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A New Test for the New Crime Exception

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INTRODUCTION

In *United States v. Marine*, an unidentified African American man wearing a "striped rugby type shirt" assaulted a member of the Area Guard in front of the 21 Area Enlisted Club in Camp Pendleton.[1] A rough description of the suspect was radioed to a guard, who stopped a group of African American men by the club.[2] This group included Lance Corporal Robert C. Marine, who was wearing a green sweater with a leather coat.[3] Another man was immediately identified as the suspect and apprehended, but Marine and the other innocent men were not told they could go free.[4] Lieutenant Phillip Moore then came over to address the men and claimed that Marine made comments to him that he deemed disrespectful.[5] Camp Pendleton guards thereafter arrested Marine for disrespect to a commissioned officer and seized a half-smoked marijuana cigarette from his pocket.[6]

After Marine was convicted of wrongfully possessing 0.17 grams of marijuana, he appealed and claimed that he was subjected to an unlawful *Terry* stop, making the marijuana cigarette inadmissible under the exclusionary rule as the fruit of the poisonous tree.[7] The United States Court of Appeals for the Armed Forces acknowledged that the initial stop of Marine might have been unlawful and racially motivated but concluded that Marine's conviction could stand.[8] It did so by applying the new crime exception to the exclusionary rule, which states "that a lawful arrest of a person who [commits a new crime after being] initially illegally seized is an intervening circumstance sufficient to dissipate any taint caused by an earlier illegal stop."[9] In other words, in *Marine*, disrespect (a crime under the Uniform Code of Military Justice)[10] operated as an intervening circumstance and made the subsequent search lawful. While some courts only apply this exception to violent crimes committed after an illegal seizure or illegal questioning, most courts apply the exception to *any* new crime, including flight from an unlawful arrest or concealing

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[1] 51 M.J. 425, 426 (C.A.A.F. 1999).
[2] *Id.*
[3] *Id.*
[4] *Id.* at 427.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 427–28; *see also infra* Part I.A–B for discussion of the exclusionary rule and the fruit of the poisonous tree doctrine.
[8] *Marine*, 51 M.J. at 428–30.
[9] *Id.* at 429.
[10] *Id.*; 10 U.S.C. § 889.

identity by giving a fake name.[11] Given that police officers disproportionately detain innocent African American and Latinx individuals,[12] this unbridled application of the new crime exception is especially troubling.

The new crime exception has existed since at least 1982[13] and is a popular exception among both federal and state courts.[14] It is well established that "[t]he new crime exception is a subset of the attenuation doctrine," which provides that "the collection of evidence may be so far removed from an illegal search or seizure that the evidence is untainted."[15] Courts typically determine whether the attenuation doctrine applies by focusing on three factors: "[1] the temporal proximity of the arrest and the defendant's response, [2] the presence or absence of intervening circumstances, and [3] the purpose and flagrancy of the official misconduct."[16] And yet, most courts do not apply this three-factor attenuation doctrine framework or even any analytical framework to decide whether the new crime exception applies.[17] Instead, courts typically make a policy-based argument that applying the exclusionary rule to evidence connected to new crimes would not deter police misconduct but would instead give a suspect "a license to kill a police officer merely because the officer arrested him without probable cause" or illegally questioned him.[18] As a result, courts usually apply the new crime exception even when defendants commit relatively minor crimes in response to relatively serious illegal conduct by police officers.[19]

This Article is the first article to propose a new test for the new crime exception.[20] It argues that this policy-based new crime exception has swallowed the exclusionary rule but that courts can recalibrate the exception by returning it to its roots in the attenuation doctrine. By simply applying that doctrine's traditional three-factor framework with a central focus on the purpose and flagrancy of the defendant's new crime under the second factor—whether there are intervening circumstances—courts can replace their current "all or nothing" approach with a

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[11] *See infra* notes 187–198 and accompanying text.

[12] *See infra* note 218 and accompanying text.

[13] Many courts trace the origin of the new crime exception to the 1982 opinion of the United States Court of Appeals for the Eleventh Circuit in United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982). *See, e.g.*, State v. Tapia, 414 P.3d 332, 337 (N.M. 2018). Other courts say that the new crimes exception pre-dates *Bailey* and was previously recognized in opinions such as United States v. Kirk, 528 F.2d 1057, 1062 (5th Cir. 1976). *See, e.g.*, *In re* B.C., 111 A.3d 690, 702 (N.H. 2015) (Lynn, J., dissenting) (citing *Kirk* as a case in which a court recognized the "new crime" exception).

[14] *See infra* Part II.

[15] State v. Serrano, 136 N.E.3d 249, 254 (Ind. Ct. App. 2019).

[16] *Bailey*, 691 F.2d at 1015.

[17] *See infra* Part II.B.1.

[18] United States v. Mitchell, 812 F.2d 1250, 1253 (9th Cir. 1987).

[19] *See infra* Part II.B.1.

[20] Indeed, there has been only one prior article written on the new crime exception. That article argued for abolishment of the exception. *See* Joline Desruisseaux, *Nurturing Poisonous Trees: How the "New & Distinct Crime" Exception Destroys the Essence of Exclusion*, 9 VA. J. CRIM. L. 87 (2020).

cost-benefit balancing that will better serve public policy goals in a more nuanced way.

This central focus on the purpose and flagrancy of the new crime should mirror the approach currently applied under a different exclusionary rule that deals with the dichotomy between past and future crimes: the attorney-client privilege. While the attorney-client privilege allows a client to prevent his attorney from disclosing confidential communications regarding past crimes, a common exception allows for disclosure if the client discusses a planned future crime that his lawyer believes is likely to result in death or substantial bodily harm.[21] Applying this analysis to the new crime exception, evidence connected to serious violent crimes committed by an illegally detained suspect would likely be admissible. Conversely, evidence connected to non-violent crimes like flight from an unlawful arrest or concealing identity likely would not be admissible.

Moreover, many courts have begun applying the policy-based new crime exception to crimes such as concealing identity committed in response to un-Mirandized interrogations following lawful arrests.[22] Such cases currently make little analytical sense because: (1) the new crime exception is a subset of the attenuation doctrine; (2) the attenuation doctrine is an exception to the fruit of the poisonous tree doctrine; and (3) the fruit of the poisonous tree doctrine does not apply to *Miranda* violations. That said, the Supreme Court has recognized a public safety exception to *Miranda*[23] that can support a similar new crime exception to the *Miranda* doctrine focused upon the purpose and flagrancy of a suspect's new crime.

Part I of this Article traces the history of the Fourth Amendment exclusionary rule from its creation to its initial expansion under the fruit of the poisonous tree doctrine and its later constriction under the attenuation doctrine. Part II explores the origin of the new crime exception to the exclusionary rule and how most courts have interpreted this exception to cover virtually any new crimes committed by defendants in response to illegal seizures and interrogations. Part III then proffers a new test for the new crime exception to the exclusionary rule that incorporates the attenuation doctrine's traditional three-factor framework with a central focus on the purpose and flagrancy of the defendant's new crime under the second factor. Finally, Part IV argues for a similar, new test for the new crime exception to the *Miranda* exclusionary rule that also focuses centrally on the purpose and flagrancy of the defendant's new crime.

I. THE FOURTH AMENDMENT EXCLUSIONARY RULE

This Part explores (A) the creation of the exclusionary rule as the remedy for violations of the Fourth Amendment; (B) the expansion of that rule under the fruit of the poisonous tree doctrine; and (C) the constriction of that rule through the attenuation doctrine.

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[21] *See infra* Part III.B.1.

[22] *See infra* Part IV.

[23] *See infra* Part IV.C.1.

A. The Creation of the Exclusionary Rule

The Supreme Court created the exclusionary rule in *Weeks v. United States*.[24] In *Weeks*, U.S. Marshals broke open the door to Fremont Weeks' house and, without a warrant, seized various papers related to the illegal sale of lottery tickets.[25] The trial court denied Weeks' motion for the return of the seized papers, which the prosecutor subsequently used to secure Weeks' conviction.[26]

Weeks appealed directly to the United States Supreme Court, which explored the history of the Fourth Amendment in its opinion.[27] The Fourth Amendment provides that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[28]

The *Weeks* Court found that there are two goals of the Fourth Amendment: (1) "to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints;" and (2) "to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law."[29]

Applying these goals, the Court concluded that the U.S. Marshals had violated Weeks' Fourth Amendment rights by breaking down his door and seizing his papers without a warrant.[30] The Court then also held that, based upon this Fourth Amendment violation, the seized papers should have been excluded as evidence against Weeks.[31] According to the Court,

> [i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[32]

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[24] 232 U.S. 383 (1914).
[25] *Id.* at 386–87.
[26] *Id.* at 388–89.
[27] *Id.* at 389–91.
[28] U.S. CONST. amend. IV.
[29] *Weeks*, 232 U.S. at 391–92.
[30] *Id.* at 392–98.
[31] *Id.* at 393.
[32] *Id.*

Courts have since recognized this sentence as creating the "exclusionary rule,"[33] which provides the judicial remedy of exclusion of evidence unlawfully seized in violation of the Fourth Amendment.[34] Notably, the Supreme Court has held that the exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendments rights by deterring police misconduct.[35] And while *Weeks* was a federal court case, in *Mapp v. Ohio*, the Supreme Court extended this rule to state court as well.[36]

B. The Fruit of the Poisonous Tree Doctrine

The Supreme Court's subsequent opinion in *Silverthorne Lumber Co. v. United States*[37] clarified the contours of the exclusionary rule. In *Silverthorne*, federal agents "without a shadow of authority went to the [Silverthorne Lumber Company] office . . . and made a clean sweep of all the books, papers and documents found there."[38] In response to a motion by the owners of the company for the return of the evidence, the government acknowledged that "its seizure was an outrage," but argued that it should be able to "study the papers before it returns them, copy them, and then . . . use the knowledge that it has gained to call upon the owners in a more regular form to produce them."[39] When the issue reached the Supreme Court, it easily turned aside the government's argument, concluding that it "reduces the Fourth Amendment to a form of words."[40]

The Supreme Court later followed up on its *Silverthorne* opinion and first used the phrase "fruit of the poisonous tree" in its second opinion in *Nardone v. United States*.[41] In its opinion in *Nardone I*, the Supreme Court reversed several defendants' Prohibition-era alcohol smuggling convictions because the prosecution introduced evidence obtained from wiretaps that it deemed unconstitutional under the Fourth Amendment.[42] The State then successfully re-prosecuted the defendants without the wiretap evidence after the trial judge refused to allow defense counsel to question the prosecution as to whether it used evidence at the retrial that it had derived from the illegal wiretaps.[43]

On the defendants' second appeal, in *Nardone II*, the Supreme Court concluded that once a defendant has established a constitutional violation, like the illegal

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[33] *See, e.g.*, United States v. Cooley, 919 F.3d 1135, 1144 (9th Cir. 2019).

[34] *See, e.g.*, Utah v. Strieff, 579 U.S. 232, 237–39 (2016).

[35] *See* United States v. Leon, 468 U.S. 897, 906 (1984).

[36] 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

[37] 251 U.S. 385 (1920).

[38] *Id.* at 390.

[39] *Id.* at 391.

[40] *Id.* at 392.

[41] Nardone II, 308 U.S. 338, 341 (1939).

[42] Nardone I, 302 U.S. 379, 383 (1937).

[43] Nardone II, 308 U.S. at 339.

wiretap, "the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree."[44] On the one hand, through such an opportunity, the defense "may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof."[45] Thus, for example, if the police spoke to witnesses or collected evidence based on what they heard on the illegal wiretaps, it would be inadmissible under the exclusionary rule as the fruit of the poisonous tree.[46] On the other hand, the connection between the constitutional violation and the evidence used at trial "may have become so attenuated as to dissipate the taint."[47] And, because the trial judge did not afford the defendants the opportunity to establish a sufficient causal connection between the illegal wiretaps and the State's evidence at the retrial, the Supreme Court remanded for further proceedings.[48]

C. The Attenuation Doctrine

Having suggested in *Nardone II* that there may be circumstances in which a Constitutional violation should not lead to the exclusion of evidence, the Supreme Court next had to decide what those circumstances should be.

1. Brown v. Illinois *and the Creation of the Attenuation Doctrine*

After mentioning the attenuation language from *Nardone* in *Wong Sun v. United States*,[49] the Supreme Court created the "attenuation doctrine" in *Brown v. Illinois*.[50] In *Brown*, Richard Brown was about to enter his Chicago apartment at about 7:45 P.M. when he saw a man inside the apartment pointing a revolver at him through a window near the door.[51] The man was a plainclothes detective who, along with another plainclothes detective, arrested Brown "without probable cause and without any warrant."[52]

The two detectives took Brown to the police station, read him the *Miranda* warnings, and, at about 8:45 P.M., asked him questions about the murder of a man named Roger Corpus.[53] Brown told the detectives that a man named Jimmy Claggett "ordered him at gunpoint to bind Corpus' hands and feet with cord from the headphone of a stereo set," followed by Claggett shooting "Corpus three times

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[44] *Id.* at 341.
[45] *Id.*
[46] *See id.*
[47] *Id.*
[48] *Id.* at 343.
[49] 371 U.S. 471, 487 (1963) ("[N]or is this a case in which the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'").
[50] 422 U.S. 590 (1975).
[51] *Id.* at 592.
[52] *Id.*
[53] *Id.* at 593–94.

through a pillow."[54] The detectives and Brown then went on an unsuccessful search for Claggett before Brown was again Mirandized at about 2:30 A.M. and provided "a factual account of the murder substantially in accord with his first statement."[55]

Brown was eventually charged with murder and unsuccessfully moved to suppress his two statements.[56] After Brown was convicted, he appealed the denial of his suppression motion, but the Supreme Court of Illinois disagreed, holding

> that the giving of the *Miranda* warnings, in the first instance by the police officer and in the second by the assistant State's Attorney, served to break the causal connection between the illegal arrest and the giving of the statements, and that defendant's act in making the statements was "sufficiently an act of free will to purge the primary taint of the unlawful invasion."[57]

In addressing this issue on appeal, the United States Supreme Court began by citing *Wong Sun* for the proposition that the exclusionary rule safeguards "Fourth Amendment guarantees in two respects: '[1] in terms of deterring lawless conduct by federal officers,' and [2] by 'closing the doors of the federal courts to any use of evidence unconstitutionally obtained.'"[58] Or more, simply, the exclusionary rule facilitates "deterrence and . . . judicial integrity."[59] This analysis allowed the Court to reject the Supreme Court of Illinois's exclusive reliance on the fact that Brown was twice Mirandized to deny his suppression motion.[60] Rather, the Court concluded that "the Miranda warnings, alone and per se, cannot always make [a confession] sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession."[61]

This is not to say, though, that *Miranda* warnings are unimportant. Indeed, the *Brown* Court acknowledged that "[t]he *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest."[62] But the Court then added that the presence or absence of those warnings is not the only factor and that "[1] [t]he temporal proximity of the arrest and the confession, [2] the presence of intervening circumstances, and, [3] particularly, the purpose and flagrancy of the official misconduct are all relevant."[63]

The Court then applied these three factors to find Brown's confessions inadmissible under the exclusionary rule as the fruit of the poisonous tree.[64] Under

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[54] *Id.* at 594–95.
[55] *Id.* at 595.
[56] *Id.* at 596.
[57] *Id.* at 597.
[58] *Id.* at 599.
[59] *Id.*
[60] *Id.* at 602.
[61] *Id.* at 603.
[62] *Id.*
[63] *Id.* at 603–04.
[64] *Id.* at 604–05.

the first factor, the Court found that "Brown's first statement was separated from his illegal arrest by less than two hours," supporting suppression.[65] With regard to the second factor, the Court held that "there was no intervening event of significance whatsoever" between Brown's illegal arrest and his first statement and that "the second statement was clearly the result and the fruit of the first."[66] Finally, under the third factor, the Court concluded that (1) "[t]he detectives embarked upon this expedition for evidence in the hope that something might turn up"; and (2) "[t]he impropriety of the arrest was obvious [and] awareness of that fact was virtually conceded by the two detectives."[67]

Courts commonly refer to the holding in *Brown* as the "attenuation doctrine," which, as the Supreme Court would later write in *Utah v. Strieff*, orders that

> [e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."[68]

Nowadays, courts, including the *Strieff* Court, typically apply *Brown*'s three-factor test to determine whether evidence is inadmissible under the exclusionary rule or admissible under the attenuation doctrine.[69]

Under the first factor—temporal proximity—courts have found that both the passage of time and "the *character* of the interaction between the law enforcement agents and the defendant is relevant . . . ."[70] With regard to the passage of time, the more time that passes between the officer's unlawful conduct and the collection of evidence, the less likely the attenuation doctrine applies (and vice versa).[71] In terms of the character of the interaction, the amount of time that can pass before the attenuation doctrine applies is inversely related to the degree of freedom granted to the suspect.[72] Therefore, in *Rawlings v. Kentucky*, the Supreme Court concluded that this subfactor favored attenuation when 45 minutes elapsed between an illegal entry into a suspect's home and his confession because he was allowed to move freely

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[65] *Id.* at 604.

[66] *Id.* at 604–05.

[67] *Id.* at 605.

[68] 579 U.S. 232, 238 (2016) (quoting Hudson v. Michigan, 547 U.S. 586, 593 (2006)).

[69] *Id.* at 239 ("The three factors articulated in *Brown v. Illinois* . . . guide our analysis.").

[70] United States v. Smith, 688 F.3d 730, 739 (11th Cir. 2012); *see also* United States v. Conrad, 673 F.3d 728, 733 (7th Cir. 2012) ("First, in terms of quantity, two hours from the violation of the curtilage to the collection of the evidence at issue is not insubstantial . . . Second, in terms of quality, the car ride afforded Mr. Conrad the opportunity to reflect upon his circumstances, with the help of a cigarette and counsel from his father.").

[71] *See, e.g.*, Reza v. State, 163 So. 3d 572, 578 (Fla. Dist. Ct. App. 2015) ("([T]he more time that passes, the more likely the confession is voluntary and not in response to a show of force.").

[72] *See, e.g.*, United States v. Montgomery, 777 F.3d 269, 274 (5th Cir. 2015).

around the first floor of his house and get a cup of coffee.[73] Conversely, in *United States v. Montgomery*, the Fifth Circuit found that same 45 minute time period cut against attenuation for a suspect who "was clearly under arrest, handcuffed, and permitted none of the freedoms of the *Rawlings* detainees . . . ."[74]

With regard to the second factor, while the Supreme Court has never explicitly defined an intervening circumstance, we can deduce an interpretation from *Taylor v. Alabama*.[75] In *Taylor*, the Supreme Court found that the State failed to explain how a suspect's 5 to 10 minute visit with his girlfriend and a male companion "could possibly have contributed to his ability to consider carefully and objectively his options and to exercise his free will" after his unlawful arrest.[76] Therefore, courts have deduced that this factor's focus should "be on the accused to determine whether there was any event that contributed to his ability to consider carefully and objectively his options and to exercise his free will."[77]

Finally, under the third factor, many federal and state courts have cited *Brown* to find purposeful and flagrant official misconduct when "(1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless; and (2) the misconduct was investigatory in design and purpose and executed 'in the hope that something might turn up.'"[78] Conversely, in *Utah v. Strieff*, where an officer entered a suspected drug house as part of a legitimate drug investigation but without reasonable suspicion, the Supreme Court found no flagrancy and no untoward purpose.[79]

2. United States v. Ceccolini *and the Refinement of the Attenuation Doctrine*

In *United States v. Ceccolini*, the Supreme Court clarified the scope and purpose of the attenuation doctrine.[80] In *Ceccolini*, in December 1974, a police officer on assignment to patrol school crossings entered the Sleepy Hollow Flower Shop on his break, went behind the customer counter, and talked "with his friend Lois Hennessey, an employee of the shop."[81] While chatting, the officer spotted "an envelope with money sticking out of it lying on the drawer of the cash register behind the counter."[82] The officer picked up the envelope, surreptitiously saw it contained money and policy slips, and, without telling Hennessey what he'd seen in the

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[73] 448 U.S. 98, 107–08 (1980).

[74] *Montgomery*, 777 F.3d at 274.

[75] 457 U.S. 687 (1982).

[76] *Id.* at 691.

[77] Ferguson v. State, 483 A.2d 1255, 1259 (Md. 1984).

[78] United States v. Simpson, 439 F.3d 490, 496 (8th Cir. 2006) (quoting Brown v. Illinois, 422 U.S. 590, 605 (1975)); *see also, e.g.*, United States v. Murphy, 703 F.3d 182, 192 (2d Cir. 2012).

[79] 579 U.S. 232, 241–42 (2016).

[80] 435 U.S. 268 (1978).

[81] *Id.* at 269–70.

[82] *Id.*

envelope, "asked her to whom the envelope belonged."[83] Hennessey responded that it belonged to the shop's proprietor, Ralph Ceccolini, and that he'd told her to give it to someone.[84]

The next day, the officer indirectly mentioned his discovery to FBI Agent Lance Emory, who was investigating suspected gambling operations in the area, including one run by Francis Millow.[85] Emory eventually interviewed Hennessey four months later, and she "related the events which had occurred" when the officer visited the flower shop.[86] Later, in May 1975, Ceccolini testified before a federal grand jury "that he had never taken policy bets for Francis Millow at the flower shop."[87] The next week, Hennessey testified to the contrary, leading to Ceccolini being indicted for perjury.[88] At Ceccolini's ensuing trial, the district court granted his motion to suppress Hennessey's testimony under the exclusionary rule, a decision affirmed by the Second Circuit on appeal.[89]

On appeal, the United States Supreme Court disagreed.[90] It began by rejecting the Government's argument that it should adopt effectively "a *per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment."[91] Rather, the Court cited *Brown*, saying:

> Even in situations where the exclusionary rule is plainly applicable, we have declined to adopt a "*per se* or 'but for' rule" that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest.[92]

Instead, the *Ceccolini* Court concluded that, in a given case, in deciding whether to apply the exclusionary rule, a court must balance the benefit of the rule—the deterrence of police misconduct—against its cost—preventing the jury from hearing the excluded evidence or testimony.[93] That said, the Court was able to announce a rule of thumb that "the cost of excluding live-witness testimony often will be greater" than the cost of excluding evidence, meaning that "a closer, more direct link between the illegality and that kind of testimony is required" to trigger the attenuation doctrine.[94]

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[83] *Id.*
[84] *Id.*
[85] *Id.* at 270–72.
[86] *Id.* at 272.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 272–73.
[90] *Id.*
[91] *Id.* at 274–75.
[92] *Id.* at 276.
[93] *See id.* at 275–78, 280.
[94] *Id.* at 278.

The Court proffered this rule of thumb based upon two findings. First, "[w]itnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet."[95] Instead, "[w]itnesses can, and often do, come forward and offer evidence entirely of their own volition."[96] Second, the exclusion of live-witness testimony "would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby."[97]

In light of these findings, the Supreme Court concluded that the attenuation doctrine applied and that the exclusionary rule did not preclude the admission of Hennessey's testimony.[98] First, in terms of temporal proximity, the Court observed that "[s]ubstantial periods of time elapsed between the time of the illegal search and the initial contact with the witness, on the one hand, and between the latter and the testimony at trial on the other."[99] Second, with regard to intervening circumstances, the Court found that "[t]he evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will in no way coerced or even induced by official authority as a result of [the officer's] discovery of the policy slips."[100] Third, regarding the purpose and flagrancy of the official misconduct, the Court concluded that there was "not the slightest evidence to suggest that [the officer] entered the shop or picked up the envelope with the intent of finding tangible evidence bearing on an illicit gambling operation, much less any suggestion that he entered the shop and searched with the intent of finding a willing and knowledgeable witness to testify against [Ceccolini]."[101] Therefore, the exclusionary rule was inapplicable because application of that rule "could not have the slightest deterrent effect" and would have "[t]he cost of permanently silencing Hennessey."[102]

It is thus now clearly established that there is an attenuation doctrine to the exclusionary rule that allows for the admission of evidence of past crimes in certain circumstances. But can and should the attenuation doctrine apply to future crimes committed *after* police misconduct? Courts eventually began answering this question in the early 1980s.

II. THE NEW CRIME EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE

Relying upon the attenuation doctrine, the Eleventh Circuit created[103] the new crime exception to the exclusionary rule in its 1982 opinion in *United States v.*

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[95] *Id.* at 276.
[96] *Id.*
[97] *Id.* at 277.
[98] *Id.* at 279.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 279–80.
[102] *Id.* at 280.
[103] *See supra* note 13 and accompanying text.

Bailey.[104] Since *Bailey*, courts across the country have mostly applied this new crime exception indiscriminately, unmoored from *Brown*'s attenuation doctrine test.

A. United States v. Bailey *and the Creation of the New Crime Exception to the Fourth Amendment Exclusionary Rule*

In *United States v. Bailey*, DEA agents saw two African American men at the Atlanta airport engaging in what they believed to be suspicious behavior, such as drifting apart before coming back together to exchange a few words and "walking at an extremely slow pace."[105] The agents decided "to put their drug courier profile into effect" by approaching the men and interrogating them.[106] The agents asked the men if they "would accompany [them] to the police precinct and consent to a search for narcotics."[107] The men nervously agreed, but then one of the men—Carl Bailey—"[a]lmost immediately" began running.[108] He was eventually apprehended by one of the agents and found to be in possession of cash, cocaine, and heroin.[109] After being charged with drug offenses, Bailey moved to suppress the heroin and cocaine, claiming that they were "obtained by exploitation of [an] illegal arrest—i.e., a 'fruit of the poisonous tree.'"[110] After that motion was denied, Bailey was convicted and appealed.[111]

The Eleventh Circuit assumed that there had been an illegal arrest and began by citing *Brown* for the proposition that "[w]hen evidence is seized during a search of the person after an illegal arrest, it will be suppressed as the tainted product of the unlawful police action, unless the prosecution carries its burden of showing that the taint has been purged."[112] The court then cited Fifth Circuit cases in which courts had found that the attenuation doctrine did not apply to defendants who legally abandoned property after illegal seizures, rendering that property inadmissible under the exclusionary rule.[113] For instance, the defendant in *United States v. Beck* tossed a marijuana cigarette out of his car's window after being illegally stopped, and the defendant in *Lawrence v. Henderson* hid narcotics paraphernalia in a police car after being unlawfully arrested.[114]

The Eleventh Circuit then held that these decisions made sense under *Brown*'s three-factor test, which, again, determines whether the attenuation doctrine applies by assessing "[1] the temporal proximity of the arrest and the defendant's response,

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[104] 691 F.2d 1009 (11th Cir. 1982).
[105] *Id.* at 1011.
[106] *See id.* at 1011–12.
[107] *Id.* at 1012.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 1013.
[111] *Id.* at 1012.
[112] *Id.* at 1013.
[113] *See id.* at 1013–14.
[114] *Id*. (citing United States v. Beck, 602 F.2d 726 (5th Cir. 1979); Lawrence v. Henderson, 478 F.2d 705, 708 (5th Cir. 1973)).

[2] the presence or absence of intervening circumstances, and [3] the purpose and flagrancy of the official misconduct."[115] The court then added, "[a]s a factual matter, we can perceive no difference between this case and the aforementioned cases in the strength of the causal connection between the evidence obtained and the illegal police conduct."[116] Specifically, "Bailey's flight was . . . no less a product of lawless police conduct than was, for example, the testimony in *Harrison* or the tossed marijuana in *Beck*."[117] Moreover, the court could not "say that Bailey's flight in the face of and only after his illegal arrest represents 'a mere coincidental decision' to run unrelated to the police conduct; 'it would be sheer fiction to presume . . . (that Bailey's flight was) caused by anything other than the illegal stop.'"[118] Thus, the evidence was inadmissible under the exclusionary rule, as the attenuation doctrine did not apply.

This left the Eleventh Circuit with the government's argument that "[d]espite the close causal nexus in fact between Bailey's [unlawful] arrest and flight," Bailey's flight was a crime, allowing for a second, lawful arrest and the recovery of evidence incident to that lawful arrest.[119] The Eleventh Circuit found support for this argument in the Fifth Circuit's opinion in *United States v. Nooks*.[120] In *Nooks*, a presumably illegal traffic stop based on racial profiling by a sheriff was followed by the defendant driving away and shooting at the sheriff, allowing for the admissibility of evidence recovered from the defendant's car after it was stopped a second time.[121]

The Eleventh Circuit noted, "[t]he court in *Nooks* did not specify whether the taint from the original arrest had been attenuated as a factual matter or because of the policy reasons we discuss *infra*."[122] That said, the Eleventh Circuit found that "because the flight itself in *Nooks* was so directly and immediately related to—i.e., caused by—the original unlawful arrest, we suggest that the policy reasons articulated here provide the most satisfactory rationale for the *Nooks* holding."[123]

This then led the Eleventh Circuit to create a policy-based test that has since been dubbed the "new crime exception" to the exclusionary rule: The court declared that "notwithstanding a strong causal connection in fact between lawless police conduct and a defendant's response, if the defendant's response is itself a new, distinct crime, then the police constitutionally may arrest the defendant for that crime."[124] Through this test, the court was able to distinguish cases like *Beck* in which "the defendant's response to the illegal police conduct (i.e., tossing the marijuana out of the car window) was not itself a new, distinct crime."[125]

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[115] *Id.* at 1015.
[116] *Id.*
[117] *Id.*
[118] *Id.* (quoting United States v. Beck, 602 F.2d 726, 730 (5th Cir. 1979)).
[119] *Id.*
[120] *Id.* at 1015–17 (discussing United States v. Nooks, 446 F.2d 1283 (5th Cir. 1971)).
[121] *See id.* at 1015–16.
[122] *Id.* at 1016.
[123] *Id.*
[124] *Id.* at 1016–17.
[125] *Id.* at 1017.

Conversely, the Eleventh Circuit found that "where the defendant's response is itself a new, distinct crime, there are strong policy reasons for permitting the police to arrest him for that crime."[126] Namely, "[a] contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct."[127] Indeed, "[w]here the police misconduct is particularly egregious, many serious crimes might plausibly be the product of that misconduct."[128] The court gave two examples: (1) "if the police illegally fired warning shots at a person, would that person be shielded from arrest and prosecution if he fired back and killed someone"; and (2) "would a person be justified if he seized an innocent hostage as a human shield to protect himself from wrongful police fire?"[129] The Eleventh Circuit concluded that the answer in both cases had to be "no" and that "extending the fruits doctrine to immunize a defendant from arrest for new crimes gives a defendant an intolerable carte blanche to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct."[130]

The Eleventh Circuit found support for this conclusion in *Ceccolini*, which it construed as "weigh[ing] the costs to society of excluding the live testimony at issue in that case and consider[ing] whether a decision admitting the evidence would provide additional incentive to police to conduct illegal searches."[131] Applying a similar analysis, the Eleventh Circuit found that its new rule would not "encourage illegal police conduct" and "should discourage and deter the incentive on the part of potential arrestees to forcibly resist arrest or to commit other new and separate crimes."[132] Therefore, the court again "conclude[d] that the police may legally arrest a defendant for a new, distinct crime, even if the new crime is in response to police misconduct and causally connected thereto."[133]

Bailey turned out to be a landmark opinion, with other courts soon citing it to apply and expand this new crime exception.

B. Federal and State Court Applications of the New Crime Exception

Since *Bailey*, court opinions applying the new crime exceptions generally fall into three categories: (1) opinions applying the exception without reference to *Brown*'s three-factor attenuation doctrine framework; (2) opinions applying the exception by modifying *Brown*'s framework; and (3) opinions applying the exception regardless of the severity of the defendant's new crime.

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[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* (citation omitted).
[132] *Id.*
[133] *Id.* at 1017–18.

1. New Crime Opinions Not Applying Brown's Three-Factor Test

It is well established[134] that "[the attenuation doctrine] . . . spawned the new crime exception"[135] and that "[t]he new-crime exception is a subset of the attenuation doctrine."[136] And yet, like the Eleventh Circuit in *Bailey*, the vast majority of federal courts have analyzed the new crime exception without applying the three attenuation doctrine factors from *Brown*. These courts have applied the exception in a variety of contexts for a variety of reasons.

In *United States v. Mitchell*, after Leroy Mitchell was allegedly unlawfully detained at the Honolulu International Airport on suspicion of drug smuggling, he told federal agents, "I'm going to kill [President] Reagan and then I'm going to kill all of you . . . I'll do what I said I'll do."[137] In applying the new crime exception, the Ninth Circuit held that "[a] person does not have a license to kill a police officer merely because the officer arrested him without probable cause."[138] This policy goal of preventing future crimes allowed the court to distinguish Mitchell's threat from a garden variety "inculpatory statement [which] usually relates to a previously committed illegal act."[139] The court did recognize that, in cases of "outrageous government conduct," it might make sense to have a new crime *defense*, but it found that this was different than applying the exclusionary rule to exclude evidence of the new crime.[140] According to the court, "[a]ffording a substantive defense to a crime committed during an illegal detention when particular circumstances so warrant provides a more rational and measured way of protecting individual rights than does the application of [F]ourth [A]mendment analysis to all such cases."[141]

In *United States v. Garcia-Jordan*, the Fifth Circuit cited this last quoted sentence from *Mitchell* in finding that the new crime exception applied when "a Mexican national . . . falsely represent[ed] himself to be a citizen of the United States" after an allegedly unlawful traffic stop.[142]

Similarly, in *United States v. Pryor*, the Seventh Circuit applied the new crime exception to a defendant who pretended to be someone else after allegedly being

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[134] *But see* 1 MCCORMICK ON EVIDENCE § 180, at 972–73 (Kenneth S. Broun et al. eds., 7th ed. 2013) ("Some courts appear to regard the doctrine as simply a specialized application of the attenuation of taint doctrine, under which intervening voluntary criminal conduct usually and perhaps inevitably attenuates the taint of illegality preceding that conduct. . . . Other courts appear to regard the doctrine as a separate exception to exclusionary requirements, based on considerations distinguishable from those supporting the attenuation of taint doctrine.").

[135] State v. Tapia, 414 P.3d 332, 337 (N.M. 2018) (quoting Christopher J. Dunne, Note, State v. Brocuglio*: The Supreme Court of Connecticut's Modification of the New Crime Exception to the Exclusionary Rule*, 23 QUINNIPIAC L. REV. 853, 860 (2004)).

[136] State v. Serrano, 136 N.E.3d 249, 254 (Ind. Ct. App. 2019).

[137] 812 F.2d 1250, 1252 (9th Cir. 1987).

[138] *Id.* at 1253.

[139] *Id.*

[140] *Id.* at 1254.

[141] *Id.*

[142] 860 F.2d 159, 160 (5th Cir. 1988); *id.* at 161 (quoting *Mitchell*, 812 F.2d at 1254).

illegally detained.[143] The court found that the new crime exception applied because "[p]olice do not detain people hoping that they will commit new crimes in their presence; that is not a promising investigative technique, when illegal detention exposes the police to awards of damages."[144] Therefore, "the gains from extending the rule to exclude evidence of fresh crimes are small, and the costs high."[145] Indeed, "[i]f the rule were applied rigorously, suspects could shoot the arresting officers without risk of prosecution."[146]

This concern was not unwarranted. In *United States v. Sprinkle*, the Fourth Circuit found that the new crime exception applied when Carl Sprinkle ran away from a police officer and fired a shot at him after being illegally detained and frisked.[147] And, in *United States v. King*, the First Circuit applied the exception when a passenger in a station wagon fired his pistol at an officer who had unlawfully stopped the station wagon and was illegally frisking the driver.[148] More recently, prosecutors tried to use the new crime exception to prosecute Breonna Taylor's boyfriend, Kenneth Walker, after he fired a bullet at police officers who executed an illegal no-knock warrant at their apartment.[149]

Courts have also applied the new crime exception to less extreme types of physical resistance to unlawful police entries and detentions. In *United States v. Waupekenay*, the Tenth Circuit applied the new crime exception when Steven Waupekenay pointed (but did not fire) his .22 caliber semi-automatic rifle at officers who had unlawfully entered his house trailer.[150] Meanwhile, in *United States v. Dawdy*, the Eighth Circuit found that it didn't matter if the defendant was illegally seized because he resisted the arresting officer's attempt to handcuff him, a new crime.[151]

Similarly, the vast majority of state courts have applied the new crime exception without any application of the three attenuation doctrine factors from *Brown*.[152] For example, in *State v. Earl*, the Utah Court of Appeals applied the new crime exception to a defendant who gave a fake name and date of birth to an officer who had made an unlawful entry into the home his stepbrother was renting.[153] And,

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[143] 32 F.3d 1192, 1194 (7th Cir. 1994).

[144] *Id.* at 1196.

[145] *Id.*

[146] *Id.*

[147] 106 F.3d 613, 619 (4th Cir. 1997).

[148] 724 F.2d 253, 256–57 (1st Cir. 1984).

[149] *See* Amir Vera & Rebekah Riess, *Kentucky Judge Dismisses Charges Against Breonna Taylor's Boyfriend, Kenneth Walker III*, CNN (Mar. 9, 2021, 12:53 PM), https://www.cnn.com/2021/03/08/us/kenneth-walker-breonna-taylor-dismissed-charges/index.html [https://perma.cc/NY6Y-VKKU]. Prosecutors tried to get Walker to plead guilty pursuant to a plea agreement, but the judge ultimately dropped the charges because he was lawfully acting in self-defense. *See id*.

[150] 973 F.2d 1533, 1537 (10th Cir. 1992).

[151] 46 F.3d 1427, 1430–31 (8th Cir. 1995).

[152] *See infra* Appendix.

[153] 92 P.3d 167, 174–76 (Utah Ct. App. 2004).

in *People v. Puglisi*, a New York appellate court reached the same conclusion when a passenger in a taxi tried to bribe officers who had stopped the cab without even reasonable suspicion.[154]

2. Courts Modifying Brown's Three-Factor Attenuation Test

Only a few courts have applied *Brown*'s three attenuation doctrine factors to decide whether the new crime exception applies. Unfortunately, most of these courts have modified the *Brown* test, applying its three factors differently than they would in a typical attenuation doctrine case to ensure the new crime exception applies.

For example, in *State v. McGurk*, state trooper Travis Anderson was dispatched to investigate a suspicious pick-up truck in a cul-de-sac and, upon arrival thirty minutes later, saw a parked car but no truck.[155] Anderson approached the car, which had Diane Molluer in the driver's seat and Sean McGurk in the front passenger's seat.[156] Anderson asked Molluer if she had seen a pick-up truck, and she responded in the negative.[157] Anderson then looked at the footwell behind the driver's seat and saw two partially full juice bottles.[158] Thinking that Molluer was under 21, he ordered her out of the car, confirmed that she was 18, and asked whether the bottles contained alcohol.[159] Molluer responded that they did not and consented to the trooper smelling the bottles.[160] Anderson smelled alcohol in a bottle, arrested Molluer for transportation of alcohol, and told McGurk he could leave.[161]

Anderson began searching the car after McGurk left, but McGurk then returned and demanded that Molluer be released.[162] Anderson told McGurk he would be arrested if he didn't leave and then continued his search, finding a small bag of marijuana.[163] Anderson asked McGurk if the marijuana was his, and McGurk swore and yelled at him, prompting the trooper to again tell McGurk he would arrest him if he didn't leave.[164] When Anderson stuck his head in Molluer's car to finish his search, McGurk "approached him from behind," prompting Anderson to arrest him for "obstructing government administration."[165]

After Anderson later placed McGurk in a holding cell, McGurk "swore at Anderson, told him he made a mistake, opened his mouth, stuck out his tongue and exhaled into Anderson's face."[166] Anderson smelled marijuana, saw pieces of

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[154] 380 N.Y.S.2d 221, 221–23 (N.Y. App. Div. 1976).
[155] 958 A.2d 1005, 1007–08 (N.H. 2008).
[156] *Id.* at 1008.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*

marijuana on McGurk's tongue, and realized that McGurk had swallowed what he had seized.[167] After McGurk was convicted of falsifying physical evidence and possession of marijuana, he claimed that he received ineffective assistance of counsel because his trial attorney didn't move to suppress the marijuana based on Anderson's unlawful seizure of Molluer and him.[168]

The Supreme Court of New Hampshire eventually found that a motion to suppress wouldn't have been successful after mentioning the three *Brown* attenuation doctrine factors.[169] But the court didn't apply all three factors; instead, it held that "[w]e need not discuss the first and third factors because, on the facts of this case, we find the second factor, the presence of intervening circumstances, sufficient to purge the taint."[170] In other words, because "the defendant's ingestion of the marijuana 'supported a new criminal charge that was distinct and separate from the prior illegal seizure,'" nothing else mattered.[171]

Similarly, in *State v. Holt*, detectives had a "hunch" that the driver of a Jeep—Jamar Holt—was trafficking in drugs, so they pulled him over under the false pretense that he'd run a stop sign.[172] Holt then drove his Jeep and pointed a gun at one of the detectives, who was able to move out of the way and non-fatally shoot Holt.[173] After the trial court held that evidence of Holt's new crime of assault was admissible, he appealed.[174]

The Court of Special Appeals of Maryland responded by announcing that it would determine the applicability of the new crime exception by analyzing the three *Brown* factors.[175] But, under the first factor—temporal proximity—the court found that "typically temporal proximity is used to 'gauge the voluntariness of a suspect's confession or a witness' statement to police.'"[176] As a result, the court held that "analyzing temporal proximity does not shed any more light on the voluntariness of [Holt's] behavior than simply analyzing the behavior itself . . . ."[177] In reaching this conclusion, though, the court ignored that many courts have also applied this factor to *behavior* by defendants, such as those who legally abandon property after illegal seizures.[178] Indeed, the Court of Special Appeals ignored its own prior opinion in *Partee v. State*, in which it held that "[w]hen the seizure and the purported

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[167] *Id.*

[168] *Id.* at 1009.

[169] *Id.* at 1011.

[170] *Id.*

[171] *Id.*; *see also* State v. Wagstaff, 846 P.2d 1311 (Utah Ct. App. 1993) (finding that an arrestee's taking and swallowing of illegally seized drugs constituted a new charge).

[172] 51 A.3d 1, 4–5 (Md. Ct. Spec. App. 2012).

[173] *Id.* at 5.

[174] *Id.* at 7.

[175] *Id.* at 14.

[176] *Id.*

[177] *Id.* at 15.

[178] *See, e.g.*, Jones v. State, 28 A.3d 1046, 1056–57 (Del. 2011) (finding that the first factor favored attenuation when the defendant dropped a bag of cocaine immediately after being illegally seized).

abandonment are contemporaneous . . . the opportunity for independent reflection and decision-making underlying the 'temporal proximity' and 'intervening circumstances' factors in *Brown v. Illinois* and militating in favor of voluntariness is missing."[179]

In *Holt*, however, the court essentially ignored this first factor and moved to the second factor, citing *Bailey* to find that Holt's new crime was an intervening circumstance supporting the application of the attenuation doctrine.[180] Then, under the third factor, the purpose and flagrancy of the official misconduct, the court acknowledged that the detectives lied to get Holt to stop based on nothing more than a hunch.[181] But the court then concluded that "the detectives' misconduct does not outweigh the strong intervening circumstance of [Holt] brandishing a firearm towards an officer, even if that officer did engage in some misconduct."[182]

While not as egregious as the Supreme Court of New Hampshire waving away the first and third *Brown* factors in *McGurk*, the Court of Special Appeals' dismissal of the first factor might have been even more impactful given that the other two factors cut in opposite directions, meaning that the first factor could have broken the tie. The Court of Appeals of Idaho dealt with a somewhat similar situation in *State v. Schrecengost*, where it found that the first and second *Brown* factors counterbalanced.[183] There were three key facts in *Schrecengost*: First, an officer illegally arrested a driver and passenger despite the driver passing a field sobriety test; second, another officer found drugs on the passenger and placed them on the countertop in the booking area; and third, the passenger grabbed the drugs and tried to flush them down the toilet.[184] While the arrest was flagrantly unlawful and ostensibly done in the hope that something might turn up, the court didn't apply *Brown*'s third factor to support suppression.[185] Instead, it referred to the third attenuation doctrine factor as the "Exclusionary Rule Rationale" and found that excluding evidence of the passenger's actions would "not provide any needed deterrent effect to illegal police conduct," effectively putting the cart before the horse.[186]

3. New Crime Opinions Disregarding Degrees of Crime

The vast majority of courts that have addressed the issue have found that, under the new crime exception, "the critical issue is not the gravity of the defendant's

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[179] 708 A.2d 1113, 1125 (Md. Ct. Spec. App. 1998).

[180] *State v. Holt*, 51 A.3d 1, 15–18 (Md. Ct. Spec. App. 2012) (relying on United States v. Bailey, 691 F.2d 1009 (11th Cir. 1983)).

[181] *Id.* at 18.

[182] *Id.*

[183] 6 P.3d 403, 405–06 (Idaho Ct. App. 2000).

[184] *Id.* at 404.

[185] *Id.* at 406–07 (excluding the analysis of any purposeful and flagrant misconduct).

[186] *Id.*

response to unlawful police action, but the legality of it."[187] Two examples in which state supreme courts reversed lower appellate courts are instructive.

First, in *State v. Suppah*, Deputy Sheriff Hulke pulled over Roman Suppah, who pretended to be someone else upon questioning.[188] In unsuccessfully moving to suppress his statement, Suppah "specifically asserted that there was no evidence that Hulke had a reason to stop him, [and] the state did not respond by presenting any evidence . . . that Hulke had ever given notice of, or recorded, any reason for the stop."[189] On appeal, the State argued that the denial of the motion to suppress was proper under the new crime exception, but the Court of Appeals of Oregon held that "we have applied it only in cases in which the challenged evidence involved a new crime that threatened officer safety."[190]

After granting certiorari, the Supreme Court of Oregon noted that "[i]f we were to follow the other state and federal courts that have considered this issue, we would conclude that defendant's decision to misrepresent his identity" was admissible under the new crime exception.[191] The court then agreed with the bulk of precedent, concluding that "[i]n choosing to misrepresent who he was and when he was born, defendant's response to the deputy's question went beyond what ordinarily would occur in much the same way that a defendant's decisions to resist arrest or to offer a bribe go beyond the consequences that ordinarily flow from an arrest."[192] In other words, for the Supreme Court of Oregon, the key was not the severity of the defendant's new crime but the fact that it went beyond accepted and expected behavior in response to police misconduct.

Similarly, in *State v. Tapia*, an officer stopped a slow-moving vehicle, but "she failed to articulate why the slow speed made her 'suspicious,' could not recall whether the vehicle was impeding traffic, and admitted there was no minimum posted speed."[193] In response to questioning, the defendant, a passenger in the car, gave the officer a fake name.[194] After unsuccessfully moving to suppress his statement, the defendant appealed to the Court of Appeals of New Mexico, which began by noting that "[o]ur jurisprudence has heretofore only addressed the new crime exception in situations involving violence or threats against police officer safety."[195] The Court of Appeals then agreed with the defendant, finding that "the policy reasons for recognizing a new crime exception to the exclusionary rule simply do not exist when a non-violent, identity-related offense is committed in response to unconstitutional police conduct."[196]

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[187] Clark v. United States, 755 A.2d 1026, 1030 (D.C. 2000).
[188] 334 P.3d 463, 465 (Or. Ct. App. 2014).
[189] *Id.*
[190] *Id.* at 475.
[191] State v. Suppah, 369 P.3d 1108, 1115 (Or. 2016).
[192] *Id.* at 1116.
[193] 348 P.3d 1050, 1052 (N.M. Ct. App. 2015).
[194] *Id.*
[195] *Id.* at 1053.
[196] *Id.* at 1055.

The Supreme Court of New Mexico disagreed, noting that many courts have "conclude[d] that even independent, non-violent criminal acts following an unlawful detention" trigger the new crime exception because such "conduct is neither natural nor predictable, and thus insufficiently connected to the initial illegality to warrant application of the exclusionary rule."[197] Applying this analysis, the court concluded that the new crime exception applied because the defendant's crime "was not a natural or predictable progression from the unlawful seizure but rather an unprompted act of his own free will."[198]

Simply put, courts largely have uprooted the new crime exception from its attenuation doctrine foundations. That doctrine is a carefully crafted carve-out from the exclusionary rule, which is directed toward the policy goal of deterring police misconduct. The three-factor attenuation doctrine test recognizes that, in limited circumstances, illegally obtained evidence should be admissible. Conversely, under the new crime exception, some courts have been less careful, essentially allowing evidence of any new crime to be admissible, regardless of the severity of the police misconduct or the defendant's response.

III. A NEW TEST FOR THE NEW CRIME EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE

This Part argues that the policy-based new crime exception created in *Bailey* has swallowed the exclusionary rule, but that courts can recalibrate the exception by returning it to its roots in the attenuation doctrine. By simply applying that doctrine's traditional three-factor framework, with a central focus on the purpose and flagrancy of the new crime under the second factor, courts can replace their current "all or nothing" approach with a cost-benefit balancing that will better serve public policy goals in a more nuanced way. Specifically, this Article proposes that, just as the purpose and flagrancy of an official's misconduct are considered under the third attenuation doctrine factor in past crimes cases, the purpose and flagrancy of the suspect's future crime should be considered under the second attenuation doctrine factor in new crime cases. This central focus on the purpose and flagrancy of the new crime should mirror the approach currently applied under a different exclusionary rule that has an exception for future crimes: the attorney-client privilege.

A. Factors One and Three of the Attenuation Doctrine Framework

Courts should be able to apply the first and third attenuation doctrine factors to new crime cases in much the same way they apply them in other cases.

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[197] State v. Tapia, 414 P.3d 332, 341 (N.M. 2018).
[198] *Id.*

1. Factor One

The first factor of the attenuation doctrine test considers the temporal proximity/time elapsed between the illegality and the acquisition of evidence. As noted, the more time that passes between the officer's unlawful conduct and the collection of evidence, the less likely the attenuation doctrine applies (and vice versa).[199] Moreover, the amount of time that can pass before the attenuation doctrine applies is inversely related to the degree of freedom granted to the suspect.[200] Courts should easily be able to apply this first factor in new crime cases.

At one end of the spectrum, reconsider the case that birthed the new crime exception: *United States v. Bailey*.[201] In *Bailey*, DEA agents racially profiled and illegally arrested Carl Bailey, who initially agreed to accompany the agents to the police precinct but then "[a]lmost immediately" began running before being caught and found to be in possession of drugs.[202] The Eleventh Circuit found the drugs admissible by eschewing the attenuation doctrine framework in favor of a policy-based test focused on deterring new crimes, such as Bailey's flight from the agents.[203] Applying the first factor of the attenuation doctrine test, however, would strongly cut against the admission of Bailey's drugs because the agents granted no degree of freedom to Bailey, and almost no time passed between the unlawful arrest and Bailey's flight.

On the other hand, there is the aforementioned case, *State v. McGurk*, where a state trooper began illegally searching a car in which Diane Molluer was in the driver's seat and Sean McGurk was in the front passenger's seat.[204] During the search, the trooper told McGurk that he could leave, McGurk left, and then McGurk returned, interfered with the continuing search, and ingested the marijuana the trooper had seized.[205] The Supreme Court of New Hampshire found that it didn't need to discuss the first and third attenuation doctrine factors because McGurk's ingestion of marijuana was a new crime, meaning that evidence of the marijuana didn't need to be suppressed.[206] If the court had actually applied the first factor, it likely would have also found that it cut against suppression. While it is unclear how much time passed between McGurk leaving and returning, the trooper granted McGurk complete freedom by saying that he could leave the scene of the search.

The only court that has posited a specific reason for ignoring the first attenuation doctrine factor in new crime cases was the Court of Special Appeals of Maryland in *State v. Holt*, where the defendant drove his Jeep and pointed a gun at one of the detectives who had pulled him over under the false pretense that he'd run

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[199] *See supra* note 71 and accompanying text.
[200] *See supra* note 72 and accompanying text.
[201] 691 F.2d 1009 (11th Cir. 1982).
[202] *Id.* at 1011–12.
[203] *See id.* at 1016–17.
[204] 958 A.2d 1005, 1007–08 (N.H. 2008).
[205] *Id.* at 1008.
[206] *Id.* at 1011.

a stop sign.[207] The court bypassed the first attenuation factor by asserting that (1) "typically temporal proximity is used to 'gauge the voluntariness of a suspect's confession or a witness' statement to police;'" and (2) "analyzing temporal proximity does not shed any more light on the voluntariness of [Holt's] behavior than simply analyzing the behavior itself . . . ."[208]

The Supreme Court's opinion in *United States v. Ceccolini*[209] reveals the error in the ruling. As noted above, in *Ceccolini*, a police officer entered a flower shop, chatted with an employee, surreptitiously opened an envelope with money, and asked the employee "to whom the envelope belonged," prompting her to respond, and later testify, that it belonged to the store's owner.[210] The Court deemed this testimony admissible despite the illegal search of the envelope, holding that "a closer, more direct link between the illegality and that kind of testimony is required" than the link between illegality and physical evidence.[211] The Court reached this conclusion by finding that, *inter alia*, "[w]itnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet."[212]

Thus, imagine a counter-hypothetical in which the police officer illegally searched the envelope while the owner was in the flower shop and eventually got the owner to produce gambling tickets from a cabinet in the store's office. *Ceccolini* stands for the proposition that courts should be more concerned about temporal proximity between illegal police behavior and the collection of physical evidence, like the gambling tickets, than they are about temporal proximity between illegal police behavior and testimony, like that of the employee. The same should apply to new crimes. Consider a third hypothetical in which the police officer illegally seized the envelope, followed by the shop owner grabbing the envelope out of the officer's hands and unsuccessfully trying to run it through a shredder. In this scenario, the temporal proximity between the officer's illegal seizure and the owner's attempt to destroy the evidence should strongly cut against application of the new crime exception.

This is not an unprecedented argument; it's the argument made by the Eleventh Circuit in creating the new crime exception. In finding that the new crime exception applied to Carl Bailey's flight from police, the court conceded that it could not "say that Bailey's flight in the face of and only after his illegal arrest represents 'a mere coincidental decision' to run unrelated to the police conduct; 'it would be sheer fiction to presume . . . (that Bailey's flight was) caused by anything other than the illegal stop.'"[213] In other words, flipping the court's conclusion in *Holt*, the temporal proximity between illegal police conduct and a suspect's new crime is crucial for

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[207] 51 A.3d 1, 5 (Md. Ct. Spec. App. 2012).

[208] *Id.* at 14–15.

[209] 435 U.S. 268 (1978).

[210] *Id.* at 269–70.

[211] *Id.* at 278.

[212] *Id.* at 276.

[213] United States v. Bailey, 691 F.2d 1009, 1015 (11th Cir. 1982) (alteration in original) (quoting United States v. Beck, 602 F.2d 726, 730 (5th Cir. 1979)).

determining whether that crime was voluntary or, on the other hand, the product of police misconduct. This would comport with the common-sense conclusion that Bailey's flight from the DEA agents was less voluntary than McGurk's ingestion of the marijuana.

2. Factor Three

The third factor of the attenuation doctrine test considers the purpose and flagrancy of the official misconduct. As the Supreme Court noted in creating the attenuation doctrine in *Brown*, this factor cuts against admissibility when "(1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless; and (2) the misconduct was investigatory in design and purpose and executed 'in the hope that something might turn up.'"[214] On the other hand, a court would find an officer's search and/or seizure based upon some legitimate suspicion and investigation but a shortfall on the applicable quantum of proof (e.g., probable cause) lacking in both flagrancy and untoward purpose.

In waving away or discounting this third factor, courts have held that the fruit of the poisonous tree doctrine should not apply to new crimes because, in the words of the Seventh Circuit, "[p]olice do not detain people hoping that they will commit new crimes in their presence; that is not a promising investigative technique, when illegal detention exposes the police to awards of damages."[215] In other words, courts have turned this third factor into a test of foreseeability and held that application of the fruit of the poisonous tree doctrine would not deter police misconduct because police could not foresee detainees committing new crimes.

There are two main problems with this analysis. First, it runs counter to the way that the *Brown* Court analyzed this factor, which favored exclusion of evidence when a police officer knowingly engages in unconstitutional behavior "in the hope that something might turn up."[216] Imagine a case in which a police officer racially profiles an African American man in New York despite lacking any specific reason to believe that the man had committed or was about to commit a crime. Further, assume that during the officer's subsequent stop and frisk of the man, he finds the driver's license of a sixteen-year-old who has gone missing from Alaska or jewelry stolen from a museum in Los Angeles. Both would be unforeseeable results, and there would certainly be no reason to believe that the police officer thought he would uncover evidence of either crime.

But that's not the point. The point is that we want to deter police officers from engaging in unconstitutional searches that cause "significant emotional,

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[214] United States v. Simpson, 439 F.3d 490, 496 (8th Cir. 2006) (quoting Brown v. Illinois, 422 U.S. 590, 605 (1975)).

[215] United States v. Pryor, 32 F.3d 1192, 1196 (7th Cir. 1994).

[216] *Brown*, 422 U.S. at 605.

psychological, and physical consequences"[217] to the person being searched. More specifically, the point is that we want to deter police officers from engaging in the types of fishing expeditions that resulted in African American and Latinx individuals being the "overwhelming target" of stops and frisks in New York City, with almost 90% of the detainees being "completely innocent."[218]

Second, even if foreseeability were the touchstone of the third factor, it would be hard to argue that many new crimes in response to illegal searches and/or seizures are, in fact, unforeseeable. It seems foreseeable that a person whom a police officer illegally arrests might give a fake name or run away. Moreover, such a response would certainly seem more foreseeable than, as in the examples above, a police officer racially profiling an African American man and uncovering evidence of an abducted minor or stolen jewelry from thousands of miles away. Finally, and most significantly, the suspect giving a fake name or running away would not be any less foreseeable than a suspect having a fake ID or tossing a marijuana cigarette out the window after his car was illegally stopped, both of which would not trigger the new crime exception.

Again, this isn't an unprecedented argument and is instead the argument made by the Eleventh Circuit in creating the new crime exception. In finding that the new crime exception applied to Carl Bailey's flight from police, the court acknowledged that his "flight was . . . no less a product of lawless police conduct than . . . the tossed marijuana in *Beck*."[219] In other words, it was no less foreseeable that Bailey would flee from police—a crime—than that the defendant in *Beck* would toss a marijuana cigarette out of his car's window, which was not a crime.

B. Recalibrating Factor Two

As noted, the second factor of the attenuation doctrine framework focuses on the presence of intervening circumstances. In *United States v. Ceccolini*, the Supreme Court observed that the purpose of the attenuation doctrine framework is to balance the benefit of the exclusionary rule—the deterrence of police misconduct—against its cost—preventing the jury from hearing the excluded evidence or testimony.[220] It is only through assessing the facts of a given case under the three-factor framework that the court determines whether the cost of excluding

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[217] Michael D. White, Henry F. Fradella, Weston J. Morrow & Doug Mellom, *Federal Civil Litigation as an Instrument of Police Reform: A Natural Experiment Exploring the Effects of the Floyd Ruling on Stop-and-Frisk Activities in New York City*, 14 OHIO ST. J. CRIM. L. 9, 13 (2016).

[218] *Stop-and-Frisk Data*, N.Y. C.L. UNION, https://www.nyclu.org/en/stop-and-frisk-Data [https://perma.cc/U8RS-P6TN] (last visited Sept. 18, 2022).

[219] United States v. Bailey, 691 F.2d 1009, 1015 (11th Cir. 1982).

[220] *See* 435 U.S. 268, 275–78 (1978).

evidence of *past* crimes outweighs the benefits of deterring future police misconduct.[221]

And yet, when it comes to *future* crimes, courts have largely dispensed with the three-factor framework and held that the exclusionary rule *never* applies in cases of new crimes committed after police misconduct.[222] These courts have reached this conclusion based on the public policy fear that applying the exclusionary rule would give suspects a license to kill misbehaving police officers.[223] As a result, courts usually apply the new crime exception even when defendants commit relatively minor crimes in response to relatively serious illegal conduct by police officers.

This Article proposes that, just as the purpose and flagrancy of an *official's* misconduct are considered under the third attenuation doctrine factor in past crimes cases, the purpose and flagrancy of the *suspect's* future crime should be considered under the second attenuation doctrine factor in new crime cases. Specifically, this Article argues that another exclusionary rule dealing with a past crime/future crime distinction—attorney-client privilege—provides a terrific analog for how this analysis can and should be done.

1. The Duty of Confidentiality and the Attorney-Client Privilege

Model Rule of Professional Conduct 1.6(a) states that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[224] According to the Comment to the Rule, this confidentiality rule "contributes to the trust that is the hallmark of the client-lawyer relationship."[225] By promising confidentiality, the Rule encourages people needing legal assistance to seek counsel "and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter."[226] Therefore, if a client charged with grand theft auto confides in his counsel that he committed the charged crime and also stole another car, counsel would not be able to disclose either of these confessions to these past crimes to the authorities.[227]

As Rule 1.6(a) notes, however, there are exceptions to attorney-client confidentiality in subsection 1.6(b). Between 1983 and 2002, Rule 1.6(b)(1) stated

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[221] *See, e.g.*, State v. Sanders, 445 P.3d 1144, 1155 (Kan. 2019) ("[C]ourts must examine the particular facts of each case and determine whether those circumstances attenuate the taint of illegality.").

[222] *See supra* Section II.B.3.

[223] *Id.*

[224] MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2020).

[225] *Id.* at r. 1.6 cmt. 2.

[226] *Id.*

[227] *See, e.g.*, James M. McCauley, *Corporate Responsibility and the Regulation of Corporate Lawyers*, 3 RICH. J. GLOB. L. & BUS. 15, 26 (2003) ("The lawyer's ethical duty of confidentiality under Rule 1.6 . . . prohibits the disclosure of client information related to a client's *past* crimes.").

that "[a] lawyer may reveal information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[228] Under this exception, the attorney in the prior example still wouldn't be able to disclose if his client told him he was planning on stealing a Lexus later that day because the client's future crime would be unlikely to result in death or substantial bodily harm. In other words, the benefits of an attorney disclosing many kinds of future client crimes do not outweigh the damage done to client trust in attorney-client confidentiality.[229]

Conversely, if a loan shark charged with aggravated battery told his attorney he planned to kill or break the legs of a debtor later that day, the attorney could disclose this confidence based on a reasonable belief that his client was going to commit a future crime that would result in imminent death or substantial bodily harm. The current comment to Rule 1.6(b)(1) states that the exception "recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm."[230] Indeed, this valuing of life and limb is further reflected in the current version of Model 1.6(b)(1), which allows attorney disclosures "to prevent reasonably certain death or substantial bodily harm,"[231] without the requirement of future criminal conduct by the client, such as when a client tells his attorney he "has accidentally discharged toxic waste into a town's water supply."[232] Model Rule 1.6(b)(1) was amended in 2002, and some states adopted the new version of the Rule while other states have retained the old version.[233]

Model Rule 1.6(a) and other attorney-confidentiality rules "are closely related to the evidentiary rule of attorney-client privilege and are animated by similar policy concerns. Both are based on the instrumental idea that clients will more likely confide fully in lawyers if they can do so behind a veil of secrecy."[234] While Model Rule 1.6(a) prevents any attorney disclosures, the attorney-client privilege is an evidentiary privilege/exclusionary rule that allows a client to prevent his attorney

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[228] *See* Colin Miller, *Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391, 394 (2008) (alteration in original) (quoting Patrick T. Casey & Richard S. Dennison, *The Revision to ABA Rule 1.6 and the Conflicting Duties of the Lawyer to Both the Client and Society*, 16 GEO. J. LEGAL ETHICS 569, 570 (2003)).

[229] *See* Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . And Its Exceptions . . .*, 81 NEB. L. REV. 1320, 1335 (2003) ("[I]t does not allow disclosure for threatened client crimes that do not pose such a threat, because the competing value of serious physical harm is not present to justify disclosure.").

[230] MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 6 (AM. BAR ASS'N 2020).

[231] *Id.* at r. 1.6(b)(1).

[232] *Id.* at r. 1.6 cmt. 6.

[233] *See* Miller, *supra* note 228, at 395.

[234] 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.55 (3D ED. 2014 & SUPP. 2012).

from testifying about their confidential communications at trial.[235] Pursuant to the attorney-client privilege, a client can prevent her attorney from testifying regarding any confidential communications about the client's *past* crimes.[236] As with Rule 1.6(b)(1), however, through either rule[237] or precedent,[238] many states also have an exception to the attorney-client privilege when a client reveals to her attorney an intention to commit a *future* crime that the attorney believes is likely to result in imminent death or substantial bodily harm. A number of federal courts have also recognized a similar exception to the attorney-client privilege, including the United States Court of Appeals for the Eighth Circuit, which found in *United States v. Ivers* that a client's threat to murder the judge was "not protected by the attorney-client privilege."[239]

Both courts and scholars have analogized the exclusionary rule of the attorney-client privilege to the exclusionary rule of the Fourth Amendment. For example, in the Supreme Court case *United States v. Leon*, Justice Stevens noted in his concurrence in part that "[t]he exclusion of probative evidence in order to serve some other policy is by no means unique to the Fourth Amendment. In his famous treatise on evidence, Dean Wigmore devoted an entire volume to such exclusionary rules," including the attorney-client privilege.[240] Similarly, Professor Ed Imwinkelried has observed that

> [t]he common-law attorney-client privilege excludes evidence of confidential communications between an attorney and his client because the State desires to foster that relationship. Similarly the [F]ourth [A]mendment exclusionary rule excludes illegally seized evidence

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[235] *See, e.g.*, Colin Miller, *Justice of the Peace?: Why Federal Rule of Evidence 404(a)(2)(C) Should Be Repealed*, 91 N.C. L. REV. 1161, 1182 (2013).

[236] *See, e.g.*, Michel Rosenfeld, *The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System, and the Corporate Client's SEC Disclosure Obligations*, 33 HASTINGS L.J. 495, 540–41 (1982) ("One of the most important functions of the attorney-client privilege is to protect fully both client communications and attorney advice concerning past crimes or frauds.").

[237] *See, e.g.*, CAL. EVID. CODE § 956.5 ("There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual."); HAW. REV. STAT. § 503(d)(2) (stating that there is no privilege "[a]s to a communication reflecting the client's intent to commit a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another").

[238] *See, e.g.*, Shorter v. State, 33 So. 3d 512, 517–19 (Miss. Ct. App. 2009) (finding an exception to the attorney-client privilege when the defendant told his attorney "that he was about to commit a homicide"); Henderson v. State, 962 S.W.2d 544, 557 (Tex. Crim. App. 1997) ("[W]e find that the attorney-client privilege was legitimately required to yield to the strong public policy interest of protecting a child from death or serious bodily injury.").

[239] 967 F.3d 709, 716 (8th Cir. 2020).

[240] 468 U.S. 897, 979 n.38 (1984) (Stevens, J., concurring in part).

> because it is believed that the exclusion will deter future police violations of the [F]ourth [A]mendment.[241]

Therefore, it makes sense to consider exceptions that apply to an attorney's duty of confidentiality to a client when assessing the proper scope of the new crime exception to the Fourth Amendment exclusionary rule.

2. Recalibrating Factor Two Through Analogy to Attorney-Client Privilege

Breaking this down, courts have held that the benefit of solving past crimes and/or preventing relatively minor future crimes does *not* outweigh the cost of damaging the attorney-client relationship that would come with an accompanying exception to attorney-client privilege. Conversely, courts have held that the benefit of preventing future crimes that will likely result in imminent death or substantial bodily harm does outweigh the cost of damaging the attorney-client relationship that comes with the future crime exception.

Through analogy to this analysis, courts can recalibrate the second factor of the attenuation doctrine in new crime cases by focusing on the purpose and flagrancy of a suspect's crime committed after illegal detention and/or questioning. On one end of the spectrum, reconsider cases such as *United States v. Sprinkle*, in which Carl Sprinkle ran away from a police officer and fired a shot at him after being illegally detained and frisked;[242] and *United States v. King*, in which a passenger in a station wagon fired his pistol at an officer who had unlawfully stopped the station wagon and was illegally frisking the driver.[243] In these cases, we can surmise that the likely result of the new crime by each defendant was killing or causing substantial bodily harm to a police officer. Therefore, under a recalibrated second factor, the attenuation doctrine would strongly favor the admissibility of evidence connected to these new crimes because the benefit of deterring such violent crimes would outweigh the cost of failing to deter future police misconduct. As a result, even if the first and third attenuation doctrine factors favored exclusion, the new crime exception would likely apply and make evidence connected to the new crime(s) admissible.

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[241] Edward J. Imwinkelried, *Chambers v. Mississippi, ___ U.S. ___ (1973): The Constitutional Right to Present Defense Evidence*, 62 MIL. L. REV. 225, 259 (1973); *see also* Tun-Jen Chiang, *Forcing Patent Claims*, 113 MICH. L. REV. 513, 547 (2015) ("I have already given the example of the exclusionary rule in the Fourth Amendment context, which excludes evidence for long-term policy purposes (e.g., to deter future constitutional violations) that are unrelated to maximizing accuracy in the individual case. Similarly, evidentiary privileges such as the attorney–client privilege exclude a suspect's confession to his lawyer not because such a confession is unreliable but because without the privilege there may be no confession in the first place, and hindering effective communication between lawyers and their clients would impose a social cost.").

[242] 106 F.3d 613, 619 (4th Cir. 1997).

[243] 724 F.2d 253, 256–57 (1st Cir. 1984).

On the other end of the spectrum, reconsider cases such as *United States v. Marine*, in which the defendant was disrespectful to a lieutenant after allegedly being racially profiled and illegally detained;[244] and *State v. Earl*, in which a defendant gave a fake name and date of birth to an officer who had made an unlawful entry into the home his stepbrother was renting.[245] In these cases, each defendant did not intend and was unlikely to cause any physical harm to anyone. Therefore, under a recalibrated second factor, the attenuation doctrine would strongly favor the exclusion of evidence connected to these new crimes because the benefit of deterring such relatively minor crimes would *not* outweigh the cost of failing to deter future police misconduct. As a result, even if the first and third attenuation doctrine factors favored admission, the new crime exception would likely *not* apply, meaning that evidence connected to new crime(s) would be inadmissible.

Finally, in the middle of the spectrum, reconsider *United States v. Dawdy*, in which a defendant was illegally seized and resisted the arresting officer's attempt to handcuff him.[246] In this case, the defendant was trying to resist an unlawful arrest and may have intended to cause some physical harm to the arresting officer but not substantial bodily harm or death. Therefore, under a recalibrated second factor, a judge would likely find that the attenuation doctrine would weakly favor the exclusion of evidence connected to this new crime because the benefit of deterring a crime of moderate severity would *not* outweigh the cost of failing to deter future police misconduct. As a result, the court's consideration of the first and third factors would likely determine whether the new crime exception would apply.

In conclusion, this new test for the new crime exception would reconnect the exception with its roots in the attenuation doctrine. By doing so, courts would have a framework that would allow them to exclude evidence of less serious new crimes by defendants and admit evidence of more serious crimes.

IV. A NEW TEST FOR THE NEW CRIME EXCEPTION TO THE *MIRANDA* EXCLUSIONARY RULE

Parts II and III dealt with situations in which defendants committed new crimes in response to police officers illegally detaining and/or questioning them without satisfying the applicable quantum of proof (*e.g.,* reasonable suspicion for a *Terry* stop and frisk). But what if a defendant commits a new crime in response to unwarned questioning following a lawful detention? In *Miranda v. Arizona*, the Supreme Court concluded that statements made in response to custodial interrogations are inadmissible unless a *Miranda* warning precedes them.[247] Unlike the Fourth Amendment exclusionary rule, the fruit of the poisonous tree doctrine and the accompanying attenuation doctrine do not apply to the *Miranda*

[244] 51 M.J. 425 (C.A.A.F. 1999).
[245] 92 P.3d 167, 174–76 (Utah Ct. App. 2004).
[246] 46 F.3d 1427, 1430–31 (8th Cir. 1995).
[247] *See infra* Part IV.A.

exclusionary rule.[248] And yet, despite the new crime exception being a subset of the attenuation doctrine, courts have begun applying the new crime exception to the *Miranda* exclusionary rule.[249] While such an application thus makes little sense under the attenuation doctrine framework, this Part argues that the public safety exception to the *Miranda* exclusionary rule can be used as an analog to conduct a similar analysis.

A. The Miranda *Exclusionary Rule and the Fruit of the Poisonous Tree*

The Fifth Amendment to the United States Constitution states in pertinent part that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself . . . ."[250] In *Miranda v. Arizona*, the United States Supreme Court held that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[251] Therefore, the Court found the need "for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."[252] Specifically, the Court concluded that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[253] The Court then held that, in the absence of other "fully effective means . . . to inform accused persons" of their Fifth Amendment privilege, the following procedural safeguard, since dubbed the *Miranda* warning, is required: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[254]

In its subsequent opinion in *Oregon v. Elstad*, the Supreme Court distinguished the *Miranda* exclusionary rule from the Fourth Amendment exclusionary rule.[255] In *Elstad*, police officers went to the house of an 18-year-old suspect—Michael Elstad—in a burglary case and asked Elstad to accompany them to the living room.[256] One officer went with Elstad's mother to the kitchen, and the other went with Elstad to the living room, where he asked him a few questions.[257] The Court noted:

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[248] *See infra* Part IV.A.
[249] *See infra* Part IV.B.
[250] U.S. CONST. amend. V.
[251] 384 U.S. 436, 467 (1966).
[252] *Id.* at 439.
[253] *Id.* at 444.
[254] *Id.*
[255] 470 U.S. 298, 306 (1985).
[256] *Id.* at 300.
[257] *Id.* at 300–01.

> Although in retrospect the officers testified that [Elstad] was then in custody, at the time he made his statement he had not been informed that he was under arrest. The arresting officers' testimony indicate[d] that the brief stop in the living room before proceeding to the station house was not to interrogate the suspect but to notify his mother of the reason for his arrest.[258]

Elstad was then taken to the Sheriff's headquarters, Mirandized for the first time, and gave a full confession.[259]

After being charged with first-degree burglary, Elstad moved to suppress his statement and confession and eventually appealed the issue to the United States Supreme Court.[260] According to the Court, Elstad's arguments for suppression relied heavily on two metaphors.[261] The first metaphor, "familiar from the Fourth Amendment context, would require that respondent's confession, regardless of its integrity, voluntariness, and probative value, be suppressed as the 'tainted fruit of the poisonous tree' of the *Miranda* violation."[262] Meanwhile, the "second metaphor question[ed] whether a confession can be truly voluntary once the 'cat is out of the bag.'"[263] The Court responded that these metaphors "should not be used to obscure fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment."[264]

Specifically, "a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the 'fruits' doctrine."[265] The "fruits" doctrine exists because "[t]he purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits."[266] Conversely, "[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself."[267] Therefore, "[i]t may be triggered even in the absence of a Fifth Amendment violation," which is premised on the suspect's statement being involuntary.[268] As a result, while "*Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily

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[258] *Id.* at 315.
[259] *Id.* at 301.
[260] *Id.* at 302–03.
[261] *Id.* at 303–04.
[262] *Id.* at 303.
[263] *Id.* at 303–04.
[264] *Id.* at 304.
[265] *Id.* at 306.
[266] *Id.*
[267] *Id.*
[268] *Id.*

made."[269] Thus, the Court found that Elstad's confession was admissible because his un-Mirandized first statement was voluntary, and his confession was then given after a knowing and voluntary *Miranda* waiver.[270]

The Supreme Court later reaffirmed and clarified its *Elstad* holding in its plurality opinion in *United States v. Patane*. In *United States v. Patane*, Samuel Francis Patane, a convicted felon, allegedly violated a temporary restraining order prohibiting him from contacting his ex-girlfriend.[271] Meanwhile, detectives who had learned that Patane illegally possessed a .40 Glock pistol arrested him and started reading him the *Miranda* warnings.[272] After being told of the right to remain silent, Patane "interrupted, asserting that he knew his rights, and neither officer attempted to complete the warning."[273] Later, under interrogation, Patane admitted to having a pistol in his bedroom, and the officers retrieved it with Patane's consent.[274] After Patane was charged with possession of a firearm by a convicted felon, he moved to suppress the pistol, claiming, *inter alia*, that it was "the fruit of an unwarned statement."[275]

When the suppression issue reached the Supreme Court, it reiterated *Elstad*'s holding that the *Miranda* exclusionary rule sweeps more broadly than the Fifth Amendment.[276] It then added that the failure to give a *Miranda* warning is not itself a constitutional violation.[277] Instead, "[p]otential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, '[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy' for any perceived *Miranda* violation."[278] As a result, unlike with "unreasonable searches under the Fourth Amendment . . . there is, with respect to mere failures to warn, nothing to deter."[279] Therefore, there was "no reason to apply the 'fruit of the poisonous tree' doctrine" and no reason to suppress the pistol.[280]

In other words, a *Miranda* violation does not occur when an officer interrogates a defendant without advising him of his right. Instead, the violation occurs with the admission of the defendant's incriminatory response. Therefore, because the questioning itself is not a poisonous tree, evidence found in response to such questioning cannot be the fruit of the poisonous tree.

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[269] *Id.* at 309.
[270] *Id.* at 318.
[271] 542 U.S. 630, 634 (2004).
[272] *Id.* at 634–35.
[273] *Id.* at 635.
[274] *Id.*
[275] *Id.*
[276] *Id.* at 639.
[277] *Id.* at 641.
[278] *Id.* at 641–42 (alterations in original) (quoting Chavez v. Martinez, 538 U.S. 760, 790 (2003) (plurality opinion)).
[279] *Id.* at 642.
[280] *Id.*

B. The New Crime Exception to the Miranda *Exclusionary Rule*

Despite that the fruit of the poisonous tree doctrine, and thus, its exception—the attenuation doctrine—do not apply to *Miranda* violations, courts have begun to apply the new crime exception to the *Miranda* exclusionary rule.

In *United States v. Owuor*, Peter Owuor was waiting to be booked at a municipal jail when two ICE agents noticed his strong African accent as he spoke to an officer.[281] The agents asked Owuor where he was from and about his accent, and he responded that he was from Atlanta and traveled extensively.[282] One of the agents then asked the officer for Owuor's arrest report and noticed it didn't have a social security number.[283] The agent asked Owuor "for [his social security] number, which he gave."[284] Subsequently, the agents gave the Social Security Administration that number and were told that the number did not belong to Owuor, who was born in Kenya.[285]

The agents then returned to the jail, took Owuor to an interrogation room, and interviewed him while he was in handcuffs.[286] The agents asked "him questions about his citizenship, to which Mr. Owuor responded with allegedly false information about his citizenship."[287] Only then did the agents Mirandize Owuor, at which point he clammed up.[288] Owuor was thereafter charged with (1) falsely and willfully misrepresenting himself as a United States citizen; and (2) knowingly and willfully making a false, fictitious, and fraudulent statement and representation.[289]

Owuor moved to suppress his statements made in the interrogation room, claiming, *inter alia*, "that the Agents violated *Miranda* requirements, and thus, his Fifth Amendment rights."[290] The district court denied the motion, finding "'that no [F]ifth [A]mendment problem is presented when a statement is admitted into evidence which is not confessional in nature, but in and of itself constitutes the crime charged.'"[291] The court reached this conclusion "because the Fifth Amendment prohibition against self-incrimination 'relates to crimes alleged to have been committed *prior* to the time when the testimony is sought.'"[292] Therefore, "Fifth Amendment protections from unwarned custodial inculpatory statements do not license a defendant to testify falsely and commit perjury."[293] This meant that Owuor's statements were admissible because they were "not evidence of a prior

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[281] No. 08-CR-149-WKW, 2009 WL 1439361, at *1 (M.D. Ala., May 20, 2009).
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.*
[288] *Id.*
[289] *Id.* at *2.
[290] *Id.* at *4.
[291] *Id.* (quoting United States v. Kirk, 528 F.2d 1057, 1062 (5th Cir. 1976)).
[292] *Id.* (quoting *Kirk*, 528 F.2d at 1061).
[293] *Id.*

crime, but [we]re themselves a new crime—that of false statements (under either charged offense)—and thus not subject to the exclusionary rule."[294] As support for this conclusion, the court cited *Bailey* to analogize its conclusion to the new crime exception to the Fourth Amendment exclusionary rule for illegal seizures.[295]

Other courts similarly have created new crime exceptions to the *Miranda* exclusionary rule. For example, in *United States v. Smith*, the Fifth Circuit found that a defendant's un-Mirandized threat to kill President George Bush was admissible "because the threat constituted a new crime rather than evidence of a prior offense."[296] In *United States v. Paskett*[297] and *State v. Tucker*,[298] the Eleventh Circuit and the Supreme Court of New Hampshire found that bribes by un-Mirandized suspects after interrogation were admissible as new crimes. And, in *People v. Compos*, the Court of Appeals of Colorado found that the prosecution could admit evidence that an un-Mirandized suspect provided a false name and birth date "because [the suspect's] false statement about his identity constituted a new crime, not evidence of a prior crime, and thus the exclusionary rule does not apply."[299]

Therefore, courts across the country now routinely read new crime exceptions into the *Miranda* exclusionary rule. As the next section will explain, however, these decisions do not make sense due to the difference between the Fourth Amendment exclusionary rule and the *Miranda* exclusionary rule.

C. Recalibrating the Public Safety Exception to the Miranda *Exclusionary Rule*

Because the attenuation doctrine does not apply to the *Miranda* exclusionary rule, it makes no sense to apply that doctrine's framework to analyze *Miranda* new crime cases. That said, the Supreme Court has recognized an exception to the *Miranda* exclusionary rule in cases in which police engage in un-Mirandized custodial interrogations in situations posing threats to public safety. This Article argues that the same framework used in these public safety cases can and should apply to *Miranda* new crime cases and produce similar results.

1. The Public Safety Exception

The Supreme Court created this public safety exception to *Miranda* in *New York v. Quarles*.[300] In *Quarles*, a woman told Officers Frank Kraft and Sal Scarring

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[294] *Id.* at *7.

[295] *Id.* at *4 n.8.

[296] 7 F.3d 1164, 1165–67 (5th Cir. 1993).

[297] 950 F.2d 705, 707 (11th Cir. 1992) (concluding that the defendant's bribe constituted a new crime).

[298] 765 A.2d 1058, 1062 (N.H. 2001) (finding that the defendant's bribe was an independent crime).

[299] 486 P.3d 363, 368 (Colo. Ct. App. 2019), *aff'd on other grounds*, 484 P.3d 159 (Colo. 2021).

[300] 467 U.S. 649 (1984).

that an African American man wearing a black jacket with the name "Big Ben" printed on the back had raped her and had just entered the nearby A & P supermarket with a gun.[301] The officers entered the A & P, spotted a man matching the woman's description, and apprehended him after he ran away.[302] Officer Kraft frisked the man, discovered an empty shoulder holster and asked him where the gun was after handcuffing but not Mirandizing him.[303] The man—Benjamin Quarles—"nodded in the direction of some empty cartons and responded, 'the gun is over there.'"[304] Kraft then retrieved a loaded .38-caliber revolver from one of the cartons.[305]

After Quarles was charged with rape and criminal possession of a weapon, he moved to suppress his un-Mirandized statement.[306] When the issue reached the Supreme Court, it held "that on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved."[307] According to the Court, "[w]hatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety."[308]

The *Quarles* Court reached this conclusion by inferring that the *Miranda* majority found that, generally, the benefit of deterring coerced confessions outweighs the cost of fewer convictions of guilty suspects.[309] Conversely, in *Quarles*, the police "were confronted with the immediate necessity of ascertaining the whereabouts of a gun" that "posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it."[310] Therefore, because the issuance of the *Miranda* warnings could have deterred Quarles from revealing the gun's location, "the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles."[311] Thus, the Court "conclude[d] that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[312]

The Court noted that "[i]n recognizing a narrow exception to the *Miranda* rule in this case, we acknowledge that to some degree we lessen the desirable clarity of

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[301] *Id.* at 651–52.
[302] *Id.* at 652.
[303] *Id.*
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *Id.* at 655–56.
[308] *Id.* at 656.
[309] *Id.* at 656–57.
[310] *Id.* at 657.
[311] *Id.*
[312] *Id.*

that rule."[313] But the Court then turned aside this concern, concluding that "[t]he exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it."[314] Indeed, the Court was confident that "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect."[315] In its subsequent opinion in *Berkemer v. McCarty*, the Supreme Court clarified that, under this public safety exception, "when the police arrest a suspect under circumstances presenting an imminent danger to the public safety, they may without informing him of his constitutional rights ask questions essential to elicit information necessary to neutralize the threat to the public."[316]

As a result, courts have held that the public safety exception does not apply to non-imminent dangers, such as dangers connected to past crimes that have already been neutralized. For example, in *Fleming v. Collins*, the Fifth Circuit cited this language from *Berkemer* to hold that the public safety exception did not apply to un-Mirandized questions that a police officer asked a bank robbery suspect after she "ascertained that he did not have a gun (both by frisking him and asking him what he did with it) . . . ."[317] Similarly, in *United States v. Mobley*, the Fourth Circuit held that the prosecution failed to establish the "immediate need" to protect the public under the exception when an FBI agent asked un-Mirandized questions to a drug dealing suspect who was encountered naked and arrested after the FBI had already made a security sweep of the premises.[318] According to the court, "[a]bsent such circumstances posing an objective danger to the public or police, the need for the exception is not apparent, and the suspicion that the questioner is on a fishing expedition outweighs the belief that public safety motivated the questioning that all understand is otherwise improper."[319]

Moreover, courts have held that not all imminent dangers to public safety trigger the exception. Instead, only the imminent danger of death or substantial bodily harm triggers the public safety exception. For example, in *State v. Stephenson*, a New Jersey appellate court found that the public safety exception did not apply when the police responded to a 911 call in which a mother said that a man had threatened to put a bullet in her son.[320] An officer subsequently handcuffed the defendant and, without administering the *Miranda* warning, told him that "he could cooperate with us and [tell] where the gun is or that we could go through the court and apply for a search warrant of the room."[321] In holding that the public safety exception did not apply, the court determined that "[a]ny perceived need by the

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[313] *Id.* at 658.
[314] *Id.*
[315] *Id.* at 658–59.
[316] 468 U.S. 420, 429 n.10 (1984) (citing New York v. Quarles, 467 U.S. 649 (1984)).
[317] 917 F.2d 850, 854 (5th Cir. 1990).
[318] 40 F.3d 688, 693 (4th Cir. 1994).
[319] *Id.*
[320] 796 A.2d 274, 276–77 (N.J. Super. Ct. App. Div. 2002).
[321] *Id.* at 277.

police . . . to determine the presence and whereabouts of a gun could have been satisfied by various means."[322]

Conversely, in *United States v. Lackey*, the Tenth Circuit held that the public safety exception applied when a police officer asked the un-Mirandized question, "Do you have any guns or sharp objects on you?" to a suspect he had arrested after a woman called 911 and said a man had fired shots at her house.[323] The court concluded that the officer's question "addressed a real and substantial risk to the safety of the officers and Defendant" because "[i]f Defendant was carrying such an item, he could use it against the officers or, perhaps more likely, someone could be seriously injured when Defendant, who was already under arrest, was routinely searched or frisked."[324]

In other words, the benefit of preventing imminent death or substantial bodily harm to members of the public outweighs the cost of overriding the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. But the benefit of solving past crimes or preventing some smaller harm to members of the public does *not* outweigh the cost of overriding the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.

2. A New Test for the New Crime Exception to the Miranda *Exclusionary Rule*

The public safety exception to the *Miranda* exclusionary rule can and should serve as an analog for the new crime exception to the *Miranda* exclusionary rule. Under this corrected version of the new crime exception, a response to an un-Mirandized interrogation that constitutes a crime would not always trigger the new crime exception. Instead, only new crimes that pose an imminent danger of death or substantial bodily harm would trigger the new crime exception.

Imagine a case in which an un-Mirandized suspect responds to interrogation by threatening to kill or seriously injure his arresting officer(s). In such a case, the benefit of deterring such threats and the actual violence that could follow would outweigh the cost of overriding the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. Therefore, the new crime would apply, and evidence of the defendant's new crime(s) would be admissible.

On the other hand, reconsider cases such as *United States v. Owuor*[325] and *People v. Compos*,[326] in which arrestees gave false information about their identities in response to un-Mirandized interrogations. In such cases, the benefit of deterring such relatively minor crimes would not outweigh the cost of overriding the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. As a result, the new crime exception would not apply, and evidence of the defendant's new crime(s) would be inadmissible.

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[322] *Id.* at 281–82.

[323] 334 F.3d 1224, 1225 (10th Cir. 2003).

[324] *Id.* at 1227.

[325] No. 08-CR-149-WKW, 2009 WL 1439361, at *1 (M.D. Ala., May 20, 2009).

[326] 486 P.3d 363, 368 (Colo. Ct. App. 2019), *aff'd on other grounds*, 484 P.3d 159 (Colo. 2021).

By applying this version of the new crime exception to the *Miranda* context, courts can achieve the same goal that the Supreme Court developed by crafting the public safety exception. Namely, courts would protect citizens who commit minor crimes in response to un-warned interrogations but would promote public safety by allowing for the admission of evidence of serious crimes committed in response to such questioning.

CONCLUSION

The new crime exception to the Fourth Amendment exclusionary rule allows prosecutors to introduce evidence connected to new crimes committed by defendants who were illegally detained and/or questioned. Unfortunately, as illustrated in this Article, courts largely have applied this new crime exception without any analytical framework or regard for the severity of the initial police misconduct or the defendant's response. Moreover, courts have begun applying the new crime exception to crimes such as giving a fake name in response to an un-Mirandized interrogation following a lawful arrest.

By doing so, courts have allowed the new crime exception to swallow two separate exclusionary rules. Courts, however, can recalibrate the exception by focusing on the purpose and flagrancy of the defendant's new crime. By using an approach that draws from the future crime exception to attorney-client privilege and the public safety exception to the *Miranda* exclusionary rule, courts can replace their current "all or nothing" approach with a cost-benefit balancing that will better serve public policy goals in a more nuanced way.

APPENDIX

The following are representative state cases applying the new crime exception without any consideration of the three attenuation doctrine factors:

- People v. Tomaske, 440 P.3d 444, 446–49 (Colo. 2019) (applying the new crime exception to a defendant who was illegally tackled and responded by resisting and dislodging the officer's baton from his duty belt);

- State v. White, 642 So. 2d 842, 843–44 (Fla. Dist. Ct. App. 1994) (applying the new crime exception to a defendant who shot at police officers who "broke down the door of [his] apartment using a sledge hammer and a halogen torch" and unlawfully "burst into the apartment");

- Tims v. State, 204 So. 3d 536, 537–40 (Fla. Dist. Ct. App. 2016) (applying the new crime exception to a defendant who responded to an unlawful entry in his home by resisting and knocking equipment from an officer's hand);

- C.P. v. State, 39 N.E.3d 1174, 1177, 1182 n.6 (Ind. Ct. App. 2015) (applying the new crime exception to a juvenile who responded to a police officer illegally seizing him by taking a fighting stance and shoving the officer);

- Wilson v. United States, 102 A.3d 751, 753–55 (D.C. 2014) (finding that the new crime exception applied because, even if the defendant was unlawfully arrested, he flailed his arms and kicked his legs as officers were trying to put him in a police cruiser);

- People v. Martin, 338 P.3d 1106, 1112–13, 1115 (Colo. App. 2014) (applying the new crime exception to a defendant who was subjected to a possibly illegal pat down by pulling away from the officers and attacking them);

- Williams v. State, 126 So. 3d 85, 89 (Miss. Ct. App. 2013) (applying the new crime exception to a defendant who responded to allegedly being illegally detained and tased by fleeing from police officers);

- People v. Evans, No. 2-09-1029, 2011 WL 10103044, at *1 (Ill. App. Ct. May 25, 2011) (finding that the new crime exception applied to a defendant who gave a false name to police officers who unlawfully entered his home);

- State v. Peterman, 216 P.3d 710, 714–15 (Kan. Ct. App. 2009) (applying the new crime exception to a defendant who pointed an assault-type rifle at a police officer who unlawfully entered her home);

- State v. Barron, 690 S.E.2d 22, 29 (N.C. Ct. App. 2010) (finding the new crime exception applied to a defendant who gave his brother's name and social security number after being unlawfully arrested);

- People v. Brown, 217 P.3d 1252, 1254, 1257 (Colo. 2009) (applying the new crime exception who was illegally detained and tased because although the defendant "never lunged at or attempted to swing at any of the officers, he appeared to be threatening them");

- State v. Panarello, 949 A.2d 732, 736 (N.H. 2008) (applying the new crime exception to a defendant who pointed a gun at a police officer who unlawfully entered his home);

- State v. Parker, 655 S.E.2d 860, 862 (N.C. Ct. App. 2008) (applying the new crime exception to a defendant who fired shots at police officers who may have unlawfully entered his home);

- State v. Lusby, 198 P.3d 735, 738 (Idaho Ct. App. 2008) (finding the new crime exception applied to a defendant who elbowed an officer who was handcuffing her after illegally entering her apartment);

- State v. Williams, 926 A.2d 340, 345–46 (N.J. 2007) (applying the new crime exception because even if there was an illegal pat-down of the defendant, he pushed an officer aside and fled);

- People v. Doke, 171 P.3d 237, 239–40 (Colo. 2007) (finding that, even if officers unlawfully trespassed on the defendant's property, the new crime exception applied because the defendant brandished a shotgun);

- Faulkner v. State, 627 S.E.2d 423, 426 (Ga. Ct. App. 2006) (finding that, even if police officers illegally stopped the defendant's vehicle, the new crime exception applied because the defendant attempted to flee);

- Brown v. City of Danville, 606 S.E.2d 523, 530–32 (Va. Ct. App. 2004) (finding that the new crime exception applied to a defendant who got in a physical altercation with police officers who were unlawfully searching him);

- State v. Earl, 92 P.3d 167, 174 n.7 (Utah Ct. App. 2004) (applying the new crime exception to a defendant who gave a false name and birth date to police officers who unlawfully entered his home);

- State v. Brocuglio, 826 A.2d 145, 148 (Conn. 2003) (adopting the new crime exception but declining to apply it to a defendant who threatened to unleash his dog on police officers who had unlawfully entered his backyard);

- State v. Ali, 797 N.E.2d 1019, 1021–24 (Ohio Ct. App. 2003) (applying the new crime exception to a defendant who threatened to kill the police officers who were unlawfully arresting her);

- Clark v. United States, 755 A.2d 1026, 1030 (D.C. 2000) (applying the new crime exception to a defendant who threatened to harm a police officer who might have been unlawfully arresting him);

- State v. Nelson, 519 S.E.2d 786, 790 (S.C. 1999) (applying the new crime exception to a defendant who ran a stop sign and sped away after a police officer allegedly tried to stop him illegally);

- People v. Cappelli, 927 P.2d 832, 834–35 (Colo. 1996) (applying the new crime exception to a defendant who fled from police officers after a warrantless arrest);

- State v. Dawdy, 533 N.W.2d 551, 555 (Iowa 1995) (applying the new crime exception to a defendant who resisted an initial unlawful arrest);

- People v. Smith, 870 P.2d 617, 619–20 (Colo. Ct. App. 1994) (finding that the new crime exception applied to a defendant who drove away at 45 miles per hour in a residential neighborhood after an illegal seizure);

- City of Maplewood v. Marti, 891 S.W.2d 500, 504 (Mo. Ct. App. 1994) (finding that the new crime exception applied to a defendant who resisted being handcuffed after an allegedly unlawful detention);

- State v. Mitchell, 848 S.W.2d 894, 896 (Tex. App. 1993) (applying the new crime exception to a defendant who responded to an officer illegally entering his home by striking him on the head with a flashlight);

- People v. Villarreal, 604 N.E.2d 923, 929 (Ill. 1992) (applying the new crime exception to defendants who attacked a police officer who had unlawfully pushed his way into their residence to arrest a third person);

- State v. Ritter, 472 N.W.2d 444, 452 (N.D. 1991) (applying the new crime exception to a defendant who responded to unlawful detention and interrogation by verbally threatening officers and pushing one of them);

- State v. Ottwell, 779 P.2d 500, 502 (Mont. 1989) (applying the new crime exception to a defendant who pointed a handgun at officers who had unlawfully entered her hotel room);

- State v. Miskimins, 435 N.W.2d 217, 218, 221 (S.D. 1989) (applying the new crime exception to a defendant who pulled a shotgun on officers who had unlawfully entered his home and might not have announced their presence);

- City of St. Louis Park v. Berg, 433 N.W.2d 87, 90 (Minn. 1988) (finding that the new crime exception applied to a defendant who resisted arrest after "forceable entry and gratuitous violence [were] used against the defendant. . . .");

- State v. Tassler, 765 P.2d 1007, 1009 (Ariz. Ct. App. 1988) (finding that, even if police officers unlawfully entered the defendant's home, the new crime exception applied because he resisted arrest);

- Napageak v. State, 729 P.2d 893, 894–95 (Alaska Ct. App. 1986) (finding that the new crime exception applied to a defendant who responded to an officer illegally entering his home by chasing him out of the home while brandishing a whale gun);

- State v. Boilard, 488 A.2d 1380, 1383, 1386–87 (Me. 1985) (finding that the new crime exception applied to a defendant who pushed a police officer who had unlawfully entered his home);

- Commonwealth v. King, 449 N.E.2d 1217, 1225–26 (Mass. 1983) (applying the new crime exception to a defendant who shot at an officer who exceeded the scope of a proper investigatory search);

- State v. Burger, 639 P.2d 706, 707–09 (Or. Ct. App. 1982) (applying the new crime exception when a defendant responded to officers illegally entering his apartment and handcuffing him by kicking one of the officers).