



U.S. Supreme Court

## Chemerinsky: Has the Supreme Court dealt a blow to the Fourth Amendment?

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By [Erwin Chemerinsky](#)



In the recently completed Supreme Court term, *Utah v. Strieff* was the only major decision where the conservatives prevailed in an ideologically divided case. The court held that evidence gained after an illegal police stop is admissible if the police learn of an outstanding arrest warrant and then conduct a search.

Justice Stephen G. Breyer joined with Justices Clarence Thomas, John G. Roberts Jr., Anthony Kennedy, and Samuel A. Alito to create the majority. This should not be a surprise because in other recent Fourth Amendment cases, Justice Breyer joined with these justices to create a five-person majority. In *Maryland v. King*, the same five justices, in a 5-4 decision, held that police may take DNA from a person arrested for a serious crime to see if it matches an unsolved crime in the police database. Likewise, in *Navarette v. California*, Justice Breyer was again with these four justices in a majority holding that police may pull over a car based on an anonymous tip of erratic driving without the officers needing to themselves observe this. In both cases, Justice Antonin Scalia wrote a dissenting opinion that was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan.

## **The facts of *Utah v. Strieff***

*Utah v. Strieff* arose when police received an anonymous tip that drug dealing was occurring in a house. Police watched the house and saw a man enter and then quickly leave. Based on this, the officer stopped the man. The State of Utah conceded that this was an illegal stop in violation of the Fourth Amendment because there was not reasonable suspicion. The officer asked the man's name and the man identified himself as Edward Strieff. The officer did a search for outstanding warrants, found one for an unpaid traffic violation and arrested Strieff. The officer then searched Strieff incident to his arrest, and found he was in possession of illegal drugs.

The issue before the Supreme Court was whether the evidence had to be excluded from the trial because it was the direct result of the police officer's violating the Fourth Amendment and illegally stopping Strieff. Long ago, the Supreme Court held that the products of police violations cannot be used as evidence by prosecutors because they are "the fruit of the poisonous tree." Otherwise, police would have too great an incentive to violate the law. The Utah Supreme Court applied this principle to hold that the exclusionary rule applied and that the drugs found on Strieff could not be used as evidence against him.

## **The holding**

But the Supreme Court, in a 5-3 decision, reversed and held that the evidence was admissible against Strieff. Justice Thomas wrote the opinion for the court and said that once the police officer discovered that there was an outstanding warrant for Strieff, that made permissible the resulting search as part of his arrest. The court said that the attenuation exception to the exclusionary rule applied. The attenuation doctrine provides that evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."

The court said that in applying the attenuation doctrine it looks at three factors: First, the court looks to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, the court considers "the presence of intervening circumstances." Third, and "particularly" significant, the court examines "the purpose and flagrancy of the official misconduct."

Applying these factors, the court held that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, the court concluded that consideration was outweighed by the latter two factors. The court said that the discovery of the outstanding arrest warrant that led to Strieff's arrest was a critical intervening circumstance that was wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the subsequent search. The court said that it was especially significant that there is no evidence that the officer's illegal stop involved "flagrantly" unlawful police misconduct.

## The dissents

Justice Sotomayor, joined by Justice Ginsburg and Justice Kagan, wrote dissenting opinions lamenting that the decision gives the police an incentive to stop people in violation of the Fourth Amendment knowing that if there is an outstanding warrant, a search can be done and any evidence gained likely will be admissible. Justice Sotomayor wrote: “[T]his case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.”

Justice Sotomayor discussed the large number of outstanding arrest warrants, and described the degrading nature of police stops. And she spoke powerfully of the impact of such police practices on minority communities: “For generations, black and brown parents have given their children ‘the talk’ —instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.” She concluded: “We must not pretend that the countless people who are routinely targeted by police are ‘isolated.’ They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.”

Justice Kagan, too, objected that this gives police an incentive to engage in illegal stops knowing that if there is an outstanding warrant, evidence gained pursuant to a search will be admissible. She wrote: “The majority’s misapplication of [the attenuation exception] creates unfortunate incentives for the police—indeed, practically invites them to do what [the officer] did here. ... 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.”

## The implications

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.” The court stressed here that the attenuation exception applied in *Utah v. Strieff* because the police did not engage in “flagrant misconduct.” But what will be deemed enough to meet this standard and be a basis for suppressing evidence? Will lower courts read *Utah v. Strieff* broadly as allowing the introduction of evidence in almost all circumstances when an arrest warrant is found after an illegal stop, or will courts narrow it by finding police conduct to be flagrant?

As for the latter, a key question will be how police are instructed about the decision. Scholars, such as Berkeley Law Professor Charles Weisselberg, reviewed police training with regard to interrogations and documented that officers were instructed as to how to circumvent the Supreme

Court's decision in *Miranda v. Arizona*. Will officers now be encouraged to engage in illegal stops knowing that if an old arrest warrant is found, then anything found in a subsequent search likely would be admissible as evidence?

*Utah v. Strieff* was decided at a time of great social tension about policing, especially in minority communities. The majority and dissenting opinions have markedly different perspectives on this. Justice Thomas, writing for the majority, seemed most concerned about wanting to make sure that evidence of illegal activity is not suppressed. The court expanded the attenuation exception to the exclusionary rule to achieve this result. The dissenting opinions, especially Justice Sotomayor's, expressed great concern about giving the police an incentive to illegally stop individuals and what this means, especially for minority communities.

*Erwin Chemerinsky is Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law at the University of California, Irvine School of Law. He is an expert in constitutional law, federal practice, civil rights and civil liberties, and appellate litigation. He's the author of seven books, including The Case Against the Supreme Court (Viking, 2014).*