

## LEGAL AND REGULATORY NOTES, AUGUST-SEPTEMBER 2016

### **U.S. Supreme Court rules in favor of police officer in political free speech retaliation claim.**

“I never make exceptions. An exception disproves the rule.”  
Sherlock Holmes, *The Sign of Four*, Chapter 2, “*The Statement of the Case*”

We’ve all seen the scenario play out in our favorite TV police drama: a person commits a crime, gets arrested, and is “let off” on some technicality despite the fact that we all – the judge, the prosecutor, the defense attorney, and the jury – know that the person is guilty. One of those “technicalities” is the so-called “exclusionary rule,” which requires courts to exclude unlawfully obtained evidence from consideration in a criminal trial. This type of ill-gotten evidence is more commonly known as the “fruit of the poisonous tree.” The exclusionary rule exists to protect the rights that American citizens are granted by the Fourth Amendment of the U.S. Constitution “to be secure in [our] persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend IV. The exclusionary rule was created to “deter unconstitutional police conduct. By barring the use of illegally obtained evidence, courts reduced the temptation for police officers to skirt the Fourth Amendment’s requirements.” It was this rule that was at the heart of the U.S. Supreme Court’s ruling in the recent case of *Utah v. Strieff*, 579 U.S. \_\_ (2016).

The scene for the drama presented in the *Strieff* case was an alleged drug house in South Salt Lake City. Having received a tip, narcotics detective Douglas Fackrell conducted surveillance of the house where the number and frequency of its visitors had raised his suspicions. Wanting to “find out what was going on [in] the house” and “what [defendant Edward Strieff] was doing there,” Officer Fackrell watched Strieff exit the house and walk to a nearby convenience store where the officer detained him. What happened next is the reason that this case went all the way up to our nation’s highest court. Admittedly lacking even a reasonable suspicion that Strieff had committed any crime, Fackrell stopped Strieff and asked for his identification. After running his information, Fackrell learned that Strieff had an outstanding arrest warrant; not for any drug related offense but for a traffic violation. On the basis of the warrant and without Strieff’s consent, Fackrell searched Strieff’s person and found methamphetamines and drug paraphernalia, giving Fackrell a reason to arrest Strieff for possession.

At trial, Strieff moved to suppress the evidence, arguing that it was the “poisonous fruit” hanging from the “tree” of an unlawful investigatory stop. The trial court denied Strieff’s motion and the Utah Court of Appeals affirmed that decision. The Utah Supreme Court, however, overruled both lower courts and ordered that the evidence be suppressed because only “a voluntary act of a defendant’s free will (as in a confession or consent to search)” sufficiently breaks the connection between the illegal search and the evidence it yields. The case was then appealed to the U.S. Supreme Court.

In a 5 to 3 decision, the U.S. Supreme Court found in Officer Fackrell's favor and reversed the Utah Supreme Court's decision. Writing for the majority (and this is where the quote at the beginning of this article comes into play), Justice Thomas pointed to the application of one of the three exceptions to the exclusionary rule: the so-called "attenuation" doctrine. As Justice Kagan explained in her dissent, the attenuation doctrine "'marks the point' at which the discovery of evidence 'become[s] so attenuated' from the police misconduct that the deterrent benefit of exclusion drops below its cost." In other words, this doctrine evaluates just how close the link is between the unlawful conduct and the discovery of the evidence resulting from it.

Both sides of the court agreed to the three factors to be weighed and their potential consequences: "First, the closer the 'temporal proximity' between the unlawful act and the discovery of the evidence, the greater the deterrent value of suppression. Second, the more 'purpose[ful]' or 'flagran[t]' the police illegality, the clearer the necessity, and better the chance, of preventing similar misbehavior. And third, the presence (or absence) of 'intervening circumstances' makes a difference." As a threshold matter, both sides of the court agreed that Officer Fackrell's actions were unconstitutional. What they disagreed on was whether his unlawful conduct warranted throwing out the evidence that resulted from it.

The majority acknowledged that the first of the above three factors (temporal proximity) did not weigh in Officer Fackrell's favor because he discovered the illegal drugs only minutes after his illegal stop. On the other hand, the second and third factors *did* weigh in the officer's favor. The exclusionary rule, the majority held, exists to deter evidence only when police misconduct is "purposeful or flagrant." In its opinion, Officer Fackrell's conduct was "at most negligent" and the product of "good-faith mistakes." That left the third factor – the presence or absence of intervening circumstances – to break the tie. On that point, Justice Thomas held that the discovery of an outstanding warrant unconnected with the illegal stop compelled Officer Fackrell to act because a "warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions."

For many, the court's decision will undoubtedly be a welcome end to this episode. The person who committed the crime will do the time. Justice is served. For others, including the dissenting justices, this decision allows police officers "to stop you for whatever reason he wants – so long as he can point to a pretextual justification after the fact" and that allowance threatens to "corrode all our civil liberties and threaten all our lives."

The *Strieff* case is archived at [https://www.supremecourt.gov/opinions/15pdf/14-1373\\_83i7.pdf](https://www.supremecourt.gov/opinions/15pdf/14-1373_83i7.pdf).

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