Circuit Court for Baltimore City
Case No. 116104005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 205

September Term, 2017

TERRENCE EDWARDS

v.

STATE OF MARYLAND

Leahy,
Reed,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: September 24, 2018

Following a string of robberies of taxi drivers, members of an Advanced Technical Team of the Baltimore City Police Department (the "Department") used a Hailstorm cell-site simulator device[1] to conduct a warrantless search for the cell phone that summoned the taxis. The Hailstorm device located the phone in an apartment in which the appellant, Terrence Edwards, was present. The police entered the apartment, took Edwards to the police station for questioning, and photographed him. Police used that photo in a double-blind photo array shown to Mr. Gerald Lewis, one of the taxi drivers who was robbed. After Mr. Lewis identified Edwards as his assailant, police arrested and booked Edwards, photographing him for a second time as part of the booking procedures. Using this second photo, police conducted a second double-blind photo array, which was shown to Mr. Kamal Bhandari, another robbery victim who is the victim in the underlying case. Mr. Bhandari identified Edwards as his assailant based on the second photo.

Prior to his trial for the robbery of Mr. Bhandari in the Circuit Court for Baltimore City, Edwards moved to suppress "any identification made in the instant matter from any photo array developed by using a cell site simulator device" relying on our decision in *State v. Andrews*, 227 Md. App. 350, 355 (2016). The circuit court denied his motion, ruling that the pretrial identification of Edwards was sufficiently attenuated from the search conducted by police using the Hailstorm device. A jury found Edwards guilty of robbery,

[1] We explained in *State v. Andrews*, 227 Md. App. 350, 359 n.4 (2016), that "cell site simulators actively locate phones by forcing them to repeatedly transmit their unique identifying electronic serial numbers, and then calculat[e] the signal strength until the target phone is pinpointed[.]" *Id.* (citations omitted). More generally, "the Hailstorm device generates an electronic barrage that impacts all the mobile devices within its range." *Id.*

second-degree assault, and theft of property under $1,000 in value. Edward appealed, presenting one issue for our review:

> "Did the trial court properly deny Edwards's motion to suppress the victim's extrajudicial identification of him as the robber?"

We hold that application of the exclusionary rule is unwarranted on the facts of this case because the taint of the illegal search and seizure by police was sufficiently attenuated from Mr. Bhandari's identification of Edwards.

BACKGROUND

A. Suppression Hearing

On February 18, 2016, a grand jury in Baltimore City returned a nine-count indictment against Edwards, including counts of robbery, robbery with a dangerous weapon, first- and second-degree assault, theft, and several weapons-related charges. The court held a hearing on Edwards' suppression motion over January 31 and February 8, 2017.[2] Edwards asked the court to suppress his pretrial identification in the photo array as "the fruit of the poisonous tree," arguing that the police obtained the photo as the result of his illegal arrest in an apartment police located through a warrantless search with a Hailstorm simulator device.

[2] Edwards filed one motion to suppress for both Case Nos. 116104005 (the robbery of Mr. Bhandari) and 116070006 (the robbery of Mr. Lawson). The Honorable Philip S. Jackson first heard argument on this motion during the pretrial hearing on January 31, 2017, prior to the trial for the robbery of Mr. Lawson. A jury acquitted Edwards of the charges related to the robbery for Mr. Lawson on February 3, 2017. Then, on February 8, 2017, Edwards renewed his motion in the pretrial hearing for the robbery of Mr. Bhandari. Edwards incorporated by reference the arguments he made at the pretrial hearing in the Lawson trial. In this opinion we will refer to the arguments made at the hearings in both cases, as do the parties in their briefing.

1. Facts

Detective Christopher Woerner of the Department's Citywide Robbery Unit took the stand and testified about the investigation that led to Mr. Edwards' arrest. Mr. Bhandari's robbery was just one in a string of robberies of drivers in the area. He explained that there were eight robberies following the same pattern that all either began or ended in the 500 block of Bryce Street in Baltimore City. In each instance, the suspect called for a sedan or a taxi to pick up a fare at a specific location—the suspect made three of these calls from 240-217-4960—and then robbed the drivers at gunpoint during the course of the rides. The last ride "terminated at 5100 Denview which is right at 5600 Sinclair[,]" where the police eventually deployed the Hailstorm device and searched the apartment in which they found Mr. Edwards. Det. Woerner testified that he "was getting very frustrated" that the pattern of robberies persisted for five weeks during the investigation. He suggested that this frustration led police to use the Hailstorm device to expedite their search for the assailant.

The parties stipulated to the following facts concerning the investigators' use of the Hailstorm device and subsequent search of the apartment that resulted in Mr. Edwards' arrest:

> On February 4, [], the Baltimore City Police Department obtained an order signed by his Honorable Judge Barry Williams of the Circuit Court of Baltimore City authorizing electronic device location information pursuant to Maryland Code Annotated Criminal Procedure 1-203, also known as a ping registration track and trace. That information pinged the general location of a phone alleged to have been used in this and other robberies. That number is 240-217-4960. That ping resulted in the identification of an address. Generally speaking, the information was within three meters of the address in the 5100 block of Denview Way.

> One February 14th of 2016, in the early morning hours, . . . Mr. Gerard Lawson, Jr. was robbed outside of 5100 block of Denview outside the location that had been previously pinging, the general location of the phone number[.]
>
> Based on that, Detective Woerner and member of the Advanced Technical Team of the Baltimore City Police Department took a Hailstorm or Stingray cell site simulator device to precisely pinpoint the apartment from which that phone was pinging. At that point, they entered. . . .

Following these stipulations, Det. Woerner testified that when police knocked on the door at 5615 Sinclair Lane, Apartment A, the "phone powered off, so they lost signal on the phone." A woman answered the door and an officer identified himself as a police officer, asked, "Can we come in?" and the woman who answered stepped aside to let in the officers. The officers did not have a search warrant at the time. Once inside, Det. Woerner's team secured the residence and did not allow anyone to come or go until police could obtain a search and seizure warrant for the apartment. The eventual search of the apartment uncovered several cell phones—but nothing found yielded any evidentiary value. Police also detained two men inside the apartment, one of whom was Mr. Edwards, and brought them both to the station without an arrest warrant. At the station, officers took a photo of Mr. Edwards "because his most recent photo in [their] system was an older photo." Officers then used that photo the next day in a double-blind photo array[3] they showed to Mr. Lawson, who identified Edwards as the man who robbed him.

[3] At the motions hearing, the parties agreed to the following description of a double-blind photo array procedure: "the main investigating officer, in this case it would have been Detective Woerner or somebody associated with the investigation, . . . puts a particular suspect into a photographic array. . . . The[n] – a completely different detective not associated with the actual investigation then meets with the witness/victim and presents that witness/victim with six photographs."

The police arrested Edwards for the robbery of Mr. Lawson and, as part of the booking procedures, photographed Edwards a second time. Then, on February 17, two days after Mr. Lawson's identification and three days after the search that located Edwards, police used this second photo in a new, double-blind array that they showed to Mr. Bhandari, who identified Edwards as his assailant based on the second photo.

2. The Parties' Positions

The State stipulated that "there was no warrant or specific finding of probable cause . . . to authorize the use of that device[,]" which "the Andrews court subsequently found [] is a violation of the Fourth Amendment." Thus, the State agreed that "the use of the Hailstorm device in this case no doubt constitute[d] a Fourth Amendment violation against the Defendant and frankly everybody in that house's reasonable expectation of privacy f[rom] unlawful searches and seizures." Despite its stipulation that the search of the apartment and detention of Edwards was unconstitutional, the State maintained that the illegal search uncovered no evidence "outside of Defendant's physical appearance and his identifying information."[4] The State asserted that an identity could not be fruit of the

[4] The State suggested that Edwards "stipulate[d] that the officer in this case acted in good faith, that there was no bad faith entry or use of the device." But Edwards clarified that, although he agreed that "[t]he officers involved in this case acted in good faith[,]"he would not stipulate that the "Police Department as a whole" acted in good faith while it kept its use of the device a secret. In other words, although there may not have been personal malice on part of the individual officers, Edwards maintained the Department's actions and the policy it imposed were not in good faith because the Department kept its use of Hailstorm secret from the public, defense attorneys, and the courts.

Additionally, the State argued that (1) Mr. Lawson's "independent ability to recollect the events of the previous night and the identity of the individual that robbed [him]" was an intervening cause; and the detectives' discovery of Edwards's identity was

poisonous tree and that it was illogical to apply a different rule to a photograph displaying the defendant's physical appearance. This is because, according to the State, the witness's identification of the defendant "ha[s] nothing to do with the legality of how that photograph is obtained." The State also argued that the evidence was admissible because an "intervening" circumstance—mainly Mr. Lawson's independent ability to identify Edwards—stopped or attenuated any taint from the illegal use of the Hailstorm device.

Edwards retorted that a photo could be fruit of a poisonous tree even if his identity could not be. He argued that the State is not simply using his identity, but illegally obtained evidence because the State detained him illegally, took his picture while he was detained illegally, and then "used that illegally obtained document[,] that is evidence[,] in furtherance of [] trying to make a case."

3. Court's Order

At the conclusion of the hearing (prior to the trial for the robbery for Mr. Lawson), the court rendered a comprehensive ruling, acknowledging the parties' stipulation that there was an illegal search, and concluding that the photographic evidence was the type of evidence that fell within the ambit of the exclusionary rule. The court recognized that "the purpose of the detaining of Mr. Edwards was so that [the police] could possibl[y] identify him in this case through a photo ID." Then, the court turned to attenuation, reasoning that Mr. Lawson's identification of Edwards was not caused by "any police misconduct, except

inevitable because Edwards lived within the two-block radius to which they'd narrowed the suspect's location, Edwards had the same birthday as the suspect, and Edwards was already on probation for two armed carjacking cases.

that they put this photo in there. The effect was that the witness, under relatively fresh recollection, in as much as roughly 24 hours earlier he or she had been robbed . . . was able to pick out Mr. Edwards." The court concluded that the attenuation factors the Supreme Court set out in *Wong Sun v. United States*, 371 U.S. 471 (1963), and *Brown v. Illinois*, 422 U.S. 590 (1975), "weigh in favor of the State for attenuation of the underlying taint[,]" with the lynchpin being that the double-blind photo array procedure police used was not suggestive.[5] The court denied Edwards' motion to suppress in Case No. 116104005 for the robbery of Mr. Lawson.

One week later, on February 8, Edwards re-raised the suppression issue prior to his trial in the underlying case, No. 11607006, for the robbery of Mr. Bhandari. Edwards reiterated that the court should suppress any evidence the police gathered after "they passed the threshold" to the apartment using the Hailstorm device, including his arrest. At this point, the State clarified for the record that there were two photos at issue—one the police took following his initial arrest on February 15 that they used in the array they showed Mr. Lawson and one taken on February 17 as part of the booking procedures following his arrest for the robbery of Mr. Lawson. The State pointed out that it was this booking photo that police used in the photo array they showed to Mr. Bhandari—not the photo taken on February 15. Edwards affirmed that this was correct but maintained his argument that "anything that came after" the arrest was fruit of the poisonous tree. The court again denied

[5] The court decided not to reach the State's argument that the inevitable-discovery exception should apply. The court noted, however, that the State's argument relied heavily on supposition because, at the time of the illegal search and seizure of Edwards, police were not using the investigative tools that the State proffered they could have used.

Edwards' motion to suppress, reasoning that the parties had "already sort of hashed [it] out" at the hearing related to Mr. Lawson's robbery.

B. Trial

The case proceeded to trial from February 28 to March 3, 2017. The State presented six witnesses, including Mr. Bhandari and the officer who administered the photo array to him. Testimony at trial established the following relevant facts:

On the afternoon of February 3, 2016, Mr. Kamal Bhandari was working as a cab driver in Baltimore City when he received a call from 240-217-4960 ordering a fare at an apartment complex at 3515 East Northern Parkway. He took his fare to pick up a child from school around 2:00 p.m. and bring the child back to the apartment on East Northern Parkway. After dropping off the child, the fare instructed Mr. Bhandari to pick up a friend at Alameda Shopping Center and then to drive to a side street off Pulaski Highway. When Mr. Bhandari turned off Pulaski Highway, the fare pulled a small pistol and demanded his money and his cell phone. The assailant took Mr. Bhandari's iPhone and about $350 in cash, then fled. Mr. Bhandari drove until he saw a police officer and reported the crime.

The jury returned a verdict finding Edwards guilty of robbery, second-degree assault, and theft of property under $1,000 in value, and not guilty on all other counts. The assault and theft counts merged with the robbery conviction and the court sentenced Edwards to 12 years in prison. Edwards noted his timely appeal to this Court.

DISCUSSION

I.

Attenuation

Edwards contends on appeal that the circuit court "erroneously considered as militating against suppression the fact that the victim made a positive identification based on his 'relatively fresh memory'[6] and that the identification was free of police misconduct because the identification was free of any police suggestion." According to Edwards, this was an erroneous application of the factors set out in *Brown v. Illinois*, *supra*, and *Ferguson v. State*, 301 Md. 542 (1984). Edwards suggests that the pretrial identification should have been suppressed because it was "relatively close to the original illegality and there w[ere] no intervening events between the illegality and the identification to free the evidence from its taint."

The State responds that "there was sufficient attenuation such that the victim's extrajudicial identification was not tainted" by the use of the Hailstorm device by police. Looking to the factors set out in *Brown* and *Ferguson*, the State contends that the booking photograph of Edwards used in the Bhandari photo array was not temporally proximate to the constitutional violation because police took the photo two days later. Additionally, the State urges that Mr. Lawson's identification of Edwards as the robber—causing police to

[6] We note that Edwards is referring here to the court's determination made regarding the identification made by Mr. Lawson and not Mr. Bhandari.

take the booking photo—was an intervening act that "created further distance between the original alleged violation and the evidence sought to be suppressed."[7]

When reviewing a trial court's ruling on a motion to suppress evidence, this Court "will consider only the facts and information contained in the record of the suppression hearing." *Longshore v. State*, 399 Md. 486, 498 (2007). Although we defer to the trial court's "determination and weighing of first-level findings of fact[]" unless clearly erroneous, *id.*, "we make an independent, *de novo*, appraisal of whether a constitutional right has been violated by applying the law to facts presented in a particular case." *Andrews*, 227 Md. App. at 371.

Under the "fruit of the poisonous tree" doctrine, courts "exclude[] direct and indirect evidence that is a product of police conduct in violation of the Fourth Amendment." *Myers v. State*, 395 Md. 261, 291 (2006). The connection between the police's illegality and the derivative evidence at issue may, however, "become so attenuated as to dissipate the taint." *Nardone v. U.S.*, 308 U.S. 338, 341 (1939); *see also State v. Sizer*, 230 Md. App. 640, 661-62 (2016) (observing that the Supreme Court has recognized three ways of determining that the fruit of the poisonous tree is not poisonous: "1) the Attenuation of Taint, 2) Independent Source, and 3) Inevitable Discovery"), *aff'd*, 456 Md. 350, 375-76 (2017). The defendant bears the burden "to show the evidence should be suppressed." *Cox v. State*, 421 Md. 630, 651 (2011).

[7] The State also asserts that the good-faith and the inevitable-discovery exceptions to the exclusionary rule apply but, like the circuit court, we do not need to reach those issues because we conclude that the pretrial identification was too attenuated from the constitutional violation in this case.

Attenuation, as a theory of non-exclusion, is based "on the idea that the poison has, through time and circumstances, become so strained and diluted that it is no longer lethal." *Sizer*, 230 Md. App. at 662. Attenuation is not simply a "but for" analysis by which courts suppress any derivative evidence the State would not have uncovered but for the illegal conduct. *Gibson v. State*, 138 Md. App. 399, 403 (2001) (citing *Wong Sun*, 371 U.S. at 488). Instead, we apply a three-factor balancing analysis the Supreme Court set out in *Brown v. Illinois*, 422 U.S. at 603-04, and the Court of Appeals later adopted in *Ferguson*, 301 Md. at 549. Therefore, to determine whether an illegal arrest was sufficiently attenuated from an extrajudicial identification, we weigh "(1) the 'temporal proximity' of the illegality and the evidence; (2) 'the presence of intervening circumstances'[;] and (3) 'particularly, the purpose and flagrancy of the official misconduct.'" *Ferguson*, 301 Md. at 549 (citing *Brown*, 422 U.S. at 603-04).

The *first* factor, the "temporal proximity attenuator," is considered less important than the other factors but "intimates that the likelihood that the taint has been purged increases in proportion to the time that has elapsed between the unlawful conduct and the evidence derived therefrom[.]" *Id.* at 550 (citations omitted). The *second* factor, an intervening circumstance, "is an event that breaks the causal connection between the unlawful conduct and the derivative evidence." *Id.* at 551. The Court of Appeals has observed that this factor most frequently "'invol[es] subsequent action on the defendant's part[,]" so courts focus their inquiry on how law enforcement's illegal acts may have caused or "tainted" the defendant's subsequent acts. *Cox v. State*, 397 Md. 200, 221 (2007) (quoting *U.S. v. Green*, 111 F.3d 515, 522 (1997)). By contrast, when the intervening

circumstance is wholly separate from the defendant's behavior, "there is less 'taint[.]'" *Id.* (quoting *Green*, 111 F.3d at 522). The *third* factor, the police's flagrancy, "effectuates the deterrence policy of the exclusionary rule by providing an incentive for police to engage in lawful conduct." *Ferguson*, 301 Md. at 552.

In *Cox*, 421 Md. 630, the Court of Appeals examined whether evidence obtained after an illegal arrest was sufficiently attenuated. Cox had been the passenger in a car the police stopped for running a stop sign. *Id.* at 637-38. Police detained Cox and the driver for somewhere between 15 and 23 minutes without conducting a check for warrants or issuing a citation. *Id.* at 638. After that time had passed, a series of calls came over the police radio alerting officers to a nearby shooting; when the driver, Rodney Johnson, looked increasingly nervous, police searched him and the car, uncovering a handgun in the trunk. *Id.* at 638. The circuit court granted the motion to suppress the handgun as the fruit of an illegal search absent consent or probable cause, and the State did not contest that finding on appeal. *Id.* at 639. The appeal focused instead on the circuit court's order denying Cox's motion to suppress the testimony of an inmate who shared a cell with Cox and the driver following their illegal arrest. *Id.* at 640-41. The State called this inmate, Michael West, to testify that he had known Johnson for about 15 years and that, while in the jailcell, Johnson told him he shot the victim at Cox's request, while Cox "stood close by, listening and occasionally filling in details." *Id.* at 639-40. Cox argued that this testimony was "'poisonous fruit' of the illegal detention, search and arrest[,]" but the trial court allowed West to testify. *Id.* at 640-41. Following his trial and conviction, Cox appealed. *Id.* at 641. This Court affirmed his convictions, holding, *inter alia*, that Johnson

and Cox's "admission in the presence of Mr. West was sufficiently attenuated from the illegal detention and search so as to not require exclusion[.]" *Id.*

The Court of Appeals granted certiorari and affirmed. As he did before the suppression court, Cox argued that West's testimony "should have been suppressed as the 'poisonous fruit' of the illegal search, because [he] and Mr. Johnson were only in jail, and thus in a position to make their admissions to Mr. West, because the police illegally detained them and searched their car." *Id.* at 651. Looking to the three factors adopted in *Ferguson*, the Court reasoned that the 20 hours between the illegal arrest and jailhouse statements "provide[d] sufficient separation" and "weigh[ed] in favor of a finding of attenuation." *Id.* at 654. As for an intervening circumstance, the Court focused on Cox's actions and "'whether there was any event that contributed to his ability to consider carefully and objectively his options and to exercise his free will.'" *Id.* (quoting *Ferguson*, 301 Md. at 551). The Court reasoned that the fact that the jailhouse statements "were purely voluntary, unprompted by police interrogation or action, or any interrogation at all, [wa]s an intervening circumstance [that] weigh[ed] heavily in favor of allowing the evidence to be admitted." *Id.* at 655. Finally, the Court determined that there was no flagrant conduct by police, noting that the police did not exploit any prior illegality to prompt Cox's and Johnson's voluntary admissions. *Id.* at 656 (citation omitted). Thus, the Court concluded that the taint dissipated sufficiently to make suppression of West's testimony unnecessary. *Id.*

In *Gibson, supra*, we also dealt with a defendant who argued that the police officers' knowledge of his identity, which eventually led to his arrest, was the fruit of an illegal

detention. 138 Md. App. at 405-06. The police suspected Gibson of three 4:00 a.m. break-ins in Montgomery County. After the first, police observed, stopped, and questioned Gibson in what he argued was an unreasonable search that "produced the police knowledge of his name and address as the person seen in the neighborhood of an attempted burglary." *Id.* at 404-05, 407. Two months later, police arrested Gibson—who was donning a ski cap and gloves—while he opened the backdoor to a house at 4:00 a.m. *Id.* at 405. At the police station following his arrest, Gibson confessed to the second robbery that occurred after his initial stop by police but before the night of his arrest. *Id.* He sought to suppress the State's use of that confession at his trial for the second robbery by arguing that police obtained the confession as a result of his arrest for the third break-in, which was tainted by evidence police obtained illegally during their investigation of the first break-in. *Id.* at 405-06. The trial court denied his motion and he was convicted of armed robbery and first-degree burglary. *Id.* at 400, 406.

Gibson appealed his conviction to this Court pressing the exclusion of his confession based on the fruit of a poisonous tree. *Id.* at 406. He maintained that the Montgomery County Police would not have known his identity or home address or investigated him as a suspect if not for the unconstitutional stop following the first break-in. *Id.* Judge Moylan, writing for this Court, explained that Gibson's theory of the case amounted to an argument that "the alleged police over-reaction on November 11, 1998, endowed him with a broad transactional immunity from any future investigation that might be facilitated by police knowledge of who he was and where he lived." *Id.* In effect, Gibson wanted "a 'Get Out of Jail Free' card with no expiration date." *Id.* Assuming but

not deciding that the initial stop was illegal, this Court determined that the initial stop "would not operate to bar from evidence or from other uses the police observations" on the occasion of Gibson's subsequent two crimes because those observations were both attenuated from the initial taint under *Wong Sun* and the product of an independent source. *Id.* at 412.

Aside from and in addition to "the irreparable break in any arguable chain of causation," we considered "equally dispositive, as an alternative rationale, the principle that a person's name and address are not excludable evidence and may not serve either as second-generation excludable 'fruits' or as the first-generation 'poisonous tree' that may yield such fruits." *Id.* at 414. Judge Moylan explained, "The argument that **BUT FOR** an illegal arrest, the police would never have had custody of the defendant, would never have known his identity, and would never have been able to prosecute him has never held weight." *Id.* at 415 (emphasis in *Gibson*). In holding that stop of Gibson by police following the first break-in "had no effect" on his confession following the third break-in, we relied on an observation in Wayne R. LaFave's treatise on searches and seizures, as well as this Court's prior opinion in *Robinson v. State*, 53 Md. App. 297 (1982).[8] *See Gibson*, 138 Md. App. at 417-18. Pertinent to Edwards' present appeal, LaFave wrote:

[8] *Robinson*, which this Court decided before the Court of Appeals adopted the three-factor approach in *Ferguson*, involved a motion to suppress a booking photograph from a prior, unrelated, allegedly illegal arrest. 53 Md. App. at 298. This Court concluded that the trial court was correct to deny Robinson's motion to suppress, ruling as follows:

> In the absence of evidence (or a reasonably firm and detailed proffer of evidence) tending to show that appellant's May 5 arrest was not only illegal

> Because photographs are typically taken as a matter of routine in the course of booking and because these photographs become a permanent part of the police files, it sometimes happens that a photo routinely taken after an illegal arrest will on some future occasion be utilized to connect a person with some other crime totally unrelated to the reasons why the pre-photographing illegal arrest was made. Under these circumstances, courts are inclined to find attenuation.

Wayne R. LaFave, 5 SEARCH AND SEIZURE (3d ed. 1996), § 11.4(g), pp. 320-21.

Applying the *Brown*/*Ferguson* attenuation factors to this case, we conclude that the taint of the police's illegal search and seizure was sufficiently attenuated from Mr. Bhandari's identification of Edwards. First, police showed Mr. Bhandari the photo array two days after Edwards' initial detention. While this temporal disjunction is not dispositive, it certainly "provide[d] sufficient separation" to weigh in favor of a finding of attenuation. *See Cox*, 421 Md. at 654. Second, and most importantly, the intervening circumstances also weigh heavily in favor of finding attenuation. The double-blind photo array that the police showed Mr. Bhandari contained a photo of Edwards taken during booking procedures following his arrest for the robbery of Mr. Lawson. Indeed, Edwards does not challenge the photo-array procedures that police used. Wholly removed from the warrantless use of Hailstorm by police or any subsequent action by Edwards, Mr. Bhandari's identification did not come until two days *after* Mr. Lawson's identification,

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> but was merely a pretext for a general exploratory search (as in *Davis v. Mississippi*, [394 U.S. 721 (1969)]) or for gathering evidence in this case as in *United States v. Crews*, [445 U.S. 463 (1980)]), a routing "booking" photograph taken as a consequence of that arrest would not be suppressible as tainted fruit in this proceeding.

Id. at 312.

and was based on a double-blind photo array that included a photograph taken after Mr. Lawson's identification. Clearly these intervening circumstances effectively "br[oke] the causal connection between the unlawful conduct and the derivative evidence." *Ferguson*, 301 Md. at 551; *see also Cox*, 397 Md. at 221-22 (reasoning that there is "less 'taint'" to purge when the intervening circumstance at issue involve an act by the defendant such as a confession).

Although the police department's actions "to protect the Hailstorm technology, driven by a nondisclosure agreement to which it bound itself" were "inimical to the constitutional principles we revere[,]" *id.* at 377, "the *Brown* factors must be balanced and . . . no single factor is dispositive on the issue of attenuation." *Cox*, 397 Md. at 219. The temporal proximity and intervening circumstances weigh more heavily than the flagrancy of the police misconduct in this case. The intervening circumstances, in particular, render the evidence here even more attenuated than that in *Cox*, 421 Md. at 654-55. In *Cox*, the Court of Appeals held that a voluntary admission was attenuated from the defendant's illegal arrest even though the defendant made that admission while detained in jail because of his illegal arrest. *Id.* Here, by contrast, after police had already released Edwards from his illegal detention, police used his photo in a double-blind array from which Mr. Lawson identified Edwards as the assailant for a separate crime; then, police arrested Edwards for that crime, photographed him as part of booking procedures for that crime, and used that new booking photo in an array police showed to Mr. Bhandari. Edwards asks us to ignore these intervening circumstances and apply what would amount to a "but for" causation (i.e., police would not have had the second photo to show Mr. Bhandari if they did not

detain him illegally in the first place). But Maryland courts have rejected such arguments repeatedly in attenuation cases. *See, e.g.*, *Cox*, 421 Md. at 654-55; *Sizer*, 230 Md. App. at 662; *see also Geiger v. State*, 235 Md. App. 102, 117 (2017) ("There is, of course, no such thing as a viable 'but for' defense. There is no right not to be identified.").

The third factor we look to is the flagrancy of police conduct. Edwards has not accused Det. Woerner or any other specific officer of flagrant misconduct. Although we cannot ignore the greater institutional misconduct at issue in this case, *see Andrews*, 227 Md. App. at 375 ("[a] nondisclosure agreement that prevents law enforcement from providing details sufficient to assure the court that a novel method of conducting a search is a reasonable intrusion made in a proper manner and 'justified by the circumstances,' obstructs the court's ability to make the necessary constitutional appraisal.") (citing *Md. v. King*, 569 U.S. 435, 447-48 (2013)),[9] the temporal proximity and intervening circumstances weigh more heavily than any police misconduct in this case. The intervening circumstances in this case render the evidence here even more attenuated than in *Cox*, 421 Md. at 654-55. Like the defendant in *Gibson*, Edwards' argument would effectively "endow[] him with a broad transactional immunity from any future investigation[,]" or "a 'Get Out of Jail Free' card with no expiration date." 138 Md. App. at 406.

[9] Another reason that the factors outweigh any police misconduct in this case is that, unlike in *Andrews*, 227 Md. App. at 409-10, in addition to a pen register trap and trace order, officers here also obtained an order pursuant to Maryland Code (2001, 2008 Repl. Vol., 2016 Supp.), Criminal Procedure Article, § 1-203.1.

For all the foregoing reasons, we hold that the circuit court was correct to deny Edwards' motion to suppress in this case.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.