No. 17-7046

IN THE SUPREME COURT OF THE UNITED STATES

ERIC JERMAINE SPIVEY AND CHENEQUA AUSTIN, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner Austin voluntarily consented to a search of petitioners' house in circumstances where officers provided one truthful reason for the search (to investigate burglaries reported by petitioners) but concealed their other, principal reason for the search (to investigate possible credit-card fraud).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 861 F.3d 1207. The order of the district court (Pet. App. 38a-44a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2017. A petition for rehearing was denied on September 13, 2017 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on December 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following conditional guilty pleas in the United States District Court for the Southern District of Florida, petitioners were convicted on one count of conspiracy to commit access-device fraud and possess device-making equipment, in violation of 18 U.S.C. 1029(b)(2), and one count of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1) and 2. Spivey Judgment 1; Austin Judgment 1. Petitioner Eric Jermaine Spivey also was convicted on one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Spivey Judgment 1. Spivey was sentenced to a total term of 70 months of imprisonment, to be followed by three years of supervised release. Spivey Judgment 2-3. Petitioner Chenequa Austin was sentenced to a total term of 36 months of imprisonment, to be followed by three years of supervised release. Austin Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-35a.

1. Petitioners shared a house in Lauderhill, Florida, which was twice burglarized in November 2014. Pet. App. 164a-171a. Petitioners reported both burglaries to the police. Id. at 169a-171a. In December 2014, police in the nearby city of Sunrise, Florida, arrested Caleb Hunt for a series of house burglaries in the area. Id. at 54a-55a, 86a-87a, 164a-165a. In a post-arrest interview, Hunt admitted having burglarized petitioners' residence, which he reported was the site of substantial credit-

card fraud. Id. at 55a, 87a-93a, 164a-165a. Alex Iwaskewycz, a Lauderhill Police Department detective assigned to a regional organized-fraud task force, learned of this information and decided to investigate. Id. at 164a-166a, 171a-174a.

On December 17, 2014, Detective Iwaskewycz and his task-force colleague, United States Secret Service Agent Jason Lanfersiek, visited petitioners' house. Pet. App. 53a, 55a-56a, 174a. Detective Iwaskewycz later testified that this visit was a "dual-purpose investigation." Id. at 257a. Although the main purpose of the officers' visit was to investigate possible credit-card fraud, Detective Iwaskewycz also received authorization from Lauderhill police to follow up about the two reported burglaries. Id. at 55a-56a, 172a-174a. At that time, no Lauderhill detective had yet investigated the burglaries, nor had police arrested anyone for those offenses. Id. at 173a, 206a-207a.[1]

The two officers arrived at the house wearing identifiable police gear. Pet. App. 56a, 175a-176a. Austin was initially outside, but entered the house upon seeing the officers arrive. Id. at 56a-58a, 175a. Austin later explained that she had gone inside to warn Spivey of the police presence and to hide incriminating evidence (a credit-card reader) in the oven. Id. at 68a, 178a.

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[1] Petitioners' suggestion (Pet. 6) that police "had already arrested the burglar * * * and closed the case" is thus in error.

Austin then met the officers at the door. Pet. App. 58a-59a, 175a. Detective Iwaskewycz accurately identified himself as an officer with the Lauderhill Police Department and said that he had come to follow up on the reported burglaries. Id. at 58a, 175a-176a. Detective Iwaskewycz inaccurately identified Agent Lanfersiek as a crime-scene technician within the same department. Id. at 58a, 176a. Although the officers did not announce that they were also investigating possible credit-card fraud, they did not assert that the burglaries were the only reason they had come to the house, nor did they promise Austin they would ignore any evidence of other crimes. Id. at 61a-62a, 176a-177a, 189a.

Austin seemed excited that the officers had come, and she invited them into the house. Pet. App. 59a, 175a-177a. Spivey, whom Austin identified as her boyfriend, emerged from the master bedroom, and Austin said that Spivey had surveillance video from one of the burglaries on his computer. Id. at 59a-61a, 178a, 183a. Detective Iwaskewycz stayed in the living room and worked with Spivey to locate and upload the video. Id. at 62a, 184a-185a. Lauderhill police later used that video as evidence in arresting Hunt for burglarizing petitioners' residence. Id. at 205a-207a.

In the meantime, at Agent Lanfersiek's request, Austin led him through the house along the path the burglar had taken. Pet. App. 60a, 62a-63a, 102a. Under the guise of being a crime-scene technician, Agent Lanfersiek pretended to dust for fingerprints.

Id. at 60a, 62a, 103a-104a. Austin took Agent Lanfersiek into the master bedroom, where he observed in plain view a stack of credit cards and a large amount of high-end commercial merchandise. Id. at 62a-64a. The closet door was open, and Agent Lanfersiek saw inside a credit-card embossing machine. Id. at 64a-65a. Alerted by Agent Lanfersiek, Detective Iwaskewycz then went into the bedroom and observed the same items that Agent Lanfersiek had seen. Id. at 185a-188a.

Detective Iwaskewycz asked Austin to step outside. Pet. App. 188a-189a. He explained to Austin that he was investigating possible credit-card fraud in addition to the reported burglaries and asked her about the suspicious items he had just seen. Id. at 189a-192a. Austin responded with explanations that did not make sense to Detective Iwaskewycz, including that the embossing machine had been left by a prior landlord. Id. at 190a-192a. Austin was then placed under arrest on an outstanding warrant. Id. at 193a.

Approximately 30 minutes after having stepped outside with Austin, Detective Iwaskewycz came back inside and similarly informed Spivey that, although he was a detective following up on the burglaries, his primary function was to investigate fraud. Pet. App. 69a-70a, 146a-147a, 194a-196a. Detective Iwaskewycz identified Lanfersiek as a Secret Service agent and stated that Austin had just been arrested. Id. at 70a, 194a-195a. Spivey

denied knowing about any fraudulent activity, and he also claimed that the embossing machine had been left by a prior landlord. Id. at 71a-72a, 145a, 195a-196a.

The officers asked Spivey if he would consent to a search of the house, and Spivey responded by giving both oral and written consent. Pet. App. 72a-73a, 196a-199a. This consent occurred approximately one hour after the officers had first entered the house. Id. at 259a-260a. The officers then conducted a thorough search and found further evidence of fraud, including the credit-card reader hidden in the oven. Id. at 134a-135a, 199a-200a. The officers also recovered a firearm, which was later determined to be the same gun used in an attempted murder for which Spivey had been charged. Id. at 199a, 203a-204a.[2]

At no point during the officers' visit did they threaten or restrain petitioners, raise their voices, or display their weapons. Pet. App. 71a, 155a, 189a. Both petitioners were polite and cooperative throughout the time leading up to their respective consents to search. Id. at 72a, 155a-156a, 185a, 196a.

2. A grand jury in the Southern District of Florida returned an indictment charging petitioners with one count of conspiracy to commit access-device fraud and possess device-making equipment, in

[2] Officers also recovered two cellular telephones belonging to Spivey, who consented to a search of their contents. Pet. App. 200a-201a. In a post-arrest interview, Austin provided additional information about Spivey's firearm. Id. at 76a-83a.

violation of 18 U.S.C. 1029(a)(3), (a)(4), and (b)(2); one count of possession of unauthorized access devices, in violation of 18 U.S.C. 1029(a)(3) and 2; one count of possession of device-making equipment, in violation of 18 U.S.C. 1029(a)(4) and 2; and two counts of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1) and 2. Indictment 1-5. Spivey was also charged with one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Indictment 5.

a. Petitioners moved to suppress the evidence obtained during the search, arguing that Austin's consent to the initial search of petitioners' residence was not voluntary. See D. Ct. Doc. 47 (July 15, 2015); D. Ct. Doc. 50 (July 24, 2015).

Following an evidentiary hearing, the district court denied the motion. Pet. App. 38a-44a. The court found that the officers had gone to petitioners' house on the "pretext of following up on [the] two burglaries, which was a legitimate reason for being there, but not the main or real reason." Id. at 39a. The court explained, however, that "not every ruse will negate the voluntariness of a consent." Id. at 41a. And considering the "totality of circumstances" and "looking at all relevant factors," the court determined that Austin had voluntarily consented to the search of the house. Id. at 40a, 42a. Among other facts, the court noted that petitioners had invited the police presence by reporting the burglaries, demonstrating that they were "willing to

risk exposure to credit card [fraud] prosecution to get [their] property back." Id. at 43a.

The district court further determined that, even if Austin's initial consent were deemed invalid, Spivey's subsequent oral and written consent cured any such deficiency. Pet. App. 40a, 43a. Applying the attenuation factors identified in Brown v. Illinois, 422 U.S. 590, 603-604 (1975), the court reasoned that, although the time between Austin's consent and Spivey's consent was "minimal (about one hour)," intervening circumstances had "severed" any causal connection between any initial illegality and Spivey's consent, and the officers' conduct "was not particularly flagrant." Pet. App. 40a, 43a.

b. Petitioners each pleaded guilty to one count of conspiracy to commit access-device fraud, in violation of 18 U.S.C. 1029(b)(2), and one count of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1) and 2. Spivey Judgment 1; Austin Judgment 1. Spivey also pleaded guilty to possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Spivey Judgment 1. The district court sentenced Spivey to a total term of 70 months of imprisonment, to be followed by three years of supervised release. Spivey Judgment 2-3. The court sentenced Austin to a total term of 36 months of imprisonment, to be followed by three years of supervised release. Austin Judgment

2-3. Each petitioner was also ordered to pay $595.93 in restitution. Spivey Judgment 5; Austin Judgment 5.

3. The court of appeals affirmed. Pet. App. 1a-35a. The court explained that the voluntariness of consent to a search is a "question of fact" to be determined from the "totality of the circumstances." Id. at 6a, 8a (citations omitted). The court stated that, although a police officer's "[d]eceit" can be one factor "relevant to voluntariness," "[n]ot all deception prevents an individual from making an 'essentially free and unconstrained choice.'" Id. at 8a, 10a (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)). Rather, "[t]he Fourth Amendment allows some police deception so long [as] the suspect's 'will was [not] overborne.'" Id. at 10a (quoting Schneckloth, 412 U.S. at 226) (third set of brackets in original).

Applying those principles, the court of appeals determined that "Austin's consent was voluntary" because "the officers' 'ruse' was a relatively minor deception" and "[t]he factors other than deceit all point in favor of voluntariness." Pet. App. 13a-14a. The court observed that petitioners had "invited the[] interaction" by "inform[ing] the police of the burglaries"; that "Austin knew that she was interacting with criminal investigators who had the authority to act upon evidence of illegal behavior"; and that petitioners had "engaged in intentional, strategic behavior" by hiding certain evidence of fraud and by giving a

"rehearsed story" to explain other evidence. Id. at 15a-16a. Having determined that Austin's consent was voluntary, the court did not reach the district court's alternative ruling that Spivey's subsequent consent to search had cured any perceived deficiencies in Austin's earlier consent. Id. at 20a.

Judge Martin dissented, expressing the view that Austin's consent to the entry of officers who misleadingly represented that they were investigating the burglaries was not voluntary based on the totality of the circumstances. Pet. App. 21a-35a.

ARGUMENT

Petitioners contend (Pet. 13-36) that the court of appeals' decision erroneously held that the officers' concealment of the primary purpose of their search was irrelevant in analyzing the voluntariness of Austin's consent. Petitioners misread the court's decision, which does not include such a holding. Rather, the court expressly acknowledged that the officers' deception was a relevant factor, but ultimately determined that Austin's consent was voluntary under the totality of the circumstances. That determination was correct and does not conflict with the decision of any other court of appeals or state court of last resort, and admission of the challenged evidence is independently supported by Spivey's subsequent consent in any event. The petition for a writ of certiorari should therefore be denied.

1. The court of appeals correctly affirmed the district court's determination that Austin voluntarily consented to the officers' entry and search of petitioners' house.

a. This Court has long recognized that "a search that is conducted pursuant to consent" is lawful under the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Such a search is valid so long as "consent was 'voluntarily' given," id. at 223, meaning that it was "the product of an essentially free and unconstrained choice," id. at 225. Whether an individual's consent was voluntary, or instead was "the product of duress or coercion," is a "question of fact to be determined from the totality of all the circumstances." Id. at 227; see also Ohio v. Robinette, 519 U.S. 33, 40 (1996).

Applying the requisite "case-by-case analysis" to the particular circumstances here, Pet. App. 8a (citation omitted), the court of appeals correctly determined that Austin voluntarily consented to the officers' entry and search of her house. The court acknowledged that the officers had committed a "ruse" by "misrepresent[ing] Agent Lanfersiek's identity" and by choosing not to disclose their primary purpose of investigating possible credit-card fraud. Id. at 13a. But the court determined those acts to be a "relatively minor deception that created little, if any, coercion." Ibid. The court observed that Austin was aware that both Detective Iwaskewycz and Agent Lanfersiek were "involved

in criminal investigations," and it found no evidence that Agent Lanfersiek's "exact position within the hierarchy of criminal law enforcement was material to Austin's consent." Id. at 13a-14a. The officers also did not promise that they "would not act upon [any] evidence of criminal activity" they discovered in the house. Id. at 14a. Indeed, Austin knew that "she faced a risk that [the officers] would notice evidence of the credit-card fraud when she consented to [their] presence in her home," ibid., as demonstrated by her decision to hide incriminating evidence in the oven.

The court of appeals also correctly recognized that Detective Iwaskewycz's representation that he was investigating the burglaries was not itself untruthful. See Pet. App. 12a. Although the officers' primary purpose was to investigate possible fraud, Detective Iwaskewycz also sought to follow up on the reported burglaries on behalf of Lauderhill police. See ibid. ("Iwaskewycz testified that it was a 'dual-purpose investigation.'"); id. at 56a, 173a, 195a, 206a, 239a, 257a. At the time of the search, although it was known that Hunt claimed to have burglarized petitioners' house, no detective from the Lauderhill Police Department had yet followed up on the case. Detective Iwaskewycz received authorization from supervisors to perform that follow up, and he did so: in particular, he worked with Spivey to obtain a surveillance videotape that was later used to support Hunt's arrest by Lauderhill police. As the court recognized, this burglary

investigation was plainly a "legitimate reason" for visiting petitioners' house, even if it was not the "main" reason. Id. at 12a (quoting id. at 39a).

Finally, the court of appeals reasonably determined that "[t]he factors other than deceit all point in favor of voluntariness." Pet. App. 14a. The officers did not raise their voices, display their weapons, or threaten or physically restrain either petitioner. Id. at 14a-15a. Austin was an adult who had prior experience with the criminal-justice system, and she "knew that she was interacting with criminal investigators who had the authority to act upon" any evidence of wrongdoing. Id. at 15a. Indeed, Austin's "strategic behavior" in hiding certain evidence in the oven, and her recitation of "a rehearsed story" about other evidence in plain view, "strongly suggest[ed]" that her "'will was [not] overborne'" by the officers' actions. Id. at 10a, 16a (quoting Schneckloth, 412 U.S. at 226) (second set of brackets in original). Although it is fair to say that Austin made a strategic misjudgment in assuming that the officers would either overlook the evidence of fraud or accept her explanations for that evidence, that misjudgment did not undermine the voluntariness of her actions. Cf. United States v. Mendenhall, 446 U.S. 544, 559 (1980) ("[T]he question is not whether the [defendant] acted in her ultimate self-interest, but whether she acted voluntarily.").

The court of appeals thus properly determined that "under the totality of the circumstances" of this case, Austin's consent was voluntary. Pet. App. 17a. That factbound determination does not warrant this Court's review. See Sup. Ct. R. 10.

b. In arguing otherwise, petitioners repeatedly assert (e.g., Pet. 22) that the court of appeals' decision "categorically holds that [police] deception, no matter how deliberate or flagrant, is legally 'irrelevant.'" Petitioners misread the court's opinion, which did not hold that affirmative acts of deception by law enforcement are irrelevant to the Fourth Amendment analysis.

To the contrary, the court of appeals expressly recognized that deception is one factor that bears on the voluntariness of a consent search. See Pet. App. 8a-10a (stating that "[d]eceit can also be relevant to voluntariness," and collecting cases); id. at 11a (recognizing "[t]hat fraud, deceit or trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable") (citation and internal quotation marks omitted); ibid. (stating that "coercion" through deception is "one factor to be considered in the totality of the circumstances"). For that reason, the court evaluated the officers' ruse in the circumstances here at issue, see id. at 13a, and it denied petitioners' suppression motion only after determining that the officers' deception did not, on these facts, vitiate the

voluntariness of Austin's consent to the search of the house. See ibid. (reasoning that "[s]tripped of its subjective purposes, the officers' 'ruse' was a relatively minor deception"); id. at 14a-15a (reasoning that "[t]he factors other than deceit all point in favor of voluntariness") (emphasis added).

As support for their contention that the court of appeals adopted a novel categorical rule forbidding all consideration of police deception, petitioners cite (Pet. 13) the court's statement that "[t]he subjective motivation of the officers is irrelevant." Pet. App. 12a. But petitioners' interpretation of that statement erroneously conflates an officer's inward motivation (which is not relevant to the analysis) with his or her outward conduct (which is).[3] The court did not conclude that police officers may engage in "flagrant" acts of "deception" (Pet. 2, 14, 22) or make "deliberate misrepresentations" (Pet. 36) without Fourth Amendment consequence. Rather, the court simply observed that the analysis must center upon an officer's conduct as considered from the perspective of the consenting individual, not upon the perceived legitimacy of the officer's subjective motivations. See Pet. App.

[3] The arguments of petitioners' amici rest on the same mistaken premise. See, e.g., Florida Ass'n of Criminal Def. Lawyers Amicus Br. 1, 3 (misinterpreting court of appeals' statement about "subjective motivation" as a "per se endorsement of police deception" or as a holding that "officers' misrepresentation[s]" are "legally irrelevant"); Pacific Legal Found. Amicus Br. 7 (interpreting same statement as a "holding" that officers may "enter private homes at will when they deliberately deceive the homeowner to obtain consent").

11a-13a. That understanding follows directly from this Court's precedent. See Fernandez v. California, 134 S. Ct. 1126, 1134 (2014) ("[O]ur Fourth Amendment cases 'have repeatedly rejected' a subjective approach.") (citation omitted); Ashcroft v. al-Kidd, 563 U.S. 731, 736 (2011) ("[T]he Fourth Amendment regulates conduct rather than thoughts."); Bond v. United States, 529 U.S. 334, 338 n.2 (2000) ("[T]he issue is not [the agent's] state of mind, but the objective effect of his actions."); Whren v. United States, 517 U.S. 806, 812 (1996) ("[A]n officer's motive" does not "invalidate[] objectively justifiable behavior under the Fourth Amendment."); Maryland v. Macon, 472 U.S. 463, 470-471 (1985).[4]

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[4] Petitioners' current position that "[w]hether [police] deception ultimately vitiates the voluntariness of consent will depend on the totality of the circumstances" (Pet. 14) accords with the court of appeals' decision, but reflects a significant shift from their arguments below. In the court of appeals, petitioners advocated a per se rule that any misrepresentation of investigative purpose automatically renders consent involuntary. See Austin C.A. Br. 26-34, 36-37, 39-40; cf. Spivey C.A. Br. 10-11 (joining in argument). The court thus understood petitioners to "present[] the question whether deception by law enforcement necessarily renders a suspect's consent to a search of a home involuntary." Pet. App. 2a (emphasis added). The court answered that question in the negative, concluding that "[n]ot all deception by law enforcement invalidates voluntary consent," id. at 20a, because voluntariness requires a "case-by-case analysis that is based on the totality of the circumstances," id. at 8a (citation and internal quotation marks omitted). Applying such an analysis to the facts here, the court affirmed the district court's decision, which similarly "rejected a 'bright line rule that any deception or ruse vitiates the voluntariness of a consent[ ]to search.'" Id. at 5a (quoting id. at 42a).

2. The court of appeals' decision does not conflict with the decisions of any other court of appeals or state court of last resort. In arguing otherwise, petitioners cite a number of federal and state cases (Pet. 14-22) recognizing that a police officer's misrepresentations of investigatory purpose are relevant in evaluating the voluntariness of consent. As already explained, however, the court of appeals shared that same understanding. See, e.g., Pet. App. 11a ("[F]raud, deceit or trickery * * * can make an otherwise lawful search unreasonable.") (citation omitted); see pp. 11-15, supra.

Petitioners note (Pet. 14-19) that, in various cases, courts have found that acts of police deception ultimately rendered consent involuntary. But those differences in outcome simply reflect application of the "totality of all the circumstances" analysis to the facts of particular cases. Schneckloth, 412 U.S. at 227. As the court of appeals itself acknowledged, police deception has frequently been found to render consent involuntary in various kinds of circumstances, including "when an officer falsely professes to have a warrant," Pet. App. 8a; "when an officer lies about the existence of exigent circumstances" suggesting "immediate danger," id. at 9a; or when "police make

false promises," ibid. Many of the cases cited by petitioners fall into those categories.[5]

Other cases cited by petitioners likewise involved facts significantly different from those here, including circumstances where the consenting party had never invited a police presence, where the consenting party was unaware of any criminal investigation, or where an officer's stated reason for a search was entirely -- not just partially -- untruthful.[6] And to the

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[5] See Bumper v. North Carolina, 391 U.S. 543, 550 (1968) (officers falsely claimed to possess a search warrant); United States v. Harrison, 639 F.3d 1273, 1276 (10th Cir. 2011) (agent falsely claimed having received a report that bombs were present in apartment); United States v. Hardin, 539 F.3d 404, 407-408 (6th Cir. 2008) (at officers' direction, building manager falsely claimed that there was a water leak); Krause v. Commonwealth, 206 S.W.3d 922, 926 (Ky. 2006) (police fabricated a story that "a young girl had just been raped"), cert. denied, 551 U.S. 1131 (2007); Redmond v. State, 73 A.3d 385, 398-399 (Md. Ct. Spec. App. 2013) (police falsely claimed to be "investigat[ing] the whereabouts of a dangerous pedophile"); State v. McCrorey, 851 P.2d 1234, 1236, 1240 (Wash. Ct. App. 1993) (defendant conditioned consent to entry on not being arrested, yet police then arrested him), abrogated on other grounds by State v. Head, 964 P.2d 1187 (Wash. 1998).

[6] See United States v. Bosse, 898 F.2d 113, 114 (9th Cir. 1990) (per curiam) (ATF agent accompanied local official on a civil licensing inspection and did not disclose his identity or criminal investigatory purpose); United States v. Phillips, 497 F.2d 1131, 1133 (9th Cir. 1974) (police falsely claimed that burglary had been reported); McCall v. People, 623 P.2d 397, 399 (Colo. 1981) (police falsely told defendants' parents that he was a witness and not a suspect, then entered to arrest him), overruled by People v. Davis, 187 P.3d 562 (Colo. 2008); People v. Daugherty, 514 N.E.2d 228, 230-231 (Ill. App. Ct. 1987) (officer's sole purpose was to search for marijuana, and he had "no reason" to investigate the theft he claimed to be pursuing); Commonwealth v. Slaton, 608 A.2d 5, 6-7 (Pa. 1992) (officers previously gave "affirmative assurances * * * that [defendant] was not the focus of" their

extent petitioners assert (Pet. 10) that the court of appeals' decision conflicts with a "well established rule" previously recognized within the Eleventh Circuit itself, that assertion does not suggest that this Court's review is warranted. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

3. In any event, this case would be an unsuitable vehicle to consider the relevance of police deception to the voluntariness of a consent search. As petitioners acknowledge (Pet. 10), the district court found denial of petitioners' suppression motion to be warranted for the additional, independent reason that the challenged evidence was admissible based on Spivey's oral and written consent. See Pet. App. 40a, 43a.

As the district court explained, although the time between Austin's consent and Spivey's consent was only "about one hour," intervening circumstances had "severed" any causal connection between the two. Pet. App. 40a, 43a; cf. United States v. Delancy, 502 F.3d 1297, 1308-1314 (11th Cir. 2007) (applying attenuation factors set forth in Brown v. Illinois, 422 U.S. 590, 603-604 (1975), to determine voluntariness of consent to search following

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investigation); State v. Bailey, 417 A.2d 915, 917 (R.I. 1980) (officer asked to use the telephone, then arrested defendant); State v. Schweich, 414 N.W.2d 227, 228-230 (Minn. Ct. App. 1987) (defendant consented to search for firearm, yet police continued search even after firearm was located).

allegedly unlawful protective sweep). As particularly relevant here, by the time of his consent, Spivey had been made fully aware that the officers' primary purpose was to investigate a possible credit-card fraud scheme based in petitioners' house. Pet. App. 71a-72a, 195a-197a. And at that time, Spivey continued to disclaim all knowledge of or involvement in the fraud, which suggests that his consent was a strategic effort to escape further suspicion rather than a reflection of his belief that any objection would be futile. See ibid.

The court of appeals did not reach this issue, instead resting its affirmance on the determination that Austin's initial consent to search was voluntary. Pet. App. 20a. Nonetheless, because Spivey's consent affords an independent basis for affirming the denial of petitioners' motion to suppress, see Gov't C.A. Br. 39-53, any error by the court in its evaluation of Austin's consent would not affect the ultimate outcome of the case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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