

ARIZONA SUPREME COURT

STATE OF ARIZONA

Arizona Supreme Court
No. CR-23-0236-PR

Court of Appeals, Division 1
No. 1 CA-CR 23-0014

Appellant,

v.

Maricopa County Superior Court
No.
CR 2018-118086-001

IAN L. MITCHAM

Appellee.

PETITION FOR REVIEW

OFFICE OF THE PUBLIC DEFENDER

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ISSUE PRESENTED TO THE COURT FOR REVIEW

The Fourth Amendment prohibits the State from developing a DNA profile from blood consensually collected as part of a misdemeanor DUI investigation. Scottsdale Police violated Ian's rights when it did exactly that. But the Court of Appeals reversed the trial court's suppression order, relying on a post-hoc probable cause finding, an inaccurate factual assumption, and misapplication of the exclusionary rules. Did the Court of Appeals err in reversing the trial court's suppression order?

PROCEDURAL AND FACTUAL BACKGROUND

A. When Ian consented to a DUI blood draw, police advised him the blood would (1) be used only to determine his BAC and (2) be destroyed after 90 days.

On January 8, 2015, Scottsdale Police (“SPD”) arrested Ian for misdemeanor DUI. R.T. 12/9/22 at 9-11. Ian signed an Admin Per Se Affidavit with the understanding police could use his blood only to determine its alcohol concentration (“BAC”) and/or drug content. [Appendix \(App.\) Item A \(Admin Per Se Affidavit\)](#). Police also provided Ian notice that SPD would destroy the blood after 90 days. [App. Item B \(Blood Destruction Notice\)](#).

The prosecutor released the blood for destruction in February 2016. R.T. 12/9/22 at 26. But the police never destroyed the blood. *Id.* Instead, three years after Ian’s DUI arrest – in a desperate attempt to solve a homicide – SPD created a DNA profile from it, violating Ian’s Fourth Amendment rights.

B. Scottsdale Police ignored the Fourth Amendment and obtained a warrantless DNA profile from Ian’s blood without consent.

Three years after Allison Feldman’s murder, the killer remained at large. SPD had a dearth of evidence and no prospect for new leads. SPD’s

only evidence was male DNA from the crime scene that did not match anyone in the CODIS database. R.T. 12/9/22 at 23. SPD had the Department of Public Safety (“DPS”) conduct “familial DNA testing” to determine whether crime scene DNA was genetically related to a known sample in CODIS. *Id.* The results suggested a familial link to Mark Mitcham. [App. Item C \(Familial DNA Results\)](#). Lockerby discovered Mark had three brothers: Ian and Craig, who lived in the Phoenix area, and Eric. R.T. 12/9/22 at 43-44.¹

Rather than launching a constitutionally compliant investigation, Lockerby zeroed in on Ian after learning SPD still possessed his 2015 DUI blood sample. *Id.* at 26. Without warrant or consent, Lockerby had a DNA profile developed of Ian’s blood. On April 5, 2018, the lab confirmed Ian’s DNA matched the crime scene DNA. R.T. 12/9/2022 at 27-29, [App. Item D \(DNA Results\)](#). SPD obtained a GPS tracking warrant and a warrant for Ian’s buccal swab². [App. Items E and H \(Warrants\)](#).

¹ During oral argument, Counsel incorrectly stated that Ian and Craig lived together in 2015. While they were not living together at that time, both brothers lived within 6.5-mile radius from the crime scene.

² The Court of Appeals Opinion (“Opinion”) notes it found no record of the buccal swab search warrant. [App. Item G \(Court of Appeals Decision\)](#)

The probable cause supporting both warrants relied solely on the unlawfully obtained DNA profile. *Id.*

Absent ill-gotten DNA, Lockerby had minimal information about Ian: his address, his vehicle information, and his DUI arrests. *See Id.* Underscoring SPD's dearth of evidence, Lockerby explicitly noted in the GPS warrant affidavit that no connection existed between Ian and the victim. *Id.*

C. The trial court agreed that SPD violated Ian's Fourth Amendment rights and suppressed the DNA evidence.

The trial court held that because Ian only "[c]onsented to the taking and analysis of his blood for drug or alcohol testing, the subsequent DNA analysis of his blood exceeded the scope of his consent." [App. Item F \(Superior Court Minute Entry 12/19/22\)](#). The trial court also suppressed the buccal swab DNA results because the unlawfully obtained DNA evidence formed the basis for that warrant. *Id.*

[dated 8-22-23](#)) at ¶ 40. However, the parties had submitted that information in the Stipulated⁵ Record on Appeal in Item 3,

D. SPD exceeded the scope of Ian’s consent, but the Court of Appeals erroneously reversed the trial court’s suppression ruling.

The Court of Appeals agreed law enforcement exceeded the scope of Ian’s 2015 Admin Per Se consent. Nevertheless, they reversed the trial court’s decision, holding that the State had probable cause to arrest Ian, absent the unconstitutionally obtained DNA evidence. Furthermore, the Court of Appeals erroneously concluded that Ian’s DNA was already in CODIS from his 2022 felony convictions, providing an independent reason for the State to possess his DNA. [App. Item G at 14-16](#).

REASONS THIS COURT SHOULD GRANT REVIEW

This Court should grant review for three reasons:

1. The Court of Appeals erred in interpreting and applying Fourth Amendment law. No warrant exception exists allowing police to create DNA profiles from blood consensually obtained in a misdemeanor DUI investigation.
2. Neither the independent source nor inevitable discovery doctrines apply here. The Court of Appeals misapplied the doctrines by conflating the independent source doctrine with an inevitable discovery analysis.

3. The Arizona Constitution's Private Affairs Clause provides increased protection from government intrusion into its citizens' DNA.

A. The Court of Appeals correctly held that the creation of a DNA profile exceeded the scope of Ian's consent to the DUI blood draw.

Under the Fourth Amendment, scope of consent is determined by objective reasonableness, *Florida v. Jimeno*, 500 U.S. 248, 251 (1991), and is "limited by the items about which the officer inquired as a predicate to the search". *State v. Swanson*, 172 Ariz. 579, 583, ¶ 9 (App. 1992). Without consent, law enforcement must obtain a warrant. *Schmerber v. California*, 384 U.S. 757 (1966); *State v. Estrada*, 209 Ariz. 287 (App. 2004).

Ian consented to the blood draw for one purpose—the 2015 DUI investigation. *App. Item A*. The Admin Per Se explicitly limited the scope of the search to that single purpose. *Id.* The State gave Ian notice that his blood would be destroyed after ninety days. *App. Item B*. No reasonable person in Ian's position would anticipate police keeping their blood and generating a DNA profile years later. This is an egregious expansion to the scope of Ian's consent and nothing close to "objective

reasonableness.” The Court of Appeals correctly held that SPD exceeded the scope of Ian’s consent in violation of the Fourth Amendment.

i. Warrantless use of DUI blood to develop a DNA profile in a separate criminal investigation raises significant privacy concerns.

The Supreme Court has yet to decide this issue, but nonetheless recognizes the significant privacy concerns implicated by the state’s ability to use DUI blood and obtain much more than “a simple BAC reading.” *Birchfield v. North Dakota*, 579 U.S. 438, 464 (2016). “Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.” *Id.* This Court and numerous circuit courts have also recognized that the Fourth Amendment protection extends to DNA profiling.³

³*Mario W. v. Kaipio*, 230 Ariz. 122, 128 (2012)(this second search presents a greater privacy concern because it involves the extraction of the genetic markers from the arrestee’s DNA profile); *U.S. v. Weikert*, 504 F.3d 1 (1st Cir. 2007)(extracting blood for DNA profiling is a search); *United States v. Amerson*, 483 F.3d 73 (2nd Cir. 2007)(given the vast amount of private information in DNA, courts have recognized strong privacy interests in that information); *U.S. v. Mitchell*, 652 F.3d 387 (3rd Cir. 2011)(the collection of DNA samples entails two separate searches—physical collection and creation of DNA profile); and *U.S. v. Davis*, 690 F.3d 226 (4th Cir. 2012)(extraction and creation of DNA profile from defendant’s clothing is a search).

The Supreme Court has found that the Fourth Amendment protects similarly private, sensitive information in areas other than blood/DNA. *U.S. v. Carpenter*, 138 S.Ct. 2206 (2018) (refusing unrestricted government access to cell site location information after considering vast amount of personal data the government could then access); and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (urine and blood testing constitutes a search even where the analysis is not conducted to garner private medical information beyond alcohol/drug use).

These privacy concerns and safeguards remain even when the government lawfully possesses the evidence. *See Walter v. U.S.*, 447 U.S. 649 (1980) (FBI agents in lawful possession of film boxes did not have authority to search contents); *Riley v. California*, 573 U.S. 373 (2014). (police must have a warrant to search a cell phone lawfully seized incident to arrest).

The *Birchfield* court was prescient. The scenario it cautioned against materialized here—the illegal use of DUI blood evidence. This case is a stark reminder of the importance of safeguarding against the unauthorized use of a person's biological information by officers whose

perspectives might be “colored by their primary involvement in ‘the often-competitive enterprise of ferreting out crime.’” *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

B. The Court of Appeals erred: *Mario W.* does not create a probable cause or reasonable suspicion exception to the warrant requirement.

The Court of Appeals incorrectly extended *Mario W.*’s rationale and applicability to Ian’s case. *Mario W. v. Kaipio*, 230 Ariz. 122 (2012). *Mario W.* addressed the constitutionality of a statute requiring juveniles, when charged with certain offenses, to provide DNA samples for the State to profile. This Court found the statute’s DNA collection requirement constitutional but found the pre-adjudication or pre-failure-to-appear DNA analysis violated the Fourth Amendment. *Id.* at 128-129.

The reasoning of *Mario W.* is inapplicable to this case. The statute at issue in *Mario W.* provided clear, objective limits when compelling juveniles to provide DNA. *Id.* at 123. These statutory limits excluded the officer’s subjective intent in the initial decision to collect and process the DNA. Yet, the Court of Appeals failed to address how the principles in *Mario W.* relate to this case. This is particularly important because (1)

Mario W's facts and rationale are inapposite to Ian's case, and (2) Lockerby's subjective intent is exactly the issue here.

Only one year after *Mario W.*, the United States Supreme Court upheld a statute permitting both the collection and analysis of DNA from individuals charged with certain serious offenses. *Maryland v. King*, 569 U.S. 435, (2013). Like *Mario W.*, the DNA collection and analysis in *King* were governed by statute, designed to protect "against further invasion of privacy." *Id.* at 465. The *King* court concluded that in light of those "scientific and statutory safeguards," the DNA analysis "did not amount to a significant invasion of privacy," and did not violate the Fourth Amendment. *Id.* at 465.

Unlike *Mario W.* and *King*, here the police conducted DNA analysis without statutory authority. Ian was not in custody, had not been charged with any serious offenses, and the State had no compelling government interest justifying the search, i.e., determining arrestee's identification during booking procedures *Id.* at 461. In the absence of a warrant or statutory provisions, the Fourth Amendment unequivocally prohibits such intrusion.

- i. A post hoc finding of probable cause or reasonable suspicion does not excuse a warrantless search.**

“To excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the Fourth Amendment.” *Brown v. McClennan*, 239 Ariz. 521 (2016) (quoting *United States v. Echegoyen*, 799 F.2d 1271 1280 n.7 (9th Cir. 1986)); See also *U.S. v. Young*, 573 F.3d 711 (9th Cir. 2009); *U.S. v. Mejia*, 69 F.3d 309 (9th Cir. 1995). The State cannot use inevitable discovery to circumvent the Fourth Amendment. “Such a claim amounts to the unacceptable assertion that police would have done it right had they not done it wrong.” *State v. Davolt*, 207 Ariz. 191, ¶ 37 (2004).

A warrantless search is considered reasonable only if it falls under “a specifically established and well-delineated exception.” *Katz v. U.S.*, 389 U.S. 347 (1967). Probable cause and reasonable suspicion are not exceptions. The Court of Appeals extended *Mario W.* “too far in favor of the State . . . [s]uch an exception could diminish—if not swallow—the warrant requirement.” *Opinion at ¶ 58 (Catlett, J. Concurring)*. Hence, law enforcement’s failure to obtain a warrant cannot be justified through a post hoc application of probable cause.

C. The Court of Appeals misapplied the Independent Source Doctrine within the framework of an Inevitable Discovery analysis.

The inevitable discovery doctrine requires a finding that police would have acquired the evidence even without their malfeasance. *See Nix v. Williams*, 467 U.S. 431, 443-444 (1984). Conversely, the independent source doctrine requires the police obtain the evidence from a source unconnected to their malfeasance. *Id.* The Court of Appeals erred here by applying the independent source doctrine within the framework of an inevitable discovery analysis, conflating the two. While both doctrines assess whether the police would have discovered the evidence absent the misconduct, there are significant distinctions necessitating separate analysis. *See Murray v. U.S.*, 487 U.S. 533 (1988). Regardless, neither doctrine applies here.

i. Independent Source

“[T]he independent source doctrine allows the trial court to admit evidence obtained in an unlawful search if officers independently **acquired it** from a separate, independent source.” *Utah v. Strieff*, 579 U.S. 232, 238 (2016) (emphasis added); *Murray* at 538-539. In cases

where the hypothetical independent source has materialized, inevitable discovery does not apply, and instead, it falls under the purview of the independent source exception. *State v. Boll*, 651 N.W.2d 710, ¶22 (S.D. 2002).

Here, the Court of Appeals erroneously concluded that CODIS contained a sample of Ian's DNA from his 2022 felony convictions. *Opinion at ¶ 47*. Instead, Ian's DNA in CODIS came *solely* from the unconstitutional search of his 2015 DUI blood. *App. Item H (Search Warrant for Ian's buccal swab)*. Ian's felony convictions happened more than four years after the unlawful search, and his DNA was never collected. While the State had the opportunity to collect Ian's DNA upon his felony convictions, they never did. *App. Item F*. Consequently, the independent source doctrine cannot be applied to evidence that has not yet materialized.

Inevitable Discovery

Integral to the proper application of the inevitable discovery doctrine is a finding that law enforcement *would* have, not simply that they *could* have, secured the evidence by lawful means. *State v. Lee*, 976 So. 2d 109 (La. 2008). Thus, a mere showing that the police had

probable cause for a search and could have secured a warrant does not satisfy the doctrine, because **it would limit the application of the exclusionary rule to cases where the police lacked probable cause.** *Id.* at 127.

The inevitable discovery doctrine “[I]nvolves no speculative elements but focuses on demonstrated historical facts capable of ready verification and impeachment.” *Nix v. Williams*, 467 U.S. 431, 444 n. 5 (1984) (finding police inevitably would have found the body despite the constitutional violation because searchers were looking for the body hours before defendant confessed). The doctrine relies upon inevitability not mere plausibility. *Id.* at 449-450. The analysis also begins with the progress of the investigation **at the time** of the government misconduct. *U.S. v. Eng*, 971 F.2d 854 (2nd Cir. 1992).

In *Lamb*, this Court adopted the inevitable discovery exception, reasoning that “evidence obtained as a result of an unlawful search need not be suppressed where, in the **normal course of the police investigation** and absent illicit conduct, the evidence would have been discovered anyway.” *State v. Lamb*, 116 Ariz. 134, 138 (1977) (emphasis added); *State v. Hein*, 138 Ariz. 360, 364-65 (1983).

Here, the possible “future” acquisition of Ian’s DNA from his 2022 convictions is not evidence that “inevitably” emerged during the homicide investigation. This is obvious because that “evidence” *still* doesn’t exist! Not only are these felonies unrelated to the homicide, but at the time of the unlawful search, the State had no way of knowing that Ian would plead guilty over four years later. Under these facts, the trial court rightly found, “application of the inevitable discovery doctrine in this relies solely on speculation, and such speculation alone cannot sustain the State’s burden.” [App. Item F](#). Speculation and assumptions do not satisfy the dictates of *Nix* and the Court of Appeals erred by ignoring this in its analysis.

iii. The misconduct here requires exclusion.

The Fourth Amendment exists to protect personal privacy against unwarranted government intrusion. [Schmerber v. California, 384 U.S. 757 \(1966\)](#). When the police exhibit “deliberate, reckless, or grossly negligent” disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. [Herring v. U.S., 555 U.S. 135, 144 \(2009\)](#). “An assessment of the flagrancy of the police misconduct constitutes an important step in the calculus.” [United](#)

States v. Leon, 468 U.S. 897, 911 (1984). Evidence must be excluded unless an exception to the exclusionary rule applies. See *Utah v. Strieff*, 579 U.S. 232, 238 (2016).

In 2018, “The State’s investigation was gaining steam through the use of familial DNA, and...may have been able to secure a warrant...through further diligent investigation.” *App. Item F*. But rather than invest additional time and effort to establish probable cause and obtain a lawful warrant, Lockerby took the easy way around—he homed in on Ian because he could easily access his DUI blood.

Lockerby chose to forego thoroughness (and a constitutional investigation) for expedience: all three Mitcham brothers’ DNA could have matched the crime scene DNA. Lockerby’s actions are “fairly characterized as deliberate, but it was at least a reckless violation of Defendant’s constitutional rights.” *Id.* Given this, and the absence of any exclusionary rule exceptions, the trial court correctly suppressed the evidence.

D. The Arizona Constitution’s Private Affairs Clause protects its citizens’ DNA profiles.

Arizona’s corollary to the Fourth Amendment: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” [Ariz. Const. Art. 2, § 8](#). This language is broader and more explicit than the Fourth Amendment because it encompasses our “private affairs.” [State v. Ault, 150 Ariz. 459 \(1986\)](#); [State v. Mixton, 250 Ariz. 282, 290 \(2021\)](#). Because the Arizona Constitution does not define “private affairs,” this Court has relied on the concept of “reasonable expectation of privacy” in applying it to specific situations. [Mixton at 282, 294](#).

In *Mixton*, this Court declined to extend the private affairs clause to “non-content” subscriber information (user’s geographic location and ISP information i.e., name, address, and phone number associated with the subscriber). [Mixton at 293-294, ¶ 44](#). In reaching this conclusion, the *Mixton* court relied on the “third-party doctrine,” finding that individuals have no reasonable expectation of privacy in information shared voluntarily as a condition of service. [Id. at 288](#). Conversely, “content-related” information would include “browsing history, email content, or other, personal information.” [Id. at 289 ¶25](#). This distinction is crucial as this latter information implicates Fourth Amendment privacy interests.

Unlike the ISP/IP information in *Mixton*, Ian’s DNA profile constitutes “content-related” information that he did **not** share voluntarily. An individual’s DNA profile reveals intimate details including their genetic makeup, health, and ancestry. Kelly Lowenberg, “*Applying the Fourth Amendment when DNA collected for one Purpose is tested for another*”, 79 U. Cin. L. Rev. 1289 (2011). Technological advances have increased the government’s ability to pry, emphasizing the importance of safeguarding individual privacy from government intrusion into “areas normally guarded from inquisitive eyes.” *Carpenter v. U.S.* 138 S.Ct. 2206, 2214 (2018).

The *Carpenter* court sought to “assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” *Carpenter at 2214* (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). Permitting police to develop DNA profiles without restraint is no less invasive than allowing them to “rummage through homes in an unrestrained search for evidence[.]” *Riley v. California*, 573 U.S. 373, 403 (2014). Ian had a reasonable expectation of privacy in the non-alcohol biological components of his blood. He reasonably relied upon the government’s notices that promised his blood would be used only for

DUI evidence and then destroyed. Instead, it was used for a different purpose in violation of his Fourth Amendment rights.

E. Conclusion

Scottsdale police exceeded Ian's consent and developed a DNA profile from a three-year-old blood sample that long should have been destroyed. Unquestionably, generating the DNA profile constituted a Fourth Amendment search requiring a warrant or an exception. No exception applies and creating a "new" probable cause or reasonable suspicion exception is an unjustifiable affront to the Fourth Amendment. The Court of Appeals' creative conflation of the independent source and inevitable discovery doctrines is a misapplication that does not provide a valid basis for admitting the evidence. For all these reasons, this Court should reverse the Court of Appeals' decision and affirm the trial court's suppression of the DNA evidence.

RESPECTFULLY SUBMITTED this 12th day of October, 2023.

OFFICE OF THE PUBLIC DEFENDER

BY/s/ Martha Barco Penunuri
MARTHA BARCO PENUNURI
Deputy Public Defender
Attorney for Appellee

ARIZONA SUPREME COURT

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APPENDIX TO PETITION FOR REVIEW

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Appendix Item A

by DR Case Number

ADMONITIONS
Dissemination is restricted to Criminal Justice Agencies and authorized Non-C.J. Agencies ONLY. Secondary dissemination by any other agency is PROHIBITED.

For the reasons stated on the front of this form, read the following to the person named on the front:

- Arizona law requires you to submit to and successfully complete tests of breath, blood or other bodily substance as chosen by the law enforcement officer to determine alcohol concentration or drug content. The law enforcement officer may require you to submit to two or more tests. You are required to successfully complete each of the tests.
- If the test results are not available or indicate your alcohol concentration is 0.08 or above (0.04 or above in a commercial vehicle) or indicate any drug defined in ARS 13-3401 or its metabolite, without a valid prescription, your Arizona driving privilege will be suspended for not less than 90 consecutive days.
- If you refuse to submit or do not successfully complete the specified tests, your Arizona driving privilege will be suspended for 12 months, or for two years if there is a prior implied consent refusal, within the last 84 months, on your record. You are, therefore, required to submit to the specified tests.

Yes No Will you submit to the specified tests?

If person unreasonably delays the completion of test, read the following to him or her:

You are not entitled to further delay taking the tests for any reason. Further delay will be considered refusal to submit to the tests.

Yes No Will you submit to the specified tests?

Additional Comments

YES 1233

Officer Signature

Appendix Item B

DATE 01/08/2014



D.U.I. BLOOD/URINE RESULTS/DESTRUCTION NOTICE

Dissemination is restricted to Criminal Justice Agencies and authorized personnel only. Secondary dissemination is PROHIBITED.

The results of your blood/urine alcohol test will be available to you or your attorney (thirty (30) days for blood) (ninety (90) days for urine) after the date of arrest. The test results can be obtained by contacting the Scottsdale Prosecutor's office. You must request the information in person and identification will be required. **DO NOT CONTACT THE HOSPITAL** as it **WILL NOT** have information on your blood/urine alcohol test results.

After (thirty (30) days for blood) (ninety (90) days for urine), a laboratory, which you or your attorney have chosen, may obtain a portion of the blood or urine drawn in this case for an independent analysis. The Scottsdale Police Department will only release the sample to your designated laboratory or its agent. The sample **WILL NOT** be released to you or your defense attorney. In order for the sample to be released to the laboratory, you or your attorney must send a request for a release with the designation of the laboratory which you have retained, to the Scottsdale City Prosecutor's Office or the Maricopa County Attorney on all felony cases. The prosecutors will then send you or your attorney a form called a "Request for Portion of D.U.I. Blood/Urine Sample for Reanalysis".

If the laboratory or its agent does not present a "REQUEST FOR PORTION OF D.U.I. BLOOD/URINE SAMPLE FOR REANALYSIS" form to the Scottsdale Police Department Property/Evidence personnel before **ninety (90) days** from today for blood, **one hundred eighty (180) days** for urine, sample will have been destroyed and unavailable for reanalysis.

Advised of opportunity for second chemical test.

A copy of this form was provided to the Defendant:

Signature of Defendant

Signature of Officer

Scottsdale Police Department
9066 E. Via Linda
Scottsdale, AZ. 85258
Hours: 8:00 am to 4:30 pm
Records: (480) 312-1999
Property: (480) 312-5888

Scottsdale City Attorney's Office
Prosecution Division
3700 N. 75th St.
Scottsdale, AZ 85251
Hours: 8:00 am to 5:00 pm
Information (480) 312-2710

All Felony Cases Contact:

Maricopa County Attorney
222 E. Javelina
Mesa, AZ 85210
(602) 506-2600

Distribution : White copy - DR Jacket; Pink copy - Defendant

PD09210 REV(07/2008)
(02/2010 - 7500)

Appendix Item C

cec



ARIZONA DEPARTMENT OF PUBLIC SAFETY

2102 WEST ENCANTO BLVD, P.O. BOX 6638 PHOENIX, ARIZONA 85005-6638 (602)223-2000

"Courteous Vigilance"

DOUGLAS A. DUCEY Governor FRANK L. MILSTEAD Director

April 04, 2018

Chief Rodbell
Scottsdale Police Department
8401 E. Indian School Road
Scottsdale, AZ 85251

Dear Chief Rodbell,

The Arizona Department of Public Safety Crime Laboratory performed a Familial Search of the DNA profile from your case number 1504116 as per your request. The profile was searched against convicted offenders and arrestees (candidates) in the Arizona database in an attempt to identify male relatives of the contributor to the profile in this case.

The qualified candidate(s) were subjected to additional DNA testing, if needed. Based on the additional testing, the candidate(s) listed in this letter may be related to the subject whose profile was submitted to us for this search. We are providing the following information on the candidate(s) whose samples are in the DNA Database to be used as an investigative lead.

Please note that:

- The named candidate(s) are not the source of the forensic unknown DNA profile from case number 1504116.
- The DNA results are best explained by a parent-child or full sibling relationship; however, other familial relationships could also explain these results. Any possible connection of the candidate's relationship to the forensic profile must be determined through further investigation by your agency.
- There is a possibility that the candidate(s) on this list are not related to the source of the unknown profile.
- The DNA results provide an indirect association, based solely on potential genetic relationships, between the source of the forensic unknown profile and the named candidate(s).

The following candidate(s) with a concordant Y-STR type were identified as:

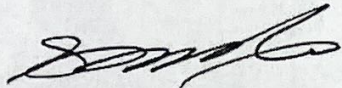
<u>Name</u>	<u>DOB</u>	<u>SSN</u>	<u>SID</u>
Mitcham, Mark L	01/09/1964	527-69-2538	AZ08405387

CC

This information is for law enforcement investigatory purposes only and is not a statement of identity. If an investigative lead is developed from a relative based on the list of names provided above, you must submit a DNA sample from that individual to the crime laboratory that performed the original analysis for comparison purposes.

If you have any questions or need any additional information, please contact Scott Rex at (602) 223-2394.

Sincerely,



Scott Rex
Central Regional Crime Laboratory Manager
Arizona Department of Public Safety

Appendix Item D



Scottsdale Police Department
 Crime Laboratory
 Examination Report



Agency: Scottsdale Police Department
 DR#: 15-04116
 Lab Number: L15-02-00539
 Requester: Lockerby, #707
 Date of Request: 04/05/18
 Type of Examination: DNA

Page 1 of 1

Request Number: 0134

Subjects: Ian Mitcham 10/06/75

Items:

- Item #1019242: (PM-H) Swab from cluster on floor near chair (previously analyzed; see amended report dated 7/13/15; request #0023).
- Item #1011685: Vial of blood collected from Ian Mitcham.
- Item #1011686: Vial of blood collected from Ian Mitcham.

Results:

DNA was extracted, amplified and typed using PCR technology for the STR loci contained in the Globalfiler Express Kit from item #1011686 (Mitcham) and compared to the DNA profile previously obtained from item #1019242 (PM-H cluster stain).

Conclusions:

The mixed DNA profile obtained from item #1019242 (PM-H cluster stain) is consistent with originating from 2 individuals. It is 3.52×10^{27} times more likely to obtain the observed DNA results if item #1011686 (Mitcham) is a contributor than if he is not a contributor.

Item #1011685 (Mitcham) was not analyzed.

The items of evidence were returned to the Property Section.

STR = Short Tandem Repeat
 CODIS = Combined DNA Index System

DNA = Deoxyribonucleic Acid

PCR = Polymerase Chain Reaction

Examiner:

Vickie Beamer

Vickie S. Beamer, DNA Technical Leader 04/06/18

This report contains the results, interpretations and opinions of the above signed examiner.

001973

Appendix Item E

STATE OF ARIZONA - COUNTY OF MARICOPA
SEARCH WARRANT AFFIDAVIT

SEARCH WARRANT # SW 2018-003663 **DR# 15-04116**

STATEMENT OF PROBABLE CAUSE

PLACE TO BE SEARCHED AND ITEMS TO BE SEIZED

Based on the facts and opinions set forth below, I have probable cause to believe that the crime of ARS 13-1105.A1, First Degree Murder has been committed or is continuing to be committed, and I seek authorization to surreptitiously search the following vehicle for the sole purpose of affixing a self powered detachable GPS tracking device and allowing operation and/or monitoring of said device twenty four hours a day, seven days a week not to exceed 30 days:

On the vehicle(s) known as: black 2001 Ford Mustang bearing Arizona plate of **CAW9036**, with VIN: **1FAFP44421F197154**, registered to Ian Mitcham (DOB:10/06/1975)

On the premises known as: 3724 East Earll Drive in Phoenix, Arizona 85018

OR

No private property will be entered to install, maintain, or remove the self-powered detachable GPS tracking device

AND TO SEARCH AND SEIZE THE FOLLOWING ITEMS:

GPS Tracking Data obtained through real time or historical data in furtherance of an ongoing criminal investigation. The GPS device will capture electronic data as both real time and historical GPS locations, addresses, dates, times, vehicle speed and direction of travel. The device will record data no faster than in five second increments. This will commence upon installation of the device on the listed vehicle and cease upon removal of the device from the listed vehicle within the specific time period authorized. All of the above stated electronic data will be preserved as evidence.

AFFIANT'S EXPERIENCE:

Sergeant Lockerby #707, your Affiant, has been employed by the Scottsdale Police Department since March of 1998. Your Affiant attended the Phoenix Regional Police Academy and received basic training in various aspects of police work, including investigations. Upon graduation from the Police Academy, your Affiant worked as a patrol officer and made numerous arrests for misdemeanor and felony crimes and investigated numerous misdemeanor and felony cases. Your Affiant has also participated in the Field Training Program of the Scottsdale Police Dept in which, your Affiant has trained numerous new Officers in basic police operations and investigations. Your Affiant attended training to participate as a Gang Liaison Officer.

In September of 2004, your Affiant was assigned as a Detective to the Violent Crimes Unit (VCU) of the Scottsdale Police Department. In April of 2015, Your Affiant was promoted to the rank of Sergeant and re-assigned to the Patrol Bureau to supervise Officers. In August of 2016, Your Affiant was transferred back to the Violent Crimes Unit to supervise Detectives in Violent Crimes. The Violent Crimes Unit is primarily responsible for investigation of Violent Crimes occurring within or related to the City of Scottsdale.

As a Detective, and prior, your Affiant has attended and successfully completed schools and training presented by The Scottsdale Police Department, other Agencies and private companies. Some of these training courses/classes were, Basic Prison and Street Gangs, Gang Liaison Officer training, California Robbery Investigation Seminar, Equivocal Death and Cold Case Homicide Investigations, 40 hour Basic Homicide Investigation, Officer Involved Shooting Investigations, Basic Bloodstain and Advanced Bloodstain Pattern Analysis, Buried Body Investigations, Domestic Violence Training, Updated Miranda Rights training, Basic and Advanced Reid Technique of Interviewing and Interrogation, Kinesic Interviewing/Interrogation, Rape and Sexual Assault Investigations, Basic and Advanced Criminal Investigative Analysis. Your Affiant is an active member of the following Professional Associations: Arizona Homicide Investigators (AHIA), California Homicide Investigators (CHIA), and International Homicide Investigators (IHIA).

The focus of some of the above-named police training was to educate the participants in various investigative methods and techniques, including identification of gang members, proper documentation and methods used by gang members, unequivocal deaths, domestic violence homicides, child crimes, and the investigation of officer-involved shootings. Additionally, these schools and/or training seminars addressed techniques used to identify, investigate, infiltrate, and recognized the methods used by criminals their associates and/or members of their organizations. Methods by which criminals convert, transfer, dispose or convey their properties and items utilized to commit crimes were also presented. As a core part of your Affiant's experience and the various training courses, your Affiant knows that it is common for criminals to alienate, or appear to alienate, their ownership or interests in property and or evidence in attempt to avoid detection or capture by law enforcement.

Furthermore, since your Affiant has been assigned in the Violent Crimes Unit, he has participated and supervised numerous felony investigations to include, Aggravated Assaults, Kidnappings, Murder for Hire, Officer Involved Shootings, Armed Robbery, Homicides Cold Case homicides, and other crimes as necessary. Your Affiant was a co-case agent in the Serial Shooter Homicide Task Force Investigation. Your Affiant has also authored numerous search warrants over the past years and has been co-Affiant in Title 3 Wiretap murder investigation.

Your Affiant is also familiar with the methods used by those engaged in illegal activities to conduct their business, protect their associates and conceal their identities, avoid detection and identification of the assets, and activities and whereabouts. Your Affiant has also authored numerous reports in relation to oral, electronic and wire communications.

Your Affiant has spoken to numerous individuals about the methods and practices of people involved in illegal activities, including subjects involved in/with violent crimes. These people include subjects involved in crimes and/or experienced federal, state, and/or local investigators. All of these types of training, experience, and sources of information have provided your Affiant with objective details of the methods and practices used by criminals involved in illegal activities.

Your Affiant also makes note that the opinions and/or evaluation expressed about the information, activities, methods and/or practices of people involved in this investigation are based on experience, training, as well, as information received from other sources.

STATEMENT OF FACTS:

On February 18, 2015 at approximately 1602 hours the Scottsdale Police Department was dispatched to 8526 E. Monterey Way, Scottsdale, Maricopa County, Arizona in reference to a medical call. The reporting party advised he found his girlfriend, Allison Feldman, unresponsive and there was blood everywhere. Officers and paramedics responded to the residence and found the victim deceased in the home as the result of a homicide. The victim's body was found to have trauma.

Responding officers found the interior of the home to have blood drops, blood spatter and blood smears on the floor. In addition, there was an overpowering chemical odor, similar to bleach, inside the home. The residence appeared to show signs of an attempt to clean up the crime scene, as well as to destroy forensic evidence. This included the apparent use of a Swiffer cleaning device. Officers also found the home to have no signs of forced entry. A check of the residential security system found the home had an open rear door that evening.

The residence was processed for forensic evidence to include DNA and fingerprints. A full DNA profile was obtained from three locations in the crime scene and was identified to an unknown male. The locations of the DNA were found to be on a capped broken beer bottle lying in a dried pool of blood with matching shards of glass around the victim, in an unknown substance (Item #1019242) on the dining room floor where the suspect had utilized a Swiffer device and an unknown chemical to clean the scene, and on a cabinet where the Swiffer box. The DNA profile (Item #1019242) was uploaded into CODIS and searched against known profiles in the database with negative results.

On November 22nd 2017, the Scottsdale Police Department requested the Arizona Department of Public Safety Crime Lab to conduct a Familial DNA search of Arizona Convicted Offender and Arrestee DNA profiles to identify candidates who are potential close biological relatives to the unknown perpetrator (Item #1019242) as determined by a statistical comparison of the DNA profiles.

On April 4th 2018, the Arizona Department of Public Safety Crime Lab met with Scottsdale Police Detectives to inform them on the Familial Search findings. Item #1019242 was searched against convicted offenders and arrestees (candidates) in the Arizona database in an attempt to

identify male relatives of the contributor to the profile in this case. AZ DPS advised that the information on the candidates whose samples are in the DNA database were to be used as an investigative lead. Furthermore, DPS also noted the following:

1. The named candidates are not the source of the forensic unknown DNA (Item #1019242).
2. The DNA results are best explained by a parent-child or full sibling relationship; however other familial relationships could also explain these results. Any possible connection of the candidate's relationship to the forensic profile must be determined through further investigation by Scottsdale PD.
3. There is a possibility that the candidates on the list are not related to the source of the unknown profile.
4. The DNA results provide an indirect association, based solely on potential genetic relationships between the source of the forensic unknown profile and the named candidates.

The following candidate with a concordant Y-STR profile type was identified as Mark L Mitcham (DOB: 01/09/64) Social Security Number: 527-69-2538, Arizona State Identification number AZ08405387. It should be noted that this was the first Familial search conducted by AZ DPS.

Scottsdale Police Detectives learned through the Arizona Department of Corrections (AZ DOC) website that Mark L Mitcham is currently incarcerated in Eyman Prison for multiple molestation, and sex conduct with a minor sentences until 2137. These offenses occurred in late 1992 and early 1993. Mark L Mitcham was sentenced in 1995.

Scottsdale Police Detectives began using traditional investigative resources, (police reports, Open-Source internet searches, Lexis Nexis, etc) to identify all known relatives, family members of Mark L Mitcham. Detectives contacted AZ DOC to determined all known approved visitors for Mark L Mitcham. Detectives learned that Ian Mitcham (DOB:10/06/1975) was listed as a visitor. Detectives also learned through investigative resources that Ian Mitcham and Mark L Mitcham are brothers. During a criminal history check for Ian Mitcham, it was found that Ian Mitcham was arrested for DUI-Alcohol on January 8th 2015 and 2 vials of blood from Ian Mitcham were obtained. These vials of blood were still in custody of the Scottsdale Police Department.

On 04/04/18, the Scottsdale Police Department Crime Lab analyzed Ian Mitcham's blood sample and developed a known DNA profile. Ian Mitcham's DNA profile was an exact match to the unknown DNA profile (Item #1019242) from the Allison Feldman crime scene. A criminal records query confirmed that Ian Mitcham does not have a DNA profile in CODIS for comparison.

During the course of this ongoing investigation for the past thirty-seven (37) months there has not been any connection discovered between Ian Mitcham and Allison Feldman and/or her residence at 8526 East Monterey Way, Scottsdale, Arizona. Through an Arizona Motor Vehicle query it was discovered Ian Mitcham owns a black 2001 Ford Mustang bearing Arizona plate of, CAW9036, with VIN: 1FAFP44421F197154 and a registration address of 3724 East Earll Drive in Phoenix, Arizona 85018.

Scottsdale Police Department Detectives located Ian Mitcham's 2001 Ford Mustang bearing Arizona license plate CAW9036 parked at his residence in Phoenix, Arizona. Scottsdale Detectives are currently surveilling the Ford Mustang and have positively identified Ian Mitcham driving the vehicle.

Due to the ongoing investigation and the high profile nature of the investigation, Your Affiant requests this Affidavit and Warrant be sealed.

NECESSITY STATEMENT TO AFFIX A SELF POWERED GPS DEVICE

It is well known that employing alternative surveillance techniques, i.e. tracking technology, used in conjunction with traditional surveillance techniques is necessary to attempt to follow suspects in the furtherance of any ongoing criminal investigation. Experienced criminals will attempt to identify police surveillance by doing "Heat Runs" to determine if they are being followed. Any conventional police surveillance, especially nighttime and early morning hours vehicle surveillance is not always effective based upon the very limited number of vehicles traveling upon the roadways during these hours, manpower, and other uncontrollable circumstances. Air surveillance also becomes challenging due to many factors including manpower and police budgets.

As an aid to conventional police surveillances, a common police tactic is to affix a self powered, self contained Global Positioning Systems (GPS) device to the suspect's vehicle. The device is attached to the vehicle by the least intrusive means by way of magnets. This device simply assists police in maintaining surveillance of a suspect(s) by monitoring the transmissions via real time or historical data, that they have probable cause to believe has committed and/or is committing felony crimes by minimizing the risk of compromising an ongoing investigation. In addition to being used as an aid in surveillance, historical data abstracted from the device can help identify additional suspects and/or locations where criminal activity is taking place.

Based on the aforementioned reasonable justification for its use, your affiant requests the following, which is requesting permission and authorization to affix a self powered GPS device upon this listed vehicle driven and controlled by Ian Mitcham (DOB:10/06/1975), AZ : DL #D06299424, SSN #600-38-4170, a black 2001 Ford Mustang bearing Arizona plate of CAW9036, with VIN: 1FAFP44421F197154, registered to Ian Mitcham (DOB:10/06/1975).

A **Nighttime Exception** is requested due to the unpredictability of a suspect's daily movements and other factors. It is requested that Detectives and/or their designee be authorized to affix a self-powered GPS device any time of the day or night. Avoiding detection is absolutely imperative to the ongoing criminal investigation. Due to the fact that it is unknown when an opportune moment will present itself to safely and covertly deploy a GPS device on the listed vehicle. The appropriate time to safely and covertly deploy the GPS device may occur during the night time hours. Allowing Officer's to move under the cover of night will allow the Officer's to avoid detection, making it safer to affix the GPS device. Due to the surreptitious nature, the purpose of the affixing the GPS device at this time will not disrupt or disturb anyone in the area.

Wherefore your affiant prays that a search warrant be issued commanding that an immediate search be made of the person(s), premise(s) and building(s), and vehicle(s) described herein for the property and things herein described, and that the same be retained in the custody of your affiant or in the custody of the agency which the affiant represents and disposed of according to law, pursuant to A.R.S 13-3911, 13-3924. I swear the information set forth above is truthful and accurate, to the best of my knowledge.

Sgt. H. Lockerby #707

Sgt Hugh Lockerby #707

SUBSCRIBED AND SWORN to before me this ____ day of ____, 2018, at ____ A.M. /P.M.

Judge of the Superior Court
County of Maricopa

AND TO SEARCH AND SEIZURE THE FOLLOWING ITEMS:

The following items are listed as items of interest in the course of an ongoing investigation. The items listed will capture strategic information and data that will be used in the investigation. The items listed are: [illegible]

STATE OF ARIZONA - COUNTY OF MARICOPA
SEARCH WARRANT AFFIDAVIT

SEARCH WARRANT # 2018003663 DR# 18-04118

STATEMENT OF PROBABLE CAUSE

PLACE TO BE SEARCHED AND ITEMS TO BE SEIZED

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SEARCH WARRANT AND AFFIDAVIT

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SEARCH WARRANT AND AFFIDAVIT

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Scottsdale Police Department Detectives located Ian Mitcham's 2001 Ford Mustang bearing Arizona license plate CAW9036 parked at his residence in Phoenix, Arizona. Scottsdale Detectives are currently surveilling the Ford Mustang and have positively identified Ian Mitcham driving the vehicle.

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Based on the aforementioned reasonable justification for its use, your affiant requests the following, which is requesting permission and authorization to affix a self powered GPS device upon this listed vehicle driven and controlled by Ian Mitcham (DOB:10/06/1975), AZ DL #D06299424, SSN #600-38-4170, a black 2001 Ford Mustang bearing Arizona plate of CAW9036, with VIN: 1FAFP44421F197154, registered to Ian Mitcham (DOB:10/06/1975).

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Wherefore your affiant prays that a search warrant be issued commanding that an immediate search be made of the person(s), premise(s) and building(s), and vehicle(s) described herein for the property and things herein described, and that the same be retained in the custody of your affiant or in the custody of the agency which the affiant represents and disposed of according to law, pursuant to A.R.S 13-3911, 13-3924. I swear the information set forth above is truthful and accurate, to the best of my knowledge.

Sgt. H. Lockerby #707

Sgt Hugh Lockerby #707

SUBSCRIBED AND SWORN to before me this 5 day of April, 2018, at 23:32 A.M.
/P.M.

[Signature]

Judge of the Superior Court
County of Maricopa

HONORABLE LORI ASH
MARICOPA COUNTY SUPERIOR COURT

Appendix Item F

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2018-118086-001 DT

12/19/2022

HONORABLE ROY C. WHITEHEAD

CLERK OF THE COURT
A. Rowe
Deputy

STATE OF ARIZONA

ERIN O OTIS
JESSI WADE

v.

IAN L MITCHAM (001)

JEFFREY A KIRCHLER
MARTHA V. BARCO PENUNURI
RICHARD RANDALL

CAPITAL CASE MANAGER
JUDGE WHITEHEAD

JESSICA ANN GATTUSO

MINUTE ENTRY

The Court has read and considered Defendant's "Motion to Suppress Illegally Obtained DNA Evidence," the State's Response, and Defendant's Reply. Additionally, the Court has considered the evidence presented at the evidentiary hearing on December 9, 2022, along with the arguments of the parties.

The factual basis for Defendant's motion is undisputed. Scottsdale Police arrested Defendant on January 8, 2015, on suspicion of driving under the influence. During the DUI investigation, a Scottsdale Police officer read Defendant the "Admin Per Se/Implied Consent Affidavit" admonition (Exhibit 1). The admonition advised Defendant that he must consent to the collection and testing of a blood or breath sample, otherwise his license would be suspended for 12 months. Defendant consented and police collected two vials of his blood. One vial was meant to be tested by the State in the course of its investigation, while the other vial was meant to be independently tested on Defendant's behalf if he so elected. Defendant was told and signed a DUI Blood/Urine Results Destruction Notice which stated that the second vial of blood would be destroyed after 90 days if a request for testing was not made (Exhibit 2).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2018-118086-001 DT

12/19/2022

Defendant's blood, however, was never destroyed. Instead, Scottsdale Police retained custody of the vials until late 2017, when Defendant became a suspect in the 2015 killing and sexual assault of Allison Feldman. After Ms. Feldman died in 2015, police collected biological evidence from the crime scene and developed a DNA profile of her suspected killer. Police entered the DNA profile into the CODIS database, but found no matches. The case went cold until then Sgt. Lockerby received approval to conduct a familial DNA investigation in 2017. Pursuant to the new investigative technique police learned that the unknown DNA profile belonged to a first-degree male relation, either a son, brother, or father, of Mark Mitcham.

Police soon learned that Mark Mitcham had two brothers in the Phoenix-Metro area, including Defendant Ian Mitcham. Police began surveilling the brothers, but focused on Defendant based on his arrest history in Scottsdale. After reviewing his files in the Scottsdale Police Department, Sgt. Lockerby learned about the two blood vials in the agency's possession. Sgt. Lockerby, now Lt. Lockerby, testified at the evidentiary hearing that he requested the analysis of Defendant's blood without getting a warrant because he did not think he needed to get one, and that Defendant did not have a reasonable expectation of privacy in the two blood vials. A subsequent analysis of the blood vials generated a DNA profile that matched the profile found at the scene of the crime. Police later obtained a search warrant to collect a buccal swap from Defendant, and the evidence collected pursuant to that warrant matched as well.

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....” U.S. Const. amend. IV. “The touchstone of the Fourth Amendment is reasonableness.” *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). While “[i]t is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is per se unreasonable.... [i]t is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (internal quotations omitted); *see also State v. Butler*, 232 Ariz. 84, 88 ¶¶ 16–18 (2013) (discussing consent for warrantless blood draw under Arizona implied consent statute, A.R.S. § 28–1321(A)).

“The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?” *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). “When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization.” *Walter v. United States*, 447 U.S. 649, 656, 100 S. Ct. 2395, 2401, 65 L. Ed. 2d 410 (1980). “Determining the validity of a law enforcement officer's search based on consent generally involves two factors: (1) whether the consent was voluntarily given and (2) whether the search was within the scope of the consent.” *State v. Becerra*, 239 Ariz. 90, 92 ¶ 8 (App. 2016);

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see also Walter, 447 U.S. at 654 (“The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents.”) Because Defendant consented to the taking and analysis of his blood for drug or alcohol testing, the subsequent DNA analysis of his blood exceeded the scope of his consent.

The State argues that this case represents an analog to that in *Maryland v. King*, 569 U.S. 435 (2013), and that because Defendant’s blood was collected for a proper purpose then he had no reasonable expectation of privacy in that blood and the State could properly conduct a DNA analysis without first obtaining a warrant. As the Court summarized in *King*, “[w]hen officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to be detained in custody, taking and analyzing a cheek swab of the arrestee’s DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.” 569 U.S. at 465–66. Insofar as Defendant was arrested for a misdemeanor offense, this Court finds *King* largely inapplicable.

Where *King* may be applicable, because Defendant consented to having his blood drawn, is in the context of the subsequent DNA analysis of his blood. As *King* notes, “[t]he argument that the testing at issue in this case reveals any private medical information at all is open to dispute.” *Id.* at 464. The Court reasons that the 13 CODIS loci used for DNA identification did not “reveal the genetic traits of the arrestee” but that additional privacy concerns may be implicated in the future if police begin using DNA analysis for purposes other than identification. *Id.* at 464–65. *But see Mario W. v. Kaipio*, 230 Ariz. 122, 128 ¶ 27 (2012) (“This second search presents a greater privacy concern than the buccal swab because it involves the extraction (and subsequent publication to law enforcement nationwide) of thirteen genetic markers from the arrestee’s DNA sample that create a DNA profile effectively unique to that individual.”) As Defendant notes in his reply, law enforcement DNA testing has progressed beyond that discussed in *King*, and appears to provide the very kind of information the Court thought could transform the privacy interest an individual has in their DNA. Finally, however, the Court reasoned that the subsequent DNA analysis did not infringe on a reasonable expectation of privacy because the Maryland statute at issue “provides statutory protections that guard against further invasion of privacy.” *King*, 569 U.S. at 465.

The DNA analysis here, of course, was not conducted pursuant to any statutory authority, aside from the general authority bestowed upon the State to investigate crime. That authority, however, is constrained by the strictures of the Fourth Amendment. Because the touchstone of the Fourth Amendment is reasonableness, this Court finds that, under these facts, Defendant had an objectively reasonable expectation of privacy in his blood and that the State did not have a compelling interest to search his blood through a DNA analysis without first obtaining a warrant. *See e.g., State v. Martinez*, 570 S.W.3d 278, 292 (Tex. Crim. App. 2019) (“[T]here is a Fourth Amendment privacy interest in blood that has already been drawn for medical purposes. In this

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case, Appellee had a subjective expectation of such a privacy interest in his blood, and the State's subsequent testing of the blood was a Fourth Amendment search separate and apart from the seizure of the blood by the State.”); *see also State v. Granville*, 423 S.W.3d 399, 426 (Tex. Crim. App. 2014) (“What *Walter v. United States*, 447 U.S. 649 (1980)] shows is that some types of property have both a physical dimension and an informational dimension and that a defendant's subjective expectation of privacy can attach to either or both. Even if a defendant's subjective expectation of privacy has been entirely frustrated with respect to the physical dimension of such property, he may yet retain a subjective expectation with respect to the informational dimension.”)

“[E]vidence seized during an unlawful search [cannot] constitute proof against the victim of the search” and “extends as well to the indirect as the direct products of the search.” *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). The State argues that identification evidence is not suppressible, but this Court finds that the DNA evidence at issue is much like fingerprint evidence, which the Supreme Court has long held may be suppressed. *See Davis v. Mississippi*, 394 U.S. 721, 723–24 (1969); *Hayes v. Florida*, 470 U.S. 811, 813–15 (1985). Accordingly, absent some exception to the exclusionary rule, the evidence at issue must be suppressed.

The State argues that the inevitable discovery doctrine applies in this case, because the State would have obtained a DNA sample from Defendant by surveillance, a ruse, or through the disposition of Defendant’s aggravated DUI or possession of narcotic drug cases. “Illegally obtained physical evidence may be admitted if the State can demonstrate by a preponderance of the evidence that such evidence inevitably would have been discovered by lawful means.” *State v. Davolt*, 207 Ariz. 191, 204 (2004) (citing *Nix v. Williams*, 467 U.S. 431, 111 (1984)). But, as Defendant notes in his reply, “inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment.” *Nix*, 467 U.S. at 444 n.5.

At the evidentiary hearing the State did not provide evidence concerning lawful efforts to obtain Defendant’s DNA through surveillance or ruse, or how successful law enforcement is in obtaining DNA through those methods. And, as Defendant notes, the State cannot demonstrate that it would have been able to obtain his DNA sample through the disposition of his pending cases without assuming that Defendant was guilty of those offenses. This is all to say that application of the inevitable discovery doctrine in this relies solely on speculation, and such speculation alone cannot sustain the State’s burden. Because the State failed to demonstrate by a preponderance of the evidence that it would have been able to lawfully obtain Defendant’s DNA sample by surveillance, ruse, or through the disposition of his pending criminal cases, inevitable discovery is not appropriate.

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“[E]ven assuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.” *United States v. Leon*, 468 U.S. 897, 918–19 (1984). The good-faith exception accordingly sanctions “searches conducted in objectively reasonable reliance on binding appellate precedent” and does not subject the fruits of such searches to exclusion. *Davis v. United States*, 564 U.S. 229, 232 (2011). As the Arizona Supreme Court recently propounded on the topic of exclusion:

“The exclusionary rule, which allows suppression of evidence obtained in violation of the Fourth Amendment, is a prudential doctrine invoked [solely] to deter future violations.” *Valenzuela II*, 239 Ariz. at 308–09 ¶ 31, 371 P.3d at 636–37 (citing *Davis v. United States*, 564 U.S. 229, 236–37, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011)). “Exclusion is ‘not a personal constitutional right,’ nor is it designed to ‘redress the injury’ occasioned by an unconstitutional search.” *Davis*, 564 U.S. at 236, 131 S.Ct. 2419 (quoting *Stone v. Powell*, 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)). Because “a deterrence purpose can only be served when the evidence to be suppressed is derived from a search which the [police] knew or should have known was unconstitutional under the Fourth Amendment,” *United States v. Johnson*, 457 U.S. 537, 565, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) (White, J., dissenting), the rule is intended to deter only “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” *Herring v. United States*, 555 U.S. 135, 144, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009). Therefore, “when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence,” the good-faith exception applies because “the deterrence rationale loses much of its force, and exclusion cannot pay its way.” *Davis*, 564 U.S. at 238, 131 S.Ct. 2419 (internal citations and quotation marks omitted); see also A.R.S. § 13-3925 (codifying good-faith exception to the exclusionary rule).

“Real deterrent value is a ‘necessary condition for exclusion,’ but it is not ‘a sufficient’ one.” *Davis*, 564 U.S. at 237, 131 S.Ct. 2419 (quoting *Hudson v. Michigan*, 547 U.S. 586, 596, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006)). “For exclusion to be appropriate, the deterrence benefits of suppression must [also] outweigh its heavy costs.” *Id.* (noting that exclusion’s “bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment”). Consequently, exclusion of evidence should be a “last resort.” *Id.* (quoting *Hudson*, 547 U.S. at 591, 126 S.Ct. 2159). The state bears the

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burden of establishing that the good-faith exception applies. *Havatone*, 241 Ariz. at 511 ¶ 19, 389 P.3d at 1256.

State v. Weakland, 246 Ariz. 67, 69 ¶¶ 6–7 (2019).

This Court cannot ignore Lt. Lockerby's testimony that he chose to forgo the warrant requirement and order the analysis of Defendant's blood because he did not think Defendant had a reasonable expectation of privacy in the blood. Lt. Lockerby did not testify that he sought legal counsel on the issue, nor did he testify that he conferred with any other colleague to determine the best path forward. Lt. Lockerby gave no indication that the State's investigation had stalled or that some exigency existed necessitating the speedy testing of Defendant's blood without a warrant. Instead, it seems that the State's investigation was gaining steam through the use of familial DNA, and that the State may have been able to secure a warrant for Defendant's DNA through further diligent investigation. Unfortunately, Lt. Lockerby chose a different path forward and secured the analysis of Defendant's blood without securing a warrant. Such action could be fairly characterized as deliberate, but it was at least a reckless violation of Defendant's constitutional rights. The good-faith exception is therefore inapplicable under these circumstances.

The Court finds it troubling that the State essentially asserts that it has the unfettered ability to conduct subsequent searches of items held in custody for unrelated reasons.

The extraction of the DNA profile is suppressed. Additionally, the resulting DNA analysis, and the subsequent DNA swabs collected pursuant to the warrant are also suppressed as they are the direct result of the improper DNA extraction.

Based on the foregoing, Defendant's motion is accordingly GRANTED.

Appendix Item G

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellant*,

v.

IAN MITCHAM, *Appellee*.

No. 1 CA-CR 23-0014
FILED 8-22-2023

Appeal from the Superior Court in Maricopa County
No. CR2018-118086-001
The Honorable Roy C. Whitehead, Judge

REVERSED AND REMANDED

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OPINION

Presiding Judge Paul J. McMurdie delivered the Court's opinion, in which Judge Michael J. Brown joined. Judge Michael S. Catlett specially concurred.

M c M U R D I E, Judge:

¶1 The State appeals from the superior court's order suppressing Mitcham's DNA profile. The State argues that developing a DNA profile from blood lawfully in its possession does not constitute a search under the Fourth Amendment. In the alternative, the State argues that, under the circumstances, the use of Mitcham's DNA profile is permitted by an exception to the warrant requirement.

¶2 We agree with the State that creating a DNA profile from a lawfully held blood sample does not violate the Fourth Amendment. But here, the State's possession was no longer lawful because the State acquired the blood through consent and developing a DNA profile from it exceeded the scope of that consent. Still, the superior court erred by suppressing Mitcham's DNA profile because (1) probable cause supported his arrest even without the impermissible DNA match that allowed the State to obtain a buccal swab and develop a DNA profile; and (2) once Mitcham pled guilty to other felony charges, the profile was properly in the State's possession. Thus, we reverse the suppression order and remand for further proceedings.

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FACTS AND PROCEDURAL BACKGROUND

¶3 In February 2015, a woman was found dead in her home lying nude in a pool of blood. The victim had sustained several injuries, including a large wound on the back of her head, ligature marks around her neck, and several lacerations to her vagina. The police identified a strong chemical odor throughout the house, chemical burns on the victim, and blood smears near the furniture. Based on the evidence, the police concluded that the killer had tried to clean up the crime scene. The police collected biological swabs from the scene and developed an unknown male DNA profile. Police entered the unknown DNA profile into the federal Combined DNA Index System (“CODIS”). But the CODIS database returned no matches, and the murder went unsolved.

¶4 In 2018, law enforcement performed a familial DNA test on the unknown profile. The test identified an Arizona prison inmate as a close relative of the unknown profile. The police discovered the inmate had two brothers, one living close to the crime scene. As a result, the police began to surveil this brother, the defendant Ian Mitcham.

¶5 Coincidentally, the police were already familiar with Mitcham. In January 2015, they arrested Mitcham for a misdemeanor driving under the influence (“DUI”) offense. Also, before the familial DNA test, Mitcham had been charged with a felony narcotics possession offense in 2016 and an aggravated DUI in 2017. *See State v. Mitcham*, Maricopa County Cause No. CR2016-111513-001; *State v. Mitcham*, Maricopa County Cause No. CR2017-001717-001. Mitcham would later plead guilty to both crimes.

¶6 During the 2015 DUI arrest, Mitcham consented to have his blood drawn. Police read Mitcham the warning provided by the Admin Per Se Implied Consent form, which provided that if Mitcham agreed to the draw, the blood would be used “to determine alcohol concentration or drug content.” *See* Ariz. Dep’t of Trans. Form #40-5807; *see also* A.R.S. § 28-1385. The warning authorized no other blood testing, and Mitcham was not informed that the police might conduct more tests. Based on the warning, Mitcham consented to a blood draw.

¶7 The police drew two blood vials according to Mitcham’s 2015 consent. One vial allowed the police to test for alcohol or drug concentration, and the second allowed Mitcham to test his blood independently. Mitcham and the police officer signed a “Destruction Notice,” which stated that if Mitcham did not pursue his opportunity to test

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within 90 days, his blood “sample will have been destroyed and unavailable for reanalysis.” The police tested their sample and determined Mitcham was over the legal limit, and he was later convicted of a misdemeanor DUI for this 2015 offense.

¶8 But the police did not destroy Mitcham’s blood sample after 90 days passed and possessed it three years later when they identified that Mitcham might be the long-sought killer. The police—without obtaining a warrant—analyzed the blood from the 2015 DUI consent draw, creating Mitcham’s DNA profile. Mitcham’s profile matched the unknown DNA at the 2015 murder scene.

¶9 The police then sought a search warrant, requesting authorization to search Mitcham’s home and place a GPS tracker on his car. The search warrant affidavit noted that (1) the police had obtained DNA from the crime scene left by an unknown male source, (2) a familial DNA test of that profile revealed that the unknown DNA likely belonged to a father, son, or brother of inmate Mark Mitcham, and (3) Ian Mitcham had been identified as Mark Mitcham’s brother. The affidavit did not identify Mark Mitcham’s other relatives or explain why Ian Mitcham had specifically been selected for investigation. But the addresses of the victim and Ian Mitcham were in the affidavit. The affidavit revealed that Ian Mitcham’s blood sample was in the custody of the Scottsdale Police Department from his 2015 DUI arrest and that a DNA profile from the blood matched the unknown profile from the crime scene.

¶10 The court approved the search warrant. Mitcham was later arrested, and a buccal swab was taken as part of a routine booking procedure. *See* A.R.S. § 13-610(K), (O). The grand jury charged Mitcham with first-degree murder, second-degree burglary, and sexual assault.

¶11 Mitcham moved pretrial to suppress the DNA evidence from his 2015 DUI blood draw and the subsequent DNA buccal sample from his arrest. He argued that the “extraction and creation of a DNA profile from a consensual blood draw . . . was an unreasonable search under the Fourth Amendment” because it “went far beyond the scope of what was permitted by his prior consent in the unrelated DUI traffic stop.” He added that the DNA profile from his arrest buccal swab was the fruit of the original illegal search.

¶12 The superior court held an evidentiary hearing and granted the suppression motion. The court reasoned that though the police “may have been able to secure a warrant for [Mitcham’s] DNA through further

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diligent investigation,” the decision not to obtain a warrant “was at least a reckless violation of [Mitcham’s] constitutional rights.” The court also found it “troubling that the State essentially asserts that it has the unfettered ability to conduct subsequent searches of items held in custody for unrelated reasons.” The court also suppressed Mitcham’s DNA profile from the arrest buccal swab and any profile resulting from his convictions in the unrelated narcotics and aggravated DUI cases. Because the State intended to appeal, the superior court vacated the trial and stayed the proceedings.

¶13 The State appealed, and we have jurisdiction under Article 6, Section 9 of the Arizona Constitution and A.R.S. § 13-4032(6). *See State v. Limon*, 229 Ariz. 22, 24, ¶ 7 (App. 2011) (“[T]he plain language of § 13-4032 allows the state to appeal from an ‘order granting a motion to suppress’ without distinguishing between interlocutory or final orders.”).

DISCUSSION

¶14 The State challenges the superior court’s application of the exclusionary rule to suppress the DNA evidence extracted from Mitcham’s 2015 consensual blood draw. First, the State argues there was no Fourth Amendment violation because developing a DNA profile from lawfully obtained evidence is not a “second search.” Second, the State argues that even if there were a Fourth Amendment violation, Mitcham’s DNA profile should not have been suppressed because several exceptions applied.

¶15 We review a court’s factual findings on a motion to suppress for an abuse of discretion, *State v. Smith*, 250 Ariz. 69, 80, ¶ 16 (2020), and consider “only the evidence presented at the suppression hearing . . . viewing it in the light most favorable to sustaining the trial court’s ruling,” *State v. Thompson*, 252 Ariz. 279, 290, ¶ 26 (2022). But we review *de novo* the legal question of whether a search complied with the Fourth Amendment. *Smith*, 250 Ariz. at 80, ¶ 16.

¶16 The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV; *see also* Ariz. Const. art. 2, § 8 (“No person shall be disturbed in

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his private affairs, or his home invaded, without authority of law.”)¹ Traditionally, courts viewed search and seizure cases through a lens of “common-law trespass,” considering whether the state “obtain[ed] information by physically intruding on a constitutionally protected area.” See *United States v. Jones*, 565 U.S. 400, 405, 406, n.3 (2012). But this narrow approach has since been expanded. See *id.* at 405–06. Because “the Fourth Amendment protects people, not places,” *Katz v. United States*, 389 U.S. 347, 351 (1967), it applies when an individual reasonably “seeks to preserve something as private,” *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)). “A ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

¶17 Under the Fourth Amendment, the basic rule is that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz*, 389 U.S. at 357); accord *State v. Valenzuela*, 239 Ariz. 299, 302, ¶ 10 (2016). But “[t]he touchstone of the Fourth Amendment is reasonableness.” *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

¶18 It is well-settled that the drawing of blood by law enforcement, involving “intrusions into the human body,” is a search under the Fourth Amendment. See *Schmerber v. California*, 384 U.S. 757, 767 (1966). But whether DNA identification analysis of a blood sample originally drawn for a non-identification purpose is a search has not yet been decided. See *Maryland v. King*, 569 U.S. 435, 464–65 (2013). In determining this issue, we are guided by two cases, *King* and *Mario W. v. Kaipio*, 230 Ariz. 122 (2012).

¹ In the superior court, the parties did not address whether the creation of Mitcham’s DNA profile violated his state constitutional rights as distinct from his rights under the federal Fourth Amendment. On appeal, Mitcham asserts that the right to privacy under the Arizona Constitution “is broader than its federal counterpart against searches and seizures,” providing an independent state ground to uphold the suppression. We do not consider this contour, as the Arizona Supreme Court has declined “to expand the Private Affairs Clause’s protections beyond the Fourth Amendment’s reach, except in cases involving warrantless home entries.” *State v. Mixton*, 250 Ariz. 282, 290, ¶ 32 (2021).

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A. Under *Mario W.*, the Creation of a DNA Profile from State-Held Evidence Is a Search, but It Does Not Require a Warrant If There Is Probable Cause or Reasonable Suspicion.

¶19 Our supreme court in *Mario W.* addressed whether juveniles facing delinquency charges could be compelled to submit to DNA extraction and profiling before those charges were adjudicated as a statutory condition of release. 230 Ariz. at 125, ¶ 12; see A.R.S. § 8-238(A). The court noted that the process involved “two separate intrusions on [the juveniles’] privacy,” distinguishing between the seizing of the buccal cells and the processing of the seized cells to create a DNA profile. *Id.* at 126–27, ¶ 18. Applying a “two-tiered approach,” *id.* at 127, ¶ 20, the court first held that the seizure of the cells was a justifiable measure to ensure that the juveniles did not abscond, *id.* at 128, ¶ 24. “A judicial order to provide a buccal cell sample occasions no constitutionally distinguishable intrusion” from an order to provide fingerprints. *Id.* at ¶ 25. But the court rejected the statute’s authorization to create profiles because DNA reveals “uniquely identifying information” and there was “no strong governmental interest in creating DNA profiles.” *Id.* at 127, 129, ¶¶ 20, 28.

¶20 The State asserts that *Maryland v. King* “necessarily modified” *Mario W.* It argues that *Mario W.* “cannot be reconciled with *King*’s express holding that ‘the processing of respondent’s DNA sample’s 13 CODIS loci did not intrude on respondent’s privacy in a way that would make his DNA identification unconstitutional.’” *King*, 569 U.S. at 464. The State reads *King* too broadly.

¶21 In *King*, the United States Supreme Court considered the constitutionality of a Maryland statutory requirement that arrestees charged with “serious crimes” have buccal swabs taken and a CODIS profile created. *King*, 569 U.S. at 443–45. The Court held that taking and analyzing buccal swabs was a search but that the search was a reasonable “routine booking procedure.” *Id.* at 465–66. The Court first noted that arrestees had diminished expectations of privacy. *Id.* at 462. The Court then evaluated the degree of the intrusion, deciding that it was minimal. *Id.* at 463–64. The Court reasoned that “CODIS loci come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee.” *Id.* at 464. But the Court acknowledged that “science can always progress further,” which “may have Fourth Amendment consequences.” *Id.* The Court upheld the Maryland statute by balancing the reduced privacy interest against the minimal privacy invasion—given the “statutory protections that guard against further invasion of privacy.” *Id.* at 465–66.

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¶22 *King* overruled *Mario W.* to a degree.² But *King* did not hold that taking a buccal swab was not a search. The *King* Court only decided that taking and processing a swab for DNA identification was reasonable upon arrest for a serious crime. 569 U.S. at 465–66. Because *King* did not address whether DNA profiling—divorced from the physical process of its collection upon arrest—is a search, we are still bound by *Mario W.*'s conclusion that it is.³ See *Mario W.*, 230 Ariz. at 129, ¶ 32. So we begin our analysis with *Mario W.*

¶23 In *Mario W.*, our supreme court did not hold that DNA analysis always requires a warrant. Instead, *Mario W.* held that the State could not extract a DNA profile from buccal swabs “absent either probable cause or reasonable suspicion.” 230 Ariz. at 129, ¶ 31. And *Mario W.* further suggested that the absconding of a charged juvenile would provide sufficient justification to create a DNA profile. *Id.* at ¶ 30. Thus, *Mario W.* and *King* harmonize in concluding that whether DNA profiling violates the

² We must follow Arizona Supreme Court decisions absent conflicting United States Supreme Court decisions on the same subject. See *State v. Crowley*, 202 Ariz. 80, 90, ¶ 30 (App. 2002); *Hernandez-Gomez v. Volkswagen of Am., Inc.*, 201 Ariz. 141, 143–44, ¶ 8 (App. 2001). As much as *King* and *Mario W.* addressed the same subject, we are bound to follow *King*.

³ *Mario W.*'s holding does conflict with other jurisdictions that have addressed this question after *King*. See, e.g., *Commonwealth v. Arzola*, 26 N.E.3d 185, 191 (Mass. 2015) (“[T]he DNA analysis of the unknown sample taken from the defendant’s lawfully seized shirt revealed nothing more than the identity of the source, which is what an analysis of latent fingerprints would have revealed (albeit with less accuracy) had they been found on the clothing. Therefore, the DNA analysis was no more a search than an analysis of latent fingerprints would be.”); *Raynor v. State*, 99 A.3d 753, 767–68 (Md. 2014) (“[W]e hold that DNA testing of the 13 identifying junk loci within genetic material, not obtained by means of a physical intrusion into the person’s body, is no more a search for purposes of the Fourth Amendment, than is the testing of fingerprints, or the observation of any other identifying feature revealed to the public—visage, apparent age, body type, skin color. That Petitioner’s DNA could have disclosed more intimate information is of no moment in the present case because there is no allegation that the police tested his DNA sample for that purpose.”); accord *People v. Mendez*, 155 N.Y.S.3d 534, 536–37 (Sup. Ct. 2021); *Hedvall v. State*, 283 So.3d 901, 920 (Fla. Dist. Ct. App. 2019).

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Fourth Amendment turns on the reasonableness of the process. Against this backdrop, we consider the arguments before us.

¶24 First, we reject the broad position urged by *amici* supporting the defense – that analyzing genetic material and generating a DNA profile “constitutes a search and seizure” and always requires a warrant. Such a restrictive view would “impose[] substantial burdens on law enforcement without vindicating any significant values of privacy.” *See Robbins v. California*, 453 U.S. 420, 429 (1981) (Powell, J., concurring). Moreover, a holding that “[t]he government must therefore obtain a warrant to search or seize DNA” cannot be harmonized with *King*, which permitted warrantless, suspicionless DNA profiling of arrestees charged with “serious crimes,” or *Mario W.*, which permitted it under some circumstances for juveniles taken into custody facing delinquency charges.

¶25 Of course, we agree that courts must take caution when it comes to DNA, as a “vast amount of sensitive information . . . can be mined,” *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007), that “reveal[s] a host of private medical facts,” *Skinner v. Ry. Lab. Execs.’ Ass’n*, 489 U.S. 602, 617 (1989). And it may be true that the DNA analyzed for CODIS⁴ contains medical information that will become accessible as technology advances. *See King*, 569 U.S. at 464 (Though noncoding parts of the DNA are used, “science can always progress further, and those progressions may have Fourth Amendment consequences.”). But as *King* explained, the identification profile generated from the DNA does not reveal any medical data. *See id.* at 445. The identification number comprising the profile is no more intrusive than a nametag on a suitcase or a license plate number on a car.

¶26 Furthermore, unlike a blood-alcohol report, cell phone records, or a contraband package, this “string of numbers” alone is not evidence of a crime. *See King*, 569 U.S. at 445, 451 (“Like a fingerprint, the 13 CODIS loci are not themselves evidence of any particular crime, in the way that a drug test can by itself be evidence of illegal narcotics use. A DNA

⁴ “The CODIS database is based on 13 loci at which the STR [short tandem repeat] alleles are noted and compared. . . . The CODIS loci are from the non-protein coding junk regions of DNA” and are “only useful for human identity testing.” *King*, 569 U.S. at 445. “STR information is recorded only as a ‘string of numbers’; and the DNA identification is accompanied only by information denoting the laboratory and the analyst responsible for the submission.” *Id.*

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profile is useful to the police because it gives them a form of identification to search the records already in their valid possession. In this respect the use of DNA for identification is no different than matching an arrestee's face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee's fingerprints to those recovered from a crime scene."). Decades ago, the United States Supreme Court approved using an identity-based rule-out test if there is particularized suspicion and the test is minimally intrusive. *See Hayes v. Florida*, 470 U.S. 811, 817 (1985) ("[T]he Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch.").

¶27 Given the limited information currently available from a CODIS DNA profile, creating a DNA profile from evidence in the State's possession does not always require a search warrant.

B. Searches Beyond the Scope of Authorization Are Unreasonable Under the Fourth Amendment.

¶28 The first step in applying *King* and *Mario W.* is determining how the genetic material came into the State's possession. In *King* and *Mario W.*, the State obtained the genetic material under statutory authority on arrest. *See King*, 569 U.S. at 441; *Mario W.*, 230 Ariz. at 124, ¶ 2.⁵ Unlike *King* and *Mario W.*, the State possessed Mitcham's blood sample via consent from the 2015 DUI arrest.

¶29 Mitcham argues that the subsequent DNA analysis in 2018 exceeded the scope of that consent. The State counters that the Fourth Amendment is no longer implicated once a biological sample has been lawfully and physically extracted from a suspect. The State minimizes the

⁵ "The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested." 34 U.S.C. § 40702(a)(1)(A). And the Attorney General may provide grants to state and local governments that analyze DNA profiles under local authority for inclusion in CODIS. 34 U.S.C. § 40701(a)(1). As of the date of the decision in *King*, it was noted: "Twenty-eight States and the Federal Government have adopted laws . . . authorizing the collection of DNA from some or all arrestees." 569 U.S. at 445.

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consent issue, emphasizing that consent's scope "no longer matter[s]" once the blood is in the State's lawful possession.

¶30 As much as the State asserts that lawful possession is always sufficient to justify warrantless DNA analysis, the law provides otherwise. *See United States v. Davis*, 690 F.3d 226, 246 (4th Cir. 2012) (Supreme Court precedent did "not give a law enforcement agency carte blanche [authority] to perform DNA extraction and analysis derived from clothing lawfully obtained from the victim of a crime in relation to the investigation of other crimes."). The Supreme Court has long clarified that even lawful possession of a suspect's property does not allow the State to do whatever it wants with that property. *See, e.g., Walter v. United States*, 447 U.S. 649, 654 (1980) ("The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents."); *United States v. Chadwick*, 433 U.S. 1, 15–16 (1977) (A steamer trunk was lawfully seized but a warrant was needed to open and determine its contents.), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991); *Riley v. California*, 573 U.S. 373, 401 (2014) (The seizure of a cell phone does not permit warrantless access to information within the phone.). This is because a person's interest in keeping information private does not vanish once the vessel of that information is held in police custody. A biological sample containing extractable DNA is no different.

C. DNA Testing that Exceeds the Scope of Consent or Warrant Renders the State's Possession Unlawful.

¶31 The State argues that the way it obtains evidence, so long as it is done lawfully, is irrelevant. We disagree. *See Terry v. Ohio*, 392 U.S. 1, 29 (1968) ("[E]vidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation."). In other contexts, a suspect may grant limited consent to a police search but retain an expectation of privacy in areas beyond the scope of that consent. *See, e.g., State v. Swanson*, 172 Ariz. 579, 584 (App. 1992) ("[C]onsent to 'take a look in the vehicle' does not encompass the further intrusion of 'tearing a car apart' by removing the door panels."); *State v. Paredes*, 167 Ariz. 609, 612 (App. 1991) ("The scope of a consensual search is limited to the scope of the consent given."); *State v. Florez*, 195 Ariz. 199, 205, ¶ 26 (App. 1999) (same). And the same rule applies to searches authorized by warrant or exigency. *See Walter*, 447 U.S. at 656 ("When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization."); *see also Arizona v. Hicks*, 480 U.S. 321, 325 (1987) ("[A]ction, unrelated to the objectives of the authorized

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intrusion . . . produce[d] a new invasion of respondent’s privacy unjustified by the exigent circumstance that validated the entry.”).

¶32 A hypothetical helps clarify this point. A homeowner’s consent to police to enter a home to seize a briefcase would not authorize the police to begin collecting hair or skin cells from the homeowner’s carpet. This is true even though (1) the collection of cells left in public is generally permissible, and (2) the officers had permission to enter the home. Under the consent, the officers would only be authorized to do what they requested permission to do – seize the briefcase.⁶

¶33 Consent to a blood draw for testing for intoxicants does not authorize the police to create a DNA profile from the cells in that blood to investigate unrelated offenses. It does not matter that (1) blood cells found in public can be DNA tested or (2) the police had lawfully obtained the blood for chemical analysis. Under the consent provided, the police could search for drugs or alcohol. But the later creation of a DNA profile is as much an unconsented privacy violation as the unrequested collection of DNA samples from within a home.

¶34 Still, the State claims, without explanation, that it is “hard to analogize blood or one’s DNA profile to a portion of a home, package, vehicle, clothing, cell phone, computer or other private piece of property to which one usually may want the ability to ‘limit’ the ‘scope’ of their consent.” Given the medical information in one’s blood, we have no such difficulty. *See Mario W.*, 230 Ariz. at 127, ¶ 20 (DNA analysis “is, in effect, the analog to opening the steamer trunk in *Chadwick* and the purse in *Tiffany O.* to see what is inside.”). *See generally In re Tiffany O.*, 217 Ariz. 370 (App. 2007).

¶35 Mitcham consented to a blood draw during the 2015 DUI arrest. Thus, the relevant question is whether the later creation of the DNA profile for use independent of the DUI fell within Mitcham’s consent. *See State v. Becerra*, 239 Ariz. 90, 92, ¶ 8 (App. 2016). “The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness.” *Jimeno*, 500 U.S. at 251. And “[w]hether a consensual search remained within the bounds of the actual consent is a

⁶ Of course, the police may also seize evidence of a crime in plain view if the police are lawfully within the home. *See generally Coolidge v. New Hampshire*, 403 U.S. 443, 465–66 (1971). For simplicity, we omit discussion of this exception because it is not relevant here.

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question of fact to be determined from the totality of circumstances.” *Swanson*, 172 Ariz. at 583.

¶36 Under the Admin Per Se Implied Consent agreement, Mitcham consented to the taking and analyzing of his blood “to determine alcohol concentration or drug content.” The written consent admonition did not authorize the creation of a DNA profile to investigate unrelated offenses or for unrelated crime detection. The consent form allowed the police to determine only what percentage of the sample comprised alcohol or intoxicating drugs. Given these facts, the superior court did not abuse its discretion by finding that creating a DNA profile from Mitcham’s 2015 blood draw exceeded the scope of his consent to draw the blood. An action outside the scope of consent renders the State’s evidence unlawful, no matter how minimally intrusive. *See Hicks*, 480 U.S. at 325 (“A search is a search, even if it happens to disclose nothing but the bottom of a turntable.”).

D. Despite the Fourth Amendment Violation, the Superior Court Erred by Suppressing Mitcham’s DNA Profile.

¶37 “[T]o say that the Fourth Amendment applies here is the beginning point, not the end of the analysis.” *King*, 569 U.S. at 446; *see also Nix v. Williams*, 467 U.S. 431, 444 (1984). “The Fourth Amendment protects the right to be free from ‘unreasonable searches and seizures,’ but it is silent about how this right is to be enforced.” *Davis v. United States*, 564 U.S. 229, 230–31 (2011).

¶38 “The exclusionary rule, which allows suppression of evidence obtained in violation of the Fourth Amendment, is a prudential doctrine invoked to deter future violations.” *Valenzuela*, 239 Ariz. at 308–09, ¶ 31. Exclusion is “not a personal constitutional right,” nor is it designed to “redress the injury” occasioned by an unconstitutional search. *Stone v. Powell*, 428 U.S. 465, 486 (1976). “The rule’s sole purpose . . . is to deter future Fourth Amendment violations.” *Davis*, 564 U.S. at 236–37. Thus, the rule is appropriate only when deterrence is necessary, and the “substantial social costs” are accounted for. *Id.* at 237. Given the “enormous societal cost of excluding truth,” suppression of evidence should not place the police in a worse position than they would have been without the illegal conduct. *See Nix*, 467 U.S. at 443–45; *Sutton v. United States*, 267 F.2d 271, 272 (4th Cir. 1959) (“It is one thing to say that officers shall gain no advantage from violating the individual’s rights; it is quite another to declare that such a violation shall put him beyond the law’s reach even if his guilt can be proved by evidence that has been obtained lawfully.”).

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1. The State Had Probable Cause to Arrest Mitcham Even Without the DNA Profile Showing a Match.

¶39 Creating a DNA profile from Mitcham’s 2015 DUI blood sample was an unauthorized search. But the superior court also suppressed subsequent DNA collection and analysis as the fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *Brown v. Illinois*, 422 U.S. 590, 599–600 (1975). We reverse the suppression order because the police had probable cause to arrest Mitcham even without the DNA match from the 2015 blood draw.

¶40 It is unclear from the record whether Mitcham was arrested under an arrest warrant or the police’s statutory arrest authority. *See* A.R.S. § 13-3883(A)(1). Though the superior court ordered the suppression of “subsequent DNA swabs collected pursuant to the warrant,” there is no such warrant in the record before us. The affidavit submitted for a *search* warrant (for a search of Mitcham’s home and GPS tracking of his car) noted the DNA profile derived from Mitcham’s 2015 DUI blood sample, but that warrant was not the basis for collecting buccal swabs here.

¶41 In any event, A.R.S. § 13-610(K) directs that when a person arrested for a serious offense is transferred to jail, the arresting authority “shall secure a sufficient sample of buccal cells or other bodily substances for deoxyribonucleic acid testing and extraction from the person for the purpose of determining identification characteristics.” Because the procurement of a buccal swab from Mitcham would have been required upon his arrest for first-degree murder, the relevant question is whether the police had probable cause to arrest Mitcham without the improperly-obtained DNA match from the 2015 blood draw. *See* A.R.S. § 13-3883(A)(1); *cf. State v. Sardo*, 112 Ariz. 509, 515 (1975) (quoting *United States v. Kandlis*, 432 F.2d 132, 135 (9th Cir. 1970)) (“This is a case where ‘the arrest and search are inextricably intertwined. The officers could neither arrest nor search without probable cause; if they had probable cause, they could do both.’”).

¶42 “To determine whether an officer had probable cause for an arrest,” we determine whether the “facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.” *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)). We consider *de novo* the mixed question of whether the facts presented established probable cause. *State v. Buccini*, 167 Ariz. 550, 555 (1991).

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¶43 Without resorting to the DNA profile from Mitcham’s 2015 DUI blood sample and even without resorting to evidence developed from the warrant-based search of Mitcham’s home and GPS tracking, the police had probable cause for the arrest. The familial DNA result, obtained independently, established that the unknown DNA at the crime scene matched inmate Mark Mitcham’s first-degree relative, meaning a father, son, or brother. At the suppression hearing, the police testified that Mark’s father was dead, Mark’s two sons lived out of state, and Mark had two brothers in the Phoenix area, one of whom was Ian Mitcham. The police also noted that the addresses of Ian Mitcham and the victim were close and that Ian Mitcham’s 2015 DUI arrest occurred in Scottsdale.

¶44 Probable cause for an arrest is present when the arresting officer knows “facts and circumstances . . . sufficient to warrant a man of reasonable caution to believe that a felony had been committed by the person arrested.” *Sardo*, 112 Ariz. at 515 (quoting *State v. Edwards*, 111 Ariz. 357, 360 (1974)). It “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity,” *Illinois v. Gates*, 462 U.S. 213, 243, n.13 (1983), and “is not a high bar,” *Kaley v. United States*, 571 U.S. 320, 338 (2014).

¶45 While the evidence is no doubt weaker without the information about the DNA match from the 2015 blood draw, the familial match and Mitcham’s proximity to the crime scene would provide a “man of reasonable caution” to believe that Mitcham may have committed the murder. *See Sardo*, 112 Ariz. at 515. And Mitcham has never challenged the validity of his arrest independently from his challenge to the results of the 2015 DNA profiling. In fact, at oral argument before this court, Mitcham conceded that the police had probable cause to support his arrest even without the DNA match evidence.

¶46 Thus, while the DNA profile from the 2015 blood sample was impermissibly obtained, the evidence independent of that DNA profile provided sufficient probable cause to authorize Mitcham’s arrest. And once Mitcham was arrested for first-degree murder, the police were required to take a buccal swab and extract a DNA profile independent of the prior violation. *See* A.R.S. § 13-610(K). For these reasons, we conclude that the superior court’s order suppressing Mitcham’s DNA profile as a fruit of the illegal search was error.

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2. The DNA Evidence Would Have Inevitably Been Obtained from Mitcham's Other Felony Convictions.

¶47 Another independent basis exists for reversing the court's suppression order. Mitcham's DNA is already in CODIS because of his felony convictions in 2022. Mitcham's later convictions for unrelated crimes provide an independent source for the State to possess Mitcham's DNA profile, proving that his profile would have inevitably been discovered even had the police not created a profile in 2018. As a result, the State argues that the inevitable discovery doctrine should apply to prevent suppression of Mitcham's DNA profile.

¶48 In reply, Mitcham seeks to distinguish the "independent source" and "inevitable discovery" doctrines, claiming that failing to fully elaborate on both arguments below results in a waiver on appeal. We disagree. We see no value in requiring the State to develop both "closely related" doctrines fully, *see Nix*, 467 U.S. at 443, especially when, as here, the arguments amount to the same thing: Mitcham's 2022 felony convictions are an independent and inevitable cause of the creation of his CODIS profile.

¶49 Mitcham also counters that he only "pled guilty as a strategic choice" to his two felonies because of the pending murder charge against him. He implies that his convictions for aggravated DUI and narcotics offenses are fruits of the purported illegal search, so the court cannot consider them in an inevitable discovery analysis.

¶50 This argument is meritless. Mitcham does not allege that his pleas were involuntary or not supported by a factual basis, merely that it was a "strategic choice" for him to enter those guilty pleas. In any event, a "plea is itself a conviction and like a jury verdict is conclusive." *State v. Linsner*, 105 Ariz. 488, 491 (1970). Under the law, Mitcham is guilty of those offenses, and the State must submit his DNA to the federal CODIS database under A.R.S. § 13-610.

¶51 Because the police would have acquired Mitcham's DNA profile even without the search of the 2015 blood draw, the superior court erred by suppressing Mitcham's DNA profile.

CONCLUSION

¶52 We reverse the order suppressing Mitcham's DNA profile and remand for further proceedings consistent with this opinion.

CATLETT, Judge, concurring in the judgment:

¶53 I concur in the judgment reversing the suppression order. Unlike the majority, however, I would not reach the inevitable discovery issue. Mitcham did not have a reasonable expectation of privacy in the non-coding regions of DNA the State lawfully possessed in 2018. Thus, no search and no Fourth Amendment violation occurred.

I.

¶54 The majority correctly explains the background in *Mario W. v. Kaipio*, 230 Ariz. 122 (2012), and *Maryland v. King*, 569 U.S. 435 (2013). *Mario W.* held that extracting and profiling a juvenile’s DNA for pre-trial processing involved two distinct searches – one upon extraction, one upon profiling. 230 Ariz. at 126–27 ¶ 18. The court then analyzed whether the two searches were reasonable in the absence of a warrant. The court concluded the first search—extracting a juvenile’s DNA—was reasonable even without a warrant. *Id.* at 128 ¶ 25. The court concluded the second search—obtaining the DNA profile from the sample—was unreasonable when a juvenile has not absconded. *Id.* at 129 ¶ 32.

¶55 The State argues *King* renders *Mario W.* “untenable.” The majority is correct that, although *King* overrules a portion of *Mario W.*’s reasonableness analysis, it does not overrule *Mario W.*’s holding that profiling a juvenile’s DNA under the statute at issue was a search separate and apart from DNA extraction. Maj. Op. ¶ 22.

¶56 Yet the majority’s subsequent analysis and application of *Mario W.* is perplexing. The majority concludes that *Mario W.* “did not hold that DNA analysis always requires a warrant” and similarly rejects that “analyzing genetic material and generating a DNA profile ‘constitutes a search and seizure’ and always requires a warrant.” Maj. Op. ¶¶ 23, 24. Both that conclusion and rejection are sound. But the majority fails to explain the import of those observations. Does DNA analysis always constitute a search? Or does DNA analysis only sometimes constitute a search? If DNA analysis is only sometimes a search, when is it a search and when is it not? Why was the DNA analysis here a search? The majority does not clarify.

¶57 The majority, for example, acknowledges a split among state courts regarding whether a search occurs when the government creates a DNA profile using lawfully possessed blood. *See* Maj. Op. ¶ 22 n.3. The

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majority then appears to take sides with those courts requiring a warrant or a warrant exception (thereby extending *Mario W.* to criminal investigations). See Maj. Op. ¶¶ 29-36. The majority analyzes the reasonableness of the police conduct at issue here (which would be unnecessary unless a search occurred), and then concludes that profiling Mitcham's DNA was unreasonable because the State exceeded the scope of Mitcham's consent. But, in so doing, the majority largely skips the crucial question in this case: whether the State conducted a new search in 2018.

¶58 The majority also extends statements in *Mario W.* too far in favor of the State, arguably creating a new warrant exception in the process. The majority says *Mario W.* held that a warrant is not required to create a DNA profile if there is probable cause or reasonable suspicion to believe an individual committed another crime. See Maj. Op. ¶ 23. The heading of that section of the majority opinion says, "Under *Mario W.*, the Creation of a DNA Profile from State-Held Evidence Is a Search, but It Does Not Require a Warrant If There Is Probable Cause or Reasonable Suspicion." Maj. Op. p.7 (emphasis added). To be sure, *Mario W.* says that its analysis might differ with probable cause or reasonable suspicion. 230 Ariz. at 129 ¶ 31; see *infra* ¶ 83 (using probable cause as one factor in the search analysis). But *Mario W.* did not create a new probable cause or reasonable suspicion exception to the warrant requirement for DNA profiles. Such an exception could diminish – if not swallow – the warrant requirement. It is also inconsistent with the majority's later conclusion that a Fourth Amendment violation occurred here (the majority says there was probable cause that Mitcham committed another crime (murder)).

¶59 There is a more direct route to resolving the constitutional issue – the route both parties urge us to take. Whether the State violated the Fourth Amendment turns, not on reasonableness or the existence of a new warrant exception, but on whether the State conducted a new search in 2018. Taking that route requires answering only two questions. Does *Mario W.*'s holding that the creation of a juvenile's DNA profile is a search unto itself govern every time the government creates a DNA profile? If not, did Mitcham have a reasonable expectation of privacy in 2018 in the non-coding regions of DNA he provided in 2015?

II.

¶60 *Mario W.* did not establish a universal rule that creating a DNA profile is always a search separate from DNA extraction. *Mario W.* did not analyze expectations of privacy in DNA in all circumstances – an impossible task. Rather, *Mario W.* involved a unique situation – a statute

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requiring juveniles merely charged with certain offenses to undergo DNA profiling. See 230 Ariz. at 123 ¶ 1. The statute mandated DNA profiling when there was not even reasonable suspicion “that a juvenile committed another offense for which the DNA profile might provide investigative assistance.” *Id.* at 125 ¶ 9.

¶61 Determining the reasonable expectations of juveniles in the non-investigative circumstances in *Mario W.* is a far cry from what we analyze here—the privacy expectations of an adult who was convicted of the crime for which he provided blood when the police later, with probable cause and for investigational purposes, create a DNA profile from that sample. *Mario W.* does not attempt to answer, let alone dictate the answer to, that Fourth Amendment dilemma—either for or against Mitcham. We should read general language in judicial opinions “as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering.” *Illinois v. Lidster*, 540 U.S. 419, 424 (2004). *Mario W.*’s two-search holding stems from the unique circumstances in which it was created and not the dissimilar circumstances we face.

¶62 I am not alone in concluding *Mario W.* is inapplicable here. One of Mitcham’s *amici* refers to *Mario W.* as conducting a “troublesome ‘two-tiered’ analysis” and asks us to apply a “holistic approach” instead. Similarly, Mitcham repeatedly argues that *Mario W.* does not apply. For example, he asserts “*Mario W.* is largely inapplicable because it did not address . . . warrantless DNA searches for criminal investigation purposes.” Mitcham also argues that “[t]his case does not involve a challenge” like that in *Mario W.*, and therefore “this Court need not address whether *Mario W.* must be overruled.” I agree with Mitcham on both points.

III.

¶63 If *Mario W.* does not resolve the Fourth Amendment question, where does that leave us? Here is where: in 2018, Mitcham did not have a reasonable expectation of privacy in the non-coding regions of DNA he provided in 2015, and the State therefore did not conduct a new search when it created a DNA profile. With no search, there was no Fourth Amendment violation.

A.

¶64 The Fourth Amendment, binding on the State through the Fourteenth Amendment, provides “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

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and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.” U.S. Const. amend. IV. As the text says, the right protects against “unreasonable searches and seizures.” U.S. Const. amend. IV. If neither a search nor a seizure occurs, the Amendment has no role. This is a search case; Mitcham does not frame this as a seizure case.

¶65 There are two approaches to determining whether a “search” occurs – the property approach and the privacy approach. See *Soldal v. Cook County*, 506 U.S. 56, 64 (1992) (“[P]roperty rights are not the sole measure of Fourth Amendment violations.”). Mitcham relies only on the privacy approach.

B.

¶66 The privacy approach—Justice Harlan’s creation in a concurring opinion in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)—asks whether “an individual ‘seeks to preserve something as private’ and that expectation is ‘one that society is prepared to recognize as reasonable.’” *State v. Mixton*, 250 Ariz. 282, 286 ¶ 13. “[O]fficial intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.” *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018).

¶67 The “reasonable expectation of privacy” test can be difficult to apply in practice. One Fourth Amendment scholar has observed that “[t]reatises and casebooks struggle to explain the test,” with “some suggest[ing] that the only way to identify when an expectation of privacy is reasonable is when five Justices say so.” Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 Stan. L. Rev. 503, 505 (2007). To avoid letting the test lead us into judicial policymaking, we should treat it as posing a descriptive question: whether society recognized the proffered expectation of privacy at the time of the alleged search. See *Carpenter*, 138 S. Ct. at 2245 (Thomas, J., dissenting) (“As written, the *Katz* test turns on society’s actual, current views about the reasonableness of various expectations of privacy.”). And we should answer the “reasonable expectation” question by looking to pre-existing law – statutes, regulations, and prior Fourth Amendment and common law precedent. See Baude & Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1852 (2016) (“[T]he positive law model calls for the bread and butter of the legal profession—doctrinal analysis. It is a task that is both more appropriate to judges’ roles and more suited to their capabilities.”).

C.

¶68 There are four factors that, when existing together⁷, dictate that Mitcham did not have a reasonable expectation of privacy in 2018 in the non-coding regions of DNA in the 2015 blood sample.

1.

¶69 The State used only the non-coding regions of Mitcham's DNA to determine whether it matched non-coding regions in DNA found at the murder scene. The non-coding regions of DNA, also known as "junk DNA," "while useful and even dispositive for purposes like identity, does not show more far-reaching and complex characteristics like genetic traits." *King*, 569 U.S. at 443. Forensic analysis of the non-coding region focuses on "short tandem repeats" ("STRs") scattered throughout the genetic code. *Id.* The size and frequency of STRs "along a strand of DNA" are known as alleles. *Id.* Forensic DNA analysis uses multiple alleles "to ensure that a DNA profile matches only one individual." *Id.* Using STRs to analyze alleles in non-coding regions, "makes it possible to determine whether a biological tissue matches a suspect with near certainty." *Id.*

¶70 The State's comparison between an STR-generated DNA profile and a fingerprint is apt. Like a fingerprint, the information provided in an STR-generated DNA profile tells you nothing about an individual, let alone anything private. Instead, the sequence of numbers produced is so unique that it can be used to connect two genetic samples, thereby confirming identification. *Cf. United State v. Mitchell*, 652 F.3d 387, 412 (3d Cir. 2011) ("[B]ecause DNA profiles developed pursuant to the DNA Act function as 'genetic fingerprints' used only for identification purposes, arrestees and pretrial detainees have reduced privacy interests in the information derived from a DNA sample."). This Court previously compared DNA testing and fingerprints in rejecting a Fourth Amendment challenge: "[DNA] tests are akin to taking fingerprints of suspects, which may be used to identify perpetrators of past and future crimes or to exonerate innocent persons." *In re Leopoldo L.*, 209 Ariz. 249, 254 (App. 2004) (Timmer, J.). As *King* explains, "[t]he additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant[.]" 569 U.S. at 459.

⁷ If any of the four factors were to change or become inapplicable, the conclusion would likely change.

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¶71 Where a DNA sample differs from a fingerprint is that a DNA sample *could* be used to discover far more personal information about an individual. I sympathize with *amici*'s concern that DNA could be used (or abused) to discover a great amount of personal information. As *amici* puts it, "[a]s technology and research continue to advance, DNA analysis will allow ever-greater incursions into our privacy." *Amici* also contends that DNA technology has advanced such that "STR profiles today yield information far beyond identity," and I have no reason to doubt that statement. If the State had used the 2015 blood sample to obtain health, medical, or other genetic information, the privacy analysis would be much different. If the State begins using DNA in an intrusive manner in future cases, the analysis must be adjusted to account for the greater privacy interests thereby implicated.

¶72 But the misuse of DNA is not at issue. Mitcham does not suggest the State used the 2015 DNA sample for anything other than a limited STR analysis. When that analysis occurred, the State already knew the DNA being analyzed belonged to Mitcham. There is no indication the State did anything other than use STRs to discover the unique pattern of alleles associated with Mitcham's DNA – that is not private information. The State then compared that unique pattern with the unique pattern in DNA found at the crime scene. That comparison showed a match, but it again revealed nothing private about Mitcham. The limited nature of the DNA profile created cuts significantly against any expectation of privacy.

2.

¶73 A search occurs when police draw blood. The U.S. Supreme Court has "long recognized that a compelled intrusion into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989) (cleaned up); *see also Birchfield v. North Dakota*, 579 U.S. 438, 463 (2016) (explaining that although a breath test does not implicate significant privacy concerns, "[b]lood tests are a different matter"). Thus, unless an exception applies, like exigent circumstances (*see Schmerber v. California*, 384 U.S. 757 (1966)) or consent (*see State v. Valenzuela*, 239 Ariz. 299, 302 ¶ 11 (2016)), police must obtain a warrant to draw blood.

¶74 Mitcham does not challenge the legality of the 2015 blood draw – Mitcham expressly consented to that draw. *See* A.R.S. § 28-1321(A) (implied consent law); *Carrillo v. Houser*, 224 Ariz. 463, 463 ¶ 1 (2010). In his briefing, Mitcham refers to the 2015 blood draw as "a lawfully obtained

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blood vial.” In 2015, the State legally came into possession of the blood sample later used again in 2018.

3.

¶75 Mitcham also could not have reasonably expected that the State was required to destroy his blood sample. In its suppression ruling, the superior court observed that Mitcham signed a notice stating that the blood he provided “would be destroyed after 90 days if a request for testing was not made,” but Mitcham’s blood “was never destroyed.” The notice, however, only gave Mitcham the opportunity to have an independent laboratory test a “sample” of blood. The notice indicated that the “sample” would be destroyed if a request for testing was not received within 90 days.

¶76 The notice did not create a reasonable expectation in destruction of *all* of Mitcham’s blood. The text of the notice did not indicate that all blood drawn would be destroyed after 90 days; it indicated only that one of the samples would go. Moreover, it would not have been reasonable for Mitcham to otherwise believe that the State would discard evidence of a potential crime (DUI) within 90 days, particularly when Mitcham’s prosecution remained pending well after 90 days.

¶77 The 2015 analysis of the blood reflected that Mitcham had a blood-alcohol level of .242. Once that result returned in May 2015, the lawfully obtained blood became evidence of a crime, and the State was entitled to maintain possession. Mitcham concedes “that blood evidence seized during a DUI, whether consensual or through a warrant, need not be returned, as it may be used as evidence in the DUI offense.” Mitcham correctly cites A.R.S. § 13-3920(B)(2) for that concession. That statutory provision provides that law enforcement must return seized items within ten days unless the item “is sought to be used for evidence.” A.R.S. § 13-3920(B)(2). When the item is criminal evidence, the statute contains no requirement or deadline for returning the item. Mitcham is deemed to know the law, and the law allowed the State to keep possession of the 2015 blood samples during pendency of the DUI prosecution.

¶78 Once Mitcham pled guilty to the DUI charges in February 2016, the State could lawfully keep the 2015 blood samples, and any limitation on use based solely on the scope of prior consent dissipated. Mitcham provides no support—and I have not independently located any—for the proposition that a criminal defendant is entitled to demand return or destruction of blood representing the primary evidence in a convicted crime. The prime evidence supporting Mitcham’s 2016 DUI

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conviction was the 2015 blood sample. Even if Mitcham had a right to demand destruction, or limit the use, of the blood prior to conviction or upon acquittal, any such right was lost once he pled guilty. *Cf. People v. King*, 232 A.D.2d 111, 118 (N.Y. App. Div. 1997) (rejecting an argument that a blood sample could not be used to investigate a second crime because “a defendant does not have a right to the automatic return of property seized in any criminal case absent a proper demand or some legal action”). Thus, the State maintained lawful possession of Mitcham’s blood sample at the time it created the 2018 DNA profile.

¶79 Several courts have held that when the government has lawful possession of a blood sample stemming from one crime, the government can use the sample to investigate another crime. *See, e.g., State v. Emerson*, 981 N.E.2d 787, 792-93 ¶ 24 (Ohio 2012) (citing cases from eight other courts to support the holding that “a person has no reasonable expectation of privacy in his or her DNA profile extracted from a lawfully obtained DNA sample”); *Washington v. State*, 653 So.2d 362, 364 (Fla.1994), (“[O]nce [blood] samples were validly obtained, albeit in an unrelated case, the police were not restrained from using the samples as evidence in the murder case.”); *State v. Benefield*, 103 A.3d 990, 100 (Conn. App. Ct. 2014) (“[T]here is no constitutional violation of a defendant’s reasonable expectation of privacy in bodily fluids that are legally obtained in one criminal investigation and subsequently used in an unrelated criminal investigation.”); *State v. Hauge*, 79 P.3d 131, 145 (Haw. 2003) (“[T]he number of investigations in connection with which the [police] tested [defendant’s] blood, once the blood is lawfully obtained, is irrelevant to the question whether the [police] violated some reasonable expectation of privacy.”).

¶80 The foregoing decisions are undoubtedly correct when the second use of the blood sample occurs *after conviction* for the first crime. Here, the State did not use the 2015 blood sample until 2018, two years *after* Mitcham pled guilty to DUI.

4.

¶81 There is a fourth factor present – even before the DNA profile, the State had probable cause to arrest Mitcham for a serious felony offense and reasonable cause to believe the DNA sample would help confirm (or exclude) Mitcham as the source of DNA at the crime scene. Returning to the fingerprint analogy, the U.S. Supreme Court has explained that an individual can be detained for fingerprinting “if there is reasonable suspicion that the suspect has committed a criminal act, [and] if there is a reasonable basis for believing that fingerprinting will establish or negate

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the suspect's connection with that crime." *Hayes v. Florida*, 470 U.S. 811, 817 (1985); *cf.* A.R.S. § 13-3905 (allowing courts, on less than probable cause, to authorize police to detain an individual to obtain biological samples for identification purposes).

¶82 In *Mario W.*, the court, citing *Hayes*, thought it relevant that the State wanted to analyze DNA without "even reasonably suspect[ing] that a juvenile committed another offense for which the DNA profile might provide investigative assistance." 230 Ariz. at 125 ¶ 9. And the court suggested its analysis would be different if there was probable cause or reasonable suspicion to believe an individual committed an uncharged offense. *Id.* at 129 ¶ 31.

¶83 Here, there was probable cause that Mitcham committed murder. As the majority explains, "the evidence independent of that DNA profile provided sufficient probable cause to authorize Mitcham's arrest." Maj. Op. ¶ 46. At oral argument, Mitcham conceded that, based on a familial DNA analysis and the location of their residences, the State had probable cause to arrest both Mitcham and his brother. *Id.* ¶ 45. It is clear, therefore, that the State could arrest Mitcham first based on his prior arrest record and the location of his home. *Cf. Maryland v. Pringle*, 540 U.S. 366, 372–73 (2003) (officer performing traffic stop had probable cause to arrest all three occupants of vehicle after cocaine was found in backseat of car behind armrest).

¶84 There was also reasonable cause to believe a DNA profile would provide investigative assistance by supporting or negating Mitcham's presence at the murder scene. Upon Mitcham's arrest, Arizona law permitted the State to perform a buccal swab and analyze the resulting DNA. *See* A.R.S. § 13-610(K). No one in Mitcham's position would think the State, upon obtaining probable cause to arrest for a serious felony offense, could not first analyze blood it *already lawfully possessed* to confirm or negate a connection to the murder scene. Though we now know the results of the DNA analysis in this case, and thus have the benefit of hindsight, there can be little doubt that Mitcham would have preferred the DNA analysis to being arrested if the analysis would have *negated* his presence at the murder scene. Thus, unlike in *Mario W.*, obtaining a DNA profile had an investigative (and potentially exonerating) purpose.

5.

¶85 In sum, Mitcham did not have a reasonable expectation of privacy in 2018 in (1) the non-coding regions of DNA contained (2) in a

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blood sample lawfully obtained in 2015 and (3) then lawfully kept following his 2016 conviction for DUI when (4) the State had probable cause to believe he committed murder and reasonable cause to believe the sample would help confirm or negate his presence at the crime scene. Consequently, creating a DNA profile in 2018 was not a “search” requiring a warrant.

IV.

¶86 I respectfully concur in the judgment.



AMY M. WOOD • Clerk of the Court
CSOO/PJL

Appendix Item H

AFFIDAVIT FOR SEARCH WARRANT
COUNTY OF MARICOPA, STATE OF ARIZONA

No. **2018-003761**

Your Affiant, Detective Heinzelman #844, a peace officer in the State of Arizona being first duly sworn, upon oath, deposes and says: That on or about February 17th, 2015, in the County of Maricopa, the State of Arizona, the crime of 13-1105.A1, First Degree Murder, a Class 1 Felony, may have been committed by Ian L. Mitcham, in the County of Maricopa, the State of Arizona.

THAT THE AFFIANT HAS PROBABLE CAUSE TO BELIEVE THAT:

(X) in/on the person(s) of: Ian L. Mitcham, a white male with a date of birth of 10/6/75, 5'09" tall, 180 pounds, red hair and brown eyes

(X) in/on the premises known as: 3724 E. Earll Drive, Phoenix, Arizona, 85018
The residence located at 3724 E Earll Dr. is a single-story, single-family house. The outside walls are constructed of brick with exposed brick on the lower half and yellow painted stucco on the top half. The front door is wood in color and material and is centrally located on the south side of the house facing south, with windows on either side. There is a large wooden/metal RV gate on the west side of the house. A short brick fence with a steel railing surrounds the front yard. The numbers "3724" are horizontally affixed to the first brick pillar of the fence just east of the driveway.

(X) in/on the vehicles described as: a black 2001 Ford Mustang convertible VIN: 1FAFP44421F197154 bearing Arizona registration plate CAW9036.

there is now being possessed or concealed property or things, which are described as:

1. Any indicia of occupancy, residency, identification, records, receipts, notes, ledgers, photographs, and/or other papers/items relating to the occupancy of 3724 E. Earll Drive, Phoenix, AZ, 85018,
2. Any and all paperwork, notes, receipts, documents, photos related to Allison Feldman and/or dated on or around February 17th to February 18th, 2015.
3. Any and all clothing that could have been worn by Ian L. Mitcham during the commission of the crime to include any items that appear bleach-stained or discolored.
4. Any and all house keys that could fit the lockset collected from the victim's residence.
5. Any women's small handbags or wallets.
6. Any credit cards, debit cards, driver licenses or any other card related to Allison Feldman.
7. Any and all shoes that would have a honeycomb sole similar to the shoe impression located inside the victim's residence.

8. Any and all pornographic material to include but not limited to videos, magazines, photographs, toys or sexual aids, etc.
9. Any documentation relating to the homicide of Allison Feldman in any medium to include but not limited to newspaper articles, internet articles, or magazines, etc.
10. Any and all towels.
11. Any and all white blankets.
12. Any and all women's underwear.
13. Any and all coaxial-type cable or charging cords.
14. Any white Apple I-Phones.
15. Any bleach or spray bottle cleaning products.
16. Any women's wrist watches to include:
 - A Michele Tahitian Ceramic watch with a black dial and white metal band
 - A Jowissa watch with blue dial and white metal band
 - A Michele Swiss Quartz watch with a silver dial and white metal band
 - A Coach Sydney bracelet watch with a pink dial and white metal band
 - A Michael Kors Runway Twist watch with a rose gold dial and band
 - A Michael Kors watch with a silver face and white and yellow metal band
 - A Dolce and Gabbana watch with a silver dial and white metal band
17. Buccal (DNA) swab(s) from Ian. L. Mitcham
18. Major case fingerprints and footprints exemplars from Ian. L. Mitcham
19. Any and all cell phones owned or controlled by Ian L. Mitcham
20. Any and all computers, laptops, tablets or other similar electronic devices owned or controlled by Ian L. Mitcham

- were stolen or embezzled.
- were used as a means for committing a public offense.
- is (are) in the possession of _____ to whom it was delivered for the purpose of concealing it or preventing it from being discovered.
- constitutes evidence tending to show that a public offense may have been committed or that Ian L. Mitcham may have committed the offense,
- may be searched and inspected in the interest of the public health, safety, or welfare as a part of an inspection program authorized by law.
- is a person being sought who is the subject of an outstanding arrest warrant.

That the following facts established probable cause for believing that grounds for the issuance of a search warrant for the aforementioned items exists:

Your Affiant, Detective John Heinzelman #844, has been employed by the Scottsdale Police Department since September of 2001. Upon hire, your Affiant attended the Arizona Law Enforcement Academy in Phoenix and received basic training in various aspects of police work and investigations. Upon graduation, your Affiant worked as a patrol officer and made numerous arrests for misdemeanor and felony crimes and investigated several misdemeanor and felony cases. Your Affiant was a patrol officer for the Scottsdale Police Department for four years. Your Affiant has also acted as a Field

Training Officer for the Scottsdale Police Department since November of 2003 and has trained several new officers in basic police operations and investigations.

In February of 2006, your Affiant was assigned as a detective in the Domestic Violence Unit of the Scottsdale Police Department. Your Affiant's responsibilities included investigating Domestic Violence crimes occurring in the City of Scottsdale. Your Affiant was also assigned to manage and maintain files on all of the registered sex offenders in the city as part of the Sex Offender Unit. In this capacity, your Affiant had the opportunity to interview numerous sex offenders pertaining to the method, mode, and commission of their past criminal activities.

In June 2006, your Affiant was assigned as a detective in the Sex Crimes Unit of the Scottsdale Police Department. This unit is primarily responsible for the investigation of all of the sex related crimes occurring within the City of Scottsdale. As a Sex Crimes Detective, your Affiant has investigated and/or assisted in numerous sex-related investigations; interviewed and/or monitored numerous interviews with suspects, victims, and/or witnesses; and processed and/or analyzed numerous items of evidence.

In August of 2012, your Affiant was assigned as a detective in the Violent Crimes Unit of the Scottsdale Police Department. This unit is primarily responsible for the investigation of all death investigations, robberies and aggravated assaults occurring within the City of Scottsdale. Your Affiant has investigated and/or assisted in numerous homicide and death investigation, robberies, and aggravated assault allegations.

Your Affiant has attended and successfully completed schools and training presented by the Scottsdale Police Department and other P.O.S.T. certified training seminars. These include but are not limited to: Basic Criminal Investigations and New Detective Training, Death and Homicide Investigation, Medical Pathology, Criminal Analysis and Advanced Criminal Analysis Training, Computer Facilitated Child Sexual Exploitation Investigation, and multiple Homicide and Sexual Assault Conferences. The focus of some of the above-named police training was to educate the participants in various investigative methods and techniques. Your Affiant has also attended numerous interview and interrogation courses including: Basic and Advanced Forensic Interviewing, REID Method Interview and Interrogation, and Phases One and Two of Kinetic Interview and Interrogation.

Your Affiant has spoken to several individuals about the methods and practices of people involved in illegal activities such as sexual offenses or violent crimes. These people include subjects involved in crimes and experienced federal, state, and local investigators. All of the training, experience, interviews, and sources of information have provided your Affiant with details of the methods and practices used by criminals involved in illegal activities.

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Your Affiant also makes note that the opinions and/or evaluation expressed about the information, activities, methods and/or practices of people involved in this investigation are based on experience, training, as well, as information received from other sources.

Facts and Circumstances:

At about 4:02pm Wednesday, February 18th, 2015, the Scottsdale Police Department received a 911 call from the male reporting party. He reported that he went to his girlfriend's residence at 8526 E. Monterey Way, Scottsdale, Arizona, Maricopa County, to check her welfare. She had not been heard from since Tuesday evening, February 17th. He reported that her car was parked in the garage and the front door to the house was locked. He rang the doorbell but got no answer. He used a key and opened the front door to the house. He said he immediately smelled an overpowering odor of chlorine or bleach coming from inside the house.

The residence is a single-family, single-story house on the east side of the street. The front door faces west. The open concept living room/dining room/kitchen are in the center of the house. The living room is sunken about four inches compared to the kitchen and dining room floor. The living room is immediately south of the front door and in the front of the house. The dining room and kitchen are east of the living room and are in the back of the house. A glass sliding glass door is along the east wall in the dining room that leads to the rear yard of the residence. A hallway runs north from the center of the house to the bedrooms along the north end of the house.

The reporting party entered the house and saw his girlfriend lying deceased in the hallway. She was supine with her head to the south and her feet to the north. She was naked with a black piece of fabric, later determined to be a cotton maxi-dress, draped over her face and right shoulder. The fabric had several white spots on it that appeared to be chemical burns or bleach spots as if the agent was splashed on it.

There was a large pool of coagulating blood under her head. There was what appeared to be blood on the floor under her genital area. Her body was covered with small orange deformities that appeared to be chemical burns. She had several small contusions on her hands, arms and shins. Her knees had what appeared to be recent contusions on them. A clear liquid was pooled inside her belly button that appeared to be burning the skin. There appeared to be a dark ligature mark around her neck just under her chin.

The flooring in the hallway, kitchen and dining room is a light-colored tile. The sunken living-room floor is a simulated wood tile. There was a large amount of what appeared to be blood in front of the sliding glass door in the dining room. There was what appeared to be blood spatter along the edge of the door and in that track indicating the door was open during the bloodletting event. There were large sweeping blood swipes on the floor in the dining room and kitchen that led near the body.

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There was a large area of coagulated blood in the northeast corner of the sunken living room floor. It appeared that the blood flowed or was pushed over the edge from the hallway to the living room floor. There was also a large amount of a white crystalline substance on the floor in the living room. It appeared to be evaporated bleach or some sort of chlorinated liquid. There were also small bits of broken brown glass throughout the kitchen, dining room, and living room floors. The glass appeared to be broken bits of a Leinenkugel beer bottle. There were also areas of floor that appeared to have had some sort of liquid spilled on it and allowed to evaporate leaving a somewhat sticky residue behind.

Scottsdale Police Department Crime Scene Specialists and Crime Laboratory personnel forensically processed the residence. Numerous swabs were collected from several surfaces inside the residence for later possible DNA comparison. Additionally, several latent fingerprints and partial latent fingerprints were processed and collected from several items and surfaces inside the residence for later possible fingerprint comparison.

Scottsdale Police Crime Laboratory personnel processed the floors in the kitchen, living room and dining room. Bare footprints, socked footprints, and shoe impressions were discovered on the floor. The shoe impressions had a honeycomb-type pattern similar to the sole found on Vans, Sketchers, and Reef sneakers among others. Several footprints and shoe impressions were processed and collected as evidence for later forensic comparison.

There were several cabinets and drawers inside the house including a chest of drawers in the master bedroom that had metal knobs on them. It appeared that several knobs throughout the house had been sprayed with a spray-bottle cleaning product of some sort.

There was a glass topped kitchen table centered in the dining room. Three black plastic chairs were around the table. A fourth chair was pulled away west from the table. There were drops of what appeared to be a brown liquid substance on the floor near the chair. The substance appeared thick and had a curdled appearance.

Swabs of the unknown substance were collected. The swabs were examined in the Scottsdale Police Department Crime Laboratory and a full autosomal DNA profile was developed from the substance.

Interviews were done with several family members and friends of the victim. It was discovered that the victim owned a white Apple I-Phone. She carried several credit cards and her Arizona driver license in a small wallet she regularly kept inside her purse. A large purse was found on the kitchen counter but it did not contain the wallet, the Apple I-Phone or any house keys. It is believed these items were stolen from the residence. Since it was believed house keys were stolen, the lockset from the front door was collected as evidence for possible future comparison purposes.

Family members told investigators that the victim owned several wrist watches. A search was done of the residence and several wrist watches were located. The family members

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searched the house and reported the following watches were not located and presumed stolen by the suspect:

- A Michele Tahitian Ceramic watch with a black dial and white metal band
- A Jowissa watch with blue dial and white metal band
- A Michele Swiss Quartz watch with a silver dial and white metal band
- A Coach Sydney bracelet watch with a pink dial and white metal band
- A Michale Kors Runway Twist watch with a rose gold dial and band
- A Michale Kors watch with a silver face and white and yellow metal band
- A Dolce and Gabbana watch with a silver dial and white metal band
- A Movado Museum watch with a black dial and black leather band

Family members also reported that the victim usually kept several hand and dish towels in the kitchen and a white blanket on the back of the couch. The towels and blanket were not located inside the kitchen. It is presumed the suspect used the towels to clean up evidence.

An autopsy was performed on the female victim on Thursday morning, February 19th, 2015. DNA swabs were collected from the victim for later comparative purposes. It was discovered that the female victim suffered massive blood loss from a large laceration to the rear of her head. The female victim had a three-eighths inch smooth ligature mark around her neck and she had trauma to the deep structures of her neck. The doctor found petechiae consistent with strangulation and believed she was strangled both manually and with a ligature. The ligature mark appeared to have been caused by a non-polarized cord similar to a coaxial cable or charging cord.

There were several lacerations to the victim's vaginal walls including one that was about two and a half inches long and about three-eighths inch deep. There was no trauma to the victim's cervix and the doctor opined that the injuries were caused by an object.

There was evidence of "broad force trauma" to the victim's chest that would be consistent with a stomp or kneeling on her chest. There were contusions and evidence of trauma to her face, both arms and hands, and both legs. The doctor characterized the orange marks on her body as post-mortem chemical burns. The tentative cause of the female victim's death was determined to be asphyxiation with blunt force trauma and the manner to be homicide.

Crime Scene Specialists processed the residence. The broken neck of a brown glass Leinenkugel's Honey Weisse beer bottle was found under the couch in the living room. The cap was still on the bottle neck and appeared to have bits of rust on it. The bottle neck was collected as evidence. It was examined in the Scottsdale Police Department Crime Laboratory for DNA. A mixture of DNA was discovered that matched the victim's DNA and DNA that matched the brown substance on the dining room floor at all genetic loci tested.

There were what appeared to be blood stains on the back of the cloth couch in the living room. The stained areas were cut from the couch and collected as evidence. They were

examined in the Scottsdale Police Department Crime Laboratory for DNA. The major contributor matched the female victim at all genetic loci tested. A mixture of DNA was discovered that matched the DNA from the boyfriend and DNA that matched the brown substance on the dining room floor at 19 loci. The boyfriend reported that he had been to the residence on numerous occasions including to spend the night and it is not uncommon to discover his DNA inside the residence.

There is a laundry room south of the kitchen. A washer and dryer were along the west wall in the laundry room. There was a cabinet mounted to the wall above the washer and dryer that had three doors with metal knobs. Swabs were taken from the metal knobs and examined in the Scottsdale Police Department Crime Laboratory for DNA. A partial DNA profile was developed that matched the DNA profile of the brown substance on the dining room floor at 14 loci.

Arizona Department of Public Safety conducted a "familial" test on the DNA profile from the unknown brown substance found on the dining room floor. The familial search matched a Mark Mitcham. Although his was not the actual DNA profile developed in the brown substance, it was believed that he was a close relative of the subject.

A search of the Scottsdale Police Department records was done. Ian L. Mitcham, a white male with a date of birth of 10/6/75, was arrested by the Scottsdale Police Department for Driving Under the Influence in January of 2016. It was discovered that he is Mark's brother. A portion of the blood sample drawn from Ian during his arrest was still impounded in the Scottsdale Police Department property and evidence. The blood sample was examined in the Scottsdale Police Department Crime Laboratory and a DNA profile for Ian was developed. Ian's DNA profile matched the DNA profile developed from the unknown brown substance on the dining room floor. Ian L. Mitcham's DNA was therefore found in the mixture with the victim on the broken bottle, the metal knob in the laundry room and a cutting from the back of the couch. *Through our investigation, no relationship between Ian L. Mitcham and victim could be established.* *CD*

Ian's Arizona driver license showed an address of 3724 E. Earl Drive, Phoenix. That is a single-family residence owned by Craig and Gina Mitcham. Craig is Ian's brother. Surveillance units responded to the residence and conducted surveillance for several days. Ian was seen coming and going from the residence and is believed to reside there.

Ian was seen driving a black 2001 Ford Mustang convertible VIN: 1FAPP44421F197154 bearing Arizona registration plate CAW9036. That vehicle is registered to Ian L. Mitcham. Scottsdale Police Department Officers arrested Ian for Driving Under the Influence in January of 2015. He had been driving a black 2001 Ford Mustang convertible VIN: 1FAPP44421F197154 bearing Arizona registration plate 910SNG. That registration plate is not valid for highway use.

Wherefore your Affiant prays that a search warrant be issued commanding that an immediate search be made of the person, premise, and/or vehicles described herein, for the property and things described herein, and that the same be retained in the custody of your Affiant or in the custody of the agency which the Affiant represents, or in any other court in which such property or things is sought to be used as evidence, pursuant to A.R.S 13-3911, 13-3912, and 13-3913.

John Heinzl 844

Your Affiant, Detective John Heinzelman
Scottsdale Police Department

SUBSCRIBED AND SWORN to before me this 9th day of April, 2018.

Cindi Nannetti

Judge of the Maricopa County Superior Court

HONORABLE CINDI NANNETTI
MARICOPA COUNTY SUPERIOR COURT