 U.S. 338, 348 (1974); *see also* Arizona v. Evans, 514 U.S. 1, 10 (1995) (noting that the Constitution "contains no provision expressly precluding the use of evidence obtained in violation of its commands").

27. *See* Weeks v. United States, 232 U.S. 383 (1914).

28. Mapp v. Ohio, 367 U.S. 643, 656 (1961).

29. Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1372 (1983) ("Unfortunately, the early cases fail to provide insight and guidance into the constitutional underpinnings for the exclusionary rule.").

30. *See* Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 821 (2013) ("Academics and jurists of all stripes agree that the Court's case law in this area is a mess."); Amar, *supra* note 8, at 757, 759; Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 329 (1973).

31. Josephson, *supra* note 9, at 179.

32. *Id*.

33. *See generally* Brent D. Stratton, *The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principal and Dissipated Logic*, 75 J. CRIM. L. & CRIMINOLOGY 139 (1984).

fact analysis.[34] Under the independent source doctrine, the taint on evidence that resulted from police misconduct will be dissipated if that same evidence is also obtained through another lawful method.[35] Under the inevitable discovery doctrine, the tainted evidence will be admitted in court if it "ultimately or inevitably would have been discovered by lawful means even if no violation of any constitutional provision had taken place."[36] In these two scenarios, evidence has been or would have been discovered by separate lawful means, so the deterrent value of the rule is insufficient to justify its application.

The third exception, the attenuation doctrine, shifts from a cause-in-fact analysis to a proximate cause analysis.[37] It permits the admission of evidence discovered through police misconduct if the legal nexus between the misconduct and the evidence is sufficiently attenuated.[38] The logic of this doctrine was first elaborated and clarified in *Wong Sun v. United States*.[39] In *Wong Sun*, the Court held that a defendant's confession, made several days after the police's unlawful invasion of his residence, was admissible because the connection between the misconduct and the confession had become sufficiently attenuated to dissipate the taint.[40] The Court identified two key elements: first, the government did not exploit the police wrongdoing to obtain the evidence, and second, the confession worked as an intervening circumstance of free will.[41]

Later in *Brown v. Illinois*,[42] the Court developed a three-factor test to determine whether the attenuation doctrine is applicable: (1) the "temporal proximity" between the unlawful police conduct and the discovery of the evidence in question, (2) the existence of "intervening circumstances," and (3) the "purpose and flagrancy" of the official's misconduct.[43] A closer temporal proximity may indicate a bigger effect of the unlawful conduct on the collection of evidence and the potential exploitation of the conduct by the police, thus working in favor of suppression.[44] An intervening circumstance is deemed to exist if it is "so distinct from the threshold Fourth Amendment violation that it can be said that the challenged

34. State v. Strieff, 357 P.3d 532, 539 (Utah 2015).
35. Murray v. United States, 487 U.S. 533, 537 (1988).
36. Nix v. Williams, 467 U.S. 431, 432 (1984).
37. *Strieff*, 357 P.3d at 540.
38. *See* Stratton, *supra* note 33, at 140–41.
39. 371 U.S. 471 (1963).
40. *Id*. at 491.
41. *See* Stratton, *supra* note 33, at 146.
42. 422 U.S. 590 (1975).
43. State v. Strieff, 357 P.3d 532, 541 (Utah 2015) (citing *Brown*, 422 U.S. at 603–04).
44. *Id*.

evidence is not a product of 'exploitation' of the illegality but instead the result of 'means sufficiently distinguishable to be purged of the primary taint.'"[45] And lastly, a purposeful and flagrant conduct is something "obviously improper" and "investigatory in design and purpose and executed in the hope that something might turn up."[46]

III. HOLDING

The issue in *Utah v. Strieff* is whether to apply the attenuation doctrine to the discovery of an outstanding arrest warrant and thereby exempt the evidence obtained from the lawful arrest from suppression.[47] According to the Supreme Court of Utah, all the attenuation-doctrine cases so far have involved voluntary confessions and the U.S. Supreme Court has never specifically decided the issue of this case.[48]

The Supreme Court of Utah delineated three general lines of reasoning adopted by lower courts on this issue.[49] The first group of cases, exemplified by *United States v. Green*, holds that the discovery of a preexisting warrant is an intervening circumstance sufficient to purge the taint of the prior unlawful police conduct, provided that the unlawful conduct itself is not flagrant.[50] In reaching this conclusion, the Seventh Circuit focused on the question of whether the deterrent function of the exclusionary rule can be served because "application of the rule does not serve this deterrent function when the police action, although erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights."[51] The court also cited *Wong Sun v. United States*, claiming that the evidence obtained from a lawful arrest pursuant to a preexisting warrant comes not "by exploitation of that illegality [but] by means sufficiently distinguishable to be purged of the primary taint."[52] In addition to the Seventh Circuit, the Eighth Circuit and eleven state high courts have also adopted this rationale.[53]

The second group of cases applied the *Brown v. Illinois* test, but concluded that in the situation of a preexisting arrest warrant, attenuation

45. *Id*. (citing *Wong Sun*, 371 U.S. at 488).
46. *Id*. (citing United States v. Simpson, 439 F.3d 490, 496 (8th Cir. 2006)).
47. *Id*. at 535.
48. *Id*.
49. *Id*.
50. *See* United States v. Green, 111 F.3d 515, 522 (7th Cir. 1997).
51. *Id*. (citing United States v. Fazio, 914 F.2d 950, 958 (7th Cir. 1990)).
52. *Id*.
53. Petition for Writ of Certiorari, Utah v. Strieff, No. 14-1373 (U.S. May 15, 2015).

doctrine does not apply.[54] In *State v. Moralez*,[55] the court concluded that: (1) applying the first factor, the short time between the unlawful detention and the discovery of the warrant leads to a high temporal proximity, which "weighs heavily" against the application, and (2) applying the third factor, the unlawful detention followed by a warrant search demonstrated some resemblance to an "investigatory detention designed and executed in the hope that something might turn up" and thus exhibited "at least some level of flagrant conduct."[56]

The third line of reasoning, the one the Supreme Court of Utah adopted in this case, is to deem the attenuation doctrine inapplicable in the situation of a preexisting warrant.[57] This rationale originated from the dissenting opinion in *State v. Frierson*,[58] in which Chief Justice Pariente proposed to limit the application of the attenuation doctrine to its original basis—situations involving a voluntary confession as a result of the independent acts of free will of the defendant, and thus excluding the preexisting warrant from consideration.[59]

The Supreme Court of Utah believed that the U.S. Supreme Court, through several seminal cases on the attenuation doctrine—*Brown, Wong Sun, Kaupp*—indicated that the application of this doctrine is restricted to cases where the intervening cause is a voluntary confession of the defendant that breaks the legal proximate causation between the discovery of evidence and the initial police misconduct.[60]

The court provided two reasons to back up this claim: (1) the *Brown* factor test works to exclude a preexisting warrant situation from application—both the "temporal proximity" and the "purpose and flagrancy" factors focus on a proximate causation inquiry, and a warrant check is hardly an unforeseeable or superseding event after an unlawful detention; (2) the scenario of this case fits better with the doctrine of inevitable discovery, which covers evidence that will inevitably be discovered by a line of lawful police work separated from the unlawful detention—in this case, the execution of the legitimate warrant.[61] The court

54. State v. Strieff, 357 P.3d 532, 543 (Utah 2015; *see also* Brown v. Illinois, 422 U.S. 590 (1975).

55. 300 P.3d 1090 (Kan. 2013).

56. *Strieff*, 357 P.3d at 543 (citing *Moralez*, 300 P.3d at 1103).

57. *Id*.

58. 926 So.2d 1139 (Fla. 2006).

59. *Strieff*, 357 P.3d at 543 (citing *Frierson*, 926 So.2d at 1149–50 (Pariente, C.J., dissenting)).

60. *Id*.

61. State v. Strieff, 357 P.3d 532, 536 (Utah 2015) ("[W]e deem the inevitable discovery doctrine to control.").

believed extending the coverage of the attenuation doctrine here would "eviscerate the inevitable discovery exception."[62] Thus, the Supreme Court of Utah reversed the lower court decision regarding the invocation of this doctrine.[63]

IV. ANALYSIS

Through a series of recent holdings, the U.S. Supreme Court's jurisprudence on the exclusionary rule has been shifting towards limiting the rule's scope and power. Both Strieff and Utah have cited these seminal Supreme Court cases and considered the arguments in those cases in forming their own arguments.[64]

In *Hudson v. Michigan*, the Detroit police force violated the knock-and-announce rule because after announcing their presence, they waited only "three to five seconds" before breaking in Hudson's house to execute a legitimate search warrant on narcotics and weapons.[65] Facing the issue of whether a violation of the knock-and-announce rule would result in the suppression of all the evidence obtained in the search, the Court, by a vote of 5-4, held that the exclusionary rule is not a proper remedy for a violation of the knock-and-announce rule.[66]

In his majority opinion, Justice Scalia stressed that the suppression of evidence "has always been our last resort, not our first impulse," and that it shall only apply when its deterrence benefits outweigh its substantial social cost, including setting dangerous criminals free.[67] Because "the value of deterrence depends upon the strength of the incentive to commit the forbidden act" and violating the knock-and-announce rule provides the police with little expected value and thus little incentive to commit the violation, the deterrence value here is too little to justify the suppression of evidence.[68]

In *Herring v. New York*, a police officer arrested Herring based on a warrant in the neighboring county's database, and a search incident to arrest revealed methamphetamine and an illegal pistol.[69] However,

62. *Id.* at 545.
63. *Id.*
64. *See generally* Brief for Petitioner, Utah v. Strieff, No. 14-1373 (U.S. Dec. 4, 2015); Respondent's Brief in Opposition, Utah v. Strieff, No. 14-1373 (U.S. June 30, 2015).
65. Hudson v. Michigan, 547 U.S. 586, 586–88 (2006).
66. *Id.* at 586.
67. *Id.* at 591.
68. *Id.* at 596.
69. Herring v. New York, 555 U.S. 135, 138 (2009).

unbeknownst to the officer, the warrant had been recalled months earlier and the recall was not entered into the system due to a police mistake.[70]

The U.S. Supreme Court, by another 5-4 vote, ruled against the suppression of the evidence, reasoning that the police officer's conduct in that case was not "sufficiently deliberate that exclusion can meaningfully deter it [or] sufficiently culpable that such deterrence is worth the price paid by the justice system."[71] The Court laid out the exclusionary rule as a remedy reserved for "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence," and concluded that a suppression of evidence is not an appropriate remedy for the simple negligence mistake.[72]

The *Herring* rationale was further confirmed by another case, *Davis v. United States*.[73] In *Davis*, the police arrested Willie Davis during a routine vehicle stop for giving a false name, and in the search of Davis's car incident to arrest, the police found an illegal weapon.[74] The police search of the vehicle complied with relevant appellate precedent at the time, but as Davis appealed his case to a federal court of appeals, the U.S. Supreme Court announced a new rule governing searches of vehicles incident to arrests of recent occupants,[75] which made the police search of Davis's car illegal.[76]

Because the police officer in *Davis* was neither negligent nor culpable and thus suppressing the evidence had no meaningful effect, the U.S. Supreme Court, by a vote of 7-2, held that the exclusionary rule was not applicable.[77] The Court continued to stress how rare the exclusionary rule should be applied and how a good faith or simple and isolated mistake of the police should not result in suppression of the evidence found.[78]

Applying the rationale of the above cases to *Utah v. Strieff*, the answer seems readily evident. The mistake made in this case was non-systemic and non-recurring. Prior to the stoppage, the officer had the house under surveillance for a week and observed sufficient short-term traffic to believe that he had enough evidence to establish reasonable suspicion about

70. *Id*.
71. *Id*. at 144.
72. *Id*.
73. 131 S. Ct. 2419 (2011).
74. *Id*.
75. *See generally* Arizona v. Gant, 556 U.S. 332 (2009).
76. *Davis*, 131 S. Ct. at 2426.
77. *Id*.
78. *Id*.

potential drug activities.[79] Although this belief was later held to be incorrect, the officer was merely one fact short from having a sufficient legal basis to stop Strieff: he did not see Strieff entering the residence under surveillance.[80] As the district court held, such a misjudgment with minimal culpability by the officer is a "good faith mistake on the part of the officer as to the quantum of evidence needed to justify an investigatory detention,"[81] and by any standard, the Court should not characterize such an action as "deliberate, reckless, or grossly negligent."[82] Thus, the exclusionary rule should not be the proper remedy.

Moreover, the above line of cases limiting the application of the exclusionary rule triggered discussion about the future of the rule and its possible abolishment,[83] especially when the very justification of the exclusionary rule—its deterrent effect on police misconduct—can hardly be empirically proven and is hotly debated. In fact, some studies show that the imposition of such rules actually increased crime rates.[84] Because of the questionable efficacy of the current ex post remedies, scholars have started to shift their attention to the alternative ex ante prevention of Fourth Amendment violations.[85] Overall, it seems that the reasons for which the exclusionary rule was originally created have already expired—the U.S. police force today has taken people's constitutional rights more seriously and generally obeys the Fourth Amendment requirement,[86] and the ubiquitous coverage of mass media has also served to deter police misconduct. Thus, it is likely that the Court will continue to limit the application of the exclusionary rule by reversing the decision of the Supreme Court of Utah.

CONCLUSION

Since its creation, the exclusionary rule, an ex post remedy deterring

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79. *Id.*

80. State v. Strieff, 357 P.3d 532, 536–37 (Utah 2015).

81. *Id.* at 535.

82. Davis v. United States, 131 S. Ct. 2419 (2011).

83. *See generally* Dehart, *supra* note 9.

84. *See* Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1383 (2008) ("[T]he imposition of the exclusionary rule increased violent crimes by 27 percent and property crimes by 20 percent.").

85. *See generally* Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609 (2012) (arguing that a serious ex ante warrant requirement will be much clearer and more effective than a deterrence model). *But see* David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149 (2009) (arguing that criminology studies have shown that the exclusionary rule still possesses its unique deterrence value).

86. Hudson v. Michigan, 547 U.S. 586, 599 (2006).

police violation of the Fourth Amendment, has been subject to controversy due to its uncertain legal foundation and questionable effectiveness. In the past decade the Supreme Court has navigated the Fourth Amendment jurisprudence towards a much more limited application of the exclusionary rule, applying it only to those cases where the police misconduct was deliberate, reckless, or grossly negligent. Thus, applying this rationale to the facts in *Utah v. Strieff*, the Supreme Court is should consider Officer Fackrell's misconduct to be a good-faith misjudgment, and decide that the exclusionary rule is not a proper remedy for it.