

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*

PETITIONER'S APPENDIX TO PETITION FOR CERTIORARI

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44 F.4th 685

United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Paige DAVIS, Defendant-Appellant.

No. 21-3091

|

Argued May 27, 2022

|

Decided August 11, 2022

Synopsis

Background: Defendant moved to suppress rifle seized following warrantless entry and search of residence. The United States District Court for the Southern District of Illinois, [Stephen P. McGlynn, J.](#), 549 F.Supp.3d 829, denied motion. Following guilty plea to aggravated battery by discharge of firearm, defendant appealed.

[Holding:] The Court of Appeals, [Kirsch](#), Circuit Judge, held that assuming police officers' initial entry to defendant's home was illegal, co-resident's voluntary consent to search was sufficiently attenuated from initial entry.

Affirmed.

[Jackson-Akiwumi](#), Circuit Judge, filed dissenting opinion.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (11)

[1] Criminal Law 🔑 Review De Novo

Criminal Law 🔑 Evidence wrongfully obtained

Court of Appeals reviews the district court's denial of a motion to suppress under a mixed standard: legal conclusions de novo and factual findings for clear error.

[2] Searches and Seizures 🔑 Necessity of and preference for warrant, and exceptions in general

Searches and Seizures 🔑 Weight and Sufficiency of Evidence

Warrantless entry is presumptively unreasonable under Fourth Amendment, so it is government's burden to show, by preponderance of evidence, that search was reasonable under valid exception to warrant requirement. [U.S. Const. Amend. 4](#).

[3] Searches and Seizures 🔑 Persons Giving Consent

Searches and Seizures 🔑 Voluntary nature in general

In determining whether consent justifies a warrantless search, court determines whether the consenting individual had authority to consent to the searched spaces and whether her consent was voluntary. [U.S. Const. Amend. 4](#).

[4] Searches and Seizures 🔑 Prior official misconduct; misrepresentation, trick, or deceit

Assuming police officers' initial entry to defendant's home without a warrant was illegal, co-resident's voluntary consent to search was sufficiently attenuated from initial entry; 45 minutes passed between initial entry and co-resident's voluntary consent, co-resident was absent from scene during initial entry and first arrived long after initial sweep was over, and officers had good-faith reasons to go into home and conduct limited sweep for individuals who might have caused harm to officers or to themselves. [U.S. Const. Amend. 4](#).

[5] Searches and Seizures 🔑 Prior official misconduct; misrepresentation, trick, or deceit

When the government justifies a search after illegal entry based on voluntary consent, the government must show that the illegal entry did not taint that consent. [U.S. Const. Amend. 4](#).

[6] **Searches and Seizures** 🔑 Prior official misconduct; misrepresentation, trick, or deceit

Whether consent to search was tainted is a question of attenuation—whether the voluntary consent was obtained by exploitation of the preceding Fourth Amendment violation, or instead by means sufficiently distinguishable to be purged of the primary taint. *U.S. Const. Amend. 4.*

[7] **Searches and Seizures** 🔑 Prior official misconduct; misrepresentation, trick, or deceit

To decide whether voluntary consent to search was sufficiently attenuated, Court of Appeals uses multi-factor balancing test, including temporal proximity of illegal entry and consent, presence of intervening circumstances, and, particularly, purpose and flagrancy of official misconduct. *U.S. Const. Amend. 4.*

[8] **Searches and Seizures** 🔑 Prior official misconduct; misrepresentation, trick, or deceit

Mere presence of officers outside of the house is not enough from which to find an illegal entry tainted a voluntary search. *U.S. Const. Amend. 4.*

[9] **Criminal Law** 🔑 Operation and extent of, and exceptions to, the exclusionary rule in general

The court does not employ the exclusionary rule when suppression would do nothing to deter police misconduct.

[10] **Criminal Law** 🔑 Purpose of Exclusionary Rule

Court employs the exclusionary rule to ensure the proper incentives are in place for law enforcement to deter intentional conduct that was patently unconstitutional.

[11] **Searches and Seizures** 🔑 Persons Giving Consent

Police may obtain valid consent to search from someone with common authority over shared premises when defendant is not present, even if he is nearby. *U.S. Const. Amend. 4.*

***687** Appeal from the United States District Court for the Southern District of Illinois. No. 3:21-cr-30036 — **Stephen P. McGlynn**, *Judge*.

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Before St. Eve, **Kirsch**, and **Jackson-Akiwumi**, Circuit Judges.

Opinion

Kirsch, Circuit Judge.

Police arrested Paige Davis, a convicted felon, on a state warrant for three counts of aggravated battery by discharge of a firearm, just outside of his residence and then entered his house without a warrant. Police conducted a limited sweep of the home and a later consensual search. The officers recovered a .22 caliber rifle which led to Davis being charged with illegally possessing a firearm in violation of  18 U.S.C. § 922(g)(1). Davis moved to suppress the rifle on the basis that no valid exception to the warrant requirement justified the initial entry and then the later search. The district court denied Davis's motion based on the undisputed facts in the record, finding that the sweep and search were justified by three separate exceptions to the warrant requirement—a protective sweep following Davis's arrest, exigent circumstances because a child was in the home at the time of the arrest, and the voluntary consent to search by Davis's housemate, Antionette Ewing-Jimerson. Davis then pled guilty and reserved his right to appeal the denial of his motion.

On appeal, Davis argues that the sweep and search were not justified under any of the exceptions identified by the district court. We disagree, at least as to consent. Davis does not dispute the fact that Ewing-Jimerson's consent was voluntary, and the undisputed facts show that her consent was not tainted by the initial entry into the house, so suppression is unwarranted.

I

The facts are undisputed and based largely on the police report from the day of the arrest, upon which both parties relied. Paige Davis is a convicted felon with an extensive history of violent crimes, including aggravated battery of a peace officer. In October 2020, Davis was charged with three counts of aggravated battery by discharge of a firearm in violation of  720 Ill. Comp. Stat. 5/12-3.05(e)(1), and a state arrest warrant was issued. Two months later, members of the U.S. Marshals Great Lakes Regional Fugitive Task Force learned Davis'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.

While being arrested, Davis told the officers that there were children in the house. Officers then entered the house to conduct a limited sweep of areas where a person could be hiding, finding an eight-year-old child and a nineteen-year-old (whom Davis may have understood to be a child). During the sweep of the house, an officer observed a .22 caliber rifle standing upright in plain view in an open bedroom closet.

About 45 minutes later, well after the sweep had concluded, Antionette Ewing-Jimerson, *688 a woman with whom Davis was living and the owner of the house, arrived home. Officers were still at the scene when she arrived. Ewing-Jimerson gave the officers oral and written consent to search the home, acknowledging that she had been advised of her rights pertaining to the search. The district court found that she was not detained during the discussion and gave her consent “without threats or promise of any kind.” She talked with the officers during the search and volunteered information, including where Davis slept and his relationship to her. Davis, who was outside the house in custody and not present when Ewing-Jimerson gave her consent, never objected to the search.

The district court denied Davis's motion to suppress the rifle, finding that the warrantless entry and search were justified

under three exceptions to the warrant requirement. 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 officer safety, who were just outside the house. Second, the court found that entry was alternatively justified under the exigent circumstances exception because, given that the ages of the children were not known, there was a “compelling need to ensure the children's safety immediately.” Finally, the court found that the subsequent search was justified based on Ewing-Jimerson's consent to search the residence because her consent was voluntary and not tainted by the initial entry, even if it were illegal.

II

[1] We review the district court's denial of a motion to suppress under a mixed standard: legal conclusions de novo and factual findings for clear error. *United States v. Terry*, 915 F.3d 1141, 1144 (7th Cir. 2019). The facts in this case are not disputed, so our review is de novo.  *United States v. Conrad*, 673 F.3d 728, 732 (7th Cir. 2012). Because we conclude that Ewing-Jimerson's valid consent justified the warrantless search, we will start and end there.

[2] [3] Warrantless entry is presumptively unreasonable under the Fourth Amendment, see, e.g., *United States v. McGill*, 8 F.4th 617, 621 (7th Cir. 2021), so it is the government's burden to show, by a preponderance of the evidence, that the search was reasonable under a valid exception to the warrant requirement,  *Riley v. California*, 573 U.S. 373, 382, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014);  *United States v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000). In determining whether consent justifies a warrantless search, we determine whether the consenting individual had authority to consent to the searched spaces and whether her consent was voluntary. See *United States v. Correa*, 908 F.3d 208, 221–22 (7th Cir. 2018).

[4] [5] Davis does not dispute that Ewing-Jimerson, a co-resident in the shared home, had authority to give consent to the spaces searched in this case, see *Terry*, 915 F.3d at 1145, and he concedes that Ewing-Jimerson's consent was voluntary, see  *United States v. Thompson*, 842 F.3d 1002, 1009–10 (7th Cir. 2016) (voluntariness is a question of fact). Rather, Davis argues that, even if voluntary, Ewing-

Jimerson's consent was tainted by an initial, illegal entry. When the government justifies a search after illegal entry based on voluntary consent, the government must show that the illegal entry did not taint that consent. *United States v. Robeles-Ortega*, 348 F.3d 679, 681 (7th Cir. 2003); *Conrad*, 673 F.3d at 732–33. Here, we can assume without deciding that the initial entry was illegal, because even so, it did ***689** not taint Ewing-Jimerson's subsequent consent.

[6] [7] Whether consent was tainted is a question of attenuation—was the voluntary consent “obtained by exploitation of” the preceding Fourth Amendment violation, *Brown v. Illinois*, 422 U.S. 590, 603, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), “or instead by means *sufficiently distinguishable* to be purged of the primary taint,” *Robeles-Ortega*, 348 F.3d at 681? To decide whether voluntary consent was sufficiently attenuated, we use a multi-factor balancing test, “including (1) the temporal proximity of the illegal entry and the consent, (2) the presence of intervening circumstances, and, particularly, (3) the purpose and flagrancy of the official misconduct.” *Id.* (citing *Brown*, 422 U.S. at 603–04, 95 S.Ct. 2254).

[8] The undisputed facts establish that Ewing-Jimerson's voluntary consent was sufficiently attenuated from the initial entry. First, Davis concedes that 45 minutes passed between the initial entry and Ewing-Jimerson's voluntary consent. Forty-five minutes is more than sufficient time to support attenuation. See *United States v. Pineda-Buenaventura*, 622 F.3d 761, 776 (7th Cir. 2010) (forty-five minutes sufficiently attenuated); *United States v. Parker*, 469 F.3d 1074, 1078 (7th Cir. 2006) (“a matter of minutes” sufficient). Second, it is undisputed that Ewing-Jimerson was absent from the scene during the initial entry and first arrived long after the initial sweep was over. Her arrival long after the initial entry was a clear intervening circumstance severing any causal connection between an illegal search and subsequent consent. See *Robeles-Ortega*, 348 F.3d at 682 (characterizing such a case where the consenting individual “was not even at home when the illegal entry was made, and therefore the force and nature of the intrusion would not have tainted his consent”). Although Davis argues that the ongoing police presence and control of the scene at the time Ewing-Jimerson arrived negates the effect of her arriving after the sweep had long been completed, the “mere presence” of officers outside of the house is not enough from which to find an illegal entry

tainted a (as Davis concedes) voluntary search. *United States v. Valencia*, 913 F.2d 378, 382 (7th Cir. 1990).

[9] [10] But we do not close our attenuation inquiry without careful scrutiny of the “most important” factor—the purpose and flagrancy of the official misconduct, *Conrad*, 673 F.3d at 735, because with voluntariness conceded, our critical inquiry pivots from the consenting individual to whether law enforcement acted in bad faith. This inquiry matters because we do not employ the exclusionary rule when “suppression would do nothing to deter police misconduct.” *Davis v. United States*, 564 U.S. 229, 232, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). We have previously cautioned courts that losing sight of this “fundamental notion” allows guilty people to go free due to an irrelevant bungle on the part of law enforcement. *United States v. Carter*, 573 F.3d 418, 422 (7th Cir. 2009) (citation omitted); see also *Davis*, 564 U.S. at 236, 131 S.Ct. 2419 (stating the well-settled principle that suppression of evidence is not a Fourth Amendment right nor a remedy for a Fourth Amendment violation). Rather, we employ the exclusionary rule to ensure the proper incentives are in place for law enforcement to deter “intentional conduct that was patently unconstitutional.” *Herring v. United States*, 555 U.S. 135, 143, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009); see also *Davis*, 564 U.S. at 231–32, 131 S.Ct. 2419 (referring to the exclusionary rule as a “deterrent sanction” on the prosecution), *id.* at 236–37, 131 S.Ct. 2419 (“The rule's sole purpose, we have repeatedly held, is to deter future ***690** Fourth Amendment violations.”). By examining the purpose of the official misconduct, we ensure that “wanton and purposeful ... Fourth Amendment violation[s]” cannot simply be excused by subsequent voluntariness. *Brown*, 422 U.S. at 602–03, 95 S.Ct. 2254.

The only misconduct Davis alleges is the officers' decision to initially enter the house without a warrant, arguing the sweep lacked sufficient legal basis and disturbed two members of the household. While we decline to decide whether the government met its burden to prove that entry was justified as a protective sweep or by exigent circumstances, the government has met its burden to show that the officers had good-faith reasons to go into the home and conduct a limited sweep for individuals who might cause harm to the officers or to themselves. When the officers went into the home, they were aware from the warrant that Davis had allegedly recently

used a firearm and that other individuals of unknown ages were in the house. The sweep was undisputedly very limited. It was conducted in a nonaggressive manner and was limited to areas where a person could be hiding. The officers did not search any enclosed areas such as drawers or cabinets and allowed two individuals who were in the residence to get dressed and step outside without incident. See [Conrad](#), 673 F.3d at 736 (finding consent was not tainted even though police initially entered the curtilage of a home illegally, when the police behavior was “professional” inside the home, and they did not enter it as a “fishing expedition”). The officers were looking only for individuals who could harm the officers located just outside the home or could harm themselves if left alone in the house. Furthermore, the arrest occurred in very close proximity to and just outside the front entryway to the home. Finally, we note, even though our review is de novo, that the district judge concluded that not only did the officers not act in bad faith, but that based on what they knew at the time, a protective sweep was warranted. To reverse based on a finding of a purposeful and flagrant violation of Davis's rights would suggest that we find the district judge's conclusion wildly off the mark, and we have no facts which suggest that. There is simply nothing to support finding Ewing-Jimerson's voluntary consent was tainted by the initial entry, even if that entry was illegal.

The dissent reasons that the attenuation exception does not apply because the rifle was first observed during the initial sweep, not the consensual search. But the attenuation exception applies regardless of whether the rifle was first observed in the initial sweep. See [United States v. Liss](#), 103 F.3d 617 (7th Cir. 1997). In [Liss](#), officers entered a barn to recover a stolen motorcycle, observed a dried marijuana plant, and then proceeded to search the barn without a warrant. [Id.](#) at 618–19. After leaving the barn, the officers obtained consent and a warrant and went back to conduct a subsequent, lawful search of the barn. [Id.](#) at 619. Liss moved to suppress all of the evidence seized. [Id.](#) The district court denied the motion. [Id.](#) On appeal, we first assumed that all the evidence found in the barn was obtained pursuant to an initial, unlawful search. [Id.](#) at 620. But then we applied the attenuation exception to affirm the district court based on the later, lawful search: “The exclusionary rule does not require the exclusion of evidence when the causal connection between the illegal police conduct and the procurement of the evidence is so attenuated as to dissipate the taint of the

illegal action.” [Id.](#) (citation omitted and cleaned up). There is no basis for the dissent's rule that an officer's observation during an initial, illegal search of what later may be ***691** seized as evidence during a subsequent, lawful search requires us to pivot from the attenuation exception to the inevitable discovery exception. In the dissent's lead case for this rule, [United States v. Cooper](#), 24 F.4th 1086 (6th Cir. 2022), the evidence at issue was seized—not just observed—during the initial, illegal search. See [id.](#) at 1095–96 (holding that because “[t]he gun was seized during the initial unlawful search, ... inevitable discovery, not attenuation, is the right tool for the job.”). So [Cooper](#) provides no support for the conclusion that observation alone renders the attenuation doctrine irrelevant.

[11] One last argument merits brief mention. Davis complains that the officers did not seek his consent to search the residence but rather waited for Ewing-Jimerson to arrive home and then obtained her consent to search the shared residence. It's well-settled that police may obtain valid consent from someone with common authority over the shared premises when the defendant is not present (even if he is nearby), which is undisputed here. [United States v. Matlock](#), 415 U.S. 164, 166, 177, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); see also [United States v. Witzlib](#), 796 F.3d 799, 802 (7th Cir. 2015).

AFFIRMED

[Jackson-Akiwumi](#), Circuit Judge, dissenting.

The exclusionary rule is “the principal judicial remedy to deter Fourth Amendment violations.” [Utah v. Strieff](#), 579 U.S. 232, 237, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016) (citing [Mapp v. Ohio](#), 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)). The rule requires courts to exclude evidence obtained as a direct result of an illegal action. [Id.](#) It also requires courts to suppress so-called “fruit of the poisonous tree”—that is, evidence discovered later but derived from the illegal action. [Id.](#) The attenuation test from [Brown v. Illinois](#), 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), applies only to the latter type of evidence—again, evidence discovered later but derived from an earlier, illegal action. This appeal does not involve the

type of secondary fruit to which  *Brown's* attenuation test applies. I therefore cannot join my colleagues in using the test to resolve Paige Davis's appeal.

The police officers in this case conducted two searches. First, they entered and searched Davis's home during a “protective sweep” (this is the search the majority opinion assumes without deciding was illegal). Second, officers searched Davis's home again once they obtained consent from the homeowner. If Davis sought to suppress evidence that officers discovered during the *second* search, then I would apply the  *Brown* attenuation test to determine whether the evidence was admissible because the homeowner's consent had dissipated any taint from the earlier entry. But the parties agree that officers discovered Davis's rifle during the *first* search. Accordingly, I would hold that the district court erred when it assessed the homeowner's consent in terms of attenuation. The homeowner's consent was relevant, if at all, only under the inevitable discovery doctrine. The record is too undeveloped, however, for us to affirm the district court's ruling based on the inevitable discovery doctrine. And because I am unpersuaded by the district court's other justifications for admitting the rifle, I would vacate Davis's conviction.

A quick recap of the facts—almost all of which come from a single incident report since there was no suppression hearing: Officers went to Davis's home to execute an arrest warrant. Davis bumped into them when he stepped outside to walk his dog. He immediately surrendered without incident. Despite having already arrested *692 Davis—the sole reason officers were at the scene—officers conducted a “protective sweep” inside the house and discovered a rifle. About 45 minutes later, homeowner Antionette Ewing-Jimerson arrived and spoke with the same officers, who asked for her consent to enter the house again. According to the district court's characterization of events, officers then seized the rifle that they had discovered during their prior search.

Because officers had already discovered the rifle during their initial search, the district court erred when it applied  *Brown's* attenuation test to Ewing-Jimerson's consent. To explain why, I start with a review of the exclusionary rule and some of its exceptions.

The exclusionary rule prohibits the introduction of two broad types of evidence. First, it bars “primary evidence obtained as a direct result of an illegal search or seizure.”  *Strieff*,

579 U.S. at 237, 136 S.Ct. 2056 (quoting  *Segura v. United States*, 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984)). Second, it bars derivative evidence that is “acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes ‘so attenuated as to dissipate the taint.’ ”

 *Murray v. United States*, 487 U.S. 533, 536–37, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988) (citations omitted). As the majority opinion emphasizes, however, the exclusionary rule is not meant to punish past sins; the rule's only purpose is to deter future misconduct.  *Davis v. United States*, 564 U.S. 229, 232, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). When excluding evidence would not further the goal of deterrence, the Supreme Court created exceptions to the exclusionary rule so that it does not apply. Three of the exceptions “involve the causal relationship between the unconstitutional act and the discovery of evidence.”  *Strieff*, 579 U.S. at 238, 136 S.Ct. 2056 (citations omitted). Those three exceptions are: (1) the inevitable discovery doctrine, which applies when evidence would have been discovered even without the unconstitutional act; (2) the independent source doctrine, which allows the admission of evidence obtained in an unlawful search if officers also acquired it from another, lawful source; and (3) the attenuation doctrine, which applies when the connection between the discovery of evidence and the illegal act is remote or has been interrupted by intervening circumstances.  *Id.*

One difference between these three exceptions is the type of evidence at issue. Whereas the inevitable discovery or independent source exceptions can save from exclusion any evidence connected to an illegal search—direct or derivative—the attenuation doctrine concerns *only* evidence indirectly derived from the illegal search—or, as our sister circuit calls it, “secondary fruits.”  *United States v. Cooper*, 24 F.4th 1086, 1093, 1095–96 (6th Cir. 2022); *see also*  *Brown*, 422 U.S. at 601–02, 95 S.Ct. 2254 (evaluating derivative evidence);  *United States v. Conrad*, 673 F.3d 728, 732 (7th Cir. 2012) (same);  *United States v. Robeles-Ortega*, 348 F.3d 679, 681 (7th Cir. 2003) (same). This is because the whole point of the attenuation doctrine is to assess whether secondary fruit has fallen so far away from the poisonous tree that a policy of deterrence no longer applies. *See*  *Conrad*, 673 F.3d at 732. *See also* Orin S. Kerr, *GOOD FAITH, NEW LAW, AND THE SCOPE OF THE EXCLUSIONARY*

RULE, 99 Geo. L.J. 1077, 1099 (2011) (comparing doctrine to proximate cause); [Cooper](#), 24 F.4th at 1092 (same).

Indeed, the [Brown](#) attenuation test presupposes that the challenged evidence was *not* discovered during an illegal search. Courts applying the test focus on the gap between an illegal action and the discovery of evidence by considering, among other things, how much time *693 has elapsed and any intervening circumstances. [Robeles-Ortega](#), 348 F.3d at 681 (citing [Brown](#), 422 U.S. at 603–04, 95 S.Ct. 2254). And they do so to answer the ultimate question of whether the discovery of the challenged evidence was “sufficiently distinguishable” from the illegal action. [Brown](#), 422 U.S. at 599, 95 S.Ct. 2254.

This case does not involve secondary fruits: Police had already discovered Davis's rifle when they sought Ewing-Jimerson's consent for a second search. Accordingly, the district court erred when it applied the attenuation doctrine. See [Cooper](#), 24 F.4th at 1095–96 (holding that district court erred by applying attenuation test when homeowner consented to a second search but the challenged evidence was discovered during earlier, illegal search).¹ Even if the district court were correct that Ewing-Jimerson's consent was free of any taint, that finding would show only that the causal link was too remote to justify suppression of any evidence found during the second, consensual search. See [id.](#) at 1095 (citing [Strieff](#), 579 U.S. at 238, 136 S.Ct. 2056). But according to the incident report, the only evidence discovered during the second search were items confirming Davis lived at the home—his clothes, wallet, and bank card—none of which Davis sought to suppress.

The only way that Ewing-Jimerson's consent could possibly be relevant to the discovery of the rifle during the initial sweep is as an application of the inevitable discovery doctrine. See [Cooper](#) 24 F.4th at 1093–94 (explaining that district court should have used inevitable discovery doctrine to assess retroactive consent to search). Discovery of the rifle was inevitable, the argument would go, because police would have sought Ewing-Jimerson's consent to search the house regardless of whether they did the earlier sweep. But the government—which has the burden of establishing that officers' warrantless entry was reasonable, [United States v. Basinski](#), 226 F.3d 829, 833 (7th Cir. 2000)—did not raise an inevitable discovery argument here or in the district

court. And based on the undeveloped record before us (recall there was no suppression hearing), it is not clear whether the officers would have sought Ewing-Jimerson's consent for a second search had they not already been aware of the rifle.² See [United States v. Rosario](#), 5 F.4th 706, 713 (7th Cir. 2021) (quoting [United States v. Marrocco](#), 578 F.3d 627, 637–38 (7th Cir. 2009)) (for inevitable discovery to apply, “Government must demonstrate that it would have conducted a lawful search absent the challenged conduct”). We thus cannot say whether an inevitable discovery argument would have been successful.

In my view, the majority opinion errs just as the district court did in applying the attenuation doctrine. To be clear, I do not quibble with my colleagues' decision to address attenuation; the parties have *694 framed this case in terms of the attenuation doctrine. But under these facts, any attenuation argument must fail. This is because, contrary to what the majority opinion expresses, our goal under the [Brown](#) test is not to determine whether police obtained Ewing-Jimerson's consent through sufficiently attenuated means. Ante at 688–89. Rather, we must consider whether the rifle—that is, “the evidence to which instant objection is made”—is a product of the initial illegal entry or of some other, sufficiently distinguishable means. *Id.*; See also [Robeles-Ortega](#), 348 F.3d at 681 (collecting cases). On this record, even if Ewing-Jimerson's consent was sufficiently attenuated, I see no basis to characterize the rifle as a product of her consent. Police undisputedly found the rifle during the first search.

I also see no significance in the district court's implied finding that police waited to *seize* the rifle during the second search.³ Our concern is with how authorities discovered the rifle, not how they seized it. “The attenuation doctrine evaluates the causal link between the government's unlawful act and the *discovery* of evidence.” [Strieff](#), 579 U.S. at 238, 136 S.Ct. 2056 (emphasis added). And in every attenuation case cited by the majority opinion, the government sought to introduce derivative evidence that authorities had discovered during a subsequent investigation marked by intervening circumstances.⁴ The majority opinion cites no authority by which officers can rely on the attenuation doctrine to seize evidence that they had already discovered during an earlier illegal action.⁵ Nor have I found any. To the contrary, we have instructed *695 courts to *suppress* evidence under facts similar to this case. See [Liss](#), 103 F.3d at 621

(citing  *United States v. Gillespie*, 650 F.2d 127, 129 (7th Cir. 1981)) (noting that evidence initially discovered during illegal search of defendant's home must be suppressed when seized during later search to which defendant consented).

The majority opinion's reliance on consent as justification for admitting the rifle evidence means that the majority opinion did not need to address the district court's analysis of the protective-sweep and exigent-circumstances justifications for the officers' initial warrantless search. But if we reached those grounds, I would conclude that the district court erred there too. The district court reasoned that Davis's statement that there were children in the house justified a protective sweep because officers “were not given any reason to believe that those inside the home did not pose a threat.” But that reasoning gets the standard backwards; the court impermissibly shifted to Davis the government's burden to cite “specific and articulable facts” suggesting that someone in the house posed a danger.  *Maryland v. Buie*, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). The court made a similar error when it reasoned that Davis created an exigency when he told officers that “children” were inside the house but “did not give the ages of the children inside the home nor state whether they could be exposed to any safety

hazards.” Again, the burden was on the government to point to some affirmative sign that would cause a reasonable officer to believe that an emergency justified an immediate warrantless entry.  *Lange v. California*, — U.S. —, 141 S. Ct. 2011, 2017, 210 L.Ed.2d 486 (2021); *United States v. Delgado*, 701 F.3d 1161, 1165 (7th Cir. 2012). All the officers knew was that Davis, when they asked, confirmed the presence of children. Any assumption about the ages of the children or whether they were unattended would have been based on speculation.

In sum, none of the three justifications provided by the district court supported the admission of the rifle or any other evidence that officers discovered during the initial warrantless entry into Davis's home. So unless some other exception to the exclusionary rule applies, the rifle should have been suppressed. In my view, the most applicable exception would have been the inevitable discovery doctrine, not the attenuation doctrine, but the record is too undeveloped for us to apply the inevitable discovery doctrine on appeal. For these reasons, I respectfully dissent.

All Citations

44 F.4th 685

Footnotes

- 1 The majority opinion emphasizes that in  *Cooper*, the police both discovered and seized the contraband during the initial illegal search. But the Sixth Circuit emphasized that the attenuation doctrine would be relevant, if at all, only to “any evidence found during the consent search.”  *Cooper*, 24 F.4th at 1095.
- 2 Indeed, the facts surrounding Ewing-Jimerson's consent are particularly muddled. In the district court, the government conceded that officers told Ewing-Jimerson about the rifle as one reason why they wanted her consent to search the house again. But this fact was not mentioned by the district court and does not appear in the police report from the day of the arrest, which is the only piece of evidence in the record. And neither party mentions this discrepancy on appeal. I find this fact concerning because it is well established that police cannot exploit illegally obtained knowledge to coerce consent.  *United States v. Liss*, 103 F.3d 617, 621 (7th Cir. 1997). Nonetheless, Davis does not raise the issue on appeal, and it does not change my overall conclusion.
- 3 The district court here characterized the rifle as having been seized during the second, consensual search, but the underlying police report is ambiguous as to when the rifle was seized. An alternative reading of the report is that police seized the rifle during the initial sweep and did not seek Ewing-Jimerson's consent until after the rifle was already in police custody. Nonetheless, Davis does not challenge the district court's characterization of events, and so we operate under the assumption that officers waited to grab the rifle during the second

search. Thus, I do not read the majority opinion as holding that the rifle would have been admissible even if Ewing-Jimerson's consent came after both the discovery *and* seizure of the rifle.

4 See  [Conrad](#), 673 F.3d at 731 (evidence from consensual search of apartment two hours after illegal search of different apartment);   [United States v. Pineda-Buenaventura](#), 622 F.3d 761, 775 (7th Cir. 2010) (officers searched wrong apartment but stopped before evidence was found, then resumed search and found evidence after obtaining consent);  [United States v. Carter](#), 573 F.3d 418, 421–22 (7th Cir. 2009) (fruits of follow-up investigation after police learned defendant's identity during an illegal search); [United States v. Parker](#), 469 F.3d 1074, 1076 (7th Cir. 2006) (evidence found during consensual search following illegal arrest);  [Robeles-Ortega](#), 348 F.3d at 680–81 (evidence found during consensual search following illegal entry);  [United States v. Valencia](#), 913 F.2d 378, 382 (7th Cir. 1990) (evidence found during consensual search following illegal entry);  [Brown](#), 422 U.S. at 596–97, 95 S.Ct. 2254 (mirandized statements following illegal arrest).

5 The majority opinion cites  [Liss](#) as authority that the attenuation exception applies regardless of whether evidence was discovered during the illegal action. But in  [Liss](#), our court did not apply the attenuation doctrine to admit the marijuana or any other evidence discovered during the initial search of Liss's barn; the only evidence at issue was different contraband—methamphetamine and firearms—found in Liss's house during a subsequent consensual search.  [Liss](#), 103 F.3d at 618–19. Our court considered the marijuana observed in Liss's barn only as part of its analysis of whether “the evidence obtained during the written-consent search must be suppressed.”  [Id.](#) at 620; see also  [Id.](#) at 622 (concluding that “the written-consent search was not tainted by the prior illegal search of the barn”). Because the illegal search did not taint the consensual search, our court determined that a subsequent search warrant based on both the illegal evidence and the consensual evidence was also valid.  [Id.](#) at 622. But our court's approval of that warrant does not equate, as the majority opinion suggests, to a holding that evidence discovered during the initial illegal search was admissible. Liss was not even charged for the marijuana discovered during the first search; the grand jury indicted him only for possession of methamphetamine and illegal firearms.  [Id.](#) at 619. So our court did not need to decide whether the marijuana was admissible, only whether it tainted the subsequent consensual search of Liss's house that was the source of the methamphetamine and firearms underlying the indictment. Indeed, the district court ruled that any illegally discovered evidence should be *suppressed*—regardless of latter consent—and the government did not challenge that ruling on appeal.  [Id.](#) at 619.

UNITED STATES DISTRICT COURT
Southern District of Illinois

UNITED STATES OF AMERICA

v.

PAIGE R. DAVIS**JUDGMENT IN A CRIMINAL CASE**Case Number: **21-CR-30036-SPM**USM Number: **10009-025****DAVID L. BRENGLE**

Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s) I of the Indictment
- ☐ pleaded nolo contendere to count(s)
which was accepted by the court.
- ☐ was found guilty on count(s)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §922(g)(1)	Felon in Possession of a Firearm	12/8/2020	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☐ Count(s) Click here to enter text. ☐ is ☐ are dismissed on the motion of the United States.
- ☐ No fine ☐ Forfeiture pursuant to order filed Click here to enter date of Order., included herein.
- ☐ Forfeiture pursuant to Order of the Court. See page Click here to type pg no. for specific property details.

It is ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Restitution and/or fees may be paid to:
Clerk, U.S. District Court*
750 Missouri Ave.
East St. Louis, IL 62201

*Checks payable to: Clerk, U.S. District Court

October 29, 2021

Date of Imposition of Judgment



Signature of Judge

STEPHEN P. MCGLYNN, U.S. DISTRICT JUDGE
Name and Title of Judge

Date Signed: 10-29-21

DEFENDANT: PAIGE R. DAVIS
CASE NUMBER: 21-CR-30036-SPM

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **87 months as to Count I of the Indictment.**

- ☒ The court makes the following recommendations to the Bureau of Prisons: The Court recommends that Defendant be placed in a Federal Medical Center that can best accommodate Defendant's treatment for his leukemia and other serious conditions he currently suffers from.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: PAIGE R. DAVIS
CASE NUMBER: 21-CR-30036-SPM

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:
3 years

Other than exceptions noted on the record at sentencing, the Court adopts the presentence report in its current form, including the suggested terms and conditions of supervised release and the explanations and justifications therefor.

MANDATORY CONDITIONS

The following conditions are authorized pursuant to 18 U.S.C. § 3583(d):

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court, not to exceed 52 tests in one year.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

ADMINISTRATIVE CONDITIONS

The following conditions of supervised release are administrative and applicable whenever supervised release is imposed, regardless of the substantive conditions that may also be imposed. These conditions are basic requirements essential to supervised release.

The defendant must report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons.

The defendant shall not knowingly possess a firearm, ammunition, or destructive device. The defendant shall not knowingly possess a dangerous weapon unless approved by the Court.

The defendant shall not knowingly leave the federal judicial district without the permission of the Court or the probation officer.

The defendant shall report to the probation officer in a reasonable manner and frequency directed by the Court or probation officer.

The defendant shall respond to all inquiries of the probation officer and follow all reasonable instructions of the probation officer.

The defendant shall notify the probation officer prior to an expected change, or within seventy-two hours after an unexpected change, in residence or employment.

DEFENDANT: PAIGE R. DAVIS

CASE NUMBER: 21-CR-30036-SPM

The defendant shall not knowingly meet, communicate, or otherwise interact with a person whom the defendant knows to be engaged, or planning to be engaged, in criminal activity.

The defendant shall permit a probation officer to visit the defendant at a reasonable time at home or at any other reasonable location and shall permit confiscation of any contraband observed in plain view of the probation officer.

The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

SPECIAL CONDITIONS

Pursuant to the factors in 18 U.S.C. § 3553(a) and 18 U.S.C. § 3583(d), the following special conditions are ordered. While the Court imposes special conditions, pursuant to 18 U.S.C. § 3603(10), the probation officer shall perform any other duty that the Court may designate. The Court directs the probation officer to administer, monitor, and use all suitable methods consistent with the conditions specified by the Court and 18 U.S.C. § 3603 to aid persons on probation/supervised release. Although the probation officer administers the special conditions, final authority over all conditions rests with the Court.

Condition: The defendant shall participate in treatment for narcotic addiction, drug dependence, or alcohol dependence, which includes urinalysis and/or other drug detection measures and which may require residence and/or participation in a residential treatment facility, or residential reentry center (halfway house). The number of drug tests shall not exceed 52 tests in a one-year period. Any participation will require complete abstinence from all alcoholic beverages and any other substances for the purpose of intoxication. The defendant shall pay for the costs associated with services rendered, based on a Court approved sliding fee scale and the defendant's ability to pay. The defendant's financial obligation shall never exceed the total cost of services rendered. The Court directs the probation officer to approve the treatment provider and, in consultation with a licensed practitioner, the frequency and duration of counseling sessions, and the duration of treatment, as well as monitor the defendant's participation, and assist in the collection of the defendant's copayment.

Justification: This condition is recommended based on the defendant's substance abuse history. Proper treatment of existing substance abuse issues will assist in the defendant's sobriety efforts, his reintegration into society, and success on supervision. This condition will also assist in protecting the public from future crimes of the defendant and in providing adequate deterrence from future criminal conduct.

Condition: While any financial penalties are outstanding, the defendant shall provide the probation officer and the Financial Litigation Unit of the United States Attorney's Office any requested financial information. The defendant is advised that the probation office may share financial information with the Financial Litigation Unit.

DEFENDANT: PAIGE R. DAVIS
CASE NUMBER: 21-CR-30036-SPM

Justification: The defendant will owe a special assessment and the Court may impose additional financial obligations. This condition allows the probation officer to monitor the defendant's income to ensure that any funds available are paid towards court-ordered financial obligations. It will reduce recidivism and promote deterrence as it will assist the probation office to ensure the defendant's income is derived from legitimate and legal sources. This condition will also facilitate the efficient collection of payments thereby reducing the risk of recidivism through compliance with conditions ordered by the Court.

Condition: While any financial penalties are outstanding, the defendant shall apply some or all monies received, to be determined by the Court, from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to any outstanding court-ordered financial obligation. The defendant shall notify the probation officer within 72 hours of the receipt of any indicated monies.

Justification: The defendant will owe a special assessment and the Court may impose additional financial obligations. This condition allows the probation officer to monitor the defendant's income to ensure that any funds available are paid towards court-ordered financial obligations. It will reduce recidivism and promote deterrence as it will assist the probation office to ensure the defendant's income is derived from legitimate and legal sources. This condition will also facilitate the efficient collection of payments thereby reducing the risk of recidivism through compliance with conditions ordered by the Court.

Condition: The defendant shall pay any financial penalties imposed which are due and payable immediately. If the defendant is unable to pay them immediately, any amount remaining unpaid when supervised release commences will become a condition of supervised release and be paid in accordance with the Schedule of Payments sheet of the judgment based on the defendant's ability to pay.

Justification: The defendant will owe a special assessment and the Court may impose additional financial obligations. This condition allows the probation officer to monitor the defendant's income to ensure that any funds available are paid towards court-ordered financial obligations. It will reduce recidivism and promote deterrence as it will assist the probation office to ensure the defendant's income is derived from legitimate and legal sources. This condition will also facilitate the efficient collection of payments thereby reducing the risk of recidivism through compliance with conditions ordered by the Court.

Condition: The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

Justification: The defendant's work history is sporadic and largely unverifiable. This condition will assist in the defendant's reintegration into society and his success on supervision. This condition will also protect the public from future crimes of the defendant and will provide adequate deterrence from future criminal conduct.

DEFENDANT: PAIGE R. DAVIS

CASE NUMBER: 21-CR-30036-SPM

Condition: The defendant's person, residence, real property, place of business, vehicle, and any other property under the defendant's control is subject to a search, conducted by any United States Probation Officer and other such law enforcement personnel as the probation officer may deem advisable and at the direction of the United States Probation Officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release, without a warrant. Failure to submit to such a search may be grounds for revocation. The defendant shall inform any other residents that the premises and other property under the defendant's control may be subject to a search pursuant to this condition.

Justification: This condition is recommended based on the defendant's prior arrests and criminal convictions, as well as the nature of the instant offense. The prospect of routine, unannounced searches will assist in affording adequate deterrence and protecting the public from future crimes of the defendant.

U.S. Probation Office Use Only

A U.S. Probation Officer has read and explained the conditions ordered by the Court and has provided me with a complete copy of this Judgment. Further information regarding the conditions imposed by the Court can be obtained from the probation officer upon request.

Upon a finding of a violation of a condition(s) of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

Defendant's Signature _____

Date _____

U.S. Probation Officer _____

Date _____

DEFENDANT: PAIGE R. DAVIS

CASE NUMBER: 21-CR-30036-SPM

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 100.00	\$	\$150.00	\$	\$

- ☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	----------------------	----------------------------	-------------------------------

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- ☐ the interest requirement is waived for ☐ fine ☐ restitution.
- ☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: PAIGE R. DAVIS
CASE NUMBER: 21-CR-30036-SPM

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A. ☐ Lump sum payment of \$_____ due immediately, balance due
☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B. ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below; or
- C. ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D. ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E. ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F. ☐ Special instructions regarding the payment of criminal monetary penalties:
All criminal monetary penalties are due immediately and payable through the Clerk, U.S. District Court. Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be paid in equal monthly installments of \$25.00 or ten percent of his net monthly income, whichever is greater. The defendant shall pay any financial penalty that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several
 Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAIGE R. DAVIS,

Defendant.

Case No. 21-CR-30036-SPM

MEMORANDUM AND ORDER

McGLYNN, District Judge:

Pending before the Court is a Motion to Suppress Evidence and memorandum in support filed by Defendant Paige R. Davis (Docs. 25, 26) along with a response to Davis's motion filed by the United States (the "Government") (Doc. 28). For the reasons set forth below, the motion is **DENIED**.

BACKGROUND

Davis and the Government agree on a simple set of facts. On December 8, 2020, St. Clair County Officer Xavier Blackburn and other law enforcement were tasked with serving an arrest warrant on Davis and taking him into custody. Davis had been charged with three counts of aggravated battery (Docs. 26, 28). After briefing on the exterior part of the residence, officers formed a perimeter around the address where they believed Davis resided along with the homeowner, Antoinette Ewing-Jimerson (Doc. 26, Doc. 28-1). As they approached the front door, Davis exited with a non-vicious leashed dog and the officers took him into custody without resistance (Docs. 26, 28-1). Davis stated that there were children in the residence, and the officers then

entered the residence and escorted one adult and one child out (Docs. 26, 28-1). The officers continued to search the residence and discovered a firearm leaning against the wall of an open closet in a bedroom belonging to Davis (Docs. 26, 28-1).

After this search, Ewing-Jimerson arrived and signed a consent form allowing the officers to conduct a search of the residence (Docs. 26, 28-1). After the officers retrieved the gun and exited the residence, they passed by Davis, who remarked, “Hey, where are you going, that’s my gun” (Docs. 26, 28-1).

In March 2021, a Federal Grand Jury indicted Davis, charging him with possession of a firearm by a felon related to the December 2020 incident, in violation of 18 U.S.C. § 922(g)(1). On May 26, 2021, Davis moved to suppress the firearm seized during his arrest in December 2020 (Doc. 25). Davis argues that the officers lacked a reasonable basis for a protective sweep of the residence. Additionally, Davis claims that Ewing-Jimerson’s consent was both tainted by the illegal search and invalid because Davis was still at the residence at the time of the search but was never asked to provide his consent.

The Government argues that a protective sweep was necessary in this case, as the officers were unsure as whether the disclosed children inside of the home presented a safety threat to the officers. This threat grew when the officers found one adult and one child inside the residence. Furthermore, the Government argues that police concern for the safety of individuals inside of the home constituted the exigent circumstances necessary to justify entry without a warrant. Finally, the Government argues that Ewing-Jimerson subsequently consented to a search of the entire residence and that the consent was untainted by the initial entry into the house.

LEGAL STANDARD

A motion to suppress seeks to exclude evidence obtained in violation of a defendant's constitutional rights. In *Simmons v. United States*, the Supreme Court explained, “[i]n order to effectuate the Fourth Amendment’s guarantee of freedom from unreasonable searches and seizures, this Court long ago conferred upon defendants in federal prosecutions the right, upon motion and proof, to have excluded from trial evidence which had been secured by means of an unlawful search and seizure.” *Simmons v. United States*, 390 U.S. 377, 389 (1968).

However, the exclusionary rule does not always apply in cases where a search violated the Fourth Amendment. The Supreme Court has declared that exclusion “has always been our last resort, not our first impulse.” *Herring v. United States*, 555 U.S. 135, 140 (2009) (citing *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). “The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free.” *Id.* (citing *United States v. Leon*, 468 U.S. 897, 908 (1984)). Ultimately, the Court has “repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.” *Id.*

Furthermore, The Court has determined that in certain circumstances, police officers can lawfully conduct a warrantless search. In *Terry v. Ohio*, the Court ruled that “police conduct, necessarily swift action predicated upon the on-the-spot observations of the officer on the beat... as a practical matter could not be, subjected to the warrant procedure.” *Terry v. Ohio*, 392 U.S. 1, 20 (1968). The Court has recognized that as a precautionary matter and without probable cause or reasonable suspicion, police officers can conduct “protective sweeps” by looking in closets and

other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. However, this sweep must be based on “specific and articulable facts” that lead officers to believe there are individuals on the premises that pose a danger. *Maryland v. Buie*, 494 U.S. 325, 327 (1989).

Another exception is when “the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.” *Kentucky v. King*, 563 U.S. 452, 460 (2011) (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)). The Seventh Circuit has deemed searches without a warrant lawful when the exigent circumstances require immediate action. *United States v. Jenkins*, 329 F.3d 579, 581 (7th Cir. 2003).

ANALYSIS

It is important to note that, according to Blackburn’s report, the officers had no issue detaining Davis; he was arrested without incident and his dog appeared to be non-vicious (Doc. 28-1). Only specific facts that led the officers to believe that those inside of the home threatened their safety would provide justification for the alleged protective sweep. Here, the lack of detail of Davis’s statement that there were children in the house provides justification for the protective sweep.

In *Maryland v. Buie*, the Supreme Court articulated that police officers could “assure themselves” that the premises of the arrest were not harboring other dangerous individuals by conducting a protective search. Moreover, “officers should not be forced to suffer preventable risk of ambush, even where a location is so isolated that the officers could conceivably be protected without entering the area.” *United States v. Burrows*, 48 F.3d 1011, 1013 (7th Cir. 1995). Multiple cases from the Seventh

Circuit have given police officers considerable autonomy in conducting protective sweeps when they are made aware of the presence of others on the premises. In *United States v. Contreras*, the Seventh Circuit upheld the District Court's determination that the presence of another person justified the search. 820 F.3d 255, 269 (7th Cir. 2016) ("Having heard the presence of another person, the police were entitled to sweep the house for their own protection."). In *United States v. Henderson*, police officers, after detaining an individual, "did not know how many occupants or what the occupants were doing inside the house;" as a result, the Court found that their search was considered lawful. 748 F.3d 788, 792 (7th Cir. 2014). Similarly, in this case, the officers had information confirming that there were others in the house but were not given any reason to believe those inside the home did not pose a threat to the officers. Consequently, it was reasonable to infer that a person posing a threat remained in the house.

Buie limits the scope of a protective sweep to a "cursory" inspection of spaces where individuals may be found and must last no longer than is necessary to dispel potential danger; it does not allow for a full search of the premises. 494 U.S. at 326. In determining whether the search was of a limited scope, courts should analyze "the configuration of the dwelling, the general surroundings, and the opportunities for ambush." *United States v. Starnes*, 741 F.3d 804, 808 (7th Cir. 2013). In this case, the close proximity between the closet and the front door as well as the fact that the doors adjoining these spaces were open made the officers susceptible to a potential ambush from individuals who might have been hiding in the northeast bedroom where the gun was ultimately found. An "ambush in a confined setting of unknown

configuration is more to be feared than if it were in the open, more familiar surroundings.” *United States v. Richards*, 937 F.2d 1287, 1291 (7th Cir. 1991). The fact that the officers were unaware of the layout of the residence beforehand coupled with its intimate configuration justified a sweep through the residence that led them into the northeast bedroom.

Importantly, the officers limited their search to areas where an individual would have the ability to hide. The gun was found leaning against the wall of an open closet, directly in plain sight. The officers did not search any enclosed areas such as drawers or cabinets that would be unlikely to be harboring an individual. The only delay the officers undertook was to allow the two individuals found in the residence time to get dressed and step outside of the house. The search fits the scope of a protective sweep and was not conducted in any more detail than was necessary than to ensure the safety of the officers.¹

Another exception that makes a warrantless search reasonable is the existence of exigent circumstances justifying entry. “Whether the exigent circumstances exception justifies warrantless action is judged by an objective standard: we ask

¹ This Court is not persuaded by the Government’s assertion that the potential threat of additional pit bulls inside of the home qualified as a specific, articulable fact for the purposes of a protective sweep. The Government cites *U.S. v. Starnes*, where officers had direct information indicating that two aggressive pit bulls were inside of the house and only one had been subdued. 741 F.3d 804, 808 (7th Cir. 2013). The Government’s reliance on this case is misplaced because Blackburn’s report did not state that he had information about an additional aggressive pit bull inside the residence. The Court also does not agree with the Government’s assertion that the strong smell of marijuana detected by officers indicated the possibility of a violent individual somewhere in the house. While federally, marijuana is still classified as a Schedule I Controlled Substance under the Controlled Substances Act, marijuana is now legal, albeit regulated, for medical and recreational use in the State of Illinois. There is no indication that Blackburn believed that illegal activity related to marijuana had occurred and there is no detail on whether he detected the smell of raw or smoked marijuana. However, the arguments related to these two issues are inconsequential to the Court’s determination in this case.

whether it was reasonable for the police officers on the scene to believe, in light of the circumstances they faced, that there was a compelling need to act and no time to obtain a warrant.” *Sutterfield v. City of Milwaukee* 751 F.3d 542, 557 (7th Cir. 2014). The recent Supreme Court case *Caniglia v. Strom* reinforced the idea that “law enforcement officers may enter private property without a warrant when certain exigent circumstances exist.” *Caniglia v. Strom* 141 S.Ct. 1596, 1599 (2021).

Seventh Circuit precedent has illustrated the necessity for police officers to ensure the safety of children once their guardian is detained. “[T]he Constitution creates a duty on the part of police officers to protect minor children from immediate hazards after police officers arrest the children’s guardian.” *Ellsworth v. City of Racine* 774 F.2d 182, 185 (7th Cir. 1985). Importantly, Davis 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. The officers recognized the compelling need to ensure the children’s safety immediately. This pressing need, independent of the actions of the officers, qualifies as exigent circumstances justifying the warrantless search.

However, even if the initial search could be considered unlawful, Ewing-Jimerson subsequently consented to an entire search of the residence. A warrantless search is justified when someone with “actual and apparent authority” consents to the search. *United States v. Aghedo* 159 F.3d 308, 310 (7th Cir. 1998). As the homeowner, Ewing-Jimerson possessed actual authority over the residence. But the consent must be voluntary and the Court must determine whether the entry tainted that consent.

The following factors are considered in determining whether consent is

voluntary: “(1) the age, education, and intelligence of the individual; (2) whether he was advised of his rights; (3) whether he was in custody; (4) how long the individual was detained prior to consenting; (5) whether consent was given immediately or after several requests; and (6) whether the officers used physical coercion.” *United States v. Thompson*, 842 F.3d 1002, 1009-10 (7th Cir. 2016). Here, all of the factors favor a voluntary consent. Ewing-Jimerson, an adult homeowner, discussed consent with Blackburn at the kitchen table of the residence, provided oral and written consent to a search, signed a form indicating she had been informed of her constitutional rights, was not detained at any point during the discussion, and gave consent “without threats or promise of any kind.” (Doc. 28-2, Doc. 28-3).

The factors relevant to determining whether the consent was tainted are “(1) the temporal proximity of the illegal entry and the consent, (2) the presence of intervening circumstances, and, particularly, (3) the purpose and flagrancy of the official misconduct.” *United States v. Robles-Ortega*, 348 F.3d 679, 681 (7th Cir. 2003) (citing *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)). In *United States v. Punzo*, the Seventh Circuit held that an occupant’s consent was voluntary and untainted where “[t]he officers did not forcibly enter the house, [he] was not under arrest when he consented, and the officers did not threaten to secure a warrant if [he] refused to cooperate.” 208 F. App’x 468, 472 (7th Cir. 2006). The intervening circumstance in this case was Ewing-Jimerson’s arrival at the residence and her voluntary consent.

This case can be distinguished from *Robles-Ortega*, where police officers broke down the door and immediately requested the leaseholder’s consent to a search while the officers had their guns drawn. *Id* at 680-681. In that case, the Court ruled that

the traumatic entry of the officers into the home coerced consent: no intervening circumstance existed. In this case, Ewing-Jimerson was not coerced into providing consent under traumatic circumstances.

Finally, there is no evidence that the officers purposefully violated Davis's Fourth Amendment rights. As articulated earlier, the officers conducted a search of the house to retrieve individuals identified by Davis, to ensure both their own safety as well as that of the individuals. Blackburn indicated that based on his training and experience, individuals had been known to hide behind closet doors and under beds and tables (Doc. 28-1). His decision to perform a search was rooted in his training and experience and not as an intentional violation of the Fourth Amendment.

The Supreme Court has articulated that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Georgia v. Randolph* 547 U.S. 103, 120 (2006). Throughout this entire incident, Davis was present at the residence but never provided an express refusal to search – he only commented about his gun after the search was conducted. Furthermore, he was not present when Ewing-Jimerson offered her consent. The Court concludes that Ewing-Jimerson's consent was voluntary and untainted by the search and that Davis never expressly objected to the search.

CONCLUSION

The warrantless search conducted in this case was lawful. Furthermore, Ewing-Jimerson provided voluntary and untainted consent to the officers. For these

reasons, the Court **DENIES** the Motion to Suppress Evidence (Doc. 25) filed by Defendant Paige R. Davis.

IT IS SO ORDERED.

DATED: July 20, 2021

s/ Stephen P. McGlynn
STEPHEN P. McGLYNN
U.S. District Judge