IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellant, v. IAN L. MITCHAM, Appellee.	No. CR-23-0236-PR Court of Appeals No. No. 1 CA-CR 23-0014 Maricopa County Superior Court No. CR2018-118086-001

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLEE

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INTEREST OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice ("AACJ"), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. The application of federal and state constitutional rights to privacy and exclusion of illegally-obtained evidence goes to the core of AACJ's mission.

DNA is not like other property, just as a cell phone is not like any other container. People have a reasonable expectation of privacy in their DNA and do not voluntarily "abandon" the biological profile embedded in the cells they shed in public spaces. Likewise, people do not impliedly consent to extraction of a DNA profile when they provide a blood sample after an arrest for driving under the influence. Furthermore, the exclusionary rule required suppression in this case, but the unusual factual scenario led both the majority and concurrence to misapply that law. Finally, this case provides an excellent vehicle for applying state constitutional protections.

This Court seeks to provide clear guidance to law enforcement. *State v. Jean*, 243 Ariz. 331, 340 ¶34 (2018); *State v. Gilstrap*, 235 Ariz. 296, 299 ¶16 (2014). For the reasons stated herein, AACJ submits that the best rule is recognizing privacy rights in one's DNA.

ARGUMENTS

Grave and fundamental privacy interests are intertwined with DNA evidence, and those concerns will only grow as medicine and technology progress. The potential to unjustly abuse DNA evidence is illustrated by the Court of Appeals' opinion, erroneously holding that anyone who lives in the same city as a non-law-abiding parent, sibling, or child can expect to be arrested if their DNA shows up at a local crime scene. *Opinion* ¶43.[1] *But see State v. Noriega*, 187 Ariz. 282, 285 (App. 1996) (mere presence); *Tison v. Arizona*, 481 U.S. 137, 184 n.20 (1987) (J. Brennan, dissenting) (anachronistic instinct concerning "sins of the father").

Regardless of whether the Court acknowledges that looming danger now or later, Mitcham is still entitled to relief today. *See Carpenter v. United States*, 138 S.Ct. 2206, 2219 (2018) ("[D]imished privacy interests" still invoke Fourth Amendment protection). Accordingly, this brief addresses (1) the need for privacy in DNA, (2) the misapplication of the federal exclusionary rule, and (3) the need for stronger state constitutional protections in response.

[1] Judge McMurdie also expressed this point at oral argument: "So it sounds to me like you have probable cause for both brothers." https://www.youtube.com/watch?v=mTsLJLQ6KZE (last visited December 13, 2023), 23:40-23:50. This assumption is erroneous because it would necessarily apply to any close male relative living in the same city.

I. The Opinion and Concurrence Both Use Clearly Erroneous Reasoning in Explaining Whether a Reasonable Search Occurred.

AACJ agrees that the majority's holding regarding the Fourth Amendment violation in this case is generally "unremarkable." Response, 16-17. It holds that citizens have some reasonable expectation of privacy in their DNA and interfering with that privacy by going beyond the scope of a consent search amounts to a violation. Nonetheless, the opinion contains erroneous language that is serious enough to warrant depublication if not review. *See* ARCAP 28(f).

The title and reasoning of §A of the opinion is inaccurate and generally misses the point of *Mario W. v. Kaipio*, 230 Ariz. 122 (2012), and *Maryland v. King*, 569 U.S. 435 (2013). *Opinion* ¶¶19-27. *Mario W.* and *King* involved quasi-administrative DNA searches governed by statute with built-in judicial oversight, as opposed to criminal investigations led by individual officers. For that very reason, no warrant was required in *King*.

Moreover, contrary to the title of §A, neither *King* nor *Mario W.* involved evidence already in the State's possession—they concerned the collection and analysis of such evidence. The concluding sentence of §A restates that same inaccuracy: "[C]reating a DNA profile *from evidence in the State's possession* does not always require a search warrant." *Opinion* ¶27 (emphasis added). Instead, since DNA profiles are entitled to at least *some* reasonable expectation of privacy, this sentence should state the unremarkable: "creating a DNA profile sometimes, but not

always, requires a search warrant." If there is statutory and judicial oversight for a quasi-administrative DNA search, no warrant is required. But absent those safeguards—when an officer is hunting for criminal evidence—a warrant (or a warrant exception) is required before extracting DNA directly from a citizen. Judge Catlett correctly criticized the majority for impliedly creating "a new probable cause or reasonable suspicion exception to the warrant requirement for DNA profiles." *Concurrence* ¶58.

AACJ agrees with the majority's conclusion that DNA testing beyond the scope of previously granted consent is a "Fourth Amendment violation." *Opinion* ¶¶28-36. The concurrence floated the idea that the legality of Mitcham's 2015 blood draw forever defeats any privacy claim related to DNA in that blood. *Concurrence* ¶78. The scope of a warrantless search is "defined by the object of the search," *United States v. Ross*, 456 U.S. 798, 824 (1982), and the scope of the consent was only "to determine alcohol concentration or drug content," *State v. Valenzuela*, 239 Ariz. 299, 301 ¶5 (2016). DNA cannot be found in an alcohol concentration analysis; therefore, Mitcham's consent could not authorize searching that DNA.

The concurrence's view that "Mitcham did not have a reasonable expectation of privacy in the non-coding regions of DNA," *Concurrence* ¶63, is a dangerous position that inexorably would lead to police collecting DNA samples of all citizens to enter into a comprehensive database. *See State v. Hummons*, 227 Ariz. 78, ¶13

(2011) (expressing concern that police could "'create a new form of police investigation' by routinely illegally seizing individuals, knowing that the subsequent discovery of a warrant would provide after-the-fact justification for illegal conduct.") (quoting *United States v. Gross*, 624 F.3d 309, 320-21 (6th Cir. 2010)). Elizabeth Anne Brown, "Your DNA Can Now Be Pulled From Thin Air. Privacy Experts Are Worried," N.Y. TIMES (May 15, 2023), https://www.nytimes.com/2023/05/15/science/environmental-dna-ethics-privacy.html; Sui-Lee Wee & Paul Mozur, "China's Genetic Research on Ethnic Minorities Sets Off Science Backlash," NEW YORK TIMES (Dec. 4, 2019), https://www.nytimes.com/2019/12/04/business/china-dna-science-surveillance.html.

To be sure, Judge Catlett framed the question correctly; if there is no reasonable expectation of privacy, there is no search. But because he ignores the Brave-New-World scenario that necessarily results, his answer necessarily is wrong. He further assumes that this "junk" DNA is otherwise useless but for identification, a point the Supreme Court carefully avoided. *King*, 569 U.S. at 442 ("The full potential for use of genetic markets in medicine and science is still being explored."); *id*. at 448 (hedging language and stating "junk" DNA was "not known to have any association" with other characteristics). That the DNA kit police typically use is focused on particular alleles does not alter the fact that investigators search the

entirety of DNA to the information encoded in those particular alleles. In other words, extracting the DNA profile involves a "search" of all the DNA but a "seizure" only of the noncoding parts used to form the profile.

Furthermore, a person may retain possessory rights over biological samples removed from the body, even if the individual's personal identity is no longer tied to the sample or data obtained therefrom. *See generally*, Petrini, Carlo, *Ethical and legal considerations regarding the ownership and commercial use of human biological materials and their derivatives*, 3 J. Blood Med. 87-96 (Aug. 7, 2012), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3440234/; *e.g.*, *Havasupai Tribe of Havasupai Reservation v. Ariz. Bd. of Regents*, 220 Ariz. 214, 220-21 ¶¶13-15 (2008) (concerning the distribution and wide-ranging research of biological information obtained from Havasupai members under other pretenses).

Judge Catlett echoes a point suggested in separate opinions by Justice Bolick in *Jean*, 243 Ariz. at 354 ¶93, and Justice Gorsuch in *Carpenter*, 138 S.Ct. at 2261: the reasonable-expectation-of-privacy test lacks clarity. *Concurrence* ¶67. Like Justice Gorsuch, Judge Catlett looks to a new privacy theory, "positive law floor," for guidance. *Concurrence* ¶67 (citing Baude & Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1852 (2016)); *Carpenter*, 138 S.Ct. at 2262-63 (same). There is one glaring problem with Judge Catlett's analysis, however: as an intermediate state appellate judge, he seeks to replace the test from

Katz v. United States, 389 U.S. 347 (1967), rather than supplement it.

It is also notable that Justice Gorsuch proclaimed "most lawyers and judges today"—including himself—believe that the government cannot "secure your DNA from 23andMe without a warrant or probable cause" without running afoul of *Katz*, despite the third-party doctrine requiring otherwise. *Carpenter*, 138 S.Ct. at 2262.

AACJ agrees with Justice Gorsuch's discussion in *Carpenter* of the role of positive law in determining privacy rights. 138 S.Ct. at 2267-72. This Court can host the discussion in the context of article 2, section 8 of the Arizona Constitution. Just as "*Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it," *United States v. Jones*, 565 U.S. 400, 414 (2012) (Sotomayor, J., concurring), a positive-law-floor test could augment, without displacing or diminishing, the *Katz* test.

Amici cannot enlarge the issues. *Cruz v. Blair*, 255 Ariz. 335, 344 n.5 (2023). However, this Court may do so by accepting review and ordering supplemental briefing—particularly when this Court must "affirm the trial court's ruling if the result was legally correct for any reason." *State v. Hernandez*, 244 Ariz. 1, 4 ¶10 (2018) (citations omitted).

II. The Majority Misapplied the Federal Exclusionary Rule.

In response to the State's "kitchen sink" approach regarding exceptions to the exclusionary rule, *State v. West*, 176 Ariz. 432, 439 (1993), the majority ignored the

State's good-faith and attenuation arguments and only addressed the independent source and inevitable discovery doctrines. It first seemingly attempts to apply the independent source doctrine without either naming it or acknowledging the doctrine's requirements. *Opinion* ¶¶37-46; *accord*, Response, 17. The Supreme Court first explained this exception to the exclusionary rule in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920): "Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

To distill Mitcham's criticism here, the doctrine addresses evidence actually collected—not some hypothetical collection based on suppositions about the trajectory of the investigation—and requires an inquiry into whether the historical evidence collection that actually occurred had any connection to the illegality whatsoever. Petition, 13-14 (citing *State v. Boll*, 651 N.W.2d 710, ¶22 (S.D. 2002)). Thus, it is not enough to say the officers nevertheless had probable cause (although that conclusion was also in error, as noted above).[2] Rather, the record needed to show

[2] For this reason, counsel's purported concession below is irrelevant. *Opinion* ¶45. That claim is not evidence, it was not evidence presented during the suppression hearing, and it cannot change the independent source doctrine.

that officers would have still arrested Mitcham absent a conclusive DNA match first. *Opinion* ¶15 (review limited to evidence at suppression hearing).[3] The simple fact that the officer (unlawfully) conducted DNA testing before arresting Mitcham is sufficient indication that the subsequent arrest was not "independent" from the illegality. Put another way, when the majority states, "And once Mitcham was arrested…," it is describing a hypothetical decision by officers that has no support in the record. *Opinion* ¶46.

Next, while expressly applying the inevitable discovery doctrine, it again violates the standard of review it originally espoused. Unlike the independent source doctrine, inevitable discovery does deal in hypotheticals, though they must be based in "demonstrated historical facts," not speculation, *Nix v. Williams*, 467 U.S. 431, 444 n.5, 448 (1984), regarding the actual trajectory of "an independent search [already] underway" before the illegality occurred. *United States v. Boatwright*, 822 F.2d 862, 865 (9th Cir. 1987). It is for this reason that Mitcham claimed waiver. *See Opinion* ¶48. Had the State raised this issue, any defendant in these circumstances could have presented myriad reasons why entering those subsequent plea agreements would have been uncertain. But absent a sufficient record, it is impossible to

[3] The opinion also notes that it is unclear whether Mitcham was arrested based on an arrest warrant. *Opinion* ¶40. If an arrest warrant was issued, then the independent source doctrine would require a court to consider whether tainted evidence had been presented and affected the magistrate. If this is a determinative factor, then remand is warranted for factual findings on this point.

determine whether suppression would leave the police in a better, worse, or the same position than if no constitutional violation had occurred. *Nix*, 467 U.S. at 448. On one hand, there are reasons why the first-degree murder charge would have encouraged pleading on lesser, unrelated charges: the pleas could amount to time-served sentences or triggered drug treatment services. On the other, absent the first-degree murder charge, Mitcham certainly would have been motivated to fight his case to prevent DNA testing. This involves assumptions upon assumptions regarding events transpiring over the course of several years, making it impossible for any appellate court to conclude in the first instance that, absent the illegality, Mitcham still would have pled guilty.

Putting aside the glaring errors in the majority opinion, this Court also should be cognizant of how the opinion implicitly diminishes other fundamental principles through erroneous reasoning. The majority opinion conflicts with this Court's holding in *Brown v. McClennen*, 239 Ariz. 521 (2016). This Court rejected the State's argument "that the exception applies because if Brown had refused consent, the deputy would have obtained a search warrant and legally drawn Brown's blood," finding that "[t]he State's view of the inevitable discovery exception would swallow the rule." *Id*. at 524 ¶¶13-14. It explained that, for the inevitable discovery doctrine to apply, "the evidence would have been lawfully discovered despite the unlawful behavior and independent of it." *Id*. at 525 ¶14. "But because the inevitable

discovery exception cannot excuse the failure to secure a warrant in the first place, the exclusionary rule applies." *Id*. ¶15. When police illegally searched Mitcham's DNA, it was far from inevitable that Mitcham would accept a plea agreement many years later; instead, it was entirely unpredictable. The State's purported confidence in its general ability to secure convictions in the next few years is not equivalent to a police department's written policy on inventory searches under specific circumstances. *See State v. Acosta*, 166 Ariz. 254, 258-59 (App. 1990).

The State is grasping at straws to salvage a case against Mitcham after Detective Lockerby lawlessly searched Mitcham's DNA. This is exactly the kind of reckless (or at least grossly negligent) violation of the Fourth Amendment that the federal exclusionary rule seeks to deter. *Herring v. United States*, 555 U.S. 135, 144 (2009). "The exclusionary rule makes the promise of the Fourth Amendment…more than an aspiration to be circumvented at the whim of an aggressive investigating officer." *State v. Scott*, 255 Ariz. 288, 296 ¶28 (App. 2023). In this country, even if "in many instances this will merely impose inconvenience on the authorities, the warrant requirement marks the dividing line between the rule of law and tyranny." *Jean*, 243 Ariz. at 353 ¶90 (Bolick, J., concurring and dissenting in part). This case involves an illegal search for which no exception to the exclusionary rule applies; for this reason, the trial court correctly suppressed the evidence. This Court should reinstate that ruling.

III. This Court should Reinvigorate the State Constitutional Exclusionary Rule.

A. Historical Purpose of Exclusionary Rule is Judicial Integrity, Not Just Deterrence.

The exclusionary rule is rooted in the interplay between the Fourth and Fifth Amendments, as explained in *Boyd v. United States*, 116 U.S. 616 (1886), and it was created in *Weeks v. United States*, 232 U.S. 383 (1914), for the purpose of maintaining judicial integrity, not just police deterrence. David J. Euchner & Barbara E. Bergman, ARIZONA CRIMINAL PRACTICE MANUAL § 14:1 (2023-24 ed.). In *Weeks*, 232 U.S. at 394, the Court explained that allowing illegally obtained evidence in court "would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *See also Silverthorne Lumber*, 251 U.S. at 392.

Through the passage of time (and some selective quoting), some courts began to chip away at the original integrity-of-the-judiciary justification. Courts first latched onto a sentence provided without citation in *Walder v. United States*, 347 U.S. 62, 65 (1954), to erroneously imply the rule was based principally on deterrence. *See People v. Martin*, 290 P.2d 855, 857 (Cal. 1955); *Elkins v. United States*, 364 U.S. 206, 217 (1960) (citing *Eleuteri v. Richman*, 141 A.2d 46, 50 (N.J. 1958)). And only later, in *United States v. Calandra*, 414 U.S. 338, 348 (1974), did

the Court begin labelling the rule "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right." Now, it is commonplace for the Court to assert, against all historical evidence to the contrary, that "[a]s late as our 1971 decision in *Whitely v. Warden, Wyo. State Penitentiary*, the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule." *Davis v. United States*, 564 U.S. 229, 238 (2011) (internal citations and quotations omitted). It views the deterrent model as recognizing and rejecting the errors of past "expansive dicta." *Id*. at 237.

The modern Court's claim regarding the Warren Court's "expansive dicta" is simply wrong. *See Wong Sun v. United States*, 371 U.S. 471, 485 (quoting independent source doctrine). Modern-day jurists who claim reliance on the text of the constitution cannot see an exclusionary rule in the text; but they need look no further than the original originalist and textualist, Hugo Black, who studied the issue for twelve years and eventually found it. *Mapp v. Ohio*, 367 U.S. 643, 661-63 (1961) (Black, J., concurring).

B. Arizona Should Expand the State Constitutional Exclusionary Rule through Article 2, Section 8.

In *State v. Bolt* and *State v. Ault*, this Court relied on the state constitution as a bastion of protection for Arizonans because of the U.S. Supreme Court's shrinking, revisionist interpretation of the Fourth Amendment's historical protections. *Bolt*,

142 Ariz. 260, 264 (1984); *Ault*, 150 Ariz. 459, 466 (1986). The State of Washington—upon whose constitution article 2, section 8 is based—recognized the same concern and has reaffirmed the original purpose of the exclusionary rule, paving the way for Arizona. Timothy Sandefur, *The Arizona "Private Affairs" Clause*, 51 ARIZ. ST. L.J. 723, 723 (2019); *Jean*, 243 Ariz. at 354 ¶96 (Bolick, J., concurring and dissenting in part).

The Washington Supreme Court first recognized the exclusionary rule in *State v. Gibbons*, 203 P. 390 (Wash. 1922). Like *Weeks*, *Gibbons* found the exclusionary rule's source not only in the text of the Fourth Amendment and its state analog but also of the Fifth Amendment's prohibition on compelled self-incrimination, not just through *testimony* but also *evidence* against oneself. *Id*. at 395. *See also People v. Marxhausen*, 171 N.W. 557 (Mich. 1919). There is no reason to believe Arizona's exclusionary rule was any different from Washington's.[4]

After *Mapp*, states did not need to interpret their state constitutional provisions when they could rely on the Fourth Amendment. As a result, states like Washington, which had modeled their exclusionary rules on the *Weeks* rule, had no need to propound on its state constitution's independent foundation and scope. But

[4] In *Wolf v. Colorado*, the Court incorrectly suggest Arizona had "rejected" *Weeks*. 338 U.S. 25, 35 (1949) (Table E). The case it cited for authority said no such thing. In *Argetakis v. State*, 24 Ariz. 599, 610-11 (1923), this Court found the facts of the case before it akin to those in *Adams v. New York*, 192 U.S. 585 (1904), in that no illegal search or seizure had in fact occurred.

as the U.S. Supreme Court has eroded these protections and recast the exclusionary rule as focused on deterring police misconduct, the Washington Supreme Court raised its state constitutional exclusionary rule from its slumber. *See State v. White*, 640 P.2d 1061, 1066-67, 1070-71 (Wash. 1982) (rejecting *Michigan v. DeFillippo*, 443 U.S. 31 (1979), under Washington Constitution).

Reaffirming the state exclusionary rule will "provide greater certainty and predictability to defendants and law-enforcement alike than hitching our jurisprudence to often amorphous and constantly evolving U.S. Supreme Court decisions." *Jean*, 243 Ariz. at 354 ¶94 (Bolick, J., concurring and dissenting in part). By unhitching its exclusionary-rule jurisprudence from the Fourth Amendment, Arizona courts can provide such certainty. AACJ requests this Court recognize (after ordering supplemental briefing, as discussed above) that the true primary purpose of the exclusionary rule is judicial integrity, with deterring police misconduct as a secondary benefit of the rule.

CONCLUSION

AACJ requests this Court grant review and affirm the trial court's ruling, or alternatively, depublish the opinion.

RESPECTFULLY SUBMITTED this 13th day of December, 2023.

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