No. ______

In the Supreme Court of the United States

STATE OF NEVADA,
Petitioner,

v.

RALPH TORRES,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An Elko, Nevada police officer lawfully stopped Ralph Torres, a pedestrian, to determine if he was old enough to be out after curfew and consume alcohol. Torres consensually produced ID indicating he was over 21, and the officer ran Torres's information through dispatch to verify the validity of the ID and check for outstanding warrants. The ID check returned an outstanding warrant for Torres's arrest, and a search incident to arrest on the warrant revealed Torres unlawfully possessed a concealed firearm.

The questions presented are:

1. After lawfully obtaining a suspect's ID to verify his age, did briefly retaining and running the ID through dispatch to check its validity and for warrants transform an otherwise lawful encounter into an unlawful seizure under the Fourth Amendment?

2. Should evidence seized incident to a lawful arrest based on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop, part of which was later found unlawful?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED . . 2

STATEMENT OF THE CASE 3

I. Factual Background 3

II. The Proceedings Below 4

REASONS FOR GRANTING THE PETITION 6

I. This Court Should Grant Review to Determine Whether Briefly Retaining an ID to Validate Its Authenticity Transforms a Lawful *Terry* Stop into an Illegal Seizure. 6

A. The Nevada Supreme Court's Holding Conflicts with Other Courts' Decisions. 6

B. The Nevada Supreme Court's Holding Conflicts with the Rationale of this Court's Fourth Amendment Cases. 12

II. This Court Should Grant Review to Determine Whether, Assuming a Fourth Amendment Violation Occurred, Discovery of an Arrest Warrant Can Dissipate the Taint of an Unlawful Detention. 15

A. Courts Are Deeply Divided Over How the Attenuation Doctrine Applies to a Preexisting Arrest Warrant. 17

B. This Case Is an Excellent Vehicle for the Court to Address this Important Conflict. . 21

CONCLUSION 22

APPENDIX

Appendix A Opinion in the Supreme Court of the State of Nevada (January 29, 2015) . . . . App. 1

Appendix B Order Denying Defendant's Motion to Suppress Evidence in the Fourth Judicial District Court of the State of Nevada, in and for the County of Elko (May 15, 2012) . . . . App. 14

Appendix C Nev. Rev. Stat. § 171.123 . . . . . . App. 20

TABLE OF AUTHORITIES

CASES

Atkins v. City of Chicago,
631 F.3d 823 (7th Cir. 2011) 19, 20

Brown v. Illinois,
422 U.S. 590 (1975) . . . . *passim*

Cox v. State,
916 A.2d 311 (Md. 2007) 18

Davis v. United States,
131 S. Ct. 2419 (2011) 11, 22

Hardy v. Commonwealth,
149 S.W.3d 433 (Ky. Ct. App. 2004) 18

Herring v. United States,
555 U.S. 135 (2009) 16, 22

Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humboldt Cnty.,
542 U.S. 177 (2004) 12, 13

Jacobs v. State,
128 P.3d 1085 (Okla. Crim. App. 2006) 18

Klaucke v. Daly,
595 F.3d 20 (1st Cir. 2010) 7, 8, 13

Mapp v. Ohio,
367 U.S. 643 (1961) 15

McBath v. State,
108 P.3d 241 (Alaska Ct. App. 2005) 18

Nardone v. United States,
308 U.S. 338 (1939) 16

People v. Brendlin,
195 P.3d 1074 (Cal. 2008) 18

People v. Defore,
150 N.E. 585 (1926) 15

People v. Mitchell,
824 N.E.2d 642 (Ill. App. Ct. 2005) 18

People v. Padgett,
932 P.2d 810 (Colo. 1997) 21

People v. Reese,
761 N.W.2d 405 (Mich. Ct. App. 2008) 18

Quinn v. State,
792 N.E.2d 597 (Ind. App. 2003) 18

Rodriguez v. United States,
135 S. Ct. 1609 (2015) 1, 12, 14, 15

State v. Bailey,
338 P.3d 702 (Or. 2014) 18

State v. Cooper,
579 S.E.2d 754 (Ga. Ct. App. 2003) 20

State v. Frierson,
926 So. 2d 1139 (Fla. 2006) 18

State v. Grayson,
336 S.W.3d 138 (Mo. 2011) 18

State v. Hill,
725 So. 2d 1282 (La. 1998) 18

State v. Hummons,
253 P.3d 275 (Ariz. 2011) 18

State v. Lisenbee,
13 P.3d 947 (Nev. 2000) 7

State v. Mazuca,
375 S.W.3d 294 (Tex. Crim. App. 2012) 18

State v. Moralez,
300 P.3d 1090 (Kan. 2013) 21

State v. Page,
103 P.3d 454 (Idaho 2004) 18

State v. Shaw,
64 A.3d 499 (N.J. 2012) 18

State v. Soto,
179 P.3d 1239 (N.M. Ct. App. 2008) 18

State v. Thompson,
438 N.W.2d 131 (Neb. 1989) 20

Terry v. Ohio,
392 U.S. 1 (1968) . . . . *passim*

Torres v. State,
341 P.3d 652 (Nev. 2015) 2

United States v. Byrd,
47 F.3d 1170 (6th Cir. 1995) 10

United States v. Cavitt,
550 F.3d 430 (5th Cir. 2008) 15

United States v. Christian,
356 F.3d 1103 (9th Cir. 2004) 10

United States v. Green,
111 F.3d 515 (7th Cir 1997) 17, 18, 19, 20

United States v. Gross,
662 F.3d 393 (6th Cir. 2011) 20

United States v. Hensley,
469 U.S. 221 (1985) 13

United States v. Hutchinson,
408 F.3d 796 (D.C. Cir. 2005) 8, 9

United States v. Kirksey,
485 F.3d 955 (7th Cir. 2007) 15

United States v. Leon,
468 U.S. 897 (1984) 22

United States v. Long,
532 F.3d 791 (8th Cir. 2008) 15

United States v. Luqman,
522 F.3d 613 (6th Cir. 2008) 11

United States v. Osborn,
203 F.3d 1176 (9th Cir. 2000) 10

United States v. Rusher,
966 F.2d 868 (4th Cir. 1992) 15

United States v. Simpson,
439 F.3d 490 (8th Cir. 2006) 18

United States v. Soto-Cervantes,
138 F.3d 1319 (10th Cir. 1998) 9, 10, 13

United States v. Villagrana-Flores,
467 F.3d 1269 (10th Cir. 2006) 15

Utah v. Strieff,
2015 UT 2 21

Wong Sun v. United States,
371 U.S. 471 (1963) 5, 16

CONSTITUTION AND STATUTES

28 U.S.C. § 1257(a) 2

42 U.S.C. § 1983 . . . . 7, 11

Nev. Rev. Stat. § 171.123 7

U.S. Const. amend. IV . . . . *passim*

U.S. Const. amend. XIV 2

OTHER AUTHORITIES

Brief of *Amici Curiae* State of Michigan and Ten Other States for Petitioner, *Utah v. Strieff*, No. 14-1373 (U.S. June 18, 2015) 1, 2, 21

Allison Gaito, *Providence Venue Takes Steps to Detect Fake IDs Almost Too Real to Spot*, WPRI.com (May 19, 2015), http://wpri.com/2015/05/19/providence-venue-takes-steps-to-detect-fake-ids-almost-too-real-to-spot-may15/ 13

Hearing on S.B. 347 Before the Assemb. Comm. on Judiciary, 2005 Leg., 73d Sess. (Nev. May 3, 2005) (Testimony of Alan Peters, Special Agent, Las Vegas Division, Federal Bureau of Investigation and Representative, Nevada Cyber Crime Task Force) 14

Elizabeth Kreft, *These Fake IDs Are So Good It's Making Law Enforcement Take Extra Notice*, The Blaze (June 23, 2014), http://www.theblaze.com/stories/2014/06/23/these-fake-ids-are-so-good-its-making-law-enforcement-take-extra-notice/ 14

Petition for Writ of Certiorari, *Utah v. Strieff*, No. 14-1373 (U.S. May 15, 2015) 1

Brian Taff, *Can You Spot the Fake ID?*, 6 ABC Action News (May 8, 2011), http://6abc.com/archive/8114482/ 13

PETITION FOR WRIT OF CERTIORARI

This case presents two important and recurring Fourth Amendment questions that have divided our nation's appellate courts. The Nevada Supreme Court adopted the minority position on both questions. This Court should grant review to address either or both questions.

The first question asks whether running a *Terry* stop suspect's ID to check its validity and for warrants is within the legitimate scope and mission of the stop, or whether it exceeds the scope of the detention and thus violates the Fourth Amendment. The Nevada Supreme Court held it exceeded the scope, which puts it in direct conflict with at least four different courts of appeal as well as the rationale of this Court's Fourth Amendment decisions. This question is especially important and timely for this Court's review because, having just reinforced in *Rodriguez v. United States* that an investigatory stop cannot be extended for activities outside the scope of a stop's "mission," 135 S. Ct. 1609, 1614 (2015), the Court should clarify that checking an ID's validity is, in fact, a reasonable part of that mission.

The second question involves a deeper and more fractured split; indeed, Utah currently has a petition for writ of certiorari pending before the Court presenting the same question: "Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?" *See* Petition for Writ of Certiorari, at i, *Utah v. Strieff*, No. 14-1373 (U.S. May 15, 2015); *see also* Brief of *Amici Curiae* State of Michigan and Ten

Other States for Petitioner, *Utah v. Strieff*, No. 14-1373 (U.S. June 18, 2015). As explained below, courts are splintered on this question, with Nevada's and Utah's highest courts joining the minority faction. Now is the right time for the Court to resolve this intractable and worsening conflict.

OPINIONS BELOW

The opinion of the Nevada Supreme Court (App. 1–13) is reported at *Torres v. State*, 341 P.3d 652 (Nev. 2015). The decision of the Fourth Judicial District Court of the State of Nevada (App. 14–19) is unreported.

JURISDICTION

The Nevada Supreme Court issued its opinion on January 29, 2015. On April 17, 2015, Justice Kennedy extended the time to file a petition for a writ of certiorari until and including June 28, 2015. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the Constitution of the United States provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides, in relevant

part, that: "No State shall * * * deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

I. Factual Background

Late at night in February 2008, Officer Shelley saw Ralph Torres swaying and staggering as he walked over a bridge in Elko, Nevada. App. 2. Because of Torres's small stature and hidden face, the officer questioned whether Torres was old enough to be out after a curfew for minors set by local ordinance. *Id.* He also suspected Torres might have violated Nevada's prohibition on underage drinking. *Id.*

Officer Shelley called Torres over and told him he was concerned Torres was violating curfew and had been drinking. *Id.* He asked Torres for ID, and Torres produced an identification card issued by the State of California. The ID indicated Torres was over 21. *Id.* But because Officer Shelley thought the ID might be fake or altered, and Torres continued to exhibit signs of being under the influence of alcohol, Officer Shelley undertook his standard practice of asking dispatch for confirmation on the validity of the ID. *Id.* at 2–3. He also requested that dispatch simultaneously run a check for outstanding warrants. *Id.*

Within five minutes, dispatch responded that Torres had two outstanding California warrants. *Id.* at 3. The first warrant was not extraditable, but dispatch soon confirmed the second was extraditable. *Id.* As a result, Officer Shelley told Torres he was placing him under arrest on the outstanding warrant. *Id.* As Officer Shelley began his search incident to arrest, Torres acknowledged he had a gun in his pocket. *Id.* The

search revealed Torres was concealing a pistol in his pocket, as well as some loose rounds of ammunition. *Id.*

II. The Proceedings Below

The State of Nevada charged Torres with being an ex-felon in possession of a firearm and unlawful possession of a concealed weapon.[1] *Id.* Torres filed a motion to suppress the firearm, asserting that his continued detention while Officer Shelley ran a records check violated the Fourth Amendment. *Id.* The state district court denied the motion without deciding whether a Fourth Amendment violation occurred. Instead, the court concluded that, even assuming an unlawful seizure occurred, the search incident to a lawful arrest on the discovered warrant served as an intervening circumstance that purged the taint of any illegality resulting from Torres's continued detention. *Id.* at 18–19.

Torres entered a conditional guilty plea that permitted him to appeal the denial of the motion to suppress. *Id.* at 4–5. On appeal, the Nevada Supreme Court reversed the state district court. The Nevada Supreme Court held that, once Officer Shelley visually confirmed Torres's age from the ID, "the suspicion for the original encounter was cured and Officer Shelley no longer had reasonable suspicion to detain Torres." *Id.* at 9. The court acknowledged Officer Shelley's testimony that his "'standard practice'" is to verify IDs

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[1] The State also charged Torres with possession of stolen property because a records check on the serial number of the firearm indicated it was stolen. App. 3. The State later dropped that charge.

because "he 'very often gets fake I.D.'s'" or IDs with "'altered information,'" but the court rejected that justification because Officer Shelley never pointed to any particularized evidence that *this* particular "ID card was fake or altered in any way." *Id.* (alteration marks omitted). The court therefore concluded the "continued detention of Torres transformed the investigative stop into an illegal seizure in violation of the Fourth Amendment." *Id.*

Turning to whether the firearm should be suppressed as fruit of an illegal seizure, the Nevada Supreme Court considered whether discovery of the firearm as a result of a lawful arrest on an outstanding warrant "is sufficiently attenuated so as to dissipate the taint of the illegality." *Id.* at 10 (quoting *Wong Sun v. United States*, 371 U.S. 471, 491 (1963)) (alteration and internal quotation marks omitted). The court acknowledged this Court's three-part test for evaluating attenuation from *Brown v. Illinois*, 422 U.S. 590 (1975), and that many courts "have considered the *Brown* factors when the 'intervening circumstance' is the discovery of an arrest warrant." App. 11–12 & n.6 (citing cases). But the Nevada Supreme Court rejected that approach, limiting *Brown* to intervening circumstances that "demonstrate an act of free will by the defendant to purge the taint caused by an illegal seizure." *Id.* at 12. Instead, the court created a categorical rule "that without reasonable suspicion, the discovery of arrest warrants cannot purge the taint from an illegal seizure." *Id.* at 12. In so holding, Nevada's highest court joined the minority side of a deeply fractured, enduring split of authority on this important and recurring issue.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Review to Determine Whether Briefly Retaining an ID to Validate Its Authenticity Transforms a Lawful *Terry* Stop into an Illegal Seizure.

A. The Nevada Supreme Court's Holding Conflicts with Other Courts' Decisions.

No one contests that Officer Shelley's initial stop of Ralph Torres on suspicion of violating curfew and underage drinking was lawful. The disagreement is whether, after Torres produced an ID stating he was over 21, the officer was acting within the scope and purpose of the stop by asking dispatch to verify the ID's validity. The Nevada Supreme Court concluded he was not, holding that once the officer visually inspected the ID, "the suspicion for the original encounter was cured and Officer Shelley no longer had reasonable suspicion to detain Torres." App. 9. Acknowledging but giving little weight to Officer Shelley's testimony that "he 'very often gets fake I.D.'s, altered information on I.D.'s, [or] I.D.'s that resemble the person but is not truly that person,'" the court instead emphasized the lack of any specific evidence or suspicion that Torres's *particular* "ID card was fake or altered in any way." *Id.* (alteration marks omitted). In short, the Nevada Supreme Court created a Fourth Amendment rule that, absent particularized suspicion a specific ID is fake, validating an ID through dispatch exceeds the scope of

a *Terry* stop, even when the legitimate purpose of the stop is—as it was here—to verify an individual's age.[2]

The Nevada Supreme Court's application of the Fourth Amendment is directly at odds with the law applied by other appellate courts. In *Klaucke v. Daly*, for example, the First Circuit in a similar case reached the opposite conclusion. 595 F.3d 20 (1st Cir. 2010). In *Klaucke*, after observing a small group of pedestrians carrying alcohol, police officers stopped the group on suspicion they were underage. *Id.* at 22. Klaucke, who was 21, initially refused to provide ID but later produced his driver's license. *Id.* at 23. Instead of returning the ID immediately, the officer "kept the license while he relayed Klaucke's information to his dispatcher to confirm the validity of the license and perform a check for outstanding arrest warrants." *Id.* The records check confirmed "the license was real and that Klaucke had no outstanding warrants." *Id*. The *Terry* stop was prolonged "[b]etween two to eight minutes" by the records check. *Id.*

Klaucke brought a Section 1983 action alleging the officer violated his Fourth Amendment rights by, among other things, "retain[ing] his license, and conduct[ing] the warrant search." *Id*. After noting that

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[2] The Nevada Supreme Court's decision references both Nev. Rev. Stat. § 171.123(4) and the Fourth Amendment. *See* App. 9 ("We conclude that under NRS 171.123(4), this continued detention of Torres transformed the investigative stop into an illegal seizure in violation of the Fourth Amendment."). The court referenced both because under established Nevada law, Section 171.123 is viewed as a codification of *Terry v. Ohio*, 392 U.S. 1 (1968), and is therefore applied coextensively with the Fourth Amendment. *See State v. Lisenbee*, 13 P.3d 947, 950 (Nev. 2000).

the initial stop was supported by "reasonable suspicion that Klaucke was a minor in possession of alcohol," the First Circuit concluded "it was not unreasonable for Officer Daly to quickly verify the license to confirm he had not been handed a fake." *Id.* at 25. As the court explained, it is "well-known" that underage drinkers "often have doctored IDs which list them as older than they are, just so they can drink." *Id*. at 26.

While underage drinking is probably the context where fake IDs are most prevalent, even when the basis for checking an ID is for a purpose other than verifying age (simply verifying identity, for example), courts have concluded that when asking a suspect to provide proof of identification is supported by reasonable suspicion, briefly holding the suspect's ID to verify its validity falls squarely within the legitimate mission of the investigative stop. The D.C. Circuit addressed this issue in a case where, as here, the defendant sought to suppress a firearm and ammunition discovered as a result of a search incident to arrest. *See United States v. Hutchinson*, 408 F.3d 796 (D.C. Cir. 2005). In that case, police officers stopped Hutchinson to question him because his appearance matched the description of an assailant in an earlier assault. *Id*. at 797. As part of the investigative stop, "the police asked for and received identification from Hutchinson and attempted to verify it through a computerized records check." *Id.* Hutchinson argued his Fourth Amendment rights were violated when the police retained his identification and "prolong[ed] the *Terry* stop for an additional two to five minutes" to verify it. *Id*. at 799. The D.C. Circuit rejected that argument, concluding that "confirming that Hutchinson either was or was not providing false

identification information to the police" by running his ID was "'necessary to effectuate the purpose of the stop.'" *Id.* at 801–02 (citation omitted).

The Tenth Circuit reached the same conclusion in *United States v. Soto-Cervantes*, 138 F.3d 1319 (10th Cir. 1998). There, officers investigating reported drug activity asked suspects for identification. *Id.* at 1322. Soto-Cervantes produced an alien registration card, and the officers ran an NCIC check on the card. *Id.* The check came back negative, but because of the officer's experience that "approximately 50 percent of alien registration cards shown to him have turned out to be fake," the officers requested an INS agent be sent to the scene to verify the ID. *Id.* Twenty minutes later, the INS agent arrived, ran an immigration check on the card, and discovered Soto-Cervantes "previously had been deported following a conviction for an aggravated felony." *Id.*

Soto-Cervantes sought to suppress the alien registration card (which turned out to be altered), "arguing that it was the fruit of an illegal detention." *Id.* at 1322. Acknowledging that "reasonable suspicion must exist at all stages of the detention," *id.*, the Tenth Circuit concluded that "[a]lthough the defendant had produced an identification card, the deputies in this case were justified in detaining him until they could verify that the card was genuine," *id.* at 1323. The court pointed to the officer's testimony that "alien registration cards were easy to fake and that he was aware of a high rate of fake documentation." *Id.* "Under these circumstances, the fact that the documentation did not appear to the deputies to be obviously fake does not prevent them from calling in

the INS agents to make a more experienced evaluation." *Id.*

The Ninth Circuit has likewise repeatedly concluded that when there is reasonable suspicion to ask for identification, it is also reasonable for the officer to run a records check. In *United States v. Osborn*, 203 F.3d 1176 (9th Cir. 2000), the Ninth Circuit concluded that Las Vegas, Nevada police officers had reasonable suspicion to briefly detain, question, and ask Osborn for identification. *Id.* at 1181–83. After Osborn "handed the officer his Nevada driver's license," the officer "radioed the police department to determine whether Osborn had any outstanding warrants or previous arrests." *Id.* at 1178. The questioning and ID check "lasted three to five minutes," *id.* at 1179, which the Ninth Circuit held was lawful under the Fourth Amendment, *id.* at 1182–83. As the Ninth Circuit later summarized its holding in *Osborn*: "Because the officer had reasonable suspicion of criminal activity, we held that his request for identification, questions about the suspect's prior contacts with law enforcement, *and a check for outstanding warrants or previous arrests*, were all within the scope of the officer's authority." *United States v. Christian*, 356 F.3d 1103, 1106 (9th Cir. 2004) (emphasis added).

Finally, the Sixth Circuit has also repeatedly held that checking the validity of a suspect's ID to "verify[] * * * identity" is "not beyond the scope of [an] investigatory stop." *United States v. Byrd*, 47 F.3d 1170 (6th Cir. 1995) (unpublished decision) (reviewing investigatory stop on suspicion of soliciting

prostitution); *United States v. Luqman*, 522 F.3d 613, 618 (6th Cir. 2008) (same).

The import of these conflicting authorities is clear: if Torres had been charged on his ex-felon in possession charge in the First, Sixth, Ninth, Tenth, or D.C. Circuits, holding his ID for five minutes to validate it through dispatch would have easily been deemed within the original scope and purpose of the *Terry* stop. This jurisdictional split alone is worth addressing because, as this Court has recognized, suppression "exacts a heavy toll on both the judicial system and society at large." *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011).

But that is not the worst of it. Because the Ninth Circuit follows the rule consistently applied by its sister circuits, the Nevada Supreme Court's misapplication of the Fourth Amendment means that whether or not a defendant could have an unlawful firearm suppressed depends on whether he is charged in state court, or whether his ex-felon in possession crime is referred for federal prosecution. Similarly, whether he might prevail on a Section 1983 action for an alleged violation of his Fourth Amendment rights could also turn on whether he brought suit in state or federal court. This disparity of outcomes for the same crime or alleged violation of constitutional rights is not fair to criminal defendants or society. The State of Nevada respectfully asks the Court to address this conflict and correct this injustice.

B. The Nevada Supreme Court's Holding Conflicts with the Rationale of this Court's Fourth Amendment Cases.

This Court recently reemphasized in *Rodriguez* that the scope and duration of an investigative stop is generally limited by the original purpose of the stop. 135 S. Ct. at 1614; *see also Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humboldt Cnty.*, 542 U.S. 177, 185 (2004). The Nevada Supreme Court correctly identified the original purpose for the stop in this case: reasonable suspicion that Torres was violating curfew and drinking underage. App. 9. But the court erred by concluding that checking the validity of Torres's ID and simultaneously running a warrant check was somehow outside the scope of that original, legitimate mission. That conclusion is not just contrary to the law in the First, Sixth, Ninth, Tenth, and D.C. Circuits; it is at odds with this Court's rationale in other Fourth Amendment cases.

As this Court explained in *Hiibel*, "[t]he request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop." 542 U.S. at 188.

> Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere.

Id. at 186. "'The ability to briefly stop a suspect, ask questions, *or check identification* * * * promotes the strong government interest in solving crimes and

bringing offenders to justice.'" *Id.* (alteration marks omitted; emphasis added) (quoting *United States v. Hensley*, 469 U.S. 221, 229 (1985)).

Recognizing that learning a suspect's identity and obtaining an ID are "strong government interest[s]" that fall within the legitimate "purpose" of a *Terry* stop, *id.*, it makes little sense to draw the constitutional line at visually inspecting the ID but not being able to quickly "run" the ID to verify its authenticity. As the federal courts in *Klaucke* and *Soto-Cervantes* expressly noted, and as Officer Shelley's testimony in this case confirmed, the proliferation of fake or altered IDs is "well-known." *Klaucke*, 595 F.3d at 26; *see also Soto-Cervantes*, 138 F.3d at 1323; App. 9, 16.[3] It is just as well-known that some fake or altered IDs are difficult or impossible to identify as such just by looking at them; indeed, that was true of the altered ID in *Soto-Cervantes*, 138 F.3d at 1321, 1323 (noting the ID "did not appear to the deputies to be obviously fake" but that the INS agent later "noticed a suspicious discrepancy").[4] Only a few years before the events in

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[3] *See also* Brian Taff, *Can You Spot the Fake ID?*, 6 ABC Action News (May 8, 2011), http://6abc.com/archive/8114482/ ("Like so many college aged kids, the local student carries a fake ID, * * * 'It was kind of socially acceptable.'").

[4] *See also* Allison Gaito, *Providence Venue Takes Steps to Detect Fake IDs Almost Too Real to Spot*, WPRI.com (May 19, 2015), http://wpri.com/2015/05/19/providence-venue-takes-steps-to-detect-fake-ids-almost-too-real-to-spot-may15/ ("These aren't your fake driver's licenses and identification cards of old. Today's fake IDs are sophisticated pieces of plastic bought from online counterfeiters, designed to look, feel and even scan like the real thing."); Taff, *supra* note 3 ("fake IDs that they say are so

this case, the Nevada Legislature heard testimony from a Las Vegas-based FBI agent about the proliferation and high quality of fake IDs in Nevada:

> We have gone inside some very nice homes in the Las Vegas area, where the upper floor of that home was a very detailed and elaborate financial forgery laboratory with equipment that would rival the Department of Motor Vehicles. The equipment is out there to create these false IDs and is readily available to the public. At the time of several of these arrests, we had capsules full of the holograms that were placed on these false IDs.

Hearing on S.B. 347 Before the Assemb. Comm. on Judiciary, 2005 Leg., 73d Sess., at 21 (Nev. May 3, 2005) (Testimony of Alan Peters, Special Agent, Las Vegas Division, Federal Bureau of Investigation and Representative, Nevada Cyber Crime Task Force).

Especially in light of this Court's recent *Rodriguez* decision emphasizing that an investigatory stop cannot be extended for activities outside the scope of the stop's "mission," the Nevada Supreme Court's departure from the established understanding in the federal courts should be addressed by the Court to clarify that

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convincing … it's possible that even the police can't spot them"); Elizabeth Kreft, *These Fake IDs Are So Good It's Making Law Enforcement Take Extra Notice*, The Blaze (June 23, 2014), http://www.theblaze.com/stories/2014/06/23/these-fake-ids-are-so-good-its-making-law-enforcement-take-extra-notice/.

checking the validity of an ID falls within that mission.[5]

II. This Court Should Grant Review to Determine Whether, Assuming a Fourth Amendment Violation Occurred, Discovery of an Arrest Warrant Can Dissipate the Taint of an Unlawful Detention.

The Fourth Amendment exclusionary rule is an extreme remedy that must be balanced against the high social cost of letting the criminal go free just "'because the constable has blundered.'" *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (quoting *People v. Defore*, 150 N.E. 585, 587 (1926) (Cardozo, J.)). Accordingly, suppression of evidence is only appropriate where it will serve to deter flagrant, intentional police

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[5] Because Torres's warrant check was done at the same time the validity of his ID was checked, App. 2–3, the warrant check does not present any independent Fourth Amendment concern. As this Court reinforced in *Rodriguez*, an officer is free to engage in unrelated investigations during an otherwise lawful detention, provided the unrelated investigation does not prolong the detention beyond the time necessary to complete the mission of the original stop. 135 S. Ct. at 1614–15. If checking the validity of Torres's ID was part of the legitimate mission of the stop, the officer and dispatch were free to check for warrants at the same time. *See also United States v. Kirksey*, 485 F.3d 955, 957 (7th Cir. 2007) (explaining when an individual "remains under suspicion for committing a crime, the officer can take a reasonable amount of time to check for outstanding warrants or criminal history, even if the initial justification for the stop had nothing to do with criminal history") (*citing United States v. Villagrana-Flores*, 467 F.3d 1269, 1275–77 (10th Cir. 2006)); *accord United States v. Cavitt*, 550 F.3d 430, 437 (5th Cir. 2008); *United States v. Long*, 532 F.3d 791, 795 (8th Cir. 2008); *United States v. Rusher*, 966 F.2d 868, 876–77 (4th Cir. 1992).

misconduct. *Herring v. United States*, 555 U.S. 135, 147–48 (2009) (declining to apply the exclusionary rule in the absence of a deterrent effect that will outweigh the social harm of suppressing evidence of a criminal offense).

This concept underlies what has come to be known as the "attenuation doctrine," which recognizes that circumstances may exist where the connection between the Fourth Amendment violation and the acquisition of evidence sought to be excluded becomes sufficiently "attenuated as to dissipate the taint" of the violation. *Nardone v. United States*, 308 U.S. 338, 341 (1939). When applying the attenuation doctrine, whether evidence discovered in conjunction with a Fourth Amendment violation is attenuated enough to be admitted is often characterized as turning on whether the evidence is considered "fruit of the poisonous tree." *Id*.

In *Wong Sun*, this Court rejected a "but for" test in determining whether to suppress evidence as fruit of the poisonous tree, emphasizing that not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." 371 U.S. at 488. Rather, the determinative question is whether the challenged evidence was obtained by "exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id*.

In *Brown v. Illinois*, 422 U.S. 590 (1975), this Court considered whether a Mirandized confession obtained after an unlawful arrest should be suppressed as fruit of the poisonous tree. *Brown* identifies three relevant factors to consider in applying the attenuation doctrine:

"[1] the temporal proximity of the arrest and the confession, [2] the presence of intervening circumstances, and, [3] particularly, the purpose and flagrancy of the official misconduct." *Id*. at 603–604 (citations omitted). Since *Brown*, lower courts have struggled with whether and how to adapt *Brown*'s three-pronged test to the factual scenario at issue in this case: the discovery of a valid, outstanding arrest warrant during the course of a stop or detention later found unlawful.

A. Courts Are Deeply Divided Over How the Attenuation Doctrine Applies to a Preexisting Arrest Warrant.

One of the difficulties courts have confronted in analyzing attenuation in cases like this is that this Court's seminal attenuation case, *Brown*, arose in a different context, causing disagreement on how (or even whether) to apply its three factors to the discovery of an outstanding warrant. Unlike the Nevada Supreme Court, most courts have applied the *Brown* factors in one fashion or another, but they have generally divided into two main groups: (1) courts that never exclude the evidence or exclude it only if the police engaged in flagrant misconduct; or (2) courts that always exclude the evidence. Nevada and a handful of other courts fall in the latter group. The majority of courts fall in the first group, but even those courts break down into two distinct sub-groups.

1. The Seventh Circuit's decision in *United States v. Green*, 111 F.3d 515 (7th Cir 1997), is the leading decision for the majority. In *Green*, the court held that unless an unlawful stop was "flagrant official misconduct," an arrest on a preexisting warrant

"constituted an intervening circumstance sufficient to dissipate any taint caused" by the unlawful stop. *Id.* at 521. The Seventh Circuit explained that "'[b]ecause the primary purpose of the exclusionary rule is to discourage police misconduct, application of the rule does not serve this deterrent function when the police action, although erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights.'" *Id.* at 523 (citation omitted).

The *Green* court has been joined by one other federal circuit and by appellate courts in 17 states.[6] Courts in this group generally apply *Brown*'s factors,

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[6] *See United States v. Simpson*, 439 F.3d 490, 495–96 (8th Cir. 2006) (holding arrest on preexisting warrant attenuated taint of nonflagrant, unlawful stop); *State v. Mazuca*, 375 S.W.3d 294, 306–10 (Tex. Crim. App. 2012) (same); *State v. Hummons*, 253 P.3d 275, 277–79 (Ariz. 2011) (same); *People v. Brendlin*, 195 P.3d 1074, 1078–81 (Cal. 2008) (same); *State v. Frierson*, 926 So. 2d 1139, 1143–45 (Fla. 2006) (same); *State v. Page*, 103 P.3d 454, 458–60 (Idaho 2004) (same); *State v. Hill*, 725 So. 2d 1282, 1283–88 (La. 1998) (same); *Cox v. State*, 916 A.2d 311, 318–24 (Md. 2007) (same); *Jacobs v. State*, 128 P.3d 1085, 1087–89 (Okla. Crim. App. 2006) (same); *People v. Reese*, 761 N.W.2d 405, 413–14 (Mich. Ct. App. 2008) (same); *McBath v. State*, 108 P.3d 241, 247–50 (Alaska Ct. App. 2005) (same); *Hardy v. Commonwealth*, 149 S.W.3d 433, 435–36 (Ky. Ct. App. 2004) (same); *Quinn v. State*, 792 N.E.2d 597, 599–603 (Ind. App. 2003) (same); *State v. Grayson*, 336 S.W.3d 138, 148 (Mo. 2011) (en banc) (holding warrant-arrest did not purge taint because stop was nothing more than a "fishing expedition" based on hunch "in the hope that something might turn up"); *State v. Bailey*, 338 P.3d 702, 715 (Or. 2014) (en banc) (similar); *State v. Shaw*, 64 A.3d 499, 512 (N.J. 2012) (similar); *State v. Soto*, 179 P.3d 1239, 1245 (N.M. Ct. App. 2008) (similar); *People v. Mitchell*, 824 N.E.2d 642, 649–50 (Ill. App. Ct. 2005) (similar).

but emphasize *Brown*'s "purpose and flagrancy of the official misconduct" factor while minimizing *Brown*'s "temporal proximity of the arrest" factor.

If this case had arisen in any of the jurisdictions following *Green*, Torres's firearm would not have been suppressed (even assuming he was unlawfully detained). Officer Shelley's conduct in running Torres's ID through dispatch was hardly flagrant; as the Nevada Supreme Court acknowledged, it was his "standard practice" because "police officers are often given fake identification cards that contain inaccurate information." App. 3. Officer Shelley's good faith in running Torres's ID is further supported by the fact that the majority of jurisdictions consider running an ID to fall squarely within the scope and mission of a *Terry* stop.

While most jurisdictions follow *Green*'s rule, some jurisdictions have held that evidence discovered in a lawful search incident to a warrant-arrest is *always* admissible, regardless of whether the police misconduct resulting in the unlawful detention was flagrant. Oddly enough, the Seventh Circuit since *Green* has moved into this sub-group. In *Atkins v. City of Chicago*, 631 F.3d 823 (7th Cir. 2011), the court considered a warrant-arrest arising out of an unlawful traffic stop. Acknowledging its precedent in *Green* and the many cases following that approach, the court opted for a simpler approach:

> [A] simpler way to justify the result in those cases (and this one), without talking about "taints" and "dissipation" and "intervening circumstances" * * *, is to note simply that the arrest was based on a valid warrant rather than

> on anything turned up in the illegal search. * * * [A] person named in a valid warrant has no right to be at large, and so suffers no infringement of his rights when he is apprehended unless some other right of his is infringed * * *.

Id. at 826–27. A couple state courts have adopted the same categorical approach. *See State v. Thompson*, 438 N.W.2d 131, 137 (Neb. 1989) (finding attenuation based solely on the discovery of the outstanding warrant, "a source completely independent of and unrelated to" the unlawfulness of the stop); *State v. Cooper*, 579 S.E.2d 754, 755–58 (Ga. Ct. App. 2003) (same).

2. In contrast to the 21 jurisdictions that permit attenuation based on an arrest warrant, a handful of courts—now including the Nevada Supreme Court—do not. This group of jurisdictions, like the other side of the split, breaks down into two sub-groups.

Three courts purport to apply *Brown*'s attenuation factors, but do so in a way that effectively precludes attenuation of evidence from an arrest based on a warrant discovered during an unlawful stop. In *United States v. Gross*, 662 F.3d 393, 404–06 (6th Cir. 2011), the Sixth Circuit gave little weight to *Brown*'s flagrancy factor in this context, calling it "a wash," and refusing to follow the analysis in *Green*. Instead, the Sixth Circuit emphasized *Brown*'s "temporal proximity" factor, suppressing a firearm that was discovered soon after the unlawful seizure but allowing other evidence because it was not discovered until later. *Id.* at 402, 406. By emphasizing *Brown*'s "temporal proximity" factor over its "flagrancy" factor, the Sixth Circuit effectively ensured that any evidence discovered during

an arrest on a preexisting warrant during an unlawful stop will always be excluded. *See also State v. Moralez*, 300 P.3d 1090, 1103 (Kan. 2013) (holding short time between unlawful detention and arrest "weighs heavily"); *People v. Padgett*, 932 P.2d 810, 817 (Colo. 1997) (holding temporal proximity is dispositive).

Most recently, two more state supreme courts have weighed in with their own variation on this minority view. In back-to-back decisions, the Utah Supreme Court and the Nevada Supreme Court (in this case) ruled that *Brown* is simply inapplicable in these circumstances because "there was no demonstration of an act of free will by the defendant to purge the taint caused by an illegal seizure." App. 12; *see also Utah v. Strieff*, 2015 UT 2, ¶¶ 2–3 ("the attenuation exception is limited to * * * a voluntary act of a defendant's free will (as in a confession or consent to search)"). Nevada and Utah therefore now have a categorical rule "that without reasonable suspicion, the discovery of arrest warrants cannot purge the taint from an illegal seizure." App. 12.

B. This Case Is an Excellent Vehicle for the Court to Address this Important Conflict.

This split is not going to be resolved without this Court's guidance. Courts were already fractured on this question, and the two most recent decisions from Nevada's and Utah's highest courts creating yet another splinter group will only add to the constitutional confusion and uncertainty. Nevada is not alone in urging that this issue warrants the Court's immediate attention. *See* Brief of *Amici Curiae* State of Michigan and Ten Other States for Petitioner, *Utah v. Strieff*, No. 14-1373 (U.S. June 18, 2015).

The recent attenuation decisions from Nevada and Utah demonstrate a sharp departure from the principles underlying this Court's applications of the exclusionary rule. This Court has long emphasized that the exclusionary rule carries a high social cost and should be applied only where it should be expected to deter intentional, flagrant police misconduct. "Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one. The analysis must also account for the 'substantial social costs' generated by the rule." *Davis*, 131 S. Ct. at 2427 (citations omitted); *see also Herring*, 555 U.S. at 147–48. By creating a categorical rule of exclusion that does not balance the high social cost of exclusion with the nature of the police conduct at issue, Nevada's and Utah's highest courts have unmoored the exclusionary rule from its recognized purposes. *Davis*, 131 S. Ct. at 2427–28; *United States v. Leon*, 468 U.S. 897, 906–08 (1984).

This Court should step in to reverse this constitutional drift. Granting review in this case gives the Court the option of addressing both questions presented together, or addressing one or the other alone. *See* App. 4 (noting state district court addressed only the second question while assuming the first). The two questions presented are the only issues decided by the Nevada Supreme Court. There are no procedural obstacles to this Court's jurisdiction, and the lawfulness of the discovered arrest warrant is unchallenged.

CONCLUSION

For the foregoing reasons, the Court should grant the State of Nevada's petition for a writ of certiorari and set the case for plenary review. In the alternative,

the Court should grant the petition and summarily reverse the Nevada Supreme Court on the first question presented because its decision conflicts with all other courts of appeal that have addressed the question—including the Ninth Circuit—and creates the injustice of having a different Fourth Amendment rule applied to criminal defendants for the same actions in the same place, depending on whether they are charged in state or federal court.

Respectfully submitted,

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June 2015

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion in the Supreme Court of the State of Nevada (January 29, 2015) . . . . App. 1

Appendix B Order Denying Defendant's Motion to Suppress Evidence in the Fourth Judicial District Court of the State of Nevada, in and for the County of Elko (May 15, 2012) . . . . App. 14

Appendix C Nev. Rev. Stat. § 171.123 . . . . . . App. 20

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 61946

[Filed January 29, 2015]

RALPH TORRES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Appeal from a judgment of conviction, pursuant to a guilty plea, of ex-felon in possession of a firearm. Fourth Judicial District Court, Elko County; Nancy L. Porter, Judge.

Reversed and remanded.

Frederick B. Lee, Jr., Public Defender, and Alina M. Kilpatrick, Deputy Public Defender, Elko County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; Mark Torvinen, District Attorney, and Mark S. Mills, Deputy District Attorney, Elko County, for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

In this appeal, we determine whether the discovery of a valid arrest warrant purges the taint from the illegal seizure of a pedestrian, such that the evidence obtained during a search incident to the arrest is admissible. We conclude that the officer's continued detention of Ralph Torres, after he dispelled any suspicion that Torres was committing a crime, constituted an illegal seizure in violation of the Fourth Amendment and the fruits of that illegal seizure should have been suppressed. Therefore, we reverse the judgment of conviction.

FACTS

In February 2008, Officer Shelley observed a smaller male wearing a sweatshirt with the hood pulled over his head sway and stagger as he walked over a bridge in Elko, Nevada. Officer Shelley thought that the man might be intoxicated and too young to be out past curfew. He then parked his patrol car in a store parking lot at the end of the bridge and addressed Torres as he walked in that direction. Officer Shelley told Torres that he stopped him because he was concerned that Torres was too young to be out after curfew and that it appeared he had been drinking. He asked Torres for identification.

Torres gave Officer Shelley his California identification card (ID card), which revealed that Torres was over the age of 21, and thus, old enough to be out past curfew and consuming alcohol. After reading Torres's ID card, Officer Shelley retained the ID card as he recited Torres's information to police

dispatch for verification and to check for outstanding arrest warrants. According to Officer Shelley, it is his standard practice to verify the identification information of every person he encounters because police officers are often given fake identification cards that contain inaccurate information. However, nothing in Officer Shelley's testimony indicated that anything about Torres's ID card seemed fake or inaccurate. Although Officer Shelley could not remember when he handed Torres his ID card back after reciting the information to dispatch, he stated that it is also his standard practice to keep an identification card in his possession until after he gets a response from dispatch.

Within five minutes of transmitting Torres's information to dispatch, Officer Shelley was informed that Torres had two outstanding arrest warrants from California. A second patrol officer arrived and, upon confirmation from dispatch that one of the warrants was extraditable, Officer Shelley took Torres into custody. After taking Torres into custody, Officer Shelley went to conduct a search incident to arrest, at which point Torres told him that he had a gun in his pocket. Officer Shelley then handcuffed Torres, removed a .22 caliber gun from his pocket, and located .22 ammunition in another pocket.

Torres was charged with being an ex-felon in possession of a firearm, receiving or possessing stolen goods, and carrying a concealed weapon. Torres filed a motion to suppress the handgun evidence and to ultimately dismiss the charges. Torres argued that his detention after Officer Shelley confirmed that he was not in violation of curfew was unconstitutional because Officer Shelley did not have suspicion that any other

crime was occurring and Torres did not consent to the interaction. Therefore, once Officer Shelley knew Torres was of age, the encounter evolved into an illegal seizure that resulted in the discovery of the firearm. Torres also contended that the discovery of the warrant was not an intervening circumstance sufficient to purge the taint of the discovery of the handgun from the illegal seizure.

In response, the State argued that Officer Shelley had reasonable suspicion to detain Torres because of his stature, the time of day, and his apparent drunkenness, and that Torres consented to the encounter. The State further contended that the discovery of the warrant was an intervening circumstance sufficient to purge the taint of the possibly illegal seizure from the discovery of the handgun, and, therefore, the handgun evidence was not the fruit of an illegal seizure.

The district court denied Torres's motion to suppress because it determined that the initial contact between Officer Shelley and Torres was consensual. However, the district court did not make a determination about whether the consensual encounter became an illegal seizure. Instead, the district court determined the warrant to be an intervening circumstance and found that "the legality, or illegality, of Officer Shelley's decision to run a warrants check on [Torres] to be irrelevant to the legality of [Torres's] arrest." The court found the question irrelevant because the warrant would have been an "intervening circumstance" sufficient to purge the illegality of the seizure if the stop had become illegal. Upon the district court's denial of Torres's motion to suppress, Torres

pleaded guilty to being an ex-felon in possession of a firearm pursuant to NRS 202.360(1)(a).[1] This appeal followed.

DISCUSSION

In this appeal, we consider whether the judgment of conviction must be reversed based on Torres's Fourth Amendment challenge and the district court's denial of his motion to suppress.[2] In reaching our conclusion, we first determine whether Officer Shelley's continued detention of Torres constituted an illegal seizure. If so, we must decide whether the discovery of Torres's valid arrest warrant attenuated the taint from the illegal seizure, such that the firearm evidence obtained during a search incident to arrest was admissible.

Officer Shelley's continued detention of Torres resulted in an illegal seizure in violation of the Fourth Amendment

In Fourth Amendment challenges, this court reviews the district court's findings of fact for clear error but reviews legal determinations de novo. *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008). Police encounters can be consensual. *See United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980). "As long as the person to whom questions are put remains

[1] In *Gallegos v. State*, we concluded that paragraph (b) of NRS 202.360(1) was unconstitutionally vague. 123 Nev. 289, 163 P.3d 456 (2007). This holding does not affect the paragraph at issue here, paragraph (a) of NRS 202.360(1), or our analysis of the issues in this appeal.

[2] Torres reserved the right to challenge the denial of his motion to suppress on appeal. *See* NRS 174.035(3).

free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *Id.* at 554. However, if a reasonable person would not feel free to leave, he or she has been "'seized' within the meaning of the Fourth Amendment." *Id.*

If a person does not consent, "a police officer may [still] stop a person and conduct a brief investigation when the officer has a reasonable, articulable suspicion that criminal activity is taking place or is about to take place." *State v. Lisenbee*, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000); *see also* NRS 171.123(1); *Terry v. Ohio*, 392 U.S. 1, 27 (1968). To conduct an investigative stop, an officer must have more than an "'inchoate and unparticularized suspicion or "hunch"'" that criminal activity is occurring; the officer must have "some objective justification for detaining a person." *Lisenbee*, 116 Nev. at 1128, 13 P.3d at 949 (quoting *Terry*, 392 U.S. at 27).

"But a 'seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution.'" *State v. Beckman*, 129 Nev. __, __, 305 P.3d 912, 916-17 (2013) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). For an investigative stop to be reasonable, it "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). "[An individual] may not be detained *even momentarily* without reasonable, objective grounds for doing so. . . ." *Id.* at 498 (emphasis added).

"[T]he nature of the police-citizen encounter can change—what may begin as a consensual encounter may change to an investigative detention if the police conduct changes and vice versa." *United States v. Zapata*, 997 F.2d 751, 756 n.3 (10th Cir. 1993). A consensual encounter is transformed into a seizure in violation of the Fourth Amendment "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 215 (1984).

In *Lisenbee*, we considered such a transformation and determined the defendant was not "free to leave." 116 Nev. at 1128-30, 13 P.3d at 950-51. There, we concluded that after the defendant produced identification demonstrating he was not the possible suspect police were looking for, NRS 171.123(4) prevented further detention by police.[3] *Id.* Accordingly, the defendant's further detention was unreasonable and resulted in an illegal seizure. *Id. See also United States v. Lopez*, 443 F.3d 1280, 1285-86 (10th Cir. 2006) (holding that the officer's retention of the defendant's identification transformed a consensual encounter into an unconstitutional seizure because the officer's reasonable suspicion for the encounter was cured "[w]ithin seconds of reviewing [the defendant's] license," and, given the totality of the circumstances, the defendant would not have felt free to leave); *State v. Westover*, 10 N.E.3d 211, 219 (Ohio Ct. App. 2014)

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[3] NRS 171.123(4) states in part that [a] person must not be detained longer than is reasonably necessary to effect the purposes of this section [(temporary detention by peace officer of person suspected of criminal behavior)]."

(concluding that "no reasonable person would [feel] free to terminate [an] encounter and go about their business, where an officer is holding that individual's identification and is using it to run a warrants check").

Veritably, scholars have noted the disagreement between other courts on whether a seizure has occurred for Fourth Amendment purposes when the police retain an individual's identification. *See* Aidan Taft Grano, Note, *Casual or Coercive? Retention of Identification in Police-Citizen Encounters*, 113 Colum. L. Rev. 1283 (2013) (highlighting the differences between the Fourth and the D.C. Circuit Courts regarding whether a consensual encounter can become a seizure solely through the retention of an individual's identification). In *United States v. Weaver*, the Fourth Circuit Court of Appeals held that an officer's retention of the defendant's identification beyond its intended purpose was not a seizure, as the defendant was a pedestrian, and, while "awkward," the defendant "could have walked away from the encounter [without his identification]." 282 F.3d 302, 311-12 (4th Cir. 2002). By contrast, in *United States v. Jordan*, the D.C. Circuit Court of Appeals held that a consensual encounter transformed into a seizure when officers retained the defendant's identification and continued questioning him, despite no "articulable suspicion that would have made a brief *Terry*-style detention reasonable." 958 F.2d 1085, 1086-89 (D.C. Cir. 1992). Based on our previous holding in *Lisenbee*, and being mindful of NRS 171.123(4), we agree with the reasoning of the D.C. Circuit Court that generally a reasonable person would not feel free to leave when an officer retains a pedestrian's identification after the

facts giving rise to articulable suspicion for the original stop have been satisfied.

Here, Officer Shelley testified that he stopped Torres because Officer Shelley thought Torres was a minor out past curfew and too young to be drinking. Once Torres produced his ID card verifying he was not a minor and over the age of 21, the suspicion for the original encounter was cured and Officer Shelley no longer had reasonable suspicion to detain Torres. But rather than release Torres, Officer Shelley continued to detain him, and contacted dispatch to check for warrants. The officer explained his further detention of Torres as his "standard practice" because he "very often get[s] fake I.D.'s, altered information on I.D.'s, I.D.'s that resemble the person but is not truly that person." However, there is no evidence to show that Torres's ID card was fake or altered in any way. Like *Lisenbee*, where a consensual encounter transformed into an illegal seizure, Officer Shelley retained Torres's ID card after the reasonable suspicion for the original stop eroded.[4] Nothing in the record provides a basis for Shelley's continued detention of Torres or offers a basis for us to conclude that a reasonable person in Torres's position was free to leave. We conclude that under NRS 171.123(4), this continued detention of Torres transformed the investigative stop into an illegal seizure in violation of the Fourth Amendment. Because Torres was illegally seized, we must now examine whether the district court should have suppressed the

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[4] Because Torres was a pedestrian, we do not address the application of *Lisenbee* or NRS 171.123(4) to a traffic stop. *See, e.g.*, *State v. Lloyd*, 129 Nev. ___, 312 P.3d 467 (2013) (discussing warrantless searches and the automobile exception).

firearm evidence Officer Shelley discovered in the search incident to arrest.

The firearm evidence should have been suppressed because it was the fruit of an illegal seizure

Generally, the exclusionary rule requires courts to exclude evidence that the police obtained in violation of the Fourth Amendment, thereby deterring any incentive for the police to disregard constitutional privileges. *See generally Mapp v. Ohio*, 367 U.S. 643, 656 (1961). Courts must also exclude evidence obtained after the constitutional violation as "indirect fruits of an illegal search or arrest." *New York v. Harris*, 495 U.S. 14, 19 (1990). However, not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). The United States Supreme Court has found that when the constitutional violation is far enough removed from the acquisition of the evidence, the violation is sufficiently "'attenuated [so] as to dissipate the taint'" of the illegality and the evidence may be admitted. *Id.* at 491 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)). To be admissible, the police must acquire the evidence "by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488, 491 (internal quotations omitted) (excluding physical evidence because it was discovered "by the exploitation" of the illegality of the unlawful arrest, but not excluding statements made by the defendant several days after his arrest because the causal connection had attenuated "the primary taint" (internal quotations omitted)).

To resolve the suppression issue, the State urges this court to either create a per se rule of attenuation or apply the factors from *Brown v. Illinois*, 422 U.S. 590 (1975), and determine that attenuation exists here. Torres argues that we should not adopt the three-factor test from *Brown* to analyze whether the presence of an outstanding arrest warrant purges the taint of evidence discovered during an illegal seizure. We agree with Torres.

In *Brown*, the police arrested the defendant without probable cause and without a warrant. *Id.* at 591. Thereafter, the police gave the defendant comprehensive *Miranda*[5] warnings, and he proceeded to make incriminating statements. *Id.* The question presented to the United States Supreme Court was whether the *Miranda* warnings sufficiently attenuated the illegal arrest from the incriminating statements, such that the incriminating statements were not the fruit of the illegal arrest and were thus admissible. *Id.* at 591-92. In performing its attenuation analysis, the Court refused to adopt a "per se" rule of attenuation or lack thereof when a Fourth Amendment violation preceded *Miranda* warnings and subsequent confessions. *Id.* at 603. Rather, the Court established a three-part test for determining whether the taint of the evidence is attenuated from illegal police conduct such that the confession would be admissible: "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 (internal citation and footnote omitted).

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[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

One factor alone is not dispositive of attenuation. *Id.* Applying those factors and limiting its decision to the facts of the case before it, the Court concluded that the lower court erroneously assumed "that the *Miranda* warnings, by themselves, . . . always purge the taint of an illegal arrest." *Id.* at 605.

To be sure, the *Brown* factors are well suited to address the factual scenario of that case in determining "whether a confession is the product of a free will under *Wong Sun.*" *Id.* at 603-04. We do not perceive the *Brown* factors as particularly relevant when, as here, there was no demonstration of an act of free will by the defendant to purge the taint caused by an illegal seizure.[6] Accordingly, in the absence of reasonable suspicion, the discovery of an arrest warrant is not "sufficiently distinguishable to be purged of the primary taint" from an illegal seizure. *Wong Sun*, 371 U.S. at 488 (internal quotations omitted). Thus, we agree with the Ninth and Tenth Circuits, as well as the Supreme Court of Tennessee, that without reasonable suspicion, the discovery of arrest warrants cannot purge the taint from an illegal seizure. *See Lopez*, 443 F.3d 1280; *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973); *State v. Daniel,* 12 S.W.3d 420 (Tenn. 2000).

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[6] Some courts have considered the *Brown* factors when the "intervening circumstance" is the discovery of an arrest warrant, but these cases do not adequately address the difference between an intervening circumstance caused by a defendant's act of free will to purge the primary taint and the absence of a defendant's free will resulting from an illegal seizure. *See, e.g.*, *United States v. Green*, 111 F.3d 515, 521-23 (7th Cir. 1997); *Golphin v. State*, 945 So. 2d 1174, 1191-93 (Fla. 2006); *People v. Mitchell*, 824 N.E.2d 642, 649-50 (Ill. App. Ct. 2005).

We conclude that the further detention of Torres was not consensual at the time of the warrants check, and thus Torres was illegally seized. The officer retained Torres's ID card longer than necessary to confirm Torres's age, rendering Torres unable to leave. Because the officer did not have reasonable suspicion necessary to justify the seizure under NRS 171.123(4), the evidence discovered as a result of the illegal seizure must be suppressed as "fruit of the poisonous tree" since no intervening circumstance purged the taint of the illegal seizure. Therefore, we conclude that the district court in this case should have suppressed the evidence of the firearm discovered on Torres's person after the investigative stop transformed into an illegal seizure.

For the reasons set forth above, we reverse the judgment of conviction and remand this matter to the district court to allow Torres to withdraw his guilty plea.

/s/ Hardesty, C.J.
Hardesty

We concur:

/s/ Parraguirre, J.
Parraguirre

/s/ Douglas, J.
Douglas

/s/ Cherry, J.
Cherry

/s/ Saitta, J.
Saitta

/s/ Gibbons, J.
Gibbons

/s/ Pickering, J.
Pickering

APPENDIX B

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

Case No. CR-FP-08-299
Dept No. I

[Filed May 15, 2012]

THE STATE OF NEVADA,
Plaintiff,
v.
RALPH TORRES,
Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Before the Court is Defendant's Motion to Suppress Evidence and Ultimately Dismiss. A hearing on Defendant's motion was conducted on March 27, 2012. Alina Kilpatrick of the Elko County Public Defender's Office appeared on behalf of Defendant; Mark Mills of the Elko County District Attorney's Office appeared on behalf of the State.

The facts relevant to Defendant's Motion to Suppress follow. On February 10, 2008, at

approximately 12:40 a.m., Officer Jeremy Shelley, while on patrol, spotted Defendant walking along the sidewalk on a bridge approximately three blocks from downtown Elko.[1] Officer Shelley testified that Defendant appeared to be swaying and staggering to the extent that Officer Shelley was concerned that Defendant might stumble into the roadway. Officer Shelley further testified that Defendant was wearing a hooded sweatshirt which served to conceal Defendant's face as Officer Shelley drove by. Due to Defendant's small stature, Officer Shelley was also concerned that Defendant may have been a minor in violation of both Elko's curfew ordinance, as well as Nevada's underage drinking laws.

Officer Shelley drove to a parking lot near the end of the bridge, exited his vehicle and, upon Defendant's approach, asked Defendant if he could talk to him. Defendant complied and walked over to Officer Shelley. Officer Shelley determined that while Defendant smelled of alcohol, he did not appear heavily intoxicated. Officer Shelley also concluded that Defendant was over the age of 18 but was unsure as to whether Defendant was over 21. Officer Shelley then asked to see Defendant's identification. Defendant voluntarily provided his identification to Officer Shelley. Defendant's California identification indicated that Defendant was 30 years of age. Based upon his standard operating procedure when provided an "I. D." in the field, Officer Shelley called in a request for a

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[1] The 5th Street bridge upon which Defendant was seen by Officer Shelley is a primary conduit for motor traffic entering and leaving the downtown area from and to various residential locations to the south and west.

"warrants check" on the name appearing on Defendant's identification. According to Officer Shelley, his routine of running such checks developed from his experience of frequently being provided "false I.D.'s."

Within 5 minutes, Officer Shelley, who still retained possession of Defendant's identification card, was informed by police dispatch of the existence of 2 outstanding warrants for Defendant's arrest issued in the State of California. Several more minutes elapsed before dispatch confirmed to Officer Shelley that one of the warrants was extraditable. Upon learning of the extraditable warrant, Officer Shelley informed Defendant that he was under arrest. During the subsequent search of Defendant's person, Officer Shelley discovered a handgun in one of Defendant's pockets. Defendant now faces charges for being an ex-felon in possession of a firearm [a violation of NRS 202.360] and for carrying a concealed weapon [a violation of NRS 202.350].

Defendant moves to suppress evidence of the handgun found on Defendant as "being the fruit" of an illegal detention. Defendant contends that Officer Shelley's conduct of retaining Defendant's identification and running a warrants check in the absence of a "reasonable, articulable suspicion" that Defendant was engaged in, or about to engage in, criminal activity resulted in an illegal detention. The defense further argues that Defendant's simple physical appearance as a heavily tattooed Hispanic was the root cause of Officer Shelley's decision to run the warrants check. Should the Court suppress evidence of the handgun, Defendant moves this Court to dismiss the charges currently pending against Defendant.

In the first instance, the Court finds Defendant's contention that the warrant check by Officer Shelley was the product of racial or social profiling to be unsupported by any evidence other than the fact that Defendant is, indeed, Hispanic and presently has several tattoos. In fact, there is no evidence in the record that Defendant had any tattoos at the time of his arrest. Moreover, even if Defendant did possess various tattoos at the time of his arrest, there is no evidence that the tattoos were visible to Officer Shelley.[2] Further, there is no evidence before the court that either Officer Shelley or his department have a practice of racial profiling of any sort.

The Court finds the initial contact between Officer Shelley and Defendant to have been consensual. *See, State v. Lisonbee*, 116 Nev. 1124, 1128 (2000) (quoting *Terry v. Ohio*, 392 U.S. 1 (1968), "Not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.") The record reflects that Defendant voluntarily acquiesced to Officer Shelley's nonaggressive request to speak to him. Moreover, upon request, Defendant voluntarily provided Officer Shelley with his identification. While the Court has reservations about the constitutionality of Officer Shelley's "standard operating procedure" to run a warrant check on any citizen who provides the officer with identification, whether the initial consensual contact between Officer Shelley and Defendant

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[2] The Court notes that Defendant's booking photo does not appear to reveal visible tattoos.

eventually evolved into an illegal detention of Defendant is an issue that this Court need not decide at this time. It is clear to the Court that the handgun was found on Defendant in the course of a search incident to a lawful arrest.

As recognized by the U. S. Supreme Court in *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963):

> "[Courts] need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

There is clearly a "but for" relationship between Officer Shelley's decision to run Defendant's identification for outstanding warrants, Defendant's arrest upon confirmation of an existing outstanding warrant, and Officer Shelley's ultimate discovery of the handgun during the subsequent search of defendant's person. However, the Court finds that the legality, or illegality, of Officer Shelley's decision to run a warrants check on Defendant to be irrelevant to the legality of Defendant's arrest. *See. e.g.*, *Golphin v. Florida*, 945 So.2d 1174, 1191-1192 (2006) (an outstanding warrant is an "intervening circumstance" which purges "primary taint" of an illegal seizure). Once the warrant was discovered, Officer Shelley had no reasonable alternative to placing Defendant under arrest. To do otherwise would have allowed a known wanted felon to

roam the streets freely. Moreover, Officer Shelley's subsequent search of Defendant incident to Defendant's arrest clearly passes constitutional muster. *U.S. v. Robinson*, 414 U.S. 218, 235 (1973) (A search incident to an arrest made upon probable cause "requires no further justification."); *see, also*, *Carstairs v. State*, 94 Nev. 125, 128 (1978).

For the reasons set forth above. IT IS HEREBY ORDERED that Defendant's Motion to Suppress Evidence and Ultimately Dismiss is DENIED.

Dated this 14 day of May, 2012

/s/ Nancy Porter
Nancy Porter
District Court Judge

[*Certificate of Hand Delivery Omitted in Printing of this Appendix.*]

APPENDIX C

Nev. Rev. Stat. 171.123 - Temporary detention by peace officer of person suspected of criminal behavior or of violating conditions of parole or probation: Limitations.

1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.

2. Any peace officer may detain any person the officer encounters under circumstances which reasonably indicate that the person has violated or is violating the conditions of the person's parole or probation.

3. The officer may detain the person pursuant to this section only to ascertain the person's identity and the suspicious circumstances surrounding the person's presence abroad. Any person so detained shall identify himself or herself, but may not be compelled to answer any other inquiry of any peace officer.

4. A person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested.