No. 14-1373

In the Supreme Court of the United States

UTAH,

Petitioner,

v.

EDWARD JOSEPH STRIEFF, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Utah Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Utah Supreme Court correctly held that the evidence seized from respondent incident to his arrest on a minor traffic warrant discovered during a concededly unconstitutional detention was inadmissible under the "attenuation" exception to the exclusionary rule.

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STATEMENT

In recent years the Court has denied four certiorari petitions presenting the same question Utah presents here. *Mazuca v. Texas*, No. 12-7773, 133 S. Ct. 1724 (2013); *Faulkner v. United States*, No. 11-235, 132 S. Ct. 761 (2011); *Brendlin v. California*, No. 08-8916, 556 U.S. 1192 (2009); *Frierson v. Florida*, No. 06-6967, 549 U.S. 1082 (2006). Utah's certiorari petition should be denied as well. The lower court conflict alleged in the petition is spurious, the Utah Supreme Court's decision below is correct, and in any event this case would be an exceedingly poor vehicle for addressing the question Utah presents.

1. Detective Doug Fackrell detained respondent Edward Strieff after Strieff left a house that Fackrell was watching. Pet. App. 4. Fackrell knew nothing about Strieff. He had never seen Strieff before. He did not know who Strieff was. He had not seen Strieff enter the house. He did not know how long Strieff had been inside. He did not know whether Strieff lived in the house or had been in the house before. Pet. App. 4-5; R125:4, 7-8.

Fackrell also knew very little about the house. He had been watching the house "off and on for a week or so" for a total of approximately three hours, after an anonymous caller left a message on a drug tip line saying "they believed there was narcotics traffic at the house and they described some short term stay traffic at the house." Pet. App. 4; R125:2-4. Apart from this anonymous tip Fackrell knew nothing about the house. He did not know who owned it,

or who lived in it, or whether any crimes took place inside.

After Fackrell observed "not terribly frequent" short-term traffic at the house, R125:3, he decided he would detain the next person he saw leaving the house. That person turned out to be Strieff. As Fackrell testified, he detained Strieff because "[h]e was coming out of the house that I had been watching and I decided that I'd like to ask somebody if I could find out what was going on [in] the house." Pet. App. 4-5; R125:4. Utah has conceded throughout this case that Fackrell did not have reasonable suspicion to detain Strieff. Pet. App. 5. Rather, Fackrell was engaged in a classic fishing "expedition for evidence in the hope that something might turn up." *Brown v. Illinois*, 422 U.S. 590, 605 (1975).[1]

Fackrell detained Strieff about a block from the house. Pet. App. 4; R125:5. He identified himself as a police officer and told Strieff that "I had been watching the house and that I believed there might be drug activity there and asked him if he would tell me what he was doing there." Pet. App. 5; R125:5. Fackrell could not remember Strieff's response. R125:11.

Fackrell asked for Strieff's identification because he wanted "to know who I'm talking to." R125:6. Fackrell took Strieff's identification and asked dispatch to run a warrants check. Pet. App. 5. The dis-

[1] Utah says Fackrell "was a fact or so shy of reasonable suspicion," Pet. 3-4, but this is quite an understatement. Fackrell was nowhere close to having reasonable suspicion.

patcher found a minor traffic warrant. Pet. App. 5. Fackrell arrested Strieff on the warrant and conducted a search, during which he found methamphetamine and paraphernalia in Strieff's pockets. Pet. App. 5.

Utah charged Strieff with possession of methamphetamine and drug paraphernalia. Pet. App. 5. Strieff moved to suppress the evidence found in his pockets, on the ground that the evidence was the fruit of an unconstitutional detention. Pet. App. 5. The state district court determined that although the stop was unconstitutional, Fackrell's discovery of the warrant was an "intervening circumstance" that rendered suppression an "inappropriate remedy." Pet. App. 6.

Strieff entered a conditional guilty plea to misdemeanor attempted possession of a controlled substance and paraphernalia. Pet. App. 6. He reserved the right to appeal the order denying his motion to suppress. Pet. App. 6.

The Utah Court of Appeals affirmed by a vote of 2-1. Pet. App. 37-98. The majority held that the evidence was admissible under the "attenuation" exception to the exclusionary rule recognized in *Brown v. Illinois*, 422 U.S. 590 (1975). Pet. App. 49-84. Judge Thorne, dissenting, concluded that the evidence should have been excluded. Pet. App. 84-98.

2. The Utah Supreme Court unanimously reversed. Pet App. 1-36.

Justice Lee's opinion for the court began by observing that evidence seized after an illegal search or

detention may nevertheless be admitted under three analytically distinct exceptions to the exclusionary rule: (1) the independent source exception, (2) the inevitable discovery exception, and (3) the attenuation exception. Pet. App. 11. Each exception, the court explained, applies to a particular fact situation. Under the independent source exception, evidence may be admitted, despite police misconduct, where the police actually obtained the evidence by lawful means and would have done so even in the absence of the misconduct. Pet. App. 11-13. The inevitable discovery exception applies where the police obtained the evidence by unlawful means but would inevitably have obtained it by lawful means at a subsequent time. Pet. App. 13-14. The attenuation exception applies where the police engaged in unlawful conduct, but the unlawful conduct was not the proximate cause by which the police obtained the evidence, because of an intervening circumstance breaking the causal chain. Pet. App. 14-18.

The Utah Supreme Court then focused on the attenuation exception, the only exception advanced by the state. The court explained that this Court has established "a three-factor test to guide the attenuation inquiry. The three factors are: (1) the 'temporal proximity' of the unlawful detention and the discovery of incriminating evidence, (2) the presence of 'intervening circumstances,' and (3) the 'purpose and flagrancy' of the official misconduct." Pet. App. 18 (quoting *Brown*, 422 U.S. at 603-04).

Under the attenuation exception, the Utah Supreme Court noted, the "prototypical intervening circumstance involves a voluntary act by the defendant,

such as a confession or consent to search given after illegal police action." Pet. App. 18-19. Indeed, the court explained, "the United States Supreme Court's attenuation cases have all involved *confessions* made by unlawfully detained individuals." Pet. App. 20. In such cases, even if police misconduct is the but-for cause of the defendant's confession, "the defendant's voluntary act is sufficiently independent to break the legal connection to the primary violation." Pet. App. 19. The Utah Supreme Court observed that "[u]nder the caselaw, the independence of such voluntary acts is established, for example, where the confession or consent comes well after termination of a defendant's illegal detention, after defendant's consultation with counsel, or as a spontaneous comment not in response to any police interrogation." Pet. App. 19.

The Utah Supreme Court concluded that "attenuation is limited to the circumstances of the cases embracing this doctrine in the Supreme Court—involving a defendant's independent acts of free will." Pet. App. 27. By contrast, "in the distinct circumstances involving the discovery of an outstanding warrant, we conclude that a different doctrine—the inevitable discovery exception—controls." Pet. App. 27.

The Utah Supreme Court provided three reasons for this conclusion.

First, the court observed that the "origins of attenuation are in cases involving independent acts of criminal defendants." Pet. App. 27. This Court's attenuation cases—*Wong Sun v. United States*, 371 U.S. 471 (1963); *Brown v. Illinois*, 422 U.S. 590

(1975); and *Kaupp v. Texas*, 538 U.S. 626 (2003)—"all involved a confession given by a defendant after an initial unlawful arrest." Pet. App. 27-28. The Utah Supreme Court noted that "[t]he seminal decision in *Brown* speaks in terms of whether a defendant's 'statements (verbal acts, as contrasted with physical evidence) were of sufficient free will as to purge the primary taint of the unlawful arrest.'" Pet. App. 28 (quoting *Brown*, 422 U.S. at 600). This focus on the defendant's independent act of free will "cannot easily be extended to the discovery of an outstanding warrant," the court pointed out, because "[t]he discovery of an outstanding warrant is hardly an independent act or occurrence" that could break the causal chain between the police misconduct and the seizure of the evidence. Pet. App. 29.

Second, the Utah Supreme Court emphasized that "[t]he attenuation factors articulated by the Supreme Court also seem to cut in the same direction." Pet. App. 29. One factor is the "'temporal proximity of the arrest and the confession.'" Pet. App. 29 (quoting *Brown*, 422 U.S. at 603). Under this factor, the longer the time lapse between the police misconduct and the defendant's confession, the more likely there has been a break in the causal chain between the two. But "applying this factor to the discovery of an independent warrant would turn the inquiry on its head," the Utah Supreme Court observed. Pet. App. 30. "In the context of an unlawful detention followed by a warrants check, temporal delay would logically count in favor of the government." Pet. App. 30. But this would make no sense, because "[t]he constitutional violation in a *Terry* stop, after all, is a product

of the unreasonable delay associated with an individual's detention by the government." Pet. App. 30. The Utah Supreme Court concluded: "the government could hardly assert the lack of 'temporal proximity' in the discovery of a search warrant as a basis for attenuation (and thus avoidance of the exclusionary rule)." Pet. App. 30.

The Utah Supreme Court added that another *Brown* factor—the "purpose and flagrancy" of the police misconduct—"is also ill-suited to the outstanding warrant scenario." Pet. App. 30. This factor focuses "on the 'manner in which [the defendant's] arrest was affected,' with particular attention to whether that 'manner' gave 'the appearance of having been calculated to cause surprise, fright, and confusion.'" Pet. App. 30 (quoting *Brown*, 422 U.S. at 605). As the Utah Supreme Court explained, this factor "is an outgrowth of the inquiry into proximate causation, as a purposeful attempt at 'surprise, fright, and confusion' could predictably yield a confession that would be entirely foreseeable (and thus connected to—and hardly independent of—the primary police misconduct)." Pet. App. 30. The court concluded that this "assessment would have little application to the outstanding warrant scenario, where 'surprise, fright, and confusion' are utterly irrelevant." Pet. App. 30-31.

The Utah Supreme Court's third reason for finding the attenuation exception inapplicable was that "extension of the attenuation doctrine to the outstanding warrant scenario would eviscerate the inevitable discovery exception." Pet. App. 31. The court explained that under the inevitable discovery excep-

tion, "where lawful police work runs in tandem with an illegal parallel, the taint of the latter is tough to eliminate." Pet. App. 32. Under *Nix v. Williams*, 467 U.S. 431 (1984), "our law does not lightly excuse an initial Fourth Amendment violation on the ground that it was paralleled by a lawful investigation. Instead we insist on exclusion unless the fruits of the lawful investigation would *inevitably* have come about regardless of the unlawful search or seizure." Pet. App. 32.

The court worried that "[e]xtension of the attenuation doctrine to this scenario would blur the lines of the inevitable discovery exception," by watering down the inevitability requirement. Pet. App. 33. "If attenuation is a free-wheeling doctrine unmoored from voluntary acts of a defendant's free will, then the limits of the *Nix* formulation of inevitable discovery would be substantially curtailed." Pet. App. 33. The court observed that "[i]f *Brown*, and not *Nix*, prescribes the standard for *lawful* police conduct removing the taint from *unlawful* acts, then *inevitablity* would no longer be the standard. Instead, it would be enough for the prosecution to assert that an initial act of police misconduct was insufficiently 'purposeful and flagrant' and lacking in 'temporal proximity' to a lawful investigation to sustain exclusion." Pet. App. 33. The court concluded: "We cannot adopt this premise without overriding the *Nix* formulation of the inevitable discovery exception." Pet. App. 34.

For these reasons, the Utah Supreme Court held that the appropriate exception for the facts of this case is inevitable discovery, not attenuation. Pet.

App. 34. Because the state had argued only for attenuation, and not for inevitable discovery, the Utah Supreme Court reversed without analyzing whether the evidence would have been admissible under the inevitable discovery exception. Pet. App. 34.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied. The lower court conflict alleged in the petition is spurious. The decision below is correct. And in any event the facts of this case make it an extremely poor vehicle for addressing the question Utah presents.

I. The lower court conflict alleged in the certiorari petition does not exist.

The certiorari petition asserts a three-way conflict among the federal circuits and state supreme courts. Pet. 8-17. But this supposed conflict evaporates upon close inspection. With two very recent exceptions (the Utah Supreme Court decision in this case and an even more recent decision of the Nevada Supreme Court, both of which will be discussed below), all these cases apply the three factors established in *Brown v. Illinois*, 422 U.S. 590 (1975). The cases reach different outcomes, because they apply the *Brown* factors to widely divergent sets of facts, but these courts are all applying the same law. *United States v. Gross*, 662 F.3d 393, 401-06 (6th Cir. 2011) (applying the *Brown* factors and determining that some evidence should have been suppressed while other evidence should have been admitted); *United States v. Green*, 111 F.3d 515, 521-23 (7th Cir. 1997) (applying the *Brown* factors and determining that

evidence should have been admitted), *cert. denied*, 522 U.S. 973 (1997); *United States v. Simpson*, 439 F.3d 490, 494-96 (8th Cir. 2006) (applying the *Brown* factors and determining that evidence should have been admitted); *State v. Hummons*, 253 P.3d 275, 277-79 (Ariz. 2011) (applying the *Brown* factors and determining that evidence should have been admitted); *People v. Brendlin*, 195 P.3d 1074, 1079-81 (Cal. 2008) (applying the *Brown* factors and determining that evidence should have been admitted), *cert. denied*, 556 U.S. 1192 (2009); *People v. Padgett*, 932 P.2d 810, 816-17 (Colo. 1997) (citing its own precedent applying the *Brown* factors and finding that evidence should have been suppressed because the "temporal proximity" factor cut strongly in the defendant's favor); *State v. Frierson*, 926 So. 2d 1139, 1143-45 (Fla. 2006) (applying the *Brown* factors and determining that evidence should have been admitted), *cert. denied*, 549 U.S. 1082 (2006); *State v. Page*, 103 P.3d 454, 458-60 (Idaho 2004) (applying the *Brown* factors and determining that evidence should have been admitted); *State v. Moralez*, 300 P.3d 1090, 1100-04 (Kan. 2013) (applying the *Brown* factors and determining that evidence should have been suppressed); *State v. Hill*, 725 So. 2d 1282, 1284-87 (La. 1998) (applying the *Brown* factors and determining that evidence should have been admitted); *Cox v. State*, 916 A.2d 311, 321-24 (Md. 2007) (applying the *Brown* factors and determining that evidence should have been admitted); *State v. Grayson*, 336 S.W.3d 138, 147-48 (Mo. 2011) (applying the *Brown* factors and determining that evidence should have been suppressed); *State v. Thompson*, 438 N.W.2d 131, 137 (Neb. 1989) (applying *Brown* and

determining that evidence should have been admitted); *State v. Shaw*, 64 A.3d 499, 508-12 (N.J. 2012) (applying the *Brown* factors and determining that evidence should have been suppressed); *Jacobs v. State*, 128 P.3d 1085, 1087-89 (Okla. Ct. Crim. App. 2006) (applying the *Brown* factors and determining that evidence should have been admitted); *State v. Bailey*, 338 P.3d 702, 713-15 (Or. 2014) (applying the *Brown* factors and determining that evidence should have been suppressed); *State v. Mazuca*, 375 S.W.3d 294, 300-10 (Tex. Ct. Crim. App. 2012) (applying the *Brown* factors and determining that evidence should have been admitted), *cert. denied*, 133 S. Ct. 1724 (2013).

Utah tries to manufacture a split among these cases by selectively quoting from them. The first of Utah's purported categories consists of cases Utah characterizes as excluding evidence "only if the police engaged in flagrant misconduct." Pet. 8. But "flagrancy of the official misconduct" is one of the *Brown* factors, 422 U.S. at 604, so it is hardly surprising that these cases would consider it along with the other two factors. Indeed, all of the cases applying *Brown*, in all three of Utah's claimed categories, consider the flagrancy of the police misconduct, along with the other two *Brown* factors, in the course of their analysis. All of these cases, in all three of Utah's ostensible categories, recognize that police misconduct is flagrant where, as here, the officer unlawfully detains the defendant "in the hope that something might turn up." *Id.* at 605. As with any multi-factor test, different factors will be more or less prominent in different fact situations, so it is

again not surprising that in some cases the "flagrancy" factor has been more pivotal than in others. Regardless of the weight given to particular factors in any given case, all these courts are applying the same test.

Utah's second purported category consists of five cases that Utah characterizes as holding that "evidence seized incident to a warrant-arrest will always be excluded." Pet. 12. But this characterization is incorrect. None of these cases holds that evidence will always be excluded.

Two of the cases that Utah lists in this category are the decision in this case and an even more recent decision of the Nevada Supreme Court. These cases will be discussed in more detail below. For now, it suffices to note that neither case holds that evidence will always be excluded. These cases simply hold that the admissibility of the evidence is governed by a different exception to the exclusionary rule.

The remaining three cases Utah places in this category likewise do not hold that the evidence will always be excluded. In *Gross*, the Sixth Circuit held that "where there is a stop with no legal purpose, the discovery of a warrant during that stop may be a relevant factor in the intervening circumstance analysis, but it is not by itself dispositive." 662 F.3d at 404. The Sixth Circuit accordingly gave considerable attention to the other two *Brown* factors. The court concluded that "[i]n view of the time that elapsed between the unlawful seizure of Gross" and his subsequent confession, "the first factor weighs significantly toward attenuation." *Id.* at 402. It further con-

cluded that the officer's conduct, although "disheartening," *id.* at 405, was not particularly flagrant and could thus be considered "a wash," *id.* at 406. Far from holding that evidence would always be excluded, the Sixth Circuit held that under the *Brown* test some evidence would be admitted while other evidence would be excluded. *Id.*

In *Moralez*, the Kansas Supreme Court likewise looked to all three *Brown* factors. 300 P.3d at 1100-03. The court explicitly held that "the three factors generally considered in performing an attenuation analysis—temporal proximity, presence of intervening circumstances, and purpose and flagrancy of police misconduct—are not exclusive, nor are they necessarily entitled to equal weight. Instead, consideration of all relevant factors will necessarily depend on the particular facts presented in each case." *Id.* at 1103. Finally, in *Padgett* the Colorado Supreme Court found no attenuation where the "temporal" factor was so "glaring" as to point heavily in the defendant's favor, 932 P.2d at 817, and where the government had not even shown that an arrest warrant existed in the first place, *id.* at 816-17. None of these cases holds that "evidence seized incident to a warrant-arrest will always be excluded." Pet. 12.

Utah's third purported category includes three cases which Utah characterizes as holding that "evidence seized incident to a warrant-arrest will never be excluded." Pet. 15. But these cases do not take this position. The Seventh Circuit case is inapposite: It involved the lawfulness of an *arrest* pursuant to a warrant, not the admissibility of evidence found in a search incident to that arrest. *Atkins v. City of Chi-*

cago, 631 F.3d 823, 826-27 (7th Cir. 2011). The Nebraska Supreme Court did not hold that evidence obtained incident to a warrant-arrest could *never* be excluded. The court merely held that on the facts of the case, under *Brown* "[t]he connection between the illegal stop and the outstanding robbery warrant was so attenuated as to dissipate the taint of the illegal stop." *Thompson*, 438 N.W.2d at 137. The third case is from an intermediate state appellate court, and even that one does not fit Utah's description. In *State v. Cooper*, 579 S.E.2d 754, 757-58 (Ga. Ct. App. 2003), the Georgia Court of Appeals found sufficient attenuation on the particular facts of the case.

Utah's asserted three-way split is thus fanciful, because courts in all three of its claimed categories apply the *Brown* factors to determine whether the seizure of evidence is sufficiently attenuated from the wrongful stop of the defendant.[2]

Very recently, two state supreme courts have held that in these circumstances attenuation is the wrong exception to the exclusionary rule. One is of course the Utah Supreme Court in the decision below. The other is the Nevada Supreme Court. *Torres v. State*, 341 P.3d 652, 658 (Nev. 2015) ("We do not perceive the *Brown* factors as particularly relevant when, as here, there was no demonstration of an act of free

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[2] In the decision below, the Utah Supreme Court noted that different lower courts, in applying the *Brown* factors, have placed different weights on different factors, Pet. App. 21-25, an inevitable outcome when a multi-factor test is applied to a wide range of factual circumstances. The split alleged in the certiorari petition is completely different from the Utah Supreme Court's description of the cases.

will by the defendant to purge the taint caused by an illegal seizure."). Review by this Court would be unwarranted, however, for three reasons.

First, all the lower courts agree, whether or not they use the attenuation exception, that evidence must be excluded where, as in this case, the police conduct a fishing expedition—an illegal detention undertaken "in the hope that something might turn up." *Brown*, 422 U.S. at 605. *See, e.g.*, *Moralez*, 300 P.3d at 1103 (explaining that evidence must be excluded "when law enforcement officers approach random citizens, request identification, and run warrants checks for no apparent reason"); *Grayson*, 336 S.W.3d at 148 ("Such a fishing expedition is precisely the sort of overreaching police behavior that the exclusionary rule is intended to deter."); *Bailey*, 338 P.3d at 714 (explaining that evidence must be excluded where the police detain a defendant "'for investigation' or for 'questioning'") (quoting *Brown*, 422 U.S. at 605); *Brendlin*, 195 P.3d at 1081 (noting that evidence must be excluded if a detention is "undertaken as a fishing expedition"); *Torres*, 341 P.3d at 657 (explaining that the officer had no reason to detain the defendant other than the officer's hope of finding illegal activity).

Second, none of the courts that apply the *Brown* attenuation factors has yet had the opportunity to consider the thorough analysis in the decision below. The Utah Supreme Court's careful opinion is the first in any jurisdiction to address at length whether the attenuation exception or the inevitable discovery exception is the proper exception to the exclusionary rule for this situation. The earliest courts that ap-

plied the attenuation exception simply assumed that it was appropriate, without any explicit consideration of the alternatives. *See, e.g.*, *Green*, 111 F.3d at 521. The later courts that applied the attenuation exception by and large followed the earlier ones, again without any consideration of the alternatives. *See, e.g.*, *Brendlin*, 195 P.3d at 1079 (citing *Green* and several other cases). These courts will now almost certainly be asked, in appropriate cases, to reconsider their view in light of the Utah Supreme Court's decision. They should be given that opportunity. As we will discuss in more detail below, the Utah Supreme Court decision is so clearly correct that the other courts are very likely to agree with it.

Third, neither the Utah Supreme Court in this case nor the Nevada Supreme Court in *Torres* addressed whether the evidence at issue would have been admissible under the inevitable discovery exception, because the state did not argue that theory in either case. We thus do not know whether substituting inevitable discovery for attenuation will have any concrete effect on the outcomes of cases. Before this Court grants review, it would be prudent to wait for some cases to be decided under the inevitable discovery exception, so the Court will have some sense of whether anything is at stake.

II. The decision below is correct.

Justice Lee's opinion for the unanimous Utah Supreme Court is the clearest and most intelligent discussion of this issue yet written. It demonstrates beyond dispute that the attenuation exception pertains only to cases in which an intervening act of the de-

fendant's free will breaks the causal chain between the police misconduct and the acquisition of the evidence sought to be admitted. The attenuation exception does not apply in the very different context of the discovery of an arrest warrant after an unlawful detention.

All of this Court's attenuation cases have involved confessions, and in all of them the Court has emphasized that the intervening factor breaking the causal chain is an independent act of free will on the part of the defendant. In the case that first discussed the attenuation exception, *Wong Sun*, the Court noted the possibility that a defendant's statement to the police after an unlawful arrest might be admissible, if it resulted from "an intervening independent act of a free will" on the defendant's part. 371 U.S. at 486. In *Brown*, the Court held that "[t]he question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case." 422 U.S. at 603. The Court then enumerated the three factors it has consulted ever since—the "temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." *Id.* at 603-04 (citation and footnotes omitted). The Court added that "[t]he voluntariness of the statement is a threshold requirement," *id.* at 604, a comment that confirms that the attenuation exception is confined to voluntary acts of the defendant in the aftermath of police misconduct.

The Court's subsequent attenuation cases have all likewise turned on whether a defendant's confession was the product of police misconduct or the product

of the defendant's own free will.[3] *See Dunaway v. New York*, 442 U.S. 200, 219 (1979) ("No intervening events broke the connection between petitioner's illegal detention and his confession."); *United States v. Ceccolini*, 435 U.S. 268, 279 (1978) ("The evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will in no way coerced or even induced by official authority."); *Taylor v. Alabama*, 457 U.S. 687, 690-91 (1982) ("Petitioner was arrested without probable cause in the hope that something would turn up, and he confessed shortly thereafter without any meaningful intervening event."); *Kaupp*, 538 U.S. at 632 ("Since Kaupp was arrested before he was questioned, and because the State does not even claim that the sheriff's department had probable cause to detain him at that point, well-established precedent requires suppression of the confession unless that confession was an act of free will sufficient to purge the primary taint of the unlawful invasion.") (quotation marks and brackets omitted).

As the Utah Supreme Court correctly observed, Pet. App. 29, attenuation cannot sensibly be extended to the discovery of an outstanding warrant, be-

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[3] Utah erroneously claims *Johnson v. Louisiana*, 406 U.S. 356 (1972), as an exception to this rule, Pet. 21, apparently because *Johnson* cites *Wong Sun*, but *Johnson* was not an attenuation case. *Id.* at 365 (explaining that a lineup was properly conducted because the defendant was lawfully in custody by virtue of commitment by a magistrate). Utah also erroneously cites *United States v. Ceccolini*, 435 U.S. 268 (1978) as an exception, Pet. 21, but *Ceccolini* held that "[t]he evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will." *Id.* at 279.

cause, unlike a spontaneous confession by the defendant, the discovery of a warrant is never an independent act or occurrence. It is a natural and foreseeable consequence of the initial detention, because the police routinely run computer checks of people they detain. The discovery of a warrant could never truly be an "intervening" circumstance, *Brown*, 422 U.S. at 603, like a statement made by a defendant of his own free will.

Moreover, the three *Brown* factors that govern the attenuation exception lose their meaning when they are transposed to the very different factual setting of the discovery of an arrest warrant. The first factor is the "temporal proximity of the arrest and the confession." *Id.* That is, the longer the delay between the wrongful arrest and the confession, the more likely the confession is to be a product of the defendant's free will, and the less likely it is to have been proximately caused by the wrongful arrest. This factor makes no sense in the warrant context. To begin with, the discovery of a warrant virtually always comes immediately after the detention of the defendant. Unlike confessions, warrants do not spontaneously arise after a long delay. Worse, as the Utah Supreme Court pointed out, Pet. App. 29-30, the longer the delay, the more egregious the *Terry* violation. Applying this *Brown* factor to the warrant context thus rewards the government for the worst police misconduct.

The second *Brown* factor is "the presence of intervening circumstances." *Id.* at 603-04. This makes sense for confessions, because all sorts of things can happen between an arrest and a confession. A de-

fendant's friends or family might counsel him to confess. A defendant might be stricken with remorse. A defendant might decide to implicate a confederate in the hope of leniency. These are all intervening circumstances that might break the causal chain between an unlawful arrest and a subsequent confession. Again, however, this factor loses its meaning when transposed to the very different context of the discovery of a warrant. If the "intervening circumstance" is the discovery of the warrant, then this circumstance is present, and indeed it is identical, in every single case, so it would be nonsensical to consider it as a factor.

The third *Brown* factor is "the purpose and flagrancy of the official misconduct." *Id.* at 604. This makes sense as applied to confessions, because the more the police deliberately try to frighten or confuse the defendant, the more likely the defendant's confession is to be a product of the police misconduct, and the less likely the confession is to be a product of the defendant's own free will. But it makes no sense as applied to the discovery of warrants. In deciding whether the discovery of a warrant was proximately caused by the police's unlawful detention of a defendant, it makes no difference whether the police detain the defendant in a frightening or confusing way. The three *Brown* factors thus cannot be woodenly transposed from confessions to the discovery of warrants.

Finally, as the Utah Supreme Court rightly emphasized, Pet. App. 31-34, extending the attenuation exception beyond voluntary acts of the defendant would eviscerate the inevitable discovery exception.

In any case that does not satisfy the requirements of inevitable discovery, the government would simply argue that the initial act of police misconduct was not "flagrant" and that there was no "temporal proximity" between the police misconduct and the subsequent discovery of the evidence. If the inevitable discovery exception could be so easily circumvented, it would have ceased to have any meaning long ago.

For these reasons, the Utah Supreme Court's opinion is correct. Inevitable discovery, not attenuation, is the appropriate exception to the exclusionary rule in this situation.

III. The facts of this case make it a poor vehicle for addressing the question presented, because the evidence would be suppressed even under Utah's view of the law.

Utah proposes to dispense entirely with the first two *Brown* factors. Pet. 19-22 (arguing that the discovery of a warrant is always an intervening circumstance of sufficient magnitude), Pet. 25 (arguing that "*Brown*'s temporal proximity factor is not relevant"). Instead, Utah invents a new test more government-friendly than any that has ever been adopted by any court, under which evidence would always be admitted unless the police make "random, dragnet-type, or otherwise arbitrary stops." Pet. 22. Such a test could not be adopted without twisting the attenuation exception beyond recognition and eviscerating the inevitable discovery exception. Even putting these objections aside, however, this case would be an exceedingly poor vehicle for deciding whether Utah's view

of the law is correct, because the police misconduct in this case was precisely the kind of random, arbitrary detention that would be forbidden even under Utah's unorthodox test.

According to Detective Fackrell's own testimony, after watching a house on and off for a total of three hours over the course of a week, he decided to stop someone who was leaving the house to see if he could find out what was going on inside. Fackrell did not have any particular person in mind. Edward Strieff happened to be the first person who walked out of the house after Fackrell formulated this plan. That is why Fackrell happened to stop Strieff rather than someone else. Fackrell had no idea whether Strieff was a short-term visitor, or a permanent resident, or the pizza delivery man. Fackrell stopped him utterly at random.[4]

In short, this was a random, arbitrary stop. Even under Utah's proposed rule, the evidence would be suppressed. That makes this case a poor vehicle for deciding whether Utah's unorthodox view of the law is correct.

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[4] Amici's discussion of police officers' "good faith," Br. of Amici Michigan et al. 5-18, is thus misplaced in this case. The purpose of the exclusionary rule is precisely to deter officers from conducting such fishing expeditions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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