No. 14-1373

In the
Supreme Court of the United States

STATE OF UTAH,
Petitioner,

vs.

EDWARD JOSEPH STRIEFF, JR.,
Respondent.

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

Reply Brief of Petitioner

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The question presented is whether evidence acquired incident to a lawful warrant-arrest should be suppressed because police learned of the warrant during an investigatory stop later found to be unlawful. Over the past two decades, the federal courts of appeals and state high courts have become deeply divided over the answer to that question and even how to analyze it. The recent decisions in Utah and Nevada have only deepened that divide.

Strieff's effort to deny the conflict is unavailing, as is his suggestion that this case is anything other than an ideal vehicle through which to resolve it. Nor is his attempt to defend the Utah Supreme Court's holding and reasoning any more successful—it cannot be reconciled with this Court's attenuation precedents and its exclusionary rule doctrine. The time has come for this Court to decide the issue.

A. The split among lower courts is real and growing.

Strieff concedes that the Utah and Nevada Supreme Court expressly held that, in conflict with virtually every other court to address the issue, the attenuation doctrine is inapposite. Br. in Opp. 14-15. He also concedes (Br. 15-16) that the Utah and Nevada Supreme Courts adopted a rule that will lead to different results than in many other federal circuits and state high courts. In Utah and Nevada, evidence obtained in a search incident to a lawful arrest following an unlawful seizure is only admissible if, as a fortuitous matter, the evidence would have inevitably been discovered anyway. Absent inevitable discovery, the evidence must be excluded. By contrast, two federal courts of appeal and 11 state high courts would admit that evidence, even if it would not inevitably have been found, unless the police engaged in flagrant misconduct when they initially seized the defendant. *See* Pet. 9-10. And as discussed further below, several additional courts would admit that evidence regardless of whether the police engaged in flagrant misconduct. *See* Pet. 15-16.

This acknowledged conflict between the Utah and Nevada Supreme Courts, on the one hand, and well over a dozen other courts around the nation, on the other, alone justifies a grant of certiorari. But contrary to Strieff's contention (Br. 9-16), the conflict among the courts is far deeper than that. The lower

courts have not merely applied the three-factor inquiry articulated in *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), to different facts and thereby reached differing results. The courts have divided into discrete, outcome-determinative camps based on the different weight they give the different factors in this context.

1. The excludes-evidence-only-if-flagrant camp.

In 1997, the Seventh Circuit held that under *Brown's* three-factor inquiry, an intervening warrant-arrest purges the taint of a prior, unlawful stop unless the illegality was flagrant. *United States v. Green*, 111 F.3d 515, 521-23 (7th Cir.), *cert. denied*, 522 U.S. 973, (1997). Over time, *Green's* analysis became the majority approach.

Courts in the *Green* camp treat *Brown's* close temporal proximity factor as basically irrelevant in the warrant context because any illegality in making the stop does not affect the lawfulness of the warrant-arrest itself. *See Green*, 111 F.3d at 522; Pet. 11. In contrast, they treat the warrant-arrest as "an even more compelling" intervening event than that found in confession cases, precisely because—unlike a confession—there is no danger that the warrant resulted from police misconduct during the stop. *Green*, 111 F.3d at 522. Attenuation in this camp thus turns on *Brown's* flagrancy factor: evidence seized incident to the intervening warrant-arrest is

usually admitted; it is suppressed only if the police illegality was flagrant. *Id.* at 521, 523.

Strieff thus misses the point when he says (Br. 11) that these courts "consider" flagrancy "along with the other two factors." They do more than *consider* that factor; they treat it as outcome-determinative.

As the State explained in its petition, most lower courts to address the issue have adopted *Green's* approach. *See* Pet. 8-12. But not all have, including courts that apply the *Brown* factors, but in a very different way.

2. The always-excludes-evidence camp.

The Sixth Circuit and four state high courts have adopted approaches that invariably lead to the exclusion of evidence found incident to a lawful arrest following an unlawful seizure. Three of those courts consider the *Brown* factors: *United States v. Gross*, 662 F.3d 393 (6th Cir. 2011); *People v. Padgett*, 932 P.2d 810 (Colo. 1997); *State v. Moralez*, 300 P.3d 1090 (Kan. 2013). But their attenuation analysis is very different than *Green's* because of the relative importance they assign to the various *Brown* factors—particularly, close temporal proximity.

Whereas the *Green* camp holds that close temporal proximity between the illegality and discovery of evidence is immaterial, the Sixth Circuit and the Kansas and Colorado Supreme Courts treat the close

temporal proximity between the seizure and the search incident to arrest as fatal to attenuation—whether or not the prior illegality was flagrant.

In *Gross*, the Sixth Circuit held that although the illegality of the stop "would [not] have been clear" to the officer (a nonflagrant violation under *Green*), the intervening warrant-arrest did "not suffice to break the chain of causation" where the challenged evidence "was found just a short time after" the defendant was arrested and jailed on the warrant. 662 F.3d at 405-06. Unlike courts in the *Green* camp, *Gross* held that close temporal proximity "weighs *significantly* toward attenuation." *Id.* at 402 (emphasis added). In *Padgett*, the Colorado Supreme Court held that the intervening warrant-arrest was insufficient to purge the taint of the unlawful stop because the "temporal and geographical proximity" of the unlawful stop to the discovery of evidence was so "glaring"—the whole encounter lasted only "four to fifteen minutes." 932 P.2d at 817. And in *Moralez*, the Kansas Supreme Court held that close temporal proximity "weighs heavily" against attenuation, and treated the warrant-arrest as an intervening event of only "minimal importance"—"neither weighing in

favor of nor against suppression." 300 P.3d at 1103-04.[1]

In sum, these courts' heavy emphasis on close temporal proximity between an unlawful detention and the discovery of evidence effectively precludes application of the attenuation doctrine to the outstanding warrant scenario—because, as Strieff concedes, "[t]he discovery of a warrant virtually always comes immediately after the detention of the defendant." *See* Br. in Opp. 19. Thus, the different outcomes found in decisions in the *Green* and *Gross* camps are not explained by varying facts, but rather by different standards. Pet. 11.

These divides are real. And the recent decisions in this case and in Nevada have only deepened that divide. The State in its petition grouped the Utah and Nevada Supreme Courts with the Sixth Circuit and Colorado and Kansas Supreme Courts because in all of these jurisdictions a warrant-arrest can never result in attenuation under their rationale. *See* Pet. 12-14. But the Utah and Nevada cases may also be understood as creating yet another camp, consisting of courts holding that the attenuation doctrine

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[1] *Moralez* also treated the illegality at issue as flagrant, appearing to equate flagrancy with any "investigative detention" not "supported by reasonable suspicion." *Id.* at 1104. But this formulation is a much different standard than that applied by the *Green* camp. *See* Pet. 22.

has no application at all to the outstanding warrant scenario. This only widens the divide.

3. The never-excludes-evidence camp.

The Sixth Circuit and Colorado, Kansas, Nevada, and Utah Supreme Courts' approaches do not merely conflict with the many courts in the *Green* camp. They also conflict with the decisions in *State v. Thompson*, 438 N.W.2d 131 (Neb. 1989), and *State v. Cooper*, 579 S.E.2d 754 (Ga. App. 2003), which effectively created a *per se* rule of attenuation in warrant cases without applying the *Brown* factors.

Thompson cited *Brown* in support of the proposition that an arrest on a warrant is "based on a source completely independent" of the initial unlawful stop. 438 N.W.2d at 137. And *Cooper* did not cite *Brown* at all. Neither court considered the *Brown* factors, much less applied them. In *Thompson*, the arresting officer's claim that he stopped the car in response to a dispatch report was refuted by the dispatch recording. 438 N.W.2d at 135-37. And in *Cooper*, the arresting officer conceded that he extended the traffic stop to investigate drugs even though, apart from the driver's nervousness, "he had no reason to believe there was contraband" in the car. 579 S.E.2d at 755. These two courts did not consider either temporal proximity or flagrancy in their analysis. Simply put, *Thompson* and *Cooper* did *not* apply the "same test" used in *Green*. And their anal-

yses in effect created a *per se* rule of attenuation—unlike *Green*.[2]

* * *

There being no serious doubt that the Utah and Nevada Supreme Court decisions deepened an existing conflict, Strieff suggests (Br. 1) that certiorari is somehow not warranted because the Court has previously denied certiorari on this issue. *See Green*, 111 F.3d 515, 520-24 (7th Cir.), *cert. denied*, 522 U.S. 973 (1997); *United States v. Faulkner*, 636 F.3d 1009, 1014-17 (8th Cir.), *cert. denied*, 132 S.Ct. 761 (2011); *People v. Brendlin*, 195 P.3d 1074, 1078-81 (Cal. 2008), *cert. denied*, 556 U.S. 1192 (2009); *State v. Frierson*, 926 So.2d 1139, 1143-45 (Fla.), *cert. denied*, 549 U.S. 1082 (2006); *State v. Mazuca*, 375 S.W.3d 294, 306-10 (Tex. Crim. App. 2012), *cert. denied* 133 S.Ct. 1724 (2013). Of course, that ignores two salient differences between this petition and those petitions.

First, in each of those cases, the lower court applied the majority rule, and the evidence—obtained

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[2] Strieff also contends that the State's reliance on *Atkins v. City of Chicago*, 631 F.3d 823 (7th Cir. 2011), is misplaced because it involved the lawfulness of an arrest rather than the admissibility of evidence. Br. in Opp. 13. The State acknowledged in its petition that *Atkins'* language on this score was dicta, but that dicta addressed *Green* directly and strongly suggests that evidence seized incident to a warrant-arrest is never subject to suppression. *See* Pet. 16-17.

in a lawful search incident to a lawful arrest—was not suppressed because the police did not engage in flagrant misconduct. This Court likely saw no reason to disturb those eminently sensible results.

Second, all of those petitions were filed before the Kansas, Utah, and Nevada Supreme Court decisions excluding such evidence; and two of them were filed before the Sixth Circuit decided *Gross*. Until recently, then, the jurisdictions that excluded evidence in the situation at issue here could have been seen as outliers. No longer.

The Court is again asked to review the issue—this time in two cases holding that the attenuation doctrine is wholly inapplicable to the outstanding warrant scenario—in this case and in *Torres v. State*, 341 P.3d 652 (Nev. 2015), *cert. pending*, Case No. 15-5.[3] The time has arrived for the Court to decide the matter.

B. Contrary to the opinion below, the attenuation doctrine applies to the outstanding warrant scenario.

Strieff admits to the divide created by the Utah and Nevada decisions (Br. 9), but contends that the

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[3] The outstanding warrant issue is the second of two questions presented in the Nevada case. The first question presented in that case is whether there was an unlawful detention to begin with.

Court should nonetheless decline to resolve the conflict. He claims that other courts have not had the opportunity to weigh in on the Utah court's rationale because it is the first to posit the theory, and that the opinion is "so clearly correct" that, given time, other courts are likely to follow suit. Br. in Opp. 15-17. He is doubly wrong.

As the Utah Supreme Court itself recognized (Pet. App. 25-26), the argument that the attenuation doctrine is limited to intervening circumstances involving a defendant's independent acts of free will was made in 2006 in a dissent in *Frierson*, 926 So.2d at 1148-51 (Pariente, C.J., dissenting). This theory of inapplicability has thus been around for nine years—and was set forth before many of the decisions that comprise the majority position.

More fundamentally, this Court should not permit the theory to gain momentum, because it is wrong. Strieff, like the Utah Supreme Court, claims that this Court has applied the attenuation doctrine only in cases involving confessions by defendants. Br. in Opp. 17-18. But as explained in the State's petition, that is not the case. *See* Pet. 21. Contrary to Strieff's claim (Br. 18 at n.3), this Court in *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972), applied the attenuation doctrine to conclude that a lineup identification should not be excluded as a "forbidden fruit" of the defendant's unlawful arrest. The Court treated the defendant's commitment by a magistrate as an

intervening circumstance purging any taint: "At the time of the lineup, the detention of the appellant was under the authority of this commitment. Consequently, the lineup was conducted not by 'exploitation' of the challenged arrest but 'by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

And in *United States v. Ceccolini*, 435 U.S. 268 (1978), which applied the attenuation doctrine in the context of a witness's testimony (not a defendant's confession), this Court implicitly recognized that factors like "free will" may be relevant in one attenuation context, e.g., confessions or witness testimony, but irrelevant in another, e.g., seizure of evidence: "Attenuation analysis, appropriately concerned with the differences between live-witness testimony and inanimate evidence, can consistently focus on [one set of] factors . . . with respect to the former, but on different factors with respect to the latter." *Id.* at 278-79. In short, this Court has never suggested that attenuation is limited to confession cases.

Strieff, like the Utah Supreme Court below, also argues that applying the attenuation doctrine to the outstanding warrant scenario would "eviscerate the inevitable discovery exception." Br. in Opp. 16, 20-21. That too is wrong.

The independent source, inevitable discovery, and attenuation doctrines are related but independ-

ent exceptions to the exclusionary rule. *See United States v. Crews*, 445 U.S. 463, 469-70 (1980) (recognizing the three distinct exceptions). Application of one does not mean the others cannot apply. Nor does application of one eviscerate the others. Seldom would the inevitable discovery exception save evidence in the outstanding warrant scenario because the facts typically will not demonstrate that the evidence "would have been obtained inevitably" notwithstanding the illegality. *Nix v. Williams*, 467 U.S. 431, 447 (1984).

The State concedes that the evidence in this case could not be saved under the inevitable discovery doctrine. The facts did not support it. But that fact does not eviscerate the inevitable discovery doctrine. The doctrine remains vibrant in situations like *Nix*, where an invalid confession led police to a body, but an organized search at the time would have led police to the body as well.

As discussed in the petition (at 19), the attenuation doctrine "'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its costs.'" *United States v. Leon*, 468 U.S. 897, 911 (1984) (quoting *Brown*, 422 U.S. at 609 (Powell, J., concurring in part)). Absent flagrant misconduct in the outstanding warrant scenario, the benefit of exclusion is

simply not worth the price paid. Pet. 18-21. Strieff offers no answer to that proposition. *See* Br. in Opp.

C. This case presents an ideal vehicle for addressing the attenuation question in outstanding warrant cases.

Strieff argues that this case is a poor vehicle for deciding whether the Utah Supreme Court's holding is correct because the police conduct below was flagrantly illegal. Br. in Opp. 21-22. That argument is wrong for two reasons: the police misconduct was not flagrant and, even if there were any doubt, it would in no way prevent the Court from addressing the issue presented.

As explained, the facts known to Detective Fackrell were just shy of reasonable suspicion. *See* Pet. 22-24. The stop was not random or arbitrary, but made after receiving a tip and conducting three hours of surveillance that corroborated that tip. Pet. 22. Based on these facts, the trial court concluded that the stop was a "good faith mistake . . . as to the quantum of evidence needed to justify an investigatory detention," the court of appeals agreed that it was a mere "misjudgment" by the officer, and the Utah Supreme Court never suggested otherwise. *See* Pet. App. 71, 102.

In all events, Strieff is missing the basic point. Under the Utah Supreme Court's reasoning, even the most reasonable of mistakes by a police officer would lead to exclusion of evidence lawfully seized

incident to a lawful arrest. Most courts around the nation disagree. This Court's resolution of that conflict is warranted. If the Court grants certiorari and adopts the majority rule, it will of course be free to apply that rule to the facts of this case (which we believe would lead to reversal) or remand to give the Utah Supreme Court the opportunity to do so.

CONCLUSION

For the reasons stated above and those in the petition, the Court should grant certiorari review.

Respectfully submitted,

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