No. 22-6012

IN THE SUPREME COURT OF THE UNITED STATES

PAIGE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether earlier sighting of a rifle, during an entry whose lawfulness is contested, required suppression of evidence of the rifle from a later consensual search.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 44 F.4th 685. The opinion of the district court (Pet. App. 18-27) is reported at 549 F. Supp. 3d 829 (2021).

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2022. The petition for a writ of certiorari was filed on November 7, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Southern District of Illinois, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2. He was sentenced to 87 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-6.

1. After state prosecutors charged petitioner with three counts of aggravated battery by discharge of a firearm, in violation of 720 Ill. Comp. Stat. 5/12-3.05(e)(1), a warrant was issued for his arrest. Pet. App. 3. Two months later, the United States Marshals Service located petitioner and arrested him just outside the front door of his residence as he was leaving to walk his dog. Ibid.

When the agents took petitioner into custody, he stated that children were in the house, prompting the agents to enter the residence to perform a "limited sweep of areas where a person could be hiding." Pet. App. 3. During the sweep, agents encountered an eight-year-old boy and a 19-year-old girl. Ibid. One of the agents also "observed a .22 caliber rifle standing upright in plain view in an open bedroom closet." Ibid.

About 45 minutes after the sweep was finished, the owner of the home arrived and gave the agents oral and written consent to

search the house, "acknowledging that she had been advised of her rights pertaining to the search." Pet. App. 3. The homeowner was not detained during the search, and she spoke freely with the agents, volunteering information about where petitioner slept and her relationship with petitioner. Ibid.

This case has proceeded on the premise that the rifle was seized only during the second search. See Pet. 4 n.2; Pet. App. 5 (court of appeals majority), id. at 8 n.3 (Jackson-Akiwumi, J., dissenting), id. at 18 (district court opinion). After the rifle was seized, the agents passed by petitioner, who exclaimed "Hey, where are you going, that's my gun." Id. at 19.

2. Petitioner was federally charged with illegally possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 2. The district court denied petitioner's motion to suppress the gun found in the house at the time of his arrest. Id. at 18-27.

The district court explained that it was deciding the motion based on a "simple set of facts" on which "[petitioner] and the Government agree[d]." Pet. App. 18. Based on those facts, the court invoked three doctrines in finding suppression to be unjustified. First, it found that the initial "search fits the scope of a protective sweep and was not conducted in any more detail than was necessary * * * to ensure the safety of the officers." Id. at 23; see id. at 21-23. Second, it found that

the "compelling need to ensure the children's safety immediately," the "pressing" nature of which was "independent of the actions of the officers," "qualifies as exigent circumstances justifying the warrantless search." Id. at 24; see id. at 23-24.

Third, the district court found that, even if the initial sweep "could be considered unlawful," the subsequent search was lawful because the homeowner "consented to an entire search of the residence." Pet. App. 24. The court found that the homeowner's consent was "voluntary and untainted" by the prior, allegedly unlawful sweep because the homeowner's arrival was an "intervening circumstance"; the homeowner "was not coerced into providing consent under traumatic circumstances"; and there was "no evidence that the officers purposefully violated [petitioner's] Fourth Amendment rights" during the initial sweep. Id. at 25-26.

After the district court denied his suppression motion, petitioner pled guilty but reserved his right to appeal. Pet. App. 2.

3. On appeal, petitioner argued that the district court had erred in determining that the initial sweep was justified, Pet. C.A. Br. 16-21, and erred in finding that the homeowner's consent was untainted by the prior unlawful sweep, Pet. C.A. Br. 22-24.

The court of appeals affirmed. Pet. App. 2-5. The court determined that, even "assum[ing] the initial sweep was illegal, [i]t did not taint [the homeowner's] consent." Id. at 4. The

court viewed that issue as "a question of attenuation -- was the voluntary consent obtained by exploitation of the preceding Fourth Amendment violation?" Ibid. (citation and internal quotation marks omitted). And it explained that, under Brown v. Illinois, 425 U.S. 590 (1975), the attenuation analysis requires a court to consider factors "including (1) the temporal proximity of the illegal entry and the consent, (2) the * * * intervening circumstances, and, particularly, (3) the purpose and flagrancy of the official misconduct." Pet. App. 4 (citation omitted).

The court of appeals determined that application of that analysis to the "undisputed facts" of this case rendered suppression inappropriate. Pet. App. 4. The court observed that 45 minutes passed between the initial sweep and the homeowner's consent; the homeowner's arrival after the sweep severed the connection between that allegedly unlawful search and the consent; and, "critical[ly]," the agents had not "acted in bad faith" in conducting the initial sweep. Ibid. In addressing the final factor, the court found that "the government ha[d] 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," but "decline[d] to decide whether" the particular entry in this case ultimately fit within the protective-sweep or exigent-circumstances doctrines. Ibid.

The court of appeals also rejected the contention, raised for the first time by the dissent, that it was improper to apply an attenuation analysis to the consent search because "the rifle was first observed during the initial sweep, not the consensual search." Pet. App. 5. The court reasoned that "[t]he 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," and that the principle applied to petitioner's case "regardless of whether the rifle was first observed in the initial sweep." Ibid. (citation omitted).

Judge Jackson-Akiwumi dissented. Pet. App. 5-8. In her view, "[t]he attenuation test from Brown" applies only to "evidence discovered later but derived from an earlier, illegal action," and she would have concluded that the viewing of the rifle under the initial entry required suppression of any evidence of its presence. Id. at 8.

ARGUMENT

Petitioner renews (Pet. 9-17) his contention that the lower courts were required to suppress all evidence of the rifle if the first entry, during which they first noticed it, was unlawful. The court of appeals correctly determined that the rifle was admissible, and its decision does not create any conflict with the decisions of the other courts of appeals warranting this Court's

review. Furthermore, this case would be a poor vehicle to consider the question presented because petitioner did not press his argument below and the question is unlikely to be outcome-determinative.

1. The Fourth Amendment "protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"' but it "says nothing about suppressing evidence obtained in violation of this command." Davis v. United States, 564 U.S. 229, 236 (2011); see Herring v. United States, 555 U.S. 135, 139 (2009); Arizona v. Evans, 514 U.S. 1, 10 (1995). To "supplement the [Amendment's] bare text," this Court "created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." Davis, 564 U.S. at 231-232. Nevertheless, because the exclusion of reliable evidence has "significant costs," suppression of evidence "'has always been [the Court's] last resort, not [its] first impulse.'" Utah v. Strieff, 579 U.S. 232, 237 (2016) (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

This Court has accordingly deemed the exclusionary rule "applicable only where its deterrence benefits outweigh its substantial social costs." Strieff, 579 U.S. at 237 (quoting Hudson, 547 U.S. at 591) (ellipses omitted). The Court has "repeatedly held" that the "sole purpose" of the exclusionary rule

"is to deter future Fourth Amendment violations," and the Court has therefore "limited the rule's operation to situations in which this purpose is 'thought most efficaciously served.'" Davis, 564 U.S. at 236-237 (citation omitted). Where, in contrast, "suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly . . . unwarranted."' Id. at 237 (citation omitted); see Herring, 555 U.S. at 141.

"Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one." Davis, 564 U.S. at 237 (citation omitted). "The analysis must also account for the 'substantial social costs"' of the exclusionary rule. Ibid. (citation omitted). "Exclusion exacts a heavy toll" because "[i]t almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence" and because "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." Ibid. This Court's decisions "hold that society must swallow this bitter pill when necessary, but only as a 'last resort."' Ibid. (citation omitted). Exclusion can be an appropriate remedy only when "the deterrence benefits of suppression * * * outweigh its heavy costs." Ibid.

One exception to the exclusionary rule embodying those principles is 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, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" Strieff, 579 U.S. at 238 (quoting Hudson, 547 U.S. at 593). In Brown v. Illinois, 422 U.S. 590 (1975), this Court articulated three factors to guide a court in analyzing whether the connection between the evidence and the allegedly unlawful police conduct is sufficiently attenuated: (1) the temporal proximity between the unconstitutional conduct and the discovery of the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct, a factor that is "particularly" significant in the analysis. Strieff, 579 U.S. at 239 (quoting Brown, 422 U.S. at 604).

2. The court of appeals correctly determined that the exclusionary rule did not require the district court to suppress evidence of the rifle from the second entry in this case. Pet. App. 4-5. Applying the attenuation factors from Brown, the court observed that 45 minutes passed between the allegedly unlawful protective sweep and the consent search, and the homeowner's arrival at the scene and voluntary consent to the search constituted intervening circumstances. Id. at 4. The court also carefully considered the "most important[] factor -- the purpose and flagrancy of the official misconduct," and it determined that

even if the protective sweep was not justified, "the government ha[d] 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." Ibid. (citation omitted).

Petitioner contends (Pet. 10-15) that the court of appeals should not have applied the attenuation doctrine because the officers first observed petitioner's rifle during the allegedly unlawful initial entry, and the attenuation doctrine "concerns only secondary fruits" of unlawful searches, Pet. 14, not "evidence obtained as a direct result of an unconstitutional search or seizure," Pet. 12. Petitioner is incorrect. This Court has explained that, while attenuation "can occur, of course, when the causal connection" between the alleged violation and the discovery of the evidence "is remote," "[a]ttenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." Hudson, 547 U.S. at 593.

That is the case here. Whether viewed through the specific lens of attenuation or otherwise, application of the exclusionary rule -- at the cost of excluding dispositive evidence of guilt -- would be unjustified. Even if their initial entry was in fact technically unlawful, "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." Pet. App. 4. They "were aware from the warrant that [petitioner] had allegedly recently used a firearm and that other individuals of unknown ages were in the house," id. at 4-5; "recognized the compelling need to ensure the children's safety immediately," id. at 24; and conducted their sweep in a reasonable manner that reflected its limited purpose, see id. at 5, 23. "Where the official action was pursued in complete good faith * * * the deterrence rationale loses much of its force." United States v. Leon, 468 U.S. 897, 919 (1984) (internal quotation marks and citation omitted).

Petitioner's position could leave officers with little recourse if, while acting in good faith, they see evidence of crime or danger in a residence that they might not otherwise have entered again. Having cabined their initial sweep to its proper limited scope, the agents here acted reasonably in seeking consent from the property owner to reenter for an additional search.

3. Petitioner asserts (Pet. 14) that the courts of appeals disagree as to whether the attenuation doctrine applies only to the "secondary fruits" of an unlawful search. But petitioner primarily relies (Pet. 7-8, 14) on United States v. Cooper, 24 F.4th 1086 (2022), a case in which the Sixth Circuit reversed a district court for applying the attenuation doctrine to a case in which the government had invoked the "inevitable discovery"

doctrine. Id. at 1095-1096. The Sixth Circuit reasoned that inevitable discovery was "the right tool for the job" because "[t]he gun was seized during the initial unlawful search." Ibid.

Here, in contrast, petitioner acknowledges (Pet. 4 n.2), the court of appeals decided the case on the premise that the "officers seized the rifle during the second [consent] search," an "implied finding" by the district court that petitioner "did not challenge * * * on appeal." And it was at petitioner's own suggestion that the court analyzed the lawfulness of the consent search based on the attenuation analysis set out in Brown v. Illinois, supra; the government merely followed suit. See Pet App. 24-26; D. Ct. Doc. 26, at 4-5 (May 26, 2021); D. Ct. Doc. 28, at 15-17 (June 28, 2021).

Thus, although the Sixth Circuit suggested in Cooper that the attenuation doctrine applies only to "secondary fruits" and that it does not "concern the admissibility of the primary products of a constitutional violation," 24 F.4th at 1093, the issue was not squarely presented there and a future panel would not be foreclosed from declining to apply the exclusionary rule in circumstances like the ones here. Nor does petitioner show that another circuit would necessarily have excluded the evidence here. In United States v. Serrano-Acevedo, 892 F.3d 454 (1st Cir. 2018), the court found that a consent search was tainted by the officers' prior unlawful conduct. Id. at 860-861. In United States v. Delancy,

502 F.3d 1297 (2007), the Eleventh Circuit rejected a defendant's suppression argument, see id. at 1314-1315, and that circuit would not be precluded from doing so on the facts here. And as petitioner acknowledges (Pet. 15), the remaining decisions that he cites adopt the same approach as the lower courts in this case. See, e.g., United States v. Brandwein, 796 F.3d 980, 982-985 (8th Cir. 2015), cert. denied, 577 U.S. 1181 (2016); United States v. Snype, 441 F.3d 119, 130-135 (2d Cir. 2006).

4. Even if this Court were interested in the question presented, this case would be a poor vehicle because petitioner did not raise the question presented below and because the question is unlikely to be outcome determinative.

As noted above and as petitioner acknowledges (Pet. 9), he did not challenge the application of the attenuation doctrine before the court of appeals. Indeed, it was petitioner who first suggested that the lawfulness of the consent search should be assessed according to the factors set out in Brown v. Illinois, supra, and petitioner did not reverse course until he filed the petition for certiorari before this Court. Cf. Johnson v. United States, 318 U.S. 189, 201 (1943) ("We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him."). While the court of appeals nonetheless briefly addressed the issue in

response to the dissent, Pet. App. 5, petitioner's position below denied the parties the opportunity for full briefing of the issue and any subsidiary matters that might be relevant to it.

Furthermore, resolution of the question presented in petitioner's favor would not mean that the rifle would be suppressed, because the government has advanced independent arguments that the protective sweep was lawful. The district court credited those arguments, and the court of appeals may well affirm on that basis even if this Court were to resolve the question presented in petitioner's favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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