No. _____

SUPREME COURT OF THE UNITED STATES

BRAD SMITH
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the attenuation doctrine set forth in *Brown v. Illinois*, 422 U.S. 590 (1975), in the context of consent to search given following a Fourth Amendment violation. Petitioner contends that inconsistencies in the case law applying *Brown* led the First Circuit Court of Appeals to incorrectly answer the following question:

Question Presented: Was petitioner's consent to search following law enforcement agents' unconstitutional entry into the curtilage of his home sufficiently attenuated from the illegality to justify not applying the exclusionary rule when the agents admittedly knew they did not have probable cause to search the home or arrest the defendant, the agents entered by going through the locked driveway gate of an entirely fenced property, the agents did not leave when no one answered their knocks at the door, the agents continued to search behind a carport for the defendant, the agents lied to the defendant about the reason for their presence and obtained incriminating statements before admitting their true purpose, the agents separated the defendant from his companion before questioning him, and the agents obtained the consent within minutes after questioning petitioner in his home.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Brad Smith, respectfully requests a writ of certiorari to review the judgement of the United States Court of Appeal for the First Circuit.

PROCEEDINGS IN THE LOWER COURTS

In *United States v. Brad Smith*, No. 18-1109, the United States Court of Appeals for the First Circuit affirmed the district court's denial of petitioner's motion to suppress. The First Circuit opinion may be found at *United States v. Smith*, 919 F.3d 1 (2019) and in the appendix beginning at A17.

The decision of the United States District Court for District of New Hampshire denying petitioner's motion to suppress may be found at *United States v. Smith*, 2017 U.S. Dist. LEXIS 201063 (NH October 18, 2017) and in the appendix beginning at page A1.

STATEMENT OF JURISDICTION

The First Circuit Court of Appeals issued its decision on March 15, 2019, and petitioner did not seek a rehearing. This court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment of the United States Constitution provides, in relevant part, that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE[1]

The Investigation

Petitioner Brad Smith was convicted and sentenced on six counts of sexual exploitation of a child to produce child pornography. He asks this Court to review the lower courts' rejection of his motion to suppress. Therefore, this statement of the case focuses on the facts and rulings related to the suppression issue while only summarizing other aspects of the case for context.

This case began in early 2014 when federal agents located child pornography in the email account of a person who lived in Michigan. That suspect was found to be in possession of child pornography and later admitted that he traded child pornography by email. The suspect had received child pornography videos from the address "smittyb172@yahoo.com" and the sender had offered to provide more. In November of 2015, a federal magistrate issued a search warrant authorizing a search for and seizure of records from the Yahoo email account. Yahoo found and produced the records to the Government. Upon reviewing the records, federal agents determined that the account was registered to Brad Smith, of Concord, New Hampshire. Through their databases, federal agents learned that Smith was living at a pecan farm in Breaux Bridge, Louisiana.

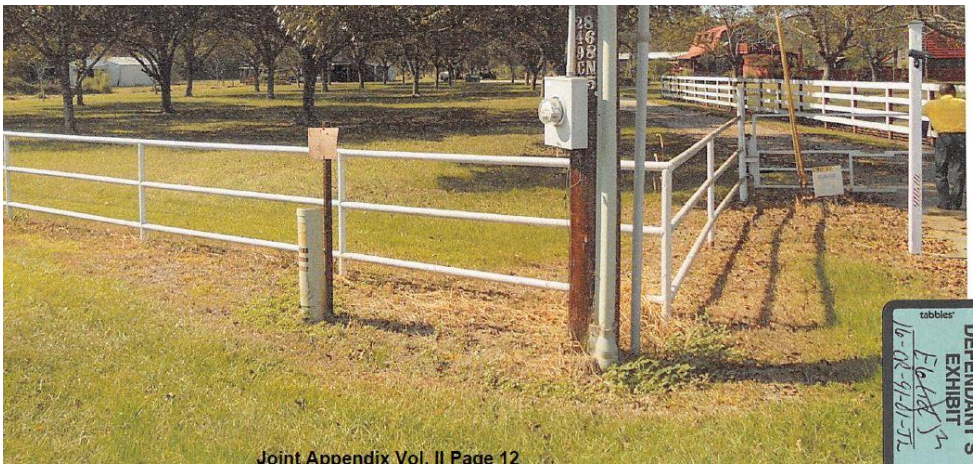
The agents in Michigan notified Special Agent Lance Lopez at Homeland Security Investigations (HSI) in Lafayette, Louisiana, of the findings so he could pursue the investigation in Louisiana. Agent Lopez typically investigated cases involving child pornography, illegal immigration, and intellectual property issues. He regularly worked with HSI Special Agent Errol Catalan, a computer forensics expert, and Investigator Georgianna Kibodeaux, of the Louisiana

[1] Citations to the record supporting the factual summary are provided in Brad Smith's brief and the appendix filed in the First Circuit Court of Appeal at No. 18-1109 on the First Circuit's electronic docket.

State Police, who often investigated child sexual exploitation cases.[2] All three had worked on cases together as a team prior to this case.

The pecan farm was located on Main Highway in Breaux Bridge. The farm had a primary house with a small adjacent guest residence. A wooden fence enclosed an area behind the main house, including the guest house. A large carport, which was open on the front, and open on part of one side, adjoined the main house and the area in front of the guest house. There was a concrete parking area in front of the garage.

The perimeter of the farm was fenced, with additional fencing on parts of the interior of the farm, as pictured below.



The fence that ran along the main highway consisted of horizontal, parallel metal bars. There was enough space between the horizontal bars that a person could step through. A driveway ran from the parking area by the residences to the highway. Investigator Kibodeaux estimated the distance from the main house to the gate to be greater than 200 feet.

[2] This case was investigated by two special agents from Homeland Security Investigations and by an investigator from the Louisiana State Police. In this petition, Smith refers to all three as "the agents."

At the end of the driveway, by the highway, was a locked metal gate which opened by operation of a motor.

The gate could not be opened without a passcode being entered on a keypad next to the gate. The passcode was not posted, but there was a sign near the gate that provided a phone number to call "for deliveries." There was no other signage near the gate. As with the metal fence that ran along the front of the property, there was enough space between the horizontal bars of the gate that a person could duck under the top bar and step sideways over the middle bar to pass between the top bar and the middle bar.

Agent Lopez received the report from HSI in Michigan on January 5, 2016. He began his investigation by conducting surveillance of the cars entering and leaving the farm. He ran the license plate numbers of the vehicles he observed, but he was not able to link any of them to Smith. Agent Lopez also contacted utility companies but determined that no utility service accounts for the farm were in the name of "Brad Smith."

During his surveillance, Agent Lopez noted the phone number on the sign by the gate at the end of the driveway. Agent Lopez called the phone number "with a ruse of just seeing who would answer the phone." When the call was answered, Agent Lopez did not reveal that he was an HSI agent. Instead, he said that he "taught at a school" and was "inquiring about tours of the

pecan farm." Smith answered Agent Lopez's call, identified himself, and stated that the farm was not currently giving tours.

Agent Lopez's next step was to meet with the local United States Attorney's Office about the possibility of obtaining a search warrant. However, after reviewing the investigation, Agent Lopez and the Assistant United States Attorney determined that they would not be able to obtain a search warrant because their information was stale – too much time had passed between the date of the emails transmitting the child pornography and the suspect coming to Louisiana.

Unable to obtain a warrant, Agent Lopez decided to conduct a "knock and talk." On January 16, 2016, Agent Lopez, Agent Catalan, and Investigator Kibodeaux traveled to the pecan farm in a truck. Agent Catalan drove and parked the truck outside of the gate. The gate was closed and could not be opened without the passcode. Agent Lopez again called the phone number on the sign by the gate "for deliveries," but there was no answer.

When no one answered his phone calls, Agent Lopez made the decision that he and Investigator Kibodeaux would go through the gate to attempt the "knock and talk." Agent Lopez testified that he stepped between the bars of the gate "like when you go through a barbed wire fence." The gate was made of two pieces that joined at the center, but Agent Lopez testified that there was not enough of an opening between the two parts to walk through. He noted that if the opening had been large enough to fit through, "that's probably the way we would have went." Investigator Kibodeaux testified that, although she stepped through the bars of the gate in the same manner as Agent Lopez, she later found that the two parts of the gate could be pushed apart so that the opening was large enough for her to fit through. No witness testified that a person could step between the two parts of the gate without pushing the two pieces apart. Nor did any witness testify that the gate had a design feature intended to allow pedestrians to pass through it.

Agent Lopez and Investigator Kibodeaux walked down the driveway to a pathway that led to the steps of the main house. Agent Catalan stayed at the truck. Investigator Kibodeaux knocked on the front door of the main house several times but there was no answer.

Agent Lopez and Investigator Kibodeaux returned to the driveway, at which point they heard the sound of machinery. Agent Lopez said they heard "machinery operating to the back of the property or on the other side of the . . . carport." Investigator Kibodeaux said they walked down the driveway "because there were three vehicles present." Agent Lopez further stated that they walked down the driveway to the carport to "make contact with whoever was operating the machinery." Neither Agent Lopez or Investigator Kibodeaux could see the machinery or any person when they were in front of the house. They did not see the machinery or the person operating the machinery until they had walked through the parking area to the carport.

On the other side of the carport, the side opposite the main house and the highway, Agent Lopez and Investigator Kibodeaux saw a man, later identified as Brad Smith, and a woman near a backhoe. Neither the record nor the district court's decision indicate the precise point at which the agents first encountered Smith. Agent Lopez stated that he went to the edge of the concrete parking pad and waved to get Smith's attention. Investigator Kibodeaux stated that she remained "on the cement area, and Agent Lopez kind of walked off onto the grass and yelled" at the two people.

A photograph provided by the Government in discovery shows that someone took a picture of a vehicle with New Hampshire license plates under the carport. During their testimony, the agents were not able to definitively describe when the photograph was taken or who took it, however, the Government acknowledged on the record that the photograph was taken during the knock and talk. At that point, the district court judge commented that the

defense was offering the photograph "to establish that during the knock and talk officers may have been in locations that they are not to have been constitutionally."

Agent Lopez waived his arms, motioning to the people by the machinery to come over to him. Agent Lopez identified himself as an HSI Agent and Investigator Kibodeaux as from the Louisiana State Police. Smith asked why Lopez and Kibodeaux were there. Agent Lopez answered that he was there "to talk about immigrants working at the farm." Although HSI does deal with immigration issues, Agent Lopez was not at the farm to talk about immigration. He made that false statement to conceal his reason for being on the farm and to get more information from Smith. Agent Lopez acknowledged that he had used the tactic of claiming a need to talk about immigrant workers in past investigations.

Agent Lopez told Smith that "his partner's out at the vehicle, would you mind giving us the gate code so he can come in." Smith provided the passcode for the gate as requested and Agent Catalan then drove to the parking area and joined the group. Investigator Kibodeaux was wearing a Louisiana State Police Polo shirt. Her sidearm and badge were visible. Agent Lopez was wearing plain clothes. He was armed but the weapon was under his clothes and not visible. Agent Catalan was similarly attired.

As Agent Catalan arrived, Agent Lopez asked Smith for identification, which he provided. Agent Catalan said that Lopez and Smith were standing in the front corner of the "overhang" of the carport. Agent Lopez asked Smith for an email address. The email address Smith gave had the same username as identified in the HSI investigation, "smittyb172," but had a gmail.com domain. Agent Lopez then asked Smith if he had another address. Smith said his backup address was smittyb172@yahoo.com, which matched the email address the agents had identified in the investigation.

Agent Lopez then asked Smith if they "could go into his residence because we had some additional stuff we needed to talk to him about." Smith agreed, leading Agent Lopez and Investigator Kibodeaux through the carport, through the fenced-in backyard behind the main house and in front of the guest house, and into the guest house where he was living. Smith was alone with the agents because Agent Catalan had asked Smith's companion to stay away. Agent Catalan subsequently retrieved a backpack with forensic computer equipment from the truck, then joined the other agents in the house a few minutes later.

Inside the guest house, Agent Lopez asked Smith if he looked at pornography. When Smith answered yes, Agent Lopez asked if he had ever come across child pornography and possibly downloaded it. Smith responded that he had downloaded child pornography accidentally. He then described a computer upstairs which contained child pornography, explaining that he had moved the child pornography files to a separate folder with plans to delete them.

The guest house was small, with only two rooms downstairs and one room upstairs. During the first part of the questioning, Agent Catalan was standing in the doorway of the downstairs entrance, but he denied that he was blocking the doorway or that Brad Smith ever attempted to leave.

When Smith stated that there was child pornography on his computer in the house, Agent Lopez asked for consent to search the computer. Agent Lopez testified that he read a consent to search form to Smith, but Smith did not sign it at that time. The agents testified that Smith gave consent to search the computer, but that he also asked what would happen if he revoked consent or did not sign the form. Investigator Kibodeaux responded that she would seize the computer,

but that it would not be searched until a judge granted a search warrant. She also informed Smith that he had the right to refuse consent.

Investigator Kibodeaux retrieved the computer and two computer peripherals from an upstairs room. As she came back downstairs with all three devices, Agent Catalan began to audio record the conversation. When asked about the two peripheral devices, Smith stated that the child pornography images would be on the computer but he consented to the search of the peripheral devices as well.

In further questioning, Smith asked whether he should be speaking to the agents. Agent Lopez responded, "whatever you want to do to proceed from here is up to you." When Agent Lopez asked Smith about coming back to the office, Smith asked if "there would be consequences either way," then ultimately declined to come back to the office with the agents. The agents further informed Smith that if he had an attorney, the attorney might be able to arrange for self-surrender.

After the recording ended, Agent Lopez provided Smith with a receipt for the property taken. Lopez also asked if Smith would sign the consent form which had been read earlier. After Agent Lopez read the form aloud, Smith signed the form, which stated that he was acting voluntarily, that he consented to search and seizure of the devices, and that he knew he had the right to withdraw his consent.

All three agents left, with Agents Lopez and Catalan returning to their office. When Agent Catalan attempted to access one of the peripheral devices, he found that it was passworded. Agent Lopez called Smith who provided the password. When Agent Catalan examined the peripheral device, he found videos in which a child was being sexually assaulted. The child in the video was the same child agents had seen in a photograph on the refrigerator in

the guest house. As a result of finding this evidence, Agent Lopez and Investigator Kibodeaux decided they would arrest Smith. Agent Lopez called Smith and falsely told him he could come into the station to retrieve his computer equipment. Smith came to the station as expected and was then arrested.

Investigator Kibodeaux conducted a post-arrest audio recorded interrogation of the Defendant. In the recording, the Defendant waived his *Miranda* rights, stated that he sexually assaulted the girl in the video, and that he is the person who made the video.

Procedural History of the Case

The Government indicted Smith on six counts of sexual exploitation of a child in violation of 18 U.S.C. §2251(a). The defense filed a motion to suppress the videos and other evidence. Among other theories, the defense argued that the entry to, and search of, the farm was unconstitutional, that the defendant's consent to entry of the residence and to the search of his computers was invalid, and that the videos and other evidence were fruits of those constitutional violations. The Government objected to the defendant's proffered version of the facts and his legal claims. After the testimony described above, the trial court ruled, in pertinent part, that the agents' entry through the gate did not violate the Fourth Amendment, that the agents had an implied license to enter the curtilage of the property to conduct the knock and talk, and that Smith's consent to the entry of his home and the search of his computer was validly obtained. *United States v. Smith*, 2017 U.S. Dist. LEXIS 201062 (D.N.H., Oct. 18, 2017).

At the trial, the Government presented the evidence of its investigation, the six videos found on the peripheral device during the search, and the subsequent recorded interrogation. Smith testified that he was innocent. The jury convicted Smith. On counts 1-5, the district court sentenced Smith to concurrent 360-month prison terms. On count 6, the sentence was 360

months, with 120 months concurrent to the sentences on counts 1-5, the remainder to be served consecutively to the sentences on counts 1-5, with the net effect that Smith is serving a sentence of 600 months (50 years).

Smith appealed the district court's denial of his motion to suppress. Relevant to this petition, Smith argued that his Fourth Amendment rights were violated when the agents entered the curtilage of the home by climbing through the locked gate, going to the front door, and then searching behind the carport, all of which were unconstitutional entries because any implied consent to enter the driveway was revoked by the locked gate. Smith further argued that his consent to the search that led to discovery of the videos was the fruit of the Fourth Amendment violation and was also involuntary. After briefing and oral argument, the Court of Appeals affirmed the denial of the motion to suppress. *United States v. Smith*, 919 F.3d 1 (1st Cir. 2019)

The Court of Appeals Opinion

The First Circuit declined to directly address the constitutionality of the agents' entry on the property or their search for Smith, stating:

> We need not resolve the legality of the agents' entrance onto the pecan farm, their knocking on the door of the primary residence, or their presence on the part of the farm where they first encountered Smith because, even assuming that there was a constitutional violation, Smith's subsequent consent was voluntary and not tainted.

Id., 919 F.3d at 10.

The Court described *Brown v. Illinois*, 442 U.S. 590, 603-04 (1975), as well as First Circuit precedent, as establishing a three-factor test for determining whether Smith's consent was tainted by the presumed Fourth Amendment violation. *Id.*, 919 F.3d at 11. The Court identified those three factors as (1) "temporal proximity" between the illegal act and the consent, (2) "the presence of intervening circumstances," and (3) "the purpose and flagrancy of the official misconduct." *Id.*

Regarding temporal proximity, the Court said there were, at a minimum, "several minutes" between the time the agents approached Smith behind the carport and the moment when they obtained Smith's consent to search inside the house. *Id*. at 11. The Court commented that at least two circuits would find that amount of time to weigh in favor of attenuation of the taint. *See United States v. Whisenton*, 765 F.3d 938, 942 (8th Cir. 2014) ("[F]ifteen minutes is sufficient to demonstrate an attenuation of the illegality."); *United States v. Myers*, 335 F. App'x 936, 939 (11th Cir. 2009) (unpublished per curiam opinion) (ten minutes sufficient attenuation where defendant was not handcuffed or detained and law enforcement agents were polite and non-threatening). However, the Court said it need not definitively resolve the issue of temporality because time is not the most important factor in the *Brown* analysis. *Smith*, 919 F.3d at 11.

The Court said the presence of an "intervening circumstance" was a more significant factor regarding attenuation. Relying on the Eleventh Circuit's decision in *Whisenton*, the Court said that an intervening circumstance which allowed the defendant time to "pause and reflect" weighs in favor of attenuation. *Smith*, 919 F.3d at 11-12; *Whisenton*, 765 F.3d at 942. The Court found such an intervening circumstance in Smith's case based on the agents' discussion of the consent form with Smith and Smith's opportunity to ask questions at that point. This exchange, the Court concluded, allowed Smith an opportunity to "pause and reflect," and thus constituted an intervening circumstance demonstrating attenuation of the consent from the Fourth Amendment violation.

Finally, the Court gave the most weight to its consideration of the "purpose and flagrancy of the misconduct" by law enforcement because that factor is tied directly to the rationale of the underlying exclusionary rule – deterrence of police misconduct. *Smith*, 919 F.3d at 12. Referring

to its own precedent and to *Brown*, the Court analyzed the "purpose and flagrancy" factor in light of (a) whether the police used threatening or abusive tactics, (b) whether the impropriety of the misconduct was obvious, and (c) whether the initial search was a mere evidence expedition calculated to elicit a confession or consent. *Smith*, 919 F.3 at 12, *quoting Brown*, 422 U.S. at 605 and *United States v. Stark*, 499 F.3d 72, 77 (1st Cir. 2007).

The Court found no threatening or abusive tactics because the agents were "professional and polite throughout their interactions with Smith," conduct which was described as a "far cry" from cases in which the police forcibly enter property, draw their weapons, or handcuff the defendant. *Smith*, 919 F.3d at 12. For the same reasons, the Court said it saw no evidence that the agents were on a "fishing expedition." *Id*. More importantly, according to the Court, the "alleged illegality of the agents' entry to the property was far from obvious." *Id*. at 13. Thus, even if the agents' conduct was unconstitutional, it was not "clearly so." For these reasons, the First Circuit said that any constitutional violation was not flagrant or purposeful.

Considering the entirety of its analysis, the First Circuit held that:

> [E]ven if one were to assume that the agents' initial entry onto the pecan farm or their knocking on the door of the primary residence on the farm was unlawful, we find that it did not taint Smith's later consent to the search of his computer and hard drives.

Id. Smith did not seek a rehearing at the Court of Appeal. He now asks this Court to review his case.

REASONS FOR GRANTING THE WRIT

The Current Body of Case Law Interpreting Brown Leads to Inconsistent and Unpredictable Results.

The Court should review this case because the lower court interpretations of *Brown v. Illinois* are so varied and inconsistent that the First Circuit was able to find attenuation of Smith's consent from a Fourth Amendment violation when another court might well have reached a different conclusion on similar facts. For example, the First Circuit repeatedly cited the *Whisenton* case from the Eighth Circuit, but *Whisenton* itself, 765 F.3d at 941, cites another Eighth Circuit decision, *United States v. Lakoskey*, 462 F.3d 965 (8th Cir. 2006), which favors petitioner.

In *Lakoskey*, the district court denied the defendant's motion to suppress which alleged an illegal entry of the defendant's home by a Postal Inspector. The defendant argued that his consent following the unlawful entry was invalid because the consent was a fruit of the unlawful entry. *Id*. at 971. The Eighth Circuit reversed the trial court and held that the entry to the home was unconstitutional. *Id*. at 974. Accepting that the defendant's consent was voluntary, *Id*. at 975, the Court nevertheless found that the consent was not attenuated from the unlawful entry into the home. *Id*. The Court pointed to facts quite similar to the facts in Smith's case: the Court did not view the constitutional violation as obvious (after all, the district and appellate courts disagreed on the issue); the police were not threatening or abusive; and the consent to the search was voluntary. Despite these facts, the *Lakoskey* Court said:

> Even if [the defendant's] consent was voluntary, however, we hold that such consent did not "right the officers' constitutional wrong, because "[the defendant's] acquiescence came immediately on the heels of the illegal entry." . . . Not only did [the defendant's] consent to search immediately follow the illegal entry, but no "intervening circumstances" occurred between the illegal entry and the consent.

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Id. Notably, the Court had assumed the voluntariness of the defendant's consent and thus did not view that as a sufficient intervening circumstance. Thus, if the *Lakoskey* panel had heard Smith's appeal and found the same facts, it would have likely disagreed with the First Circuit panel.

As explained below, the explanation for the contradiction in the analysis of Smith's case and Lakoskey's case is that the lower courts have not consistently interpreted the factors identified in *Brown*.

An Examination of the Brown v. Illinois Factors Demonstrates that They Are Inconsistently Interpreted.

Temporal Proximity. The First Circuit noted that there is no bright-line rule defining the temporal factor, but recognized that, in general, an extremely short timeframe favors a finding of no attenuation. *Smith*, 919 F.3d at 11. Nevertheless, the Court relied on cases from other circuits stating that time periods of 15 and 10 minutes were sufficient to support a finding of attenuation. *See Whisenton*, 765 F. 3d at 942 (15 minutes); *Myers*, 335 F. App'x at 939 (10 minutes). There are other cases, not cited by the First Circuit, which might support its point. *See, e.g., United States v. Conrad*, 673 F.3d 728, 733 (7th Cir. 2012)(valid consent two hours after unlawful entry into curtilage); *United States v. Barnum*, 564 F.3d 964, 972 (8th Cir. 2009)(valid consent 12-15 minutes after an illegal traffic stop).

Yet, there are other cases which do not support the idea that a matter of 10 to 15 minutes is sufficient to support a finding of attenuation. *See, e.g., United States v. Fox*, 600 F.3d 1253, 1260 (10th Cir. 2010) (consent invalid when obtained after amount of time it took for the defendant to drive across the street and the officer to run a records check); *Lakoskey*, 462 F.3d at 975 (consent to search not valid when given immediately after unlawful entry into home) (discussed above); *United States v. Robeles-Ortega*, 348 F.3d 679, 683 (7th Cir. 2003) (consent invalid when obtained within a few minutes of the illegal entry); *Compare Kaupp v. Texas*, 538

U.S. 626, 633 (2003) (a confession while in custody, rather than consent while not in custody, was at issue, but this Court noted that there was "no indication from the record that any substantial time passed" between unlawful arrest and confession)

To be sure, the temporal factor must be evaluated in the factual context of each case. On the other hand, an obvious advantage of time as a factor is that, it is, by definition, a uniform measure. Unfortunately, the value of this factor under current case law is questionable since there seems to be some support both for and against attenuation in the facts of most cases.

Intervening Circumstances. The First Circuit viewed the discussion of consent between *Smith* and the agents as an intervening circumstance which weighed in favor of finding attenuation. *Smith*, 919 F.3d at 12. Here again, the First Circuit relied on *Whisenton*, which also accepted the idea that the act of consenting may itself constitute an intervening circumstance. *Smith*, 919 F.3d at 12; *Whisenton*, 765 F.3d at 77. The Court found additional support in *United States v. Delancy*, 502 F.3d 1297, 1311-12 (11th Cir. 207), which said the review and signing of a consent form may be an important intervening circumstance.

Other cases do not appear to give any weight to the idea that the consent itself may serve as the intervening event weighing in favor of attenuation. *See, e.g., Lakovsky*, 462 F.3d at 975; *United States v. Chanthasouxat*, 342 F.3d 1271, 1280-01 (11th Cir. 2003) (expressly stating that voluntariness was a requirement separate from the analysis of the *Brown* factors). Moreover, the theory that the consent may itself be an intervening factor is inconsistent with *Brown v. Illinois* itself. In *Brown*, the Court recognized that while the Fifth Amendment requires *Miranda* warnings before a confession may be found to be attenuated from an illegal arrest, *Miranda* warnings alone would be insufficient to demonstrate attenuation and justify not applying the exclusionary rule as a means of enforcing the Fourth Amendment. *Brown*, 422 U.S. at 601-02.

To be consistent with *Brown*, in the context of consent following an illegal search, valid consent would be prerequisite to the attenuation analysis, not a factor which supports that finding. In other words, voluntary consent is necessary to satisfy the Due Process requirements of the Fourteenth Amendment, but a showing of voluntary consent does not answer whether the exclusionary rule should be applied to deter future similar Fourth Amendment violations.

Purposeful or Flagrant Conduct: Lastly, the First Circuit cited purposeful and flagrant misconduct as the most important factor in its analysis. In general, petitioner does not dispute the importance of this factor which *Brown* described as "particularly" relevant. *Brown*, 422 U.S. at 603-04; *see also Utah v. Strieff*, 136 S.Ct. 2056, 2062-63 (2016); However, the First Circuit interpreted this factor too strictly, apparently requiring a finding that the police must kick in doors and hold suspects at gunpoint before this factor is said to be present. *Smith* 919 F.3d at 12. Other courts of appeals have not required a similar showing. *See, e.g., United States v. Beauchamp*, 659 F.3d 560, 574 (6th Cir. 2011) (expressly stating that the police misconduct was "investigatory," but not flagrantly unlawful, yet finding the taint not dissipated); *Lakoskey*, 462 F.3d at 975 (finding no attenuation based on close temporal proximity and no intervening circumstance, without a finding of flagrant misconduct). Moreover, although the First Circuit mentioned that it would be a concern if the police were on a "fishing expedition," it did not view the facts that the agents entered through a locked gate and lied to Smith about why they were there to be any evidence of flagrant misconduct. *Smith*, 919 F. 3d at 12.

These differing views among the lower courts regarding each of the *Brown* factors further demonstrates the need for the Court to grant review of this case.

The Inconsistencies in the Case Law Resulted in the First Circuit Failing to Apply the Exclusionary Rule in Circumstances When It Would Be Most Effective.

The widely varying views of the *Brown* factors produced an unjust result in Smith's case. This Court recently indicated, regarding application of the attenuation doctrine in another context, that the exclusionary rule should be enforced when police misconduct is most in need of deterrence, as opposed to when the police have simply made a mistake or were negligent. *Strieff*, 136 S.Ct. at 2063. The facts of this case present a strong argument for application of the exclusionary rule because:

- The agents consulted with an Assistant United States Attorney and knew the government did not have probable cause to search the defendant's home;
- The agents did not have either a search or arrest warrant justifying their entry onto the property;
- Even though the property was fenced and the driveway gate locked, the agents climbed through the gate, traveled down the driveway on foot, and approached the residence;
- The agents did not leave after knocking on the front door of the main residence and getting no answer;
- The agents continued their search behind the carport rather than leaving;
- The agents' contact with Smith surprised him because the agents had entered the property despite not getting an answer when they called the phone number posted by the locked gate;
- Agent Lopez initially lied to Smith about why the agents were present;
- Agent Lopez obtained incriminating information (confirmation of the email address) while questioning Smith under false pretenses and prior to any warning of any kind;

- Agent Catalan took steps to ensure that Smith was separated from his companion so that Smith faced the agents alone; and,
- The agents obtained Smith's consent within minutes after the foregoing events.

Notwithstanding these facts, and likely because of the inconsistent case law, the First Circuit was able to reach the conclusion that even if the initial search that located Smith was unlawful, his consent immediately thereafter was sufficiently attenuated from the illegality so that it should not be suppressed. That conclusion was in error and should be corrected by this Court in an opinion clarifying the application of the *Brown* factors in cases such as Smith's.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Court grant his petition for a writ of certiorari.

Date: June 13, 2019

Respectfully submitted,

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CERTIFICATE OF MEMBERSHIP OF SUPREME COURT BAR

I, Richard Guerriero, certify that I am a member of the Supreme Court Bar, Bar No. 177863, since 1988.

/s/ *Richard Guerriero*
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Counsel of Record
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SUPREME COURT OF THE UNITED STATES

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APPENDIX