No. _____

IN THE

Supreme Court of the United States

PAIGE DAVIS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fourth Amendment's prohibition against unreasonable searches and seizures protects persons in their homes against unwarranted intrusions. The exclusionary rule protects the Fourth Amendment guarantees by prohibiting the introduction of both primary evidence obtained as a direct result of an illegal search or seizure as well as "evidence later discovered and found to be derivative of an illegality," the so-called "fruit of the poisonous tree." *Segura v. United States*, 468 U.S. 796, 804 (1984). The purpose of the exclusionary rule is to deter future misconduct and this Court has recognized exceptions where exclusion does not further the goal of deterrence. The Supreme Court has articulated an exception to the exclusionary rule for cases where an arrest or search involved a Fourth Amendment violation but the connection between the illegal conduct and the subsequent discovery of evidence became so attenuated the deterrent effect of the exclusionary rule no longer justified its cost. *See Wong Sun v. United States*, 371 U.S. 471 (1975). In applying the "attenuation exception," *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), identified a three-factor test. More recently, *Utah v. Strieff* clarified that the "attenuation doctrine" applies where the connection between the government's unlawful act and the *discovery of evidence* is remote or has been interrupted by intervening circumstances. 579 U.S. 232, 238 (2016).

1) Is it error to apply the attenuation test articulated in *Brown v. Illinois* to determine whether evidence discovered *during* an illegal search should be suppressed? More specifically, where officers conduct an initial unconstitutional search discovering incriminating evidence, and subsequently obtain voluntary consent to perform a second search, is the admissibility of the evidence discovered in the initial search properly analyzed under the attenuation doctrine?

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties to the proceeding.

DIRECTLY RELATED PROCEEDINGS

United States v. Davis, Case No. 21-cr-30036-SPM-1, United States District Court for the Southern District of Illinois. Judgment entered October 29, 2021.

United States v. Davis, No. 21-3091, United States Court of Appeals for the Seventh Circuit, opinion affirming District Court, issued August 11, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Paige Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals, dated August 11, 2022, is published at 44 F.4th 685, and appears at Appendix 1 to this Petition.

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Illinois originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States.

Petitioner timely appealed the District Court's Amended Judgment of Conviction and Sentence to the United States Court of Appeals for the Seventh Circuit, pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The Seventh Circuit affirmed the judgment on August 11, 2022.

Petitioner seeks review of the Seventh Circuit's published opinion affirming Petitioner's conviction and sentence pursuant to 28 U.S.C. § 1254(1). This Petition is timely filed within 90 days of the Seventh Circuit's opinion affirming the District Court's final Judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

> 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.

STATEMENT OF THE CASE

Petitioner seeks review of the Seventh Circuit's opinion affirming the District Court's denial of his motion to suppress.

A. Factual Background: A state arrest warrant was issued for Petitioner Paige Davis, charging him with three counts of aggravated battery by discharge of a firearm. App. 3. Two months later, members of the U.S. Marshals Great Lakes Regional Fugitive Task Force learned Petitioner's whereabouts and arrested him just outside the front door of his residence, as he was opening the door and stepping out to walk his dog. App. 3. When asked, Davis confirmed to officers that there were children in the house. App. 3; Doc. 26-1.[1] The police officers proceeded to conduct two searches: First, despite having already arrested Petitioner, they conducted a "protective sweep" of his home and discovered a rifle. App. 3. Approximately 45 minutes later, the homeowner, Antoinette Ewing-Jimerson arrived home while officers were still on the scene. App. 3, 6. After obtaining her consent, officers conducted a second search of Petitioner's home. App. 3, 6. During the second search, items confirming Davis lived at the home were found—his clothes, wallet, and bank card. App. 7. The police report from the day of the arrest stated:

> Davis was immediately taken into custody without injury or incident. Officers standing perimeter took temporary custody of the dog which appeared to be non vicious. Davis when asked advised there were children inside the residence. A protective sweep of the residence was conducted checking for any individuals including the children Davis had mentioned to ensure the safety of the officers on scene. . . . I, and other officers entered a bedroom located in the northeast corner of the residence . . . [.] Behind the closet door a .22 caliber Ruger Rifle was found standing upright with its barrel pointed upward towards the ceiling. Pictures were taken with an agency's cell phone (U.S. Marshals) which were later downloaded and attached for review. . . . I collected the item[] as evidence and proceeded outside to secure them inside my unmarked police vehicle. Davis as I headed towards my police vehicle stated, "Hey, where you going, that's my gun".

[1] "Doc." refers to electronic documents in the case management/electronic case filing system of the United States District Court for the Southern District of Illinois.

> I, before securing the firearm inside my police vehicle properly unloaded it pointing the muzzle in a safe direction, extracting the magazine and removing rounds from inside the chamber. I visually and physically checked the firearm making sure it was empty.
> . . .
> Ewing-Jimerson while I and other officers were still on scene arrived home. Ewing-Jimerson gave officers on scene consent to search the residence.[2]

Doc. 26-1.

B) Trial court proceedings: On March 16, 2021, Petitioner was charged by indictment in the United States District Court for the Southern District of Illinois with one count of violating 18 U.S.C. § 922(g)(1). App. 2; Doc.1. On May 26, 2021, Petitioner filed a motion to suppress the rifle, which the District Court denied on July 20, 2021, without an evidentiary hearing. App. 2, 18.

In denying Petitioner's motion to suppress the rifle, the district court found the initial warrantless entry and search were justified under three exceptions to the warrant requirement. App. 2. First, the court found that the initial entry was justified as a protective sweep because the lack of detail on the ages of the children in the house suggested that a person inside the house could be a threat to the officers' safety. App. 21. The district court reasoned that the officers "were not given any reason to believe those inside the home did not pose a threat to the officers." App. 22. Second, the district court found that entry was alternatively justified under the exigent circumstance exception because Petitioner "did not give the ages of the children inside the home nor state whether they could be exposed to any safety hazards inside the house" which created a compelling need to ensure the children's safety. App. 3, 24.

[2] Despite the officer's sequencing of events in the police report, which appears to indicate the rifle was taken to the officer's car *prior to* obtaining the homeowner's consent, according to the district court's characterization, the officers seized the rifle during the second search. App. 6, 8 n.3, 19. Because the district court did not rely on the timing of the retrieval of the rifle in any of its suppression analysis, Petitioner did not challenge the implied finding on appeal.

Finally, the court found even if the initial search was unlawful, Ewing-Jimerson had consented to a subsequent search of the entire house. App. 3, 24. The district court found her consent was voluntary and was not tainted by the initial entry by applying the attenuation exception factors set forth in *Brown v. Illinois*, 422 U.S. 590 (1975). App. 3, 25.

Petitioner entered a plea of guilty, reserving his right to challenge the denial of his motion to suppress on appeal. App. 2. Defense Counsel timely filed a notice of appeal from the district court's final judgment of conviction and denial of his motion to suppress.

C) Seventh Circuit review:

In his appellate brief, Petitioner argued the admission of the rifle was not justified under any of the three exceptions identified by the district court. Petitioner challenged the district court's conclusions that the initial search was justified as a protective sweep and exigent circumstances existed, arguing the district court erroneously relied on Petitioner's failure to proffer additional details to the police when confirming there were children in the house. Petitioner claimed it was the government's burden to justify the warrantless search and the district court impermissibly shifted that burden to the defendant to prove individuals in the home did not pose a danger to the officers at the scene and to disprove any children in the home were at immediate risk. As to the district court's ruling that the warrantless entry and search were justified based upon Ewing-Jimerson's consent, Defense Counsel argued the district court failed to consider and fully analyze all of the attenuation factors under *Brown v. Illinois*.

The Seventh Circuit affirmed. Assuming without deciding the initial search was illegal, the majority opinion concluded Ewing-Jimerson's voluntary consent justified the warrantless search. App. 3-4. The majority determined Ewing-Jimerson's consent was sufficiently attenuated from the taint of the initial entry by applying the multi-factor attenuation test

articulated in *Brown v. Illinois*. App. 4. In drawing this conclusion, the majority focused on the following *Brown* factors: the timing of the consent, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct. App. 4. As the majority opinion found the attenuation exception applied, it declined to reach Petitioner's challenges to the district court's other holdings—that the initial entry was justified both as a protective sweep and under the exigent circumstance exception. App. 3.

Judge Jackson-Akiwumi dissented from the majority opinion as she concluded the majority erred in relying on the attenuation doctrine. App. 7. Judge Jackson-Akiwumi noted the exclusionary rule requires courts to exclude both primary evidence obtained as a direct result of an illegal action as well as "fruit of the poisonous tree"—evidence discovered later but derived from the illegal action. App. 5. Judge Jackson-Akiwumi claims the *Brown v. Illinois* attenuation test applied by the majority applies *only* to the latter type of evidence—the "secondary fruits" derived from an earlier, illegal action. App. 5. Because it is undisputed the officers had already discovered the rifle—a primary fruit—during their initial search prior to seeking Ewing-Jimerson's consent, Judge Jackson-Akiwumi states the attenuation doctrine was applied in error by the district court and the majority opinion. App. 6, 7.

In support of her conclusion, Judge Jackson-Akiwumi, citing this Court's decision in *Utah v. Strieff*, 579 U.S. 232 (2016), notes the attenuation exception to the exclusionary rule applies when the causal link between the illegal act and the subsequent discovery of evidence is remote or has been interrupted by intervening circumstances. App. 6. Judge Jackson-Akiwumi claims the *Brown* attenuation test presupposes the challenged evidence was *not* discovered during an illegal search—noting the test focuses on the *gap* between the illegal action and the discovery of the evidence. App. 7. Judge Jackson-Akiwumi points to the Sixth's Circuit's clear

analysis in *United States v. Cooper*, 24 F.4th 1086,1095–96 (6th Cir. 2022), which held the district court erred by applying the attenuation exception when the homeowner consented to a second search, but the challenged evidence was discovered during earlier, illegal search. App.7.

Judge Jackson-Akiwumi further contends the majority misconstrued *Brown*'s attenuation test itself by focusing on whether the police obtained Ewing-Jimerson's *consent* through sufficiently attenuated means. App. 7. According to the dissent, the focus should be on whether the police obtained the evidence at issue—the rifle—through sufficiently attenuated means. App. 7. Moreover, even if Jimerson-Ewing's consent was sufficiently attenuated, Judge Jackson-Akiwumi found no basis to characterize the rifle as a product of that consent. App. 7.

According to the dissent, the only way Ewing-Jimerson's consent could possibly be relevant to the discovery of the rifle during the initial sweep is through the inevitable discovery exception—which would require the government to show the evidence would have been discovered in the absence of the unconstitutional act. App. 7. Judge Jackson-Akiwumi states the government would have to prove discovery of the rifle was inevitable by showing the police would have sought Ewing-Jimerson's consent regardless of whether they did the earlier sweep. App.7. The dissent conceded it was not clear the officers would have sought Ewing-Jimerson's consent had they not already found the rifle, and as such, the record was too undeveloped to affirm the district court's ruling. App. 7.

Judge Jackson-Akiwumi further noted as the majority opinion relied solely on consent as justification for admitting the rifle, it did not reach the district court's analysis of the protective-sweep and exigent-circumstances justifications for the officers' initial warrantless search. App. 8. Judge Jackson-Akiwumi found the district court erred in these additional findings too as it impermissibly shifted the government's burden to Petitioner to establish those exceptions. App.

8. Accordingly, Judge Jackson-Akiwumi concluded she would vacate Petitioner's conviction. App. 6.

The majority opinion disputes the dissent's conclusion that it erred, claiming the attenuation exception applies regardless of whether the rifle was discovered in the initial illegal sweep. App. 5. In support, the majority relies exclusively on *United States v. Liss*, 103 F.3d 617 (7th Cir. 1997), even though, as the dissent observes, the *Liss* court applied the attenuation doctrine to *derivative*, not primary evidence. App. 5. The majority further discounts the dissent's reference to the Sixth Circuit's opinion in *Cooper*. Although *Cooper* concludes the attenuation doctrine is inapplicable to the primary fruits of an illegal search, the majority suggests that holding should be limited to the circumstances in *Cooper*, where the evidence sought to be suppressed was both discovered *and seized* during the initial illegal search. App.5. However, the dissent easily dispels this suggestion, noting the majority's distinction runs afoul of *Utah v, Strieff*, which makes clear attenuation is concerned with the causal link between the illegality and the *discovery* of evidence, not its seizure. App. 7.

REASONS FOR GRANTING THE PETITION

The question in this case is whether the attenuation exception to the exclusionary rule may be applied to determine the admissibility of primary evidence discovered during an unconstitutional search where consent is later obtained to perform a subsequent search. Conflicting answers to this question triggered a dissent in this case and other circuit courts that have addressed this issue have similarly come to different conclusions. Resolution of the question is important to deter police misconduct and safeguard Fourth Amendment rights and warrants this Court's attention.

Petitioner challenged the validity of Ewing-Jimerson's consent to justify the warrantless search—but did not specifically urge the basis relied upon by the dissent. The Seventh Circuit, however, has addressed the question presented. The Supreme Court may reach an issue that was addressed by the court of appeals even though the parties did not raise it there. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n.8 (1991). The Supreme Court will not review a question not pressed *or* passed on by the courts below. *United States v. Williams*, 504 U.S. 36, 41 (1992). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon[.]" *Id.* Here, the Seventh Circuit passed on the question presented—an issue that is in a state of uncertainty, and one of importance to safeguarding Fourth Amendment rights. *See Virginia Bankshares*, 501 U.S. at 1099, n.8 (citations omitted; internal quotation marks omitted) ("It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law.").

A) The Seventh Circuit majority opinion erred in applying the attenuation doctrine to determine the admissibility of the rifle—a primary product of an unconstitutional search. Correcting this error will resolve confusion and conflict in the lower courts.

The Seventh Circuit majority opinion applied the attenuation test articulated in *Brown v. Illinois* to Ewing-Jimerson's consent to justify the prior warrantless search and discovery of the rifle. The majority found Ewing-Jimerson's voluntary consent was sufficiently attenuated from and untainted by the illegal entry and search. The majority clarified the attenuation doctrine applies regardless of whether the evidence sought to be suppressed was discovered during the initial illegal search. The majority's holding impermissibly expands this Court's application of the attenuation doctrine and misconstrues the *Brown v. Illinois* attenuation test.

Here it is undisputed the officers discovered the rifle on the initial search of Petitioner's home, prior to obtaining Ewing-Jimerson's consent. As the dissent points out, the discovery of the rifle during the initial sweep makes it a direct, primary product of an illegal search—constituting an important classification when it comes to determining whether the attenuation exception to the exclusionary rule is applicable.

"Under the Court's precedents, the exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and, 'evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree.'" *Strieff*, 579 U.S. at 237 (quoting *Segura*, 468 U.S. 804). While the primary fruits of a constitutional violation include materials seized in an illegal search and items observed in the course of the unlawful activity, in the typical derivative evidence, "fruit of the poisonous tree" case, the challenged evidence is acquired by the police *after* some initial Fourth Amendment violation. *United States v. Crews*, 445 U.S. 463, 470-71 (1980).

When excluding evidence would not further the goal of deterring police misconduct, the Supreme Court has created exceptions to the exclusionary rule so it does not apply. *Strieff*, 579 U.S. at 237-38. Three exceptions have been recognized that specifically involve the causal relationship between an unconstitutional act and the discovery of evidence: the independent source doctrine, the inevitable discovery doctrine, and the attenuation doctrine, which is at issue here. *See Strieff*, 579 U.S. at 238.

This Court, in *Segura v. United States*, addressed the distinction between primary and derivative evidence when applying attenuation analysis. The *Segurra* Court stated:

> *Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion.* The question to be resolved when it is claimed that evidence *subsequently* obtained is "tainted" or is "fruit" of a prior illegality is whether the challenged evidence was come at by exploitation of the initial illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

468 U.S. at 804–05 (quotations and brackets omitted; emphasis added). "The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence." *Strieff*, 579 U.S. at 238. Under the attenuation doctrine, "evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance." *Id.* at 238.

The majority opinion erred in applying the attenuation exception to the rifle. As noted by the dissent, every attenuation case cited by the majority opinion is distinguishable from the circumstances here where primary evidence of an illegality is at issue. In the cases relied on by the majority, the government sought to introduce *derivative* evidence that authorities had discovered during a subsequent investigation marked by intervening circumstances. *See* App. 9, n. 4 (distinguishing cases relied on by majority opinion).

Moreover, the majority opinion provides no authority for extending the attenuation exception to evidence obtained as a direct result of an unconstitutional search or seizure. The majority relies exclusively on the Seventh Circuit's opinion in *United States v. Liss*, 103 F.3d 617 (7th Cir. 1997), in support of the majority's proposition that the attenuation exception applies regardless of whether the evidence at issue was discovered during the initial illegal action. However, a review of *Liss* establishes the attenuation doctrine was applied by the Seventh Circuit to determine the admissibility of *derivative* evidence found in a subsequent consensual search (as well as a third search pursuant to a warrant) at a different location from the initial illegal search. *Id.* at 618–19. The *Liss* court noted the government had acknowledged there was "some problem" with the evidence discovered in the initial search and that it would only use the evidence obtained in the subsequent consensual search and the search pursuant to the warrant at trial. *Id.* at 619. Thus, in *Liss*, only derivative evidence—a fruit of the poisonous tree—was at issue and evaluated under the attenuation doctrine. *Liss* does not support the majority's proposition.

The majority also erred by applying the attenuation doctrine in a manner inconsistent with the articulation of the test by this Court. In finding the rifle admissible, the majority asked whether the police obtained Ewing-Jimerson's *consent* through sufficiently attenuated means from the illegality. As pointed out by the dissent, this was the wrong question, focusing on the wrong causal link. The plain language of *Strieff* makes clear the appropriate inquiry under *Brown* concerns the causal link between the illegal act and the discovery of evidence. *Strieff*, 579 U.S. at 238. The correct question, therefore, is whether the evidence at issue, the rifle, was a product of the initial illegality or was "come at by . . . sufficiently distinguishable" means. *Brown*, 422 U.S. at 599. Where the discovery of contraband is interwoven with and occurs

during the course of an unconstitutional search, as here, it cannot be deemed "sufficiently distinguishable" from the illegality. Moreover, Ewing-Jimerson's consent is not an "intervening circumstance" between the illegal search and the discovery of the rifle—it is subsequent event. As urged by the dissent, it is clear the attenuation exception presumes the challenged evidence was not discovered during an illegal search—and the test should not be applied to primary product of an illegality.

Significantly, the instances in which this Court has addressed or applied the attenuation doctrine indicate the attenuation exception should be confined to circumstances where the evidence in question is an indirect, derivative result of an unconstitutional act. Two seminal cases, *Brown and Wong Sun*, apply the attenuation exception to derivative evidence. Both *Wong Sun* and *Brown* involved derivative verbal evidence—confessions—that followed a prior illegal arrest. *Wong Sun*, 371 U.S. at 491; *Brown*, 422 U.S. at 591-92. In *United States v. Ceccolini*, this Court found sufficient attenuation between an officer's illegal search of an envelope's contents and the subsequent fruit-of -the-poisonous tree, derivative testimony of a witness. 435 U.S. 268 (1978). *Utah v. Strieff* involved derivative evidence of an illegality as well. 579 U.S. at 239-40 (during an unconstitutional investigatory stop, the discovery of a valid, pre-existing, and untainted arrest warrant led to a lawful arrest and the *subsequent* discovery and seizure of contraband). As qualified in *United States v. Crews*, in a "'*fruit of the poisonous tree case*,'. . . the question before the court is whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality." 445 U.S. at 471. In *Crews*, this Court considered whether an in-court identification was properly suppressed as the fruit of the poisonous tree of an illegal arrest. *Id.* at 463. In *Murray v. United States*, the Court

stated the exclusionary rule barred direct evidence of an unlawful search and then specified that *derivative evidence* is barred up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint. 487 U.S. 533, 536–37 (1988). The *Murray* Court considered whether the Fourth Amendment required the suppression of primary evidence initially discovered during the illegal entry of a private premises. *Id.* at 533. The *Murray* Court did not utilize the attenuation doctrine, but instead found the independent source doctrine could be applied to determine the admissibility of the primary evidence. *Id.* at 542.

Although this Court's guidance strongly indicates the attenuation exception concerns only secondary fruits, it has not directly addressed whether the exception is applicable to the primary evidence of an illegal search. Nor has the Court addressed the more specific question of whether the attenuation exception can reach evidence discovered during an initial illegal search followed by a consensual search.[3] As the conflict between the Seventh Circuit's majority opinion and the dissent here illustrates—in the absence of clarification from the Supreme Court, the circuit courts will continue to provide different answers to these inquiries. *Compare United States v. Cooper*, 24 F.4th 1086, 1095-96 (6th Cir. 2022) (holding the district court erred in applying attenuation doctrine when homeowner consented to a second search but the challenged evidence was discovered during earlier, illegal search), *and United States v. Serrano-Acevedo*, 892 F.3d 454, 460–61 (1st Cir. 2018) ((finding primary fruits of illegal sweep must be excluded, but concluding attenuation test was applicable to evidence recovered pursuant to subsequent consensual search), *and United States v. Delancy*, 502 F.3d 1297 (11th Cir. 2007) (applying inevitable discovery exception to drugs seized and ammunition observed during initial

[3] This question encompasses circumstances where the seizure of evidence discovered during an initial illegal search takes place during the illegal search or a subsequent consensual search. *Strieff* makes clear attenuation concerns the causal link between the illegal action and the *discovery* of evidence. *Strieff*, 579 U.S. at 239.

unconstitutional protective sweep and attenuation doctrine to evidence obtained pursuant to later consensual search), *with United States v. Scott*, 517 F. App'x 647, 648-50 (11th Cir. 2013) (applying attenuation exception to contraband discovered during unconstitutional protective sweep followed by a consensual search), *and United States v. Snype*, 441 F.3d 119, 130-35 (2d Cir. 2006) (applying attenuation doctrine to evidence observed during illegal entry as well as evidence obtained in later consensual search), *and United States v. Brandwein*, 796 F.3d 980, 982–85 (8th Cir. 2015) (applying attenuation doctrine to determine admissibility of guns and drug paraphernalia discovered during illegal entry where subsequent consent was obtained to search the premises).

B) Correcting the Seventh Circuit's holding serves the purpose of the exclusionary rule—to deter officer misconduct and protect the Fourth Amendment guarantees.

The Supreme Court has long recognized the need to exclude evidence obtained in violation of the Constitution's protections. *E.g., Weeks v. United States*, 232 U.S. 383 (1914). The exclusionary rule seeks to discourage official misconduct by removing the incentive to obtain evidence in violation of the Constitution. *United States v. Calandra*, 414 U.S. 338, 348 (1974) ("[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."). The invasion of a person's home is precisely the type of action the Fourth Amendment is most concerned with preventing, and therefore the interests in deterrence and in protecting the integrity of the judicial process are very high in this circumstance. *See Georgia v. Randolph*, 547 U.S. 103, 115 (2006).

Misconstruing the attenuation doctrine encourages Fourth Amendment violations. Treating direct evidence discovered during an unconstitutional search as a fruit that has fallen

away from the poisonous tree undermines the efficacy of the exclusionary rule. The underlying purpose of the attenuation exception is to mark the point where fruit has fallen so far from the tree—that the deterrent effect of the exclusionary rule no longer justifies its cost. *See Brown*, 422 U.S. at 609. Attenuation marks the point of diminishing returns of the deterrence principle. "It is critical that courts wrestling with 'fruit of the poisonous tree' issues keep that fundamental notion in mind, for when it is lost sight of the results can be most unfortunate." Wayne R. La Fave, Search and Seizure, § 11.4(a) (6th ed. 2022). Where, as here, the fruit has not even fallen off the tree, the rationale of attenuation loses its force as the deterrent value of exclusion is still substantial. The purpose of the exclusionary rule would be substantially eroded under the majority's application of attenuation.

The rationale underlying the attenuation exception can be compared to the rationale for the two other exceptions involving the causal relationship between an unconstitutional act and the discovery of evidence: the independent source and the inevitable discovery exceptions. While the attenuation doctrine serves the purpose of deterrence by analyzing the gap between the illegal act and the discovery of evidence, these independent source and inevitable discovery exceptions serve the goal of deterrence by contemplating the discovery of the evidence in the absence of the illegality. The "independent source" doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent lawful source. *See Murray*, 487 U.S. at 537. To be deemed admissible under the independent source doctrine, the evidence at issue must have been discovered by means wholly independent of any constitutional violation. *Nix v. Williams*, 467 U.S. 431, 443 (1984). Similarly, "the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source." *Strieff*, 579 U.S. at 238.

The independent source and the inevitable discovery doctrines flow from the deterrence goals underpinning the exclusionary rule itself: If the same evidence was discovered or would have been found without the illegality, then the deterrence rationale has so little basis that the evidence should be received. *See Nix*, 467 U.S. at 443-44. The independent source and inevitable discovery exceptions ensure that the exclusionary rule puts police in the same position they would have been in without the illegality, not a worse one. *See Murray*, 487 U.S. at 541.

The majority's application of the attenuation doctrine here to justify the illegal search gives Ewing-Jimerson's consent a retroactive effect, rehabilitates a prior illegal search and saves evidence discovered during that illegal search from exclusion, putting the police in a better position because of their unconstitutional conduct. Thus, the Seventh Circuit's majority opinion's holding that the attenuation exception applies regardless of whether the rifle was discovered during the illegal search ignores the purpose of the exclusionary rule, encourages police misconduct and ultimately dilutes and weakens the Fourth Amendment's guarantees.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Dated: November 7, 2022

Respectfully submitted,

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