Illegal Predicate Searches and Tainted Warrants After *Heien* and *Strieff*

Kit Kinports

Follow this and additional works at: https://elibrary.law.psu.edu/fac_works

Part of the [Criminal Law Commons](https://elibrary.law.psu.edu/crim_law_commons), [Criminal Procedure Commons](https://elibrary.law.psu.edu/crim_procedure_commons), and the [Fourth Amendment Commons](https://elibrary.law.psu.edu/fourth_amendment_commons)
Illegal Predicate Searches and Tainted Warrants After *Heien* and *Strieff*

Kit Kinports*

A long-standing debate has surrounded the relationship between two features of the Fourth Amendment’s exclusionary rule—the fruits of the poisonous tree doctrine and the good-faith exception—in cases where the evidence used to secure a search warrant was obtained in violation of the defendant’s constitutional rights. Some judges and scholars maintain that the fruits of the poisonous tree doctrine takes precedence in such “tainted warrant” cases, leading to the suppression of any evidence seized in executing the warrant unless the warrant was supported by probable cause independent of the illegal predicate search. By contrast, others believe that the good-faith exception should be available in these circumstances because the police acted in reasonable reliance on a search warrant.

Two recent Fourth Amendment opinions issued by the Supreme Court—the 2014 mistake of law ruling in *Heien v. North Carolina* and the 2016 fruits of the poisonous tree decision in *Utah v. Strieff*—limited the consequences of errors police make in conducting Terry stops and potentially have implications for the tainted warrant cases. In examining the impact these two opinions may have on the admissibility of evidence seized pursuant to a tainted warrant, this Article approaches the tension between the poisonous tree doctrine and the good-faith exception first by disaggregating the tainted warrant cases depending on what type of law enforcement mistake led to the unconstitutional predicate search and then by analogizing to the standards of appellate review.

A warrant may be tainted because the officer conducting the predicate search made a mistake of fact, a mistake about the reach of state criminal law, a mistake about the existence of probable cause or reasonable suspicion, or a mistake about some other substantive Fourth Amendment doctrine. Examining each type of error in turn, the Article concludes that the Court’s current Fourth Amendment jurisprudence is adequate to address all varieties of tainted warrants, that law enforcement misinterpretations of state criminal codes can be evaluated under *Heien*, and that *Strieff*’s attenuation analysis does not call for excusing any additional tainted warrants. The Article therefore argues against extending the good-faith exception to save any tainted warrant that cannot survive under the Court’s existing case law and that is not supported by probable cause independent of the impermissible predicate search.

I. **INTRODUCTION** .................................................................838

II. **THE LANDSCAPE BEFORE *HEIEN* AND *STRIEFF*** .................839

   A. **The Early Supreme Court Cases** ......................................839

   B. **The Lower Court Conflict** ...........................................843

III. **HEIEN AND THE VARIOUS TYPES OF TAINTED WARRANTS** ......856

IV. **STRIEFF AND THE ATTENUATION EXCEPTION** .....................869

V. **CONCLUSION** .........................................................................879

* © 2018 Kit Kinports. Professor of Law and Polisher Family Distinguished Faculty Scholar, Penn State Law (University Park). I am indebted to Joshua Dressler and David Kaye for their thoughtful comments on an earlier draft of this Article.
I. INTRODUCTION

Two foundational Fourth Amendment principles collide in cases with "tainted" search warrants—warrants where the information giving rise to probable cause was obtained in violation of the defendant's constitutional rights. On the one hand, the exclusionary rule, in combination with the fruits of the poisonous tree doctrine, entitles defendants to suppress evidence acquired both directly and indirectly from an unconstitutional search or seizure. On the other hand, the good-faith exception to the exclusionary rule allows prosecutors to introduce evidence obtained illegally pursuant to a search warrant that should never have been issued because it was not supported by probable cause. Evidence uncovered by a tainted warrant is presumably the fruit of a poisonous tree, but does the good-faith exception insulate the fruit of that warrant from the exclusionary rule?

For years, the courts and commentators have been divided on that question. Although the United States Supreme Court has implicitly suggested that evidence seized pursuant to tainted warrants should be suppressed under the fruits of the poisonous tree doctrine, it has never expressly addressed the issue. The Court's 2009 ruling in *Herring v. United States* generated renewed interest in the question, but the conflict persists. Moreover, in analyzing the admissibility of evidence obtained by a tainted warrant, lower courts and scholars have failed to distinguish between different types of illegal predicate searches that can lead to tainted warrants—those based on mistakes of fact, mistakes about the reach of state criminal law, mistakes about the existence of probable cause or reasonable suspicion, and mistakes about other substantive Fourth Amendment doctrines. Now is a particularly appropriate time to revisit the tainted warrant cases given two recent Supreme Court opinions: the mistake of law ruling in *Heien v. North Carolina*, and the fruits of the poisonous tree decision

---

1. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to the states); *Nardone v. United States*, 308 U.S. 338, 341 (1939) (coining the phrase "fruit of the poisonous tree").
4. 135 S. Ct. 530, 534 (2014) (holding that a police officer's reasonable misinterpretation of state criminal law does not undermine reasonable suspicion). For further discussion of *Heien*, see infra notes 91-119 and accompanying text.
in *Utah v. Strieff*. Those opinions substantially limited the consequences of errors police make in conducting stops and potentially have implications for the issues raised by tainted warrants.

In examining the appropriate relationship between the poisonous tree doctrine and the good-faith exception in tainted warrant cases, the Article proceeds as follows. Part II describes the relevant Supreme Court case law prior to *Heien* and *Strieff* and the conflict among the lower courts, siding with those courts that have refused to extend the good-faith exception to tainted warrants. After introducing the Court's decision in *Heien*, Part III addresses the different varieties of unconstitutional predicate searches, analogizing to the standards of appellate review and concluding that the Court's Fourth Amendment jurisprudence is already adequate to handle any type of illegal predicate search. Part IV adds *Strieff* to the mix, taking the position that the Court's ruling in that case does not require a different result. Part V concludes, arguing that *Heien* and *Strieff* should not be interpreted to further erode constitutional protections by excusing any tainted warrant that cannot be saved by existing Fourth Amendment doctrines.

II. THE LANDSCAPE BEFORE *HEIEN AND STRIEFF*

A. The Early Supreme Court Cases

The Supreme Court created the good-faith exception to the exclusionary rule in its 1984 ruling in *United States v. Leon*, invoking a cost-benefit test in refusing to suppress evidence where police reasonably relied on a warrant that turned out to be unsupported by probable cause. Explaining that the exclusionary rule's function is to deter Fourth Amendment violations, the Court separately considered the exclusionary rule's potential to influence two different audiences: the judges who improperly issue warrants, and the police officers who

---

5. 136 S. Ct. 2056, 2059 (2016) (refusing to exclude evidence found during the search incident to an arrest on an outstanding arrest warrant that was discovered as the result of an unconstitutional stop). For further discussion of *Strieff*, see infra notes 156-202 and accompanying text.

6. See 468 U.S. at 905.

7. See id. at 906 (referring to the exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved" (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)); id. at 921 n.22 (rejecting the notion that the exclusionary rule is designed to preserve "the integrity of the courts"); see also Davis v. United States, 564 U.S. 229, 236-37 (2011) ("The rule's sole purpose . . . is to deter future Fourth Amendment violations.").
seek and execute them. \textsuperscript{8} With respect to the former group, the Court advanced three rationales to explain why suppression was not necessary to incentivize judges to exercise greater care in making probable cause determinations. First, the Court made clear, the exclusionary remedy is “designed to deter police misconduct rather than to punish the errors of judges and magistrates.” \textsuperscript{9} Second, the Court was not convinced that judges “are inclined to ignore or subvert the Fourth Amendment.” \textsuperscript{10} Finally, and “most important” according to the Court, exclusion would not have “a significant deterrent effect” on magistrates because they “are not adjuncts to the law enforcement team,” but rather “neutral judicial officers” who have “no stake in the outcome of particular criminal prosecutions.” \textsuperscript{11}

Turning to the exclusionary rule’s deterrent impact on law enforcement, the \textit{Leon} majority made two points. First, the Court asserted generally that the exclusionary rule cannot deter objectively reasonable police behavior. \textsuperscript{12} Second, and tied more specifically to the facts of \textit{Leon}, the Court reasoned that an officer who obtains a warrant “cannot be expected to question the magistrate’s probable-cause determination” and therefore “[p]enalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.” \textsuperscript{13}

The Court would later go on to extend the good-faith exception to three other situations it found analogous to \textit{Leon}: where an impermissible search or seizure was based on an officer’s reliance, not on a warrant, but on a statute subsequently determined to be unconstitutional, \textsuperscript{14} on a court clerk’s inaccurate computer records, \textsuperscript{15} and on “binding appellate precedent” that was “later overruled.” \textsuperscript{16} On each occasion, the Court repeated \textit{Leon}’s admonition that the exclusionary rule’s deterrent focus is on law enforcement and not other state actors and cited the cost-benefit test in finding insufficient

\begin{itemize}
\item \textsuperscript{8} See \textit{Leon}, 468 U.S. at 916-21.
\item \textsuperscript{9} \textit{Id.} at 916.
\item \textsuperscript{10} \textit{Id.}
\item \textsuperscript{11} \textit{Id.} at 916-17.
\item \textsuperscript{12} See \textit{id.} at 919.
\item \textsuperscript{13} \textit{Id.} at 921.
\item \textsuperscript{15} Arizona \textit{v. Evans}, 514 U.S. 1, 3-4 (1995) (clerk’s computer database showed an outstanding arrest warrant for the defendant).
\item \textsuperscript{16} Davis \textit{v. United States}, 564 U.S. 229, 232 (2011) (Eleventh Circuit case law allowed the search of a vehicle incident to arrest even after the arrestee had been secured in a police patrol car).
\end{itemize}
justification for suppressing the illegally seized evidence in order to deter police.17

On the same day that the opinion in Leon was released, the Supreme Court also decided Segura v. United States, a fruits of the poisonous tree case involving an allegedly tainted warrant.18 In that case, law enforcement officials made a presumably illegal entry into the defendants' apartment, and two officers then remained on the scene to secure the premises while others went to obtain a search warrant.19 In analyzing the admissibility of the evidence uncovered in the apartment when the police later executed the "valid search warrant," the Court acknowledged that, under the fruits of the poisonous tree doctrine, the exclusionary rule "extends as well to the indirect as the direct products' of unconstitutional conduct."20 Like the good-faith exception, the poisonous tree doctrine is based on a deterrent rationale. As the Court explained in Nardone v. United States, "[t]o forbid the direct use of [unconstitutional] methods . . . but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'"21

Although the Court thus applied the fruits of the poisonous tree doctrine in Segura, it ultimately refused to suppress the evidence seized pursuant to the warrant under one of the well-established exceptions to the poisonous tree doctrine: the independent source exception.22 The search warrant in Segura, the Court explained, was

17. See id. at 238-41; Evans, 514 U.S. at 14-16; Krull, 480 U.S. at 349-53. As discussed below, Davis focused more on the absence of law enforcement culpability. See infra notes 49-51 and accompanying text. The Davis Court did not specifically recite Leon's observations that judges do not routinely flout the Fourth Amendment and are disinterested decision-makers with no stake in the outcome, but it did observe that "punish[ing] the errors of judges' is not the office of the exclusionary rule." Davis, 564 U.S. at 239 (alteration in original) (quoting Leon, 468 U.S. at 916).
19. See id. at 798, 800-01 (finding "no reason to question" the lower courts' judgment that the warrantless entry was unjustified, though noting that "[t]hat issue is not before us").
20. Id. at 804 (quoting Wong Sun v. United States, 371 U.S. 471, 484 (1963)).
22. See 468 U.S. at 799. The other two exceptions are the attenuation and inevitable discovery exceptions. See Nix v. Williams, 467 U.S. 431, 444 (1984) (recognizing an exception to the poisonous tree doctrine if "the information ultimately or inevitably would have been discovered by lawful means"); Nardone, 308 U.S. at 341 (observing that the poisonous tree doctrine does not apply if the "connection" between the constitutional violation and the evidence has "become so attenuated as to dissipate the taint"). For additional discussion of attenuation, see infra notes 156-202 and accompanying text. For additional discussion of inevitable discovery, see infra note 209 and accompanying text.
“issued wholly on information known to the officers before the entry into the apartment” and was “unrelated to the entry and therefore constituted an independent source for the evidence.”23

Given that the opinions in Leon and Segura were issued on the same day, the Court would presumably have mentioned the good-faith exception in Segura had the Justices thought that it might be relevant in a tainted warrant case.24 But neither majority opinion even cited the other decision, lending support to the view that the good-faith exception cannot save a tainted warrant.25 Nevertheless, the Court expressly “decline[d] to consider” whether the good-faith exception applied to a tainted warrant in its 1987 ruling in Arizona v. Hicks.26

The following year, when the Court decided Murray v. United States, another case involving an unconstitutional predicate search, the majority, as it had in Segura, again failed to mention the good-faith exception.27 Murray extended Segura to allow the introduction of evidence initially seen during an illegal entry and seized only later during a warranted search.28 In so holding, the Court reasoned that the independent source exception is intended to ensure that the government neither “profit from its illegal activity” nor “be placed in a worse position than it would otherwise have occupied” without the impermissible predicate search.29 Therefore, the Court held, the warrant obtained in Murray could serve as “a genuinely independent source” for the evidence so long as two requirements were met: first, the officers’ “decision to seek the warrant” was not “prompted by

---

23. 468 U.S. at 799.
24. See State v. Johnson, 716 P.2d 1288, 1300 (Idaho 1986) (observing that the cases were decided on the same day and describing Segura as “amplifying[ing] upon the various factual scenarios discussed in Leon”); State v. Carter, 630 N.E.2d 355, 363 (Ohio 1994) (per curiam) (noting the timing of the two opinions and reasoning that “the decision in Segura implies that . . . an unpurged illegality irreparably taints the search warrant when evidence is illegally obtained, and thus the specific deterrence rationale upheld by Leon dictates that suppression be granted”).
25. Although Justice Stevens’s dissenting opinion in each case did refer to the other decision, he did not address the relationship between the two cases. See United States v. Leon, 468 U.S. 897, 977 n.35 (1984) (Stevens, J., dissenting); Segura, 468 U.S. at 826 n.19 (Stevens, J., dissenting).
26. 480 U.S. 321, 329 (1987) (holding that an officer violated the Fourth Amendment by moving pieces of stereo equipment to record their serial numbers, after which a warrant to search the defendant’s apartment was obtained).
27. 487 U.S. 533 (1988). While Justice Marshall’s dissent did cite to Leon in its background discussion of Fourth Amendment principles, the dissent did not suggest that police could rely on the good-faith exception in Murray. See id. at 544-45 (Marshall, J., dissenting).
28. See id. at 541-42 (majority opinion).
29. Id. at 542.
what they had seen during the initial entry"; and second, the “information obtained during that entry” was not “presented to the Magistrate” and did not “affect[] his decision to issue the warrant.”

In subsequent opinions, the Court has implied that the good-faith exception cannot excuse police reliance on a tainted warrant that cannot meet the two-part standard set out in *Murray*. Thus, in *Georgia v. Randolph*, after holding that the consent search exception did not justify an officer’s warrantless entry into the defendant’s home, the Court found no “grounds independent of . . . consent . . . that might have justified entry into . . . the premises where the police found the powdery straw (which, if lawfully seized, could have been used . . . to establish probable cause for the warrant issued later).” But the Court has never explicitly addressed the issue, generating a conflict described in the following subpart.

**B. The Lower Court Conflict**

In the absence of controlling authority from the Supreme Court, lower courts and commentators have divided on the relationship between the good-faith exception and the fruits of the poisonous tree doctrine in tainted warrant cases. Some take the position that the

30. *Id.* For lower court opinions in tainted warrant cases finding in favor of the defendant on this ground, see United States v. Mowatt, 513 F.3d 395, 404 (4th Cir. 2008), abrogated on other grounds by Kentucky v. King, 563 U.S. 452 (2011); State v. Reno, 918 P.2d 1235, 1244 (Kan. 1996); State v. Boll, 651 N.W.2d 710, 718-19 (S.D. 2002). For an opinion finding in favor of the prosecution, see People v. Arapu, 283 P.3d 680, 687 (Colo. 2012).

31. *Murray*, 487 U.S. at 542. For lower court opinions in tainted warrant cases finding in favor of the defendant on this ground, see United States v. Wanless, 882 F.2d 1459, 1466-67 (9th Cir. 1989); Smith v. United States, 111 A.3d 1, 8 (D.C. 2014), *aff’d mem.*; 159 A.3d 1220 (D.C. 2017); *Reno*, 918 P.2d at 1244; State v. Carter, 630 N.E.2d 355, 364 (Ohio 1994) (per curiam); State v. Thomas, 334 P.3d 491, 495 (Okla. Crim. App. 2014); *Boll*, 651 N.W.2d at 719-20. For opinions finding in favor of the prosecution, see United States v. O’Neal, 17 F.3d 239, 243-44 (8th Cir. 1994); United States v. Oakley, 944 F.2d 384, 387 (7th Cir. 1991); *Arapu*, 283 P.3d at 686-87.

32. 547 U.S. 103, 123 (2006) (emphasis added); see also Florida v. Jardines, 133 S. Ct. 1409, 1413 (2013) (noting that the court below held “that the use of the trained narcotics dog to investigate Jardines’ home was a Fourth Amendment search unsupported by probable cause, rendering invalid the warrant based upon information gathered in that search”); United States v. Place, 462 U.S. 696, 710 (1983) (concluding, in an opinion issued the year before *Leon* was decided, that “the seizure of respondent’s luggage was unreasonable” and, “[c]onsequently, the evidence obtained from the subsequent [warranted] search of his luggage was inadmissible”); *cf.* *Kyllo* v. United States, 533 U.S. 27, 40 (2001) (“Since we hold the Thermovision imaging to have been an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause—and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.”).
good-faith exception should extend to warrants that depend on illegal predicate searches. In a number of such cases, courts have reasoned that even if the information used to support the warrant was obtained illegally, the relevant Fourth Amendment rules were sufficiently ambiguous that the officers’ belief in the constitutionality of the predicate search was reasonable and therefore it was reasonable for them to believe the warrant was supported by probable cause. In United States v. Massi, for example, the United States Court of Appeals for the Fifth Circuit concluded that the good-faith exception could insulate a tainted warrant if “the prior law enforcement conduct that uncovered evidence used in the affidavit for the warrant [was] ‘close enough to the line of validity’ that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct.” 33 In other cases, the governing Fourth

33. 761 F.3d 512, 528-29 (5th Cir. 2014) (quoting United States v. McClain, 444 F.3d 556, 566 (6th Cir. 2006)) (relying on “the absence of precedent” on the propriety of prolonging the detention of a suspect not “to investigate,” but to “corroborat[e] information already known by law enforcement” “in order to prepare a proper warrant request”); see also United States v. Ganias, 824 F.3d 199, 223 (2d Cir. 2016) (noting that the case “did not turn on whether the violation found was predicate, or prior to, the subsequent search warrant on which the officers eventually relied, but on whether the officers’ reliance on the warrant was reasonable” because “they had no ‘significant reason to believe’ that their predicate act was indeed unconstitutional” (quoting United States v. Reilly, 76 F.3d 1271, 1281 (2d Cir. 1996)); McClain, 444 F.3d at 566 (finding that “the facts surrounding the initial warrantless search were close enough to the line of validity to make the executing officers’ belief in the validity of the search warrants objectively reasonable”); United States v. 15324 Cty. Highway E., 332 F.3d 1070, 1071 (7th Cir. 2003) (concluding that law enforcement officials who obtained a warrant based on evidence supplied from a thermal imager “acted in objectively reasonable reliance upon a warrant issued in accordance with the law as it then existed”). United States v. Carmona, 858 F.2d 66, 68 (2d Cir. 1988) (agreeing with the district court’s reasoning that an officer’s discovery of cash while moving a block during a security sweep was probably permissible under the law in effect at the time of the search (citing United States v. Londono, 659 F. Supp. 758, 763-64 (E.D.N.Y. 1987))); United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984) (observing that “the overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the home and the curtilage thereof”); cf. McClintock v. State, No. PD-1641-15, 2017 Tex. Crim. App. LEXIS 291, at *19-20 (Tex. Crim. App. Mar. 22, 2017) (adopting similar reasoning in interpreting the state’s statutory good-faith exception). But cf. State v. Pogue, 868 N.W.2d 522, 533 (N.D. 2015) (concluding that “the officer’s pre-warrant conduct [was] clearly illegal” and distinguishing cases involving a “close question” “where there was no police conduct to deter” (citing United States v. Fletcher, 91 F.3d 48, 51 (8th Cir. 1996))). Some commentators have likewise endorsed this position. See Thomas K. Clancy, Extending the Good Faith Exception to the Fourth Amendment’s Exclusionary Rule to Warrantless Seizures That Serve as a Basis for the Search Warrant, 32 HOUS. L. REV. 697, 715, 698 (1995) (defending this approach as “consistent with Leon” so long as the magistrate is advised of the predicate searches and can deny the warrant “if illegal activity is disclosed”); Alyson M. Cox, Note, Does It Stay, or Does It Go?: Application of the Good-Faith Exception When the Warrant...
Amendment principles were clear, but the court concluded that the good-faith exception was available because the police reasonably, even if erroneously, applied the law to the circumstances surrounding the predicate search—in determining, for example, that probable cause or reasonable suspicion justified their actions\(^{34}\) or that the property on which they intruded did not fall within the protected curtilage of the defendant's residence.\(^{35}\)

Other courts have rejected that approach, taking the view that the good-faith exception cannot rescue a tainted warrant no matter how ambiguous the relevant legal principles. In *Evans v. United States*, for example, the District of Columbia Court of Appeals concluded that "the subsequent issuance of [a] search warrant ... based on information obtained during [an] unlawful entry" does not "operate to attenuate the illegality of [the] entry."\(^{36}\) The court therefore refused to apply the good-faith exception "without regard to whether [the] entry was 'close enough to the line of legality' as to reflect a good-faith effort to comply with the law."\(^{37}\) Some of the courts in this camp

\(^{34}\) See Fletcher, 91 F.3d at 52 (observing that "the officers had an objectively reasonable belief that they possessed a reasonable suspicion such as would support the valid detention of Fletcher's bag as well as an objectively reasonable belief that the warrant issued was valid"); United States v. Kiser, 948 F.2d 418, 422 (8th Cir. 1991) (noting that "the circumstances gave the officers an objectively reasonable belief that they possessed a reasonable articulable suspicion that would make the search warrant valid"); United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989) (finding an absence of reasonable suspicion to justify the detention of the defendant's luggage but, because the case fell into "the gray area created by Leon," "the facts of this case are close enough to the line of legality to make the officers' belief in the validity of the warrant objectively reasonable"); cf United States v. Hallam, 407 F.3d 942, 948 (8th Cir. 2005) (holding that "reasonable good-faith reliance" on an initial search warrant that was unsupported by probable cause "served to purge any taint that might otherwise require exclusion of evidence that was obtained during the second [warranted] search as a proximate result of the inadequate first warrant"). *But cf.* O'Neal, 17 F.3d at 243 n.6 (concluding that "[n]o officer could in good faith believe that the facts would lead a reasonable person to believe that O'Neal was involved in criminal activity").

35. See United States v. Diehl, 276 F.3d 32, 43 (1st Cir. 2002) (characterizing an officer's mistaken belief that he was not within the curtilage of the defendants' home when he used a thermal imager as "a case of a "penumbral zone," within which an inadvertent mistake would not call for exclusion") (quoting United States v. Leon, 468 U.S. 897, 925 n.26 (1984))).


37. *Id.* (citing Smith v. United States, 111 A.3d 1, 8 n.9 (D.C. 2014), aff'd mem., 159 A.3d 1220 (D.C. 2017)); *see also* United States v. Cos, 498 F.3d 1115, 1132-33 (10th Cir. 2007) (refusing to apply the good-faith exception when even a reasonable mistake was made by the searching officers themselves). A number of commentators have also endorsed this approach. *See* Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287, 302-03 (1985); Kay L. Levine et al., *Evidence*...
distinguish the good-faith exception on the grounds that the police were entirely blameless in the *Leon* line of cases: they reasonably relied on the earlier pronouncement of a court, for example, that was only later found to be mistaken. As the California Supreme Court put it, the reasoning underlying the good-faith exception does not justify allowing police to “cure the taint of warrantless searches and seizures by applying the *Leon* exception to the magistrate’s subsequent issuance of a warrant.”38 Moreover, as a number of these courts recognize, four of the five justifications underlying *Leon’s* decision to create the good-faith exception presumed that the police were relying on an independent third party who was not aligned with law enforcement.39

Nevertheless, *Leon’s* final rationale was broader, perhaps reflecting the views of Justice White, who authored the majority opinion and was a proponent of a more expansive good-faith exception.40 Thus, the Court observed in *Leon*, “[w]e have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.”41 In the same vein, the Court noted—without any qualification about reliance

---


40. See Illinois v. Gates, 462 U.S. 213, 255 (1983) (White, J., concurring in the judgment) (proposing that “the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment”).

41. *Leon*, 468 U.S. at 918.
on a third party—that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."\(^42\) That language has not been lost on the lower courts and has been cited by some judges to support extending the good-faith exception to tainted warrants.\(^43\)

In addition, more recent Supreme Court opinions have provided fodder for a more generous reading of *Leon*. In its 2009 ruling in *Herring v. United States*, the Court considered a question it had previously left open—whether the exclusionary remedy is available where "police personnel" rather than court employees were at fault in failing to update a computer database to indicate that an outstanding arrest warrant had been quashed.\(^44\) Because the case involved admitted negligence on the part of law enforcement,\(^45\) the Court did not rely on the *Leon* good-faith exception but instead broadly pronounced that the exclusionary rule does not apply to "[a]n error that arises from nonrecurring and attenuated negligence."\(^46\) Introducing an element of culpability, the Court explained that in order "[t]o 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."\(^47\) The Court concluded that the exclusionary remedy only "serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."\(^48\)

\(^{42}\) *Id.* at 919.

\(^{43}\) See, e.g., United States v. McClain, 444 F.3d 556, 565-66 (6th Cir. 2006); United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989); United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 1985). For scholarly commentary making this point, see Clancy, *supra* note 33, at 715.


\(^{45}\) See *id.* at 140 & n.1.

\(^{46}\) *Id.* at 144; see also *id.* at 137 (noting that "the error was the result of isolated negligence attenuated from the arrest"); *id.* at 138-39 (describing the mistake as "merely negligent and attenuated from the arrest"). For further discussion of *Herring*’s references to "attenuation," see *infra* note 55 and accompanying text.

\(^{47}\) *Herring*, 555 U.S. at 144.

\(^{48}\) *Id.* For criticism of *Herring*’s culpability analysis, see Hadar Aviram et al., *Moving Targets: Placing the Good Faith Doctrine in the Context of Fragmented Policing*, 37 *Fordham Urb. L.J.* 709, 729, 714-15 (2010) (arguing that *Herring* "downplays deterrence," "allows the government to shirk responsibility for its mistakes by hiding behind multiple agencies and blurring the path of accountability," and "allows a potential for future abuse by discouraging efficient collaboration between agencies and incentivizing redundancies and inefficiency"); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 *Wm. & Mary Bill Rts. J.* 821, 835-49 (2013) (criticizing *Herring*’s deterrence and culpability reasoning as inconsistent with both Supreme Court precedent and theories of deterrence); Levine et al., *supra* note 37, at 659 (charging that *Herring*
The Court's decision two years later in *Davis v. United States* fell more squarely within *Leon*’s ambit because the police officers there were relying on an independent third party—judicial precedent allowing warrantless automobile searches incident to arrest. The Court could have simply recited *Leon*’s tripartite justification for analyzing only the exclusionary rule's deterrent impact on law enforcement and then explained that the police in *Davis* could not be deterred because they were "not culpable in any way." But instead of merely reiterating the five common rationales underlying the *Leon* line of cases, the *Davis* majority picked up on the notion of police culpability introduced in *Herring*. Interspersing quotations from *Herring* and *Leon*, the *Davis* Court said: "[W]hen the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful or when their conduct involves only simple, 'isolated' negligence, the 'deterrence rationale loses much of its force,' and exclusion cannot 'pay its way.'" Invoking *Herring* was completely unnecessary, of course, because *Davis* was a straightforward good-faith exception case where the police reasonably relied on precedent and therefore were not even negligent.

Despite language in *Herring* and *Davis* supporting denial of an exclusionary remedy in cases where police reasonably believed they were acting properly (or were merely negligent), neither opinion unequivocally endorses extending the good-faith exception to tainted warrant cases. Even though no neutral third party was involved in *Herring*, the computer error in question originated from the sheriff's office in a neighboring county, enabling the Court to point out that the officer who actually arrested Herring "did nothing improper." At best, then, these cases suggest that the good-faith exception might be available in tainted warrant cases if the impermissible predicate search was conducted by an officer other than the one who ultimately executed the warrant—a consideration that was important in some

---

50. Id. at 239-40.
51. Id. at 238 (quoting United States v. Leon, 468 U.S. 897, 909 (1984); *Herring*, 555 U.S. at 137; *Leon*, 468 U.S. at 919 (internal quotation marks omitted); id. at 908 n.6).
52. 555 U.S. at 140.
53. See United States v. Woerner, 709 F.3d 527, 534-35 (5th Cir. 2013) (finding no evidence that an officer who knowingly executed an expired search warrant engaged in "intentional or reckless misconduct" or "intentionally set out to launder the fruits of the illegal search ... by passing the illegally-obtained evidence" to "unsuspecting" law enforcement agents who obtained a second warrant, and concluding—without citing
of the lower court opinions that predated Herring\textsuperscript{54} and that would accord with Herring's unexplained references to "attenuated negligence."\textsuperscript{55}

Other courts, however, have refused to apply the good-faith exception even in tainted warrant cases that involve different

\textit{Herring}—that "the police misconduct \ldots was at most the result of negligence of one or more law enforcement officers" (quoting district court opinion); United States v. Martinez, 696 F. Supp. 2d 1216, 1259-60 (D.N.M. 2010) (recognizing that \textit{Herring} "changed the landscape of the exclusionary rule," but relying on the Court's reference to "nonrecurring and attenuated negligence" in rejecting the proposition that \textit{Herring} excuses all negligent Fourth Amendment violations, and observing that "[t]he negligent data entry of an administrative employee \ldots is more attenuated \ldots than the negligence of an officer in the field who executes an unconstitutional search based on his own misapplication of the standard for determining whether exigent circumstances exist"); also noting, however, that the evidence showed that "misapplication of the exigent-circumstances standard is recurring and not limited to the officers involved in this case" (quoting \textit{Herring}, 555 U.S. at 144)); Aviram et al., \textit{supra} note 48, at 714-15 (interpreting \textit{Herring} as "hinge[ing] upon the question 'who made the mistake?' as the decisive element in establishing good faith," and "reflect[ing] a healthy dosage of \textit{real politik} and particular awareness of the realities of fragmented policing"); Levine et al., \textit{supra} note 37, at 642, 645 (reading \textit{Herring} as permitting "evidence laundering" in tainted warrant cases involving different law enforcement officials, absent evidence of "significant or recurring misconduct" on the part of the officer responsible for the illegal predicate search).

54. \textit{See} United States v. McClain, 444 F.3d 556, 566 (6th Cir. 2006) ("More importantly, the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search \ldots."); United States v. Teitloff, 55 F.3d 391, 393 (8th Cir. 1999) (noting that the officers who executed the warrant "were not involved and did not have any knowledge about the prior unlawful searches at [the defendant's] business" and "act[ed] in an objectively reasonable manner when they executed the arrest warrant"); see also Cox, \textit{supra} note 33, at 1540 (endorsing this approach unless the lone officer involved "disclosed all of the circumstances of the original search or seizure in adequately sufficient detail to the issuing magistrate"). \textit{But cf.} United States v. Massi, 761 F.3d 512, 528 (5th Cir. 2014) (refusing to require different officers as a "necessary element" of the good-faith exception).

55. \textit{Herring}, 555 U.S. at 144; \textit{see also} supra note 46 and accompanying text. The \textit{Herring} Court did not define the concept of "attenuation," and commentators have taken conflicting positions on its meaning and the extent to which it restricts the reach of the Court's holding. \textit{See}, \textit{e.g.}, Albert W. Alschuler, \textit{Herring} v. United States: \textit{A Minnow or a Shark?}, 7 OHIO ST. J. CRIM. L. 463, 478-81 (2009); Wayne R. LaFave, \textit{The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule}, 99 J. CRIM. L. & CRIMINOLOGY 757, 770-83 (2009); Levine et al., \textit{supra} note 37, at 636. In its subsequent decision in \textit{Davis}, however, the Court's description of \textit{Herring} failed even to mention the term, making it less likely that attenuation will serve as a meaningful limit on \textit{Herring}'s exemption for negligent violations. \textit{See} Davis v. United States, 564 U.S. 229, 238-40 (2011); \textit{JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE} § 20.06[C][3], at 372 (6th ed. 2013) (observing that \textit{Davis} "can be interpreted as eliminating, \textit{sub silentio}, th[e] factor" of attenuation); \textit{see also} David H. Kaye, \textit{Unraveling the Exclusionary Rule: From Leon to Herring to Robinson—and Back?}, 58 UCLA L. REV. DISCOURSE 207, 211 (2011) (criticizing the extension of \textit{Herring} to non-attenuated circumstances); \textit{Note}, \textit{Toward a General Good Faith Exception}, 127 HARV. L. REV. 773, 779 & nn.67-68 (2013) (citing conflicting lower court decisions on the importance of attenuation).
officers, a result that squares with Herring’s decision not to invoke the good-faith exception and extend Leon to cases where police reasonably relied on officers from another jurisdiction. In creating the good-faith exception, the Court in Leon emphasized that the exclusionary rule is designed to deter law enforcement “as a whole,” to promote institutional compliance with the dictates of the Fourth Amendment. Leon therefore treated law enforcement as a single entity, cautioning that the good-faith analysis must take into account “the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination.” “Nothing in our opinion,” the Court warned, “suggests . . . that an officer could obtain a warrant on the basis of a ‘bare bones’ affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search.” Thus, the Court in Herring acknowledged that in determining whether the exclusionary rule should apply, “Leon admonished that we must consider the actions of all the police officers involved.” That should include not only (in Leon’s words) the “future counterparts” of the officers who participated in a particular investigation, but also the officer who executed a tainted warrant as well as the one who conducted the illegal predicate

56. See Martinez, 696 F. Supp. 2d at 1261-62.
57. United States v. Leon, 468 U.S. 897, 920 n.20 (1984) (referring to “the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment,” and observing that “[t]he key to the [exclusionary] rule’s effectiveness as a deterrent lies . . . in the impetus it has provided to police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits” (first quoting Illinois v. Gates, 462 U.S. 213, 261 n.15 (1983) (White, J., concurring in the judgment); and then quoting Jerold H. Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 MICH. L. REV. 1319, 1412 (1977) (second alteration in original))); see also Davis, 564 U.S. at 246 (noting that the exclusionary rule’s deterrent impact depends on “alter[ing] the behavior of individual law enforcement officers or the policies of their departments” (quoting Leon, 468 U.S. at 918)).
58. 468 U.S. at 923 n.24.
59. Id.
60. Herring, 555 U.S. at 140 (emphasis added); see also Jennifer E. Laurin, Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence, 111 COLUM. L. REV. 670, 684 & n.60 (2011) (interpreting Herring’s reference to “‘systemic negligence’” as endorsing a view of the exclusionary rule “expressly aimed at institutional, in addition to individual, misconduct” (quoting Herring, 555 U.S. at 144)). But cf. Levine et al., supra note 37, at 630-31 (describing Herring as adopting an “atomistic,” “individualistic view of police work,” “depart[mental]z[ing] the relevant actions of each individual officer, rather than scrutinizing the behavior of the whole law enforcement team”).
61. Leon, 468 U.S. at 919 (quoting United States v. Peltier, 422 U.S. 531, 539 (1975)) (internal quotation marks omitted).
search. The interest in deterring law enforcement as a whole from engaging in unconstitutional predicate searches therefore counsels against extending the good-faith exception to any tainted warrant case, regardless of how many different officers or departments played a role in obtaining and executing the warrant.

An independent reason some lower courts have cited for refusing to allow police to sanitize tainted warrants by means of the good-faith exception is that the magistrate’s decision to issue a warrant reflects only a finding of probable cause and not an assessment of the constitutionality of the law enforcement methods used to obtain the information included in the warrant application. Search warrant applications need not attest to the constitutionality of predicate searches, and magistrates are not required to analyze potential objections to the permissibility of those searches. In Leon, for example, the Court described the magistrate’s “responsibility” as “determin[ing] whether the officer’s allegations establish probable cause and, if so, to issue a warrant.” Moreover, a subsequent

---

62. See Levine et al., supra note 37, at 660 (criticizing courts that “focus exclusively on the effect that exclusion would have on the second officer” and “overlook the culpability of the first” in tainted warrant cases).

63. See Halcom, supra note 37, at 484 (arguing that applying the good-faith exception to tainted warrant cases “reward[s] police officers’ ignorance of the Fourth Amendment’s requirements,” and citing, by way of example, three Eighth Circuit decisions that “allowed the admission of illegally seized evidence in three virtually identical [tainted warrant] cases over the course of six years”); Lipson, supra note 37, at 1170 (proposing that the exclusionary rule should apply even in tainted warrant cases involving one officer and “courts should either relegate the Herring scienter requirement to police provision of misinformation that leads to an illegal search, or they should rule that illegal predicate searches are per se reckless or grossly negligent”); cf. Hochberg, supra note 37, at 324 (distinguishing efforts to deter “isolated incidents of negligent recordkeeping” from “[d]eterrence of illegal searches and seizures,” which are “among the core concerns that gave rise to the exclusionary rule and the poisonous fruit doctrine”). But cf. Cox, supra note 33, at 1547 (maintaining that the exclusionary rule has no deterrent effect if all the officers involved were acting in good faith and “the only flaws in the process” were attributable to the magistrate’s decision to issue the warrant).

64. See, e.g., United States v. O’Neal, 17 F.3d 239, 242 n.6 (8th Cir. 1994); United States v. Vasey, 834 F.2d 782, 789-90 (9th Cir. 1987); State v. DeWitt, 910 P.2d 9, 15 (Ariz. 1996). For scholarly commentary making this argument, see Bradley, supra note 37, at 302; Clancy, supra note 33, at 705-06.

65. See, e.g., 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3(f), at 98-99 (5th ed. 2012) (cautioning that “when the warrant-issuing process leaves totally unresolved the lawfulness of the prior police activity, then there is no reason why that process should, via Leon, shield that activity from full scrutiny at the suppression hearing”); Melilli, supra note 37, at 560 (noting that “it is not the magistrate’s function to determine if the evidence submitted to establish probable cause was lawfully obtained”).

66. Leon, 468 U.S. at 921; see also FED. R. CRIM. P. 41(d)(1) (providing that a magistrate “must issue [a] warrant if there is probable cause”).
opinion, *Groh v. Ramirez*, distinguished *Leon* and refused to apply the good-faith exception, in part because the magistrate was not “alert[ed] ... to the defect in the warrant that [the agent] had drafted” (in that case, a failure to particularly describe the evidence to be seized), and the Court was therefore unwilling to attribute even a “plain[]” and “patent[]” “constitutional error” to the magistrate.67 Just as *Leon* refused to countenance police passing off unsupported warrants to “ignorant” colleagues, so they should not be permitted to excuse impermissible predicate searches by obtaining a tainted warrant from an uninformed magistrate.68

On the other hand, some courts have been willing to apply the good-faith exception to tainted warrants so long as the warrant application did disclose the relevant background information about the predicate search to the magistrate. In *United States v. Massi*, for example, the Fifth Circuit observed that “knowingly hid[ing] or misrepresent[ing] the course ... of the investigation ... to the magistrate judge, making him unaware of a constitutional violation, ... could be seen as equivalent to misleading the magistrate by falsities in the affidavit” and therefore “could similarly lead to the unavailability of the good faith exception.”69 Where, however, the magistrate was fully informed about the allegedly impermissible predicate search, these courts have found that it was reasonable for the police to have relied on the magistrate’s issuance of a warrant. Thus, in *United States v. 15324 County Highway E.*, the United States Court of Appeals for the Seventh Circuit explained that “law enforcement agents properly left the probable cause determination, and its attendant constitutional and precedential considerations, to the better judgment of the magistrate,” who “was in a relatively better position to divine the as-yet unannounced unconstitutionality of [a] thermal imaging scan.”70 Cautioning that “any error ... must be attributed to the magistrate” in that case, the court distinguished situations where “agents conceal known or reasonably knowable Fourth Amendment

68. *468* U.S. at 923 n.24; see *supra* note 59 and accompanying text; see also Bradley, *supra* note 37, at 302 (observing that *Leon*’s acknowledgment that the good-faith exception is unavailable “when policeman X passes on illegally obtained information to policeman Y, who then obtains the warrant, would seem to govern [tainted warrant] case[s] as well”).
69. 761 F.3d 512, 531 (5th Cir. 2014) (analogizing to the exception recognized in *Leon*, 468 U.S. at 914, for cases of “knowing or reckless falsity of the affidavit”); cf. *United States v. Diehl*, 276 F.3d 32, 42 (1st Cir. 2002) (finding that inaccuracies in an affidavit were “consistent with either inadvertence or sloppiness, but not with an intentional misrepresentation, or one made with reckless disregard of the truth,” and that there was “no possibility that the issuing magistrate judge was misled ... the affidavit”).
70. 332 F.3d 1070, 1075 (7th Cir. 2003).
violations from the issuing magistrate."71 The United States Court of Appeals for the Second Circuit similarly noted in United States v. Thomas, "[t]he magistrate, whose duty it is to interpret the law, determined that the [impermissible] canine sniff could form the basis for probable cause" and "it was reasonable for the officer to rely on this determination."72 "There is nothing more the officer could have or should have done under these circumstances to be sure his search would be legal," the court concluded.73

Other courts find the accuracy of the warrant application irrelevant. In United States v. Wanless, for example, the United States Court of Appeals for the Ninth Circuit declined to create an exception to the fruits of the poisonous tree doctrine in cases involving tainted warrants, noting that the prosecution's reliance on the truthfulness of the warrant application "misperceives the 'good faith' exception."74 That exception simply "does not apply where a search warrant is issued on the basis of evidence obtained as the result of an illegal search," the court held.75

Charting a middle course, the Massachusetts Supreme Judicial Court refused to mandate that search warrant affidavits "establish that [police officers'] observations were made without infringement on Fourth Amendment rights."76 But the court cautioned that "if, as a

71. Id. (noting that the law enforcement officials there "disclos[ed] fully their antecedent actions").
72. 757 F.2d 1359, 1368 (2d Cir. 1985).
73. Id.; see also United States v. Gianis, 824 F.3d 199, 221 (2d Cir. 2016) (observing that "to assert good faith reliance successfully, officers must, inter alia, disclose all potentially adverse information to the issuing judge"); United States v. Woerner, 709 F.3d 527, 534 (5th Cir. 2013) (cautioning that the good-faith exception is unavailable if "the officer applying for the warrant knew or had reason to know that the information was tainted and included it anyway without full disclosure and explanation"); United States v. McClain, 444 F.3d 556, 566 (6th Cir. 2006) ("More importantly, ... Officer Murphy's warrant affidavit fully disclosed to a neutral and detached magistrate the circumstances surrounding the initial warrantless search."); United States v. Reilly, 76 F.3d 1271, 1280 (2d Cir. 1996) ("The good faith exception to the exclusionary rule does not protect searches by officers who fail to provide all potentially adverse information to the issuing judge, and for that reason, it does not apply here."); State v. Reno, 918 P.2d 1235, 1245 (Kan. 1996) (warning that, "[e]ven if Leon applied, a search warrant issued by a magistrate from whom material facts had been withheld cannot be reasonably relied upon by the officer").
74. 882 F.2d 1459, 1466 (9th Cir. 1989).
75. Id.
76. Commonwealth v. D'Onofrio, 488 N.E.2d 410, 415 (Mass. 1986); cf. United States v. Deaner, 1 F.3d 192, 196-97 (3d Cir. 1993) (rejecting the argument that "every piece of evidence relied on by an affiant must be shown to have been acquired constitutionally" because it "would subject probable cause determinations to a hyper-technical analysis" and would impose "a substantial burden on affiants, as imaginative defense counsel will often successfully be able to argue that the failure to disprove some hypothetical set of facts left it ambiguous as to whether the facts contained within the four-
matter of fact, the observations resulted from a violation of the defendants’ Fourth Amendment rights, the observations cannot support the issuance of search warrants, and any evidence traceable to those observations must be suppressed.”

Extending Leon’s concept of reasonable police reliance on a warrant beyond the magistrate’s determination of probable cause is problematic for several reasons. First, the warrant proceeding is ill-suited to an assessment of the constitutionality of predicate searches. As the Supreme Court noted in Franks v. Delaware, a magistrate’s determination of probable cause is “necessarily ex parte,” and “an ex parte inquiry is likely to be less vigorous” because “[t]he magistrate has no acquaintance with the information that may contradict . . . the affiant’s allegations.” “The pre-search proceeding will frequently be marked by haste,” the Court continued, and “this urgency will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses.” Moreover, although some scholars have suggested that the good-faith exception should apply in tainted warrant cases if the magistrate did in fact review the constitutionality of the predicate searches, the inherent nature of a warrant application proceeding—an ex parte hearing that typically does not involve witness testimony—does not lend itself to the resolution of these issues, particularly if they involve questions of disputed fact.

Second, providing the magistrate with information about a suspect illegal predicate search could jeopardize the prosecution’s
efforts to establish that the warrant was an independent source under *Murray*. *Murray* itself, of course, expressly provided that the independent source exception to the poisonous tree doctrine is unavailable if “information obtained during [an unconstitutional predicate search] was presented to the Magistrate and affected his decision to issue the warrant.”

As the Utah Supreme Court pointed out, encouraging police to advise a magistrate about impermissible predicate searches “would seriously limit the applicability of the independent source doctrine” by hindering prosecutors from proving that the “probable cause determination was not tainted by observations made during the unlawful entry.” And even more important, such a requirement would prove to be of greatest value to more culpable police officers, who know to include the information in their warrant application because they deliberately conducted an impermissible predicate search in the hope of eventually using a tainted warrant to insulate their misconduct.

In short, a number of considerations support the lower court opinions refusing to use the good-faith exception to sanitize tainted warrants that cannot satisfy the two-part standard set out in *Murray*—even if the police reasonably believed their predicate search complied with the dictates of the Fourth Amendment. Most of the justifications underlying the *Leon* line of cases are inapplicable when the officers were not acting in reliance on the earlier determination of a neutral third party, and warrant application proceedings are not well-adapted to a thorough evaluation of the constitutionality of predicate searches. Moreover, despite the Court’s gratuitous reliance on *Herring* in adding broad dicta to its opinion in *Davis*, extending those cases to overlook even tainted warrants obtained and executed by different officers would undermine the exclusionary rule’s goal of deterring all of the law enforcement officials involved in a particular search.

In addition to these general objections to broadening the good-faith exception to excuse tainted warrants, what most courts and scholars have failed to recognize is that these warrants vary in terms of the nature of their underlying illegal predicate search. The discussion that follows addresses those differences, as well as the potential impact the Court’s mistake of law decision in *Heien v. North Carolina* may have on the relationship between the good-faith exception and the poisonous tree doctrine.

---

83. State v. Krukowski, 100 P.3d 1222, 1227 n.3 (Utah 2004).
85. 135 S. Ct. 530 (2014).
III. **HEIEN AND THE VARIOUS TYPES OF TAINTED WARRANTS**

Tainted warrants do not all fit into one mold; instead, they vary in terms of the source of the error made by the officer who conducted the illegal predicate search. For the most part, those differences have been ignored by both judges and scholars. After analyzing the various types of mistakes that can lead to an impermissible predicate search and analogizing to the standards of appellate review, this Part of the Article concludes that the Court’s current Fourth Amendment jurisprudence is adequate to handle all forms of tainted warrants and that its recent ruling in *Heien* does not call for allowing the prosecution to introduce the fruits of any such warrants that would otherwise be inadmissible under existing case law.

In many tainted warrant cases, the police made a mistake of law concerning the constitutional limits on searches and seizures—in thinking, for example, that their conduct did not effect a “search” within the meaning of the Fourth Amendment or that a warrant exception was available. In others, they erred applying well-established Fourth Amendment principles in gauging whether a particular predicate search or seizure was justified by probable cause or reasonable suspicion. A few involved a mistake of fact—for example, the failure to realize that an outstanding arrest warrant had

---

86. *See, e.g.*, Evans v. United States, 122 A.3d 876, 886 (D.C. 2015) (viewing precedent discussing an officer’s misinterpretation of local criminal law as controlling in a case involving an officer’s mistake about the contours of the Fourth Amendment (citing Smith v. United States, 111 A.3d 1 (D.C. 2014), aff’d mem., 159 A.3d 1220 (D.C. 2017))). But cf. Perez v. State, No. 08-13-00024-CR, 2016 Tex. App. LEXIS 812, at *31 (Jan. 27, 2016), vacated and remanded, No. PD-0213-16, 2017 Tex. Crim. App. Unpub. LEXIS 700 (Oct. 4, 2017) (noting that “*Heien* addresses a mistake of substantive criminal law ... and not a mistake of criminal procedure,” and arguing that it “should be cabined to ... objectively reasonable dispute[s] over the application of a criminal statute to a person’s conduct”); Hochberg, *supra* note 37, at 318 (observing, in discussing concerns that the good-faith exception enables courts to avoid ruling on the merits of Fourth Amendment claims, that “[t]ainted warrant cases generally raise a different Fourth Amendment probable cause issue” than the question surrounding a magistrate’s probable cause determination analyzed in *Leon*).

87. *See, e.g.*, United States v. Ganias, 824 F.3d 199, 225 (2d Cir. 2016) (whether “retention of the mirrored hard drive[]” of a computer that had been searched pursuant to a warrant was permissible); United States v. 15324 Cty. Highway E., 332 F.3d 1070, 1071 (7th Cir. 2003) (whether a thermal imager effected a “search”); Evans, 122 A.3d at 880 (whether a warrantless entry was constitutional); State v. Pogue, 868 N.W.2d 522, 532 (N.D. 2015) (whether an inventory search was permissible); State v. Thomas, 334 P.3d 941, 945 (Okla. Crim. App. 2014) (whether a search incident to arrest could extend to a cell phone).

88. *See, e.g.*, United States v. McClain, 444 F.3d 556, 563-64 (6th Cir. 2006); United States v. Fletcher, 91 F.3d 48, 51 (8th Cir. 1996); State v. Carter, 630 N.E.2d 355, 362 (Ohio 1994) (per curiam).
been quashed.  

And occasionally the officer made a mistake of law relating to the reach of the criminal code. That last type of error was the subject of the Supreme Court's 2014 decision in *Heien v. North Carolina*.  

The Court concluded in *Heien* that a police officer's reasonable misinterpretation of state criminal law—in that case, the belief that a vehicle was required to have two functioning brake lights—does not undermine the reasonable suspicion required to conduct a traffic stop. The eight Justices in the majority, in an opinion written by Chief Justice Roberts, found reasonable mistakes of law "no less compatible with the concept of reasonable suspicion" than comparable mistakes of fact. "To be reasonable is not to be perfect," the Chief Justice explained, noting that the Court had previously upheld searches and seizures based on reasonable mistakes of fact. 

Observing that reasonable suspicion "arises from the combination of an officer's understanding of the facts and his understanding of the relevant law," the majority could find no justification for distinguishing between the two types of errors. The Court then had "little difficulty" in reaching the conclusion that the officer's mistake of law was a reasonable one and the stop of Heien's car was therefore supported by reasonable suspicion.  

*Heien* was a substantive Fourth Amendment ruling about the nature of the reasonable suspicion requirement and not a remedial decision about the scope of the exclusionary rule's good-faith exception. Because *Heien* differed from the *Leon* line of cases in that respect, Justice Sotomayor's dissent was wrong to assume that the good-faith exception would apply on the facts of *Heien* in a jurisdiction that had not rejected the exception under its own state law.  

---

89. Cf. United States v. Woerner, 709 F.3d 527, 531 (5th Cir. 2013) (search warrant had expired).

90. See Smith, 111 A.3d at 5 (mistake regarding local regulations governing license plates).

91. 135 S. Ct. 530 (2014).

92. See id. at 534.

93. Id. at 536.

94. Id.

95. Id. But cf. id. at 542 (Sotomayor, J., dissenting) (taking the position that the reasonableness of a search or seizure "requires evaluating an officer's understanding of the facts against the actual state of the law" (emphasis added)).

96. Id. at 540 (majority opinion). For criticism of the Court's reasoning in *Heien* and discussion of the potential reach of the decision, see Kit Kinports, *Heien's Mistake of Law*, 68 ALA. L. REV. 121 (2016).

97. See Heien, 135 S. Ct. at 539 (noting that the mistake of law at issue there "relates to the antecedent question" whether "there was [a] violation of the Fourth Amendment in the first place" and not "the separate matter of remedy").
Nevertheless, *Heien* did ultimately excuse a mistake made by a single law enforcement official who was not relying on a neutral third party. Could the Court’s opinion therefore be cited by way of analogy to support extending the good-faith exception to tainted warrant cases despite the fact that the officer who made the illegal predicate search was not relying on an independent authority?

On the one hand, doing so would undermine the narrow limits to the Court’s ruling in *Heien*. In response to the concern that the Court’s decision would incentivize police ignorance, Chief Justice Roberts cautioned that any error must be “objectively reasonable” and “an officer can gain no Fourth Amendment advantage through a sloppy study of the laws.”

The state vehicle code provisions at issue in *Heien* sent “conflicting signals,” and even the dissent in the court below characterized as “surprising” the state appellate court’s construction of the statute as requiring only one working brake light. Chief Justice Roberts pointed out that the relevant statutory language used both the singular and plural forms of the term “stop lamp” and that *Heien*’s case marked the first time the state appellate courts had interpreted the brake light provision.

Providing further support for a narrow reading of *Heien*, Justice Kagan, joined by Justice Ginsburg, wrote a concurring opinion to “elaborate briefly on the important limitations” in the Court’s ruling. The concurrence predicted that law enforcement officials’ mistakes of law will be deemed reasonable only in “exceedingly rare” cases.

---


100. Id. at 542 (Kagan, J., concurring).

101. Id. at 540 (majority opinion) (quoting State v. Heien, 737 S.E.2d 351, 359 (N.C. 2012) (Hudson, J., dissenting)).

102. See id. But cf. id. at 547 (Sotomayor, J., dissenting) (criticizing the majority’s insistence on leaving “undefined” the objective reasonableness standard it was endorsing); Kinports, supra note 96, at 157 (“Beyond the clues that can be gleaned from the Court’s disposition of this specific statutory interpretation issue, the majority provided little content to its definition of a reasonable mistake of law.”).

103. 135 S. Ct. at 541 (Kagan, J., concurring).
circumstances. The law in question must be “genuinely ambiguous,” Justice Kagan emphasized, “‘so doubtful in construction’ that a reasonable judge could agree with the officer’s view.” The concurrence then reiterated that the criminal statute “must pose a ‘really difficult’ or ‘very hard question of statutory interpretation’” and that rejecting the officer’s construction of the statutory language must “require[] hard interpretive work.” By contrast, the two concurring Justices warned, law enforcement officials who are “unaware of or untrained in the law” or who act in “reliance on ‘an incorrect memo or training program’” have not made a reasonable mistake. As Orin Kerr pointed out, the concurrence described “a much narrower test than a reasonable officer” standard.

On the other hand, the Chief Justice’s majority opinion observed that the Fourth Amendment “inquiry” the Court was conducting in *Heien* was “not as forgiving” as the standard of objective reasonableness used in “the distinct context” of qualified immunity.

---

105. *Id.* (quoting The Friendship, 9 F. Cas. 825, 826 (C.C.D. Mass. 1812) (No. 5125)).
106. *Id.* (quoting Transcript of Oral Argument, supra note 104, at 50; see also id. at 542 (observing that the various code provisions at issue there created “a quite difficult question” of statutory construction and that the officer’s mistaken interpretation of them “had much to recommend it” and “a court could easily take [his] view”). But cf. The Supreme Court, 2014 Term—Leading Cases, 129 HARV. L. REV. 251, 259 (2015) (discussing *Heien* and observing that the concurrence’s “superlative terms” might be “reassuring on the surface,” but they “offered little guidance as to what ‘very hard’ or ‘really difficult’ actually mean,” and pointing out that “the difficulty of resolving a question of statutory interpretation can often depend entirely on one’s preferred interpretive approach”).
109. United States v. McClain, 444 F.3d 556, 566 (6th Cir. 2006). But cf. Kinports, supra note 96, at 156-67 (discussing the varying ways the lower courts have defined reasonable mistakes of law in the wake of *Heien*).
110. 135 S. Ct. at 539; see also id. at 541 (Kagan, J., concurring) (agreeing that *Heien*’s standard is “more demanding” than the qualified immunity inquiry); cf. id. at 547 (Sotomayor, J., dissenting) (objecting to the Court’s failure to “elaborate[e]” on the distinction between the Fourth Amendment standard and the qualified immunity inquiry and predicting that the difference “will prove murky in application”). But see Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 72-78 (2016), http://www.minnesotalawreview.org/wp-content/uploads/
a standard that has been analogized to the good-faith analysis required by *Leon*. The qualified immunity defense protects executive-branch officials in section 1983 litigation so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," and *Leon* itself cited the Court's qualified immunity jurisprudence despite recognizing that "[t]he situations are not perfectly analogous." Subsequently, in *Malley v. Briggs*, the Court was more unequivocal, flatly stating that "the same standard of objective reasonableness that we applied . . . in *Leon* defines the qualified immunity accorded an officer."

Notwithstanding the Supreme Court opinions equating the qualified immunity inquiry and the good-faith exception, *Heien*’s less "forgiving" standard should be deemed controlling when an impermissible predicate search results from an officer’s inaccurate interpretation of state law. If the officer’s mistake is deemed reasonable, then no Fourth Amendment violation occurred and the exclusionary rule is obviously unavailable for that reason. If the mistake does not satisfy *Heien*’s standard of reasonableness, the prosecution should not be able to do an end run around *Heien* by relying on the good-faith exception to introduce illegally seized evidence that would otherwise be inadmissible. After all, *Heien*
stands virtually alone in forgiving a mistake of law made solely by an “officer engaged in the often competitive enterprise of ferreting out crime,” who is not reasonably relying on a third party, and the opinion deserves to be read narrowly as a result.

Even if Heien is extended to make the good-faith exception available in some tainted warrant cases, the Court was careful to limit the reach of its ruling to mistakes involving the criminal statute the police thought the defendant was violating. In fact, all nine Justices acknowledged that a mistake of law on the officer’s part concerning Fourth Amendment doctrine would have been irrelevant in that case “no matter how reasonable.” Heien thus provides no support for applying the good-faith exception to tainted warrants that are based on an officer’s mistaken belief that a predicate search complied with constitutional norms.

In addition, making the good-faith exception available in such cases would circumvent the limitations set out in Davis. The Court concluded there that the good-faith exception should apply when police reasonably relied on “binding appellate precedent” that justified their actions. If such precedent supported the legality of a

agreeing that “an objectively unreasonable understanding of the substantive law renders the officer culpable for purposes of the good faith exception”).

116. Hudson v. Michigan, 547 U.S. 586 (2006), is the other exception, but it is limited to denying an exclusionary remedy for violations of the knock-and-announce rule.


118. Heien v. North Carolina, 135 S. Ct. 530, 539 (2014) (“An officer’s mistaken view that the conduct at issue did not give rise to [a Fourth Amendment] violation—no matter how reasonable—could not change that ultimate conclusion.”); see id. at 541 n.1 (Kagan, J., concurring) (agreeing with the majority that “an error about the contours of the Fourth Amendment itself[] can never support a search or seizure”); id. at 546 (Sotomayor, J., dissenting) (likewise citing the Court’s “prior assumption” that police have no “leeway” when making mistakes about the Fourth Amendment); see also Brief for the Respondent, supra note 104, at 29-30, 31 & n.2 (making this concession as well); Brief for the United States as Amicus Curiae Supporting Respondent at 29 n.3, Heien, 135 S. Ct. 530 (No. 13-604) (same).


120. Davis v. United States, 564 U.S. 229, 232 (2011); see also id. at 250 (Sotomayor, J., concurring in the judgment) (noting that the case did “not present the markedly different
predicate search in a tainted warrant case, then the prosecution could obviously take advantage of Davis.\textsuperscript{121} But in the absence of controlling case law, applying the good-faith exception based on a police officer’s misperception that a predicate search was constitutional would unduly expand Davis and undermine the exclusionary rule’s deterrent effect.\textsuperscript{122} Despite the broad dictum in Davis quoted above—the ambiguous reference to “police act[ing] with an objectively ‘reasonable good-faith belief’ that their conduct is lawful”\textsuperscript{123}—the good-faith exception should not be extended beyond the confines of the Court’s holding to include cases where an officer was not relying on an authoritative and neutral third party.\textsuperscript{124}

Finally, refusing to overlook an individual officer’s mistaken views about constitutional norms is consistent with the standards of appellate review applied in Fourth Amendment cases. Questions of law are typically reviewed de novo on appeal.\textsuperscript{125} Courts of appeals generally do not defer even to trial courts’ conclusions of law because appellate judges are better positioned to make these determinations: they are “not encumbered” by the “time-consuming[] process of hearing evidence” and thus are “freer to concentrate on legal questions,” and “the collaborative, deliberate process” of sitting on

\textsuperscript{121} For examples of pre-Davis tainted warrant cases that could potentially fall into this category, see United States v. 15324 Cty. Highway E., 332 F.3d 1070, 1073 (7th Cir. 2003) (noting that the ruling in Kyllo v. United States, 533 U.S. 27 (2001), that use of a thermal imager on a residence effected a “search” overturned Seventh Circuit precedent); United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 1985) (involving use of a drug dog that predated the holding in Florida v. Jardines, 133 S. Ct. 1409 (2013), that allowing a dog to sniff the outside of a home constituted a “search”).

\textsuperscript{122} See State v. Thomas, 334 P.3d 941, 945 (Okla. Crim. App. 2014) (refusing to apply the good-faith exception in a tainted warrant case and distinguishing Davis because “there was no binding appellate precedent which could have justified the search of Thomas’s cell phone” during the search incident to arrest, even though the search predated the decision in Riley, 134 S. Ct. at 2485, banning such searches).

\textsuperscript{123} Davis, 564 U.S. at 238 (emphasis added) (quoting United States v. Leon, 468 U.S. 897, 909 (1984)); see also supra note 51 and accompanying text.

\textsuperscript{124} Cf. Kinports, supra note 96, at 172-74 (warning that Davis’s dictum, in combination with Herring, could be read by “a prosecution-friendly court” to support denying an exclusionary remedy where police made reasonable, or even negligent, mistakes about Fourth Amendment principles).

\textsuperscript{125} See 6 LAFAVE, supra note 65, § 11.7(c), at 559-60 (citing federal and state cases). For examples of court opinions applying this standard in tainted warrant cases, see United States v. Massi, 761 F.3d 512, 519 (5th Cir. 2014); United States v. Mowatt, 513 F.3d 395, 399 (4th Cir. 2008), abrogated on other grounds by Kentucky v. King, 563 U.S. 452 (2011); United States v. McGough, 412 F.3d 1232, 1236 (11th Cir. 2005); People v. Arapu, 283 P.3d 680, 684 (Colo. 2012); State v. Boll, 651 N.W.2d 710, 715 (S.D. 2002).
panels "reduces the risk of judicial error on questions of law."\textsuperscript{126} By analogy, judges are in a better position to draw legal conclusions than police officers, who must often act in haste\textsuperscript{127} and who do not have the same legal training and familiarity with constitutional principles as judges.\textsuperscript{128} Admittedly, the same could be said about questions of state criminal law, despite the Court's decision in \textit{Heien} to equate law enforcement mistakes of fact and state criminal law. That is one of the many reasons the Court's decision in that case is subject to criticism,\textsuperscript{129} and there is no cause for compounding the error by broadening \textit{Heien} to cover questions of constitutional law.\textsuperscript{130}

A better argument for extending the good-faith exception to tainted warrants can perhaps be made when the reason a predicate search was unlawful was because an officer misapplied the definition of probable cause or reasonable suspicion to the facts of a particular case. The Court has cautioned that the police "deserve deference" in making probable cause and reasonable suspicion determinations because they "view[] the facts through the lens of [their] police experience and expertise."\textsuperscript{131} In \textit{United States v. Cortez}, for example, the Court noted that a "trained officer draws inferences and makes deductions . . . that might well elude an untrained person."\textsuperscript{132}

\textsuperscript{126.} United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984) (en banc). \textit{See generally} 7 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5(e), at 124 (4th ed. 2015) (articulating the reasons for reviewing conclusions of law de novo on appeal).

\textsuperscript{127.} \textit{See} \textit{Heien} v. North Carolina, 135 S. Ct. 530, 539 (2014) (noting that officers "may 'suddenly confront' a situation in the field" that requires "a quick decision on the law" (quoting Brief for Petitioner at 21, \textit{Heien}, 135 S. Ct. 530 (No. 13-604))).

\textsuperscript{128.} \textit{See id.} at 543 (Sotomayor, J., dissenting) (concluding that judges are "in the best position to interpret the laws"); United States v. Sanders, 196 F.3d 910, 913 (8th Cir. 1999) (arguing that law enforcement officials could not be "expected . . . to interpret the traffic laws with the subtlety and expertise of a criminal defense attorney"); Brief for the Respondent, \textit{supra} note 104, at 15 (noting that "officers in the field should not be expected to be 'legal technicians'" (quoting Ornelas v. United States, 517 U.S. 690, 695 (1996))); Brief for the United States as Amicus Curiae Supporting Respondent, \textit{supra} note 118, at 25 (agreeing that "judges, rather than officers, are best suited to resolve legal questions").

\textsuperscript{129.} \textit{See Kinports}, \textit{supra} note 96, at 130-31.

\textsuperscript{130.} \textit{But cf.} \textit{Clancy}, \textit{supra} note 33, at 711 (proposing giving magistrates "an expanded role" to consider the constitutionality of predicate searches, and "extending the current deferential standard of review" to those determinations).

\textsuperscript{131.} \textit{Ornelas,} 517 U.S. at 699.

\textsuperscript{132.} 449 U.S. 411, 418 (1981); \textit{see id.} at 419 (observing that, "when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion"); \textit{see also} United States v. Arvizu, 534 U.S. 266, 273, 276 (2002) (reasoning that police "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them," and that the agent there "was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants"); \textit{Terry} v. Ohio, 392 U.S. 1, 27 (1968) (admonishing
Moreover, the Court has described probable cause and reasonable suspicion as "elusive" concepts given the difficulty of clearly and exhaustively delineating how they apply to "the myriad factual situations" confronting law enforcement officials.133

But the definitions of probable cause and reasonable suspicion already take into account the objective reasonableness of a police officer's assessment. In Ornelas v. United States, for example, the Court specified that the relevant inquiry is whether the "historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause."134 The Court has also observed that "the substance of all the definitions of probable cause is a reasonable ground for belief of guilt,"135 and Terry v. Ohio described the reasonable suspicion required to conduct a stop and frisk as arising "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous."136

Justice Stevens's dissent in Leon persuasively argued that the Court created "a double standard of reasonableness" in that case by recognizing the possibility that a police officer could ever make a reasonable mistake in thinking the probable cause standard had been met.137 "[W]hen probable cause is lacking," Justice Stevens explained, "then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search that "due weight must be given . . . to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience").

133. Cortez, 449 U.S. at 417.
134. 517 U.S. at 696.
135. Maryland v. Pringle, 540 U.S. 366, 371 (2003) (alteration omitted) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)); see also Ornelas, 517 U.S. at 696 (noting that "probable cause to search . . . exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found").
136. 392 U.S. at 30; see also id. at 21-22 ("[I]n making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). For discussion of the Court's tendency to use similar language to define both probable cause and reasonable suspicion, see Kit Kinports, Diminishing Probable Cause and Minimalist Searches, 6 OHIO ST. J. CRIM. L. 649, 649-57 (2009).
137. United States v. Leon, 468 U.S. 897, 976 (1984) (Stevens, J., dissenting); see also id. at 958-59 (Brennan, J., dissenting) ("Because the [probable cause and good-faith exception] standards overlap so completely, it is unlikely that a warrant could be found invalid [because of an absence of probable cause] and yet the police reliance upon it could be seen as objectively reasonable; otherwise, we would have to entertain the mind-boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant.").
will produce evidence of a crime."\textsuperscript{138} Extending the good-faith exception to tainted warrants could potentially amount to triple-counting reasonableness: first in evaluating whether the predicate search was actually justified by probable cause/reasonable suspicion; then in determining whether the officer’s mistaken view that the standard was met was a reasonable one; and finally in analyzing whether the officer reasonably relied on the tainted warrant.\textsuperscript{139} If two bites at the apple seem excessive, allowing a third is clearly unwarranted.

Moreover, despite admonishing that deference is owed to law enforcement’s evaluations of probable cause and reasonable suspicion, the Court held in \textit{Ornelas} that the question whether the facts of a case give rise to probable cause or reasonable suspicion is “a mixed question of law and fact” that should be reviewed de novo on appeal.\textsuperscript{140} If the goal of promoting “a unitary system of law” means that even a trial judge’s assessment of these concepts is not entitled to “sweeping deference,” there seems little justification for according greater weight to a police officer’s judgment.\textsuperscript{141} And the Court in \textit{Ornelas} expressly distinguished the “great deference” paid when reviewing a decision to issue a warrant” in order to further the policy goal of promoting a “‘strong preference’” for warrants.\textsuperscript{142} “[T]he

\textsuperscript{138} \textit{Id.} at 975 (Stevens, J., dissenting) (referring to \textit{Illinois v. Gates}, 462 U.S. 213, 238 (1983), which defined probable cause as “a practical, common-sense decision whether, given all the circumstances . . . , there is a fair probability that . . . evidence of a crime will be found in a particular place”).

\textsuperscript{139} \textit{See Cox, supra} note 33, at 1537, 1543 (advocating that the availability of the good-faith exception turn on a finding both that the predicate search was “close enough to the line of validity” that a reasonable officer “would believe that the information supporting the warrant was not tainted by unconstitutional conduct,” and that a reasonable officer “would [not] have known that the search was illegal despite the magistrate’s authorization” (first quoting United States v. McClain, 444 F.3d 556, 566 (6th Cir. 2006); and then quoting \textit{Leon}, 468 U.S. at 922 n.23)). \textit{But cf.} United States v. Fletcher, 91 F.3d 48, 51 (8th Cir. 1996) (requiring only a two-step analysis).

\textsuperscript{140} 517 U.S. at 696. For the view that \textit{Ornelas} was interpreting the Constitution and thus is binding on the states, see \textit{6 LAFAVE, supra} note 65, § 11.7(c), at 565-66 & n.106 (citing conflicting state court opinions). \textit{See generally id.} at 562-63 (observing that the lower courts disagree on the appropriate standard of appellate review for other mixed questions of law and fact in Fourth Amendment cases).

\textsuperscript{141} \textit{Ornelas}, 517 U.S. at 697.

\textsuperscript{142} \textit{Id.} at 698-99 (quoting \textit{Gates}, 462 U.S. at 236); \textit{see also} \textit{Leon}, 468 U.S. at 914 (noting that “we have . . . concluded that the preference for warrants is most appropriately effectuated by according ‘great deference’ to a magistrate’s determination” (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969))). \textit{But cf. 6 LAFAVE, supra} note 65, § 11.7(c), at 578 (arguing that de novo review could be justified on the ground that warrants are issued in ex parte proceedings and the reviewing court therefore “has the same record as the magistrate (that is, the affidavit) and thus is in essentially as good a position as the magistrate was to make the probable cause determination”).
police are more likely to use the warrant process,” the Court explained, “if the scrutiny applied to a magistrate’s probable-cause determination to issue a warrant is less than that for warrantless searches.”143 Ornelas thus created what Justice Scalia’s dissent termed “a dual standard of review” of probable cause determinations—“deferential review of a magistrate’s decision to issue a warrant, and de novo review of a [trial] court’s ex post facto approval of a warrantless search.”144 Analogizing to Ornelas, then, a police officer who misjudged the existence of probable cause and, as a result, made an illegal predicate search without a warrant should be entitled to no greater deference than a trial judge who erroneously believed a warrantless search was supported by probable cause.

Perhaps the best case for extending the good-faith exception to tainted warrants can be made when the predicate search violated constitutional norms because an officer made a mistake of fact. Suppose, for example, that the evidence used to obtain a search warrant was found during a stop or arrest that was based on outdated information about the status of the defendant’s license or outstanding warrants.145 Or suppose that the police made an illegal predicate search, erroneously believing that an apartment was abandoned,146 that the ways the defendant used a particular part of her property placed that area outside the curtilage of the home,147 or that the

143. Ornelas, 517 U.S. at 699.
144. Id. at 704-05 (Scalia, J., dissenting); see also 6 LAFAVE, supra note 65, § 11.7(c), at 572-73 & n.151 (noting that deference to the magistrate must be paid by “both the suppression hearing judge and the appellate court,” but that the court of appeals will use a de novo standard in reviewing the suppression hearing judge’s decision).
146. For a tainted warrant case with similar facts, see State v. Johnson, 716 P.2d 1288, 1295 (Idaho 1986) (involving a dispute whether the rental period for the defendant’s apartment had expired).
147. For a tainted warrant case with similar facts, see United States v. Diehl, 276 F.3d 32, 37 (1st Cir. 2002) (noting that evaluating whether an officer was standing within the curtilage when he smelled marijuana required the court to “confront a mixture of specific factual questions, such as distances, visibility, boundaries, and uses of property, as well as . . . a legal judgment about the significance of [the] collection of facts”). Cf. United States v. Dunn, 480 U.S. 294, 301 (1987) (including as one factor to be considered in defining the curtilage “the nature of the uses to which the area is put”). See generally 6 LAFAVE, supra note 65, § 11.7(c), at 569 & n.129 (reporting that courts conflict as to whether the definition of curtilage involves a question of fact or a mixed question of law and fact).
defendant had invited another officer into her home when in fact she
had been told she had no say in the matter.148

The Court's Fourth Amendment jurisprudence has warned that
deference is owed to trained officers' assessment of the facts. For
example, the Court has cautioned that law enforcement officials are
"expected to apply their judgment" to "recurring factual question[s]"149 and that they "deserve a margin of error" because they
"must make factual assessments on the fly."150

Analogizing once again to the standards for appellate review, the
Supreme Court instructed in Ornelas that appellate courts should
"review findings of historical fact only for clear error and . . . give due
weight to inferences drawn from those facts by resident judges and
local law enforcement officers."151 Appellate courts defer to trial
judges on questions of fact because here, unlike with questions of law,
trial judges are in the best position to resolve factual disputes: the
"opportunity to . . . make credibility determinations" affords them "a
significant advantage over appellate judges in evaluating and
weighing the evidence," and "valuable appellate resources are
conserved for those issues that appellate courts . . . are best situated to
decide" if courts of appeals need not conduct "a full-scale
independent review and evaluation of the evidence."152 Similarly, as
noted above, when police officers make factual inferences, they rely
on their training and experience and, in many cases, on their own
senses.153

Despite the deference owed to law enforcement's factual
assessments, existing Fourth Amendment precedents are adequate to

---

148. For a tainted warrant case with similar facts, see People v. Machupa, 872 P.2d
114, 117, 123 (Cal. 1994) (involving a discrepancy between one officer's assertion that the
defendant "invited" police into his house and another officer's statement that the defendant
was told "the officers 'would have to go with him').


Arvizu, 534 U.S. 266, 277 (2002) (requiring that "due weight" be given to "the factual
inferences drawn" by police).

151. 517 U.S. 690, 699 (1996). For examples of court opinions applying this standard
in tainted warrant cases, see United States v. Massi, 761 F.3d 512, 519 (5th Cir. 2014);
United States v. Mowatt, 513 F.3d 395, 399 (4th Cir. 2008), abrogated on other grounds
by Kentucky v. King, 563 U.S. 452 (2011); United States v. McGough, 412 F.3d 1232, 1236
(11th Cir. 2005); People v. Arapu, 283 P.3d 680, 684 (Colo. 2012); State v. Boll, 651
N.W.2d 710, 715 (S.D. 2002). See generally 6 LAFAVE, supra note 65, § 11.7(c), at 556-57
(noting that this standard is generally used in both federal and state courts' Fourth
Amendment decisions).

152. United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984) (en banc). See
generally Anderson v. City of Bessemer City, 470 U.S. 564, 573-76 (1985) (articulating
the reasons for deferring to trial judges' factual findings).

153. See supra notes 131-133 and accompanying text.
resolve cases of tainted warrants that rest on mistakes of fact. If the officer conducting the predicate search received inaccurate information from an independent state actor, *Leon* and its progeny would presumably preclude use of the exclusionary rule to suppress the fruits of that search—including any evidence seized pursuant to a subsequently obtained warrant. If the misinformation was received from another law enforcement official, at least one from a different jurisdiction, *Herring* might well preclude an exclusionary remedy so long as the other officer's culpability was no greater than negligence.

Extending the good-faith exception to additional tainted warrant cases would risk broadening *Herring* to excuse more culpable misconduct on the part of law enforcement. In the case of the involuntary predicate consent search, for example, the officer who made the coercive statement to the defendant could knowingly mislead other officers about the nature of the conversation, and those officers could then conduct what they in good faith believed was a proper consent search. Denying an exclusionary remedy in such situations goes well beyond *Herring* and the *Leon* line of cases and threatens to incentivize the "purposeful" and "flagrant" Fourth Amendment violations the Court has asserted are "most in need of deterrence."154

In the end, then, the Court's Fourth Amendment jurisprudence is already adequate to handle any type of illegal predicate search, and there is no call for expanding the good-faith exception to forgive tainted warrants in any additional circumstances. Predicate searches based on an officer's misreading of state criminal law can be analyzed under *Heien*'s substantive Fourth Amendment reasoning. The *Leon* line of cases can deal with situations where an officer, acting in reliance on a neutral authority, misunderstood the constitutional rules governing searches and seizures. The definitions of probable cause and reasonable suspicion already account for reasonable errors police make in applying those standards to the facts of a particular case. And illegal predicate searches arising from factual mistakes can be excused under *Herring* or the existing good-faith exception decisions. Evidence uncovered by any tainted warrants that cannot be saved by these precedents, and that cannot be considered an independent source under the two-part standard outlined in *Murray*, should be

---

suppressed under the fruits of the poisonous tree doctrine. It remains to consider whether the Court's attenuation analysis in *Utah v. Strieff* requires rethinking any of these conclusions.155

IV. *STRIEFF* AND THE ATTENUATION EXCEPTION

The Supreme Court's most recent assault on the exclusionary rule came in 2016 in *Utah v. Strieff*, which relied on the attenuation exception to the poisonous tree doctrine in refusing to suppress evidence obtained when a police officer made an unconstitutional suspicionless stop, discovered Strieff had an outstanding arrest warrant for a traffic violation, and then found drugs in the resulting search incident to arrest.156 The attenuation exception allows the prosecution to introduce evidence notwithstanding a “causal connection” between a constitutional violation and the discovery of that evidence—i.e., where there is no independent source for the evidence—if the connection has “become so attenuated as to dissipate the taint.”157 The “apt question” to be asked in analyzing the attenuation exception, the Court instructed in *Wong Sun v. United States*, is “whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”158 Like the *Leon* line of cases and the fruits of the poisonous tree doctrine generally, the attenuation exception is premised on the exclusionary rule's deterrent function. As the Court pointed out in *Leon*, attenuation analysis “attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.”159

Applying the three attenuation factors identified in *Brown v. Illinois*,160 Justice Thomas's majority opinion in *Strieff* acknowledged

---

155. 136 S. Ct. 2056.
156. See id. at 2059-60.
157. Nardone v. United States, 308 U.S. 338, 341 (1939); see also Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (warning that “[w]e need not hold that all evidence is ‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police”).
158. 371 U.S. at 488 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1959)).
160. See Brown, 422 U.S. at 603-04 (finding insufficient attenuation between an improper arrest and the defendant's confession). For criticism of *Strieff*’s reliance on the *Brown* factors, see George M. Dery III, *Allowing “Lawless Police Conduct” in Order to Forbid “Lawless Civilian Conduct”: The Court Further Erodes the Exclusionary Rule in
that the first factor—the “temporal proximity between the initially unlawful stop and the search”—favored the defendant.\textsuperscript{161} But the Court thought that the second factor—“the presence of intervening circumstances”—“strongly favor[ed]” the prosecution because the concededly “valid” warrant was “entirely unconnected with the stop” and the officer “had an obligation to arrest Strieff” once he learned of the outstanding warrant.\textsuperscript{162} The Court likewise concluded that the third, and “‘particularly’ significant,” factor—“the purpose and flagrancy” of the constitutional violation\textsuperscript{163}—“strongly favor[ed]” the prosecution because the improper stop reflected “at most negligence” on the part of the officer and was not “part of any systemic or recurrent police misconduct.”\textsuperscript{164} Elaborating on this point, Justice Thomas characterized the impermissible stop as “an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house” rather than “flagrantly unlawful police misconduct.”\textsuperscript{165}

\textsuperscript{161.} Strieff, 136 S. Ct. at 2062.

\textsuperscript{162.} Id.

\textsuperscript{163.} Id. at 2062-63 (quoting Brown, 422 U.S. at 604).

\textsuperscript{164.} Id. at 2063; see also id. at 2064 (asserting that a flagrant violation requires “more severe misconduct . . . than the mere absence of proper cause for the seizure”). Interestingly, the Court did not cite Herring here despite using language reminiscent of its opinion in that case. For discussion of Herring, see supra text accompanying notes 44-48 and infra text accompanying notes 188-193.

\textsuperscript{165.} Strieff, 136 S. Ct. at 2063; see also id. at 2064 (noting that “the application of the Brown factors could be different” if the evidence showed that police “engage[d] in dragnet searches” “because of the prevalence of outstanding arrest warrants”). But cf. id. at 2068-69 (Sotomayor, J., dissenting) (citing statistics showing that “[o]utstanding warrants are surprisingly common,” “the vast majority of which appear to be for minor offenses,” and that police routinely conduct stops, often without reasonable suspicion, and are trained to check for outstanding warrants); id. at 2073 (Kagan, J., dissenting) (observing that the police department’s “standard detention procedures . . . are partly designed to find outstanding warrants” and “find them they will, given the staggering number of such
Strieff differs, of course, from the tainted warrant cases because the outstanding arrest warrant there “predated,” and was undeniably “untainted” by, the constitutional violation.\textsuperscript{166} On its face, therefore, the Court’s decision seems far removed from the concerns that arise when police seek a warrant only after violating the defendant’s rights. But if even a pre-existing warrant can constitute an “intervening” circumstance, can a subsequently issued tainted warrant likewise trigger Strieff’s forgiving attenuation analysis and thus allow the admission of evidence where the prosecution cannot satisfy Murray’s independent source standard—i.e., where the probable cause necessary to support the warrant rested in part on evidence uncovered by the illegal predicate search and/or the officers’ decision to seek the warrant was prompted by that search?\textsuperscript{167}

In considering how the three Brown factors would apply to a tainted warrant, the time interval between a constitutional violation and discovery of the fruit of that violation now seems largely irrelevant after Strieff. Obtaining a warrant presumably takes longer than a matter of minutes,\textsuperscript{168} but the Court thought the attenuation analysis ultimately favored the prosecution in Strieff even though “only minutes” separated the unconstitutional stop and the discovery of drugs in the search incident to arrest.\textsuperscript{169} A later warrant is technically an “intervening” circumstance in the sense that it comes after the constitutional violation, and the Court did not seem troubled by the fact that the intervening circumstance in Strieff was entirely foreseeable.\textsuperscript{170} And Strieff adopted a very constricted view of what

\textsuperscript{166} Strieff, 136 S. Ct. at 2062, 2061.

\textsuperscript{167} See Henning, supra note 114, at 320 n.269 (noting that “[t]he relationship between the good faith exception and the attenuation doctrine, as well as the Court’s willingness to accept police errors, remains in a state of flux” after Strieff and the majority there “arguably increased its tolerance for constitutional violations by incorporating some of the culpability concerns of the good faith exception into the attenuation doctrine”).

\textsuperscript{168} But cf. Missouri v. McNeely, 569 U.S. 141, 154 & n.4 (2013) (listing thirty-five states that authorize some remote method of applying for warrants, such as by phone or email).

\textsuperscript{169} 136 S. Ct. at 2062.

\textsuperscript{170} See id. at 2066 (Sotomayor, J., dissenting) (arguing that the outstanding “warrant was not some intervening surprise that [the officer] could not have anticipated,” but instead was “part and parcel of the officer’s illegal ‘expedition for evidence in the hope that something might turn up’” (quoting Brown v. Illinois, 422 U.S. 590, 605 (1975))); id. at
constitutes a flagrant Fourth Amendment violation. In fact, rather than faithfully applying a multifactor test, Strieff arguably articulated a per se rule that the "discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest." Even if the Court's statements along those lines can be discounted simply as shorthand references for its conclusion that Brown's three-factor attenuation analysis favored the prosecution, the way Strieff applied those factors may not bode well for a defendant seeking to suppress evidence obtained by a tainted warrant.

In order to fully analyze Strieff's impact on the tainted warrant cases, however, three aspects of the Court's opinion must be considered: the Court's deliberate decision to link the attenuation and independent source exceptions to the poisonous tree doctrine; its use of Leon and the term "good faith"; and its focus on the officer's many..

2073 (Kagan, J., dissenting) (agreeing that the warrant was "an eminently foreseeable consequence" of the stop and therefore did not qualify as an intervening circumstance).

171. See id. at 2065 (Sotomayor, J., dissenting) (noting that the officer stopped Strieff because he "just happened to be the first person to leave a house that the officer thought might contain 'drug activity'")); id. at 2072 (Kagan, J., dissenting) ("[F]ar from a Barney Fife-type mishap, [the officer's] seizure of Strieff was a calculated decision, taken with so little justification that the State has never tried to defend its legality."); Brief for the Respondent at 14, Strieff, 136 S. Ct. 2056 (No. 14-1373) (reporting that the officer decided to seize "the next person he saw leaving the house"); Joelle Anne Moreno, Flagrant Police Abuse: Why Black Lives (Also) Matter to the Fourth Amendment, 21 BERKELEY J. CRIM. L. 36, 41, 69 (2016) (pointing out that, "[i]n virtually every other context, flagrant . . . mean[s] both 'obvious' and 'intentional,'" and charging that the Court imposed a "virtually insurmountable burden of proof" on "defendants seeking to rebut a prosecutor's argument of attenuated taint"); Kerr, supra note 160 (observing that "an officer who intentionally or recklessly violates the Fourth Amendment is acting in bad faith," and therefore wondering "how a generic statement that the officer was trying to investigate the case can meet the government's burden of showing good faith"); cf. Murray v. United States, 487 U.S. 533, 540 n.2 (1988) (denying that that case reflected a "search first, warrant later' mentality;", noting that the agents may have made the illegal entry because they "misjudged the existence of . . . exigent circumstances"); Brown, 422 U.S. at 605 (reasoning, in finding a flagrant violation there, that "[t]he impropriety of the arrest was obvious" and "virtually conceded by the two detectives when they repeatedly acknowledged . . . that the purpose of their action was 'for investigation' or for 'questioning'").

172. 136 S. Ct. at 2059; see id. at 2062 ("[W]e ultimately conclude that the warrant breaks the causal chain . . .."); id. at 2064 ("We hold that the . . . discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest."); see also Dery, supra note 160, at 430 (charging that Strieff "embraced the cure-all of the unknown warrant," in contrast to Brown itself, which rejected the notion that Miranda warnings could serve as a "cure-all" (quoting Brown, 422 U.S. at 602)).

173. But cf. Strieff, 136 S. Ct. at 2063 (noting, in summarizing the intervening circumstances factor, that "[t]he discovery of the outstanding warrant broke the causal chain between the unconstitutional stop and the discovery of evidence").
lawful actions. The remainder of this Part addresses each of these in turn.

First, in discussing the second Brown factor, Justice Thomas described Segura, a case involving an allegedly tainted warrant, as one with “similar facts.” Although acknowledging that a different exception to the poisonous tree doctrine—the independent source exception—was at issue in Segura, Justice Thomas read Segura as “suggest[ing] that the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is ‘sufficiently attenuated to dissipate the taint.’ ” Assuming a tainted warrant can be characterized as a “valid” one, this suggestion could be read to support an attenuation argument in a case involving an illegal predicate search.

Admittedly, Segura, like other independent source opinions, incorporated language typically associated with the attenuation exception—referring, for example, to purging and dissipating the taint of a constitutional violation—and thus threatened to conflate the two exceptions. In introducing the fruits of the poisonous tree doctrine, for example, the Segura majority described “[t]he question to be resolved” in determining whether evidence “is ‘tainted’ or is ‘fruit’ of a prior illegality” in the same terms Wong Sun had used to define attenuation: “whether the challenged evidence was ‘come at by exploitation of the initial illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’ ” Then, after noting it was “well established” that the exclusionary rule does not apply when “the connection between the illegal police conduct and the discovery and seizure of the evidence is ‘so attenuated as to dissipate the taint,’” the Court’s opinion in Segura continued: evidence

174.  Id. at 2062.
175.  Id. (quoting Segura v. United States, 468 U.S. 796, 815 (1984)).
176.  See United States v. Wade, 388 U.S. 218, 241 (1967) (using such language in describing “the proper test” to be applied in determining whether in-court identifications of a defendant by prosecution witnesses had a source independent of an impermissible lineup); Wong Sun v. United States, 371 U.S. 471, 486 (1963) (rejecting the contention that the defendant’s statements were “an intervening independent act” and thus “sufficiently an act of free will to purge the primary taint of the unlawful invasion” of his home (quoting the Government’s argument)); cf. Nix v. Williams, 467 U.S. 431, 448 (1984) (noting, in recognizing the inevitable discovery exception to the poisonous tree doctrine, that where evidence “would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible”).
177.  Segura, 468 U.S. at 804-05 (alteration omitted) (quoting Wong Sun, 371 U.S. at 488) (internal quotation marks omitted).
"is not to be excluded, for example, if police had an 'independent source' for discovery of the evidence."\textsuperscript{178}

The Segura majority therefore seemed to treat proof of an independent source as one way for the prosecution to establish that the taint of a Fourth Amendment violation has been purged. That view makes perfect sense: the taint can disappear from illegally seized evidence if police develop an independent source for the evidence or if the connection between the violation and that evidence becomes sufficiently attenuated. Moreover, the Court took pains to make clear that it was talking about something very different from the attenuation exception in Segura. After noting—in the language quoted by the Strieff majority—that its precedents "allow[] admission of evidence, notwithstanding a prior illegality, when the link between the illegality and that evidence was sufficiently attenuated to dissipate the taint," the Segura opinion went on to carefully separate the independent source and attenuation exceptions:

By the same token, our cases make clear that evidence will not be excluded as "fruit" unless the illegality is at least the "but for" cause of the discovery of the evidence.\. .\. The illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant; it is clear, therefore, that not even the threshold "but for" requirement was met in this case.\textsuperscript{179}

Thus, the Court clearly based its decision not on the fact that the warrant was an intervening circumstance that helped attenuate the taint of the entry into Segura's apartment, but that the evidence seized pursuant to the warrant was not the fruit of the illegal entry in the first place.

By contrast, the Segura majority did engage in a cursory attenuation analysis at the end of its opinion, in addressing the dissent's objection that the agents' continued access to the evidence ultimately found in the apartment might have been the result of their illegal entry.\textsuperscript{180} In response, the Court invoked the attenuation exception, noting that courts faced with such "‘sophisticated . . . causal connection’" arguments "should consider whether ‘as a matter of good sense such connection may have become so attenuated as to
dissipate the taint." That part of the Court's opinion, unlike its independent source analysis, did assume a causal relationship may have existed between the constitutional violation and the fruits of the warranted search—just like in other attenuation cases, such as Strieff, where an impermissible stop led to the discovery of an outstanding arrest warrant. But the bulk of the Court's opinion in Segura was devoted to its independent source analysis, which found no causal link between the officers' unconstitutional actions and the issuance of the search warrant. That discussion, which was the part of the opinion relied on in Strieff, thus provides little support for the Court's holding that the discovery of Strieff's outstanding arrest warrant constituted an intervening circumstance for purposes of the attenuation analysis, much less for extending the attenuation exception to cases involving illegal predicate searches that do not even feature the "pre-existing," "untainted" warrant found in Strieff.

A second aspect of the majority's opinion in Strieff that potentially has an impact on the tainted warrant cases is its use of Leon and the term "good faith." The Court's discussion of intervening circumstances cited Leon for the proposition that the officer "had an obligation to arrest Strieff," characterizing the arrest as "a ministerial

181. Id. at 816 (majority opinion) (alterations omitted) (quoting Nardone, 308 U.S. at 341).
182. See New York v. Harris, 495 U.S. 14, 19 (1990) (pointing out that, in cases like Brown, "the challenged evidence—i.e., the post arrest confession—is unquestionably the product of [the] illegal governmental activity'—i.e., the wrongful detention") (alteration in original) (internal quotation marks omitted) (quoting People v. Harris, 532 N.E.2d 1229, 1235 (N.Y. 1988) (Titone, J., concurring)).
183. See Utah v. Strieff, 136 S. Ct. 2056, 2067 (2016) (Sotomayor, J., dissenting) (observing that "Segura would be similar only if the agents [there had] used information they illegally obtained from the apartment to procure a search warrant or discover an arrest warrant"); id. at 2073 n.2 (Kagan, J., dissenting) (arguing that Segura "lacks any relevance" to a case like Strieff "when an unconstitutional act in fact leads to a warrant which then leads to evidence"); Moreno, supra note 171, at 68 (calling the Court's "misuse" of Segura "fairly egregious," concluding that "Segura would support attenuation only in an alternate universe where [the officer] refrained from seizing Mr. Strieff until after he had gathered the reasonable suspicion necessary for a lawful Terry stop"); Josephine Ross, Warning: Stop-and-Frisk May Be Hazardous to Your Health, 25 WM & MARY BILL RTS. J. 689, 696 (2016) (pointing out that “[t]he warrant in Segura was an independent event, not an intervening event," and “[t]he only similarity between Segura and Strieff is that they both involved warrants"; also noting that applying the exclusionary rule in Strieff "would have [place[d] the government in the same position it would have been in had [the officer] obeyed the law").
184. Strieff, 136 S. Ct. at 2061; see also id. at 2062 (pointing out that “the information supporting the warrant” in Segura “was wholly unconnected with the [arguably illegal] entry and was known to the agents well before the initial entry” (alteration in original) (emphasis added) (quoting Segura, 468 U.S. at 814)). See generally Hochberg, supra note 37, at 319 (observing that “[t]he warrant process can only perpetuate, not attenuate, the taint of a Fourth Amendment violation").
act that was independently compelled" by the outstanding arrest warrant. 185 Quoting from Leon, Justice Thomas described a warrant as "a judicial mandate to an officer to conduct a search or make an arrest." 186 This reasoning could arguably be used to support the argument that police have a similar duty to execute tainted warrants.

Nevertheless, the outstanding warrant in Strieff differs markedly from a tainted warrant based on an illegal predicate search. Law enforcement officials might have a responsibility to execute a previously issued warrant, but they have no similar obligation to seek a warrant in order to sanitize prior unconstitutional misconduct. The Court emphasized that the outstanding warrant in Strieff was "entirely unconnected with" the officer's unconstitutional activity and the arrest of Strieff "independently compelled by the pre-existing warrant." 187 None of these characterizations accurately describe tainted warrants that cannot meet the two-part Murray standard, and thus Strieff's citation to Leon does not suggest that a tainted warrant can serve as an intervening circumstance for purposes of the attenuation exception.

Without explicitly invoking the Leon line of cases, the Strieff majority, in addressing the third Brown factor, also used the term "good-faith mistake[""] to describe the officer's "errors in judgment," errors that were not predicated on information he received from a third party, neutral or otherwise. 188 Moreover, those so-called good-faith errors reflected at least negligence on the officer's part rather than the objectively reasonable police behavior found in the good-faith exception cases. 189 Interestingly, the Court did not rely on Herring's restriction of the exclusionary remedy to cases involving police culpability greater than mere negligence, perhaps because the negligence in Strieff could not be considered "attenuated" from the constitutional violation (the suspicionless Terry stop). 190

185. Strieff, 136 S. Ct. at 2062-63.
186. Id. at 2062 (quoting United States v. Leon, 468 U.S. 897, 920 n.21 (1984)) (internal quotation marks omitted).
187. Id. at 2062-63 (emphasis added); see also id. at 2063 (calling the outstanding warrant "a critical intervening circumstance that is wholly independent of the illegal stop").
188. Id. at 2063.
189. See id.; see also Emily J. Sack, Illegal Stops and the Exclusionary Rule: The Consequences of Utah v. Strieff, 22 Roger Williams U. L. Rev. 263, 275-76 (2017) (finding the Court's "use of the phrase good faith . . . noteworthy" in that "Justice Thomas equated a negligent mistake with good faith").
190. Herring v. United States, 555 U.S. 135, 144 (2009). Whatever Herring meant by the term "attenuated," see supra note 55 and accompanying text, the Court did not cite the exception to the fruits of the poisonous tree doctrine. See LaFave, supra note 55, at 774 (referring to the attenuation exception as relating to "another branch of exclusionary rule jurisprudence" distinct from Herring's use of the term). But cf. Levine et al., supra note 37, at 635 (arguing that Herring "tied together two different doctrinal threads, extending the
Nevertheless, the Court’s characterization of the officer’s mistakes as good-faith ones arguably supports broadening Leon to apply to miscalculations law enforcement officials themselves make in assessing probable cause and reasonable suspicion and thereby to at least some tainted warrant cases.

Although “the phrase good faith” may well “connote the ‘good faith exception’” when used “in the context of the exclusionary rule,” the Strieff majority did not rely on the Leon line of cases here (and never cited Herring). Given the many reasons counseling against extending the good-faith exception to errors in tainted warrant cases that the police make on their own, without relying on a neutral authority, Strieff’s reference to “good faith” should not signal the Court’s tacit endorsement of efforts either to stretch the good-faith exception to excuse those errors or to apply Herring to cases of unattenuated negligence.

The final aspect of Strieff that must be considered is its emphasis on the many lawful actions taken by the officer in that case. The majority based its decision that the third Brown factor favored the prosecution in part on the fact that the officer’s “conduct [after the unconstitutional Terry stop] was lawful.” As noted above, the Court also focused on the validity of the outstanding warrant in discussing the second Brown factor, leading George Dery to comment:

The entire thrust of Strieff’s curious argument . . . was that officers could somehow bank an earthly form of karma or extra credit to immunize themselves from a violation they later commit or have committed in the past. If an officer performs enough lawful acts before and after performing an unreasonable seizure of a person, such good acts will smother the violation out of existence.

Professor Dery is appropriately critical of this reasoning, pointing out that “the Constitution does not work that way” because the police “are forever held to a constitutional minimum regardless of all the good they do.” Nevertheless, his suggestion that Strieff

reach of the ‘attenuation’ doctrine to make it relevant to good faith analysis” so that “good faith now resembles other limitations on the exclusionary rule that rest on the causal link between the original source of the error and the proposed use of the evidence”).

191. Sack, supra note 189, at 275-76.
192. The only citation to Herring came in Justice Kagan’s dissent, in her introductory description of the Court’s Fourth Amendment “framework.” Strieff, 136 S. Ct. at 2071 (Kagan, J., dissenting).
193. See supra notes 38-39, 57-84 and accompanying text.
194. Strieff, 136 S. Ct. at 2063.
195. Dery, supra note 160, at 415 (emphasis added).
196. Id.
provides equal cover for a police officer’s prior and subsequent misdeeds could potentially be used to support the admission of evidence in tainted warrant cases—where an officer’s single misstep is then followed by the perfectly lawful action of obtaining a warrant—and thereby to reject the distinction some lower courts have drawn between the previously issued warrant executed in *Leon* and the subsequently issued warrant obtained in a tainted warrant case.197

But such an extension of *Strieff*'s attenuation analysis would be unwarranted. Even if an impermissible predicate search does not rise to the level of a flagrant Fourth Amendment violation, the key factor motivating the outcome in *Strieff* was the majority’s conclusion that the second *Brown* factor favored the government. If the Court’s opinion can be interpreted as adopting any sort of per se rule, it is that the discovery of the outstanding arrest warrant was an intervening circumstance that “broke the causal chain” between the improper stop and the discovery of evidence during the search incident to arrest.198 Again, securing a tainted warrant is different from discovering a “pre-existing,” “untainted” one and therefore cannot properly be characterized as an intervening circumstance that suffices to sever the causal link between an impermissible predicate search and a tainted warrant.199

No matter how minor a constitutional violation was effected by an illegal predicate search, then, *Strieff* cannot support applying the attenuation exception in a tainted warrant case when only one of the *Brown* factors that retain any significance favors the government. Despite the Court’s description of the third factor as “‘particularly’ significant” to the attenuation inquiry, the critical factor in *Strieff* was actually the second.200 Under the Court’s analysis in *Strieff*, a warrant must be “entirely unconnected with” and “wholly independent of” the constitutional violation in order to constitute an intervening circumstance.201 By definition, therefore, a tainted warrant that cannot satisfy *Murray*’s two-part independent source standard—which requires that the subsequent seizure of evidence be both “genuinely independent” of the illegal predicate search and “lawful” (not just the result of a nonflagrant violation)—cannot qualify as an intervening circumstance under *Strieff*.202 As a result, the ruling in *Strieff* does not

---

197. See supra note 38 and accompanying text.
198. *Strieff*, 136 S. Ct. at 2063; see also supra notes 172-173 and accompanying text.
200. Id. at 2062 (quoting Brown v. Illinois, 422 U.S. 590, 604 (1975)).
201. Id. at 206-63.
require reconsideration of the conclusion that the Court's current Fourth Amendment jurisprudence is adequate to handle all forms of tainted warrants and does not call for denying an exclusionary remedy in any additional tainted warrant cases.

V. CONCLUSION

The convoluted maze of conflicting rules and approaches found in the subset of Fourth Amendment cases that involve tainted warrants reflects the overall incoherence of the Supreme Court's Fourth Amendment jurisprudence. At bottom, the exclusionary rule is meant to incentivize constitutional methods of criminal investigation. If law enforcement officials can simply sanitize any impermissible search by obtaining a warrant using the information uncovered by that predicate search, they have no reason to toe the constitutional line. Satisfying the probable cause standard is not a particularly onerous task, and the courts should require that it be done with evidence independent of any illegal predicate search. While some have argued that expanding the good-faith exception to include tainted warrants would have the salutary effect of encouraging the police to secure warrants, that benefit is not an especially valuable one given how easy it is to obtain a warrant and how ill-suited the warrant application proceeding is to determining the constitutionality of predicate searches.

Current Fourth Amendment doctrine is adequate to evaluate the different types of illegal predicate searches that lead to tainted warrants, and there is no cause for broadening the good-faith

203. See generally Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 757, 759 (1994) (calling Fourth Amendment case law "an embarrassment" and a "doctrinal mess"); Christopher Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 U. ILL. L. REV. 363, 375 (comparing the exclusionary rule to "swiss cheese").

204. See Hudson v. Michigan, 547 U.S. 586, 596 (2006) (observing that "the value of deterrence depends upon the strength of the incentive to commit the forbidden act," and pointing out that "[v]iolation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained").

205. Cf. The Supreme Court, 2015 Term—Leading Cases, supra note 160, at 346 (criticizing Strief on the ground that "given the baseline of how easy it is for law enforcement to find a reasonable articulable suspicion to justify stopping someone, the resulting cost of applying the exclusionary rule and requiring reasonable articulable suspicion would have been slight").

206. See United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989); Clancy, supra note 33, at 722.

207. See, e.g., 1 DRESSLER & MICHAELS, supra note 55, § 10.02, at 165 (pointing out that "judge-shopping is common" in warrant application proceedings, the process often takes only a few minutes, and more than 90% of applications are granted).

208. See supra notes 78-81 and accompanying text.
exception to allow the introduction of evidence that would otherwise be inadmissible under existing case law. When, as in the majority of these cases, the illegal predicate search is based on an officer’s misunderstanding of the Fourth Amendment rules governing searches and seizures, the good-faith exception should ignore that mistake only if it is based on misinformation received from an independent authority who is not aligned with law enforcement. The definitions of probable cause and reasonable suspicion already give the police room to make reasonable errors in applying those standards to the facts of a particular case. Predicate searches based on an officer’s misinterpretation of state criminal law should be analyzed under Heien’s substantive Fourth Amendment reasoning. And those that result from factual mistakes should be excused if they fall either within the Leon line of cases or Herring’s exemption for isolated instances of attenuated police negligence. If all else fails, the prosecution can invoke the exceptions to the fruits of the poisonous tree doctrine. While obtaining a tainted warrant should not qualify as an intervening circumstance for purposes of the attenuation exception, even after Strieff, the prosecution can still rely on Murray’s two-part independent source standard or the inevitable discovery exception.209

Taking the opposite view and using the good-faith exception to rescue tainted warrants under additional circumstances would allow the good-faith exception to swallow the exclusionary rule. The warrant requirement would become a mere formality: so long as the police eventually obtained one, it would not matter how many constitutional lines they crossed along the way. The fruits of the poisonous tree doctrine would become a moot point: the prosecution would no longer need to show that the warrant was supported by probable cause independent of the impermissible predicate search or that the evidence uncovered by the tainted warrant would inevitably have been discovered by some other lawful means.

Heien and Strieff already go a long way toward expanding police officers’ ability to conduct pretextual stops, so long as they were either “close enough” in believing a suspect was committing a crime or traffic violation210 or lucky enough to find an outstanding

---

209. For tainted warrant cases applying the inevitable discovery exception, see United States v. Wanless, 882 F.2d 1459, 1467 (9th Cir. 1989); State v. Boll, 651 N.W.2d 710, 716-17 & n.6 (S.D. 2002).

warrant. These law enforcement techniques disproportionately affect communities of color, and the damage done by the Court’s recent decisions should not be exacerbated by extending them to tainted warrant cases and thereby turning the good-faith exception into “a magic lamp for police officers to rub whenever they find themselves in trouble.”

211. For statistics suggesting that not much luck is actually required, see Utah v. Strieff, 136 S. Ct. 2056, 2066, 2068 (2016) (Sotomayor, J., dissenting); id. at 2073 & n.1 (Kagan, J., dissenting).

212. See, e.g., id. at 2070 (Sotomayor, J., dissenting) (noting that “it is no secret that people of color are disproportionate victims” of “suspicionless stop[s]” and “unconstitutional searches” (emphasis omitted)); Floyd v. City of New York, 959 F. Supp. 2d 540, 558-59 (S.D.N.Y. 2013) (citing statistics showing that more than 80% of the 4.4 million people subjected to Terry stops in New York City between 2004 and 2012 were African-American or Latino, although those groups represented only slightly more than half of the population); LYNN LANGTON & MATTHEW DUROSE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 3, 7, 9 (2013), http://www.bjs.gov/content/pub/pdf/pbttss11.pdf (reporting a racial disparity in the incidence of traffic stops, in the percentage of such stops that led to the issuance of tickets, and especially in the percentage that resulted in a search); Sekhon, supra note 165 (manuscript at 1) (pointing out that “[o]utstanding warrants beget arrests and arrests beget more warrants,” a “dynamic” that “[o]ver time . . . amplifies race and class disparities in criminal justice”).

213. United States v. Reilly, 76 F.3d 1271, 1280 (2d Cir. 1996).