

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellant,

v.

IAN L. MITCHAM,

Appellee.

No. CR-23-0236-PR

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

Maricopa County Superior Court
No. CR2018-118086-001DT

**RESPONSE TO PETITION FOR REVIEW AND CONDITIONAL
CROSS-PETITION FOR REVIEW**

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INTRODUCTION

In 2015, Scottsdale Police (“SPD”) found victim Allison Feldman murdered in her house. They took biological samples and developed an unknown male DNA profile, but the case went cold. Three years later, a familial DNA hit led the police to Ian Mitcham. It turned out that SPD had Mitcham’s blood in evidence from an unrelated DUI where Mitcham consented to a blood draw based on the Implied Consent / Admin Per Se advisement. From that sample, and without a warrant, SPD developed Mitcham’s DNA profile. Mitcham’s DNA profile matched the unknown DNA profile developed from the sample in Allison’s home.

The trial court suppressed “the extraction of” Ian Mitcham’s DNA profile after finding that police exceeded Mitcham’s scope of consent. More problematic, the trial court seemingly indefinitely precluded the State from linking Mitcham’s DNA profile to the previously unknown sample because, today, Ian Mitcham is a twice convicted felon, having pled guilty and been sentenced to two felony cases in June 2022. By law, his DNA evidence must be entered into the Combined DNA Index System (“CODIS”). [A.R.S. § 13–610\(O\)\(1\)](#). That system will report a match today, and indefinitely in the future, between Mitcham’s DNA and the previously unknown DNA profile developed from biological material discovered at the scene of Allison Feldman’s murder.

To reach its holding, the trial court found that the State exceeded the scope of Mitcham’s consent when it developed his DNA profile in 2018. It then rejected the independent source, inevitable discovery, and attenuation doctrines.

The Fourth Amendment does not compel that result, and the court of appeals agreed. First, the court held that police had independent grounds to arrest Mitcham and take his DNA based, in part, on the familial DNA match. [*State v. Mitcham*, ___ Ariz. ___, ¶ 46 \(App. 2023\)](#). Second, the court held that “[a]nother independent basis exists for reversing the court’s suppression order. Mitcham’s DNA is already in CODIS because of his felony convictions in 2022.”¹ [*Id.* at ¶ 47](#). This portion of the court of appeals decision correctly applies Fourth Amendment precedent. Further review is unnecessary, so the State asks this Court to deny the Petition for Review.

The State, however, is filing a conditional cross-petition to preserve its argument that that the processing of Mitcham’s blood sample for DNA was not a second search within the meaning of the Fourth Amendment. In attempting to harmonize [*Mario W. v. Kaipio*, 230 Ariz. 122 \(2012\)](#) and [*Maryland v. King*, 569 U.S. 435 \(2013\)](#), the majority opinion held that the State violated the Fourth Amendment when it developed Mitcham’s DNA profile from the 2015 DUI blood draw because it exceeded the scope of consent. [*Mitcham*, at ¶ 36](#). Judge Catlett

¹ Mitcham asserts that the second clause is factually incorrect because Mitcham’s DNA was not entered into CODIS in 2015. That argument is addressed below.

disagreed. In a concurring opinion, he held, that the police did not conduct a search in 2018. [Mitcham](#), at ¶ 85 (Catlett, J., concurring).

Judge Catlett’s approach is more consistent with the traditional Fourth Amendment privacy test and the holding in *King*. If inclined to accept review, the State asks this Court to grant the cross-petition and hold that the State did not violate Mitcham’s expectation of privacy because sequencing a DNA profile from evidence lawfully in police custody does not violate a reasonable expectation of privacy.

STATEMENT OF FACTS

In 2015, Allison Feldman was murdered in her home. When Scottsdale Police (“SPD”) found Allison in her home, she was lying nude in a pool of blood having suffered several injuries. *See* Ex. 5, at 6 (Attch. A). The police sensed a strong chemical odor, observed chemical burns on Allison’s body, and blood smears near the furniture. *See Id.* After collecting biological swabs from the home, police developed an unknown male DNA profile which was entered into the Combined DNA Index System (“CODIS”). *Id.*; R.T. 12/9/22, at 22-23 (Attch. B). At the time, there was no DNA match.

In 2018, in an effort to solve the case, law enforcement analyzed the unknown profile using a familial DNA test. *See* R.T. 12/9/22, at 22. The test revealed that a close relative of the unknown profile was an Arizona prison inmate who had two brothers, Ian Mitcham being one of them. R.T. 12/9/22, at 23-25; *see* Ex. 4 (Attch.

C); Attch. A at 7. The SPD already knew of Ian Mitcham. In January 2015, they arrested Mitcham for a misdemeanor DUI offense. *See* R.T. 12/9/22, at 9, 25-26, 37-38. Then, in January of 2016, they arrested him for the offense of Aggravated DUI for which he was charged in 2017. *See State v. Mitcham*, Maricopa County Cause No. CR2017-001717-001 (Attch. D.); *See* R.O.A., Item 2, at 18 (Attch. E). In light of the DNA results and Mitcham’s proximity to Allison’s home, the police now had probable cause to arrest Mitcham for Allison’s murder. [Mitcham](#), at ¶ 46. However, they did not yet make an arrest. Instead, they sought to verify that Mitcham’s DNA did in fact match the unknown profile at the crime scene. For that, they looked to the 2015 DUI arrest.

During the 2015 DUI arrest, an SPD officer read Mitcham the warning provided by the Admin Per Se / Implied Consent form. Mitcham voluntarily consented and allowed police to obtain two vials of his blood. R.T. 11-12, 14, 16; *see* Attch. A at 7. One vial allowed the police to test for alcohol or drugs, and the second afforded Mitcham the opportunity to test his blood independently. Mitcham signed a “Destruction Notice,” *see* Ex. 2 (Attch. F), the text of which stated that if Mitcham did not pursue an independent test within 90 days, his blood “sample will have been destroyed and unavailable for reanalysis.” Attch. F; *see* R.T. 12/9/22, 16, 18-19, 36. The Notice did not indicate that both vials of his blood sample would be destroyed after 90 days. *See* Attch. F. As part of the 2015 DUI case, the police tested

a sample and determined Mitcham was over the legal limit. Mitcham was then prosecuted and later convicted of misdemeanor DUI for this 2015 offense.

Meanwhile, both vials of Mitcham's blood sample remained in SPD's custody throughout the prosecution of that case and after his conviction. R.T. 12/9/22, at 18-19. His blood sample was still available to SPD in 2018 upon learning of the familial DNA test results and that Mitcham may be Allison's killer. *Id.* The police retrieved and analyzed Mitcham's blood from the 2015 DUI consent draw, creating Mitcham's DNA profile. *Id.* at 27-28. Mitcham's profile matched the unknown DNA found in Allison's home. *Id.* at 29; Ex. 6 (Attch. G). The police then procured a warrant to search Mitcham's home and place a GPS tracker on his car. As the Court of Appeals noted below:

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.

[Mitcham](#), at ¶ 9. After Mitcham was arrested, a buccal swab was taken as part of a routine booking procedure. See [A.R.S. § 13-610](#)(K), (O). Mitcham was subsequently indicted on charges of first-degree murder, second-degree burglary, and sexual assault.

While Mitcham's murder case was pending, he pled guilty to two separate, unrelated felonies: a felony narcotics possession offense in 2016 and the 2016

aggravated DUI for which he was charged in 2017. *See State v. Mitcham*, Maricopa County Cause No. CR2016-111513-001 (Attch. H); *State v. Mitcham*, Maricopa County Cause No. CR2017-001717-001 (Attch. D).

Mitcham moved to suppress the DNA evidence arguing that the use of his DNA profile from the 2015 blood violated the Fourth Amendment. R.O.A., Item 1 (Attch. I). After an evidentiary hearing, the superior court granted the motion to suppress the use of Mitcham’s DNA profile, regardless of whether it came from the 2015 blood, the buccal swab taken upon his arrest, or even any profile that might result from his convictions in the unrelated narcotics and aggravated DUI cases. R.O.A., Item 6 (Attch. J). The State appealed.

The Court of Appeals reversed the trial court’s order suppressing Mitcham’s DNA profile and included a concurrence by Judge Catlett. The majority opinion explained that “*King* overruled *Mario W.* to a degree” and that “[b]ecause *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.” [Mitcham](#), at ¶ 22. The opinion then seeks to harmonize *Mario W* and *King* by treating the development of a DNA profile as a “search” under the Fourth Amendment, but one that does not “always require a search warrant” when created from evidence in the State’s possession. [Id.](#) at ¶ 27.

The opinion, therefore, did not analyze whether Mitcham had a reasonable expectation of privacy under the Fourth Amendment in the 2015 blood. Instead, the analysis moves to the question of whether the “search” exceeded the scope of Mitcham’s consent, holding that under the circumstances here, it did. [Id. at ¶ 36](#). Nonetheless, the Opinion then turned to the application of the exclusionary rule. The opinion identified two reasons why the exclusionary rule does not apply to Mitcham’s DNA profile: (1) there was probable cause to arrest Mitcham even without his DNA profile, and thus, police were authorized to obtain a buccal swab pursuant to A.R.S. 13-610(K); (2) the DNA would have independently and inevitably have been discovered as a result of Mitcham’s other felony convictions. [Mitcham, at ¶¶ 46-51](#). In other words, the opinion applied the “closely related” doctrines of “independent source” and “inevitable discovery” in finding that the superior court erred in suppressing Mitcham’s DNA profile. [Id. at ¶ 48](#).

The concurring opinion noted that there is a “more direct route to resolving the constitutional issue” [Id. at ¶ 59](#). Specifically, the concurrence focused analyzed whether the police conducted a search in 2018 when they sequenced Mitcham’s DNA profile. [Id.](#)

Applying the privacy approach, the concurrence found that Mitcham did not have a reasonable expectation of privacy in 2018 in the non-coding regions of DNA in the 2015 blood sample. [Id. at ¶ 69-72](#). This is because, like a fingerprint, the

information provided in Mitcham’s DNA profile “tells you nothing about an individual, let alone anything private.” *Id.* at ¶ 70. In reaching the conclusion that the creation of a DNA profile from the 2015 blood sample was not a “‘search’ requiring a warrant,” the concurrence also considered that the blood sample was obtained lawfully and lawfully kept following his conviction in 2016. *Id.* at ¶ 85.

REASONS WHY REVIEW SHOULD NOT BE GRANTED

A. The Court of Appeals Correctly Applied the Independent Source and Inevitable Discovery Exceptions

As a starting point, Mitcham argues that the Court of Appeals erred by applying the independent source doctrine within the framework of an inevitable discovery analysis by conflating the two, arguing that “[w]hile both doctrines assess whether the police would have discovered the evidence absent the misconduct, there are distinctions necessitating separate analysis.” Pet. for Rev. at 13. Then, citing [*Brown v. McClennan*, 239 Ariz. 521 \(2016\)](#), he first claims that the court incorrectly applied the inevitable discovery doctrine because “[a] post hoc finding of probable cause or reasonable suspicion does not excuse a warrantless search.” Pet. for Rev. at 11-12. Lastly, Mitcham argues that the independent source doctrine does not apply because his “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.” *Id.* at 14.

The inevitable discovery and independent source doctrines are exceptions to the fruit of poisonous tree doctrines. Assuming a constitutional violation occurred,² the fruit of the poisonous tree doctrine provides that “evidence seized during an unlawful search [cannot] constitute proof against the victim of the search. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.” [Wong Sun v. United States, 371 U.S. 471, 484–85 \(1963\)](#) (internal citations omitted); [State v. Hackman, 189 Ariz. 505, 508 \(App. 1997\)](#) (“The exclusionary rule requires the suppression at trial of evidence gained directly or indirectly as a result of a government violation of the Fourth . . . Amendment[.]”). The rule therefore applies to both “the ‘primary evidence obtained as a direct result of an illegal search or seizure’ and . . . ‘evidence later discovered and found to be derivative of an illegality.’” [Utah v. Strieff, 579 U.S. 232, 237 \(2016\)](#) (citation omitted).

² Mitcham still asserts that there was “misconduct” that “requires exclusion.” Pet. for Rev. at 16. The State disputes that any misconduct occurred and that a warrant was required in its cross petition below, which is supported by the concurring opinion. Furthermore, the majority opinion noted that “whether DNA identification analysis of a blood sample originally drawn for a non-identification purpose is a search has not yet been decided.” [Mitcham, at ¶ 18](#). Even if one believes a warrant was required, under these circumstances here, the good faith exception would apply and the costs of exclusion would outweigh any negligible deterrent benefit. *See* State’s argument. Attch. K, 30-33.

The rule has its limits, however, with exceptions focusing on the “causal relationship between the unconstitutional act and the discovery of evidence.” *Id.* at 238. The three exceptions are summarized as follows:

First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. Third, . . . is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.

Id. (cleaned up); see [State v. Schinzel, 202 Ariz. 375, 382–83 \(App. 2002\)](#) (quoting [Hackman, 189 Ariz. at 508](#)) (applying the independent source doctrine). The court of appeals correctly applied both doctrines here.

To start, the court did not conflate the two doctrines. It correctly assessed that the doctrines are “closely related.” [Mitcham, at ¶ 48](#) (quoting *Nix*, 467 U.S. at 443); see [State v. Laster, 497 P.3d 224, 247 \(Mont. 2021\)](#) (The so-called independent source and inevitable discovery exceptions are “closely related,” with the inevitable discovery exception essentially an “extrapolation from” the independent source exception). Under the circumstances in this case, the court of appeals concluded that “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.” [Mitcam, at ¶ 48.](#)

The distinction between the two doctrines may have mattered if Mitcham sought to suppress DNA profile before he was convicted in 2022, but he did not. *See* Attch. I. Today, no one disputes Mitcham was convicted of two felony offenses in 2022 that were committed in 2015 and 2016 respectively and those felony convictions require that Mitcham’s DNA be entered into CODIS. Because those two convictions are unrelated to this offense, they are an independent source for Mitcham’s DNA. It would be absurd to require the court to ignore Mitcham’s convictions because they occurred after the police obtained the disputed DNA profile in this case.

Turning to the inevitable discovery doctrine, the court of appeals did not reference *Brown* because it is inapplicable here. In *Brown*, this Court held “because the inevitable discovery exception cannot excuse the failure to secure a warrant in the first place, the exclusionary rule applies.” [239 Ariz. 521, 525, ¶ 15.](#) (A.B. at 30-31.) SPD in this case, however, obtained a search warrant for a buccal swab in 2018, so this is not a case where police never obtained a warrant. *See* Attch. A to Attch. L. And after excising any evidence related to Mitcham’s DNA profile developed from the 2015 DUI blood draw, “the evidence independent of that DNA profile

provided sufficient probable cause to authorize Mitcham's arrest.”³ [Mitcham, at ¶ 46](#). To be sure, “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.” [Id. at ¶ 45](#) (quoting *State v. Sardo*, 112 Ariz. 509, 515 (1975)). And once the police arrested Mitcham, they had to take a sample for DNA. [A.R.S. § 13-610\(K\), \(O\)\(2\)\(a\)](#). [Mitcham, at ¶ 46](#).

In response, Mitcham further argues that the court of appeals incorrectly applied the independent source doctrine because the court erroneously concluded that CODIS contained a sample of Mitcham’s DNA from his 2022 felony convictions. That argument is a red herring and takes the court of appeals quote out of context.

³ At oral argument, Mitcham effectively agreed police had probable cause to arrest him in 2018:

Judge McMurdie: So it sounds to me like you have probable cause for both brothers. They could have arrested both brothers and tested them for DNA.

Ms. Barco Penunuri: They could have potentially arrested the brothers and tested them for DNA.

Mitcham, Oral Argument, at 23:45 to 24:00 (June 14, 2023), *available at* <https://www.youtube.com/watch?v=mTsLJLQ6KZE>.

The court of appeals wrote, “Mitcham’s DNA is already in CODIS because of his felony convictions in 2022.” [Mitcham, at ¶ 47](#). As the State pointed out in its original brief, “DPS already has a biological sample from Mitcham because of his arrest for first degree murder in this case. [A.R.S. § 13–610\(O\)\(3\)](#). DPS will likely not take an additional sample from Mitcham regardless of the new convictions because his biological evidence is fungible. [A.R.S. § 13–610\(G\)](#).” Attch. K at 2 n.2. Mitcham cannot seriously argue a constitutional violation occurred because the police did not re-swab Mitcham in 2022 to extract his identical DNA profile to reupload it into CODIS. The distinction Mitcham draws is form over function and is the type of claim Arizona’s constitution rejects. [Ariz. Const. art. 6, § 27](#) (“No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.”).

It is now an inescapable historical fact that his 2022 felony convictions would be an “independent and inevitable cause of the creation of his CODIS profile.” *See Mitcham, at ¶ 48* . *See also Nix v. Williams, 467 U.S. 431, 444 (1984)* (“inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification...”). The court of appeals correctly applied both the inevitable discovery and independent source doctrines to the facts of this case.

B. Defendant Misreads the Court of Appeals Opinion. The Opinion Did Not Create a Probable Cause or Reasonable Suspicion Exception to the Warrant Requirement.

The concurrence notes that the majority opinion “arguably create[es] a new warrant exception in the process.” [Mitcham, at ¶ 58](#) . Both the Defendant and the concurrence seem to believe that the opinion reads *Mario W.* as creating a new probable cause or reasonable suspicion exception to the warrant requirement for DNA profiles.

As a starting point, *Mario W.* did not address whether a warrant was required to sequence a DNA profile of a juvenile arrestee who was adjudicated or failed to appear. [230 Ariz. at 129, ¶ 32](#) (“[W]e find no state interest sufficient to justify the serious intrusion on the privacy interests of the Juveniles occasioned by the second search—the extraction of the DNA profile from the buccal swab before adjudication or failure to appear. The swab remains available for processing thereafter, and no exigency exists warranting an earlier suspicionless search.”). And *King* held that police did not need a warrant to obtain a buccal swab and sequence a DNA profile for certain arrestees. [King, 565 U.S. at 465](#) (“Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure.”) Following these two cases, the majority’s holding that “creating a DNA profile from evidence in the State’s

possession does not always require a search warrant,” is unremarkable. [Mitcham, at ¶ 27.](#)

The majority’s later probable cause discussion was connected to its independent source doctrine analysis. The majority discussed the significance of the statute requiring that certain arrestees provide a saliva sample.

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.

[Id. at ¶ 41.](#) After determining that the police had probable cause to arrest Mitcham, the majority observed:

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.

[Id. at ¶ 46](#) (emphasis added). The majority did not create a new exception to the warrant requirement, but rather engaged in the probable cause analysis as part of the proper application of the independent source doctrine.

STATE'S CONDITIONAL CROSS PETITION FOR REVIEW

I. Issue Presented for Cross Appeal

Does sequencing a DNA profile from evidence lawfully held by police amount to a search under the Fourth Amendment?

A. Although the Court of Appeals Correctly Applied the Independent Source and Inevitable Discovery Doctrines, The Majority Opinion Incorrectly Assumed a Fourth Amendment Violation.

The State's principal argument has been that no Fourth Amendment violation occurred premised on [Maryland v. King, 569 U.S. 435 \(2013\)](#). There, the Supreme Court held that sequencing DNA lawfully in police custody was not a search when it held, "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." [Id. at 464](#).

That holding, however, conflicts with this Court's earlier opinion in *Mario W.* The statute at issue there, A.R.S. § 8-238, required that "juveniles charged with certain offenses and summoned to appear at an advisory hearing . . . submit to the investigating law enforcement agency" a buccal sample for DNA testing. [Mario W., 230 Ariz. at 123-24, ¶ 1](#); A.R.S. § 8-238. After holding that the State can constitutionally compel "the physical extraction of . . . DNA," this Court concluded that the extraction of a DNA profile was a "second search" that "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.” [Mario W.](#), 230 Ariz. at 128, ¶¶ 25, 27.

For that reason, both the majority and special concurrence reasoned that *King* modifies *Mario W.* [Mitcham](#), at ¶ 22 (“King overruled *Mario W.* to a degree.”); *Id.* at ¶ 55 (“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.”) (Catlett, J., concurring). Where the two depart is how *King* and *Mario* apply to this case.

The majority opinion concluded that “*Mario W.* and *King* harmonize in concluding that whether DNA profiling violates the Fourth Amendment turns on the reasonableness of the process.” [Mitcham](#), at ¶ 23. The majority then concluded that the State’s creation of a DNA profile was unreasonable in this case because the State violated the scope of *Mitcham*’s consent by using the 2015 DNA blood draw to sequence *Mitcham*’s DNA profile. *Id.* at ¶ 36 (“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.”).

The concurring opinion, concluding *King* and *Mario W.* were unnecessary to resolve this case, instead focused on “whether the State conducted a new search in

2018.” [Id. at ¶ 59](#). Applying settled Fourth Amendment law, it then identified the starting point as “the reasonable expectation of privacy test” first set forth in [Katz v. United States](#), 389 U.S. 347, 361 (1967). See [Kyllo v. United States](#), 533 U.S. 27, 33 (2001).

To address Mitcham’s reasonable expectation of privacy in 2018, the concurring opinion considered four factors. First, 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.” [Mitcham](#), at ¶ 69. Second, the police legally came into possession of the blood sample later used again in 2018. [Id. at ¶ 74](#). Third, and contrary to Mitcham’s contention, the concurring opinion accurately concluded that “Mitcham also could not have reasonably expected that the State was required to destroy his blood sample.” [Id. at ¶ 75](#). Fourth, the concurrence appropriately observed that “[n]o 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.” [Id. at ¶ 84](#).

The State agrees with the concurrence on those four points, which are consistent with the State’s arguments in its briefing. There exists, however, a more straightforward way to resolve the Fourth Amendment issue—developing a DNA profile from evidence lawfully in police custody does not violate the Fourth

Amendment. *See* [King, 569 U.S. at 464](#) (holding “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.”). Once the concurrence concluded that the State did not exceed the scope of Mitcham’s consent when it processed his 2015 DUI blood sample to sequence a DNA profile in 2018, the Fourth Amendment analysis was complete. The State did not conduct a search in 2018 because Mitcham had no reasonable expectation of privacy in the sequencing of his DNA profile.

To be sure, and contrary to the majority’s holding, the State did not exceed the scope of Mitcham’s consent for the reasons explained by the concurrence. The development of Mitcham’s DNA profile occurred years after the blood draw and involved no additional intrusion into Mitcham’s body. “Mitcham also could not have reasonably expected that the State was required to destroy his blood sample.” [Mitcham, at ¶ 75](#). The text of the Admin Per Se Form never promised that all blood samples would be destroyed, nor should destruction be expected when a prosecution occurs and the blood becomes evidence of a crime. [Id. at ¶ 76](#). Not only was the State entitled to maintain the blood samples, Mitcham had no right to demand the return or destruction of what was the primary evidence in a crime he was convicted of. [Id. at ¶ 78](#).

A close reading of both the majority and concurrence suggests they agree *King* modified *Mario W.* Given then that the Fourth Amendment analysis turns on facts unique to this case, the State is conditionally filing this petition for review to preserve its argument above.

CONCLUSION

The court of appeals correctly applied the independent source and inevitable discovery exceptions to the exclusionary rule. This Court should therefore deny Mitcham's petition for review. However, if inclined to grant Mitcham's petition for review, the State asks this Court to grant its cross petition and hold that, under the circumstances present here, the sequencing of Mitcham's DNA profile did not amount to a search under the Fourth Amendment.

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