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Fourth Amendment Flagrancy: What It Is, and What It Is Not

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FOURTH AMENDMENT FLAGRANCY: WHAT IT IS, AND WHAT IT IS NOT

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INTRODUCTION

An officer illegally stops a man without reasonable suspicion, violating his Fourth Amendment right against unreasonable search and seizure. Based on information gained during this illegal stop, the officer searches the man and discovers drugs and paraphernalia.[1]

The exclusionary rule to the Fourth Amendment states that when an officer, through his own illegal act, discovers evidence against a defendant, such evidence cannot be used against the defendant.[2] Therefore, in the above example, because the officer only found the evidence because of an illegal stop, the exclusionary rule should prevent the evidence from being used against the man.

However, in June of 2016, the Supreme Court in *Utah v. Strieff*[3] declined to apply the exclusionary rule in the very situation described above.[4] In this case, after Officer Fackrell stopped defendant Strieff without reasonable suspicion, he discovered an outstanding arrest warrant in Strieff's name for a completely unrelated traffic violation.[5] Fackrell then arrested Strieff and conducted a search incident to the arrest authorized by the warrant.[6] During this search, Fackrell found methamphetamines and drug paraphernalia.[7] While conceding that the original stop was illegal, the Court held that the evidence was

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1. Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016) (holding that evidence was admissible under the attenuation doctrine because officer's conduct was not flagrant).

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

3. 136 S. Ct. 2056 (2016).

4. *Id.* at 2064.

5. *Id.* at 2059.

6. *Id.* at 2060.

7. *Id.* ("When Officer Fackrell searched Strieff incident to the arrest, he discovered a baggie of methamphetamine and drug paraphernalia.").

admissible because of an exception to the exclusionary rule known as attenuation.[8]

Attenuation means that when the causal connection between the illegal conduct and the acquisition of evidence is remote or "attenuated" enough, the evidence may be admissible.[9] The Court applies a three-factor test to assess the connection.[10] One of these factors is "purpose and flagrancy of official misconduct."[11] In *Strieff*, the Court ruled that the evidence was admissible under the attenuation exception because the officer's conduct was not flagrant.[12] However, the Court never explained how it came to that conclusion, nor did it indicate what distinguishes flagrant conduct from non-flagrant conduct.[13]

The purpose of the exclusionary rule is to deter police misconduct by removing the incentive for an officer to conduct an illegal search or seizure.[14] The Supreme Court has explicitly tied flagrancy to this deterrent purpose—the more flagrant a violation is, the greater the need to deter that behavior by applying the exclusionary rule.[15] However, without clear articulation of what sets a flagrant violation apart from a non-flagrant violation in the context of police misconduct, lower courts have no guidance regarding what behavior the Court aims to deter by applying the exclusionary rule.[16] Further, as Justice Kagan explained in her dissent in *Utah v. Strieff*, the result of the majority's ruling implies that "[t]he officer's incentive to violate the Constitution thus increases: From here on, he sees potential advantage in stopping individuals without reasonable suspicion—exactly the temptation the exclusionary rule is supposed to remove."[17]

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8. *Id.* at 2064.

9. New York v. Harris, 495 U.S. 14, 19 (1990) (recognizing rule); Wong Sun v. United States, 371 U.S. 471, 486–87 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939).

10. Brown v. Illinois, 422 U.S. 590, 603–04 (1975).

11. *Id.* at 604.

12. Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

13. Erwin Chemerinsky, *Has the Supreme Court Dealt a Blow to the Fourth Amendment?*, ABA J. (Aug. 2, 2016), http://www.abajournal.com/news/article/chemerinsky_has_the_supreme_court_dealt_a_blow_to_the_fourth_amendment [https://perma.cc/ZGB8-C4L8].

14. *See generally* Davis v. United States, 564 U.S. 229 (2011).

15. *Id.* at 238 (2011) ("In a line of cases beginning with *United States v. Leon* . . . we also recalibrated our cost-benefit analysis in exclusion cases to focus the inquiry on the flagrancy of the police misconduct at issue." (internal quotations omitted)).

16. Chemerinsky, *supra* note 13.

17. *Strieff*, 136 S. Ct. at 2074 (Kagan, J. dissenting).

Accordingly, even though this case "has received little public attention . . . [it] carries enormous implications" regarding the future of the exclusionary rule.[18]

Part I of this Note will illustrate how the Supreme Court has failed to explicitly define flagrancy in the context of Fourth Amendment jurisprudence. Part II will demonstrate how the lower courts have grappled with such lack of a definition. Part III will define flagrancy as an objective measure: an officer's illegal conduct is flagrant when it violates clearly established case law.

I. A FAILURE TO DEFINE FLAGRANCY

The Supreme Court has not clearly articulated what kind of police conduct is flagrant in the context of the Fourth Amendment's exclusionary rule.[19] The term most prominently appears in one of the exclusionary rule's exceptions known as the attenuation doctrine. Under this doctrine, evidence obtained illegally may be admissible if the prosecution can show that the connection between the illegal police behavior and the challenged evidence has "become so attenuated as to dissipate the taint" of the illegality.[20] In assessing such connection, the Court evaluates three factors—temporal proximity between the illegal conduct and acquisition of evidence, any intermediate circumstances between the illegal conduct and acquisition of evidence, and the "purpose and flagrancy" of the official misconduct. This Note focuses on the purpose and flagrancy factor of the attenuation exception. However, the analysis of this factor has been influenced by another exception to the exclusionary rule known as the good faith exception.

Section I.A will formally introduce the exclusionary rule and give an overview of each exception to the rule—good faith, independent source, inevitable discovery, and attenuation. Section I.B will discuss issues presented by *Herring v. United States*, a Supreme Court case premised on the good faith exception. Language from this case has since been used to alter the Court's analysis of the attenuation exception's "purpose and flagrancy" factor. Section I.C will introduce the Court's most recent application of the attenuation exception—

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18. Julian A. Cook III, *The Wrong Decision at the Wrong Time:* Utah v. Strieff *in the Era of Aggressive Policing*, 70 SMU L. Rev. 293, 293 (2017).

19. Chemerinsky, *supra* note 13 ("The impact of the decision ultimately will depend on how lower courts apply it and how police react to it. As to the former, courts will need to face the question of what it means for police conduct to be 'flagrant.'").

20. Nardone v. United States, 308 U.S. 338, 341 (1939).

Utah v. Strieff—and explore scholars' concerns with this case's implications for the exclusionary rule in general.

A. Exclusionary Rule Jurisprudence

The Fourth Amendment aims to protect individuals against unreasonable searches and seizures by the government.[21] A police officer who stops, searches, or arrests someone without the proper justification violates that constitutional protection.[22] To remedy such violations, the Supreme Court adopted the exclusionary rule.[23] Under this rule, evidence of an individual's guilt that is found as a result of a Fourth Amendment violation—such as an unjustified search or arrest—cannot be used against that person at trial.[24] The rule applies both to the direct products of an officer's illegal act, but also to secondary evidence, which is considered "fruit of the poisonous tree."[25]

The main rationale underlying the exclusionary rule is that it aims to "deter [violations]—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[26] The Court has recently stated, "the exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial social costs."[27] Accordingly, the Court has delineated four exceptions in which the social costs of the

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21. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

22. *See, e.g.*, Sibron v. New York, 392 U.S. 40, 67 (1968) (holding that an officer violated defendant's Fourth Amendment rights by stopping him based solely on witnessing defendant talk to narcotics addicts).

23. *See generally* Weeks v. United States, U.S. 383 (1914) (mandating application of exclusionary rule to federal trials); Mapp v. Ohio, 367 U.S. 643 (1961) (mandating that the exclusionary rule applies to the states).

24. *Mapp*, 367 U.S. at 660.

25. Nardone v. United States, 308 U.S. 338, 341 (1939).

26. *Mapp*, 367 U.S. at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)); *see also Elkins*, 364 U.S. at 217 ("The rule is calculated to prevent, not to repair."). The Supreme Court had previously articulated two reasons for application of the exclusionary rule—one reason was deterrence, and the other was to promote judicial integrity by preventing judges from acting as "accomplices in the . . . disobedience of a Constitution they are sworn to uphold." *Id.* at 223. However, since *Mapp* was decided, the Court has abandoned the judicial integrity rationale. *See* United States v. Leon, 468 U.S. 897, 916 (1984) ("First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.").

27. Hudson v. Michigan, 547 U.S. 586, 594 (2006) (internal quotations omitted).

rule outweigh the potential deterrence benefits. The first is the good faith exception, which is currently premised on analysis of police culpability.[28] The remaining three exceptions are causation limitations to the "fruit of the poisonous tree" doctrine. The general premise of the fruit of the poisonous tree doctrine is that secondary evidence—anything discovered as a result of illegally obtained primary evidence—is also inadmissible under the exclusionary rule.[29] The three exceptions to this doctrine arise in situations in which the government can prove that secondary or derivative evidence is far enough removed from the initial illegality that it is not causally tied to the illegal police conduct. These fruit of the poisonous tree exceptions are referred to as the independent source exception, the inevitable discovery exception, and the attenuation exception. The following subsections provide an overview of the four limitations.

1. Culpability Limitation: Good Faith

Originally, the Court established the "good faith" exception in *United States v. Leon*.[30] In *Leon*, the Court held that evidence obtained pursuant to a search warrant that is later declared to be invalid may be introduced at a defendant's criminal trial, if a reasonably well-trained officer would have believed the warrant was valid.[31] This standard was entirely objective.[32] In *Leon*, police officers executed a facially valid search warrant that led to the discovery of evidence, but the warrant was subsequently declared invalid due to judicial error.[33] While the district court initially suppressed the evidence because it was obtained based on a faulty warrant, the Supreme Court reasoned that suppression would not serve any law enforcement deterrent purpose because the mistake

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28. *See* Herring v. United States, 555 U.S. 135, 144 (2009) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.").

29. *See generally* United States v. Crews, 445 U.S. 463, 471 (1980).

30. 468 U.S. 897 (1984).

31. *Id.* at 922.

32. An objective standard does not consider the subjective state of mind of the officer. Rather, all actions are compared to what a reasonably well-trained officer would have done in similar circumstances. *Id.*

33. *Id.* at 902 ("A facially valid search warrant was issued in September 1981 by a State Superior Court Judge.").

was on the part of the judge, not an officer.[34] The Court ruled that the officers' reliance on the warrant was reasonable, and that any other reasonably trained officer would have acted similarly.[35] Accordingly, the benefits of deterrence under these circumstances were not significant enough to warrant exclusion.

In 2009, however, Chief Justice John Roberts controversially altered this objective analysis of the good faith exception by defining the standard in terms of officer culpability.[36] In *Herring v. United States*,[37] Chief Justice Roberts declared that the exclusionary rule only serves to deter "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level [of culpability]."[38] Officers obtained evidence during a search incident to an arrest made pursuant to a warrant in the defendant's name that appeared in a computer database.[39] This database was later found to be incorrect due to a negligent error made by a member of the neighboring county's sheriff's department.[40] Accordingly, the Court had to address the novel issue of whether a negligent error by *law enforcement*, rather than a court employee,[41] judge,[42] or legislature,[43] would change the outcome of the good faith exception. Ultimately, the substantive outcome was the same. The evidence was admissible under the good faith exception. However, the reasoning was entirely different: rather than analyzing the reasonableness of the officers' action in relying on the computer database, Roberts reasoned that the neighboring sheriff's department's negligent error did not rise to the

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34. *Id.* at 921 ("Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.").

35. *Id.* at 922 ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated warrant cannot justify the substantial costs of exclusion."); *see also* Illinois v. Krull, 480 U.S. 340, 360 (1987) (holding that an officer's illegal search was made in good faith because the officer's belief that his conduct was lawful was objectively reasonable, given that the statute he acted under was not declared unconstitutional until the next day).

36. Albert W. Alschuler, Herring v. United States*: A Minnow or A Shark?*, 7 OHIO ST. J. CRIM. L. 463, 483–84 (2009) ("Chief Justice Roberts's opinion in *Herring* sent objective and subjective pronouncements flying in all directions.").

37. 555 U.S. 135, 144 (2009).

38. *Id.*

39. *Id.* at 137.

40. *Id.* ("There had, however, been a mistake about the warrant.").

41. *See generally* Arizona v. Evans, 514 U.S. 1, 4 (1995).

42. *See generally* United States v. Leon, 468 U.S. 897 (1984).

43. *See generally* Illinois v. Krull, 480 U.S. 340 (1987).

level of culpability required to warrant suppression.[44] As will be discussed in Section I.B, this new standard created concerns for the exclusionary rule's future.

2. Causation Limitation: Independent Source

The first causation limitation to the fruit of the poisonous tree doctrine is the independent source exception. This exception permits the admission of illegally obtained evidence if the government can prove the evidence could have been obtained through an *independent source*.[45] This exception applies both when the challenged evidence is discovered for the first time during lawful police activity and when the challenged evidence is initially discovered unlawfully, but is later obtained lawfully in a manner independent of the original discovery.[46] The Court justifies this exception by reasoning that while the police should not profit from their own misconduct, they also should not be made worse off than they were before they committed the misconduct.[47]

For example, in *Murray v. United States*,[48] the independent source exception allowed evidence discovered during an illegal entry to be admitted because the officers subsequently obtained a legal warrant justifying the entry.[49] The officers witnessed the defendant, who was already under federal surveillance, and a co-conspirator drive separately to a warehouse.[50] The officers entered the warehouse illegally, without a warrant, and observed bales of marijuana inside.[51] Normally, this evidence would be suppressed under the exclusionary rule, because even though they had probable cause, they entered the

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44. *See Herring*, 555 U.S. at 145–46. Further, Roberts reasoned that "[i]f the police ha[d] been shown to be *reckless* in maintaining a warrant system, or to have *knowingly* made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified." *Id.* at 146.

45. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

46. *See generally* Murray v. United States, 487 U.S. 533 (1988).

47. *Id.* at 541–42; Nix v. Williams, 467 U.S. 431, 443 (1984) ("[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse position that they would have been in if not police error or misconduct occurred.").

48. 487 U.S. 533 (1988).

49. *Id.* at 542.

50. *Id.* at 535.

51. *Id.*

warehouse without a warrant.[52] However, subsequent to the illegal entry, the officers left, obtained a valid warrant based on probable cause independent of what they had seen inside the warehouse, and then seized the bales of marijuana.[53] The Court applied the independent source exception, reasoning that even though the bales of marijuana were first observed during the illegal entry, they also would have been observed had the officers not entered illegally and only entered with the valid warrant.[54] The warrant served as an "independent source."[55]

3. Causation Limitation: Inevitable Discovery

The second causation limitation to the fruit of the poisonous tree doctrine is the inevitable discovery exception. Under this exception, evidence illegally obtained may still be admissible if the prosecution can prove such evidence *would have been discovered* through lawful means had the illegal conduct never occurred.[56] The logic behind this exception is similar to the logic behind the independent source exception, in that the courts do not want to put the prosecution in a worse position than it otherwise would be had the police's illegal conduct never occurred.[57]

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52. *See, e.g.*, Davis v. Mississippi, 394 U.S. 721 (1969) (holding that unreasonable detention, fingerprinting, and interrogation at police headquarters should result in application of exclusionary rule in rape case).

53. *Murray*, 487 U.S. at 536.

54. *Id. at* 541–42.

55. *See generally id.*

56. Nix v. Williams, 467 U.S. 431, 440–50 (1984).

57. *Murray*, 487 U.S. at 539. ("The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered."). This exception was actually established in the context of a Sixth Amendment violation. *See generally* Nix v. Williams, 467 U.S. 431 (1984). In *Nix*, officers deliberately violated the defendant's Sixth Amendment right to counsel, elicited incriminating information from him, and induced him to lead them to the body of the murder victim. *Id.* at 431–33. Even though the violation was a Sixth Amendment violation, the fruit of the poisonous tree doctrine applies in the same manner as it does to Fourth Amendment violations—the body of the murder victim was found as the result of the information obtained during the illegal interrogation—the poisonous tree—and would typically be excluded as tainted fruit. *Id.* However, as the defendant agreed to lead the police to the body, a separate search team, based on information completely independent from what was gathered during the illegal interrogation, was within a few miles from the scene. The team was called off after the defendant cooperated. *Id.* The Court applied the inevitable discovery exception to the body because it would have been discovered "within a short time" "in essentially the same condition" as a result of the completely independent search, based on separately gained information. *Id.* Accordingly, similar to the reasoning of

For example, in *United States v. Zapata*,[58] the police illegally searched the defendant's automobile and found cocaine in the trunk.[59] The First Circuit ruled that because the car was unregistered and uninsured, it would have been impounded, and the cocaine *would have been discovered anyway* during an inventory search after impounding.[60] Thus, suppressing the cocaine evidence would have put the government in a worse position than they otherwise would have been had the illegal search not occurred.[61]

4. Causation Limitation: Attenuation

The final causation limitation to the fruit of the poisonous tree doctrine is the attenuation exception. In *Nardone v. United States*,[62] the Court held that evidence secured as the result of police illegality is admissible when the causal connection between the illegal conduct and the evidence has "become so attenuated as to dissipate the taint" from the original illegal search or seizure.[63] The rationale is that when the "taint" of the illegal search or seizure is far enough removed from the acquisition of evidence, suppression would not likely deter future violations of the same type.[64]

In *Brown v. Illinois*,[65] the Court articulated a multi-factor framework to evaluate whether this exception applies. The first factor examines how much time passed between the officer's initial illegal conduct and the acquisition of the evidence.[66] Generally, when little time passes between the illegal act and acquisition of evidence, this factor cuts against attenuation.[67] The second factor considers whether an intermediate circumstance occurred between the initial

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the independent source exception, suppressing the corpse would have put the government in a worse place than they otherwise would have been in had the illegal interrogation not occurred. *Id.*

58. 18 F.3d 971 (1st Cir. 1994).

59. *Id.* at 974.

60. *Id.* at 978.

61. *Id.* at 979 n.7.

62. 308 U.S. 338 (1939).

63. *Id.* at 341.

64. Mosby v. Senkowski, 470 F.3d 515, 521 (2d Cir. 2006) (explaining that when the causal link between the illegality and subsequently discovered evidence is so long or torturous that suppressing the evidence would not deter future similar violations, the evidence will be admissible under attenuation).

65. 422 U.S. 590 (1975).

66. *Id.* at 603.

67. *See, e.g.*, Utah v. Strieff, 136 S. Ct. 2056, 2062 (2016) ("Our precedents have declined to find that this factor favors attenuation unless 'substantial time' elapses between an unlawful act and when the evidence is obtained.").

illegality and ultimate discovery of evidence, and whether such circumstance was significant enough to attenuate the causal relationship between the illegality and evidence.[68] When the Court finds such intervening circumstances to be present, this factor weighs strongly against suppression.[69] The third factor—the purpose and flagrancy of the police misconduct—is most closely tied to the ultimate purpose of the exclusionary rule, to deter police misconduct.[70]

In *Brown*, the Court applied these three factors to address whether confessions obtained after an illegal search and arrest were sufficiently attenuated from the search and arrest.[71] Without probable cause, the defendant's home was illegally entered and searched, and the defendant was arrested.[72] He was taken to the station and given Miranda warnings.[73] He confessed to murder.[74] About seven hours later, he was given Miranda warnings again, and he gave a second confession.[75]

The Court analyzed the first two factors in one sentence: "Brown's first statement was separated from his illegal arrest by less than two hours, and there was no intervening event of significance whatsoever."[76] However, in analyzing the third factor—the purpose and flagrancy of the official misconduct—the Court dedicated a whole paragraph:

> The illegality here, moreover, had a quality of purposefulness. The imporpriety [sic] 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." The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was

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68. *Id.*

69. *See*, *e.g.*, *id.* at 2062–63.

70. *See id.* at 2063 ("The exclusionary rule exists to deter police misconduct . . . The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.") (internal citation omitted).

71. Brown v. Illinois, 422 U.S. 590, 604–05 (1975).

72. *Id.* at 592.

73. *Id.* at 594.

74. *Id.* at 594–95.

75. *Id.* at 595.

76. *Id.* at 604.

> affected gives the appearance of having been calculated to cause surprise, fright, and confusion.[77]

Accordingly, the Court concluded that because these officers effected a warrantless arrest without probable cause despite knowing they had no legal basis to do so, such conduct constituted the type of purposeful and flagrant conduct the exclusionary rule was meant to deter.[78] In conjunction with the short temporal proximity and the lack of intervening circumstances between the illegal arrest and first confession, the Court decided that the first confession was not sufficiently attenuated from the illegal arrest, and because the second confession "was clearly the result and the fruit of the first," the Court found it inadmissible.[79] However, as the next sections explore, the "purpose and flagrancy" factor has not been treated consistently by the courts.

B. A Prelude to *Strieff*: The Problems Caused by the *Herring* Opinion

Although the new culpability standard announced by Chief Justice Roberts in *Herring v. United States* was intended to evaluate good faith,[80] this standard has since been applied by the lower courts in the context of attenuation cases.[81] An understanding of the general problems created by both *Herring*'s new culpability standard and the opinion's language is necessary before exploring how this standard has been applied to the attenuation exception. This section thus outlines concerns scholars have raised regarding the precedent set by the *Herring* opinion.

1. Contradicts Fourth Amendment Jurisprudence

Scholars comment that the culpability standard requiring deliberate, reckless, or grossly negligent misconduct for the exclusionary rule to apply finds no support in Fourth Amendment case law because this standard now requires courts to consider the

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77. *Id.* at 605 (internal citations omitted).

78. *Id.* at 605.

79. *Id.* at 604–05.

80. *See supra* Section I.A.1.

81. *See infra* Part II; *see also* Joëlle Anne Moreno, *Flagrant Police Abuse: Why Black Lives (Also) Matter to the Fourth Amendment*, 21 BERKELEY J. CRIM. L. 36, 68 (2016) (explaining how the Court has mapped its flagrant police abuse standard from *Herring* to the attenuation exception).

subjective mental states of police officers.[82] However, the Supreme Court has specifically stated that courts should not probe the minds of police officers.[83] The *Leon* Court "predicted that requiring proof of actual (rather than reasonable) police bad faith . . . would 'send state and federal courts on an expedition into the minds of police officers [and] would produce a grave and fruitless misallocation of judicial resources.'"[84] Accordingly, the *Leon* Court cautioned that the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."[85]

However, as Professor Albert Alschuler notes, despite quoting *Leon*'s objective standard and claiming it was applying the same deterrence analysis, the *Herring* Court's use of the words "reckless" and "deliberate" suggests subjective inquiries based on a particular police officer's state of mind rather than on *Leon*'s 'reasonably well trained officer' standard.[86] Further, Justice Ginsburg highlights this contradiction in her dissent in *Herring*, stating that "[i]t is not clear how the Court squares its focus on deliberate conduct with its recognition that application of the exclusionary rule does not require inquiry into the mental state of the police."[87]

2. Undefined Terms

Second, some scholars acknowledge that the terms used in the new culpability standard for the good faith exception remain undefined in the context of the Fourth Amendment. For example, the term recklessness "establishes an objective standard in civil cases and a

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82. Wayne R. Lafave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 763 (2009) ("But where does the *Herring* Court find this "culpability" test for determining the scope of the exclusionary rule? It is set out as if a foregone conclusion, and is immediately followed with quotations from *Leon* and *Krull*, suggesting that the notion is well-grounded in existing jurisprudence on the exclusionary rule.").

83. *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

84. Joëlle Anne Moreno, *Rights, Remedies, and the Quantum and Burden of Proof*, 3 VA. J. CRIM. L. 89, 152–53 (2015); *see also* Illinois v. Krull, 480 U.S. 340, 355 (1987) ("As we emphasized in *Leon*, the standard of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers."); United States v. Leon, 468 U.S. 897, 919–20 n.20 (1984).

85. *Leon*, 468 U.S. at 922 n.23.

86. Alschuler, *supra* note 36, at 485–86.

87. Herring v. United States, 555 U.S. 135, 157 n.7 (2009) (Ginsburg, J., dissenting).

subjective standard in criminal cases," but it is not clear which interpretation of recklessness applies in *Herring*'s culpability standard.[88] Similarly, as Professor Wayne LaFave notes, the term "gross negligence" is an elusive term that has "left the finest scholars puzzled."[89] Further, the Court has never used the term "systemic negligence" before.[90]

Professor Joëlle Moreno argues that the *Herring* opinion also implicitly gave new meaning to the term "flagrancy."[91] She notes that in *Herring*, the Court stated that "an assessment of the flagrancy of the police misconduct constitutes an important step in the [exclusion] calculus" under the good faith doctrine.[92] Two years after *Herring*, the Court in *Davis v. United States*[93] adopted this rationale in another case premised on the good faith exception. The Court held that suppression in the context of good faith "focus[es] the inquiry on the flagrancy of the police misconduct at issue."[94] Moreno believes that in *Herring*, Chief Justice Roberts improperly conflated flagrant misconduct with intentional or mentally culpable misconduct.[95]

3. New Procedural Impracticalities

Professor Andrew Ferguson argues that replacing the good faith standard with this new subjective culpability standard creates new issues to consider for courtroom litigation.[96] For example, focusing

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88. Alschuler, *supra* note 36, at 486.

89. Lafave, *supra* note 82, at 784 ("The Court has acknowledged that the term "gross negligence" can often equate to recklessness. However, because "gross negligence" "is used in *Herring* to fill out a list into which the term "reckless" had already been placed, presumably the term is not being used merely as a synonym for recklessness."); *see also supra* Section I.A.1.

90. *Id.* at 784–85 ("[I]t presumably refers to a variety of negligence that has an effect upon an entire recordkeeping system . . . [b]ut just what is necessary to show what the Court referred to as 'systemic error' at another point in *Herring* is far from clear.").

91. Moreno, *supra* note 81, at 49 ("Starting with *Herring*, a majority of the Court transformed the operative constitutional language by inserting a single ambiguous word into the new suppression standard.").

92. Herring v. United States, 555 U.S. 135, 143 (2009).

93. 564 U.S. 229 (2011).

94. *Id.* at 238.

95. Moreno, *supra* note 81, at 51 ("Starting with *Herring*, the Court has repeatedly used the word flagrant when it actually means intentional or mentally culpable.").

96. *See generally* Andrew Guthrie Ferguson, *Constitutional Culpability: Questioning the New Exclusionary Rules*, 66 FLA. L. REV. 623 (2014) (addressing the various issues presented by the Supreme Court's recent Fourth Amendment decisions).

on an officer's subjective knowledge may give the prosecution an additional opportunity to bolster its case by allowing the officer to testify as to his subjective reasoning.[97] Allowing an officer to testify as to his subjective belief for why he thought his actions were constitutional may sway the Court to focus too much on subjective considerations that the defense cannot contradict.[98]

Another problem potentially created is that prior experience of the officer now becomes relevant under this new standard.[99] Previously, "past experience was irrelevant to whether the officer acted within constitutional restraints."[100] However, as Ferguson notes, under the new culpability standard, "[i]f an officer had been disciplined because of prior inattention to constitutional restraints, this fact would bear on the nature of the constitutional wrong . . . [a]s might be imagined, this history of prior conduct will present a real difficulty for courts in terms of time, expense, and confusion."[101]

Finally, using a subjective culpability standard may increase the defendant's burden of proof in the context of the good faith exception.[102] As Professor Kay Levine notes, "[e]vidence of malicious or reckless intent is often hard to come by, especially when officers are testifying under oath."[103] This new burden of proof requirement will likely lead to many fewer applications of the exclusionary rule at suppression hearings.[104]

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97. *Id.* at 671.

98. *Id.* at 673 ("Showing a pattern of constitutional practice may counteract the defense's attempt to show a pattern of violations.").

99. *Id.* at 671.

100. *Id.* at 673.

101. *Id.*

102. United States v. De La Torre, 543 F. App'x 827, 830 (10th Cir. 2013) (holding that despite defendant's proof of overbroad search warrant, good faith exception applies unless defendant also proved the overbroad warrant resulted from a 'flagrant or deliberate' violation of rights under *Herring*); United States v. Guerrero, 500 F. App'x 263, 264–65 (5th Cir. 2013) (holding that evidence seized pursuant to facially invalid warrant is admissible based on *Herring* because defendant could not prove the officer's conduct was sufficiently culpable).

103. Kay L. Levine et al., *Evidence Laundering in a Post*-Herring *World*, 106 J. CRIM. L. & CRIMINOLOGY 627, 644 (2016); *see also* Herring v. United States, 555 U.S. 135, 157 (2009) (Ginsburg, J., dissenting) ("How is an impecunious defendant to make the required showing?").

104. Tom Goldstein, *The Surpassing Significance of* Herring, SCOTUSBLOG (Jan. 14, 2009), http://www.scotusblog.com/wp/the-surpassing-significance-of-herring/ [https://perma.cc/67ZM-FGN7] ("[T]he Supreme Court today extended the good faith exception to ordinary police conduct.") ("If *Herring* comes to be cited for the proposition that the defendant must affirmatively prove that the officer was reckless rather than merely negligent, then the exclusionary rule will apply much, much more rarely than it does today.").

4. Unclear Implications for Attenuation

Scholars also comment on the unprecedented use of the word "attenuated" in the *Herring* opinion.[105] The Court used language three different times that suggested that its holding might be relevant to a completely separate exception to the exclusionary rule—the attenuation exception. First, the Court stated that "the error was the result of isolated negligence attenuated from the arrest . . . [and] that in these circumstances the jury should not be barred from considering all the evidence."[106] Second, in describing the Eleventh Circuit's ruling, the Court then stated that "[b]ecause the error was merely negligent and attenuated from the arrest, the Eleventh Circuit concluded that the benefit of suppressing the evidence 'would be marginal or nonexistent . . . .'"[107] Finally, the Court concluded that "[a]n error that arises from nonrecurring and attenuated negligence is . . . far removed from the core concerns that led us to adopt the rule . . . ."[108]

The Court never explained why it used the word attenuated at all.[109] As Alschuler demonstrates, according to the meaning attenuation has had over the last seventy years, "attenuation" had no place in the *Herring* opinion:

> The negligence of the Dale County clerk in *Herring* was plainly both a but-for and a proximate cause of the defendant's unlawful arrest. . . . Nothing whatsoever had happened to "dissipate" or "attenuate" his error. Although the clerk's error occurred five months before Herring's arrest, the passage of time certainly did not "dissipate the taint" or break the causal chain. To the contrary, Dale County's failure to check its electronic record against its paper record during the five-month period might have been regarded as aggravating the initial wrong.[110]

Accordingly, scholars remain puzzled as to what the Court meant by "attenuated" in the *Herring* opinion.[111] However, as the next section demonstrates, cases focused on the attenuation exception have begun to use language from *Herring*'s good faith analysis.

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105. Alschuler, *supra* note 36, at 478–81.
106. *Herring*, 555 U.S. at 137.
107. *Id.* at 138–39.
108. *Id.* at 144.
109. Alschuler, *supra* note 36, at 478–79.
110. *Id.* at 479.
111. Lafave, *supra* note 82, at 771–76.

C. *Herring*'s Lasting Impact: *Utah v. Strieff* and the Current State of the Attenuation Exception's Purpose and Flagrancy Factor

Despite the concerns outlined by scholars in the previous section, the Court has continued to rely upon *Herring*'s controversial culpability analysis.[112] Specifically, the culpability analysis, established in the context of the good faith exception, has been used to evaluate the purpose and flagrancy factor of the attenuation exception in *Utah v. Strieff*.[113] Section I.C.1 reviews the facts and decision of *Utah v. Strieff*. Section I.C.2 discusses the dissent's concern that *Strieff* incentivizes officers to commit illegality. Section I.C.3 explains scholars' concern that equating flagrancy with *Herring*'s culpability standard overly burdens the defendant.

1. Utah v. Strieff*: Facts and Majority Opinion*

In *Utah v. Strieff*, the Court held that an illegal stop was sufficiently attenuated from drug evidence later found on the defendant, Edward Strieff.[114] In this case, Officer Fackrell had been intermittently surveilling a house he suspected of drug activity based on an anonymous tip.[115] During his surveillance, he observed Edward Strieff exiting this house, but he did not know when he entered the building or how long he had been there.[116] Officer Fackrell stopped Strieff—illegally, since he did not possess the requisite reasonable suspicion[117]—and demanded identification information, which led him to discover an outstanding arrest warrant for an unrelated traffic violation.[118] Based on the warrant, Officer Fackrell arrested Strieff and searched him incident to the arrest.[119] Officer Fackrell discovered drug evidence against Strieff during this search.[120]

To determine whether the evidence was properly admitted at trial, the Court applied the three *Brown* attenuation factors.[121] It first

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112. Davis v. United States, 564 U.S. 229, 240–41 (2011).

113. Moreno, *supra* note 81, at 68 ("The assessment of flagrancy [in *Strieff*] was a not-so-subtle attempt to map the current Court's flagrant police abuse suppression standard onto preexisting attenuation doctrine.").

114. Utah v. Strieff, 136 S. Ct. 2056, 2060 (2016).

115. *Id.* at 2059.

116. *Id.* at 2060.

117. *Id.* at 2062 (ruling that the information possessed by Officer Fackrell did not rise to the level of reasonable suspicion).

118. *Id.* at 2060.

119. *Id.*

120. *Id.*

121. *Id.* at 2062.

declared that the temporal proximity factor favored suppression because the time between the illegal stop and discovery of evidence was only a few minutes.[122] Second, it deemed the outstanding warrant an intervening circumstance, which would weigh in favor of admission.[123] Third, and most significantly, when analyzing the purpose and flagrancy factor, the Court implicated *Herring*'s good faith analysis.[124]

Instead of assessing the obviousness of the impropriety as was done in *Brown*,[125] the Court asked whether Fackrell's mistakes were more than negligent, like in *Herring*.[126] The Court answered by concluding that Officer Fackrell's decision to unlawfully stop Strieff was a "good-faith mistake" that was "at most negligent."[127] However, the Court never explained why it believed a "good faith" determination was appropriate in the context of attenuation's purpose and flagrancy factor. Further, the Court stated that "it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct."[128] Ultimately, the Court found that the evidence was sufficiently attenuated from the illegal stop and thus deemed it admissible.[129]

2. The Dissents: Strieff *Provides Incentive to Commit Misconduct*

Justice Sotomayor and Justice Kagan wrote separately in dissent, but both argued that the outcome of *Strieff* provides police with further incentive to commit Fourth Amendment violations.[130] Justice Sotomayor argued that based on this decision, as long as an outstanding warrant exists, the illegality of a search makes no difference.[131] She specifically discussed how "surprisingly common"

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122. *Id.*

123. *Id.* at 2062–63.

124. *Id.* at 2063; *see also* Goldstein, *supra* note 104 ("[T]he Supreme Court today extended the good faith exception to ordinary police conduct."). *But see* Alschuler, *supra* note 36, at 473 ("First, creating a general good faith exception for police conduct would be an extraordinary shift in Fourth Amendment law that would effectively overrule a ton of cases" (internal quotations omitted)).

125. Brown v. Illinois, 422 U.S. 590, 605 (1975) ("The impropriety of the arrest was obvious . . . ").

126. Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

127. *Id.* at 2063.

128. *Id.*

129. *Id.* at 2064.

130. *See id.* at 2065–66 (Sotomayor, J., dissenting); *id.* at 2073–74 (Kagan, J., dissenting). Justice Kagan was joined by Justice Ginsburg. Justice Sotomayor was joined by Justice Ginsburg as to all but Part IV of the opinion.

131. *See id.* at 2067 (Sotomayor, J., dissenting).

outstanding arrest warrants are, and "how these astounding numbers of warrants can be used by police to stop people without cause."[132] Quite powerfully, she opined that "this case tells everyone, white and black, guilty and innocent . . . that your body is subject to invasion while courts excuse the violation of your rights."[133]

Justice Kagan similarly objected that this outcome incentivizes police to commit illegal stops.[134] She argued that applying the exclusionary rule to the facts of *Strieff* would have resulted in sufficient deterrence benefits.[135] She reasoned that an officer who believes any evidence he discovers illegally will be inadmissible "is likely to think the unlawful stop [is] not worth making."[136] She further commented that such effect is "precisely the deterrence the exclusionary rule is meant to achieve."[137] The outcome of the *Strieff* decision removes the deterrent benefit of the exclusionary rule as long as an outstanding warrant exists:

> So long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution. The officer's incentive to violate the Constitution thus increases: From here on, he sees potential advantage in stopping individuals without reasonable suspicion—exactly the temptation the exclusionary rule is supposed to remove.[138]

These justices ultimately believe that conduct like Officer Fackrell's should be dis-incentivized. However, as Justice Sotomayor notes, the officer's incentive to violate the law will remain so long as the burden of proof remains on the defendant to prove an officer's subjective culpability.[139]

3. Increased Burden of Proof Turns on Flagrancy's Definition

Scholars predicted that the *Herring* culpability standard would ultimately result in fewer applications of the exclusionary rule because the defendant will have an increased burden to prove that an officer acted with the required subjective culpability level.[140]

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132. *Id.* at 2068 (Sotomayor, J., dissenting).
133. *Id.* at 2070.
134. *See id.* at 2074 (Kagan, J., dissenting).
135. *See id.* at 2071–72.
136. *Id.* at 2073.
137. *Id.* at 2073–74.
138. *Id.* at 2074.
139. *See id.* at 2069 (Sotomayor, J., dissenting).
140. Goldstein, *supra* note 104.

According to Moreno, the outcome of *Strieff* confirms this prediction, in the context of the attenuation exception.[141]

The *Strieff* Court held that "it [was] especially significant that there [was] no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police conduct."[142] The Court, significantly, rejected Strieff's argument that Officer Fackrell was flagrant by concluding that his behavior "was not a suspicionless fishing expedition 'in the hopes that something would turn up.'"[143] Moreno argues that the facts of *Strieff* do not support such a conclusion.[144] Moreno points out that Fackrell candidly admitted that he lacked sufficient reasonable suspicion to stop Strieff.[145] Considering Fackrell's other admission, that he wanted to "find out what was going on [in] the house,"[146] the fact that he did not wait to develop reasonable suspicion for a lawful stop suggests to Moreno that "[t]he evidence, on its face, cannot support a finding of mere negligence."[147] Still, Strieff was unable to convince the Court that Fackrell acted flagrantly.

Moreno argued that the Court's treatment of flagrancy in this case equates flagrant conduct with intentional or reckless conduct, just like in *Herring*.[148] She believes that *Strieff*'s treatment of the word flagrancy puts an unfair burden on the defense to prove the officer's subjective culpability because "[w]hen flagrancy is defined as a hidden mental state it becomes unknowable."[149] She acknowledges that proof of subjective culpability is an acceptable burden for the prosecution to bear when trying to overcome the presumption of innocence in a criminal case.[150] However, she argues that applying this same "insurmountable burden" to defendants in the context of a suppression hearing is inappropriate:

> Searches and seizures are rarely witnessed events, police officers characteristically do not disclose to suspects their intent to violate the constitution, and police officers who witness illegal police conduct are unlikely to be cooperative and forthcoming. Thus, defendants typically must rely on their own first-hand eyewitness

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141. *See* Moreno, *supra* note 81, at 46–48.
142. *Strieff*, 136 S. Ct. at 2063.
143. *Id.* at 2064 (quoting Taylor v. Alabama, 457 U.S. 687, 691 (1982)).
144. Moreno, *supra* note 81, at 69.
145. *Id.*
146. *Strieff*, 136 S. Ct. at 2072.
147. Moreno, *supra* note 81, at 69.
148. *Id.* at 41–42.
149. *Id.* at 51.
150. *See id.* at 55.

> accounts of police misconduct, which are necessarily self-serving and may also be incomplete or poorly-recalled.[151]

II. LOWER COURT PURPOSE AND FLAGRANCY FACTORS

Given the issues presented by scholars in the above part, a new standard for "flagrancy" must be developed. Much like the Supreme Court shows in *Utah v. Strieff*, lower courts' decisions demonstrate confusion about how flagrancy is to be defined in the Fourth Amendment context. No formal analysis of different interpretations of the purpose and flagrancy factor exists in scholarly writing. Accordingly, this section attempts to distinguish three different trends of how the purpose and flagrancy factor has been interpreted within the attenuation context since *Herring*. Each case discussed represents a different trend or variation of a trend.

The courts have treated flagrancy in three general ways. Section II.A discusses two cases that expressly equate flagrancy with subjective intent. Section II.B discusses a case that defines flagrancy as both an objective and subjective inquiry. Section II.C explores three cases that utilize an objective definition for flagrancy, but still consider the officer's subjective intent as a separate "purpose" component.

A. Flagrancy Equated to Subjective Intent

Some courts completely abandon the objective approach and evaluate the "purpose and flagrancy" factor of the attenuation exception based on the officer's subjective culpability. These courts treat purpose and flagrancy as equivalent, interchangeable concepts that depend on the subjective intent of the officer.[152] They also tend to require the highest levels of mens rea culpability—deliberate or intentional—for the final attenuation factor to weigh in favor of suppression.

This approach poses the highest evidentiary hurdle for defendants.[153] Fourth Amendment case law has historically rejected analysis of an officer's subjective intent, so prosecutors do not ask officers questions about their subjective beliefs on direct examination

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151. *Id.*

152. *See, e.g.*, United States v. Shetler, 665 F.3d 1150, 1160 (9th Cir. 2011) (holding that an officer acts with the requisite intent when he "purposely extracts evidence" *or* acts with "flagrant illegality" (citing United States v. Washington, 387 F.3d 1060, 1075 n.17 (9th Cir. 2004)).

153. *See* Moreno, *supra* note 81, at 69 (noting that proof of intentional or mentally culpable police misconduct constitutes a "virtually insurmountable burden of proof").

at a suppression hearing.[154] Therefore, while it is theoretically the government's burden to prove attenuation, in practice, the defendant often ends up bearing the burden of proof.[155] Thus, a defendant needs to develop a record with evidence pertaining to officer intent through cross examination.[156] However, this burden is heavy, particularly at the highest level of mens rea culpability.[157] An officer will rarely admit that his intent was to violate the law or that it was improper, and most courts presume that an officer does not possess the required culpable intent unless otherwise proven.[158] Thus, these courts most frequently find in favor of attenuation.

For example, in *United States v. Belt*,[159] the Fourth Circuit held that the state troopers' intent was not flagrant because the circumstances were not coercive enough to convince the court the officers had an improper purpose.[160] Based on a tip that the defendant was making methamphetamines, troopers headed to his home intending to conduct a knock-and-talk.[161] Instead, when they arrived, they noticed the defendant's eleven-year-old son outside and followed him into the defendant's home; this conduct constituted an illegal entry because the defendant did not consent to their entry.[162] Once inside, one trooper asked the defendant for consent to search his home, but he refused and said they would need a warrant.[163] Troopers continued questioning him and asked what was worrying him.[164] The defendant answered that there were "two jars upstairs

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154. *See* Orin Kerr, *Opinion Analysis: The Exclusionary Rule Is Weakened but It Still Lives*, SCOTUSBLOG (June 20, 2016, 9:35 PM), http://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives/ [https://perma.cc/W8JU-84JK] (noting that although the government bears the burden of establishing attenuation, the Court has made clear officer's intent is completely irrelevant to Fourth Amendment violations in recent decades, and thus there is usually nothing in the record relevant to officer purpose). *See generally* Moreno, *supra* note 81.

155. *See* Kerr, *supra* note 154.

156. *See id.*

157. *See* Moreno, *supra* note 81, at 55.

158. *See id.*

159. 609 F. App'x 745 (4th Cir. 2015).

160. *See id.* at 750.

161. *Id.* Normally, the home is a constitutionally protected area. *See* Florida v. Jardines, 569 U.S. 1, 6 (2013). However, under the knock and talk rule, an officer may "approach a home and knock, precisely because that is 'no more than any private citizen may do.'" *Id.* at 8 (quoting Kentucky v. King, 563 U.S. 452, 469–70 (2011)).

162. *See Belt*, 609 F. App'x at 747–48.

163. *Id.* at 747.

164. *Id.*

that had been used for something" and explained the jars contained "the stuff everyone makes."[165] Based on the information learned, one of the troopers left and obtained a search warrant.[166] Upon returning, the troopers searched the home, and found firearms and items used to manufacture methamphetamines.[167] The Fourth Circuit held that the discovery of the methamphetamine evidence was sufficiently attenuated from the illegal entry, noting the troopers did not flagrantly violate the law when entering the defendant's home without his consent.[168]

Based on the defendant's seemingly voluntary actions and calm demeanor, the court declined to infer that the troopers possessed any culpable intent.[169] The court openly disagreed with the troopers' decision to follow the young son into the home instead of conducting the knock-and-talk.[170] However, the court found that because the defendant "felt comfortable refusing consent to search the home," and because "the voluntary nature of the discussion between defendant and troopers" never changed, no evidence indicated intimidating circumstances or that the troopers possessed culpable intent.[171] Therefore, their illegal entry was not a flagrant violation of the law that would warrant suppression, and the evidence was properly admitted under the attenuation exception.[172]

However, in *United States v. Shetler*,[173] the Ninth Circuit found sufficient evidence to determine that the officers' subjective intent was specifically to find evidence against the defendant. In this case, officers had received a tip that the defendant was making methamphetamines.[174] Officers knocked on his front door, and the defendant exited his house and approached them from a side door.[175]

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165. *Id.*

166. *Id.*

167. *Id.* at 747–48.

168. *Id.* at 749–50.

169. *Id.* at 750 ("Nothing indicates the troopers acted with an improper purpose. The troopers intended to conduct a "knock and talk" until Appellant's son invited them into the home, and after Appellant refused to permit the troopers to search his home, one trooper merely asked what worried Appellant. Appellant could have refused to answer this question. The fact that Appellant felt comfortable refusing consent to search the home reflects an absence of intimidation in this scenario.").

170. *See id.* at 750 (noting the troopers "should have proceeded with greater caution and respect for Appellant's privacy").

171. *Id.*

172. *Id.*

173. 665 F.3d 1150 (9th Cir. 2011).

174. *Id.* at 1153.

175. *Id.* at 1154.

Immediately, the officers handcuffed and detained him.[176] The officers called into the defendant's house to get his girlfriend and daughter out of the house.[177] Once they exited, the officers entered the home and conducted a search of the home.[178] While the home was already being searched, other officers asked the defendant's girlfriend for consent to search the house, which she eventually gave, but only after the search had started.[179] After witnessing the officers' entry, the defendant was Mirandized and then confessed that he'd been manufacturing methamphetamines in his garage.[180]

In considering the third prong of the attenuation test, the court said the officers' conduct was flagrant after inferring their improper subjective intent from four circumstances.[181] First, the officers never left the house after performing the illegal search—they stayed in a room near the entryway for about twenty-five more minutes.[182] Second, they searched the house before asking the defendant's girlfriend for consent to enter and search their home.[183] Third, officers remained inside the house while others obtained the girlfriend's (tainted) consent.[184] Fourth, the court assumed the officers specifically used the items they illegally seized when questioning the defendant.[185] Accordingly, the court concluded that the purpose of the officers' subsequent illegal searches was "indisputably to find evidence that could be used against the defendant."[186] Because of this improper purpose, the officers' actions were determined to be flagrant, the attenuation exception did not apply, and the defendant's inculpatory statements were suppressed.[187]

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176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 1160.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 1158–60 (reasoning that because the defendant was detained outside his home for over five hours, during which he saw several illegal searches involving protective clothing and masks, the answers he gave were likely "influenced by his knowledge that the officials had already seized certain evidence").
186. *Id.* at 1160.
187. *Id.* at 1150.

B. Flagrancy Depends on Objective Reasonableness and Subjective Intent

Some courts apply both an objective standard and a subjective standard to the purpose and flagrancy factor of the attenuation exception. These courts use both objective and subjective standards to define flagrancy.[188] These courts first consider whether the officer acted in "objective good faith." Second, they consider whether the officer had the specific intent required to justify exclusion.

For example, in *McDaniel v. Polley*,[189] the Seventh Circuit decided the officers' actions were not flagrant for both objective and subjective reasons. In this case, four officers went to the defendant's house in a murder investigation, knowing they did not yet have probable cause to arrest the defendant.[190] The defendant consented to their requests to enter and to search his home.[191] The defendant then began acting nervously, so the officers cuffed him but informed him he was not under arrest.[192] After the officers uncuffed him, the defendant agreed to the officers' request to go to the station.[193] The defendant was then Mirandized and questioned three separate times over twenty-four hours.[194] He confessed to murder and signed a written confession.[195] The trial court concluded that the officers unlawfully placed the defendant in custody by handcuffing him.[196] However, the Seventh Circuit held that the confession was sufficiently attenuated from the original illegal arrest, and therefore the confession was admissible.[197]

In evaluating what it called the "flagrancy" factor of the attenuation analysis,[198] the Seventh Circuit made two determinations. First, the court determined whether the officers' mistake of arresting

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188. *See, e.g.*, United States v. Reed, 349 F.3d 457, 465 (7th Cir. 2003) (requiring a showing of objective "bad faith" and subjective intent to commit misconduct without probable cause in order to tip the entire final attenuation factor towards suppression).

189. 847 F.3d 887 (7th Cir. 2017).

190. *Id.* at 891.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 892.

195. *Id.*

196. *Id.*

197. *Id.* at 897.

198. *Id.* at 896 ("The flagrancy of police misconduct is the most important element of our analysis because the exclusionary rule is aimed at deterring police misconduct.") (citing United States v. Reed, 349 F.3d 457, 464–65 (7th Cir. 2003)).

the defendant (when placing the cuffs on him) without probable cause was made in good faith.[199] The court said it was, because the mistake was merely negligent.[200] Second, the Seventh Circuit determined that the officers' subjective intent was not culpable.[201] The court suggested that the officers only would have been sufficiently culpable if they subjectively intended to arrest the defendant when placing the cuffs on him.[202] Here, they did not.[203] Therefore, based on both objective and subjective determinations, the Seventh Circuit held that the officers' placement of the cuffs on the defendant was not flagrant.[204] Excluding the confession, according to the court, "would not deter this type of conduct: officers would still have to investigate crimes before they have probable cause and would continue to rely on various witnesses' and suspects' consent when doing so."[205]

C. Flagrancy Depends on Objective Reasonableness, and Purpose Depends on Subjective Culpability

Some courts treat flagrancy as an entirely objective consideration based on the clarity of existing case law. These courts consider an officer's conduct flagrant if it violates case law that is sufficiently clear and thus should be known by a reasonably trained officer. This standard is objective because it does not require determining whether the officer subjectively knows his conduct is illegal when committing it, but rather it requires determining whether the officer *should have* known it was illegal, based on how clear case law is concerning the particular act. However, while flagrancy remains an objective determination, the officer's subjective intent still affects the attenuation analysis. The "purpose" portion of the flagrancy and purpose factor is still treated as a subjective consideration that is analyzed separately from the flagrancy determination.[206]

For example, in *United States v. Fuller*,[207] the court evaluated "flagrancy" under an objective standard and separately analyzed

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199. *McDaniel*, 847 F.3d at 896 ("These mistakes, if they were mistakes, constitute negligence.").

200. *Id.* at 896–97.

201. *Id.* at 897.

202. *Id.* at 896–97.

203. *Id.* at 897.

204. *Id.*

205. *Id.*

206. *See, e.g.*, United States v. Cantu, 426 F. App'x 253, 258–59 (5th Cir. 2011) (applying an objective flagrancy factor and a separate purpose factor based on subjective culpability).

207. 120 F. Supp. 3d 669, 682, 689 (E.D. Mich. 2015).

"purpose" under a subjective standard. In this case, two officers—Officers Montgomery and Corrie—stopped the defendant for questioning, subjectively "seeking to execute an outstanding arrest warrant" against a man that Officer Montgomery confused with the defendant.[208] Officer Montgomery realized that the defendant was not the person he was looking for, but he continued to detain Fuller.[209] At this point, reasonable suspicion was removed.[210] However, the officers illegally detained the defendant anyway to determine whether any outstanding warrants existed in his name.[211] Officer Montgomery attempted to do a pat-down search, but the defendant refused, and eventually fled on foot.[212] The officers caught the defendant, subdued him, and discovered a loaded handgun.[213] The court ruled that the discovery of the handgun was not sufficiently attenuated from the unlawfully continued detention of the defendant.[214]

First, the court stated "[t]he purposefulness factor is met when the unlawful action is investigatory, that is, when officers unlawfully seize a defendant 'in the hope something might turn up.'"[215] Here, the court found that the officers possessed such intent.[216] Even though the informed officer knew that the defendant was not the man they were looking for, he conceded that he wanted to see if there was an outstanding warrant.[217] However, Officer Montgomery had been directly involved with the defendant's prior criminal case, meaning that he should have been fully aware that the defendant no longer had any outstanding arrest warrants.[218] While the court ruled it was relevant to consider whether "the illegal conduct was calculated 'to cause surprise, fright, and confusion,'" it concluded that "purposeful

208. *Id.* at 672.

209. *Id.* at 674.

210. *Id.* at 682 ("Once Deputy Montgomery's reasonable suspicion was dispelled, Deputy Montgomery had no objectively reasonable basis to continue to detain Fuller.").

211. *Id.* at 675.

212. *Id.* at 675–76.

213. *Id.* at 676 ("Deputy Montgomery then conducted a pat down of Fuller and found a loaded handgun in Fuller's back pocket.").

214. *Id.* at 690.

215. *Id.* at 689.

216. *Id.* at 682.

217. *Id.* at 689.

218. *Id.* at 689–90.

and flagrant misconduct is not limited to situations where the police act in an outright threatening or coercive manner."[219]

The court said that "[a]n officer's conduct is flagrant if it violates well-established legal rules."[220] The court found Officer Montgomery's conduct flagrant because he "violated the long-settled rule that a police officer must end a *Terry* stop[221] as soon as his reasonable suspicion evaporates."[222] The court concluded that Officer Montgomery "should have been aware that there was *no* warrant outstanding" for the defendant, and he, thus, should have communicated that to his fellow officer.[223] The officers continued the stop nonetheless. The court characterized Officer Montgomery's decision to continue the *Terry* stop as "especially reckless"[224] because, given his involvement in the defendant's previous criminal case, he *should have known* that the defendant had no outstanding arrest warrant.[225] This comment emphasizes the objective nature of the flagrancy factor because it demonstrates that the court does not require the officer to have subjectively known that he was violating the law. Accordingly, the officer's continued detention of the defendant, which he conceded was to investigate whether an outstanding warrant existed, was flagrant.[226] Therefore, in this case,

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219. *Id.* at 689 (first quoting Brown v. Illinois, 422 U.S. 590, 605 (1975); and then quoting United States v. Shaw, 464 F.3d 615, 630 (6th Cir. 2006)).

220. *Id.*

221. A "*Terry* stop" is another way to describe a regular stop. Under *Terry v. Ohio*, 392 U.S. 1 (1968), a *Terry* stop can be made without the usual probable cause requirements of an arrest or search. It is only valid when it is justified by an objective manifestation that the person stopped or about to be stopped is about to be involved in criminal activity. *See id.* at 32.

222. *Fuller*, 120 F. Supp. 3d at 689.

223. *See id.*

224. *Id.*

225. *Id.* at 689–90 ("[L]ong before Deputy Montgomery encountered Fuller on Wiard Boulevard, the Prosecuting Attorney had both charged Fuller with assault and battery and dismissed that charge. Deputy Montgomery was the officer in charge of that case. As the officer in charge, he had a clear responsibility to keep abreast of the proceedings. Indeed, an officer in charge is tasked with communicating with witnesses; serving subpoenas on the witnesses; and attending certain court proceedings. And although Deputy Montgomery claims that he has no memory of playing any role in the Fuller case once it reached state court, there [sic] some reason to believe that Deputy Montgomery did, in fact, serve a witness subpoena in that case—which should have signaled to Deputy Montgomery that Fuller's criminal case was in process and that no warrant was outstanding. Yet Deputy Montgomery had no idea that the charges against Fuller had been dismissed several months before he encountered Fuller on Wiard Boulevard in October of 2014. Deputy Montgomery's abject failure to learn and remember the status of *his own recent case* led him to violate Fuller's Fourth Amendment rights." (internal citations omitted)).

226. *Id.* at 689.

the purpose and flagrancy factor leaned toward exclusion, and the handgun was ruled inadmissible.[227]

However, the outcome of *United States v. Cantu*[228] demonstrates that a defendant's failure to prove an officer's subjective culpability will outweigh an objective finding of flagrancy and lead to attenuation instead of suppression. In this case, the defendant's boyfriend gave the officers his consent to search his car, in which the officers found a purse.[229] One officer asked the defendant if the purse belonged to her, and she said yes.[230] Despite not asking for consent, the officer then searched her bag and found marijuana and rolling paper.[231] When asked, the defendant confirmed they were hers.[232] The officer arrested her and told her she could help herself out if she knew of narcotics in the vehicle, and she said she believed there might be.[233] A canine searched the car and led the officers to find a substantial amount of cocaine underneath the front seat.[234] DEA agents were notified and then conducted their own interrogation of the defendant.[235] At the end of the interrogation, the defendant confessed to the cocaine in the car.[236]

The court first determined flagrancy based on the objective consideration of how clear the case law was concerning these factual circumstances.[237] The court determined that the precedent laid down by the court in *United States v. Jaras*,[238] which held that mere acquiescence cannot be construed as voluntary consent when officers never asked permission, was longstanding enough that a reasonable

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227. *See id.* at 690.
228. 426 F. App'x 253 (5th Cir. 2011).
229. *Id.* at 255.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* at 255–56.
236. *Id.* at 256, 258.
237. *Id.* at 258 (stating specifically that there was "nothing unclear about *Jaras*, which has been the law of this circuit for almost [fifteen] years").
238. 86 F.3d 383 (5th Cir. 1996). In *Jaras*, police obtained consent for a search from the driver of a vehicle, leading them to two suitcases in the trunk. *Id.* at 386. The driver informed the officers that the suitcases belonged to his passenger, Jaras. *Id.* The officers told Jaras that they obtained permission from the driver to search the car. *Id.* They continued to open the suitcases without obtaining Jaras's explicit consent to the search. *Id.* The court held that the driver's consent to the car did not apply to his passenger's property. *Id.* at 389–90. The court emphasized that Jaras's "mere acquiescence" did not count as voluntary consent to search his belongings, particularly because the officers failed to ask for permission. *Id.* at 390.

officer would be aware of it and not violate it.[239] Therefore, the officer in this case *should have* been aware of it and not violated it.[240] Because he did violate it, he acted flagrantly when searching the defendant's bag.[241]

Second, the court determined that the officer was not subjectively culpable.[242] Specifically, the court did not believe the officer subjectively intended to elicit the defendant's confession to the cocaine by illegally searching her bag.[243] While stating that the officer who searched the defendant's purse was flagrant in doing so, the court ultimately concluded that the illegal search of the purse was still sufficiently attenuated from the discovery of the cocaine because "[n]othing suggests that [the officer] searched [the defendant]'s bags to gain leverage to exact her confession to *other* drugs in the car, nor did his discovery that she had possession of a small quantity of marijuana compel her to confess to possession of a large quantity of cocaine when it was later found."[244] The court afforded the officer's lack of subjective culpability more weight than it afforded its own finding of flagrancy. Accordingly, the court found in favor of attenuation.[245]

In *United States v. Gross*,[246] the Sixth Circuit similarly separated purpose from flagrancy. Flagrancy again depended on the clarity of case law. Purpose, however, did not require specific intent from the officer to be sufficiently culpable to justify exclusion, as it did in *Fuller*. Rather, the court required subjective awareness of the illegality, a slightly lower level of culpability.[247]

In *Gross*, an officer noticed a legally parked car with the defendant sitting in the passenger seat.[248] The officer ran the license plate of the car and found no arrest warrants in the car owner's name.[249] Still, the

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239. *See* United States v. Cantu, 426 F. App'x 253, 257–58 (5th Cir. 2011).
240. *See id.* at 258.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 259.
246. 662 F.3d 393 (6th Cir. 2011).
247. *Fuller* required specific intent, which requires proof that the officer had a specific purpose in mind when committing the illegality. *See* United States v. Fuller, 120 F. Supp. 3d 669, 689 (E.D. Mich. 2015). Awareness of illegality is a slightly lower burden to prove because it does not require a specific thought, only the subjective awareness of circumstances making particular conduct illegal. *See Gross*, 662 F.3d at 406.
248. *Gross*, 662 F.3d at 396.
249. *Id.*

officer exited his vehicle and approached the car, asking what the defendant was doing.[250] He responded that he had been over at his girlfriend's house.[251] During the conversation, the officer noticed a "partially consumed bottle of Remy Martin cognac."[252] After being asked several times, the passenger verbally identified himself.[253] The officer ran a warrant check, which revealed the passenger had an outstanding felony warrant for carrying a concealed weapon.[254] He arrested him and searched him at the precinct but could not find a gun.[255] Shortly after the defendant went to the bathroom, officers found a gun there.[256] Two months later, the defendant confessed to having the gun.[257] Ultimately, the confession was admissible under the attenuation exception.[258]

When evaluating the purpose part of the purpose and flagrancy factor, the court held that the officer's state of mind during the illegal investigatory stop was not sufficiently culpable to tilt the purpose half of this factor towards suppression. The court reasoned that the officer was not subjectively aware that his conduct was illegal.[259] This standard did not depend on the officer's specific intent to engage in an arrest or search without probable cause, as it did in *Cantu*. Rather, it depended on a slightly lower level of culpability: whether he subjectively "knew [he] did not have probable cause" to act as he did.[260] The court inferred that, because he did not "immediately [ask] several questions related to criminal activity other than trespassing,"

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250. *Id.* at 397.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* ("Gross entered a restroom pod that obscured Williams's view of Gross from the shoulder down. A short time later, officers discovered a .380 caliber firearm near the toilet that Gross had used.").

257. *Id.*

258. *Id.* at 402.

259. *See id.* at 406. This court also does not explicitly use the term reckless here. However, the way the court interprets the purpose factor most closely resembles the Model Penal Code's definition of criminal recklessness.

260. *Id.* at 406 (quoting United States v. Shaw, 464 F.3d 615, 631 (6th Cir. 2006)). *Compare* MODEL PENAL CODE § 2.02(2)(a)(i) (AM. LAW. INST. 1962) (requiring that a particular result be the specific intent or "conscious object" of the actor), *with id.* § 2.02(2)(b)(ii) (requiring that the actor be subjectively aware that his conduct will produce a certain result).

he must have subjectively thought he was acting within the permissible scope of behavior.[261]

When evaluating the flagrancy within the overall "purpose and flagrancy" factor, the court applied the same objective clarity of case law standard as in *Cantu* and *Fuller*.[262] The court found that the officer's illegal investigatory stop was not flagrant because the belief that his conduct constituted a legal consensual encounter was reasonable.[263] The court reasoned that because the specific case law establishing his conduct as an investigatory stop rather than a consensual encounter was decided *after* the events of this case had occurred, his mistake was reasonable.[264] Therefore, the conduct could not have been flagrant.[265]

III. THE NEED TO RETURN TO OBJECTIVITY

The above cases from the lower courts demonstrate that significant disagreement persists regarding how to define flagrant misconduct in the attenuation exception. *Herring*'s culpability standard lies at the heart of this disagreement. The Court should not have changed course in *Herring v. United States* when it adopted a new culpability-based standard under the good faith exception. Similarly, the Court should not have transposed this approach in *Utah v. Strieff* to analyze the attenuation exception's "purpose and flagrancy" factor.

When an officer's subjective culpability is considered in the purpose and flagrancy factor analysis, the entire attenuation analysis suffers because it unjustifiably weighs too heavily against the defendant.[266] Originally, the prosecution bore the burden of proof in demonstrating that discovery of evidence was sufficiently attenuated from the officer's illegality. However, under the current culpability standard, the defense unjustly bears the burden to prove the officer's state of mind when committing an illegal act.[267] Further, application of this culpability standard results in outcomes that provide incentives to commit police misconduct rather than avoid it.

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261. *See Gross*, 662 F.3d at 406 (quoting United States v. Williams, 615 F.3d 657, 670–71 (6th Cir. 2010)).

262. *Id.* at 405–06.

263. *Id.*

264. *Id.* ("[I]t was not until . . . [United States v. See], decided after the events in this case, that it would have been clear to [the officer] that his methods were decidedly an investigatory stop and not a consensual encounter.").

265. *Id.* at 406.

266. *See supra* Section I.B.4.

267. *See supra* Section I.C.3.

Accordingly, flagrancy should be defined according to an objective standard, not a subjective standard. Specifically, flagrancy of an illegal act should depend—as it did in *Fuller*, *Cantu*, and *Gross*—on whether a reasonable officer would have committed it, based on clarity of case law precedent at the time of the offense.[268] However, *unlike* in those three cases, the Court should *not* require proof of any level of subjective culpability. Flagrancy should be found when an officer unreasonably violates the law according to a reasonable officer standard. Further, flagrancy should be the only determination within the final attenuation factor—"purpose" should be removed.

Section III.A evaluates why a subjective culpability standard should be rejected and thus why the final attenuation factor should depend solely on an objective determination of flagrancy. Section III.B demonstrates how an objective flagrancy standard based on clarity and longevity of case law could better replace what currently exists.

A. Impracticalities of Subjectivity

The government is supposed to bear the burden of proof when arguing an exception to the exclusionary rule.[269] Scholars correctly predicted, however, that *Herring* would lead to a heightened burden for the defendant. Further, scholars also correctly predicted that *Herring* would complete a shift in Fourth Amendment case law to include an officer's subjective state of mind as a relevant factor. The first part of this section addresses the defendant's heightened burden of proof under a subjective standard. The second part of this section shows why this shift in Fourth Amendment jurisprudence is unnecessary.

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268. *See, e.g.*, United States v. Gross, 662 F.3d 393, 405–06 (6th Cir. 2011); United States v. Cantu, 426 F. App'x 253, 258 (5th Cir. 2011); United States v. Fuller, 120 F. Supp. 3d 669, 689 (E.D. Mich. 2015) ("An officer's conduct is flagrant if it violates well-established legal rules.").

269. *See generally* Wong Sun v. United States, 371 U.S. 471, 487–88 (1963) (holding that after defense proves that officer conduct was illegal, the burden shifts to the prosecution to prove, in the context of attenuation, that "the evidence . . . has been come at by . . . means sufficiently distinguishable to be purged of the primary taint"); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390–92 (1920) (after defendant alleged the search or seizure was illegal, the burden shifted to the prosecution to prove that the exclusionary rule should not apply).

1. Defendant's Burden Is Too High

United States v. Cantu[270] demonstrates how the defendant's heightened burden to prove subjective culpability results in an improper evidentiary outcome. The case depended on whether the purpose and flagrancy factor weighed in favor of suppression or not. The court correctly declared that the officer's behavior was flagrant because the case law pertaining to the officer's particular behavior was perfectly clear and long established.[271] However, because the defendant could not additionally prove that the officer subjectively intended to use the marijuana he illegally found to "exact her confession to *other* drugs in the car . . . ," the Fifth Circuit deemed he was not sufficiently culpable to tip the entire "purpose and flagrancy" factor towards exclusion.[272]

The Fifth Circuit should not have required the defendant to prove the officer's subjective state of mind at the time of his illegal act. The flagrancy determination alone should have made up the entirety of the third attenuation factor. The only evidence available to the defendant pertinent to the officer's intent at the time of the illegal search was what he told the defendant after she was already arrested[273]: that she should "help herself out" and that "if there are any more narcotics in the vehicle, you know, and stuff like that we should know about, I mean, you should let us know."[274] This statement supports the argument that the officer "improperly" intended to use his arrest of Cantu—which was based on the marijuana—to gain evidence regarding the cocaine. Still, the court was unconvinced. The outcome of this case demonstrates the heightened burden on defendant that is created by inserting a subjective culpability consideration into the purpose and flagrancy factor.

The court's decision in *United States v. Belt* demonstrates that a similar problem occurs when flagrancy is directly equated with proof of a subjective state of mind.[275] In *Belt*, the Fourth Circuit determined that the officers were not flagrant when illegally following

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270. *See generally Cantu*, 426 F. App'x 253.

271. *Id.* at 257.

272. *Id.* at 258.

273. *See supra* Section I.C.3 (explaining that defendant only has limited means available to them to prove an officer's state of mind).

274. *Cantu*, 426 F. App'x at 255.

275. United States v. Belt, 609 F. App'x 745, 749–50 (4th Cir. 2015).

the defendant's eleven-year-old-son into defendant's home[276] because "[n]othing indicates the troopers acted with an improper purpose."[277] The court's assumption that the officers were not trying to use the son to gain entry for searching purposes was based on a perceived lack of coercion due to the defendant's calm demeanor.[278] However, the defendant's demeanor should not be dispositive of the officer's subjective state of mind. Furthermore, the court assumed the officer's motives were proper, demonstrating the burden shift that a subjective standard produces in practice. Even though the court disagreed with the officer's decision to follow the son into the defendant's home, because he was not found subjectively culpable, the evidence was ultimately admissible.

2. No Need to Contradict Fourth Amendment Jurisprudence

Cases such as *Shetler*, *McDaniel v. Polley*, *Gross*, and *Fuller* demonstrate that courts may be able to sometimes achieve the proper outcome despite having a partially or fully subjective standard. However, a subjective standard still yields improper outcomes, such as those in *Belt* and *Cantu*. An objective flagrancy standard would achieve the same outcomes in the cases that came out properly, and it would also correct the outcomes of cases that came out improperly. Accordingly, contradicting case law by applying a subjective culpability standard in the third attenuation factor is unnecessary.

For example, the illegal search of the defendant's home in *Shetler* was objectively flagrant simply based on clearly and consistently held precedent that consent can only be used as an exception to the warrant requirement when it is given voluntarily.[279] No reasonable officer could ever conclude that the consent given by the defendant's girlfriend under the circumstances of this case was voluntary. Furthermore, her consent was only granted *after* some of the officers

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276. This action was illegal because "no reasonable officer would believe that Belt's eleven-year-old child had authority to consent to the officers' entry into Belt's home, nor does the record establish that the child had actual authority to give such consent." *Id.* at 751 (Wynn, J., dissenting); *see also* United States v. Matlock, 415 U.S. 164, 171 (1974) (requiring a third party to have common or actual authority to consent to police entering a defendant's premises).

277. *Belt*, 609 F. App'x at 750.

278. *Id.* at 249.

279. Consent is legally invalid unless the individual granting consent does so voluntarily, rather than as "the result of duress or coercion, express or implied." Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973). Further, a larger number of officers, as was present here, is a known factor suggesting lack of voluntariness. *See generally* WAYNE R. LAFAVE & DAVID C. BAUM, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. 2017).

had already illegally entered the defendant's home.[280] This conduct would have been objectively flagrant and would have tipped the flagrancy factor in favor of suppression just the same, without requiring the court to make inferences regarding subjective intent.

Similarly, the continued detention of the defendant in *Fuller* was objectively flagrant based on the long-held principle that a stop is only justifiable when reasonable suspicion exists.[281] Once Officer Montgomery realized that the defendant was not the person he was looking for, his reasonable suspicion to detain the defendant no longer existed. A reasonably well-trained officer would have let the defendant go after that point. Accordingly, Officer Montgomery's conduct would have been deemed flagrant under an entirely objective standard (as it was in the case).[282]

Cases like *Gross* and *McDaniel v. Polley* each demonstrate situations where the officer was not acting objectively flagrantly, and therefore applying the attenuation exception was appropriate. In *Gross*, the court expressly conceded that "it was not until . . . [*United States v. See*[283]], decided after the events in this case, that it would have been clear to [the officer] that his methods were decidedly an investigatory stop and not a consensual encounter."[284] Accordingly, the court acknowledged that case law was not sufficiently clear at the time of the questionable behavior for a reasonable officer to have known that it was unconstitutional, and thus, his behavior was not flagrant.[285]

In *McDaniel v. Polley*, the conduct at issue was whether placing handcuffs on a defendant while telling him he was not under arrest actually qualifies as an arrest.[286] Applying an objective flagrancy standard based on clarity of case law, this conduct would not be considered flagrant. Case law is not entirely clear as to when a police encounter escalates to an "arrest." The standard currently applied by the courts to determine whether conduct constitutes an arrest is whether a reasonable person would feel free to leave.[287] The lower court concluded that handcuffing the defendant constituted an

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280. United States v. Shetler, 665 F.3d 1150, 1154 (9th Cir. 2011).

281. *See* Terry v. Ohio, 392 U.S. 1, 26 (1968) (establishing that an officer need not have full probable cause to conduct a stop and frisk, so long as the officer reasonably believes his physical safety is in danger due to a weapon).

282. *See generally* United States v. Fuller, 120 F. Supp. 3d 669 (E.D. Mich. 2015).

283. 574 F.3d 309 (6th Cir. 2009).

284. United States v. Gross, 662 F.3d 393, 405–06 (6th Cir. 2011).

285. *Id.* at 406.

286. *See supra* Section II.B.

287. Florida v. Royer, 460 U.S. 491, 502 (1983).

arrest,[288] but handcuffs do not always mean someone is under arrest.[289] Therefore, the officer in this case reasonably believed his conduct did not constitute an arrest. He would not be flagrant under an objective standard, just as he was not found flagrant under a standard considering subjective culpability.

B. Flagrancy Should Be Based on Clarity of Case Law

The flagrancy standard applied in *Fuller*, *Cantu*, and *Gross* (separate from the purpose factor in those cases) solves the above problems that the subjective approach creates because it is an entirely objective standard. Whether a violation is flagrant or not should depend on whether case law clearly and consistently has established the constitutionality of the conduct in question.

1. Burden Properly Relieved

Applying an objective flagrancy standard based on clarity of case law will return the defendant's burden of proof at the suppression hearing to its proper level.[290] The government is supposed to bear the burden of proof when arguing an exception to the exclusionary rule.[291] However, currently, most courts presume an officer's subjective intent to be legal until proven otherwise.[292] Accordingly, the current *Herring* flagrancy standard requires the defendant to find evidence of the officer's subjective state of mind.[293] Because the testimony of an officer will rarely include evidence of intent, the defendant is at a severe disadvantage because all he has are his first-hand observations of the officer's conduct.[294] Such evidence only circumstantially demonstrates an officer's intent and requires courts to make speculative inferences, which they are loathe to do.[295]

In *Utah v. Strieff*, the defendant's burden of proof would have been significantly relieved if the Court determined flagrancy under an objective standard based on clarity of case law precedent. In *Strieff*, the government only had one statement regarding the officer's

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288. McDaniel v. Polley, 847 F.3d 887, 892 (7th Cir. 2017) ("The trial court ruled that the officers arrested McDaniel when they handcuffed him at his home . . . ").

289. *See, e.g.*, Arizona v. Johnson, 555 U.S. 323, 327 (2009) (holding that a stop did not escalate to an arrest simply because the officers handcuffed the defendant).

290. Moreno, *supra* note 81, at 52–55.

291. *See generally* Moreno, *supra* note 84.

292. Moreno, *supra* note 81, at 54; *see also* Kerr, *supra* note 154.

293. *Id.* at 54.

294. *Id.* at 55.

295. *See generally* Moreno, *supra* note 84.

purpose.[296] At the suppression hearing, when asked why he stopped Strieff, Fackrell replied that Strieff "was coming out of the house" that he had been watching and he wanted to "find out what was going on in the house . . . [and] what Strieff was doing there."[297] The Court decided, within the purpose and flagrancy factor of the attenuation analysis, that Fackrell's decision was a "good faith" mistake.[298] It remains unclear how this generic statement that he wanted to investigate the case met the government's burden to show good faith.[299] Still, the Court found the officer's conduct was not flagrant.[300]

However, a flagrancy standard like that in *Fuller, Cantu,* or *Gross* (but *not* including the separate "purpose" consideration) would have yielded a different—and appropriate—outcome. The only burden would be to discern the clarity of case law surrounding stops, particularly whether a reasonable officer would know that without seeing when someone leaves a suspected drug house, he does not have the requisite reasonable suspicion to stop the individual.[301] In *Utah v. Strieff*, a reasonable officer would have known he did not have enough evidence to stop the individual.[302] Thus, the officer's conduct was flagrant, and the flagrancy factor of the attenuation analysis would favor suppression.

2. Court Can Choose What It Wants to Dis-Incentivize

Justices Sotomayor, Kagan, and Ginsburg were concerned that the outcome of *Strieff* would incentivize officers to commit future illegalities.[303] Applying an objective flagrancy standard will allow courts to more clearly delineate the behavior that they aim to deter or dis-incentivize. For example, in *Belt*, even though the court disagreed with the troopers' decision to follow the defendant's son into the home instead of conducting the planned knock and talk, the court decided the troopers' actions were not flagrant. The dissent, however, acknowledged that alternatives were available to them: "the officers could easily have knocked on his door, identified themselves,

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296. Utah v. Strieff, 136 S. Ct. 2056 (2016).

297. *Id.* at 2072 (Kagan, J., dissenting).

298. *Id.* at 2063. The Court did not explain why it used the words "good faith" in the context of the attenuation exception.

299. Kerr, *supra* note 154.

300. *Strieff*, 136 S. Ct. at 2063.

301. *See supra* Section I.C.3.

302. Moreno, *supra* note 81, at 48.

303. *See supra* Section I.C.2.

and sought Belt's consent before entering."[304] Further, the dissent highlights that "[t]hese alternatives would have avoided not only violating Belt's Fourth Amendment rights but also the oft-cited safety risks involved when officers confront individuals in their homes without warning."[305]

Applying a flagrancy standard based on the clarity of case law would aim to deter future officers from using a defendant's child as a way around valid consent. It would incentivize them to choose the alternatives that the court highlighted. Courts handling cases with facts similar to those of this case consistently make clear that an eleven-year-old son of the defendant under these circumstances would not have valid authority to allow officers to enter the defendant's home.[306] A reasonably well-trained officer should be aware of such precedents. Therefore, under an objective flagrancy standard, officers like those in *Belt* could be deterred from similar conduct in the future if their conduct was deemed flagrant, and the attenuation exception had not been applied.

CONCLUSION

When subjective intent is considered in analyzing the third attenuation factor, the defendant is put at too much of a disadvantage. It is inherently difficult to prove an officer's intent when the record is more often than not devoid of evidence of what the officer was thinking. This consequence is evident in *Strieff*, where the defendant could not prove the officer was sufficiently subjectively culpable, and thus the officer's discovery of an arrest warrant was considered an intervening circumstance that severed causation.[307]

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304. United States v. Belt, 609 F. App'x 745, 754 (2015) (Wynn, J., dissenting). Further, Judge Wynn acknowledged the officers could have "ask[ed] Belt's son to retrieve his father from the home." *Id.*

305. *Id.*

306. *See, e.g.*, Saavedra v. State, 622 So. 2d 952, 959 (Fla. 1993) (holding that the accused's fifteen-year-old son could not provide valid consent for the police to enter accused's home when police had no warrant and had not elicited facts to suggest son had authority over premises); State v. Ellis, 210 P.3d 144, 148, 150–53 (Mont. 2009) (holding that defendant's thirteen-year-old daughter could not give valid consent to search of father's residence or her own bedroom).

307. In *Strieff*, the warrant check was perceived as an intervening circumstance, and the majority did not seem to view it as a "foreseeable consequence" the same way the dissenters did. *Compare* Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016), *with id.* at 2073 (Kagan, J., dissenting). Had the majority viewed Fackrell's conduct as flagrant, it probably would have also believed that the outstanding warrant was a foreseeable consequence based on traditional practice and the incredibly high amount of outstanding warrants that exist.

Therefore, the officer essentially got away with creating his own probable cause. This unfair consequence indicates that subjective intent is not an appropriate consideration in the context of flagrancy. Such burden inappropriately subverts the justice system's principle that a defendant is "innocent until proven guilty."

Further, it is not readily apparent that basing suppression rulings on officers' mens rea actually achieves the Court's stated goal of promoting officer deterrence. Because of the high burden involved in proving subjective culpability, actions that would otherwise be deemed flagrant under an objective standard end up being categorized as innocent mistakes more often than flagrant violations—as was the case in *Strieff*. Accordingly, using subjective intent to determine admissibility significantly limits the power the Court actually has in delineating the kind of conduct it finds impermissible. Instead, using a subjective intent standard provides incentive to ignore constitutional limits, as Justices Sotomayor, Kagan, and Ginsburg fear.

Therefore, the best solution is to remove the subjective intent analysis completely from the purpose and flagrancy factor. The new final attenuation factor should simply be determining whether the officer's conduct was flagrant. An officer should be deemed flagrant when he violates case law that has been so clear and well-established that any reasonably well-trained officer would be aware of it and its implications. Under this standard, the exclusionary rule can avoid being further narrowed, the courts will be less burdened, and the defendant is *actually* treated as innocent until proven guilty.