

COMMENT

Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability

On July 8, 2001 in Lake Park, Florida, Anthony Frierson was sitting in his 1981 Plymouth sedan on Old Dixie Highway waiting for the light to turn green. Once the green turn arrow appeared, he turned left without using his signal. Although turning without a signal does not violate Florida traffic laws,¹ Officer Steven Miller observed Frierson making the turn and pulled him over illegally.² When asked, Frierson provided the officer with his license, which Miller used to run a warrants check. The check revealed an outstanding warrant for Frierson's arrest for failure to appear in traffic court. On the basis of that warrant, Officer Miller arrested Frierson and conducted a search incident to arrest. That search revealed an illegal firearm, for which Frierson was charged and later convicted.³

In *State v. Frierson*, the Florida Supreme Court upheld the conviction, permitting entry of the firearm into evidence. The court reasoned that "the outstanding arrest warrant was a judicial order directing the arrest of respondent whenever the respondent was located," and thus "the search was incident to the outstanding warrant and not incident to the illegal stop."⁴ Although the suspicionless traffic stop violated the Federal Constitution, the

1. *State v. Riley*, 638 So. 2d 507 (Fla. 1994).

2. A traffic stop violates the Fourth Amendment if the officer lacks probable cause or "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

3. *State v. Frierson*, 926 So. 2d 1139 (Fla. 2006).

4. *Id.* at 1144.

discovery of the outstanding arrest warrant had constituted an “intervening circumstance that dissipate[d] the taint of the illegal action.”⁵

A growing number of state supreme courts and federal courts of appeals disagree over the question addressed in *Frierson*: whether the discovery of an outstanding warrant in the course of an illegal detention dissipates the “taint” of the initial illegality, permitting entry of evidence seized in a search incident to arrest. Because warrants checks are routine features of many police-citizen encounters,⁶ this question is a matter of substantial practical importance. Eight courts have concluded that because officers must execute arrest warrants when they discover them and because searches incident to arrest are constitutional, the discovery of an arrest warrant is an intervening circumstance that attenuates the taint of an initially illegal encounter and permits entry of the evidence.⁷ At least seven other state high courts and federal courts of appeals have concluded that evidence obtained in a search made pursuant to an illegally discovered arrest warrant constitutes fruit of the poisonous tree and should be suppressed.⁸

This Comment supports a middle ground, arguing that evidence should be suppressed when the discovery of an arrest warrant during the course of an illegal detention is the foreseeable result of intervening police conduct. This approach better accommodates the exclusionary rule’s purpose of deterring illegal searches and seizures.⁹

For example, police often employ an investigatory technique known as a field interview. According to this strategy, officers canvass high-crime neighborhoods, randomly stopping pedestrians without any suspicion of

-
5. *Id.* at 1140 (quoting *Frierson v. State*, 851 So. 2d 293, 294 (Fla. Dist. Ct. App. 2003)).
 6. *See, e.g., Golphin v. State*, 945 So. 2d 1174, 1202 (Fla. 2006) (Pariante, J., concurring) (“[P]olice officers in some jurisdictions view a warrants check as a routine feature of almost any citizen encounter.”), *cert. denied*, 128 S. Ct. 40 (2007).
 7. *See United States v. Simpson*, 439 F.3d 490 (8th Cir. 2006); *United States v. Green*, 111 F.3d 515 (7th Cir. 1997); *Frierson*, 926 So. 2d 1139; *State v. Page*, 103 P.3d 454 (Idaho 2004); *State v. Martin*, 179 P.3d 457 (Kan. 2008); *State v. Hill*, 725 So. 2d 1282 (La. 1998); *Myers v. State*, 909 A.2d 1048 (Md. 2006); *Jacobs v. State*, 128 P.3d 1085 (Okla. Crim. App. 2006); *see also State v. Dunn*, 172 P.3d 110, 115-16 (Mont. 2007) (Leaphart, J., concurring) (arguing that discovery of an outstanding warrant cures an illegal home search).
 8. *See United States v. Lopez*, 443 F.3d 1280 (10th Cir. 2006); *United States v. Lockett*, 484 F.2d 89 (9th Cir. 1973); *People v. Padgett*, 932 P.2d 810 (Colo. 1997); *Sikes v. State*, 448 S.E.2d 560 (S.C. 1994); *State v. Daniel*, 12 S.W.3d 420 (Tenn. 2000); *St. George v. State*, 237 S.W.3d 720 (Tex. Crim. App. 2007); *State v. Topanotes*, 76 P.3d 1159 (Utah 2003).
 9. *See, e.g., Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998); 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4(a), at 259 (4th ed. 2004) (describing deterrence as the exclusionary rule’s “most fundamental point”).

criminal activity.¹⁰ An officer initiates consensual contact with a pedestrian and asks to see his identification. When the pedestrian complies, the officer holds on to it while running a warrants check, a process that can take as long as fifteen minutes. Several courts have concluded that retaining the citizen's identification for a warrants check effects a seizure of the pedestrian.¹¹

Because it is foreseeable that the warrants check will reveal any open warrants for a particular individual, the *Frierson* rule incentivizes officers to retain the identification unconstitutionally in order to run the check. If the check does not reveal a warrant, then the officer lets the individual go, having spent only a few minutes of time. If the warrants check does reveal an open warrant, the officer obtains legal authorization to conduct a search incident to the arrest, and the unconstitutionality of the stop is rendered irrelevant. Only when the discovery of an arrest warrant is not foreseeable—such as when an individual volunteers without police solicitation that he has an open warrant, or when the officer has independent knowledge of an open warrant¹²—will suppression fail to prevent future unconstitutional detentions. Courts, therefore, should suppress evidence found in a search incident to an arrest during an illegal detention any time the discovery of the warrant is the foreseeable result of intervening police conduct.

I. THE EXCLUSIONARY RULE AND ATTENUATION

The exclusionary rule is a settled fixture of Fourth Amendment law. The Supreme Court has explained that “[i]n order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person . . . evidence seized during an unlawful search [can]not constitute proof against the victim of the search.”¹³ This exclusionary rule is expressly fashioned as a “judicially created means of deterring illegal searches and

10. See, e.g., *Golphin*, 945 So. 2d 1174.

11. A police officer seizes a person within the meaning of the Fourth Amendment when “a reasonable person would [not] feel free ‘to disregard the police and go about his business.’” *United States v. Drayton*, 536 U.S. 194, 201 (2002) (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). Over one dozen state supreme courts and federal courts of appeals are divided over whether an officer’s retention of identification constitutes a seizure of the pedestrian. Compare, e.g., *Lopez*, 443 F.3d 1280 (seizure), with, e.g., *Golphin*, 945 So. 2d 1174 (no seizure).

12. See *infra* notes 30-31 and accompanying text.

13. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (citing *Boyd v. United States*, 116 U.S. 616 (1886)).

seizures.”¹⁴ The rule, however, has never operated as an absolute bar. Courts decline to apply the rule in two categories of circumstances in which suppression would have little or no deterrent effect. First, the exclusionary rule does not apply where the illegality is not a but-for source of the evidence sought to be excluded.¹⁵ Suppression of evidence that would have been discovered notwithstanding the illegal conduct will not succeed in deterring the illegal conduct.

Second, the exclusionary rule does not apply where the connection between the illegality and the seizure of the evidence “become[s] so attenuated as to dissipate the taint” of the illegality.¹⁶ As the Supreme Court recently explained in *Hudson v. Michigan*, “[E]vidence is [not] ‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police”; it will be inadmissible only if it “has been come at by *exploitation* of that illegality.”¹⁷ Attenuation doctrine, therefore, attempts to mark the point at which suppression no longer deters unconstitutional police conduct because some intervening event breaks the link between the police misconduct and discovery of the evidence.¹⁸

II. THE PROBLEM WITH *FRIERSON*’S ANALYSIS

The central question in *Frierson* was whether the discovery of an arrest warrant constitutes such an intervening event. In addressing this question, the *Frierson* opinion relied exclusively on the Seventh Circuit’s reasoning in *United States v. Green*.¹⁹ On facts similar to those in *Frierson*, the Seventh Circuit reasoned that “[i]t would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to

14. *Scott*, 524 U.S. at 363 (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

15. *See, e.g., Murray v. United States*, 487 U.S. 533 (1988).

16. *Brown v. Illinois*, 422 U.S. 590, 608 (1975) (quoting *Wong Sun*, 371 U.S. at 491).

17. 547 U.S. 586, 592 (2006) (quoting *Wong Sun*, 371 U.S. at 487-88) (emphasis added).

18. The paradigmatic example of dissipation of a prior illegal police action is “an intervening independent act of a free will,” such as a voluntary confession. *Wong Sun*, 371 U.S. at 486. In *Wong Sun*, the Supreme Court declined to apply the exclusionary rule to Wong Sun’s confession even though it would not have been made but for the illegal arrest at issue in that case. *Id.* at 491. The Court concluded that three days’ time and an independent act of a free will had broken the connection between the initial illegal arrest and the defendant’s voluntary confession. *Id.*

19. 111 F.3d 515 (7th Cir. 1997). Seven other opinions on this side of the conflict rely on *Green*. *See supra* note 7 and accompanying text.

be wanted on a warrant.”²⁰ Since the arrest was lawfully made pursuant to the warrant, the “search incident to the arrest [was] also lawful.”²¹ The court decided that the discovery of the warrant therefore must have constituted an intervening circumstance that dissipated the taint of the illegal stop.

By working backward from the legality of the arrest, however, both courts inverted the legal question at issue. The relevant exclusionary rule doctrine asks whether an intervening event attenuates the initial illegality; if it does, it will render the evidence admissible. The *Frierson* and *Green* courts concluded instead that if evidence is admissible (it would be “startling” to suggest otherwise), the admissibility renders the intervening event attenuating. That approach, of course, puts the cart before the horse. Determining that the evidence of one crime should be suppressed notwithstanding the discovery of an arrest warrant for another crime does not operate as an indictment of the legality of the arrest; it operates instead as an indictment of the precedent illegal detention.

The folly of the courts’ analytical inversion comes into sharp relief when set against the value underlying the exclusionary rule: deterrence of unconstitutional police conduct. In fact, the eight courts on this side of the conflict have effectively encouraged police officers to conduct unconstitutional fishing expeditions for open warrants in order to undertake “legal” (but otherwise impermissible) searches.²² The *Frierson* rule encourages officers not only to canvass high-crime neighborhoods, therefore, but also to stop any vehicle without cause and in violation of the Fourth Amendment. So long as the officers run a warrants check and discover a warrant, they will be free to

20. *Id.* at 521. The Florida Supreme Court offered similar reasoning in *Frierson*. See *supra* text accompanying note 4.

21. *Green*, 111 F.3d at 521.

22. The discovery of an open warrant is likely not independently sufficient to incentivize such unconstitutional detentions. The great majority of outstanding warrants are issued for trivial offenses, particularly the failure to appear in traffic court. See, e.g., RANDALL GUYNES & RUSSELL WOLFF, UN-SERVED ARREST WARRANTS: AN EXPLORATORY STUDY 1 (2004), available at <http://www.ilj.org/publications/FinalWarrantsReport.pdf> (“The largest single group of outstanding warrants at any time is composed of bench warrants for failure to appear in court . . . [for] traffic citations.”). Very few outstanding warrants relate to major crimes because “the police prioritize the most serious offenses” when actively serving warrants. *Id.* at 24. Thus, the large majority of outstanding warrants are for traffic violations, while only about five percent are for “major crimes.” *Id.* at 22 exhibit 9. The utility of discovering an open warrant therefore is generally not derived from serving the warrant, but rather from conducting a search incident to arrest.

search the driver and vehicle incident to the arrest and without concern of suppression.²³

For these reasons, the predictable discovery of an outstanding arrest warrant cannot logically be viewed as attenuating unconstitutional conduct in the manner contemplated by the Supreme Court's jurisprudence on the exclusionary rule. As the Court recently observed in *Hudson*, "The value of deterrence depends upon the strength of the incentive to commit the forbidden act."²⁴ Under the *Frierson* rule, the incentive to make unconstitutional detentions involving police conduct that foreseeably results in the discovery of open warrants is extremely strong.

III. ATTENUATION, INTERVENING POLICE CONDUCT, AND FORESEEABILITY

To improve deterrence of police officers' unconstitutional conduct, this Comment argues that the exclusionary rule should apply notwithstanding the discovery of an open warrant any time an officer's conduct during the course of an unconstitutional encounter foreseeably results in the warrant's discovery.

Consider the question from a police officer's perspective. Imagine two officers are patrolling a high-crime area and suspect that a pedestrian is carrying illegal drugs. They know they lack reasonable suspicion and that if they stop and search the individual, any evidence they discover will be suppressed as unconstitutionally obtained.²⁵ Cue the *Frierson* rule, which suggests to the officers that if they stop the pedestrian and discover an open warrant (most likely for an unpaid traffic violation²⁶), they can then conduct the search they previously lacked cause to undertake.

-
23. To be certain, courts have generally recognized that the flagrancy of police misconduct is relevant to the attenuation question, such that intentional and flagrant unconstitutional detentions might be ruled out even under the *Green* analysis. See, e.g., *State v. Frierson*, 926 So. 2d 1139, 1143-45 (Fla. 2006). It is not clear, however, why the exclusionary rule should be concerned with deterring only "flagrant" unconstitutional conduct. Non-flagrant unconstitutional conduct violates the Constitution just the same. A foreseeability rule, unlike a flagrancy rule, would prevent that conduct as well.
24. *Hudson v. Michigan*, 547 U.S. 586, 587 (2006). In fact, the *Frierson* rule also discourages courts from deciding important questions of Fourth Amendment law. See, e.g., *Cox v. State*, 916 A.2d 311, 316 (Md. 2007) (declining to decide whether retention of identification effects a seizure because the officers had discovered an outstanding warrant).
25. See *United States v. Sokolow*, 490 U.S. 1, 7 (1989).
26. See *supra* note 22.

According to the *Frierson* rule, the officers know three things going into the illegal detention: (1) if they run a warrants check or inquire about warrants and the individual has an open warrant, they will probably discover it; (2) if they discover a warrant, any evidence they seize in the search incident to arrest will be admissible, regardless of the illegality of the detention; and (3) if they do not discover a warrant, they are no worse off. Thus, the *Frierson* rule necessarily encourages unconstitutional detentions that include intervening police conduct that foreseeably results in the discovery of a warrant. As a corollary, deterrence of unconstitutional detentions requires suppression when the discovery of the warrant is the foreseeable result of intervening police conduct.²⁷

To be clear, this Comment does not advocate a broad, torts-like foreseeability rule according to which evidence should be suppressed if the officer foresees, as a probabilistic matter, that an individual has an outstanding arrest warrant in advance of the illegal stop.²⁸ Instead, it takes for granted that it is foreseeable that *anyone* might have an outstanding warrant.²⁹ The *Frierson* rule's encouragement of officers to make illegal stops does not turn on the specific probability that the suspect has a warrant. It turns instead on the possibility that he has a warrant and the certainty that if he does, the police officers will discover it. The foreseeability of the discovery of a warrant when

27. Suppression here is not meant to discourage police from checking for outstanding warrants. Instead, it is intended only to prevent officers from using warrants checks as an end run around the Fourth Amendment to obtain and admit evidence at trial against individuals of whom they do not otherwise have constitutionally sufficient suspicion.

28. See David S. Anthony, *State v. Zavala: Consent to Search as Attenuating the Taint of Illegal Searches and Seizures*, 38 IDAHO L. REV. 135 (2001) (arguing for a "proximate cause" test for attenuation).

29. See Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93, 98-99 (2004) (detailing the distribution of millions of open warrants across the nation). In Cincinnati, for instance, the ratio of outstanding warrants to residents is about one-to-three; in Baltimore, it is one-to-twelve. In all of Massachusetts, the ratio is about one-to-eight. *Id.*; see COMMONWEALTH OF MASS. SENATE COMM. ON POST AUDIT & OVERSIGHT, WARRANTING IMPROVEMENT: REFORMING THE ARREST WARRANT MANAGEMENT SYSTEM, S. 181-2381, 181st Sess., § 1 & n.6 (1999), <http://www.mass.gov/legis/senate/warrant.htm> (reporting 275,000 computerized open warrants and an "excess of 500,000" additional open warrants). I calculated these ratios using U.S. Census population data. See U.S. Census Bureau State & County QuickFacts, <http://quickfacts.census.gov/cgi-bin/qfd/lookup> (last visited June 23, 2008).

As mentioned previously, the great majority of outstanding warrants are for trivial, nonviolent offenses like traffic violations. See *supra* note 22. Officers would have no reason to believe that any one individual is more likely than another to have an unpaid speeding ticket.

the officer runs a warrants check ultimately is what undermines deterrence of unconstitutional detentions under the *Frierson* rule.

Accordingly, permitting entry of the evidence is only appropriate when the discovery of the warrant is not the foreseeable result of intervening police conduct. Without the intervening act of running a warrants check or inquiring about open warrants, an officer would have no reason to believe that a given detention would result in the discovery of a warrant. In such cases, therefore, suppression would not deter future illegal detentions designed to uncover warrants.

There are at least two situations in which an officer may discover an arrest warrant during an unconstitutional encounter where that discovery is not the foreseeable result of a warrants check or interrogation. First, the officer may have independent knowledge of an open warrant for a particular individual, obviating the need for a warrants check.³⁰ For example, an officer may unconstitutionally stop a car in which, coincidentally, he finds an individual he knows to have an outstanding arrest warrant. In this scenario, the officer had no way to know that the stop would lead to the discovery of an individual he knew to have an outstanding warrant. To be sure, the police officer's initial illegal detention of the individual is a but-for cause of the discovery. Nevertheless, suppression in this case would not discourage police misconduct because it is not foreseeable when an officer will have independent knowledge of outstanding arrest warrants.

Discovery of an open warrant is also unforeseeable during the course of an illegal stop when an individual voluntarily admits, without solicitation, that there is an outstanding warrant for his arrest.³¹ Because an officer would have no reason to believe *ex ante* that any given individual would make an unsolicited and voluntary admission to having an outstanding warrant, suppression will not discourage illegal detentions that involve such unpredictable admissions.

In most cases, however, the discovery of outstanding arrest warrants during unconstitutional detentions will take place as a result of warrants checks or direct police questioning. In those cases, evidence obtained in the searches incident to arrest should be suppressed. Effective deterrence of unconstitutional police conduct requires that the foreseeable discovery of an

30. See, e.g., *United States v. Roberts*, 256 F. App'x 493, 496 (3d Cir. 2007); *United States v. Snowden*, 250 F. App'x 175, 178 (7th Cir. 2007); *State v. Thompson*, 438 N.W.2d 131, 137 (Neb. 1989).

31. See, e.g., *United States v. Smith*, 423 F.3d 25, 29 (1st Cir. 2005).

arrest warrant cannot constitute an intervening circumstance that dissipates the taint of an initially illegal police-citizen encounter.

CONCLUSION

This Comment has described an expanding conflict among the state supreme courts and federal courts of appeals over an important question of Fourth Amendment law: whether the discovery of an outstanding arrest warrant in the course of an illegal detention dissipates the taint of the initial illegality and permits entry of evidence seized in a search incident to arrest. It has argued that courts holding that the discovery of a warrant attenuates the illegality have overlooked the motivating value underlying the exclusionary rule—deterrence of unconstitutional police conduct. Recognizing that the courts that have upheld suppression have failed to provide a theoretical framework for doing so, this Comment has developed one test to determine when the discovery of a warrant attenuates the initial unconstitutionality: whether intervening police conduct foreseeably leads to the discovery of the warrant. Evidence should be suppressed when it is obtained in a search incident to arrest made pursuant to an arrest warrant that was foreseeably discovered as the result of intervening police conduct. “[T]he interest protected by the constitutional guarantee that has been violated”—the interest in being free from suspicionless police detentions—“would [surely] be served by suppression of the evidence obtained” under such circumstances.³²

MICHAEL KIMBERLY

32. *Hudson v. Michigan*, 547 U.S. 586, 593 (2006).



THE YALE LAW JOURNAL

NOVEMBER 2008 VOLUME 118, NUMBER 2

EDITOR-IN-CHIEF
Anthony Vitarelli

EXECUTIVE EDITORS
Stephanie Hays
Dina Mishra
William J. Rinner

MANAGING EDITOR
D. Zachary Hudson

NOTES EDITORS
Jesse M. Brush
Kellen S. Dwyer
Jeremy M. Licht
Anne O'Hagen Karl
Nicolas W. Thompson
Victoria L. Weatherford

PROJECTS EDITORS
Christina Andersen
Anna Arkin-Gallagher
Jennifer B. Broxmeyer
Rachel Cotton
Thomas G. Donnelly
Tyler McGaughey
Margot K. Mendelson

Manav K. Bhatnagar
Kirk S. Cheney
Jason A. Chlipala
Justin M. Collings

Scott Anderson
Amanda Andrade
Yaw Anim
BJ Ard
Matthew Barbabella
Henry Barkhausen
Brian Barnes
Sipoura Barzideh
Jennifer Bennett
Sam Berger
Elizabeth Bullock
Jorge Camacho
Courtney Carrell
David Chao
Paul Clark
Kathleen Claussen
Tom Dannenbaum
David Diamond
Caroline Edsall
Vikram Fielding-Singh
Brian Frazelle
Rebecca Freeland

ARTICLES & ESSAYS EDITORS
Michael Coenen
George E. Doty III
Jami Johnson
Sarah Joy
Baolu Lan
Claire V. McCusker
Michael Murray
Marcus P. Smith

BOOK REVIEWS & FEATURES EDITORS
Kate Heinzelman
Gabriel V. Rauterberg

PUBLIC EDITOR
Jill E. Habig

SENIOR EDITORS
Kathryn A. Eidmann
Zachary D. Hale
Joshua S. Johnson

EDITORS
Rory Gillis
Nathaniel Gleicher
Karen Grohman
Benjamin Gross
Adam Gustafson
Cyrus Habib
Danny Habib
Scott Hartman
Ari Holtzblatt
Alex Kardon
Jennifer Keighly
Jacob Kling
Rebecca Krauss
Jeffrey Lee
Theresa Lee
William Levi
James Ligtenberg
Jacob Lillywhite
Bradley Lipton
Grant Martinez
John Muller

COMMENTS EDITORS
Sameer Ahmed
Scott S. Grinsell
Martha L. Lovejoy

THE POCKET PART EDITORS
Katherine L. Wilson-Milne, *Chair*
Charles M. Kersten
Jillian J. Rennie
Natalya Shnitser

ADMISSIONS COMMITTEE
Benjamin L. Berwick
Arwyn Carroll
Jennifer A. Sorenson
Christen Linke Young

José L. Miñán
Carrie Pagnucco
Gabriel D. Rosenberg
Jeffrey E. Sandberg

Ana Munoz
Lindsay Nash
Alexandra Orme
Christina Parajon
Rebekah Perry
Erin Phillips
Levi Pinsky
Leslie Pope
Megan Quattlebaum
Amelia Rawls
Ryan Sakoda
Eric Sandberg-Zakian
Mark Shawhan
Trevor Sutton
Benjamin Taibleson
Liz Tulis
Austin Van
E. Brantley Webb
Jonah White
Daniel Winnick
Aaron Zelinsky
David Zhou

BUSINESS MANAGER
Jean E. Russo