ARIZONA SUPREME COURT

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

STATE OF ARIZONA'S SUPPLEMENTAL BRIEF

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QUESTION(S) PRESENTED FOR REVIEW

1. Did the Court of Appeals err in reversing the trial court's suppression order?

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

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The Court of Appeals correctly reversed the trial court's order. Below the State first argues that Mitcham did not have a reasonable expectation of privacy in his short tandem repeat (STR) DNA profile. Second, the State argues that the trial court incorrectly rejected any exceptions to the exclusionary rule. Third, the State argues that no warrant is required to sequence a DNA profile from lawfully held evidence.

I. THE COURT OF APPEALS CORRECTLY HELD THAT A WARRANT WAS NOT REQUIRED TO CREATE A DNA PROFILE FROM MITCHAM'S STATE-HELD BLOOD SAMPLE.

The State argued in the court of appeals, and contends below in Section III, that *Maryland v. King* held sequencing a DNA profile from lawfully obtained evidence is not a second "search" within the meaning of the Fourth Amendment: "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." 569 U.S. 435, 464 (2013). Opening Br. at 15-22. The State therefore maintains that *King* rendered untenable this Court's earlier holding that sequencing a DNA profile was "a second more extensive" search. *Mario W. v. Kaipio*, 230 Ariz. 122, 127, ¶ 20 (2012). In other words, sequencing a DNA profile is not a second search, and doing so without a warrant does not violate the Fourth Amendment.

The majority, however, ultimately rejected the State's argument against the second search analysis holding 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." *State v. Mitcham*, 256 Ariz. 104, ___, ¶ 22 (App. 2023). The opinion then tried 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 concurrence also agreed that *Mario W.*'s second search analysis survived *King*. It concluded 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." *Mitcham*, at ¶ 55. It departed from the majority by concluding that extracting the DNA profile here was not a search. *See id.* at ¶ 68 ("There are four factors that, when existing together, 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." (footnote omitted)).

The trial court found that *King* was "largely inapplicable." R.O.A., Item 6, at 3. With that ruling, the court found 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." *Id.* Although the State disagrees with portions of the majority and concurrence, it agrees both were correct to reverse the trial court's order.

At a minimum, the State agrees with the majority's holding that the Fourth Amendment does not always require a search warrant to develop a DNA profile. As much was clear in *King*—"[t]o say that no warrant is required is merely to acknowledge that 'rather than employing a *per se* rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.'" *King*, 569 U.S. at 448 (quoting *Illinois v. McArthur*, 531 U.S. 326, 331 (2001)).

a. THE TRIAL COURT INCORRECTLY RULED THE STATE VIOLATED MITCHAM'S REASONABLE EXPECTATION OF PRIVACY. THE MAJORITY ERRED BY FINDING THE STATE EXCEEDED THE SCOPE OF CONSENT AND THAT DNA SEQUENCING IS EQUIVALENT TO CONTAINER SEARCHES.

As the concurrence pointed out, the majority impliedly found that sequencing a DNA profile from the 2015 DUI sample was an unreasonable search under the Fourth Amendment. *See* *Mitcham*, at ¶ 57. The majority did not clearly define its reasons for reaching that conclusion, but it offered two clues. First, it concluded the State exceeded the scope of consent. *See* *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."). Second, sequencing a DNA profile from lawfully obtained evidence was the equivalent of a container, or cellphone, search. *See id.* at ¶ 30 ("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.").

The concurrence was correct to reject these two concerns and find that Mitcham had no reasonable expectation of privacy.

i. Mitcham's consent to the 2015 blood draw did not affect his reasonable expectation of privacy in 2018.

Mitcham's 2015 DUI blood sample was obtained through consent following the Admin Per Se / Implied Consent warning in a DUI investigation. R.O.A., Item 1, Attch. A. That form authorizes a blood draw to "determine alcohol concentration or drug content," but it does not discuss DNA sequencing. Once Mitcham's blood tested positive for alcohol, it became central evidence of his DUI. As the concurrence found, "[e]ven 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." *Mitcham*, at ¶ 78 (citing *People v. King*, 232 A.D.2d 111, 117-18 (N.Y. App. Div. 1997).

This position is not novel. The Ninth Circuit has held that "[n]o claim can be made that items seized in the course of a consent search, if found, must be returned when consent is revoked. Such a rule would lead to the implausible result that

incriminating evidence seized in the course of a consent search could be retrieved by a revocation of consent." *Jones v. Barry*, 722 F.2d 443, 449 n.9 (9th Cir. 1983). Thus, police routinely submit evidence obtained by consent for forensic testing because it does not violate a reasonable expectation of privacy.

Drugs are the most common example. There's no contention that it violates the Fourth Amendment to identify an unknown substance with forensic testing. *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) ("A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular test."). Similarly, courts uphold forensic tests on items law enforcement obtain during booking. *United States v. Edwards*, 415 U.S. 800, 807 (1974) (finding no Fourth Amendment violation from a warrantless test of paint chips on clothing and holding "[t]his is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the 'property room' of the jail, and at a later time searched and taken for use at the subsequent criminal trial"); *People v. Serges*, --- N.W.3d ---, 2024 WL 1469924, at *11 (Mich. Ct. App. April 4, 2024) (holding that police could develop a DNA profile from blood on pants obtained from the defendant during booking).

The majority, however, offered a hypothetical to clarify its holding:

> 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.

Mitcham, at ¶ 32 (footnote omitted). That hypothetical would apply if police never lawfully obtained the biological sample necessary for DNA.[1] And like a fingerprint, there is no reason the police could not take a biological sample from the seized suitcase and develop a DNA profile. *See King*, 569 U.S. at 460. Similarly, there is no dispute that the 2015 DUI sample was lawfully obtained by Mitcham's consent, so it is like the briefcase that was lawfully obtained in the majority's hypothetical.

ii. A STR DNA Profile is not the Equivalent of a container or cellphone.

Second, sequencing a DNA profile is not the equivalent to a container or cellphone search. People necessarily expect that the contents placed inside mailed boxes, trunks, and purses, or the intimate personal information in cellphones will be shielded from public view. *Walter v. United States*, 447 U.S. 649, 654 (1980) (pornography sent by mail in individual boxes); *United States v. Chadwick*, 433

[1] In addressing obtaining samples, the State has already agreed that "[a] buccal swab 'is still a search as the law defines that term,' *King*, 569 U.S. at 446, and a *Terry* stop is a search and seizure. *State v. Boteo-Flores*, 230 Ariz. 105, 107, ¶ 11 (2012)." Consolidated Resp. to Amicus, at 5 n.2.

U.S. 1, 15-16 (1977) (footlocker inside of car), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991); *Riley v. California*, 573 U.S. 373, 401 (2014) (searching the contents of a cellphone incident to arrest); *In re Tiffany O.*, 217 Ariz. 370, 375, ¶ 17 (App. 2007) (contents of a purse incident to arrest).

Of course, the contents of containers or cellphones are potentially unlimited. As one commentator explains, "[t]he Orthodox Jew on Yom Kippur with an apple core in her purse, the Catholic juvenile with birth control pills in hers, and the English literature professor with sleazy novels in her trunk all have a fair claim to freedom from unregulated intrusions into their purses or luggage." David H. Kaye, *On the "Considered Analysis" of Collecting DNA Before Conviction*, 60 UCLA L. Rev. Discourse 104, 124 (2013). It is unsurprising then that the Fourth Amendment distinguishes between legally possessing someone's luggage and searching the contents of someone's luggage.

DNA sequencing is different and not "the analog to opening the steamer trunk in *Chadwick* and the purse in *Tiffany O.*" *Mario W.*, 230 Ariz. at 127, ¶ 20 (concluding that sequencing a DNA profile is like a container search). STR DNA profiles used by law enforcement agencies only reveal one item—a person's identity. Given the limited information produced by a STR DNA profile, container cases are not comparable:

> A bare desire to avoid being linked to a crime (at least through a method that is highly accurate) deserves no Fourth

> Amendment protection. Because DNA laboratories do not rummage through the genome for information that merits protection, the container cases are inapposite. When the data acquisition procedure is sufficiently narrow in its scope, as in *Jacobsen*, *Place*, and *Caballes*, it is not a search. The distillation of the data from the biological sample therefore is not a second search, even though, as *Mario W.* rightly observes, it implicates distinct interests from swabbing the cheek or pricking the finger of an arrestee. The DNA profile may be unique, and it certainly is an inherited characteristic of the individual, but not all that is genetic and unique is "intimate personal information" that merits constitutional protection.

Kaye, *supra*, at 126.[2]

Related to this point, Mitcham argues that this Court should require a warrant based on the Supreme Court's decisions in *Kyllo v. United States*, 533 U.S. 27 (2001) and *Carpenter v. United States*, 585 U.S. 296 (2018). Resp. to Cross-Pet. for Rev. at 5-7. In *Kyllo*, thermal imaging allowed police to "explore details of the home that would previously have been unknowable without physical intrusion." 533 U.S. at 40. And in *Carpenter*, cell site location information would give the

[2] *Illinois v. Caballes*, 543 U.S. 405, 409-10 (2005) ("The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."); *United States v. Place*, 462 U.S. 696, 707 (1983) ("Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited.").

State "unrestricted access to . . . physical location information" that is "deeply revealing." 585 U.S. at 320. For the reasons discussed above, STR DNA is incomparable to the contents of a person's home, or their detailed movements over the course of years. This argument is, therefore, no different from the container cases discussed above.

King is instructive here if not determinative. 569 U.S. at 465. As with *Jacobsen*, *Caballes*, and *Place*, the limited information obtained from an STR DNA profile is not the equivalent of a container search.

iii. At a minimum, the concurrence correctly found that Mitcham had no reasonable expectation of privacy in his STR DNA profile.

In contrast, the concurrence addressed whether sequencing a DNA profile was reasonable, concluding that "Mitcham did not have a reasonable expectation of privacy in the noncoding regions of DNA the State lawfully possessed in 2018." *Mitcham*, at ¶ 53. To reach that conclusion, the concurrence relied on the following "four factors" considered together: (1) the STR-generated DNA profile is like a fingerprint; (2) the State legally possessed Mitcham's 2015 blood sample; (3) Mitcham's 2015 DUI blood sample contained evidence of a crime; and (4) the State had probable cause to believe Mitcham committed murder, which would have required a DNA sample. *Id.* at ¶¶ 68-85 & n.7. Mitcham disputes the importance of each of these points. Resp. to Cross Pet. for Rev. at 11-19. The

second and third points were discussed above, so the State addresses only the first and fourth points.

1. STR DNA profiles are like fingerprints.

The comparison "between an STR-generated DNA profile and a fingerprint is apt." *Mitcham*, at ¶ 70. The Court of Appeals has already concluded that STR DNA profiles "are akin to taking fingerprints of suspects." *In re Leopoldo L.*, 209 Ariz. 249, 254, ¶ 21 (App. 2004). So has the Supreme Court. *King*, 569 U.S. at 451 ("In this respect the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.").

Mitcham argues that "[a]dvances in technology show that STR profiles yield information beyond identity, including private medical and ancestry information." Resp. to Cross-Pet. for Rev. at 9. Whatever the merits of those claims, that did not happen here. While earlier CODIS Y-STR testing led law enforcement to Mitcham, Mitcham's STR DNA profile revealed nothing other than his identity. (Ex. 6.) The potential for STR DNA to reveal medical and other personal information, is hypothetical.[3] "No such 'host of private medical facts' resides in the

[3] The article cited by Mitcham also recognizes the uncertainty of this conclusion. *See Generally* Mayra M. Bañuelos et al., *Associations Between Forensic Loci and Expression Levels of Neighboring Genes May Compromise Medical Privacy*, PNAS (Sept. 27, 2022), https://www.pnas.org/doi/10.1073/pnas.2121024119 ("Within the limitations of the publicly available data examined here, our results suggest that information on gene expression levels may be revealed by CODIS

particular noncoding STR alleles that comprise the DNA profiles in law enforcement databases." David H. Kaye, *The Genealogy Detectives: A Constitutional Analysis of "Familial Searching,"* 50 Am. Crim. L. Rev. 109, 135-36 (2013).[4]

If future advances in DNA allow law enforcement to extract more than identifying information from STR profiles, and law enforcement uses those advancements, this Court can consider those circumstances then. *King*, 569 U.S. at 464 (recognizing "science can always progress further, and those progressions may have Fourth Amendment consequences"); *State v. Burns*, 988 N.W.2d 352, 364 (Iowa 2023) ("[W]hile we appreciate that some forms of DNA analysis may provide remarkable windows into deeply personal information, we remain focused on the facts of the case before us." (internal quotation marks omitted)).

2. *The State had probable cause to believe Mitcham committed murder, which would have required a DNA sample.*

The Scottsdale Police Department obtained Mitcham's buccal swab through a warrant signed on April 9, 2018. *See* R.O.A., Item 3, at Attch. A, p.6. That

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profiles."). Even so, the article has little importance for what is happening here because police are not using STR DNA profiles to identify medical and other personal information.

[4] *See* State's Consolidated Resp. to Amici, at 11-14, discussing the statutory and rule-based on limits on both the National DNA Index System (NDIS) and the Arizona DNA Index Service (AzDIS).

affidavit included the results of the DNA comparison developed using the 2015 DUI sample, but it also included additional facts that standing alone supported probable cause, including that Allison was found murdered in her home, unknown male DNA was found in various areas of the house, familial DNA testing on the unknown male DNA indicated that it was connected to a close relative of Mark Mitcham, Mitcham is Mark's brother, and Mitcham had been arrested for DUI in January "2016" in the same city where Allison was murdered.[5] *See id.* at 7-12.

Based on this evidence, both the concurrence and majority were correct to hold that police had probable cause to arrest Mitcham. *See* *Mitcham*, at ¶ 83 (Catlett, J., concurring) (citing the majority's analysis). As the majority explained:

> 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. This information by itself was sufficient to issue a warrant to obtain a buccal swab for Mitcham's DNA.

Mitcham, ¶ 45 (quoting *State v. Sardo*, 112 Ariz. 509, 515 (1975)); *see also* *State v. Sisco*, 239 Ariz. 532, 537, ¶ 18 (2016).

Both Mitcham and the Arizona Attorneys for Criminal Justice (AACJ) argue that the above evidence was insufficient to arrest Mitcham. Resp. to Cross Pet. for Rev. at 14-18; AACJ Amicus Br. at 8-9. While the State disagrees, both the

[5] The affidavit lists 2016, but the correct date was 2015.

majority and concurrence addressed both probable cause to arrest and probable cause "to obtain a buccal swab. *See* *Mitcham*, ¶ 45; *see id.* at ¶ 84 (Catlett, J., concurring).

This evidence was certainly sufficient to obtain the warrant for Mitcham's buccal swab." *See* A.R.S. § 13-3912(4) (authorizing search warrants "[w]hen property or things to be seized consist of any item or constitute any evidence which tends to show that . . . a particular person has committed the public offense"). Probable cause to search is not the equivalent of probable cause to arrest. *See e.g.*, *United States v. Baker*, 976 F.3d 636, 645 (6th Cir. 2020) ("The probable-cause standard applies differently in different contexts. This case involves probable cause for an arrest, not a search. While the same 'prudent person standard' governs both contexts, the arrest and search inquiries 'focus' on 'different' things."); *United States v. Dawkins*, 17 F.3d 399, 404 (D.C. Cir. 1994); *Lessley v. City of Madison, Ind.*, 654 F. Supp. 2d 877, 897 (S.D. Ind. 2009); *State v. Smith*, 278 A.3d 481, 499-500 (Conn. 2022); *Butler v. United States*, 102 A.3d 736, 740 (D.C. Cir. 2014); *Caffee v. State*, 814 S.E.2d 386, 392 (Ga. 2018); *State v. Chippero*, 987 A.2d 555, 564-65 (N.J. 2009); 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 3.1(b) (6th ed. 2024).

The warrant authorizing police to obtain a buccal swab to sequence Mitcham's STR DNA profile was supported by probable cause, even after excising

any reference to the STR DNA profile developed from the 2015 DUI sample. Both the concurrence and majority correctly found that SPD had probable cause.

II. THE MAJORITY OPINION CORRECTLY HELD THAT THE INDEPENDENT SOURCE AND INEVITABLE DISCOVERY DOCTRINES APPLY.

The State focused on the independent source and inevitable discovery exceptions to the exclusionary rule in its Response to the Petition for Review, so it will not repeat them here. (Resp. to Pet. for Rev. & Cross Pet. for Rev. at 10-15. As the majority held, "We see no value in requiring the State to develop both 'closely related doctrines fully [independent source and inevitable discovery], 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." *Mitcham*, at ¶ 48 (internal citation omitted). It correctly applied the "closely related" independent source and inevitable discovery doctrines. *Id.* There is no compelling reason to require the State to ignore Mitcham's inevitable DNA match in CODIS now and in perpetuity.

Another reason the Court of Appeals did not err in reversing the trial court's suppression order is that the exclusionary rule is uncalled for under the circumstances here. The Court of Appeals rightfully acknowledged that suppression of evidence brings with it the "enormous societal cost in excluding truth." *Mitcham*, at ¶ 38 (citing *Nix v. Williams*, 467 U.S. 431, 443-45 (1984)).

Although the Court of Appeals did not address the State's "good faith exception" argument, the recent holdings in Minnesota and Wisconsin discussed below add further support to the State's position that law enforcement acted in good faith reliance on *King*.

Under "*Davis v. United States*, 'searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *State v. Jean*, 243 Ariz. 331, 342, ¶ 40 (2018) (quoting *Davis*, 564 U.S. 229, 232 (2011)). As *Jean* explained, "*Davis* requires good faith and reasonableness, not a crystal ball." *Id.* at 343, ¶ 45. Moreover, 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. Opening Br. at 30-33.

III. POLICE CAN DEVELOP A DNA PROFILE FROM LAWFULLY HELD EVIDENCE WITHOUT A SEARCH WARRANT.

The foundation of the State's argument below and in its Cross-Petition for Review is that STR DNA profiles are functionally equivalent to fingerprints for Fourth Amendment purposes. Resp. to Pet. for Rev. & Cross Pet. for Rev. at 18-22.

Police can obtain fingerprints during routine booking procedures or items lawfully in their control and place those fingerprints into IAFIS without a warrant. *See King*, 569 U.S. at 460. If so, then sequencing DNA from a biological sample lawfully held by police, should be no different.

The court of appeals, *In re Leopoldo L.*, 209 Ariz. at 254, ¶ 21, the Supreme Court, *King*, 569 U.S. at 451, and other courts have found DNA identification analogous to fingerprints. *Burns*, 988 N.W.2d at 363 ("Although it is true that humans distribute DNA continually and unconsciously, the same is true of latent fingerprints (not to mention footwear impressions, tire tracks, and other impression evidence). Like our DNA, we leave fingerprints everywhere—and generally without volition."); *Commonwealth v. Arzola*, 26 N.E.3d 185, 191 (Mass. 2015) ("Apart from the source's sex, the 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 (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 . . . .").

Given these similarities, the State contends that *King* has held that sequencing a DNA profile from lawfully obtained evidence does not infringe on a privacy interest protected by the Fourth Amendment. 569 U.S. at 464. In fact, since the petition for review was filed, two state courts have reached a similar conclusion.

Earlier this month, the Supreme Court of Minnesota addressed an argument that police violated the Fourth Amendment when they "generated and analyzed an STR profile containing DNA gathered from [a] discarded napkin." *State v. Westrom*, --- N.W.3d ---, 2024 WL 2036402, *3 (Minn. May 8, 2024). Investigators had developed an unknown single nucleotide polymorphism ("SNP") DNA profile generated from crime scene evidence. *Id.* at *2. Using genetic genealogy and a commercial DNA database, they identified the defendant as a possible suspect. *Id.* While watching the defendant, investigators seized a napkin the defendant had thrown away and developed an STR DNA profile without a warrant. *See Id.* at *2. The profile from the napkin matched the previously unknown STR DNA profile developed from the murder scene. *Id.*

The defendant moved to suppress all evidence obtained through the STR analysis of DNA taken from his discarded napkin, arguing that DNA profiles are "deeply personal" and that the seizure of the napkin gave police "access to *all* of

[his] genetic information." *Id.* at *3-*4. The Minnesota Supreme Court disagreed relying on *King*:

> The STR profile generated from [the defendant's] discarded napkin was analyzed using the same method as the STR profile in *King*. Both analyses gave police access to only the noncoding parts of the subjects' DNA; thus, the analyses were incapable of "revealing information beyond identification." Because the police had lawfully acquired possession of the napkin and did not extract from it information beyond the equivalent of a genetic "fingerprint," their analysis of the napkin was not a search.

Id. at *4 (internal citation to *King* omitted).

Just last month, the Wisconsin Court of Appeals addressed an argument that the defendant "had a reasonable expectation of privacy in his 'DNA and the information contained therein.'" *State v. Vannieuwenhoven*, 2024 WL 1879183, at *1 (Wisc. Ct. App. April 30, 2024).[6] There, police collected the defendant's DNA from an envelope he licked and voluntarily gave to law enforcement as part of a "ruse." *Id.* After concluding that "that law enforcement lawfully seized both the envelope and its contents," the court held, "[o]nce the State lawfully possessed the envelope and its contents, it was free to develop a DNA profile using the saliva from the envelope and compare that profile to the DNA from the crime scene." *Id.*

[6] Publication is pending. *See* Wisc. Stat. § 809.23.

As in *Mario W.*, the defendant argued a "second search occurred" when police analyzed the DNA. *Id.* at *4. Relying on *King*, the Court rejected this argument:

> The [State Crime Lab] analyzed [the defendant's] saliva for noncoding DNA—i.e., DNA not related to [the defendant's] race, hair color, or other phenotypes—and, therefore, the analysis did not reveal a vast amount of personal information about [the defendant]. Specifically, the [State Crime Lab] extracted the DNA from the sample that was lawfully in its possession and then created a DNA profile by determining the noncoding core loci. The only purpose for analyzing [the defendant's] DNA was to compare the loci with those of the DNA profile from the 1976 sample.

Id. at *7 (internal citations and footnotes omitted).

Each of the above cases reinforces the growing consensus. In the context of bodily fluids, the Fourth Amendment protects the privacy interest that individuals maintain over their own bodies. But once a fluid such as blood or saliva is removed from the body, DNA identification, like a fingerprint, provides no "intimate window into a person's life." *See* *Carpenter*, 585 U.S. at 311. Mitcham's DNA profile tells the prosecution nothing about his political views, professional associations, religious beliefs, movements, or any other aspect of his life history.

Mitcham cites *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989), to support his argument that the State violated the Fourth Amendment. Resp. to Cross-Pet. for Rev. at 9-10. Consistent with the State's argument in the Court of Appeals, Reply Br. at 4-5, the Wisconsin Court of Appeals found *Skinner*

distinguishable because "it dealt with a challenge to the manner in which the government collected blood and urine samples rather than the manner in which the government tested or analyzed a DNA sample once it was lawfully obtained." *Vannieuwenhoven*, at *8. *Skinner* says nothing about the issue here—the development of a DNA profile for identification purposes.

AACJ suggests the State's argument "inexorably would lead to police collecting DNA samples of all citizens to enter into a comprehensive database." AAJC Amicus at 4-5. Setting aside that police cannot seize citizens or obtain biological samples without a warrant, federal law would prohibit such a practice. *See* 34 U.S.C. § 12592(a)-(b).

Consistent with *King*, this Court should recognize that law enforcement can sequence a DNA profile from lawfully held evidence without a warrant.

IV. CONCLUSION.

Based on the above, the State asks this Court to affirm reversing the trial court's order suppressing Mitcham's DNA evidence.

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