St. Mary's Law Journal

Volume 53 | Number 1 Article 1

2-12-2022

Judicial Federalism and the Appropriate Role of the State Supreme Courts: A 20-year (2000–2020) Study of These Courts' Interest Evaluations of the Fruits and the Attenuation Doctrines

Dannye R. Holley Mr.
Texas Southern University, Thurgood Marshall School of Law

ARTICLE

JUDICIAL FEDERALISM AND THE APPROPRIATE ROLE OF THE STATE SUPREME COURTS: A 20-YEAR (2000–2020) STUDY OF THESE COURTS' INTEREST EVALUATIONS OF THE FRUITS AND THE ATTENUATION DOCTRINES

DANNYE HOLLEY*

* B.A. and J.D., State University of New York, Buffalo. LL.M., University of California, Berkeley. Professor of Law and Dean Emeritus, Thurgood Marshall School of Law, Texas Southern University.

INTRODUCTION

This Article is about America's federal legal system's regulation of the police power in a democracy structured to share that power between a national government and the states that are its members. This Article is context and time-interval-specific. The research this Article reflects focuses on identifying pertinent decisions by state supreme courts from 2000–2020. Its multiple research hypotheses define pertinence. The principal hypothesis is: the nation's state supreme courts were, much more so than the Supreme Court of the United States (SCOTUS), during the research-study period, the primary guardians against "flagrant" unconstitutional Government Investigative Techniques (GIT).

In perspective, this Article examines the context of the issues implicated by the policies underlying the Fruits and Attenuation Doctrines the degree to which "progress" has occurred in fulfilling Justice William Brennan's

aspiration for state supreme courts to play a strong, independent role in safeguarding the rights reflected in the national and state constitutions.[1]

The GITs studied arguably violated rights found in the Fourth, Fifth, and Sixth Amendments of the Constitution and comparable rights in state constitutions. A subtext hypothesis of this Article is: a state supreme court is more likely to hold that exclusion is constitutionally required when it places reliance only on their state's constitution.

The study examines the series of doctrines that account for the ultimate outcome articulated in the principal hypothesis. The study begins with the baseline—an analysis of important SCOTUS decisions and the Court's analysis of the Fruits and the Attenuation Doctrines, specifically looking at the identification and evaluation of the interests served and resolutions they portend.[2] Part One also includes a discussion of how this Article qualified and disqualified state supreme court decisions for inclusion in this study.[3] Part Two examines a crucial related procedural issue: the allocation of the burdens of production and persuasion when the defendant claims that the violation of one or more of these rights requires exclusion of the evidence at issue.[4] Part Three begins by examining whether the state supreme courts are more likely to require exclusion because they are more inclined than SCOTUS to find an initial constitutional violation.[5] Next, Part Three evaluates whether the state supreme courts are also more likely than SCOTUS to hold evidence at issue seized subsequent to the initial unconstitutional GIT, usually as a result of a subsequent GIT (even if not an independent unconstitutional GIT), must also be excluded because it is fairly found to be a product of the initial unconstitutional GIT; the so-called "Fruit of the Poisonous Tree."[6]

This final section of Part Three discusses the policy significance of the difference in outcomes, especially in the context of the primary hypothesis

1. *See* William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502–04 (1977) (asserting state supreme courts should scrutinize constitutional decisions by federal courts in their role of expanding constitutional protections and safeguarding the rights of the people of this nation). *But see* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 817–18 (1992) (asserting a less optimistic view of state constitutions and the ability of state supreme courts to make principled decisions based on their state constitutions).

2. *See infra* notes 16–59 and accompanying text.

3. *See infra* notes 60–63 and accompanying text.

4. *See infra* notes 64–81 and accompanying text.

5. *See infra* notes 82–85 and accompanying text.

6. *See infra* notes 86–108 and accompanying text.

of this study.[7] Part Three concludes by identifying and assessing the significance of the difference in outcomes between SCOTUS and the state supreme courts. Proof is presented that a number of these state supreme courts expressly based their Fruits Doctrine decisions on their state constitutions.[8] Part Four examines whether state supreme courts are also more likely than SCOTUS to hold evidence at issue should be excluded because the Attenuation Doctrine does not justify excusing the exclusion.[9] In its final part, Part Five, this Article focuses first on the findings and conclusions that should be drawn from the study of the cases identified in the first four parts.[10] Part Five continues by identifying the most important implications and recommendations that should be drawn from the study.[11] The crucial recommendation is presumptively making the "flagrancy" of the government's unconstitutional course of conduct the sole inquiry for resolving the competing interests implicated by the Fruits and Attenuation Doctrines.[12] This section of Part Five next examines whether and when the resolution of these competing interests—to determine if exclusion is justified—needs to also consider the other two concepts currently used in these evaluations by SCOTUS and the state supreme courts—temporal proximity, and intervening events and conduct.[13] Finally, Part Five provides overall perspectives to be drawn from this Article, including how its major proposal might impact the significance of the Independent Source—and its hypothetical iteration, the Inevitable Discovery Doctrines.[14]

7. *See infra* notes 104 and accompanying text.
8. *See infra* notes 96–104 and accompanying text.
9. *See infra* notes 109–156 and accompanying text.
10. *See infra* notes 157–205 and accompanying text.
11. *See infra* notes 206–227 and accompanying text.
12. *See infra* notes 206–227 and accompanying text.
13. *See infra* text discussion between notes 206 and 210 and accompanying text.
14. *See infra* note 228–243 and accompanying text.

I. SCOTUS AND ITS EVOLUTION OF THE FRUITS AND ATTENUATION DOCTRINES: AN INTEREST ANALYSIS INCLUDING INITIAL FLAGGING OF THE ROLE OF RACE AND CASTE & DEFINING THE PARAMETERS FOR INCLUSION OF STATE SUPREME COURT DECISIONS IN THE STUDY

Wong Sun[15] remains, and appropriately so, the anchor SCOTUS decision employed to identify and evaluate the interests reflected in the Fruits and Attenuation Doctrines.[16]

First, the facts reflect multiple "Primary Taints," distinct, and sequential unconstitutional government investigatory techniques employed against three different minority men.[17] The fact that all three men were members of a minority racial group cannot be ignored because it stands as a harbinger of the same circumstantial context in which these doctrines and their interest identification and evaluations have played out through the decades until 2020.[18]

In *Wong Sun*, there was an unconstitutional home invasion, followed by an unconstitutional search, followed by an unconstitutional seizure—the arrest without probable cause of the first man, Toy.[19] This was followed by an unconstitutional search of the home of the second man, Yee, without probable cause.[20] The officers soon thereafter repeated this sequence of unconstitutional investigative techniques—entering the home of the third man without a warrant, searching without probable cause, and subsequently, unconstitutionally seizing the third man, Wong Sun.[21]

Having identified a series of primary taints, the Court turned to defining and applying the Fruits Doctrine to determine whether some of the

15. Wong Sun v. United States, 371 U.S. 471 (1963).

16. *See id.* at 484–88 (articulating the Court's analysis of the interests furthered by the Fruit and Attenuation Doctrines).

17. *See id.* at 473–75 (detailing the events that led to the arraignment of Yee, Toy, and Wong Sun).

18. *See infra* notes 89, 126, 132–33, 141, 205, 209, and 217 and accompanying text.

19. *See Wong Sun*, 371 U.S. at 474 (describing how Agent Wong broke into Toy's home, searched the premises for narcotics, and placed Toy under arrest even though no narcotics were found in the home). Today, post-*Miranda* and its progeny, another such unconstitutional act would have followed this course of unconstitutional conduct—an interrogation without any warnings. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (highlighting the right of individuals to be aware of their rights prior to interrogation).

20. *See Wong Sun*, 371 U.S. at 474–75 (detailing the identification of and entry into Yee's home that led to Yee surrendering the heroin he had in his home).

21. *See id.* at 475 (recounting the night where Alton Wong and six other officers entered Wong Sun's apartment, brought him from his bedroom in handcuffs, and thoroughly searched his apartment).

statements made by Toy and Wong Sun should be excluded.[22] In one paragraph, the Court set out the core sequential elements of the Fruits Doctrine, which have framed this issue in our nation's high courts for the last fifty-seven years.[23]

The scope and significance of the collective taint resulting from the course of "lawless" government conduct, however, was not precisely defined in the opinion.[24] The fact that the lawless conduct was a "but for" cause of the subsequent opportunity to seize or hear the evidence at issue was found not to be enough linkage to justify exclusion of that evidence as the fruit of the illegality and the Court has adhered to that position.[25]

More was required. But what "more" was enough to establish the necessary nexus between the taint(s) and evidence at issue was colorfully described, but not well defined. The standards can be restated as a search for whether the evidence at issue was obtained by the exploitation of the illegal conduct—and the degree of that exploitation—or by means that would allow the evidence to be sufficiently "purged" of the taint, such as knowledge from separate legal sources or intervening circumstances.[26]

No definition of "purge," or "taint," or "intervening circumstances" was developed.[27] More importantly, despite the obvious opportunity, the Court did very little to detail and emphasize the significance of the multiple flagrant and racist sequences of unconstitutional GITs. The failure to define the increments and develop appropriate policy foundations for the Fruits Doctrine risked subjectivity playing a significant role in future cases.

With respect to Toy's inculpatory statements made in his home, the Court concluded they were obtained during the government's unconstitutional

22. *See id.* at 484–85 (determining the Fruits Doctrine is applicable to tangible and verbal evidence through a review of prior caselaw).

23. *See id.* (reviewing the caselaw that guided the development of the Fruits Doctrine).

24. *See id.* at 487 (discussing the relationship between the lawless conduct of the police and the evidence's ability to be excluded without addressing the scope or significance the lawless conduct plays in this determination).

25. *Id.* at 487–88. Almost all state supreme courts have held the same. *See infra* notes 37, 182, and 230 and accompanying text.

26. *Wong Sun*, 371 U.S. at 488 (quoting JOHN MAGUIRE, EVIDENCE OF GUILT 221 (1959)). This Article will advocate for "probable cause" as the appropriate nexus. *See infra* note 206 and accompanying text.

27. *See Wong Sun*, 371 U.S. at 486 (declaring it is unreasonable to infer that the evidence was purged of its unreasonable taint but failing to define this terminology). *But see* Brown v. Illinois, 422 U.S. 590, 603–04 (1975) (describing the trio of components of the Attenuation Doctrine, including the presence of intervening circumstances, which is strikingly missing from the *Wong Sun* opinion).

search and seizure and rejected the government's claims that the statements were admissible because they were voluntary.[28]

Once Toy's statements in his home were excluded, the Court concluded—without revisiting the "elements" of the Fruits Doctrine—that the drugs seized shortly thereafter at Yee's home must also be excluded as fruit of the course of unconstitutional conduct.[29] The opinion did not place reliance upon the scope of the flagrancy of the government's course of unconstitutional conduct or that the conduct targeted members of a minority group.

However, Wong Sun's unsigned statement was not excluded. The Court concluded that Wong Sun's voluntary return to the station days later removed the influence of the illegal arrest.[30] The Court did not assess the continuing effect and emotional distress the unconstitutional invasion and search of his home would have had on Wong Sun.

The policy implications of this standard, and its strengths and weaknesses, have echoed in the decisions of our highest court for the last six decades. The Attenuation Doctrine's evolution, for example, awaited subsequent decisions by SCOTUS. The two key attenuations decisions are *Brown v. Illinois*[31] and *Utah v. Strieff*.[32]

In *Brown*, the case also began with a series of unconstitutional police investigative techniques which bore characteristics that justified each to be appropriately categorized as flagrant, even if the Court did not.[33] A team of police officers, without a warrant and absent probable cause, broke into the unoccupied home of a minority man and conducted an unconstitutional search of the person's effects.[34] Thereafter, the officers occupied the home, awaited the man's return, and with guns drawn, arrested him as he entered the apartment; all without probable cause or a warrant.[35]

The Court's decision focused on an evaluation of whether the evidence at issue, two sequential stationhouse confessions made within hours of the

28. *Wong Sun*, 371 U.S. at 486.
29. *Id.* at 488.
30. *Id.* at 491.
31. *Brown*, 422 U.S. at 591–96.
32. Utah v. Strieff, 136 S. Ct. 2056 (2016).
33. *Brown*, 422 U.S. at 593.
34. *Id.* at 593.
35. *Id.* at 593.

arrest, should be declared the fruit of the unconstitutional arrest.[36] The Court again endorsed that "but for" is not enough of a nexus principle.[37]

To guide its decision, the Court referenced and adopted the trio of Attenuation Doctrine elements identified in *Wong Sun*.[38] Hence the intervening fact principle was reconfirmed by the Court, but the Court found there were no significant intervening events; somehow compartmentalizing the series of *Miranda* warnings given Brown as a separate consideration.[39] This conceptual departure heightened the risk of subjective outcomes and skewed policy guidance.

The Court held that *Miranda* warnings could not serve alone to per se remove the taint of the illegal arrest because it invited a premeditated and intentional resort to the warnings to excuse flagrant government investigative violations of the Fourth Amendment.[40] A policy position the Court would eventually also adopt as the justification for barring premeditated, purposeful violations of the Fifth Amendment rights the *Miranda* warnings were crafted to protect.[41]

The *Strieff* majority held that the first two factors in the attenuation evaluation—temporal proximity and intervening circumstances—split with one strongly favoring the accused and the other strongly favoring the government.[42] On the third factor—the flagrancy of the course of government's unconstitutional conduct—which the majority acknowledged was the most significant of the three—the *Strieff* majority simply politicized the evaluation by resting the outcome on a subjective, untenable interest

36. *Id.* at 602–06.

37. *Id.* at 603.

38. *See id.* at 603–04 (referring to the temporal proximity of the initial arrest and defendant's subsequent confession, interfering circumstances, and the purpose and gravity of police misconduct) (first citing Johnson v. Louisiana, 406 U.S. 356, 365 (1972); then citing Wong Sun v. United States, 371 U.S. 471, 491 (1963)).

39. *Id.* at 604–05.

40. *Id.* at 602–603, 605 (first citing Davis v. Mississippi, 394 U.S. 721, 726–27(1969); then quoting Mapp v. Ohio, 367 U.S. 643, 648 (1961)). A purposeful violation of the Fourth Amendment would only benefit the investigation, prosecution, and conviction of the accused if the agents knew they could thereafter take action that would excuse this unconstitutional course of conduct. It should be noted that in the context of this analysis, the Court did indirectly recognize that such a course of unjustified, serious incursions into the property and person of an accused, was possibly designed to cause, and therefore, possibly could cause, fright. *Id.* at 605.

41. Missouri v. Seibert, 542 U.S. 600, 619–20 (2004) (Kennedy, J., concurring) (citing Oregon v. Elstad, 470 U.S. 298, 105 (1985)). *See infra* note 56 and accompanying text.

42. Utah v. Strieff, 136 S. Ct. 2056, 2062 (2016).

reconciliation course of decision.[43] Justice Thomas, writing for the majority, effectively held that the government can accost any American citizen, without even needing reasonable suspicion, when that citizen is a pedestrian.[44] The government can demand the person speak to the government officer, turn over his identification, wait while the officer determines if the citizen has an arrest warrant, and if the government gets lucky, and a warrant exists, this course of completely unjustified unconstitutional conduct is not flagrant, but only negligent.[45]

To characterize this officer's unconstitutional course of conduct as "good faith," and to include a flagrant lie that the officer's conduct after the initial stop was legal, invites an authoritarian-style government to America. In the minds of the justices, who signed on to the majority opinion, the Constitution does not prevent the government from stopping any citizen for any reason, including what the accused may look or sound like.[46] This Article will track the degree to which the nation's state supreme courts have found Justice Thomas's reasoning persuasive in interpreting their state constitutions.[47]

Other important SCOTUS decisions, properly viewed as contributing to the evolution of the Court's efforts to reconcile the interest reflected in the Fruits and Attenuation Doctrines, include those in which the Court's primary opinion failed to expressly reference or employ the doctrines to reach its decision.[48] The substance of *Seibert*, however, mirrored *Brown's* interest analysis, and like *Brown*, concluded that exclusion was required because the flagrancy of the government's unconstitutional conduct intentionally violated, in that case, the person's Fifth Amendment

43. *Id.* at 2063.

44. *Id.* at 2064.

45. *But see id.* (Sotomayor, J., dissenting) (arguing the Court's decision to uphold the constitutionality of the stop because the existence of a warrant for a crime, often trivial in nature, effectively attenuated the taint of evidence as unreasonable); Rebecca Laitman, *Fourth Amendment Flagrancy: What it is, and What it is Not*, 45 FORDHAM URB. L.J. 799, 801 (2018) (concluding the Court failed to explain why it characterized the government's conduct as non-flagrant and never attempted to define flagrant).

46. *See Strieff*, 136 S. Ct. at 2064 (holding the evidence seized from the defendant was admissible and the defendant's constitutional protections were not violated); s*ee also infra* notes 129–147 and accompanying text.

47. *See infra* notes 129–149 and accompanying text.

48. *See generally* Missouri v. Seibert, 542 U.S. 600 (2004) (plurality opinion) (failing to reference the Fruits and Attenuation Doctrines in deciding the holding).

privilege.[49] As in *Brown*, therefore, the opinion rejected Miranda warnings as necessarily adequate to constitute a qualifying intervening act.[50]

Under the facts in *Siebert*, it was clear the policies underlying the Fruits Doctrine versus those underlying the Attenuation Doctrine left no doubts that the second confession was the product of the first confession given only minutes earlier.[51] Justice Breyer wrote his concurrence to make the point that under the facts of *Seibert*, the principles and policies underlying the Fruits Doctrine better-justified exclusion.[52] In Justice Breyer's view, the Fruits Doctrine did a better job harmonizing the Court's precedent, guiding future government agent conduct, and facilitating judicial decision-making.[53]

The *Seibert* decision also demonstrates why it is properly included in this study, because in its record and recognized by the plurality, there was a stark example of what this Article contends should be the primary policy factor the nation's highest courts should employ in reconciling the interest reflected in the Fruits and Attenuation Doctrines—the flagrancy of the government's unconstitutional misconduct. This Article advocates for fully defining flagrant. *Seibert* presented an additional and egregious component of a robust definition of flagrant government unconstitutional conduct.[54] Justice Souter cited multiple police training manuals, including a national manual, urging departmental-wide resort to an unconstitutional workaround of Miranda protections by interrogating first, and then, only after securing a confession, providing the accused with *Miranda* warnings.[55] The plurality, however, did not make evidence of such intentional, systemic violation of the Constitution the deciding basis for its holding, and thereby left the door open for the government to continue to deliberately train officers to violate

49. *Id.* at 616–18.

50. The plurality opinion's attempt to avoid the Fruits Doctrine, seeking to avoid reconsideration of its *Elstad* decision, was completely unconvincing, but more importantly, unnecessary. *Id.* at 614 n.4. One page later the opinion expressly referenced the *Elstad* holding and asserted that, in the facts of that case, the relationship between the first and second confessions were "speculative and attenuated." *Id.* at 615.

51. *Seibert*, 542 U.S. at 615–16.

52. *See id.* at 617–18 (Breyer, J., concurring) (plurality opinion) (employing the Fruits Doctrine to justify exclusion).

53. *Id.*

54. *See id.* at 611–13

55. *See id.* at 609–11 (mentioning multiple law enforcement training manuals instructing how to circumvent *Miranda* warnings).

the Constitution so long as they did it in the field, including in the accused's residence.

Instead, the opinion rested primarily on what police and an accused were most likely thinking during the—interrogate first, *Mirandize* later—custodial course of interrogation.[56]

In another plurality decision, announced the same day as *Seibert*, the Court again decided not to employ the Fruits and Attenuation Doctrines, while both dissenting opinions believed the analytic frameworks provided by those doctrines was the appropriate basis for resolving the issue of whether to exclude the gun, which was the basis of the conviction.[57] None of the opinions, however, made the partial and relatively innocuous violation of *Miranda* warnings, presented in the facts of the case, the basis of the decision.[58] Justice Thomas' plurality opinion seemed more bent on continuing to challenge the scope of the constitutional mandate of *Miranda* by suggesting, with neither strong precedent nor policy, that a *Miranda* violation could not justify exclusion of an exhibit.[59]

A. *Defining the Scope of the Study*

SCOTUS and state supreme court decisions have employed the Fruits and Attenuation Doctrines to evaluate claims made in the context of alleged violations of the Constitution's Fourth, Fifth, and Sixth Amendments, including similar or identical provisions in the constitutions of the several states.[60] Hence, the doctrines are potentially applicable to alleged search and seizures, confessions, and right to counsel violations, so this Article will identify and evaluate state supreme court decisions that involve one or more of these rights.[61]

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56. *See id.* at 615–16 (discussing why mid-interrogation *Miranda* warnings under facts similar to *Elstad v. Oregon* may be adequate; however, the Court decided those facts were distinct from the interrogation technique used against Seibert).

57. United States v. Patane, 542 U.S. 630, 645–47 (2004) (Souter, J., dissenting); *Id.* at 647–48 (Breyer, J., dissenting).

58. *See id.* at 635 & n.1 ("Detective Benner attempted to advise [Patane] of his *Miranda* rights but got no further than the right to remain silent. At that point, [Patane] interrupted, asserting that he knew his rights, and neither officer attempted to complete the warning.").

59. *See* discussion of *Wong Sun supra*, and in that case, as with others to follow, the application of the Fruits Doctrine resulted in the exclusion of exhibits. *Id.* 542 U.S. at 643–44.

60. *See infra* note 179 and accompanying text.

61. *See, e.g.*, State v. Knapp, 700 N.W.2d 899, 905–08 (Wis. 2005) (discussing the far-reaching applicability of the Fruits Doctrine to alleged Fourth, Fifth, and Sixth Amendment violations).

B. *Identifying the Criteria for Determining Whether a State Supreme Court Decision is Within the Scope of the Study*

In defining the scope of this study, a related issue involved determining the criteria for qualifying cases for potential inclusion in the study. To qualify, the government investigatory technique under review must have violated a national or state constitutional right. Given this focus on constitutional federalism issues, excluded are cases determined to involve an illegal but not an unconstitutional GIT.[62] Also excluded, for the same reason, were cases in which the state supreme court determined that the GIT in question only violated a specific state constitutional provision that did not have an analogous federal constitutional provision.[63]

II. ALLOCATION OF THE BURDENS OF PROOF—BURDEN OF PRODUCTION AND BURDEN OF PERSUASION WITH RESPECT TO THE FRUITS AND ATTENUATION DOCTRINES

There are important procedural issues that set the stage for how the assessment of the sequential issues of establishing constitutional rights, an unconstitutional violation of one or more of such rights, and the Fruits Doctrine and its relationship to the Attenuation Doctrine will be undertaken. One important issue is multi-faceted and sequential—who has the burden of production and persuasion to prove each of these sequential issues? With respect to whether the accused qualifies for the right claimed, SCOTUS and most state supreme courts allocate both the burden of production and persuasion to the accused.[64]

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62. *See generally* Wilson v. Commonwealth, 37 S.W.3d 745 (Ky. 2001) (exampling a subpoena for phone records as an unauthorized form of government pre-trial discovery. The dissent lamented the decision, signaling the end of the Fruits Doctrine in the Commonwealth (non-constitutional illegalities)). *See also* Commonwealth v. Long, 69 N.E.3d 981, 989, 992 (Mass. 2017) (concluding prosecution did not satisfy state wiretap statute threshold requirement); State v. Adams, 763 S.E.2d 341, 347–48 (S.C. 2014) (finding no federal jurisprudence and turning to the state statute regulating installation of GPS devices); State v. Kipp, 317 P.3d 1029, 1032, 1034 (Wash. 2014) (recording conversation in which accused confessed violated state privacy act but neither the national nor the state constitutions).

63. *See* State v. Bilant, 36 P.3d 883, 886–87 (Mont. 2001) (examining how the Montana constitution included a specific right to privacy, and analogizing the search protection of that right to the protections found under the Fourth Amendment, in the context of a Fruits Doctrine assessment, to Montana's provision).

64. *See generally* Katz v. United States, 389 U.S. 347 (1967) (discussing the government's ability to use an electronic recording device); United States v. Jones, 565 U.S. 400 (2012) (attaching and using GPS devices on vehicles is within the Fourth Amendment); Stansbury v. California, 511 U.S. 318

The second sequence of the burden of production and persuasion allocation issues is whether there was an initial unconstitutional GIT employed. In some cases, there may be a related sequential issue: whether there was another subsequent, independent, unconstitutional GIT(s). Here, the definitive precedent from SCOTUS and the state supreme courts becomes less systemic and clear-cut, particularly regarding the burden of production.

Once the accused has convinced SCOTUS that he qualifies for the constitutional right claimed, allocation of the burden of production is unclear, but SCOTUS appears to follow the guideline that the party having the ultimate burden of persuasion likewise has the burden of production.[65] SCOTUS has placed the burden of persuasion on the government to prove their course of investigation honored the constitutional right, for which the accused has proven he qualified.[66] Similarly, the Court has required the government to also bear the burden of persuasion with respect to proving that a warrant-based search or seizure was done with probable cause and satisfied the other requirements of the Fourth Amendment.[67] SCOTUS has also required the government bears the burden of persuasion regarding proving a warrantless search and seizure falls within those facts that establish one of the recognized exceptions to the warrant clause.[68]

The next allocation of the burden of proof issues is two-fold. First, evaluating if the Fruits Doctrine requires or if the Attenuation Doctrine

(1994) (discussing custody); Rhode Island v. Innis, 446 U.S. 291 (1980) (examining interrogation); State v. Leonard, 943 N.W.2d 149, 156 (Minn. 2020) (discussing suspicion-less searches).

65. *Cf.* Brown v. Illinois, 422 U.S. 590, 604 (1975) (stating the prosecution has the burden of proof on admissibility of evidence sprouting from allegedly unconstitutional police misconduct).

66. *See* Missouri v. Seibert, 542 U.S. 600, 608 n.1 (2004) (discussing allocation of burden of persuasion on the government to prove "at least by a preponderance of the evidence" the initial GIT was not unconstitutional when that GIT was honoring *Miranda* warnings and by proving the voluntariness of the subsequent confession); *Brown*, 422 U.S. at 604 (holding the government has the burden of proving the admissibility of a confession, which strongly suggests that at that point, given the facts and reasoning in *Brown*, the government was allocated the burden of persuasion to prove the confession was admissible at step one in terms of proving the accused's constitutional rights were not violated in securing the confession, including the confession constituting the fruit of unconstitutional conduct. If that fails, then proving there was sufficient attenuation to excuse exclusion).

67. *See generally* United States v. Leon, 468 U.S. 897 (1984) (discussing, in part, when an officer has reasonable cause for a search or seizure); Illinois v. Gates, 462 U.S. 213 (1983) (discussing a two-pronged test for probable cause).

68. *See* Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (alteration in original) (footnotes omitted) ("The exceptions are 'jealously and carefully drawn,' and there must be a 'showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.'").

excuses exclusion. Second, whether the unconstitutional GIT is a probable cause of the government securing the evidence sought to be excluded at the suppression hearing, trial, or on appeal. These are the allocations of these burdens of proof to the Fruits Doctrine. The fact that in most cases, like these, the most reliable sources of evidence would appear to be in the possession of the government strongly favors allocating the duty to produce those records to the government.[69] The Supreme Court has placed the burden of persuasion on the government, this time to prove the negative: that the unconstitutional prior GIT was not the reason for the seizure of the evidence.[70]

The final inquiry in this sequence of allocation of the burden of proof regarding these doctrines is premised on findings that the evidence sought to be admitted by the government, at the suppression hearing, trial, or on appeal, was the fruit of the unconstitutional GIT(s). Did the prosecution's crime-charging decision or other evidence, nevertheless, justify admitting the evidence under the Attenuation Doctrine? SCOTUS, while not expressly allocating the burden of production regarding the Attenuation Doctrine, has held the burden of persuasion is on the government to ultimately prove the Fruits Doctrine was trumped by the Attenuation Doctrine.[71]

During the two decades under review (2000–2020), more than a dozen state supreme courts correctly placed the burden of persuasion on the government to prove a constitutional right was not violated, and if there was an unconstitutional GIT, that neither the Fruits Doctrine nor the

69. The police reports, written or oral, are available to begin identifying and evaluating the course of the government's investigatory techniques. Their records of the course of interrogation, in confession cases such as *Brown*, should serve as presumptively the most likely available source to begin identifying and evaluating if those confessions were probably caused by the unconstitutional seizure. *Brown*, 422 U.S. at 604.

70. *Id.*

71. *Id.* at 604–05. *See generally* United States v. Crews, 445 U.S. 463 (1980) (illustrating the conceptual relationship between the Fruits Doctrine, applicable to unconstitutional GITs, which violate the Fourth, Fifth, or Sixth Amendment rights of an accused, and the subset of that doctrine in a series of identifications of the accused where the unconstitutional GIT is somewhere in that line of identifications). In *Crews*, the unconstitutional GIT was a Fourth Amendment violation—an illegal arrest—which was followed by two pre-trial identifications from a photo array and a line-up. *Id.* at 465–68. The lower courts and SCOTUS agreed those identifications were the fruit of the illegal arrest and, therefore, were subject to exclusion. *Id.* at 467–70. The issue was, however, the trial identification by the same witness, and whether the pre-trial viewing opportunity and its confirmation by pre-taint descriptions by the witness served to free the trial identification from the illegal arrest taint. *Id.* at 469–73.

Attenuation Doctrine applied to excuse exclusion.[72] However, a handful of state supreme courts, expressly or by implication, decided to shift the burden of the persuasion to the defendant to prove firstly that there was an initial unconstitutional GIT, and secondly that the evidence seized by a subsequent GIT was primarily the product of the use of the prior unconstitutional GIT.[73]

The South Dakota Supreme Court made a series of decisions that provided some evidence that its sometimes erroneous assertion allocating the burden of proof to the accused could be attributed in part to its failure

72. Holmes v. State, 65 S.W.3d 860, 864 (Ark. 2002); *see also* State v. Brunetti, 901 A.2d 1, 22 (Conn. 2006) (placing the burden of persuasion on the government to prove that consent to search a home was voluntary); State v. Trinque 400 P.3d 470, 482 (Haw. 2017) (stating the State has the burden to demonstrate the evidence was not gained from prior illegal searches); State v. Bishop, 203 P.3d 1203, 1210 (Idaho 2009) (relying on the national Constitution to allocate burden of persuasion on these sequential issues); State v. Sanders, 445 P.3d 1144, 1150 (Kan. 2019) (allocating burden of persuasion generally to the government at a suppression hearing); State v. Jefferson, 310 P.3d 331, 339 (Kan. 2013) (explaining the Attenuation Doctrine exception); Thornton v. State, 214 A.3d 34, 45 (Md. 2019) (requiring the government to prove that the alleged primary unconstitutional GIT—a frisk—was constitutional); Elliott v. State, 10 A.3d 761, 770 (Md. 2010) (holding the government must prove that the conduct was a stop and not an arrest); Commonwealth v. Tavares, 126 N.E.3d 981, 995 (Mass. 2019) (requiring the Commonwealth to establish the evidence presented was sufficiently attenuated from other illegalities to be free of taint); Commonwealth v. Gentile, 2 N.E.3d 873, 885 (Mass. 2014) (requiring the Commonwealth to show "that the evidence it has obtained and intends to use is sufficiently attenuated from the underlying illegality so as to be purged from its taint." (quoting Commonwealth v. Damiano, 828 N.E.2d 510, 518 (2005)); State v. Grayson, 336 S.W.3d 138, 142 (Mo. 2011) (mandating the state bear the burden of both producing the evidence and establishing the evidence should be allowed); *In re* Ashley, 821 N.W.2d 706, 720 (Neb. 2012) (listing attenuation as a necessary element for preclusion of the exclusionary rule); State v. Morrill, 156 A.3d 1028, 1034–35 (N.H. 2017) (stating illegally obtained evidence is admissible if the state proves the taint was purged); State v. Thompkin, 143 P.3d 530, 536 (Or. 2006) (summarizing a three-part test used to show illegally obtained evidence is admissible); State v. Ingram, 331 S.W.3d 746, 755 (Tenn. 2011) (involving a warrantless search as the primary taint); State v. Hawkins, 67 A.3d 230, 237 (Vt. 2013) (discussing the presumption of illegal and inadmissible evidence stemming from a violation of a person's constitutional rights); State v. Kinzy, 5 P.3d 668, 674–75 (Wash. 2000) (regarding the warrantless seizure as the primary taint).

73. Cox v. State, 28 A.3d 687, 699 (Md. 2011); *see also* State v. Nelson, 356 P.3d 1113, 1120 (Okla. Crim. App. 2014) (holding the accused must prove that the government violated his rights and that the evidence at issue was derivative of that illegality); Commonwealth v. Santiago, 209 A.3d 912, 930 (Pa. 2019) (stating appellant failed to show the illegal search tainted the investigation); State v. Tenold, 937 N.W.2d 6, 13 (S.D. 2019) (stating the party seeking suppression of evidence bears the burden of proving illegality); State v. Heney, 839 N.W.2d 558, 562 (S.D. 2013) (placing on the accused the burden of proving the but for causal link between the original unconstitutional GIT, and the subsequent GIT that resulted in the seizure of evidence at issue).

to distinguish between the allocation of the burdens of production and persuasion with respect to these doctrines.[74]

The Maryland Court of Appeals, however, still reached an erroneous decision regarding allocating the burden of persuasion on these issues, despite the fact the court based its analysis on separating the issues of the burden of production and the burden of persuasion.[75]

Once the burden of persuasion shifts to the accused, a state's supreme court can focus on the failure of the accused to produce convincing evidence that the tainted GIT was the primary reason the police or prosecutors had the opportunity to subsequently seize the evidence at issue.[76]

The switching of the burden of persuasion to the accused to establish that the Fruits Doctrine applies invites sequential conceptual confusion, taking the form of such a court next failing to clearly allocate the burden of persuasion to the government with respect to establishing that the Attenuation Doctrine justified excusing exclusion.[77]

This unconstitutional shifting of the burden of persuasion may also be attributed to conscious or unconscious policy choices. Once a court correctly decides the national Constitution places the burden of persuasion on the government to prove the right established by the accused was honored and the government fails to do so, to then require the accused to prove the unconstitutional GIT caused the seizure of the evidence at issue, is flawed conceptually and as a matter of interest analysis.[78] When a state supreme court determines it can rest its decision to excuse excluding evidence on the failure of the accused to satisfy the burden of proof, it may

74. *See Tenold*, 937 N.W.2d at 18 (requiring proof by the government that the probable cause standard for issuance of a valid search warrant was satisfied); State v. Rosales, 860 N.W.2d 251, 256 (S.D. 2015) (stating the defendant must show the connection between the illegal taint and the evidence sought to be suppressed); *Heney*, 839 N.W.2d at 562 (requiring the defendant to bear the burden of establishing the evidence stems from a constitutional violation and should thus be inadmissible).

75. King v. State, 76 A.3d 1035, 1044 (Md. 2013).

76. *Santiago*, 209 A.3d at 930.

77. *See id.* at 930 (characterizing the state's responsibility as the opportunity to offer proof of such exceptions to exclusions once the accused has satisfied his burden of proof with respect to the Fruits Doctrine).

78. During the study period, the Maryland Court of Appeals has made this error. *Compare* Thornton v. State, 214 A.3d 34, 45 (Md. 2019) (holding the government must prove that alleged primary unconstitutional GIT, a frisk, was constitutional); *with King*, 76 A.3d at 1044 (holding the accused must prove Fruits Doctrine applies).

fail to evaluate the dimension of the government's unconstitutional conduct.[79]

In part, the shift in the allocation of the burden of proof with respect to these doctrines may be attributed to the courts' misinterpretation of the significance of the national Constitution in our federal system, leading the state supreme court to require the accused to argue and convince the court that the state constitution provided more protection on the array of issues surrounding the Fruits Doctrine than that provided by the national Constitution.[80]

By shifting the burden of persuasion to the accused with respect to these doctrines, a state supreme court may nevertheless correctly decide the case, given the record has no evidence the unconstitutional GIT prompted the subsequent GIT, which produced the evidence at issue.[81]

III. THE FRUITS DOCTRINE IN THE STATE SUPREME COURTS FROM 2000–2020

This Article turns next to the study of the state supreme courts' Fruits Doctrine jurisprudence during the first twenty years of this millennium. The governing hypothesis tested in this part is when the issue is presented for decision, these courts will find the Fruits Doctrine requires exclusion. This part will focus on cases in which the court reached a decision without relying primarily on the Attenuation Doctrine.

The first step in systematically examining and searching for the appropriate accommodation of the competing interest reflected in the Fruits and Attenuation Doctrines is to document how the state supreme courts evaluate and determine if there was a "primary taint"—the initial unconstitutional government investigative technique—which triggered the possible application of the Fruits Doctrine. A key hypothesis of this part of this Article is that the nature of the initial and possible further unconstitutional GIT(s) in the same course of government conduct will play a significant role in determining the presumptive scope of the Fruits Doctrine.

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79. *See Santiago*, 209 A.3d at 930 (demonstrating how the court, assisted by defense counsel concession and similar lack of focus on this issue, never evaluated how long the officer studied the accused's photograph provided him as a result of the illegal search of his cell phone, or whether the officer retained the photo, and examined it after the first view).

80. *Id.* at 921. *See infra* note 99 and accompanying text.

81. State v. Heney, 839 N.W.2d 558, 563–65 (S.D. 2013).

Unconstitutional searches of a home and analogous structures which result in the seizure of the accused's effects, contraband, or incriminating statements are excluded by most of these courts, employing the Fruits Doctrine.[82]

When government agents stop, detain, frisk, arrest, or search a vehicle, its passengers, or a pedestrian bereft of or with inadequate evidence, state supreme courts, sometimes relying on their state constitution, and sometimes at odds with SCOTUS decisions, have held that the Fruits Doctrine requires exclusion of evidence seized as a result of the unconstitutional government course of conduct.[83]

Police observations during an unconstitutional seizure, as well as possible use of those observations to criminalize the accused's failure to then obey government agent commands, are included in the scope of the exclusion ordered by these courts, provided the failure itself was not a separate

82. *See* State v. Spencer, 848 A.2d 1183, 1198 (Conn. 2004) (finding the warrantless search of the defendant's apparent required suppression of the evidence obtained); State v. Lee, 821 A.2d 922, 923 (Md. 2003) (violating the knock and announce element of the constitution, and contraband seized); Commonwealth v. Gentile, 2 N.E.3d 873, 885 (Mass. 2014) (finding the evidence seized "were fruits of the illegal entry, and the connection between the illegality and the granting of consent was 'sufficiently intimate' that the consent cannot be found to have been so attenuated from the illegal entry as to be purged from its taint"); State v. Davis, 360 P.3d 1161, 1171 (N.M. 2015) (finding the low flying helicopter hovering over the back of house disturbed the curtilage of home and was therefore a search).

83. Keenom v. State, 80 S.W.3d 743, 748–49 (Ark. 2002). *See also* State v. Weldon, 445 P.3d 103, 112–13 (Haw. 2019) (involving an unconstitutional search of a backpack which resulted in the discovery of a "baton"); State v. Bishop, 203 P.3d 1203, 1219 (Idaho 2009) (involving an unconstitutional search based on an officer's subjective, unjustified feelings); State v. Sanders, 445 P.3d 1144, 1151–54 (Kan. 2019) (involving a pedestrian); *Thornton*, 214 A.3d at 50 (involving an unconstitutional frisk); Commonwealth v. Tavares, 126 N.E.3d 981, 994–95 (Mass. 2019) (involving an unconstitutionally long detention); State v. Grayson, 336 S.W.3d 138, 143 (Mo. 2011) (involving an unconstitutional traffic stop, not relying on any reasonable suspicion); State v. Sund, 215 S.W.3d 719, 725 (Mo. 2007) (finding evidence seized during an illegal detention during a traffic stop is inadmissible); *In re* Ashley, 821 N.W.2d 706, 720 (Neb. 2012) (involving a suspicion-less stop of a vehicle in which juvenile accused was a passenger); Torres v. State, 341 P.3d 652, 658 (Nev. 2015) (holding a stop became an illegal detention, and detaining person while holding his identification and conducting a warrant search because of that detention required suppression of a gun found after warrant search found two arrest warrants); State v. Morrill, 156 A.3d 1028, 1036 (N.H. 2017) (relying on state constitution); State v. Blesdell-Moore, 91 A.3d 619, 625 (N.H. 2014) (failing to set free at the end of the constitutionally permissible stop); State v. Badessa, 885 A.2d 430, 437–38 (N.J. 2005) (involving the suppression of evidence of a breathalyzer test); State v. Bailey, 338 P.3d 702, 715 (Or. 2014) (finding an officer's failure to advise the defendant they were free to leave, resulted in an unconstitutional seizure); State v. Tenold, 937 N.W.2d 6, 13–14 (S.D. 2019) (involving the suppression of evidence resulting from an officer's suspicion-less traffic stop); State v. Ingram, 331 S.W.3d 746, 758 (Tenn. 2011) (rejecting the justification of a search as incident to an arrest absent a resulting arrest).

crime.[84] Courts almost always hold that effects and contraband seized, contemporaneously with an unconstitutional stop or arrest, and the subsequent use of such tainted evidence to then arrest the accused, search a vehicle, or testify as to those observations and seizures at trial, are subject to exclusion.[85]

Once an unconstitutional GIT is identified by these courts, they have frequently held over the last two decades that the Fruits Doctrine requires exclusion of effects (items acquired, instrumentalities, contraband, crime evidence) thereafter seized, as well as any consent or incriminating statements of the arrestee, even if voluntary, provided the effects, consent, or statements are a product primarily of that unconstitutional GIT.[86]

However, seven state supreme courts' assessments of the interests at stake in making primarily a Fruits Doctrine evaluation found the doctrine inapplicable, therefore, excusing exclusion.[87] Two courts made these holdings despite the record before the court, including facts that should have dictated an interest assessment that would end with a strong

84. State v. Hammond, 778 A.2d 108, 118 (Conn. 2001); *Bishop*, 203 P.3d at 1220; *see also Sund*, 215 S.W.3d at 725 (holding contraband found in the trunk of the vehicle inadmissible); *Torres*, 341 P.3d at 658 (Nev. 2015) (finding "without reasonable suspicion, the discovery of arrest warrants cannot purge the taint from an illegal seizure"); *Badessa*, 885 A.2d at 435–37 (N.J. 2005) (discussing the suppression of an officer's testimony regarding the observations made about the defendant during an illegal stop).

85. *See* State v. Santos, 838 A.2d 981, 992–93 (Conn. 2004); *Hammond*, 778 A.2d at 118; *Bishop*, 203 P.3d at 1219; Elliott v. State, 10 A.3d 761, 774 (Md. 2010); Commonwealth v. White, 59 A.3d 369, 379 (Mass. 2016); *Sund*, 215 S.W.3d at 725; *Torres*, 341 P.3d at 658 (Nev. 2015); *Badessa*, 885 A.2d at 437–38 (requiring suppression of evidence obtained during an illegal stop or arrest).

86. *See* State v. Joseph, 128 P.3d 795, 812 (Haw. 2006) (finding the Miranda violation as primary taint and subsequent accused's statements as fruits); State v. Pringle, 805 A.2d 1016, 1030–33 (Md. 2002) (detailing the events surrounding petitioner's arrest and a lack of interceding attenuation); Commonwealth v. Fredericq, 121 N.E.3d 166, 177–78 (Mass. 2019) (holding consent elicited by express reference [a "flagrancy" metric] to effects seized as a result of an unconstitutional search); State v. Bray, 902 N.W.2d 98, 111–14 (Neb. 2017) (finding valid consent notwithstanding the prior unconstitutional search); State v. Socci, 98 A.3d 474, 483 (N.H. 2014) (holding the evidence will only be admissible if the consent was "voluntary and not an exploitation of the prior illegality."); State v. Thompkin, 143 P.3d 530, 537 (Or. 2006) (volunteering incriminating evidence as fruit of unconstitutional detention); State v. Hawkins, 67 A.3d 230, 237 (Vt. 2013) (analyzing statements made by accused following an illegal arrest).

87. King v. State, 76 A.3d 1035, 1042 (Md. 2013); Knapp v. Comm'r. Pub. Safety, 610 N.W.2d 625, 629 (Minn. 2000); State v. McGurk, 958 A.2d 1005, 1010–11 (N.H. 2008); State v. Tolentino, 926 N.E.2d 1212, 1215–16 (N.Y. 2010); State v. Pederson, 801 N.W.2d 723, 729 (N.D. 2011); State v. Nelson, 356 P.3d 1113, 1121 (Okla. Crim. App. 2015); State v. Felix, 811 N.W.2d 775, 790–91 (Wis. 2012).

justification for application of the Fruits Doctrine.[88] First, the New York Court of Appeals upheld the government's authority to have its agents seize or search without any justification—opening the door to the use of race, gender, and class as the reason for the unconstitutional GIT.[89] The majority of the New York Court of Appeals was willing to excuse this most flagrant violation of Fourth Amendment protection by crediting the government's luck that the accused, once seized, turned out to be a person who had a record that merited arrest and prosecution.[90]

Second, the record before the Minnesota Supreme Court included strong evidence that contradicted the court's conclusion—the unconstitutional GIT was the only reason for the subsequent search or seizure that produced the evidence at issue on appeal.[91]

Some of these courts followed SCOTUS in limiting the scope of the Fruits Doctrine per se, based on the nature of the primary unconstitutional GIT and the courts' policy assessment of the interest implicated by that GIT.[92] In considering the protections afforded by the United States Constitution—as opposed to their state constitution—these courts adhered to the rule set out in *New York v. Harris*.[93] The primary unconstitutional GIT that triggers this outlier rule is an arrest in the home, supported by probable cause but without an arrest warrant, which subsequently produces incriminating evidence after the suspect is removed from his home.[94] In perspective, this policy position may also serve to divert attention from a

88. *See Tolentino*, 926 N.E. 2d at 1215 (stating "defendant's DMV records were . . . not suppressible as the fruit of the purportedly illegal stop"); *Knapp*, 610 N.W.2d at 629.

89. *See Tolentino*, 926 N.E. 2d at 1215 (pulling over accused without cause, resulting in seizure of the accused). The dissent makes it clear that this flaw was the core reason the judge dissented. *Id.* at 1218 (Ciparick, J., dissenting).

90. *See id.* at 1213 (driving with a suspended license; however, at the time of the unconstitutional seizure, police had no basis for even suspecting the accused of that crime).

91. *See Knapp*, 610 N.W.2d at 628 (assuming there was inadequate evidence to justify the breathalyzer test which produced an inclusive result, but if that is true, the subsequent order not to drive was unconstitutional, and that order was the only evidence the officer possessed for stopping the accused only a few minutes later).

92. *Pederson*, 801 N.W.2d at 728–29; Felix, 811 N.W.2d at 789–90.

93. *See* New York v. Harris, 495 U.S. 14, 20–21 (1990) (holding where the police make an arrest in a home without a warrant but with probable cause, the exclusionary rule does not render evidence inadmissible when the statement by the accused is made outside of his home and after the arrest).

94. *Pederson*, 801 N.W.2d at 729; *see also* Felix, 811 N.W.2d at 784 (challenging the admissibility of defendant's statement made at the police station, asserting that it must be suppressed under the attenuation analysis, rather than the Harris rule). *But see* State v. Eserjose, 259 P.3d 172, 181–82 (Wash. 2011) (rejecting the per se approach but adopting some of the *Harris* court's reasoning under the Attenuation Doctrine to conclude exclusion was not justified).

careful assessment of the facts in the record to determine the nature and number of unconstitutional GITS—the first step required in order to make a principled fruits evaluation. The North Dakota Supreme Court, for example, omitted giving any consideration to the record on appeal regarding whether it demonstrated that the police had probable cause to make the arrest, since the only evidence of probable cause was the police officers' assertion that their confidential informant told them of robberies at the motel occupied by the accused.[95]

State supreme courts, which based their fruits/attenuation evaluations on their state constitution rather than the United States Constitution, as interpreted by SCOTUS, are more likely to conclude that the Fruits Doctrine applies and requires exclusion.[96] Reliance on the state constitution is more likely to produce an outcome applying the Fruits Doctrine when the state supreme court first expands what constituted an unconstitutional search or seizure beyond the definition of SCOTUS.[97] Reliance on the state constitution was also more likely to produce an outcome applying the Fruits Doctrine when the court finds that its state provision has multiple policy goals, including goals beyond deterring unconstitutional police conduct, such as those related to protecting the privacy interests of state citizens.[98]

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95. *See Pederson*, 801 N.W.2d at 729 (finding no incriminating evidence was seized at the motel).

96. Dorsey v. State, 761 A.2d 807, 818–21 (Del. 2000); State v. Weldon, 445 P.3d 103, 115 (Haw. 2019); State v. Trinque, 400 P.3d 470, 481 (Haw. 2017); State v. Eli, 273 P.3d 1196, 1209–11 (Haw. 2012); State v. Joseph, 128 P.3d 795, 806 (Haw. 2006); Commonwealth. v. Fredericq, 121 N.E.3d 166, 176 (Mass. 2019); State v. Leonard, 943 N.W.2d 149, 156 (Minn. 2020); State v. Morrill, 156 A.3d 1028, 1034 (N.H. 2017); State v. Blesdell-Moore, 91 A.3d 619, 623 (N.H. 2014). *But see* State v. McGurk, 958 A.2d 1005, 1010–11 (N.H. 2008) (applying their state constitution and finding the taint was purged); State v. O'Neill, 936 A.2d 438, 454–58 (N.J. 2007); State v. Thompkin, 143 P.3d 530, 536 (Or. 2006); *see also* State v. Tatro, 445 P.3d 173, 180 (Kan. 2019) (identifying the possible outcome determinative consequence—i.e., waiver—when a defendant fails to raise and argue that the state constitution provides greater protection than that of its analogous federal constitutional provision).

97. *See Weldon*, 445 P.3d at 115 (establishing a stop takes place anytime the police approach and question a citizen for purposes of investigating their possible participation in criminal activity); *see also infra* notes 129–131 discussing SCOTUS' decision in *Strieff*; *O'Neill*, 936 A.2d at 457 (holding "that when *Miranda* warnings are given after a custodial interrogation has already produced incriminating statements, the admissibility of post-warning statements will turn on whether the warnings functioned effectively in providing the defendant the ability to exercise his state law privilege against self-incrimination").

98. *Blesdell-Moore*, 91 A.3d at 626; State v. Chippero, 753 A.2d 701, 707(N.J. 2000) (citing state precedent for the proposition that, in addition to deterrence of police misconduct, excluding evidence in order to preserve the integrity of the judicial system, is also a policy goal). *But see Eserjose*, 259 P.3d at 178 (finding the "paramount concern [of state provision regulating search and seizures] is to protect

Reliance on the state constitution is especially more likely to produce an outcome finding the Fruits Doctrine required exclusion when the court adopts the federalism policy of applying the state constitution first, and therefore, possibly only the state constitution.[99] Even when these courts place reliance on the three-factor evaluation, which is most frequently associated with Attenuation Doctrine analysis, the courts found that the Fruits Doctrine requires exclusion.[100]

Reliance on the state constitution by the accused is also per se required when the case reaches the court on remand from SCOTUS, which had reversed the state court's ruling that the Fruits Doctrine under the United States Constitution requires exclusion.[101] But this review posture does not necessarily mean that the state supreme court will stick with its original decision and hold that the state constitution requires application of the Fruits Doctrine.[102] The Maryland Court of Appeals determined that its constitution provided no greater search and seizure protection than that provided by the national Constitution, and in addition, that Maryland law did not have an express exclusionary rule remedy.[103]

In summary, the overall finding on the first major hypothesis of this study is that a substantial majority of the state supreme courts (20 of 27) evaluating the merits of applying the Fruits Doctrine, were led by their interest analysis

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the privacy [interest of its citizens]." Nevertheless, such provision provided no greater protection under the facts of the record on appeal). *See supra* note 94 and accompanying text.

99. *Fredericq*, 121 N.E.3d at 181; *Weldon*, 445 P.3d at 115; *Morrill*, 156 A3d at 1034; *Blesdell-Moore*, 91 A.3d at 623; *O'Neill*, 936 A.2d at 454–58; *see also Thompkin*, 143 P.3d at 537 (applying only the state constitution, and expressly reiterating that its constitutional provision regulating and providing exclusion as a remedy with respect to search and seizures issues, protects the rights of its citizens). *But see* State v. Davis, 360 P.3d 1161, 1166 (N.M. 2015) (noting that the New Mexico Supreme Court follows the "interstitial approach" to this issue, whereby it first evaluates if the right claimed is protected by the national Constitution, and if so, the court will not evaluate the overlapping state constitutional provision).

100. *See Fredericq*, 121 N.E.3d at 178–81 (affirming the order granting defendant's motion to suppress, relying on analysis of the exclusionary rule under state constitution application); *Blesdell-Moore*, 91 A.3d at 626–27.

101. *See Knapp*, 700 N.W.2d at 901 (deciding on remand that the state constitution requires exclusion).

102. King v. State, 76 A.3d 1035, 1042 (Md. 2013). The earlier decision, which was later reconsidered, was made just a year before in *King v. State*, 42 A.3d 549, 581 (Md. 2012).

103. *See King*, 76 A.3d at 1041–42 (interpreting the state constitution *in pari materia* with the United States Constitution on these issues. There was no primary taint in the first DNA state statute mandated swab test, thus the second swab could not be the fruit of the first swab).

to conclude that the doctrine required exclusion.[104] The Maryland, Minnesota, and New Hampshire Supreme Courts made decisions landing on both sides of the Fruits Doctrine's interest analysis evaluations.[105] The Minnesota Supreme Court appeared to give more emphasis in its more recent decision to the flagrancy of the police misconduct in determining if the Fruits Doctrine requires exclusion.[106] The court used but rearranged the order of its analysis of the three considerations usually associated with the Attenuation Doctrine evaluation, to move the purpose and flagrancy of the government's unconstitutional course of conduct to serve as the first and most significant consideration.[107] On the other hand, the interest evaluations in the New Hampshire Supreme Court decision denying exclusion based on the Fruits Doctrine, and the two requiring exclusion

104. *See* Keenom v. State, 80 S.W.3d 743, 748–49 (Ark. 2002) (excluding the verbal admission, consent, contraband, and physical evidence, because of the unconstitutional seizure that occurred just outside his home); Holmes v. State, 65 S.W.3d 860, 864–66 (Ark. 2002); People v. Casillas, 427 P.3d 804, 813 (Colo. 2018); State v. Spencer, 848 A.2d 1183, 1197–98 (Conn. 2004); *see also* State v. Brocuglio, 826 A.2d 145, 156 (Conn. 2003) (determining the new crime exception to exclusion could not retroactively apply to the accused in the present case in which the exception was adopted); Dorsey v. State, 761 A.2d 807, 821 (Del. 2000) (holding the state constitution's probable cause provision—which rejects the "good faith" exception—provides stronger Fruits Doctrine protection than its federal counterpart); *Weldon*, 445 P.3d at 115–16; State v. Trinque, 400 P.3d 470, 485 (Haw. 2017); State v. Joseph, 128 P.3d 795, 811–12 (Haw. 2006) (rejecting under state constitution the two-step police interrogation to skirt *Miranda* strategy); State v. Eli, 273 P.3d 1196, 1211 (Haw. 2012) ("[T]he incriminating statement given by defendant . . . was obtained in violation of the *Miranda* rule, [therefore] the statement should not have been admitted in evidence and must be excluded."); State v. Bishop, 203 P.3d 1203, 1220 (Idaho 2009); State v. Lee, 821 A.2d 922, 924, 935 (Md. 2003); Commonwealth v. Goncalves-Mendez, 138 N.E.3d 1038, 1043 (Mass. 2020); *King*, 76 A.3d at 1042–44 (applying the doctrine to the second DNA sample obtained by a warrant, based on the results of the unconstitutional, warrantless, and suspicionless first DNA sample, which was authorized by statute); Commonwealth v. Tavares, 126 N.E.3d 981, 995–96 (Mass. 2019); Commonwealth v. Gentile, 2 N.E.3d 873, 884–85 (Mass. 2014); State v. Leonard, 943 N.W.2d 149, 152–53 (Minn. 2020); State v. Sund, 215 S.W.3d 719, 725 (Mo. Banc. 2007); *In re* Ashley, 821 N.W.2d 706, 720–22 (Neb. 2012); Torres v. State, 341 P.3d 652, 658 (Nev. 2015) (en banc), *vacated*, 136 S. Ct. 2505 (2016), *remanded to* 426 P.3d 604 (Nev. 2018); *Davis*, 360 P.3d at 1172–73; *Morrill*, 156 A.3d at 1035–36; *Blesdell-Moore*, 91 A.3d at 625–27; O'Neill, 936 A.2d at 441, 458–59; *Thompkin*, 143 P.3d at 537; State v. Tenold, 937 N.W.2d 6, 13, 18 (S.D. 2019); State v. Ingram, 331 S.W.3d 746, 759–60, 762–63 (Tenn. 2011) (concluding the money seized was the fruit of warrantless crime scene search, but not the later "consent" search of the accused home); State v. Hawkins, 67 A.3d 230, 237–38 (Vt. 2013); *Knapp*, 700 N.W.2d at 901.

105. *King*, 76 A.3d at 1048; King v. State, 42 A.3d 549, 580–81 (Md. 2012), *rev'd*, 569 U.S. 435 (2013); *Leonard*, 943 N.W.2d at 152–53; *Knapp*, 610 N.W.2d at 629; *Morrill*, 156 A.3d at 1035–36; State v. McGurk, 958 A.2d 1005, 1010–11 (N.H. 2008).

106. *Leonard*, 943 N.W.2d at 162.

107. *See id.* at 155; *see also supra* note 91 and accompanying text (discussing the earlier decision and its apparent undervaluing of the flagrancy of the government's unconstitutional course of conduct).

based on the doctrine identified in this section of the Article are consistent.[108]

IV. THE ATTENUATION DOCTRINE IN THE STATE SUPREME COURTS—2000–2020

A. *State Supreme Courts—The Significance of Their Choosing to Focus on the Attenuation Decisions*

The study's second major hypothesis is that state supreme courts will make policy assessments which will favor finding that the Attenuation Doctrine does not trump the Fruits Doctrine, and therefore, exclusion is still justified. Attenuation decisions even if they reference it, often omit assessment of the Fruits Doctrine before moving directly to evaluating the Attenuation Doctrine. These decisions reflect an analytic protocol by such courts that once attenuation is raised by the prosecution, the fruits evaluation merges with the attenuation evaluation.[109]

This conceptual decision cuts both ways with respect to careful assessment of the interest at stake when finding attenuation, and therefore, excusing exclusion. First, under the Constitution, SCOTUS has held that the prosecution must bear the burden of persuasion to prove attenuation. Once it is proven or the government admits that the unconstitutional (federal or state) GIT or series of unconstitutional GITs was the sole or primary reason the evidence at issue was seized and used to convict the accused.[110] Some of the state supreme courts have expressly allocated the burden of persuasion and thereafter held that the government failed to carry

108. *See infra* note 125–126 and 218 and accompanying text discussing the reason for the outlier decision, and why it is consistent with the reasoning of the court in its other decisions.

109. State v. Hummons, 253 P.3d 275, 277–79 (Ariz. 2011); *see also* State v. Brunetti, 901 A.2d 1, 23–26 (Conn. 2006), *cert. denied*, 549 U.S. 1212 (2007) (establishing an attenuation evaluation despite the setting of reconsideration, concluding the accused failed to preserve his primary appeal claim); Spencer, 848 A.2d at 1197–98; State v. Cohagan, 404 P.3d 659, 663–68 (Idaho 2017); People v. Henderson, 989 N.E.2d 192, 201–05 (Ill. 2013); State v. Lane 726 N.W. 371, 380–92 (Iowa 2007); State v. Jefferson, 310 P.3d 331, 339–41 (Kan. 2013); Thornton v. State, 214 A.3d 34, 50–57 (Md. 2019); United States v. Dunn, 480 U.S. 294, 301 (1987) (skewing the statement of the Attenuation Doctrine to add a fourth step to the primary taint, Fruits, and attenuation sequential analysis); Commonwealth v. Fredericq, 121 N.E.3d 166, 175–81 (Mass. 2019); State v. Bray, 902 N.W.2d 98, 111–14 (Neb. 2017); State v. Socci, 98 A.3d 474, 479–81 (N.H. 2014); *In re* J.A., 186 A.3d 266, 273–74 (N.J. 2018); State v. Bailey, 338 P.3d 702, 708–15 (Org. 2014); *Ingram*, 331 S.W.3d at 760–63; State v. Jackson, 464 S.W.3d 724, 731–34 (Tex. Crim. App. 2015).

110. Brown v. Illinois, 422 U.S. 590, 604 (1975) (emphasizing the preponderance of the evidence standard rests on the prosecution to prove attenuation).

that burden of persuasion.[111] There were, however, state supreme courts which made no reference to that constitutionally mandated allocation of the burden of persuasion and allocated the burden to the defense.[112]

Second, and conversely, by not focusing first on an evaluation of the Fruits Doctrine, these state supreme courts consciously or unconsciously heighten the significance of the assessment of the state government's claim for excusing exclusion. This focus risks undervaluing the accused's claim concerning the quantity and quality of the unconstitutional government conduct that could have been found in the record on appeal as the basis for justifying the application of the Fruits Doctrine.[113]

The decision to skip focusing first on an interest analysis assessment of the Fruits Doctrine and instead focusing only on the Attenuation Doctrine could possibly prove outcome determinative, unless the attenuation assessment consistently included a quality evaluation of the interest of the accused reflected in the Fruits Doctrine. We turn in the next section to examine how the state supreme courts over the last two decades have sorted out these issues.

B. *State Supreme Courts' Assessment of Their Attenuation Decisions*

This initial evaluation of the relationship between the Fruits and Attenuation Doctrines, and what is at stake in getting the interest

111. *Jefferson*, 310 P.3d at 341; Commonwealth v. Gentile, 2 N.E.3d 873, 884–85 (Mass. 2014). *But see Ingram*, 331 S.W.3d at 760 (holding government satisfied its burden of persuasion); *see also supra* notes 72–73 and accompanying text a list of additional cases allocating the burden of persuasion to the government, with respect to one or more steps of the evaluation: primary taint, fruits, and attenuation, followed by a list of decisions erroneously allocating one or more of these burden of persuasion to the defense.

112. *Hummons*, 253 P.3d at 277; *Jackson*, 464 S.W.3d at 734.

113. *See Hummons*, 253 P.3d at 279 (detaining person without evidence to seek warrant inquiry is the unconstitutional GIT, yet if a warrant is found immediately thereafter, it attenuates the unconstitutional GIT, thus foreshadowing *Strieff*); *Brunetti*, 901 A.2d at 24–26 (disregarding the number of independent unconstitutional investigatory techniques law enforcement employed, and heavily relying on *Miranda* warnings to constitute the intervening circumstance that reduced the relationship between the unconstitutional arrest and the defendant's second confession to a level the court found acceptable to deny exclusion); *Spencer*, 848 A.2d at 1197–98 (concluding the record lacked sufficient evidence to support finding the officers had reasonable belief that conducting the illegal search was necessary, thus evidence obtained through the search was excluded as the fruit of prior officer illegality); *Ingram*, 331 S.W.3d at 762–63 (focusing on the lack of flagrancy in the officer's behavior in concluding that the evidence was not obtained by exploitation); *Jackson*, 464 S.W.3d at 734 (evaluating the interest implicated by the government's initial unconstitutional installation of the GPS undervalued the injury to the rights of the accused—who was barely speeding—by subordinating that injury to the immediate use thereafter of other constitutional technology to detect the same speeding offense).

reconciliation right, sets the stage for a more thorough evaluation of how the almost universally accepted current policy protocol for resolving these issues does the job. That protocol is most commonly articulated by the state supreme courts as the standard evaluation protocol for the Attenuation Doctrine.[114]

This protocol was born with the initial seminal SCOTUS Fruits case, altered by the Court, and recently reconfirmed in SCOTUS precedent, identifying a sequential three-factor Attenuation Doctrine analysis.[115]

First, the evaluation focuses upon determining the temporal proximity between the unconstitutional GIT(s) and the subsequent GIT that produced the evidence seized and sought to be employed by the government.[116]

Second, the evaluation turns to whether the record of the facts in the case includes what these courts are willing to characterize as "intervening conduct or events" taking place between the unconstitutional GIT(s) and the subsequent GIT that produced the evidence seized and sought to be employed by the government.[117] Third, the evaluation focuses on what chronologically should be the first (and this Article will advocate primary) factor evaluated—the flagrancy of the government's unconstitutional course of conduct.[118]

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114. *See infra* notes 118–149 and accompanying text.

115. Brown v. Illinois, 422 U.S. 590, 603–04 (1975); Utah v. Strieff, 136 S. Ct. 2056, 2061–62 (2016). *See supra* notes 26–59 and accompanying text.

116. *Strieff*, 136 S. Ct. at 2062.

117. *Id.*

118. *See id.* (evaluating unconstitutional conduct taken by the government); *see also Hummons*, 253 P.3d at 277–78 (performing the three evaluations, placing emphasis on the flagrancy evaluation); *Brunetti*, 901 A.2d at 23–24; *Spencer*, 848 A.2d at 1192–98; State v. Cohagan, 404 P.3d 659, 664–66 (Idaho 2017) (performing the three evaluations); State v. Sanders, 445 P.3d 1144, 1159 (Kan. 2019) (finding unconstitutional detention followed by a search, Attenuation Doctrine did not justify use to admit evidence found during search that was the sole basis for prosecution); State v. Tatro, 445 P.3d 173, 183 (Kan. 2019) (remanding to lower court for further evaluation of the "flagrancy" factor, as that term was more precisely defined in the opinion); State v. Jefferson, 310 P.3d 331, 341 (Kan. 2013) (finding the accused's incriminating statements were fruit of illegal seizure and retention of his car); Thornton v. State, 214 A.3d 34, 51–57 (Md. 2019); Commonwealth v. Fredericq, 121 N.E.3d 166, 178–81 (Mass. 2019); State v. Grayson, 336 S.W.3d 138, 147 (Mo. 2011); State v. Bray, 902 N.W.2d 98, 111 (Neb. 2017); *In re* Ashley W., 821 N.W.2d 706, 719, 721–22 (Neb. 2012); State v. Socci, 98 A.3d 474, 480 (N.H. 2014) (outlining attenuation factors to determine whether taint of illegal search is purged); *In re* J.A., 186 A.3d 266, 277–78 (N.J. 2018); State v. Chippero, 753 A.2d 701, 708–11 (N.J. 2000); State v. Davis, 360 P.3d 1161, 1173 (N.M. 2015); State v. Bailey, 338 P.3d 702, 713–15 (Or. 2014) (evaluating record of case against attenuation factors and finding circuit court erred by denying motion to suppress); *Ingram*, 331 S.W.3d at 761–62; *Jackson*, 464 S.W.3d at 730; State v. Eserjose, 259 P.3d 172, 179–82 (Wash. 2011) (adopting the Attenuation Doctrine for state constitutional

The Kansas Supreme Court, when considering whether a confession is the fruit of the preceding unconstitutional search or seizure, added or perhaps substituted Miranda warnings for a general inquiry about a significant intervening conduct or event.[119]

Scrutiny of the decisions applying this attenuation protocol prompts one of the crucial conclusions of this Article. Each component of the protocol, as well as the overall evaluation of their significance standing alone and relative to each other, and therefore, the resulting decisions employing the protocol, are fraught, in varying degrees, with the risk of inconsistent and subjective decision-making.[120]

This risk of an undesirable level of subjectivity in these decisions is increased by the fact that many of these state supreme courts have adopted the component of the Supreme Court's decision in *Brown*, which asserted there is no required per se comparative significance of any of these factors in a specific case; and furthermore, that other factors may be relevant in determining if attenuation should excuse exclusion by trumping the Fruits Doctrine.[121]

This risk is further increased by most of these courts taking the approach of sequentially evaluating each of the factors.[122] Hence the first factor evaluated by most of these courts is the temporal proximity of the unconstitutional GIT(s) and the GIT that produced the evidence at issue on appeal. The risk of subjectivity is demonstrated by the fact that some of these courts declare that temporal proximity is the least significant consideration in determining if attenuation should excuse exclusion.[123] This is despite the fact that the significance of temporal proximity can only be fairly assessed until the length of the influence of the unconstitutional course of government conduct on the record is first assessed. An assessment of the nature and severity of the unconstitutional GIT(s) that is identified by the judges as the primary taint, or sequence of unconstitutional

evaluation purposes, and noting the close conceptual relationship between fruits and attenuation analysis).

119. *Jefferson*, 310 P.3d at 339–41.

120. *See id.* at 341 (reassessing significance of an accused coming to police and making incriminating statements after an unconstitutional seizure of his property reassessed by the court, but still failing to give dual significance to the fact that the police lacked probable cause to search the vehicles in both cases); *Bray*, 902 N.W.2d at 111–14; *Jackson*, 464 S.W.3d at 732–33.

121. Brown v. Illinois, 422 U.S. 590, 603–04 (1975); *Thornton*, 214 A.3d at 51.

122. *Jefferson*, 310 P.3d at 340–41.

123. *Jackson*, 464 S.W.3d at 733.

primary taints, and subsequent fruits are necessary to accurately identify the duration of the temporal proximity.[124]

Further examination of how the state supreme courts, during the period of this study, defined and interpreted the significance of the three-factors of the Attenuation Doctrine follows.

There are two important outcome patterns in these state supreme courts' decisions which focus on the Attenuation Doctrine. In the first pattern, the interest analysis by the courts ends by justifying that the Fruits Doctrine is trumped by the Attenuation Doctrine; and therefore, exclusion is excused. This outcome pattern is one in which the Court's decision rests predominantly on finding a certain type of intervening factor and holding that the factor per se trumps temporal proximity and flagrancy of the unconstitutional conduct. State supreme courts have consistently found that the Fruits Doctrine does not require exclusion when the government proves that the intervening factor is a separate crime which infringes upon distinct government interest, and that the evidence at issue on appeal was seized as a result of that separate crime.[125]

These courts have held that such crimes include resisting an illegal arrest, forcibly resisting an unconstitutional intrusion into the accused's home, destroying evidence, and assault of a police officer.[126] It should be noted in support of the policy position taken in these cases that this outcome has the possibility of being employed in a race, gender, and class neutral manner, especially when the separate crime must be proven beyond reasonable doubt by the government.

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124. *See infra* notes 217–227 and accompanying text (reviewing how state supreme courts have ruled on whether evidence should be excluded when potential unconstitutional GITs are involved).

125. *See* People v. Tomaske, 440 P.3d 444, 448–49 (Colo. 2019) (concluding resisting arrest after illegal entry was an intervening crime not warranting evidence exclusion); State v. Brocuglio, 826 A.2d 145, 155 (Conn. 2003) (holding evidence of interfering with an officer after unlawful entry into home was admissible); State v. McGurk, 958 A.2d 1005, 1010–11 (N.H. 2008) (finding the ingestion of marijuana after illegal stop intervened to produce admissible evidence); State v. Panarello, 949 A.2d 732, 736–37 (N.H. 2008) (concluding pointing a gun at an officer after illegal entry was an intervention, which produced admissible evidence); State v. Nelson, 356 P.3d 1113, 1120 (Okla. Crim. App. 2015) (holding evidence of resisting arrest and obstruction of justice after illegal traffic stop intervened was admissible); *In re* Jeremiah W., 606 S.E.2d 766, 769 (S.C. 2004) (finding evidence of a threat to an officer after unlawful arrest was admissible); State v. McEachin, 213 A.3d 1094, 1102 (Vt. 2019) (concluding evidence of an assault on an officer after unlawful detention was rightfully not suppressed).

126. *Brocuglio*, 826 A.2d at 155; *McGurk*, 958 A.2d at 1010–11 (explaining the accused charged originally with interference with government operations ends up pleading to two counts of evidence tampering—destruction by consumption of seized contraband); *Panarello*, 949 A.2d at 736–37; *Nelson*, 356 P.3d at 1120; *In re* Jeremiah W., 606 S.E.2d at 769; *McEachin*, 213 A.3d at 1102.

Not all state supreme courts have taken this position. The Maryland Court of Appeals held that it will track the *Brown* tripartite protocol in this situation, and therefore, an intervening crime does not per se trump the other two considerations.[127] The Court held that the per se approach would eliminate careful assessment of the severity of the unconstitutional conduct of the government, thereby eliminating giving appropriate consideration to the significance of the flagrancy of government agents' unconstitutional conduct; the factor most closely associated with justifying exclusion, deterring police misconduct.[128]

The second and even more policy consequential pattern of outcomes is the one in which the interest of citizens and government are aligned as they were in the facts in the record of *Utah v. Strieff*.[129] The *Strieff* decision terminated Fourth Amendment rights for those the police choose to accost on the street without even reasonable suspicion, and thereafter unconstitutionally seize by demanding identification documentation.[130] SCOTUS held that this course of unconstitutional conduct can be excused and exclusion denied if, thereafter, the government gets lucky and the person has an arrest warrant which can be accessed while the person is unconstitutionally seized.[131]

When generalized, this position by SCOTUS and the minority of state supreme courts agreeing with that decision means that the Attenuation Doctrine can be employed by the federal or state governments, for whatever reason, to decide to search or seize the people or their effects, and thereafter engage in further unconstitutional investigative techniques based on the opportunities afforded by the GIT constituting the primary taint, so long as subsequent purely fortuitous events give the government ostensibly an interest before seizure of the person or evidence at issue.[132] Hence the

127. *See* Thornton v. State, 214 A.3d 34, 52 (Md. 2019) ("[W]hether the individual's act purges the taint of the Fourth Amendment violation must be analyzed on a case-by-case basis by balancing the factors set forth in *Brown*.")

128. *See id.* (holding purposely initiated and persistent course of police unconstitutional misconduct could not be excused by accused flight on foot).

129. Utah v. Strieff, 579 U.S. 232 (2016).

130. *Id.*

131. *Id.*

132. *See* State v. Hummons, 253 P.3d 275, 279 (Ariz. 2011) (holding an officer may politely approach a pedestrian and have a consensual conversation with a person, politely request their identification, and then unconstitutionally detain—seize them—while they run a wants and warrants check, provided this officer can prove that he doesn't make a habit of engaging in such conduct—even more egregiously the burden that the action may be unconstitutional is placed on the accused); People v. Henderson, 989 N.E.2d 192, 199–200 (Ill. 2013) (finding police stopped a car without reasonable

government, possibly for reasons of race, gender, or class, can stop a pedestrian or a vehicle for no pretextual reasons other than focusing on these impermissible characteristics, and proceed to possibly engage in a series of additional unconstitutional GIT's. People traveling in a vehicle, for example, can be stopped for no reason, and thereafter ordered out of their vehicle. If thereafter, a person engaged in a lawful act of running from the unconstitutional seizure upon leaving the vehicle, drops a gun or contraband, the taint is gone and the person can be prosecuted and convicted solely on the basis of possession of the gun, contraband, or other crime evidence.[133] For practical purposes, such decisions signal the end of the Fruits Doctrine as a shield against possible race and class-based policing in situations in which the government has no interests at stake when they began to engage in the unconstitutional course of conduct.

This skewing of the evaluation of the interest at stake in the *Strieff* fact pattern can be further distorted if, as a few state supreme courts have found, a government interest or less flagrant violation of constitutional rights on the basis that the government agent engaging in the unconstitutional conduct, subjectively believed he had authority to do so.[134] This conclusion was reached despite the fact it flies in the face of the well-established rule that the subjective good faith or bad faith belief that the law supports his actions is irrelevant to determining the constitutionality of that course of conduct.[135] The correct conceptual focus is on the issue of whether a

suspicion); State v. Tatro, 445 P.3d 173, 182–83 (Kan. 2019) (exemplifying when officer stopped a person on the street at 3:30 a.m. to evaluate whether the flagrancy of the officer's conduct, justified exclusion notwithstanding the intervening finding of an arrest warrant that prompted the arrest, which lead to the search of the person's effects, which led to the discovery of contraband drug trace).

133. *See Henderson*, 989 N.E. 2d at 204 (finding the record failed to demonstrate whether the court or the lawyers inquired whether the two police patrol car officers simply invented the 1:30 a.m. informant who for no apparent motive to walk to their car, reporting that a person with a gun sitting in a car somewhere in the vicinity, and a thorough assessment of the intentionality and flagrancy of the possible government conduct was never made).

134. *Tatro*, 445 P.3d at 181 (examining flagrancy based on officer's subjective state of mind and whether they acted in good faith). *Cf.* State v. Ingram, 331 S.W.3d 746, 762 (Tenn. 2011) (finding officers' mistaken beliefs of the constitutionality of their actions to weigh against suppression of evidence).

135. *See* Herring v. United States, 555 U.S. 135, 145 (2009) ("We have already held that 'our good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal' in light of 'all of the circumstances." (quoting United States v. Leon 468 U.S. 897, 922 n.23 (1984))); Casillas v. People, 427 P.3d 804, 810 (Colo. 2018).

reasonably well-trained officer was aware or should have been aware that his investigatory technique was constitutional.[136]

Most state supreme courts who addressed the *Strieff* fact pattern during the period of this study, however, including most of these courts who have decided this issue post-*Strieff*, have recognized this threat and crafted a rule that more appropriately accommodates the interest of the government and the accused under this reoccurring fact pattern.[137]

The Minnesota Supreme Court has recently reiterated that "a free society will not remain free if police may use . . . crime detection devices at random and without reason."[138] The Missouri Supreme Court has expressly recognized that reliance on an alleged unknown informant, even if filtered through a police dispatch operator, creates an opportunity for the investigating officers to fabricate the informant.[139] The Missouri Supreme Court also recognized that allowing the government to seize people or vehicles for no reason opens the door for further unconstitutional searches and seizures to follow, thereby infusing into the narrative this dimension of "flagrancy."[140]

The Hawaii Supreme Court's interest analysis effectively departed from *Strieff* at the outset of an encounter by eliminating the government's authority to "encounter" its citizen pedestrians for investigation, bereft of

136. *Herring*, 555 U.S. at 145; *Casillas*, 427 P.3d at 810.

137. *See* State v. Weldon, 445 P.3d 103, 115 (Haw. 2019) (finding that mere presence of potentially illegal items near the accused neither constitutes reasonable suspicion nor justifies an investigative stop); State v. Cohagan, 404 P.3d 659, 666 (Idaho 2017); State v. Sanders, 445 P.3d 1144, 1157 (Kan. 2019); State v. Moralez, 300 P.3d 1090, 1102 (Kan. 2013); State v. Leonard, 943 N.W.2d 149, 155–56 (Minn. 2020); State v. Grayson, 336 S.W.3d 138, 147–48 (Mo. 2011) (finding a current warrant after both an illegal stop and an illegal seizure of the person, while an intervening significant factor, on balance, had to be subordinated to the close temporal proximity of the unconstitutional GIT(s) and the flagrancy of the officer's unconstitutional course of conduct); State v. Chippero, 753 A.2d 701, 708–11 (N.J. 2000); State v. Bailey, 338 P.3d 702, 712–14 (Or. 2014) (holding the purpose of the unconstitutional detention of the accused was to run an arrest warrant check); State v. Topanotes, 76 P.3d 1159, 1164 (Utah 2003) (declaring government may not resort to an inevitable discovery theory based on claim that they would have run a wants and warrant check of the accused after illegally stopping her, even if they had not retained her identification—a driver's license while waiting the results of the warrant inquiry).

138. *Leonard*, 943 N.W.2d at 155 (quoting Commonwealth v. Johnston 530 A.2d 74, 79 (Pa. 1987)).

139. *Grayson*, 336 S.W.3d at 144.

140. *See id.* at 146–47 (finding an unconstitutional stop of a vehicle, followed by an unconstitutional seizure of the driver by detaining him while a wants and warrants could be run while his license was being held).

an evidential basis, including the unconstitutional reasons of race, religion, ethnicity, and gender.[141]

Most significantly, the Kansas Supreme Court held in 2019 that the *Strieff* ruling was inapplicable because the arrest warrant discovery occurred after not only the initial unconstitutional seizure, but after the officers had already searched and seized the evidence at issue on appeal.[142] This meant that the search incident to arrest could not be based on having located the warrant, and the assessment of its constitutionality without the warrant should have lead the court to expressly conclude that the search prior to discovering the warrant was an independent second violation of the accused's constitutional protection.[143]

Even under the *Strieff* facts, the Kansas Supreme Court found policy reasons for avoiding the outcome of that case.[144] The solution was to hold the arrest, on a valid outstanding arrest warrant, even if discovered only because of a totally unjustified seizure or search of the person, was constitutional, as is the attendant search incident to that arrest.[145] The court held, however, that there was a separable constitutional issue of whether a prosecution could be based not only on the warrant crime, but upon any evidence found pursuant to an arrest based on the warrant when the warrant and the arrest were solely the result of the initial suspicionless seizure.[146] The court held that in applying the Attenuation Doctrine's three-factor protocol, flagrancy of the unconstitutional conduct in combination with close temporal proximity could trump locating an arrest warrant in between the unconstitutional seizure of the person or search, and the seizure of the evidence at issue on appeal.[147]

The Idaho Supreme Court expressly distinguished *Strieff* by weighing more heavily the concern that the police course of conduct was a purposeful

141. *Weldon*, 445 P.3d at 115. *See supra* note 17–18, 34–35 and accompanying text.

142. *Sanders*, 445 P.3d at 1157.

143. *See id.* at 1157–58 (holding a search after discovering an arrest warrant was also another unconstitutional GIT because it exceeded the scope authorized by a search incident to an arrest); *see also id.* (explaining why multiple independent unconstitutional searches or seizures should be an express component of the definition of "flagrant").

144. *Id.*

145. *Id.* at 1157.

146. *Id.*

147. *Id.* at 1158; *see also* State v. Bailey, 338 P.3d 702, 715 (Org. 2014) ("[T]he temporal proximity between the unlawful detention and the discovery of the challenged evidence, outweighs any value the otherwise might be assigned to the subsequent discovery of a valid arrest warrant."); State v. Cohagan, 404 P.3d 659, 668 (Idaho 2017).

circumvention of the law at a point in time when the officer was aware there was no reason to even request that the accused turn over his identification so the officer could run an arrest warrant inquiry.[148]

Thoroughly "vetting" all dimensions of police "flagrant" unconstitutional course of conduct, as this Article recommends, should serve as the crucial inquiry to fairly reconcile the interest implicated by the Fruits and the Attenuation Doctrines.[149]

B. *Attenuation—State Supreme Courts' Decisions: Outcomes and Implications*

Nine state supreme courts, in ten decisions, ultimately concluded that the Fruits Doctrine should prevail because the Attenuation Doctrine did not justify excusing exclusion.[150]

Fourteen state supreme courts, in seventeen decisions, ultimately concluded that the Attenuation Doctrine justified excusing exclusion.[151]

It is important to note, that seven of these courts sided with application of the Attenuation Doctrine in the arguably appropriate context that the intervening act was the commission by the accused of a separate and distinct

148. *Cohagan*, 404 P.3d at 666.

149. *See infra* notes 192–210 and accompanying text (detailing this Article's review of state supreme court decisions surrounding the Fruits Doctrine and Attenuation Doctrine).

150. State v. Spencer, 848 A.2d 1183, 1198 (Conn. 2004); *Cohagan*, 404 P.3d at 664–66; *Sanders*, 445 P.3d at 1159; State v. Jefferson, 310 P.3d 331, 341 (Kan. 2013); Thornton v. State, 214 A.3d 34, 57 (Md. 2019); Commonwealth v. Fredericq, 121 N.E.3d 166, 178–79 (Mass. 2019); State v. Socci, 98 A.3d 474, 482–83 (N.H. 2014) finding in the record multiple indices of potential "Flagrant" misconduct in seeking consent including threats to: arrest, remove children, and damage property, and elicitation of consent by express reference to what was observed during course of an unconstitutional search); State v. Chippero, 753 A.2d 701, 708–11 (N.J. 2000); State v. Davis, 360 P.3d 1161, 1173 (N.M. 2015) (discussing elicitation of consent by express reference to what was observed during course of an unconstitutional search); *Bailey*, 338 P.3d at 714 (stating the purpose of the unconstitutional detention of the accused was to run an arrest warrant check).

151. State v. Hummons, 253 P.3d 275, 279 (Ariz. 2011); People v. Tomaske, 440 P.3d 444, 448–49 (Colo. 2019); State v. Brunetti, 901 A.2d 1, 23–24 (Conn. 2006); State v. Brocuglio, 826 A.2d 145, 155 (Conn. 2003); State v. Lane, 726 N.W. 371, 391–92 (Iowa 2007) (finding third party consent qualified as an intervening event that justified application of the Attenuation Doctrine); People v. Henderson, 989 N.E.2d 192, 201, 205 (Ill. 2013); King v. State, 76 A.3d 1035, 1044 (Md. 2013); State v. Bray, 902 N.W.2d 98, 111–14 (Neb. 2017); *In re* Ashley W., 821 N.W.2d 706, 720 (Neb. 2012); State v. McGurk, 958 A.2d 1005, 1010–11 (N.H. 2008); State v. Panarello, 949 A.2d 732, 736–37 (N.H. 2008); *In re* J.A., 186 A.3d 266, 277–78 (N.J. 2018); State v. Nelson, 356 P.3d 1113, 1120 (Okla. Crim. App. 2015) (finding resisting arrest and obstruction of justice was an independent action); *In re* Jeremiah W. 606 S.E.2d 766, 769 (S.C. 2004); State v. Ingram, 331 S.W.3d 746, 762–63 (Tenn. 2011); State v. Jackson, 464 S.W.3d 724, 734 (Tex. Crim. App. 2015); State v. McEachin, 213 A.3d 1094, 1102 (Vt. 2019).

crime, but two of these seven courts also held that the Attenuation Doctrine excused exclusion outside of this context.[152]

The Maryland and New Jersey Supreme Courts made decisions landing on both sides of the Fruits and Attenuation Doctrines interests analyses evaluations.[153] The New Jersey Supreme Court, in its case which held attenuation justified excusing exclusion, gave almost no significance to a series of unconstitutional actions by the police, each succeeding unconstitutional government investigative technique building on the prior.[154] Hence, an admittedly unconstitutional entry into the family home of the accused juvenile was followed by an unconstitutional search of the interior of the home by the police, which was followed by the unconstitutional warrantless seizure and arrest of the accused, followed by the unconstitutional handcuffing and movement of the accused to another part of the home where he was visibly in custody as the other members of the family returned home.[155]

Nevertheless, the majority of the Court reached the conclusion that the accused's brother's decision to search for the stolen item in the company of the police constituted consent, and as such, an independent intervening event purging the taint of this series of unconstitutional GITs.[156]

V. FINDINGS & CONCLUSIONS—IMPLICATIONS AND RECOMMENDATIONS

A. *Findings & Conclusions*

1. An Interest at Stake Assessment

Over the course of about a half century, SCOTUS has developed its standards for assessing the interest implicated by the Fruits and Attenuation Doctrines, and its work has significantly influenced how the state supreme courts have addressed these doctrines.[157] SCOTUS' work can fairly be

152. *See supra* notes 125–126 and accompanying text.

153. *See Chippero*, 753 A.2d at 708–13 (applying the three-factor attenuation analysis, the court concluded exclusion was justified); *King*, 76 A.3d at 1044 (following SCOTUS assessment that attenuation trumped Fruits Doctrine); *In re* J.A., 186 A.3d 266, 277–78 (N.J. 2018) (finding attenuation trumps fruits based on third party consent analysis); *Thornton*, 214 A.3d at 57 (holding Fruits Doctrine requires exclusion and inadequate proof of attenuation to displace Fruits Doctrine).

154. *In re J.A.*, 186 A.3d at 277–78.

155. *Id.* at 269.

156. *Id.* at 278.

157. *See supra* notes 16–59 and accompanying text.

characterized as laying the foundation of infrastructure for evaluating each doctrine and their relationship to each other.[158] Opportunities, however, were missed, first to employ—even when members of the Court convincingly argued that it should—these doctrines, and the interest implicated therein, as the basis of decision.[159]

Second, lost was the opportunity to center the development of the standards defining these doctrines and their purpose on a consistent interest analysis, rather than colorful but potentially subjective phrases, unlikely to direct lawyers or judges to consistently focus on the interest in play.[160] Hence the rights of the people were assessed without reference to the significance that these doctrines were developed frequently in factual narratives in which government agents violated the constitutional rights of minority men.[161] Nor has SCOTUS' work on these doctrines given appropriate and consistent recognition to the lack of any significant government interest at play at the time when its agents initiated and perpetuated a course of conduct that enmeshed these men in the criminal justice system due to the violation of their national constitutional rights, and thereby the rights of all Americans.[162] The Court condemned such conduct in several cases, but did so without relying on the conclusion warranted by the facts in the record—that the government had no real interest at stake when it violated the Fourth, Fifth, or Sixth Amendment rights of its citizens.[163]

Nor was its condemnation of the government's unconstitutional conduct strong, clear, and consistent; although during the period of this study it did identify the threat of systemic intentional governmental unconstitutional conduct as one of its reasons for finding exclusion was the appropriate remedy.[164] In its most recent important decision assessing the interest implicated by these doctrines, the Court endorsed major indices of a police state, and this time a majority man's constitutional rights were injured.[165]

158. *See supra* notes 16–59 and accompanying text.
159. *See supra* notes 48–57 and accompanying text.
160. *See supra* notes 26, 42–59 and accompanying text.
161. *See supra* notes 18, 29, 34–35 and accompanying text.
162. *See supra* notes 42–47, 129–149 and accompanying text.
163. *See supra* note 134 and accompanying text.
164. *See supra* notes 55–56 and accompanying text.
165. *See supra* notes 42–47, 129–131 and accompanying text.

2. Allocation of the Burden of Proof

This Article identified as an important preliminary procedural issue, the allocation of burdens of proof with respect to an accused qualifying for the right claimed, and thereafter, if the person qualifies, the determination of whether that right was violated.[166] This Article found that the Court has allocated to the accused the burden of proving they qualified for the right, and thereafter allocating the burden of persuasion to the prosecution to prove that its course of conduct did not violate the accused's right.[167]

Allocation of the burdens of proof was not an issue consistently and expressly addressed in the important Fruits and Attenuation Doctrines decisions of the Court. When this issue was evaluated, the Court appears to get right the policy and interest analysis implications of allocating the burdens of production and persuasion on these doctrines: by allocating the burden of persuasion to the government to prove that the unconstitutional government investigatory technique was not the probable cause of the government's securing the evidence at issue, and if it was, why the facts and the government's interest they implicate nevertheless justify excusing exclusion.[168] To the degree the SCOTUS decisions constitutionally require the allocation of the burden of persuasion to the government, the state supreme courts are bound to also allocate the burden of persuasion to the government with respect to these doctrines. This Article found that a majority of the state supreme courts expressly evaluating the issue of allocating the burden of proof with respect to these doctrines during the period of the study did allocate the burden of persuasion to the government.[169]

However, this Article found that a few state supreme courts, including Maryland's high court, which in previous decisions allocated the burden of persuasion to the government, unconstitutionally switched the burden of persuasion to the accused with respect to one or more of these burden of persuasion issues.[170] There was a finding that poor policy choices, including failing to give sufficient attention to the interest implications of forcing the accused to prove that the Fruits Doctrine applied or the

166. *See supra* notes 65–66 and accompanying text.
167. *See supra* notes 66–68 and accompanying text.
168. *See supra* notes 69–71 and accompanying text.
169. *See supra* note 72 and accompanying text.
170. *See supra* note 73 and accompanying text.

Attenuation Doctrine did not, accounted to some degree for this minority viewpoint.[171]

3. The Fruits Doctrine

The first important finding from this study of the state supreme courts' analysis and application of the Fruits Doctrine (2000–2020) is the term "primary taint" should be and can be more precisely defined. A more precise definition would better structure the interest analysis to properly account for what is at stake in determining whether requiring exclusion is justified. To achieve this improved conceptual approach to the interest analysis, the definition of "primary taint" should begin by identifying the initial unconstitutional GIT.[172] Once identified, the initial taint should be tracked to determine if thereafter, there were additional unconstitutional GIT(s) that were independent of the initial taint (i.e., involving a recognized distinct GIT that was not inevitably the result of the initial taint).[173] The unconstitutional course of conduct present in the facts of *Wong Sun* and *Brown* provide good examples of such subsequent independent unconstitutional GITs.[174] As those cases and some state supreme courts held, "but for causation" is not enough to justify the application of the Fruits Doctrine.[175] The reciprocal and balancing approach of the interest principle identified and discussed herein is that but for causation between the initial unconstitutional GIT and subsequent unconstitutional GITs is not enough to disqualify those subsequent GITs from constituting additional components of the primary taint.

The most important finding of this study of the state supreme courts' interest analysis of the Fruits Doctrines, with respect to the most important hypothesis of this study concerning that doctrine, was that a substantial majority of the state supreme courts (twenty of twenty-seven), when focused on evaluating the merits of applying the Fruits Doctrine, were led by that analysis to conclude that the doctrine required exclusion.[176] This study also found that state supreme courts, which base their Fruits and Attenuation evaluations on their state constitution rather than the national Constitution as interpreted by SCOTUS, are more likely to conclude that the Fruits

171. *See supra* notes 74–81 and accompanying text.
172. *See supra* notes 17–24 and accompanying text.
173. *See supra* notes 82–83 and accompanying text.
174. *See supra* notes 16–21, 34, 35 and accompanying text.
175. *See supra* notes 26–28, 37 and accompanying text.
176. *See supra* text at the beginning of Part 3, note 104 and accompanying text.

Doctrine applies and requires exclusion.[177] This result is even more likely when a state supreme court decides to broaden the scope of the right at issue or broaden the policy justification for exclusion beyond achieving the goal of deterrence of government misconduct.[178]

Most significantly, this study found evidence that state supreme courts are even more likely to require exclusion if the court expressly takes the stance that an issue implicating constitutional protections guaranteed under the state's constitution are possibly more protective of criminal defendants than the protections provided by the Fourth, Fifth, and Sixth Amendments of the national Constitution, and should be considered first, if applicable, thereby eliminating the need to assess the application of the parallel national Constitution's provision.[179] These findings support the conclusion that confirms a major hypothesis of this Article. The state supreme courts over the last two decades have demonstrated an ability to conduct principled interest analysis of the Fruits Doctrine, and they have frequently departed from the more limited protection afforded by SCOTUS' assessment of the interest at stake.[180]

The implication of this stance by these courts is significant for the future of striking the appropriate federalism balance between state supreme courts and SCOTUS on these issues. No matter the composition of SCOTUS, and the resulting interest analysis conducted by the Court, the state supreme courts are authorized by our federal dual constitutional system to conduct their own identification and evaluation of the interest implicated by the Fruits and Attenuation Doctrines.

4. The Attenuation Doctrine

This study's second major hypothesis was that state supreme courts will make policy assessments which will favor finding that the Attenuation Doctrine does not trump the Fruits Doctrine, and therefore, exclusion is still justified. The study found that when these courts focused on the Attenuation Doctrine, even if they referenced the Fruits Doctrine, often omitted assessment of the Fruits Doctrine before moving directly to determining if the Attenuation Doctrine justifies excusing exclusion.[181] These decisions reflected an analytic protocol that once attenuation is raised

177. *See supra* notes 96–106 and accompanying text.
178. *See supra* notes 97–98 and accompanying text.
179. *See supra* notes 99–100 and accompanying text.
180. *See supra* notes 97–100, 105–08 and accompanying text.
181. *See supra* notes 109–113 and accompanying text.

by the prosecution, the Fruits evaluation merges with the Attenuation evaluation.[182]

This merger provides a great opportunity for reform of the evaluation and reconciliation of the interest implicated by these doctrines, an implication leading to a key recommendation discussed in Section Two of this final part.[183]

This study found that the conceptual decision to merge the evaluation of the Fruits and Attenuation Doctrines cuts both ways with respect to careful assessment of the interest at stake when deciding whether attenuation should be found, and therefore, exclusion excused.[184] The most important finding was that by the omission of focusing first on an evaluation of the Fruits Doctrine, these state supreme courts consciously or unconsciously heightened the significance of the assessment of the government's claim for excusing exclusion, and that this focus risked undervaluing the accused's claim concerning the quantity and quality of the unconstitutional government conduct that could be found in the record on appeal which could have served as the basis for a state supreme court concluding that the Fruits Doctrine should prevail over the government's attenuation claim.[185]

This study concluded that the decision to skip an evaluation focusing first on a Fruits Doctrine assessment and instead focusing on the Attenuation Doctrine, could possibly prove outcome determinative, unless the attenuation assessment consistently included a quality evaluation of the interest of the accused reflected in the Fruits Doctrine.[186]

This study found that there is a consensus among the state supreme courts, tracking the approach first adopted by SCOTUS, of what the components are for evaluating an Attenuation Doctrine claim by the government, and that those components, given their amorphous nature and their sequencing, risk inconsistent and subjective decision-making.[187] This risk was framed by the differences in the interest analysis undertaken by these courts in determining whether the Attenuation Doctrine should excuse exclusion.[188] This study found that at least seven state supreme courts who focused their interest evaluation on the intervening conduct

182. *See supra* note 109 and accompanying text.
183. *See infra* notes 206–227 and accompanying text.
184. *See supra* notes 110–13 and accompanying text.
185. *See supra* note 113 and accompanying text.
186. *See supra* note 113 and accompanying and immediately following text.
187. *See supra* notes 120–24 and accompanying text.
188. *See supra* notes 125–149 and accompanying text.

component of the Attenuation Doctrine held that when the record on appeal included evidence that the accused had committed a separate crime in reaction to the government's unconstitutional conduct that the crime was per se intervening conduct that justified excusing exclusion.[189] This study found, however, that the Maryland Court of Appeals in 2019, rejected the per se approach, and held that the separate crime finding did not justify failing to evaluate the interest protected by determining the flagrancy of the government's course of unconstitutional conduct, or the relationship between that unconstitutional conduct, the time interval between it, and the occurrence of the separate crime.[190] This decision is more consistent with the Attenuation Doctrine's analytic protocol which calls presumptively for at least an assessment of all three interest implicating factors. But even more importantly, the difference in outcomes in this reoccurring fact pattern illustrates how the protocol, as crafted and employed by the nation's highest courts, inherently risk subjectivity in decision-making.

The second pattern of decisions is the state supreme courts' reaction to the facts found in the record in the decision of SCOTUS in the *Strieff* case.[191] This study found that most state supreme courts considering this fact pattern, which involves the government engaging in at least one unconstitutional GIT, despite the fact that at the time the government possessed no facts which gave it an interest, held in contrast to the SCOTUS holding in *Strieff*, that exclusion was required.[192] Notably, this study found that the handful of state supreme courts assessing based on their state constitution, the appropriate reconciliation of the interest at stake in the *Strieff* facts after that decision, have rejected the SCOTUS evaluation and decision and held that the post hoc discovery of a warrant provided a government interest that could be accommodated in a much fairer fashion.[193]

This study found that the Hawaii, Idaho, and Kansas Supreme Courts, post-*Strieff*, took on the interest analysis and outcome of that case head on, and rejected its interest evaluation and reconciliation for multiple and distinct reasons.[194] The Hawaii Supreme Court focused on the lack of the government's interest at the outset of an "encounter" between government

189. *See supra* notes 125–26 and accompanying text.
190. *See supra* notes 127–28 and accompanying text.
191. *See supra* notes 129–149 and accompanying text.
192. *See supra* notes 137–149 and accompanying text.
193. *See supra* notes 138–149 and accompanying text.
194. *See supra* notes 141–49 and accompanying text.

agents and citizens, and essentially held that the government lacked a real interest in seeking to investigate people for no reason other than the subjective suspicion of the officer which may be motivated by multiple issues the agent may have, including racial, ethnic, and gender prejudice.[195] The Idaho Supreme Court's holding focused on the unjustified, unconstitutional course of conduct by the government and found it flagrant.[196] The Kansas Supreme Court was more thorough in its interest evaluation and reconciliation, and rejected *Strieff* at multiple levels and for multiple reasons, producing a significantly fairer interest accommodation.[197]

This study found that overall, during the twenty year period of this study, fourteen of the twenty-three state supreme courts identified herein, when focusing their evaluations on the Attenuation Doctrine, held that the Doctrine trumped the Fruits Doctrine and justified excusing exclusion.[198] This outcome's alignment is modestly contrary to this Article's second major hypothesis, that state supreme courts would protect the interest of the people reflected in the claims of the accused, which reached these state supreme courts, by holding that the government's attenuation claim did not justify excusing exclusion.[199]

The outcome alignment, however, does not tell the whole story. First, because the outcome alignment is consistent with the conceptual approach, most of these courts took to analyzing the interest implicated by the Fruits and Attenuation Doctrines by merging those evaluations and featuring the Attenuation Doctrine.[200] Second, most of this difference in the alignment of state court decisions, focusing upon the Attenuation Doctrine, can be attributed to an outlier interest analysis fact pattern: the finding of the commission of an independent crime by the accused, which served as the intervening factor that justifies excusing exclusion.[201] Two state supreme courts made decisions on both sides of the ledger.[202]

This study found that federalism policies play, and should play, a significant role in accounting for the outcome differential in these cases,

195. *See supra* note 141 and accompanying text.
196. *See supra* note 148 and accompanying text.
197. *See supra* notes 142–47 and accompanying text.
198. *See supra* notes 150–52 and accompanying text.
199. *See supra* note 109 and accompanying text.
200. *See supra* notes 110–13 and accompanying text.
201. *See supra* notes 125–28 and accompanying text.
202. *See supra* notes 153–55 and accompanying text.

especially once the interest assessment of the two doctrines is merged. Policies that include (a) the willingness of a state supreme court, at a particular point in time, to rely on its state constitution; (b) the breadth of the policies the court envisions are implicated by its constitution; (c) the degree to which the state supreme court is willing to view its constitution as an independent basis for deciding the case; and (d) the order in which a state supreme court is willing to consider its state versus the national Constitution as the basis for its decision.[203]

This split in the outcomes in the state supreme courts, in evaluating and applying the Attenuation Doctrine, is circumstantial evidence of the difficult task these courts face when employing the current widely accepted attenuation tripartite protocol—to identify, assess, and reconcile the interest implicated by the Attenuation Doctrine—when the Attenuation Doctrine surrogates for both it and the Fruits Doctrine.[204]

This study documented the risk that subjective and possibly socially and legally impermissible considerations, such as race and class, could have played a role based on the facts in the record before the court on appeal.[205] Section 2 of the final part of this Article focuses upon a recommendation and its implications for leveling the interest analysis playing field when state supreme courts take on the challenge of reconciling the competing interest underlying the Fruits and Attenuation Doctrines.

B. *Implications and Recommendations*

In the long run, state supreme courts' principled constitutional decision-making would be better served first if no state adopted (and the states that have adopted abandon) the "interstitial approach" to determining the core federalism issue of whether to apply the state or the federal Constitution first.[206]

Assessing the state constitution first furthers the development of in-depth and principled interest analysis as the basis for determining whether the Fruits Doctrine justifies exclusion, or the Attenuation Doctrine excuses it. Applying the state constitution first achieves these valued constitutional federalism goals because the decisions collectively can inform and enhance the evaluation each subsequent state supreme court is capable of making.

203. *See supra* notes 96–100, and 137–148 and accompanying text.
204. *See supra* notes 45, 120, 160, and 186 and accompanying text.
205. *See supra* notes 18, 89, 127, 133–34, 141 and accompanying text.
206. *See supra* note 99 and accompanying text.

This Article's recommendation regarding "flagrancy" demonstrates how a much more robust development of principled state constitutional evaluations of the Fruits and Attenuation Doctrines' interest implication can be accomplished, and the potential benefits it could produce for the country.

The state supreme courts would be better served if the Fruits and Attenuation Doctrines evaluation protocol were merged, and focused first, and presumptively primarily, on only one factual inquiry; whether the record on appeal evidenced that the government engaged in flagrant unconstitutional conduct. If the record demonstrates it did, maximum deterrence is required, and evidence of temporal proximity and intervening events or conduct should be subordinated to achieving that much-needed deterrence, so long as that flagrant course of government misconduct was a "probable cause" of the government's securing the evidence at issue. "Probable cause" is a term of art whose definition has been developed over a lengthy course of time to determine if the government was justified in engaging in certain GIT that would otherwise violate search and seizure protections.[207] If that definition of probable cause is borrowed to determine the degree to which the government's flagrant unconstitutional course of conduct was the cause of the government securing the evidence at issue, it could well produce a fair interest balancing; every time probable cause was found to justify the government's conduct in the search and seizure context, it would serve to define a sufficient causal connection between the flagrant government conduct and the seizure of the evidence at issue on appeal. This conceptual reciprocity would also heighten the likelihood of objective decision-making because of this reciprocal relationship and the scores of precedent that can be employed to help with the definition.

SCOTUS, most state supreme courts, and commentators agree the flagrancy of the government's unconstitutional course of conduct should be the most significant factor in determining the need to deter police

207. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE (11th ed. 2018), 132−149 (tracking SCOTUS decisions defining probable cause, as well as the interpretation of state and federal courts of the definition of probable cause; authors conclude that the standard developed in the decisions is properly characterized as a "fair probability"); Dannye Holley, *The Decline of the Right to Privacy and Security:* Gates *and the States—The First Three Years*, 21 CREIGHTON L. REV. 823, 857–58 (1988) (criticizing the definition of probable cause in the SCOTUS *Gates* decision, and identifying the interest at stake, which should guide defining probable cause to reflect a reasonable accommodation of those interest).

misconduct by excluding the evidence at issue.[208] Even state supreme courts, in finding attenuation to excuse exclusion, have endorsed the primacy of the flagrancy of government misconduct in determining if the contested evidence should be excluded.[209]

When the government's course of conduct does not involve flagrantly unconstitutional conduct, which is a probable cause of the seizure of the evidence at issue, two alternative interest analysis courses of evaluation are worthy of consideration. The first is to employ a per se or presumptive policy that exclusion is not justified. This option has the value of reducing the risk of race and other irrelevant factors playing at least an unconscious role in law enforcement agents, prosecutors, and lower courts' decision-making. These influences are not readily detected at the state supreme court level. This option is also likely to reduce the risk of inconsistent decision-making and enhance the likelihood of objective, neutral decision-making, provided of course that the flagrancy evaluation was robust and principled—centered on the multiple objective facets of that concept, including those identified herein.

The second policy option to consider if the course of government agent conduct involves unconstitutional, but not flagrantly unconstitutional conduct, is to thereafter require evaluation to determine the temporal proximity between the unconstitutional GIT and the securing of the evidence at issue. The evaluation would also consider whether there were intervening events and conduct of the accused and the government pertinent to determining if the unconstitutional, but not flagrant, government course of conduct was a probable cause of the government's obtaining the evidence at issue on appeal. This second option is more complex, and therefore, risks the likelihood of more inconsistent and subjective decision-making. On the other hand, this second option increases the probability of a higher quality interest identification, assessment, and reconciliation that lower courts, prosecutors, and defense lawyers from the jurisdiction can track, and in which sister state supreme courts may consider. For example, when there is no significant time interval between the unconstitutional GIT and the securing of the evidence in question, but the accused commits an independent crime after that GIT, the

208. *See supra* notes 56, 128, 147–48 and accompanying text.

209. Cox v. State, 28 A.3d 687, 701–02 (Md. 2011); State v. Ingram, 331 S.W.3d 746, 762 (Tenn. 2011); State v. Jackson, 464 S.W.3d 724, 733 (Tex. Crim. App. 2015) (finding, once the court decides there is a significant intervening factor, the temporal proximity factor's significance decreases, and the flagrancy of the officer's unconstitutional GIT increases).

decision to excuse exclusion is only presumptively justified; those studying the opinion can track the more nuanced assessment the Maryland Court of Appeals employed and this Article documented.

For this revised interest analysis-based conceptual protocol to work, there must be a robust definition of flagrant, which has a strong potential for objective and consistent race, gender, and caste neutral state supreme court application.

Several of the SCOTUS decisions evaluated in Part One included a course of government conduct that includes unconstitutional actions that illustrate and can be employed to help build a robust and principled definition of flagrant.[210] A flagrant unconstitutional GIT is one, which when undertaken, the government had no interest in pursuing because there were no facts present at the time that justified the government violating rights protected by the Fourth, Fifth, or Sixth Amendments of the national Constitution or its state constitution equivalents.[211] An important aspect of this assessment, needed to focus the evaluation on objectively determinable facts, is that the government agent's subjective beliefs about the constitutionality of his conduct should play no role.

The facts of *Wong Sun*, *Brown*, and the *Strieff* cases all presented such an unjustified government course of conduct, but only the *Strieff* majority turned a blind eye and deaf ear to the magnitude of the government's misconduct.[212] The government accosted a majority man on the street, bereft of any objective evidence but ripe with subjective suspicion.[213] The pedestrian was accosted; an unconstitutional demand made that the person talk to the government agent; an unconstitutional demand thereafter made that the citizen turn over his identification; an unconstitutional seizure made of the citizen, ordering him to wait while the identification is used to determine if the citizen had an arrest warrant.[214] No government interest justified this sequential course of unconstitutional conduct, until after the fact the government got lucky, and an arrest warrant of any ilk was found to exist.[215]

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210. *See supra* text proceeding and accompanying notes 26–29; *see also supra* notes 33–35, 40–41, 45–46, 55–56.

211. *See supra* notes 19–21, 33–35, 42–45 and accompanying text.

212. *See supra* notes 42–46 and accompanying text.

213. *See supra* note 44 and accompanying text.

214. *See supra* note 45 and accompanying text.

215. *See supra* note 45 and accompanying text.

During the period of this study, 2000–2020, state courts of last resort were more likely than SCOTUS to apply the Fruits Doctrine or refuse to find that attenuation justified excusing exclusion when the record demonstrated that the government violated an accused's constitutional rights, and that violation commenced at a point in time when the government had no evidence to justify its interest in engaging in the unconstitutional GIT.[216] These state courts of last resort were even more likely to apply the Fruits Doctrine or refuse to find that attenuation justified excusing exclusion when the record on appeal included indisputable evidence of another dimension of flagrant unconstitutional conduct; multiple, distinct suspicionless and sequential suspicionless GITs.[217] There are state supreme court decisions discussed in this study where the record reflected multiple and sequential unconstitutional GITs whether or not the court acknowledged, or the defense expressly argued, the significance of such government conduct.[218]

The fact that these unconstitutional GITs were done without any justification requires exclusion of the evidence at issue on appeal, and the government is held per se to know of the absence of any viable evidence; culpability becomes an added dimension, and never an excuse, of this component of a robust definition of flagrant.[219] A related component of a principled and robust definition of flagrant was identified in cases discussed in this study; the court based its decision, at least in part, on holding the government agents, who engaged in the unconstitutional conduct, to know the current law, including *Miranda* requirements, and the state supreme courts' interpretations of the definition of the crime relied upon by the government to engage in the investigatory technique(s) at issue on appeal.[220] This element of flagrant is likely to encourage government law

216. *See supra* notes 83, 87–89, 137–148 and accompanying text.

217. *See supra* notes 143, 173–75 and accompanying text.

218. State v. Bray, 902 N.W.2d 98, 111–14 (Neb. 2017); *In re* Ashley W., 821 N.W.2d 706, 712 (Neb. 2012) (discussing an illegal stop, followed by an illegal frisk); State v. Blesdell-Moore, 91 A.3d 619, 622 (N.H. 2014) (finding, after unconstitutionally failing to terminate a vehicle stop, an officer next unconstitutionally executed a consent frisk of the driver by retrieving wads of money that he knew weren't weapons); State v. Grayson, 336 S.W.3d 138, 146 (Mo. 2011) (finding an unconstitutional stop of a vehicle, followed by an unconstitutional seizure of the driver by detaining him while a wants and warrants check could be run while his license was being held).

219. *See supra* notes 42, 136, and 148 and accompanying text.

220. State v. O'Neill, 936 A.2d 438, 454–58 (N.J. 2007) (stating all police must know *Miranda* and its requirements); State v. Tenold, 937 N.W.2d 6, 11 (S.D. 2019) (discussing interpretations by the state supreme court).

enforcement agencies to increase the quality of training law enforcement agents receive, as well as fortifying training regimes and resources, all of which can serve as objective sources for evaluating the presence of this component of flagrant.[221]

A state supreme court fleshed out the ignorance of the law "culpability" level of government agents that meets the threshold for finding the police conduct flagrant under this component of the definition of that term. The Kansas Supreme Court has recently held that the record on appeal demonstrated the government agents involved in the unconstitutional conduct were at least grossly negligent in believing their conduct was constitutional, or that their conduct reflected "recurring or systemic negligence" by the police department's members.[222] The decision suggested, and other decisions discussed in this Article identified, systemic government unconstitutional conduct fairly characterized as sanctioned or tolerated by the governmental agency. Such conduct poses the threat that the government could, and likely planned, to resort to this same unconstitutional GIT(s) repeatedly, as a fourth facet of a principled definition of flagrant.[223]

State supreme courts, to deter the replication of such a course of lawless government conduct, should exclude effects seized and statements made following such course of institutional, systemic unconstitutional conduct, while giving little or no weight to an evaluation of the temporal time interval, or whether there were intervening events and conduct. If exclusion is the punishment, it would provide maximum, justified deterrence and a great incentive for the government to cease this course of conduct.[224] Governments are in the best position to take preventative action to mitigate or eliminate systemic, unconstitutional conduct.

The government's unjustified invasion of a person's constitutional rights also implicates a fifth dimension of flagrant unconstitutional government investigatory techniques; although rarely recognized by advocates or courts, the fear and humiliation inflicted upon the innocent, as well as those subsequently prosecuted, risks emotional distress by subjecting the people

221. *See supra* note 55 and accompanying text.

222. State v. Tatro, 445 P.3d 173, 178 (Kan. 2019) (quoting Herring v. United States, 555 U.S. 135, 144 (2009)).

223. *See supra* notes 40–41, 55 and accompanying text; and *infra* notes 227–29 and accompanying text.

224. *See supra* notes 55 and accompanying text; and *infra* notes 227–29 and accompanying text.

to invasion of their constitutional rights without justification.[225] Encouraging lawyers on both sides and the lower courts to pay attention to facts documenting such emotional distress, will likely raise awareness and encourage preventative action that reduces such conduct, thereby eliminating fears that race, gender, ethnicity, and other irrelevant characteristics are the reason the government agents embarked on this lawless course of conduct.

Several of the SCOTUS decisions evaluated in Part One included a course of government conduct including multiple unconstitutional actions that targeted minority males, and therefore, illustrated and can be employed to build a robust and principled definition of flagrant.[226]

Excluding evidence seized as a result of flagrantly unconstitutional government conduct, will provide significant incentive for the government to redouble efforts to deter such conduct by its agents and have the likely societally significant collateral benefit of reducing the risk of violence against government agents, as well as the persons whose rights were violated. For example, multiple components of this multi-faceted definition of flagrant are implicated when the police go to a home of a third party with an arrest warrant, but fail to secure a constitutionally required search warrant as well, proceed to search the home ostensibly for the arrestee, and then repeat that same unconstitutional GIT approximately a month later.[227]

C. *Postscript—Implications for the Independent Source and Inevitable Discovery Doctrines*

There are two other doctrines courts have developed to justify excusing exclusion as an exception to the application of the Fruits Doctrine: the "Independent Source" and "Inevitable Discovery" Doctrines. State supreme courts, during the study period of this Article, 2000–2020, in the context of determining if the Fruits Doctrine should require exclusion, evaluated if these doctrines justified excusing exclusion. Because of the analysis and conclusions in this Article, these cases were reserved for evaluation until this final section.

They were reserved because once the Fruits and Attenuation Doctrine evaluations are merged, and focused solely on the issue of the flagrancy of the government's unconstitutional course of conduct, the Independent

225. *See supra* text discussion following note 29.

226. *See supra* notes 17, 18, 29, 33 and accompanying text.

227. State v. Poulton, 179 P.3d 1145, 1149 (Kan. 2008).

Source Doctrine—when factually supported by the record on appeal—escapes the focus on flagrancy because, by definition, that course of conduct was not a probable cause of the obtaining of the evidence at issue on appeal. The flagrant misconduct may, however, constitute the appropriate basis for a civil claim, or as strong evidence of the need for systemic reform of the government's investigatory techniques, which, considering the American culture in 2020, there is strong reason not to ignore by legislatures. If there was no probable-cause nexus, then there is no need for an exception in the form of an Independent Source Doctrine because a Fruits Doctrine evaluation should conclude that exclusion is not justified.

The Inevitable Discovery Doctrine, on the other hand, provides no policy reason for excusing from exclusion any evidence at issue which was seized as a probable result of flagrant government unconstitutional conduct. When that conduct is the probable cause of the government's acquisition of the evidence at issue, there is the strongest justification for excluding that evidence to encourage deterrence. The fact that the government may have, by some other investigatory techniques, seized the evidence at issue at some other later point in time, in no way ameliorates the government's flagrant unconstitutional conduct and the harm it has caused the individual, the government, or the safety and other interests of American society.

Restating this balancing inquiry in the form of the following hypothesis: are the Independent Source and Inevitable Discovery Doctrines, grounded on interests sufficiently distinct to justify exempting them from the outcomes that result from the application of the Fruits and Attenuation Doctrines' interest analysis, when that analysis is focused on the flagrancy of the government's unconstitutional course of conduct? This hypothesis is tested by examining the decisions of the state supreme courts who invoked these doctrines, in the context of a Fruits Doctrine assessment, to determine if they reflect a per se elimination of the accommodation and protection of the interest of the people implicated by the most flagrant police unconstitutional investigative techniques.

Hence the evaluation of the fairness of the interest reconciliation reflected in these doctrines had to be postponed until the multi-faceted definition of flagrant was developed during this Article.[228] A Maryland Court of Appeals decision within the study period illustrates a court whose holding and reasoning is consistent with the proposal made herein for evaluating the role the Independent Source and Inevitable Discovery

228. *See supra* notes 206–227 and accompanying text.

Doctrines should play in determining if exclusion of the evidence at issue should be excused.[229] The court held that neither doctrine justified excusing exclusion when the Independent Source Doctrine was inapplicable because the police conduct constituted flagrant violations of the Constitution's knock and announce requirement, which were but for causes of the subsequent seizure of the contraband.[230]

The Inevitable Discovery Doctrine was applicable, but the court rejected its use to excuse exclusion because the court recognized to employ the doctrine to excuse exclusion under the facts of the case would open the door to repeat violations of the knock and announce protection.[231]

Other state supreme courts, however, employed the Inevitable Discovery Doctrine to excuse exclusion without recognizing either the highly subjective nature of the doctrine, and that they were possibly ignoring interests of the accused that are potentially accommodated by the appropriate reconciliation of the competing interest reflected in the Fruits and Attenuation Doctrines.[232] The Inevitable Discovery Doctrine when applied, no matter how unjustified, intrusive, and humiliating the unconstitutional GIT, would unfairly excuse exclusion. For example, a state supreme court relying on the Inevitable Discovery Doctrine unwittingly reinstated a murder scene exception to the exclusionary rule after acknowledging that the per se adoption of this exception was rejected by SCOTUS.[233] This position was taken by the court, despite the fact that police are held to know and follow SCOTUS precedent.[234] The court relied on the fact that government agents had viewed the crime scene from outside the room before unconstitutionally entering, and thereafter, eventually searching the room and seizing the effects therein without having first secured a search warrant.[235]

The Missouri Supreme Court recognized the danger of considering the Inevitable Discovery Doctrine to excuse exclusion once a court has reconciled the Fruits versus the Attenuation Doctrine in favor of exclusion, primarily because of the flagrancy of the government's unconstitutional

229. State v. Lee, 821 A.2d 922, 939–941 (Md. 2003).

230. *Id.*

231. *Id.*

232. Roy v. State, 62 A.3d 1183, 1190 (Del. 2012); Teal v. State, 647 S.E.2d 15, 21–22 (Ga. 2007); State v. Newcomb, 679 S.E.2d 675, 697–98 (W. Va. 2009).

233. *Teal*, 647 S.E.2d at 20, 22.

234. *See supra* notes 135–36 and accompanying text.

235. *Teal*, 647 S.E.2d at 22.

course of conduct.[236] The same court, however, along with the West Virginia Supreme Court of Appeals, also appropriately applied the Inevitable Discovery Doctrine to excuse exclusion.[237] In the *Oliver* case, there was an unconstitutional seizure of the accused's effects done under circumstances which did not implicate any of the components of the multi-dimensional definition of flagrant developed in this Article.[238]

The South Dakota Supreme Court did demonstrate the interests implicated by the Primary Taint, Fruits, Attenuation, Independent Source, and Inevitable Discovery Doctrines can be duly noted and fairly reconciled.[239] The court's core, correct point was that the Independent Source Doctrine is the appropriate basis for resolution, rather than the Fruits Doctrine, when the GIT that led to the seizure of the evidence at issue was totally independent of the primary unconstitutional GIT and its fruits.[240] This rule is not only an appropriate accommodation of the interest identified in these competing doctrines, it is also capable of being objectively applied, even if it is further qualified by giving the government the opportunity to prove that the evidence it possessed at the time of the GIT at issue was sufficient alone to satisfy the applicable constitutional standards, and after striking any evidence whose source was an unconstitutional, but not necessarily flagrantly unconstitutional, course of government conduct.[241]

The lower court in the West Virginia decision found a way, that the Supreme Court of Appeals let stand, to accommodate the competing interest in the context of a *Miranda* violation as the unconstitutional government conduct.[242] The court ruled that the government could not introduce the tainted inculpatory, in-custody statement made by the accused without *Miranda* warnings to prove guilt, but that the weapon that would have been easily discovered by the scope of the constitutional search that would have been undertaken for it, could be used to prove guilt.[243]

236. State v. Grayson, 336 S.W.3d 138, 150–51 (Mo. 2011).
237. State v. Oliver, 293 S.W.3d 437, 443 (Mo. 2009); *Newcomb*, 679 S.E.2d at 697–98.
238. *Oliver*, 293 S.W.3d at 443; *Newcomb*, 679 S.E.2d at 697–98.
239. State v. Boll, 651 N.W.2d 710, 717–18 (S.D. 2002).
240. *Id.* at 717 n.6.
241. *Id.* at 718–20.
242. *Newcomb*, 679 S.E.2d at 697–98.
243. *Id.*

D. *Reflections and Perspectives*

Finally, this final subsection of Part Five provides overall perspectives to be drawn from the Article, including how its major proposal might impact the significance of the Independent Source and its hypothetical iteration, the Inevitable Discovery Doctrines.

1. Constitutional Federalism

First, this Article advocates for a more robust interest analysis focused on judicial federalism by state supreme courts asserting their inherent federalism authority to make their own interest assessment of the competing interests implicated by the Fruits and Attenuation Doctrines. This Article has suggested, and expressly recommends, that this better form of federalism would be maximized if a critical mass of the state supreme courts would follow the current example set by a few state supreme courts. The state supreme courts should adopt the approach of first applying the Fruits Doctrine and the provisions of their state constitution to assess the interest implicated by the Fruits and Attenuation Doctrines to determine if the record demonstrates flagrant unconstitutional government conduct.

If flagrant unconstitutional conduct is found, exclusion is required under the state constitution. Such an appropriate federalism interest evaluation-based assessment would encourage litigants to rely heavily on their state constitution, before any consideration of the national Constitution, in evaluating the interest in play generally, and in particular, in the Fruits and Attenuation Doctrines cases. Multiple state supreme courts' decisions focused on their justices' independent interest assessment would help these courts pool, and thus, improve the quality of their evaluations, as well as serve as a possible valuable counterpoint to the interest analysis reflected in contemporaneous SCOTUS Fruits and Attenuation cases. The interest analysis evaluations found in the state supreme courts' decisions over the first two decades of this century, identified and discussed in this study, could serve at least as a starting point for such evaluations.[244] The implication of this stance by these courts is significant for the future of striking the appropriate federalism balance between state supreme courts and SCOTUS on these issues. No matter the composition of SCOTUS, and the resulting interest analysis conducted by that Court, the state supreme courts are authorized by our federal dual constitutional system to conduct their own

244. *See supra* note 183 and accompanying text.

identification and evaluation of the interest implicated by the Fruits and Attenuation Doctrines.

2. The Fruits–Attenuation Doctrines

First, this Article recommends the express merger of the analysis of the two doctrines as the first major step to reducing inconsistent and subjective decision-making. The future analysis should begin by the state supreme court reviewing, in the first case that comes before it which presents these issues, the courts decisions it characterized primarily as Fruits Doctrine cases, and those the court primarily characterized as Attenuation Doctrine cases. The review with a focus on flagrancy of the government's course of unconstitutional conduct should produce first a more precise definition of "primary taint." This process would serve as an important initial step in getting the interest identification, evaluation, and reconciliation implicated by the Fruits and Attenuation Doctrines correct.

In the context of that merged evaluation, the flagrancy assessment would proceed to determine if there were other independent unconstitutional GIT's. Focusing solely on the objective components of flagrancy, identified herein, is likely to enhance the quality of the decision-making, including reducing inconsistent and subjective decision-making.

In the *Strieff* fact patterns, for example, the interest accommodation that should result would hold that the government could prosecute, and possibly convict, for the crime for which the valid warrant was issued. The government, however, should not prosecute, and the trier of fact would not convict, for the crime that is based upon the government's course of flagrant unconstitutional conduct. In both situations the outcomes are consistent with the focus on the flagrancy of the government's unconstitutional course of conduct and whether it was the probable cause of the searches and seizures that were the basis for the prosecution.

Probable cause provides a more familiar proof standard for determining when flagrantly unconstitutional GIT's justify exclusion without the need for an independent evaluation of temporal proximity or intervening events or conduct. Probable cause, which satisfies the government's proof burden, is the same level of causal connection which would justify excluding evidence on behalf of the accused subjected to flagrant unconstitutional government conduct.