THE NEW CRIME EXCEPTION TO THE FOURTH AMENDMENT

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I. INTRODUCTION

Officer Jones stops an individual, John Doe, for questioning based not on reasonable suspicion, but on a hunch. As the intensity of the encounter escalates, the indignant Doe becomes outraged and shoves Officer Jones. Assaulting a police officer is a serious offense but the stop may have been unlawful under *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The common remedy for an unlawful search or seizure by police is the suppression of evidence gained by such measures. *Mapp v. Ohio*, 367 U.S. 643, 645 (1961). In this case, suppression would allow Doe to commit an act of violence against a police officer without consequence because of a constitutional violation by the police officer. Suppression would not restore Doe's rights but would hide reliable evidence regarding the assault from the court. This unsatisfying outcome may be avoided by the application of the new crime exception to the exclusionary rule. *See generally*. *United States v. Sprinkle*, 106 F.3d 613 (4th Cir. 1997); *US v. Pryor*, 32 F.3d 1192 (7th Cir. 1994); *United States v. Waupekenay*, 973 F.2d 1533 (10th Cir.1992); *United States v. King*, 724 F.2d 253 (1st Cir.1984); *United States v. Bailey*, 691 F.2d 1009 (11th Cir.1982); *United States v. Nooks*, 446 F.2d 1283 (5th Cir.1971); *State v. McGurk*, 958 A.2d 1005 (N.H. 2008); *State v. Panarello*, 949 A.2d 732, 734 (NH 2008); *State v. Burger*, 639 P.2d 706 (Or. Ct. App. 1982), *Miller v. State*, 194 S.E.2d 353 (N.C. 1973).

The new crime exception to the exclusionary rule allows for admission of evidence relating to a crime that occurs during the course of or immediately following a constitutional violation by police, such as an unlawful search or seizure. This hypothetical is just one possible scenario. One could imagine that an encounter with police, whether reasonable under the Fourth Amendment or not, could result in any number of crimes by the person being stopped in efforts to resist or evade the authority of the police. The admissibility of evidence gathered will turn on the facts of each specific incident but it is likely that this and similar scenarios will not result in exclusion of evidence relating to the new crime that was committed during the unlawful police contact because of the application of the new crime exception to exclusion. The new crime exception should be upheld and applied in other jurisdictions because it is based on widely accepted principles such as the public safety exception, the presence of an intervening event to break the chain of causation from the police illegality, and the lack of deterrent value. *See*. *Sprinkle*, 106 F.3d at 619 (deciding that criminal acts by the defendant during an unconstitutional police contact amounted to an intervening event that broke the chain of causation); *Pryor*, 32 F.3d at 1196 (holding that evidence of a crime committed during an illegal police search should not be excluded because suppression would have little deterrent value); *Miller*, 194 S.E.2d at 358 (declining to suppress evidence of an independent crime during an unwarranted search because such a ruling would turn police into "unprotected legal targets"). Evidence of the assault on Officer Jones should be admitted at trial because exclusion would allow violence against a police officer to occur without consequence, the unforeseeable intervening criminal act by Doe broke the chain of causation between Jones' unlawful stop and the evidence of Doe's assault to be suppressed, and therefore exclusion of the new crime evidence would have little value as a deterrent.

II. BASIS FOR EXCLUSION

The practice of exclusion is implemented in order to protect those individual rights guaranteed by the Fourth Amendment. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. While a court cannot restore the right against unreasonable search and seizure once violated, the common remedy has been to suppress evidence acquired in violation of the Fourth Amendment. In *Mapp v. Ohio*, 367 U.S. 643, 645 (1961), the Supreme Court held "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."

In *Mapp*, police forced their way into the home of the defendant, holding an apparently blank piece of paper in the air as a warrant. 367 U.S. at 644. When the defendant protested, she was handcuffed and police executed a full search of the home revealing pornographic material in a bedroom occupied by the defendant's roommate. *Id.* at 645. Possession of the pornographic material was illegal in Ohio at that time and the defendant was convicted of possession of obscene materials. *Id.* The defendant appealed based on the unwarranted search and seizure. The court reasoned that, "the state, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold." *Id.* at 657. Thus, the practice of exclusion was extended to the states to remedy violations of the Fourth Amendment.

The doctrine of exclusion has been extended to apply to so-called "derivative evidence" under the "fruit of the poisonous tree" doctrine. "Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). In *Wong Sun*, a series of warrantless searches by federal narcotics agents based on an informant tip resulted in the recovery of narcotics evidence. *Id*. at 475. Following the arrests, the two defendants made incriminating statements. *Id*. at 477. "We think it clear that the narcotics were 'come at by the exploitation of that illegality' and hence that they may not be used." *Id*. at 488. Each piece of evidence gained was based on the preceding chain of warrantless searches and seizures so none could stand alone on its own justification. The court ruled that the proper question "is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id*. quoting Maguire, *Evidence of Guilt*, 221 (1959).

In the case of John Doe and Officer Jones, there was no warrant justifying Jones' stop of Doe. Under *Mapp*, 367 U.S. at 657 and *Wong Sun* 371 U.S. at 488, evidence gained, not just during the initial stop, but other evidence arrived at during the subsequent related events was recovered unlawfully. At first glance, these rulings seem to suggest that evidence relating to a crime committed during an unlawful stop by police is improperly acquired and should be suppressed but the exclusionary rule is more complex in its application. Many jurisdictions, including the U.S. Courts of Appeal for the First, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits and state courts in Connecticut, New Hampshire, North Carolina, Oregon, and

Virginia have recognized exceptions to exclusion which may apply when a new crime is committed during an incidence of unlawful police conduct.

III. THE APPLICATION OF THE NEW CRIME EXCEPTION

The new crime exception to exclusion is applied in cases that present fact patterns similar to the hypothetical case of Officer Jones and John Doe. Generally, the police do not commit violations as flagrantly as seen in *Mapp*, U.S. 643, 644 but rather, the difference between lawful conduct and the violation committed by police is a matter of degrees. The new crimes committed in response range from minor infractions, such as providing a false identification, to hurling gunfire at police. In all of the cases analyzed, the new crime exceptions to exclusion are based on established legal principles such as the public safety exception, the presence of an intervening event to break the chain of causation from the police illegality, and the lack of deterrent value in suppression.

This new crime exception was applied by the Supreme Court of Connecticut in 2003 in *State v. Brocuglio*, 264 Conn. 778 (2003). Police officers entered the rear yard of the defendant's home without a warrant for the purpose of ticketing abandoned and unregistered vehicles. *Id*. at 781-82. The defendant approached the police with a dog, threatened to release the dog, and yelled profanities at them. *Id*. at 783. The defendant was then arrested and charged with interfering with an officer. *Id*. at 784.

On appeal, the defendant challenged the trial court's denial of his motion to suppress evidence in response to the officer's unlawful search of his back yard. *Brocuglio,* 264 Conn. 778, 785. The Supreme Court of Connecticut noted, "Several rationales have been advanced for

application of the new crime exception: (1) the defendant has a diminished expectation of privacy in the presence of police officers; (2) the defendant's intervening act is so separate and distinct from the illegal entry so as to break the causal chain; and (3) the limited objective of the exclusionary rule is to deter unlawful police conduct-not to provide citizens with a shield so as to afford an unfettered right to threaten or harm police officers in response to the illegality. Citing *Brocuglio*, 264 Conn. 778, 788. The court adopted the new crimes exception and, under this exception to the exclusionary rule, "the evidence relating to the defendant's statements and actions with regard to the crime of interfering with an officer would be admissible." *Id*. at 794. Despite the announcement of a new crimes exception to the exclusionary rule, the Supreme Court of Connecticut declined to apply the exception retroactively and reverse the lower court's suppression of evidence because, "a limited common-law right to resist an unlawful, warrantless entry" supports the actions of the defendant. *Id*. at 781. While affirming the dismissal of the case against the defendant, the court announced the existence of the new crime exception.

In *US v. Pryor*, 32 F.3d 1192, 1193 (7th Cir. 1994), the defendant encountered law enforcement officials when his companion attempted to fraudulently acquire a social security card. Police requested identification from the defendant in order to determine if he could temporarily take custody of his companion's children. *Id*. The defendant offered a false identification and was eventually discovered, arrested for, and convicted of using false identification. *Id*. at 1194. The defendant appealed, arguing that the initial encounter with authorities was a custodial interrogation and therefore the evidence that he furnished false identification should be suppressed. *Id*. at 1195. The U.S. Court of Appeals for the Seventh Circuit affirmed the conviction, reasoning that, "[p]olice do not detain people hoping that they will commit new crimes in their presence; that is not a promising investigative technique, when

illegal detention exposes the police to awards of damages." *Id*. at 1196. As in the case of Jones and Doe, it seems illogical that Jones would approach and question Doe in the hopes of triggering an assault for which he could be prosecuted.

The new crime exception was applied in a Virginia case in which the defendant became unruly during a police response to a domestic disturbance report. *Brown v. City of Danville*, 44 Va.App. 586, (Va. Ct. App. 2004). Despite several attempts by police to separate the defendant from the altercation and calm the situation, the defendant became increasingly combative and unmanageable. In response to the unpredictable behavior of the defendant, the police officer patted him down and a struggle ensued. *Id*. at 592-93. The defendant argued that the pat-down was not based on reasonable suspicion but was convicted of obstruction nonetheless. *Id*. at 594. The court of appeals upheld the conviction, stating, "if a person engages in new and distinct criminal acts in response to unlawful police conduct, the exclusionary rule does not apply, and evidence of the events constituting the new criminal activity, including testimony describing the defendant's own actions, is admissible." *Id*. at 600. The court based the ruling in part on concern for officer safety, reasoning, "extending the [the exclusionary rule] to immunize a defendant from arrest for *new* crimes gives a defendant an intolerable *carte blanche* to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct." *Id*. at 602.

In *State v. Burger*, 639 P.2d 706 (Or. Ct. App. 1982) a court again declined to exclude new crime evidence because the new crime constituted violence toward a police officer. In *Burger*, police responded to a reported burglary to find the defendant fleeing. *Id*. at 707. The police officer followed the defendant to his home, leading to a struggle inside the doorway when the police officer requested identification. *Id*. The defendant was charged with resisting arrest

and assault but challenged the evidence on grounds that the officer's entry and questioning was an unreasonable search and seizure. *Id*. The Oregon Court of Appeals rejected the defendant's argument, explaining, "[a] person who correctly felt that he had been illegally stopped, for example, could respond with unlimited violence and under an exclusionary rule be immunized from criminal responsibility for an action taken after the stop." *Id*. at 708.

The Supreme Court of North Carolina recognized the new crime exception based on concern for officer safety in *Miller v. State*, 194 S.E.2d 353 (N.C. 1973). In *Miller*, police officers with a warrant that was ultimately ruled invalid, entered an illegal gambling operation resulting in gunfire from the defendant. *Id*. at 355. The invalidated warrant led to a suppression motion but the Supreme Court of North Carolina declined to exclude the evidence of the incident under the new crime exception. The court reasoned, "[a]lthough wrongfully on the premises, officers do not thereby become unprotected legal targets." *Id*. at 358.

Police officers once again faced gunfire following an unwarranted search or seizure in *United States v. Sprinkle*, 106 F.3d 613 (4th Cir. 1997). In *Sprinkle*, a police officer approached the defendant, a known probationer, who was behaving suspiciously and then fled *Id*. at 616. The officer pursued and the defendant drew a gun and fired a shot at the police officer. *Id*. The defendant moved to suppress the gun but the motion was rejected and that denial affirmed on appeal because the defendant's flight and use of a firearm, were intervening events that broke the chain of causation to the police misconduct. *Id*. at 619. The court explained that when the defendant fired the gun, "Officer Riccio had probable cause to arrest Sprinkle because the new crime purged the taint of the prior illegal stop." *Id*.

The new crime exception was recently applied in two separate New Hampshire cases in *State v. McGurk*, 958 A.2d 1005 (N.H. 2008) and *State v. Panarello*, 949 A.2d 732 (NH 2008). In *McGurk*, a police officer responded to the scene of a reported suspicious pickup truck. 958 A.2d 1005, 1008. He did not find a pickup truck but approached the passenger car occupied by the defendant and a companion. The officer suspected underage transportation of alcohol and told the defendant, who was not driving, to leave the scene. *Id*. The defendant returned to the scene, became disorderly, and obstructed the officer's efforts to carry out his duties. *Id*. During the encounter, the officer discovered marijuana in the possession of the defendant, a struggle ensued, and the defendant swallowed the marijuana. *Id*. He was charged with possession of marijuana and falsifying evidence. *Id*. The court declined suppression of the evidence based on the argued illegality of the original stop because the causal connection between the police misconduct and the evidence discovered was broken by the intervening actions by the defendant. The court explained, "the presence of intervening circumstances, sufficient to purge the taint. Specifically, the defendant's ingestion of the marijuana supported a new criminal charge that was distinct and separate from the prior illegal seizure." *Id*. at 1011. In *Panarello*, a police officer entered a home in response to a request for a welfare check to find the defendant brandishing a gun. 949 A.2d 732, 734. The Supreme Court of New Hampshire rejected the defendant's suppression motion based on concern for officer safety. *Id*. at 737.

These cases demonstrate a very consistent application of the new crime exception across a wide range of jurisdictions. There are many common characteristics in these cases including that exclusion of evidence gained during unlawful police conduct is forgone because such a ruling would create an immunity for violence against police, because the independent criminal act by the defendant breaks the chain of causation to the police misconduct, and because that

interruption of the causal connection diminishes the deterrent value of exclusion. These justifications for the new crime exception are firmly rooted in constitutional jurisprudence. Therefore, the new crime exception to exclusion should be upheld and should be applied to the case of Jones and Doe.

IV. THE NEW CRIME EXCEPTION IS BASED ON THE PUBLIC SAFETY EXCEPTION

In many instances, the application of the new crime exception is based on concern for officer safety. As noted by the U.S. Court of Appeals for the Seventh Circuit, "[i]f the [exclusionary] rule were applied rigorously, suspects could shoot the arresting officers without risk of prosecution." *US v. Pryor*, 32 F.3d at 1196 (7th Cir. 1994). In *Pryor*, 32 F.3d 1192, 1196, the court simply recognized the possibility of violence if the new crime exception were not adopted but in other cases, that violence has not been a possibility but a reality. As in the case of Officer Jones and John Doe, an illegitimate search or seizure by police can result in a physical struggle between the police and the suspect. In *Brown*, the officer's attempt to pat-down an unruly participant in a domestic disturbance led to an altercation in which police "were wrestling with [Brown] on the ground for quite a while, trying to get him in the handcuffs." 44 Va.App. 586, 594. In *Burger*, the police officer was kicked during the unwarranted arrest in the home of a robbery suspect. 639 P.2d 706, 707. In both *Miller* and *Panarello*, police found themselves under gunfire after entry into a private residence without a valid warrant. *Miller v. State*, 194 S.E.2d 353, 355; *State v. Panarello*, 949 A.2d 732, 734. These cases underscore the obvious fact that the work of a police officer can be dangerous but that danger would be magnified if suspects

were immune from prosecution for new crimes committed once a constitutional violation is committed by police. Courts have been careful to carve out exceptions to the Constitutional protections of the Fourth, Fifth, and Sixth Amendments when the safety of police officers or the public at large is at stake.

"Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). In Katz, the Supreme Court ruled that, by using electronic surveillance to eavesdrop on the telephone conversations the defendant had in a public phone booth, authorities violated the defendant's reasonable expectation of privacy and therefore his rights under the Fourth Amendment. Such a high value is placed on public safety, that the Supreme Court has carved out exceptions to the requirements of three Constitutional Amendments in order to allow law enforcement to better prevent and neutralize threats to public safety. Courts have allowed warrantless searches in some circumstances in order to preserve evidence and to avoid threats to the safety of the public or police in *Chimel v. California*, 395 U.S. 752 (1969) and *Arizona v. Gant*, 129 S.Ct. 1710 (2009). In its decision in *New York v. Quarles*, 467 U.S. 649 (1984), the Supreme Court described a public safety exception to the Fifth Amendment rights outlined in *Miranda v. Arizona*, 384 U.S. 436 (1966). Finally, the Supreme Court described an exception to the confrontation clause of the Sixth Amendment rights in its decisions in *Michigan v. Bryant*, 131 S.Ct. 1143 (2011) and *Davis v .Washington*, 547 U.S. 813 (2006). While the public safety exceptions outlined in these cases do not perfectly align with the fact pattern described in the hypothetical case of Officer Jones and John Doe, they could apply to other situations in which a crime is committed during an unlawful stop by police and they demonstrate the Court's

overriding interest in protecting the safety of police and the public. It is possible that a criminal act committed during an unlawful stop by police could place the safety of the officer or the public at risk. It is in such situations that the Supreme Court relieves police of some of the restrictions created by the Fourth, Fifth, and Sixth Amendments in order to allow police to combat those threats to safety.

The public safety exception to the Fourth Amendment expands the area that a police officer may lawfully search without first acquiring a warrant. The Supreme Court considered the issue of public safety exceptions to the Fourth Amendment in *Chimel v. California*, 395 U.S. 752 (1969). In *Chimel*, the police properly arrested the defendant in his home but went on to search the entire home against the stated wishes of the defendant. *Id*. at 753. The Supreme Court rejected the claim that searching the full house was justified as a search incident to lawful arrest but approved a search of any area within the reach of the accused in order to prevent destruction of evidence or the acquiring of a weapon to use against police. *Id*. at 764. "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition … the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule." *Id*. at 763. It was concern for officer safety that prompted the court to expand the scope of a search incident to lawful arrest beyond just the clothing and articles in the possession of the accused in order to avoid placing the officer in harm's way.

In *Chimel*, the court determined the appropriate scope of a search incident to a lawful arrest. In the cases that fall under the new crime exception, a fundamental characteristic is that

the initial search or seizure was not lawful. This fact casts doubt on the admissibility of the new crime evidence based on the "fruit of the poisonous tree" doctrine. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). In *Chimel*, an otherwise unlawful, warrantless search was allowed because it followed a lawful arrest based on probable cause and was necessary to secure officer safety and preserve evidence. 395 U.S. 752, 764. In the case of Officer Jones and John Doe as in all of the new crime exception cases, the distinction between the warrantless searches and seizures is temporal. Whether a warrantless search occurs before or after probable cause is an important factor but does not diminish the threat to officer safety. In fact, the Court bases its decision in *Chimel* on the potential for threats to officer safety but the new crime exception cases often involve actual violence against police. *See*. *Brown*, 44 Va.App. at 594 (finding that the defendant wrestled with a police officer as the officer attempted to manage a domestic disturbance); *Burger*, 639 P.2d at 707 (in which the police officer was kicked during the unwarranted arrest in the home of a robbery suspect); *Miller*, 194 S.E.2d at 355 (denying suppression of evidence that the defendant opened fire on police executing a warrant that was later found invalid); *Panarello*, 949 A.2d at 734 (in which a police officer met gunfire while checking on the welfare of the defendant). In light of the seriousness of the threat posed to the safety of police in these new crime cases, courts should give as much weight to concerns over officer safety as given in *Chimel*.

In *Chimel*, the Supreme Court analyzed the extent to which concerns for officer and public safety justified an expansion of the scope of a search incident to lawful arrest in the home. When such a scenario takes place in an automobile on public roads, potential threats to public safety takes on a new dimension. The Supreme Court revised its rule on search incident to lawful arrest in a vehicle context in *Arizona v. Gant*, 129 S.Ct. 1710. In *Gant*, the defendant was

arrested for driving on a suspended license and, while he was detained in the back of a police cruiser, his car was searched, revealing cocaine in a jacket on the back seat. *Id*. at 1714. On appeal, the resulting conviction was overturned because concerns over officer safety and evidence preservation were no longer relevant once the scene had been secured. *Id*. at 1715. The court held that "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. *Id*. at 1719. While again limiting the scope of a search incident to lawful arrest, the court maintained that, "officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search." *Id*. at 1721.

As in *Chimel*, *Gant* can be distinguished from the new crime cases because of the relative timing of the warrantless search and the presence of probable cause. However, the fact remains that Courts consistently curb the constitutional restrictions on searches by police in order to protect officer safety. *See*. *Chimel*, 395 U.S. 752, 764 (allowing a search incident to lawful arrest into any area to which a suspect could reach for a weapon); 129 *Gant*, S.Ct. 1710, 1721 (holding that an expanded search of a vehicle's passenger compartment is justified by evidentiary and officer safety concerns). The Court's ruling in *Gant* limited the area subject to search in a vehicle context but the court explicitly allowed for an expanded search "… when genuine safety or evidentiary concerns … justify a search." S.Ct. 1710, 1721. Several of the new crime exception cases involved vehicle stops. See. *Sprinkle*, 106 F.3d 613, 616; *McGurk*, 958 A.2d 1005, 1008; *Burger*, 639 P.2d 706, 707. Once again, the new crime cases often do not involve a search incident to lawful arrest but when officer safety is used to justify one exception to the

Fourth Amendment, it is logical that the same justification would apply to the new crime exception.

The public safety exception to the Fourth Amendment is not limited to instances of a search incident to lawful arrest. There are other threats to public safety that call for an expansion of the latitude granted to police officers with respect to the requirements of the Fourth Amendment. In *Michigan v. Tyler*, 436 U.S. 499, 502 (1978). , police and fire officials entered a still-smoldering building without a warrant to gather any information regarding the cause of the fire before all was consumed. The officials gathered evidence which led to the conclusion that the fire was caused by arson. *Id*. The defendant challenged the evidence on the grounds that the unwarranted search violated the Fourth Amendment. *Id*. at 503. The court ruled that a warrant was required for fire officials to conduct an investigation after the fire but any evidence gained during the course of fighting the fire was lawfully acquired. *Id*. at 509 "A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.' Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze." *Id*. The factual pattern found in *Tyler* differs greatly from the new crime exception cases but the exigent circumstances of a threat to public safety are present in all of these cases. The court in *Tyler*, allowed into evidence any evidence that was in plain view while the firefighters were actually fighting the blaze. *Id*. at 509. To suppress this evidence would be to require firefighters to essentially close their eyes to any evidence of illegality while responding to an emergency situation. Similarly, to suppress evidence of Doe's assault on Officer Jones would be to require that Jones close his eyes to the illegal and dangerous conduct of Doe. The Supreme Court rejected this resolution in *Tyler* and the same should be done under the new crime exception. *Id*.

These cases identify exigent or emergency circumstances and threats to officer or public safety which allow for otherwise unreasonable searches. At the moment that the threat materializes, police actions that would otherwise be subject to exclusion become permissible under the Constitution. A criminal act can present a very real threat to the safety of the public or police officers present. In the case of John Doe and Officer Jones, there was no lawful arrest to open the door for an expanded search under *Chimel* or *Gant*. No expanded search was needed to recover evidence of the assault. Jones simply needed to observe and be allowed to offer testimony regarding the assault that he experienced in public. The court reasoned in *Brocuglio*, "in light of the defendant's ability to obtain relief to protect his constitutional rights and the public policy concerns regarding escalating violence, we hereby adopt the new crime exception to the exclusionary rule." 264 Conn. 778, 79o. Suppression in the case of John Doe and Officer Jones would tend to jeopardize Jones's safety as it would create a virtual "open season" for Doe.

Protection of individual liberties is an important aspect of law enforcement but it is not absolute. As with other constitutional protections, there are exceptions to the Fifth Amendment requirements instituted by the *Miranda v. Arizona*, 384 U.S. 436 (1966) decision. One such exception was announced by the Supreme Court in its decision in *New York v. Quarles*, 467 U.S. 649 (1984). In *Quarles*, the Court ruled that there existed a public safety exception to *Miranda* when "… the need for answers to questions in a situation posing a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657. In *Quarles*, police responded to a woman who claimed to have just been raped by a man armed with a gun and matching the description of the defendant. *Quarles*, 467 U.S. 649, 651. A lone officer spotted the defendant in a nearby grocery store. The defendant fled and the officer quickly regained visual contact with the defendant, subdued him,

and frisked him to discover an empty holster. *Id*. at 652. Before advising the defendant of his rights, the officer asked him where the gun was. *Id*. In trial, the defendant moved to suppress the gun recovered as a result of the officer's questioning. *Id*. The trial court granted the motion and on appeal, the Supreme Court reversed. *Id*. at 653. In Justice O'Connor's concurring opinion, she described the majority's conclusion "…that overriding considerations of public safety justify the admission of evidence—oral statements and a gun—secured without the benefit of such warnings." *Id*. at 660.

It could be argued that police concerned with public safety could interrogate a suspect prior to Miranda warning without violating the Fifth Amendment by utilizing any information gained in such an interrogation to secure the public safety but not in a criminal trial. This scenario was addressed in O'Connor's concurring opinion. "Miranda has never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question Miranda addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State." *Id*. at 664. The majority held that the state does not forfeit its right to use such evidence in a criminal trial. *Id*. at 657.

Many of the new crime exception cases have dealt with warrantless searches or seizures of a home or individual which would violate the Fourth Amendment if not for an exception to the warrant requirement. *See generally*. *Brown*, 44 Va.App. 586, 594 (in which an officer attempted to pat down an unruly defendant during a domestic disturbance); *Burger*, 639 P.2d 706, 707 (in which the police officer followed a robbery suspect into his home without a warrant); *Miller v. State*, 194 S.E.2d 353, 355; (in which police entered a home with a warrant later found invalid); *State v. Panarello*, 949 A.2d 732, 734 (in which a police officer entered the home of the defendant without a warrant in order to check on the welfare of the defendant).

However, the defendant in *Pryor*, 32 F.3d 1192, 1195, challenged what he claimed was a custodial interrogation in violation of *Miranda*. The defendant was asked to step into a federal building by Investigators for the Department of Health and Human Services and asked several questions regarding his identity and relationship to a companion. *Id*. at 1193. The companion was being arrested and her children needed to be cared for. *Id*. The defendant argued that this questioning was the functional equivalent of a custodial interrogation without prior Miranda warning so any evidence regarding the defendant's use of false identification should be suppressed. The Seventh Circuit's affirmation of the defendant's conviction was based in part on concern for the well-being of the children. *Id*. at 1195. Just as in Quarles, public safety considerations outweighed strict adherence to the Fifth Amendment requirements under *Miranda*. Pryor serves as an example of the application of the new crime exception to exclusion in a case in which the new crime evidence was challenged based on a violation of Fifth Amendment rights under *Miranda.*

Courts have recognized the importance of allowing police to secure the public safety even through means that would otherwise be violative of the Constitution. In light of this fact, the cases above establish circumstances in which the public safety justification relieves law enforcement of the warrant requirement under the Fourth Amendment and protection against self-incrimination under the Fifth Amendment. Concern over public safety can also create an exception to the confrontation requirement described in the Sixth Amendment. Recent court decisions have announced a public safety exception which allows out of court statements to be offered into evidence when the statements were elicited by authorities in order to deal with an imminent threat or exigent circumstances.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Supreme Court ruled in *Crawford v. Washington*, 541 U.S. 36,53-54 (2004) against "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Since *Crawford*, numerous court cases have provided a more concrete meaning to the term "testimonial statements." In several cases, the Supreme Court has held that statements elicited by police in order to deal with an ongoing emergency are not testimonial and can therefore be admitted into evidence without the in court testimony of the declarant. *See*. *Davis v. Washington*, 547 U.S. 813 (2006); *Michigan v. Bryant*, 131 S.Ct. 1143 (2011).

The Supreme Court allowed into evidence a recorded exchange between a complaining witness and the "911" operator in *Davis*, 547 U.S. 813. In *Davis*, a woman called 911 to report that her boyfriend was assaulting her and, while on the phone, she identified him by name. *Id*. at 817. At the time of trial, the woman refused to testify so the recorded conversation, including the identification of the defendant, was admitted into evidence. *Id*. The Supreme Court affirmed the conviction, holding that the statements were non-testimonial. *Id*. at 834. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id*. at 822. By contrast, a testimonial statement is one without an ongoing

emergency in which the facts indicate that "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*.

In a similar case, the Supreme Court held that a dying man's identification of his shooter was non-testimonial and therefore admissible under *Crawford*. *Bryant*, 131 S.Ct. 1143. In *Bryant*, the police responded to an emergency call and found a man in a gas station parking lot, suffering from gunshot wounds. *Id*. at 1146. In response to police questions, the victim identified the shooter and the location of the shooting. *Id*. The defendant was then arrested, charged, and convicted of second degree murder but his conviction was overturned because the victim's out of court identification was improperly admitted into evidence. *Id*. at 1146-47. The Supreme Court reversed, holding that the statements were non-testimonial because they were elicited in order to "… enable police assistance to meet an ongoing emergency." *Id*. at 1156. The fact that an ongoing emergency existed at the time of the statements to police "is among the most important circumstances informing the 'primary purpose' of an interrogation." *Id*. at 1157. In both *Davis* and *Bryant*, the "ongoing emergency" that rendered the hearsay statements admissible was a crime either in progress or immediately concluded.

In the case of John Doe and Officer Jones, Jones was dealing with an ongoing emergency in the form of an assault on a police officer. Many of the new crime exception cases involved a similar ongoing emergency. *See generally*. *See*. *Brown*, 44 Va. App. 586, 594; *Burger*, 639 P.2d 706, 707; *Miller*, 194 S.E.2d 353, 355; *Panarello*, 949 A.2d 732, 734. While these cases do not include statements that might be challenged under the confrontation clause, the frequent incidence of violence against police officers in these cases would seem to suggest that there could potentially be situations in which there is an overlap in the application of the new crime exception and the ongoing emergency exception to *Crawford*.

The public safety exceptions to the Fourth and Fifth Amendments allow for the admission of certain evidence despite unlawful conduct by police. This emergency exception to *Crawford* does not address unlawful police conduct but it does clear the way for the admission of otherwise improper evidence. Each of these cases underscores the Supreme Court's enduring concern for public safety. Whether the threat to public safety comes in the form of hidden weapons, a burning building, or a crime in progress, the Supreme Court has set aside constitutional safeguards in order to allow law enforcement to meet the threat. The application of these public safety exceptions to a situation in which a new crime is committed in connection with an illegal or unconstitutional act by police turns upon the facts of the particular case. The new crime exception is not a subset of any of these other exceptions but the officer safety justification for the new crime exception closely mirrors the justifications for other well-established public safety exceptions to Constitutional safeguards.

V. NEW CRIMES CONSTITUTE AN INTERVEENING EVENT WHICH BREAKS THE CHAIN OF CAUSATION TO POLICE MISCONDUCT

Evidence must be suppressed if it is "come at by exploitation of … illegality." *Wong Sun*, 371 U.S. at 488. In order to determine whether evidence is "come at by exploitation of illegality", it is useful to study the analogous logic underlying the principle of the unforeseeable intervening act found in civil cases. Under this concept, an unforeseen intervening event breaks the chain of causation, "thus shielding the defendant from liability." *Marshall v, Perez Arzuaga*, 828 F.2d 845, 1848 (1st Cir. 1987). Just as the unforeseen intervening act breaks the chain of causation, shielding the defendant from liability in a civil case, the intervening act of a new crime breaks the chain of causation from the initial police misconduct. Evidence is not to be

excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is "so attenuated as to dissipate the taint," *Nardone v. United States*, 308 U.S. 338, 341 (1939).

In *Marshall*, the plaintiff returned a rental car to the rental terminal to have a flat tire repaired only to see the same tire go flat again almost immediately after returning to the road. 828 F.2d at 846. When he exited the car to assess the situation, the plaintiff was struck by another car and seriously injured. *Id*. The defendant brought a civil action against both the driver of the other car and the rental agency. *Id*. at 847. The rental agency challenged the jury verdict on the grounds that the negligent driving by the other driver was an unforeseeable intervening act which extinguished the agency's liability for the negligent repair of the tire. *Id*. The appellate court recognized the established principle that a party has no duty to protect against a truly unforeseen risk but declined to overrule the jury finding that the risk of being struck by passing traffic was not an unforeseeable result of a flat tire. *Id*. at 848, 51. The impact of an unforeseen intervening act is a well established principle in civil cases and is logically analogous to criminal cases in which the uncovering of challenged evidence is the unforeseen result of police misconduct. The unpredictability of the new crime breaks the chain of causation to the original unconstitutional activity by police.

The U.S. Court of Appeals for the Fourth Circuit applied parallel logic in its use of the new crime exception in *Sprinkle*, 106 F.3d at 619. In *Sprinkle*, a police officer observed suspicious behavior between the defendant and a known probationer. *Id*. at 616. When the officer approached the two and asked for consent to search for weapons, the defendant drew a gun, fled, and fired a shot at the pursuing officer. *Id*. The defendant moved to suppress all evidence resulting from the unlawful stop but the court affirmed the denial of the motion. *Id*. at 619. The

court explained, "Officer Riccio had probable cause to arrest Sprinkle because the new crime purged the taint of the prior illegal stop." *Id*.

The same logic was used to justify the application of the new crime exception in *McGurk*, 958 A.2d at 1011. In *McGurk*, a police officer observed suspicious behavior and discovered underage possession of alcohol and possession of marijuana. *Id*. at 1008. A companion of the original arrestee became unruly, struggled with the officer, and swallowed the marijuana. The defendant was then charged with assault and falsifying evidence. *Id*. The defendant appealed his conviction on grounds that all evidence should have been suppressed because the initial stop was unlawful. *Id*. at 1009. The court rejected the appeal based on "… the presence of intervening circumstances, sufficient to purge the taint. Specifically, the defendant's ingestion of the marijuana supported a new criminal charge that was distinct and separate from the prior illegal seizure." *Id*. at 1011.

These cases are all based on the premise that an intervening event breaks the chain of causation between unlawful police conduct and a criminal act. With the causal connection gone, exclusion is no longer an appropriate remedy. *See*. *Sprinkle*, 106 F.3d at 619; *McGurk*, 958 A.2d at 1011. In the case of John Doe and Officer Jones, an unforeseeable intervening act separated Jones' unlawful stop from the evidence of Doe's assault. Doe's assault severed the chain of causation from Jones' stop. Doe's actions were not the foreseeable consequence of Jones' questioning any more than gunfire was the foreseeable consequence of the officer's inquiry in *Sprinkle*, 106 F.3d at 619 or destruction of evidence were the foreseeable consequences of police investigation into suspicious behavior in *McGurk*, 958 A.2d at 1011.

To suggest that violence or criminal conduct is the reasonably foreseeable result of an illegal police stop is to suggest that such conduct is a normal response to unwanted or possibly illegal

contact with police. This suggestion is as unsound legally as it is logically. Individuals must "… endure even an unlawful arrest without resorting to force, on the ground that the indignity and inconvenience if the arrest turns out to be improper are less serious than the injuries (and the frustration of lawful police activity) engendered by encouraging suspects to make their own snap judgments about the legality of official demands." *Pryor*, 32 F.3d at 1195. The unforeseeable intervening act of Doe's assault distinguishes the evidence of the assault from the constitutional violation that occurred with the stop and severs the chain of causality so the new crime exception should be applied.

VI. THE ABSENCE OF A CAUSAL CONNECTION DIMINISHES THE DETERRENT VALUE OF SUPPRESSION

Exclusion of evidence gained by illegal police conduct, even reliable evidence, is based in part on the premise that exclusion will deter police misconduct. *Mapp*, 367 U.S. at 656. The exclusionary rule is applied in cases in which evidence was acquired through methods which run afoul of the Fourth Amendment. The suppression or exclusionary rule is a judicially prescribed remedial measure and as "with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra*, 414 U.S. 338, 348 (1974). Exclusion protects the rights of the accused by creating a disincentive for police to engage in unlawful activities in the course of gathering evidence. However, exclusion is not an effective deterrent in all situations as some evidence could not be reasonably foreseen as the product of a constitutional violation by police.

In *Segura*, police were surveilling the home of the defendant while waiting for a search warrant to be processed. *Segura v. United States*, 468 U.S. 796, 800 (1984). When the defendant arrived home, the police, fearing the potential destruction of evidence, arrested the defendant and then conducted a security check of the home. *Id*. On appeal, the Supreme Court suppressed only evidence gained during the unwarranted security check of the residence but not the evidence uncovered when the search warrant was finally produced. *Id*. at 802-03. The Court declined to suppress evidence gained during the latter warranted search because the connection between that evidence and the unlawful conduct by police was too distant to have a deterrent effect. *Id*. at 804-05. While *Segura* did not involve a new crime, several of the new crime exception cases have based decisions in part on the absence of any deterrent value to suppression.

In *Pryor* , the defendant encountered law enforcement officials when his companion attempted to fraudulently acquire a social security card. *US v. Pryor*, 32 F.3d 1192, 1193 (7th Cir. 1994). Police requested identification from the defendant in order to determine if he could temporarily take custody of his companion's children. *Id*. The defendant offered a false identification and was eventually discovered and arrested for and convicted of using false identification. *Id*. at 1194. The defendant appealed, arguing that the initial police encounter was an unlawful search and therefore the evidence that he furnished false identification should be suppressed. *Id*. at 1195. The U.S. Court of Appeals for the Seventh Circuit affirmed the conviction, reasoning that, "[p]olice do not detain people hoping that they will commit new crimes in their presence; that is not a promising investigative technique, when illegal detention exposes the police to awards of damages." *Id*. at 1196. Furthermore, the court opined, "[a]n

exclusionary rule that does little to reduce the number of unlawful seizures, and much to increase the volume of crime, cannot be justified." *Id*. at 1196.

In *Panarello*, the court based its decision partly on the lack of any deterrent value provided by suppression. 949 A.2d at 736. The police officer simply entered the home to determine the well-being of the defendant in response to a report by a concerned coworker of the defendant's, not to gather evidence through unconstitutional means. *Id*. The Court rejected exclusion in *Brown* based on the insufficient deterrent effect because the challenged pat-down did not uncover evidence of a past crime but led to a new independent crime by the defendant. 606 S.E.2d at 531. The court reasoned, "the gains from extending the [exclusionary] rule to exclude evidence of fresh crimes are small, and the costs high." *Id*. In each of these cases, the courts reject exclusion of new crime evidence because there was no causal connection to the prior illegal activity by police.

In the case of John Doe, Officer Jones could not have predicted that stopping Doe based on less than reasonable suspicion would trigger an assault by Doe. The unforeseeable act by Doe was not the logical consequence of Jones's actions. In a situation in which the evidence to be suppressed is not the logical or foreseeable consequence of the unlawful act by police, suppression would have no deterrent impact. *Segura*, 468 U.S. at 804-05. Therefore, exclusion of evidence stemming from a new crime committed during an unlawful police encounter is unlikely to deter Fourth Amendment violations by police. Without the benefit of protecting the rights of the accused, exclusion of evidence in this scenario would only hide facts from the court and stand in the way of court efforts to seek the truth.

In the case of John Doe, his freedom to move about unmolested by police was threatened by Jones's actions. Officer Jones did not have the reasonable suspicion needed to justify a stop and questioning of Doe. While the stop may have been unlawful, the remedy is not to allow Doe to freely assault a police officer. Doe may argue that evidence relating to the assault was derivative evidence stemming from the unlawful stop and therefore inadmissible under *Wong Sun*. 371 U.S. at 488. However, it can hardly be said that, by being the victim of an assault, Jones was exploiting the unlawful stop.

It is unlikely that exclusion would have a deterrent effect because the criminal act by Doe is not logically connected to the Fourth Amendment violation by Officer Jones. Courts have relied on exclusion to discourage police from trampling the rights of citizens and to deny to the prosecution the benefit of evidence gained by such lawless methods. *Wong Sun*. 371 U.S. at 488 The suppression can only have a deterrent effect if the evidence to be suppressed is logically and predictably connected to the right violated.

Courts recognize that suppression is an extreme measure and should only be employed if the value of the deterrent outweighs the harm of inhibiting the prosecution of crimes. The value of deterrence depends on the strength of the incentive to commit the forbidden act. *Hudson v. Michigan*, 547 U.S. 586, 587 (2006). In *Hudson*, the Supreme Court declined to suppress all evidence recovered during an illegal police entry into a home. *Id*. at 602. The police entered the home with a warrant but without observing an acceptable "knock and announce" period. *Id*. at 586. The Court suppressed only that evidence recovered immediately after the knock and announce violation, while allowing all other evidence resulting from the lawful, warranted search. *Id*. at 600. "Indeed, exclusion "has always been our last resort, not our first impulse." *Id*. at 591. Suppression of evidence in the case of John Doe and Officer Jones would not deter

police from engaging in the behavior that runs afoul of the Fourth Amendment and therefore, the new crime exception to exclusion is appropriate.

VII. CONCLUSION

The case of John Doe and Officer Jones is fictional but all too realistic. The cases described above highlight numerous instances in which conduct by police that violates constitutional protections is followed by a new, independent crime by the suspect. Under *Mapp* and *Wong Sun*, any evidence gained following a constitutional violation by police would be suppressed in order to prevent the authorities from benefitting from the violation of constitutionally protected rights. *Mapp,* 367 U.S. at 645; *Wong Sun*, 371 U.S. at 488. However, strictly enforcing exclusion in this case would not restore the rights violated by Jones' unlawful stop but it would grant immunity to Doe in his assault on a police officer. The court must determine whether to excuse Jones' violation of Doe's constitutional rights or Doe's violent assault. Many jurisdictions have adopted the new crime exception to exclusion in order to allow admission of evidence of the new crime at trial. *See generally*. *Sprinkle*, 106 F.3d 613; *Pryor*, 32 F.3d 1192; *Waupekenay,* 973 F.2d 1533;. *King,* 724 F.2d 253; *Bailey,* 691 F.2d 1009; *Nooks,* 446 F.2d 1283; *McGurk*, 958 A.2d 1005; *Panarello*, 949 A.2d 732, 734; *Burger*, 639 P.2d 706; *Miller,* 194 S.E.2d 353.

In the case of John Doe and Officer Jones, and in other similarly situated cases, the constitutional violation by police should not trigger the suppression of evidence relating to the following crime. The new crime exception has a sound basis in legal precedent. The new crime exception is based in concerns for the safety of police and the public *Brown*, 44 Va.App. at 594;

Burger, 639 P.2d at 707; *Miller*, 194 S.E.2d at 355; *Panarello*, 949 A.2d at 734 in accordance with other public safety exceptions to otherwise unconstitutional activity by police *Chimel*, 395 U.S. 752; *Gant*, 129 S.Ct. 1710; *Quarles*, 467 U.S. 649; *Bryant*, 131 S.Ct. 1143; *Davis*, 547 U.S. 813. The commission of a new independent crime breaks the chain of causation *Sprinkle*, 106 F.3d at 619; *McGurk*, 958 A.2d at 1011 from the original illegality by police. *Nardone*, 308 U.S. at 341. Finally, the elimination of the causal connection between the original violation by police and the evidence of the new crime *Pryor*, 32 F.3d at 1193; *Panarello*, 949 A.2d at 736 diminishes the deterrent value of suppression. *Segura*, 468 U.S. 804-805.

Evidence of the Doe's assault should be admitted at court because neither the safety of Officer Jones, nor the public at large should be placed in jeopardy in order to strictly apply exclusion, the unforeseeable intervening act of Doe's crime breaks the chain of causation between Jones's constitutional violation and the evidence to be suppressed, and suppression would not deter police misconduct. Suppression would not restore the rights violated and several public safety exceptions to exclusion bar the extreme remedy in cases in which the evidence in question is acquired by police in order to prevent or neutralize a threat to public safety. The new crime exception recognized in many jurisdictions allows for admission of evidence relating to a new crime despite a prior constitutional violation by police. This new crime exception should be upheld and adopted by other jurisdictions.