No. _____

IN THE

Supreme Court of the United States

J.A.,
Petitioner

v.

STATE OF NEW JERSEY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

I. DID A SEARCH INVOLVE STATE ACTION UNDER THE FOURTH AMENDMENT WHERE POLICE OFFICERS ENTERED A HOME ILLEGALLY, AN OFFICER THERE TOLD AN INQUIRING CIVILIAN THAT HIS BROTHER WAS SUSPECTED OF ROBBING A CELL PHONE, AND THE CIVILIAN THEN FOUND THE PHONE WHILE ACCOMPANIED BY THE OFFICER?

II. WAS THE DISCOVERY OF THE CELL PHONE UNDER THE ABOVE CIRCUMSTANCES A FRUIT OF THE ILLEGAL ENTRY, UNATTENUATED BY THE CIVILIAN'S INVOLVEMENT?

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The petitioner, J.A., respectfully prays that a Writ of Certiorari issue to review the June 6, 2018, judgment and decision of the Supreme Court of New Jersey. That decision affirmed the denial of his J.A.'s motion to suppress evidence.

OPINIONS BELOW

The June 6, 2018 opinion of the Supreme Court of New Jersey (Appendix A) is reported at *State ex rel. J.A.*, 233 N.J. 432, 186 A.3d 266 (2018).

JURISDICTION

The Supreme Court of New Jersey filed its opinion on June 6, 2018. (Appendix A) This petition for a writ of certiorari is filed within ninety days of the opinion. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> 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.

Section one of the Fourteenth Amendment to the United States Constitution states in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE MATTER INVOLVED

In the New Jersey Superior Court, J.A. was charged in a juvenile delinquency proceeding with committing robbery. He filed a motion to suppress evidence seized in violation of his constitutional rights. Police Officers Jesus Serrano, William Spanier, and Sharif Hewlett and Detective Ed Walker testified as follows at the suppression hearing.

At approximately 9:17 a.m. on May 30, 2014, Officer Serrano was dispatched to investigate a robbery at a Willingboro, New Jersey, bus stop. Complainant Jordan Crosland told Serrano that a "black male" had asked to borrow his iPhone. When Crosland permitted the stranger to use it, the stranger punched Crosland in the arm and ran off with the iPhone. Crosland provided a description of the suspect, which included that he was wearing camouflage shorts, and of the iPhone, which included that it had a glittery pink case.

Serrano and Crosland activated the "Find My iPhone" application. The application "pinned" to an address that was approximately three blocks away. After two minutes, the iPhone shut down and could no longer be tracked. The iPhone was still located at the pinned address when it shut down. At the hearing, Serrano did not explain how the Find My iPhone application functioned, other than providing the above account.

Serrano went to the address, which was a detached two-story house. Serrano and other responding officers, including Officers Spanier and Hewlett, began to "secure the perimeter." Serrano went to the rear of the house. The windows were

covered with blinds. Serrano did "an exterior security check." That is, he put his face "less than a foot" from a rear window and "peeked" in a "small space" left below the blinds. He saw a bedroom with a pink glittery phone case lying on the bed. (Serrano was referring to the case only, without the phone inside.)

Meanwhile, Spanier and Hewlett knocked on the front door. They received no answer. After waiting for approximately 30 seconds to 2 minutes, they decided to climb into an unlocked kitchen window. The officers had no warrant.

After climbing inside the window, Spanier and Hewlett began searching the house, looking in places where the suspect could be hiding. They encountered J.A.'s sister emerging from a downstairs bedroom. The sister looked like she had just woken up. The officers explained about the robbery suspect and asked if anyone else was inside. The sister indicated that she did not know. In another downstairs bedroom, the officers observed the glittery pink case. In the two upstairs bedrooms, they observed a pair of camouflage shorts on the floor and found J.A. in bed. J.A. was "sweating profuse" [sic] under the covers. The officers handcuffed J.A. and brought him downstairs.

At that point, Serrano left the house, picked up complainant Crosland, and drove him by the location while Spanier held J.A. in the driveway. Crosland was unable to identify J.A.

Spanier then left the location to go to the school of J.A.'s younger brother and investigate his possible involvement in the robbery. When Spanier left, the persons

present at the house were Hewlett, Serrano, Sergeant Cuney, J.A., and the sister. No one else had arrived yet.

Detective Walker arrived at the house "sometime after 10 in the morning." About two or three minutes later, J.A.'s older brother arrived. Shortly afterwards, J.A.'s mother, who was the homeowner, arrived home. The arrival of the mother occurred about fifteen minutes after J.A. was located.

At the hearing, Detective Walker initially gave the following account of what had happened when the older brother arrived. The older brother said, "Hey, guys, what's going on?" The officers explained that J.A. was suspected of robbing a cell phone. The older brother said, "That's some of the shit he would do. You guys find the phone?" Walker answered, "Nope." The older brother said, "If it is not in his room, it's probably in [the younger brother's] room cause they're like that." The older brother then proceeded up the stairs. Walker followed along, saying "Where are you going?" The older brother responded, "I know where it's at." The older brother turned into a bedroom with Walker still following. At the hearing, Walker described what he had then seen: "[The older brother] looks right to the left. [sic] He looks down. He looks up. Right there on the edge of the top shelf he pulls something out and goes, 'Is this what you are looking for?'"

Detective Walker saw that it was an iPhone. He exclaimed, "Oh shit!" Walker took the phone and went downstairs. Confronting J.A. with it, Walker said, "Dude, really."

After providing this above account at the hearing, Detective Walker clarified that he and the older brother had paused to speak to J.A. before going upstairs. The older brother had said, "J.A., if you did this, you need to let them know. Talk to them." Walker interjected to the older brother that he had talked to J.A. Walker then turned to J.A., "If you can give me this cell phone back maybe we can get this phone back to him and, you know, everybody's -- maybe he's just concerned with getting his property back. It doesn't have to go any further than that." J.A. denied doing anything.

Meanwhile, Serrano asked the mother for consent to search the house. At first, the officers did not have a consent form. The mother, however, gave verbal consent to search. The mother was "very irate" and told the officers that she was "sick" of J.A.'s "S-H-I-T." Walker testified at the hearing that only this verbal consent had occurred "at the scene," "at the location," or "on location." Sometime after the verbal consent, at 10:30 a.m., the mother signed a written form consenting to the search of the house. In describing the written consent, Serrano testified that he had told the mother that she had the right to refuse consent.

After the hearing, the Superior Court denied the motion to suppress evidence. J.A. went to trial and was adjudicated delinquent. The Appellate Division affirmed the denial of the motion to suppress in an unpublished decision. The New Jersey Supreme Court then granted J.A.'s petition for certification.

In a published five-to-two decision, the majority of the New Jersey Supreme Court ruled that the officers' initial warrantless entry into the home violated the

Fourth Amendment. At the time, the officers had no reasonable basis to believe that the robber knew that he was being tracked and that he would present a danger of violence or of destruction of evidence while a warrant was obtained. Therefore, the circumstances were not exigent. The officers should have obtained a warrant before entering. *See State ex rel. J.A.*, 186 A.3d 266, 276 (N.J. 2018).

Nevertheless, the majority refused to suppress the phone. The majority reasoned that the Fourth Amendment only restrains state action. *Id.* at 276-77. According to the majority, the older brother was "not acting as an agent of the State when he searched the house for the phone." *Id.* at 277.

> [D]efendant's brother decided to search the house without solicitation or even encouragement from the officers present. And when the brother successfully recovered the victim's phone, he offered it to the police without request. The mere presence of an officer during the brother's self-imposed investigation does not by itself indicate police coercion or influence.

Id. at 277-78. Thus, the "brother's search for the missing phone was independent non-state action free from constitutional restrictions." *Id.* at 277.

In addition, for essentially the same reasons, the majority held that the discovery of the phone was attenuated from the illegal entry: "Defendant's brother's unprovoked decision to search for the phone himself is an intervening circumstance that breaks the causal connection between the unlawful police entry and the finding of the phone." *Id.* at 278. In analyzing attenuation, the majority seemed to place the burden of proof on J.A.:

> No evidence in the record supports a finding that defendant's brother's search was causally or temporally connected to the police misconduct. . . . [T]he dissent's conclusions that the police's unconstitutional presence "surely heavily influenced" and motivated the brother's decision to search for the phone and that it was "not likely" that the brother would have looked for evidence in the parents' home without the presence of the police are unsupported by the record.

Id. at 278.

Having based its decision on lack of state action and attenuation, the majority declined to decide whether the mother's consent could justify the search.[1] *Id.* at 269, 278 n.2.

The dissenters would have ruled that attenuation was not proven and would have suppressed the phone. They criticized the majority for "ignor[ing]" that the burden of proof was on the state. *Id.* at 280-81 (Albin, J., dissenting). Placing the burden that way, the dissenters stated: "The State failed to show that the unlawful police occupation of the family home did not heavily influence the brother's decision to fetch the phone and that, absent the unlawful police presence, the brother would have volunteered to look for the phone." *Id.* at 279. The dissenters explained:

> [The brother's] offer to find the cell phone cannot be disentangled from the presence of the officers as an occupying force in his family's home. . . . It would hardly be surprising that the brother would want to hasten the departure of the police from his parent's home. The State did not show that the brother's action was voluntary, an

[1] At the New Jersey Supreme Court, J.A. and amici raised various issues as to the mother's purported consent, including whether the consent was untimely, i.e., was after the discovery of the iPhone; whether the consent was involuntary; and whether the consent was a fruit of the illegal entry.

> act of unconstrained free will, given that the officers appeared unlikely to leave until they accomplished their mission. Would the brother have looked for incriminating evidence to damn his seventeen-year-old sibling in the absence of the unconstitutional police presence in his parent's home? Not likely. Cast in that light, there are no true intervening circumstances breaking the unconstitutional chain of causation.

Id. at 281.

The dissenters did not address the majority's lack-of-state-action holding.

REASONS FOR GRANTING THE WRIT

In essence, the New Jersey Supreme Court's decision was based on the proposition that Detective Walker didn't find the phone; the civilian older brother found the phone. Thus, according to the decision's alternative rationales, the search did not involve government action and the discovery of the phone was attenuated from the illegal entry. The decision warrants this Court's review for several reasons:

1. The decision conflicts with this Court's decision in *Lustig v. United States*, 338 U.S. 74, 78-79 (1949), and with the various decisions that have followed *Lustig* over the years. To deter police gamesmanship, the *Lustig* line of cases takes the broad view that a search involves government action when a police officer has any hand in "the total enterprise of securing and selecting evidence." *Lustig v. United States*, 338 U.S. 74, 78-79 (1949). Detective Walker had such a hand here: he accompanied the older brother during the search; he and the other officers blocked any potential interference from J.A.; he recognized the evidentiary value of the iPhone; and he secured it for evidence. To be sure, not all modern decisions follow *Lustig*; some seem more like that of the New Jersey Supreme Court. These conflicts in the government-action decisions are a primary reason why certiorari should be granted.

2. The Court should reconcile *Lustig* and its progeny with *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). In *Coolidge*, the police officers accompanied the defendant's wife into his home and took the defendant's property. Nevertheless, the Court confusingly suggested that what happened was not a search or seizure by

the officers and did not involve government action. This reasoning seems to conflict with *Lustig* and with first principles of Fourth Amendment law. The tension can be resolved if the Court clarifies that the *Coolidge* result was actually justified by the wife's consent, not by the absence of government action.

3. The Court should clarify the key role that proximate causation -- and thus reasonable foreseeability -- play in the attenuation analysis. This Court's prior decisions suggest that reasonable foreseeability is, in fact, the key test in deciding whether evidence was discovered through exploitation of the police's illegal conduct. In other words, if the events that led to the discovery of the evidence were a reasonably foreseeable result of an illegal entry, suppression is appropriate to deter police misconduct. *See Brown v. Illinois*, 422 U.S. 590, 609-10 (1975) (Powell, J., concurring). The problem is that these prior cases are open to misinterpretation because they never seem to have explicitly used the terms "proximate causation" and "reasonable foreseeability." And such a misinterpretation occurred here: the majority and dissenters in the New Jersey Supreme Court focused on everything but the foreseeability that a civilian, upon learning the object of police officers' entry into a home, would undertake to assist the officers in finding evidence. This decision should be reviewed to provide needed clarification of attenuation law.

Below, the Petition addresses each of these three reasons in turn.

I. The New Jersey Supreme Court decision, which held that no government action had occurred even though an officer was present during the search and identified the stolen property, conflicted with this Court's decision in *Lustig v. United States*, 338 U.S. 74 (1949), and with the decisions of various other courts.

There can be no quibbling with the proposition that the Fourth Amendment only reaches government action. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). The question is: When does a search that is ostensibly made by a civilian involve government action? Before the incorporation of Fourth Amendment protections into the Fourteenth Amendment -- i.e., when the Fourth Amendment only restrained federal officers -- this Court often confronted an analogous issue: When does a search that is ostensibly made by a state officer involve federal action? The leading case of the time took the broad view that a search involved federal action if a federal officer had any hand in "the total enterprise of securing and selecting evidence." *Lustig v. United States*, 338 U.S. 74, 78-79 (1949).

In *Lustig*, the federal officer's investigation of counterfeiting caused him to communicate to local officers that "something was going on" in a particular hotel room. Without the federal officer's presence, the local officers began a warrantless search of the room. *Id.* at 76-77. The federal officer "did not request the search" and "was not the moving force of the search." *Id.* at 78. Nevertheless, the federal officer arrived at the tail end, after the state officers had already rummaged through the occupants' belongings. The federal officer then examined the items in the room and selected those that were evidence of counterfeiting. *Id.* at 77.

This Court held that the search involved federal action. "[S]earch is a functional, not merely a physical, process. Search is not completed until effective appropriation, as part of an uninterrupted transaction, is made of illicitly obtained objects for subsequent proof of an offense." *Id.* at 78. The federal officer's selection of the evidence was "not severable" and was part of the search. *Id.* The Court explained:

> It surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection with the view to its use in a federal prosecution, or the federal agent himself takes the articles out of a bag. It would trivialize law to base legal significance on such a differentiation. Had [the federal officer] accompanied the city police to the hotel, his participation could not be open to question even though the door of Room 402 had not been opened by him.
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> * * * *
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> It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it.

Id. at 78-79.

Another case from the pre-incorporation era -- which found federal action when a federal officer accompanied local officers on a search -- further explains this result. The Court enjoined "vigilan[ce] to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods." *Byars v. United States*, 273 U.S. 28, 32 (1927). No judicial sanction should be placed on "equivocal methods, which, regarded superficially, may

seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right." *Id.* at 33-34.

In the modern post-incorporation era, courts have continued to rely on the above cases. But the issue now is an analogous one: whether a government actor has participated in a search that was ostensibly initiated by a civilian actor. In one case, for example, the complainant invited a police officer to stand by the open door while the complainant searched the defendant's apartment for stolen property. *Moody v. United States*, 163 A.2d 337, 339 (D.C. 1960). In holding that the officer had participated in the search, the court commented: "We cannot characterize him as a willing but innocent beneficiary in standing silently by while the appropriation was taking place. The officer certainly recognized the evidentiary value of the goods themselves." *Id.* at 340. The officer, concluded the court, should have posted a guard at the door while obtaining a search warrant. *Id.*

See also *United States v. Reed*, 15 F.3d 928, 930-33 (9th Cir. 1994), holding that officers participated in a search by responding to the summons of a hotel manager who suspected drug activity and by standing by while the manager searched the room; *United States v. Payne*, 429 F.2d 169, 170-71 (9th Cir 1970), holding that an officer participated in a search by responding to the summons of a civilian who suspected drug activity and by standing by while the civilian searched his neighbors' car; *Stapleton v. Superior Court*, 447 P.2d 967, 970 (Cal. 1968), stating that "the police need not have requested or directed the search in order to be

guilty of 'standing idly by'; knowledge of the illegal search coupled with a failure to protect the petitioner's rights against such a search suffices."

But cases can be found that are inconsistent with those above. In one extreme example, an officer stationed at a FedEx facility subjected a package to a canine sniff for drugs. The dog alerted. The officer then took the package to a FedEx manager, explained his suspicions, and said that "if she wanted to open it that would be fine." *United States v. Smith*, 383 F.3d 700, 703 (8th Cir. 2004). Despite the officers' actions and his presence at the subsequent search, the court held that the search was private. The court mainly reasoned that the officer "made it clear that he was not asking or ordering [the manger] to open the package," and "[t]here is no evidence that [the manager] felt she was obligated to open the package." *Id.* at 705.

In another case, a bus station employee believed that a package was suspicious. He called in a police officer. The officer said that he believed the employee could open the package, while the officer could not. The officer then stood by while the employee opened the package. *United States v. Smythe*, 84 F.3d 1240, 1241-42 (10th Cir. 1996). The court held that the search was private. The court reasoned that the officer had "in no way instigated, orchestrated or encouraged the search"; his "mere presence" did not change its character. *Id.* at 1243. *See also Hensley v. Gassman*, 693 F.3d 681, 688-692 (6th Cir. 2012) (collecting repossession cases and analyzing the varying results reached on whether police presence constituted government action).

J.A.'s case could hardly be more similar to *Lustig*, where the federal officer was held to have participated in the search. Similar to the federal officer, Detective Walker alerted J.A.'s older brother that "something was going on": in J.A.'s case, that "something" was that J.A. was suspected of robbing a cell phone. Although neither the federal officer in *Lustig* nor Walker directed the search, both tagged along and played the crucial role of examining the items grabbed, recognizing their evidentiary value, and securing them for evidence.

Detective Walker and his colleagues, in fact, played an even greater role than the federal officer in *Lustig*. Unlike the *Lustig* suspects, J.A. was present at the time of the search. Thus, the illegal police presence in J.A.'s house ensured that he did not interfere with or protest the older brother's search -- as he might have if the officers were absent. In sum, just as in *Lustig*, Walker and his colleagues had a hand in "the total enterprise of securing and selecting evidence."

The New Jersey Supreme Court's decision – that Detective Walker did not participate in the search because he did not explicitly encourage it – was contrary to *Lustig* and the modern cases that follow *Lustig*. The decision was closer to the cases on the other side of the split, like *Smith* and *Smythe*. These conflicts in the cases -- which have developed in the almost seventy years since the Court last issued a comprehensive opinion on government action and the Fourth Amendment -- deserve the Court's attention.

II. The Court should take this case to reconcile *Lustig* and its progeny with *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) -- which seemed to hold that no government action had occurred even though officers had accompanied defendant's wife into his home and had taken his property.

The Court has issued at least one opinion in the modern era discussing state action and the Fourth Amendment. Unfortunately, the opinion's reasoning is brief and is in tension with *Lustig* and its progeny. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), police officers accompanied the defendant's wife into his home and took the defendant's property. Nevertheless, the Court confusingly suggested that what happened was not a search or seizure by the officers. The tension can be resolved if the Court recognizes that *Coolidge* is actually justified by the wife's consent, not by the absence of government action.

In *Coolidge*, the officers suspected the defendant of murder. They went to his home to question his wife, who let them in. *Id.* at 488. They asked if defendant owned any guns. Believing that she was producing evidence that would exonerate the defendant, she answered affirmatively and volunteered that she would get the guns from the bedroom. *Id.* at 486, 489. The officers accompanied her. The wife took four guns out of the closet and told the officers that they could take them. She likewise gave them the clothes that the defendant was wearing on the night of the murder. *Id.* at 489.

The Court refused to suppress the items. The court framed the question as whether the wife was acting as an "agent of the state" when she turned them over.

Id. at 487. The Court answered that question in the negative, reasoning principally that the police did not "coerce" her and that she had acted voluntarily "of her own accord." *Id.* at 489.

In thus holding that no government action had occurred, the Court did not examine the significance of the officers' entry into the home and seizure of property. This omission is problematic. Under *Lustig* and under any rational view of Fourth Amendment rights, such events are invariably significant and require sufficient justification -- i.e., some combination of consent, probable cause, a warrant, exigent circumstances, etc.

The answer to this puzzle was suggested in subsequent cases of this Court. Without extended discussion, these cases reclassified *Coolidge* as a decision involving third-party consent by a person with apparent authority over the property. *United States v. Matlock*, 415 U.S. 164, 171 (1974); *Schneckloth v. Bustamonte*, 412 U.S. 218, 245 (1973). Indeed, it makes eminent sense to view what happened in *Coolidge* as a government search and seizure, but one that had the wife's voluntary consent. Such a view avoids the inevitable confusion caused by a decision that no government action occurred, even though officers had entered a home and had seized property therein. In short, another reason to grant certiorari in J.A.'s case is to fully address any tension in government-action doctrine caused by the *Coolidge* decision.[2]

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[2] It must be noted that that Detective Walker's involvement in the search of the bedroom could not be justified by any purported consent of the older brother. First, (footnote continued)

III. The New Jersey Supreme Court's attenuation holding -- that the older brother's retrieval of the phone was an intervening circumstance that broke the causal chain -- shows the need for this Court to clarify the role that reasonable foreseeability should play in the causation analysis.

At bottom, a court must analyze proximate causation to determine whether evidence was obtained through exploitation of illegal police action and is therefore suppressible. An early case referred to the "causal connection" between the illegal police conduct and the discovery of the evidence and to the possibility that "such connection may have become so attenuated as to dissipate the taint." *Nardone v. United States*, 308 U.S. 338, 341 (1939). *See also Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (stating the issue as "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"). A leading attenuation case picked up on the theme of proximate causation by referring to the possibility of "intervening circumstances": specifically, the factors to be considered in determining whether evidence is obtained through exploitation of an illegality are the "temporal proximity" of the

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the prosecutor – who would have had the burden of proving the brother's apparent authority to consent, *see Illinois v. Rodriguez*, 497 U.S.177, 181 (1990) – never attempted to prove it. Moreover, the little information in the record casts serious doubt on the older brother's authority because he didn't seem to live in the home; that is, he didn't seem to live in the specific bedroom searched or in any of the other three bedrooms mentioned in the record. Most importantly, even assuming the older brother's apparent authority, any consent was a fruit of the illegal police presence in the home. More on that next.

illegality and the discovery of the evidence, "the presence of intervening circumstances," and "the purpose and flagrancy of the official misconduct." *Brown v. Illinois*, 422 U.S. 590, 603-604 (1975). *See also Hudson v. Michigan*, 547 U.S. 586, 592 (2006) (stating that "but-for causality is only a necessary, not a sufficient, condition for suppression").

As with any issue of proximate causation, the key question is whether the result was reasonably foreseeable at the time of the wrongful act. As Justice Powell explained:

> The notion of the "dissipation of the taint" attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.
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> * * * *
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> The basic purpose of the rule, briefly stated, is to remove possible motivations for illegal [conduct].
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> .

Id. at 609-10 (1975) (Powell, J., concurring).

While the key role of proximate causation and reasonable foreseeability can thus be gleaned from this Court's cases, the problem is that the Court never seems to have employed the phrases "proximate causation" and "reasonable foreseeability." This omission leaves the proper analysis open to misinterpretation.

Such a misinterpretation seems to have occurred here. A proper analysis shows that the older brother's involvement in the search for the phone was not an intervening circumstance that broke the chain of causation. When the officers entered the home in pursuit of the cell phone robber, it was reasonably foreseeable

that they would reveal their purpose to any civilians inside the home. Such a revelation is exactly what society would expect from its police officers (although society would, of course, frown on the illegality of the entry). It was also reasonably foreseeable that any innocent civilians thus informed would assist if they happened to have an idea where the cell phone was located. Such assistance is exactly what society would expect from its citizens. In short, officers illegally entered J.A.'s home looking for the cell phone robber, they found a suspect and a phone shortly after, and nothing about the events inside was unforeseeable. The phone was a fruit of the illegal entry.

The New Jersey Supreme Court majority made two mistakes in holding otherwise. First, the majority improperly shifted the burden of proof to J.A.. The prosecutor should have been required to prove that the discovery of the evidence *was not* caused by the illegality; it was not incumbent upon the defendant to prove that the discovery of the evidence *was* caused by the illegality. *See Brown,* 422 U.S. at 604.

More to the point, the majority improperly focused on whether the older brother's search was "voluntary,' "unprovoked," and unencouraged by the police. *J.A.*, 186 A.3d at 278. The dissenters made a similar mistake, focusing on whether the older brother's conduct was in some sense not voluntary and not "an act of unconstrained free will." *Id.* at 281 (Albin, J., dissenting). Neither side focused on the proper issue -- whether the events were a reasonably foreseeable result of the illegal entry. These mistakes are understandable given that the lack of explicitness

in this Court's prior cases. Accordingly, the Court should grant certiorari to provide needed clarification of the key role that reasonable foreseeability plays in the attenuation analysis.

In the end, the New Jersey Supreme Court's decision opens quite a loophole in the Fourth Amendment. Officers will receive the message that they can avoid the consequences of illegally entering a home if they simply inform the occupants of their purpose and then wait for the occupants to "voluntarily" fetch any contraband. An officer would later be able to say in court: "I didn't find it, the civilian found it." This message is pernicious. Certiorari should be granted.

CONCLUSION

For the reasons set forth above, the Court should grant certiorari to review the New Jersey Supreme Court's decision.

Respectfully submitted,

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