

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellant/Respondent/Cross-
Petitioner,

v.

IAN MITCHAM,

Appellee/Petitioner/Cross-
Respondent.

No. CR-23-0236-PR

Arizona Court of Appeals
No. 1 CA-CR 23-0014

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

MITCHAM'S SUPPLEMENTAL BRIEF

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ISSUE

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

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SUPPLEMENTAL BRIEF

The lower court erred when it reversed the trial court's suppression order. First, the lower court was distracted by an irrelevant inquiry: whether officers conducted a second "search." Second, because officers exceeded the scope of Ian's consent, the warrants premised on the unlawfully obtained evidence were invalid. Finally, no exceptions to the warrant requirement apply.

1. This case turns on the scope of Ian's consent, not whether developing the DNA profile was a "search."

Both opinions below focus on a purported difference between *Mario W. v. Kaipio*, 230 Ariz. 122 (2012), and *Maryland v. King*, 569 U.S. 435 (2013). As they frame it, *Mario W.* concluded that developing a DNA profile was a second search and *King* undercut this point. See *State v. Mitcham*, 256 Ariz. 104, ¶ 22 (App. 2023); *id.* at ¶¶ 54-55 (Catlett, J., concurring).

There is no distinction. The scheme in *King* contemplated two searches: 1) the bodily intrusion upon charge and 2) the intrusion into the sample once a judicial officer determined probable cause. *King*, 569 U.S. at 443. And *King* centered on the reasonableness of the later search. *Id.* at 465. Considering the scientific and statutory safeguards, the search "did not amount to a significant invasion of privacy" *Id.* But those safeguards do not exist here. No statute constrained Lt. Lockerby's conduct and there was no finding of probable cause before the search.

In any case, whether development of a DNA profile qualifies as a second search is irrelevant. The proper focus is the scope of Ian's consent.

A. Law enforcement is bound by the scope of a defendant's consent.

Searches and seizures are limited to the scope of authorization. “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 (1980); accord *State v. Paredes*, 167 Ariz. 609, 612 (1991).

In a case on all fours with this one, the Georgia Court of Appeals suppressed a DNA profile, finding that the search exceeded the scope of the consent provided. *State v. Gerace*, 437 S.E.2d 862 (Ga.App. 1993). There, the defendant was involved in a car accident and taken to the hospital. *Id.* at 862. While at the hospital, the police read the defendant “his implied consent rights, and obtained consent to take a blood test” to determine alcohol level. *Id.* The state crime lab later developed a DNA profile which linked the defendant to an unrelated rape and sodomy case. *Id.*

The Georgia Court of Appeals found that blood collected under the implied consent provision could be tested only for alcohol or drugs. *Id.* at 863. The Court also found the defendant had a reasonable expectation of privacy in their blood. *Id.* And the Court rejected the state's claim that a lawfully obtained sample could be

used for any purpose. *Id.* Such an argument “paints the notion of consent with far too broad a brush.” *Id.*

Gerace is not alone. In *State v. Binner*, the Court of Appeals of Oregon ruled that officers could not test a blood sample for drugs when the defendant’s consent was limited to testing for alcohol. *State v. Binner*, 886 P.2d 1056, 1058 (Or.App. 1994). And California reached the same decision more recently in *People v. Pickard*, 222 Cal.Rptr.3d 686, 689 (Cal.App.Super.Ct. 2017).

Here, the state urges this Court to adopt the same arguments rejected in *Gerace*, *Binner*, and *Pickard*. Most troubling is the state’s plea for this Court to rule that “developing a DNA profile from evidence lawfully in police custody does not violate the Fourth Amendment.” Resp. PFR, 20-21. In doing so, the state disregards the boundaries of an individual’s consent.

B. Ian’s consent was limited to drug and alcohol testing.

The admin per se limited the use of Ian’s blood to alcohol and drug testing. PFR Appx. A. And the Destruction Notice provided that the “sample will have been destroyed” after 90 days. PFR Appx. B.

The concurring opinion, however, claims nobody in Ian’s position would think the state could not analyze DNA from blood in its possession. *Mitcham*, 256 Ariz. 104, ¶ 84 (Catlett, J., concurring).

Based on this information, Ian had no reason to believe that his blood would be tested for DNA. And Ian had no reason to believe that law enforcement would retain his blood after 90 days—let alone three years.

Both the state and concurring opinion draw support from cases where police properly secured a biological sample to test for DNA. For instance, the concurring opinion claims, “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.” *Id.* at ¶ 79.

But these cases are not on point. In two of the cases, police possessed DNA profiles because of warrants. *State v. Emerson*, 981 N.E.2d 787, ¶ 5 (Ohio 2012); *State v. Hauge*, 79 P.3d 131, 135 (Haw. 2003). In another, the defendant agreed to give officers hair and blood samples so they could develop a DNA profile. *Washington v. State*, 653 So.2d 362, 364 (Fla. 1994). And in the final case the defendant gave “unqualified consent to a complete search of his saliva sample” *State v. Benefield*, 103 A.3d 990, 992 (Conn.App. 2014).

None of these cases address the circumstances before this Court: officers obtained Ian’s blood sample based on limited consent and then exceeded that consent when they developed a DNA profile. *Gerace*, *Binner*, and *Pickard* are more on point. When law enforcement acquires a biological sample through consent, the scope of that consent dictates how the government can use it.

2. Because officers exceeded the scope of Ian’s consent, the warrants resulting from that violation are invalid.

It was only after law enforcement exceeded the scope of Ian’s consent that they applied for any warrant. The first was the GPS warrant. PFR Appx. E.

The GPS warrant included the findings of the familial DNA search, revealing DOC inmate Mark Mitcham could be a first-degree relative to the unknown DNA profile found at the crime scene. *Id.* at pg. 7. First-degree relatives can include a parent-child or sibling relationship. PFR Appx. C.

In the affidavit, Lt. Lockerby presented Ian as Mark’s only brother. PFR Appx. E at 7.

This was a lie of omission—several people qualified as first-degree relatives. Mark had a son and three brothers: Ian, Craig, and Eric. Ian and Craig lived in Phoenix in 2018, while Eric lived in Washington. But Lt. Lockerby did not investigate to determine the three brothers’ whereabouts in 2015, the time of the homicide. Instead, he tested Ian’s 2015 DUI blood sample for DNA without a warrant. When the DNA matched, Lockerby included the results in the GPS warrant affidavit. RT 12/9/22 at 27-28.

Law enforcement then relied on the unlawfully obtained DNA match to secure a second warrant four days later—a DNA swab. PFR Appx. H, 7. In this warrant, the officer noted that Ian lived at a home owned by his brother Craig Mitcham. *Id.* But law enforcement failed to acknowledge that Craig was also a

familial match to Mark or that Craig lived in the same home. Instead, the officers reiterated that Ian’s DNA matched the evidence found at the scene. *Id.*

As discussed in more depth below, however, when the DNA match is removed and the deceptive warrant practices are considered, there was no probable cause for either warrant. *See infra* § 3(A)(ii) (pg.9).

3. No exceptions to the warrant requirement apply.

The lower court’s primary error is its willingness to excuse the state’s failure to follow the law. The majority concluded that the DNA profile was admissible because “The State Had Probable Cause to Arrest Mitcham Even Without the DNA Profile Showing a Match” and “The DNA Evidence Would Have Inevitably Been Obtained from Mitcham’s Other Felony Convictions.” *Mitcham, 256 Ariz. 104, ¶¶ 39, 47.* And the concurring opinion believed, “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.” *Id.* at ¶ 81 (Catlett, J., concurring). These exceptions do not withstand scrutiny.

A. Exceeding the scope of Ian’s consent cannot be justified on the grounds that officers had probable cause and could have done it the right way.

The majority opinion uses probable cause as a new warrant exception. *Id.* at ¶¶ 39-46. While criticizing this, the concurring opinion uses the same approach—possibly an easier one. *Id.* at ¶¶ 58, 81-84. There are two problems with this

approach. First, the failure to secure a warrant cannot be justified on the grounds that officers could have followed the law. Second, even if such an excuse were sufficient, law enforcement did not have probable cause.

i. The state’s failure to secure a warrant cannot be excused on the grounds that it could have gotten the warrant.

Courts cannot rely on a post-hoc determination of probable cause to excuse the state’s failure to get a warrant. That’s the rule this Court approved in *Brown v. McClennon*, 239 Ariz. 521, ¶ 14 (2016). Quoting the Ninth Circuit’s decision in *U.S. v. Echegoyen*, this Court observed, “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.” *Id.* (quoting *U.S. v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986)). Or, as this Court explained when analyzing inevitable discovery, “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 probable cause test amounts to no more than the conclusion that officers could have followed the law the first time. The majority bases its probable cause standard on a single clause from *Mario W.*, taken out of context. *Mitcham*, 256 Ariz. 104, ¶ 23 (quoting *Mario W.*, 230 Ariz. 122, ¶ 31). And though the concurring judge criticized this holding as creating an exception that “could diminish—if not swallow—the warrant requirement,” the concurrence relied on

probable cause to justify the search as well. *Id.* at ¶¶ 58, 81-84 (Catlett, J., concurring).

In fact, *Mario W.* illustrates why it was unconstitutional for law enforcement to exceed the scope of Ian's consent. "But one accused of a crime, although having diminished expectations of privacy in some respects, does not forfeit Fourth Amendment protections to other offenses not charged absent either probable cause or reasonable suspicion. An arrest for vehicular homicide, for example, cannot alone justify a warrantless search of an arrestee's financial records to see if he is also an embezzler." *Mario W.*, 230 Ariz. 122, ¶ 31. This Court did not create a probable cause exception in *Mario W.* It reinforced this Court's commitment to safeguarding people against warrantless searches.

As a result, the state now tries to reframe the majority's probable cause exception as an "independent source doctrine analysis." Resp. PFR, 17.

But the majority was not engaged in an independent source analysis. The majority addressed the independent source doctrine in the next section. *See Mitcham*, 256 Ariz. 104, ¶¶ 47-48.

Rather, the majority did what they said they did: they excused law enforcement's disregard of the warrant requirement because they believed law enforcement had probable cause at the time. Probable cause is not an exception to

the warrant requirement. And courts cannot forgive law enforcement for their failure to follow the law simply because they could have.

ii. There was no probable cause.

Even if a probable cause exception existed, officers did not have probable cause here. This is illustrated by the failure of both the majority and concurring opinions to correctly apply probable cause law. Two errors permeate the decisions: 1) The lower court ignored that probable cause must be particularized to the suspect, and 2) The lower court, in its application, reduced the quantum of proof required by probable cause.

1. The lower court disregarded the requirement that probable cause be particularized.

Probable cause must be particularized to the suspect. Indeed, the majority correctly explained that probable cause exists when the 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.*” *Mitcham*, 256 Ariz. 104, ¶ 44 (cleaned up; emphasis added). As the U.S. Supreme Court explained in *Ybarra v. Illinois*, a search or seizure “must be supported by probable cause particularized with respect to that person.” *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); accord *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). Officers cannot evade this requirement on the grounds that “there exists probable cause to search or seize

another or to search the premises where the person may happen to be.” *Ybarra*, 444 U.S. at 91.

The majority below claims two facts satisfy probable cause: “the familial match and Mitcham’s proximity to the crime scene.” *Mitcham*, 256 Ariz. 104, ¶ 43.

This conclusion falls apart when the facts are considered.

At least four people qualified as first-degree relatives. Mark Mitcham had a son that lived out of state and three brothers: Ian, Craig, and Eric.

And more than one person lived near the crime scene. The buccal swab search warrant included only the address where both Craig and Ian lived in 2018. Lt. Lockerby never testified to the brothers’ whereabouts in 2015 (the year of the crime). Still, proximity pointed to at least two people: Craig and Ian.

The evidence was not particularized to Ian.

To get around this, the majority and concurring opinion both claim Ian’s attorney conceded probable cause existed as to both Ian and his brother. *See Mitcham*, 256 Ariz. 104, ¶¶ 45, 83.

First, this characterization is incorrect and unfair:

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, but that’s, that’s—

Judge Catlett: So why can’t they just arrest one of them?

Ms. Barco Penunuri: At that point, Your Honor, I think that the problem is that they’re focusing their attention on Mr. Mitcham

because of this evidence that they have in their hands. And that’s problematic because, again, all brothers at that point in the investigation could have equally been a match. And it doesn’t excuse the state’s failure to obtain a warrant in the first place as our Supreme Court held in *Brown v. McClennan*. What law enforcement should have done is obtain a warrant and then test whether it was just Mr. Mitcham or Mr. Mitcham and all his brothers.¹

The “concession” was an opening clause that defense counsel sought to distinguish—illustrated by her attempt to transition with “but that’s—”

When interrupted with a question, counsel explained two things:

- The evidence stood in equal weight to all the brothers, and
- Law enforcement had no reasoned basis to distinguish between Ian and his brothers; they simply had Ian’s blood on hand.

Defense counsel’s answer—viewed in its entirety—was that officers could only have arrested the brothers if they developed more evidence to ensure the probable cause was particularized.

Second, even if a “concession,” our courts are not bound by such concessions. *Word v. Motorola, Inc.*, 135 Ariz. 517, 520 (1983); *State v. Copeland*, 253 Ariz. 104, ¶ 16 (App. 2022). Rather, the lower court should have independently assessed whether proof that one of two people committed a crime is probable cause. The cases provide an answer: probable cause must be particularized. *Ybarra*, 444 U.S. 85, 91; *Pringle*, 540 U.S. 366, 371. Proof that one

¹ Mitcham, Oral Argument, at 23:45 to 24:37 (June 14, 2023), available at <https://www.youtube.com/watch?v=mTsLJLQ6KZE>.

of two people may have committed a crime is not probable cause, which gets to the second error.

2. The majority reduced the quantum of proof needed.

The lower court ignored the probable cause standard in a second way: the court reduced the proof needed to satisfy probable cause.

The court reasoned that “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.” *Mitcham*, 256 Ariz. 104, ¶ 45 (emphasis added).

May have is not enough.

The lower court cited *State v. Sardo* for this proposition. *See id.* (citing *State v. Sardo*, 112 Ariz. 509, 515 (1975)).

Sardo held no such thing. In *Sardo*, this Court stated the correct standard for probable cause: “The lawfulness of a warrantless arrest depends upon whether the facts and circumstances within the knowledge of the arresting officer at the time were 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)). This Court did not say probable cause was satisfied by evidence that a crime *may have* been committed. Nor did this Court say probable cause was satisfied by evidence that the suspect *may have* been the person to commit the crime.

It is not enough that evidence shows a specific person *may have* committed a crime. The evidence must show that a crime was committed and that the suspected person was the one who committed it. Officers cannot circumvent this requirement by omitting relevant evidence.

B. Neither independent source nor inevitable discovery saves the unlawful search.

Two exceptions to the warrant requirement are also at issue: independent source and inevitable discovery. Neither exception applies.

i. Finding an independent source or inevitable discovery would improperly rely on speculation.

Throughout its discussion of the exceptions, the majority below speculates about what could have happened or what law enforcement could have done.

This is improper. As the U.S. Supreme Court explained in *Nix v. Williams*, a doctrine like independent source or “inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment” *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984).

The majority relied on the direction in [A.R.S. § 13-610\(K\)](#) to “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.” See [Mitcham](#), 256 Ariz. 104, ¶ 41.

But this statute does not provide an independent source for the DNA profile. The statute does not mandate the development of a DNA profile. It merely requires that the arresting authority then transmit the sample to the Department of Public Safety. [A.R.S. § 13-610\(K\)](#).

And this is based on speculation of how police would have proceeded and what would have occurred at the initial appearance. If a person is instead summoned, the person must “report within five days of release on bail or on the person’s own recognizance” to provide the sample. [A.R.S. § 13-610\(L\)](#).

Nothing demands the initial appearance court find probable cause. The initial appearance judge must independently “determine whether there is probable cause for purposes of release from custody, and, if no probable cause is found, immediately release the person from custody” [Ariz. R. Crim. P. 4.2](#).

If a court did not find probable cause, there would be no legal reason to require a defendant’s submission to a buccal swab.

Even if police had arrested Ian and taken a buccal swab, there is no guarantee the prosecutor would have charged Ian. Prosecutors must “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause” [Ariz. R. Supreme Ct. R. 42, E.R. 3.8](#). If a prosecutor believed there was not enough evidence, Ian could have moved to have his buccal swab destroyed under [A.R.S. § 13-610\(M\)](#).

The majority's decision is a hypothesis of how things could have proceeded had police chosen to follow the law. The state could have arrested Ian, rather than summoned him. The court could have found probable cause, rather than not. The prosecution could have charged Ian, rather than refused the charge.

ii. The independent source and inevitable discovery doctrines do not prevail.

The problematic analysis continues when turning to the majority's claim that the state has an independent source for Ian's DNA profile: the CODIS entry from to Ian's 2022 convictions. *See Mitcham*, 256 Ariz. 104, ¶¶ 47-48.

As an initial point, the state did not argue independent source below. *See State v. Brita*, 158 Ariz. 121 (1988) (waiver applied to good faith argument).

Moreover, while the independent source and inevitable discovery doctrines are related, they are not the same. And the majority's discussion illustrates why they should be deemed separate. The majority's analysis is neither an independent source nor an inevitable discovery analysis. It's a mishmash of the two.

Inevitable discovery is: "The rule that evidence obtained indirectly from an illegal search is admissible, and the illegality of the search is harmless, if the evidence would have been obtained nevertheless in the ordinary course of police work." *Black's Law Dictionary* (11th ed. 2019), *inevitable-discovery rule*; *accord State v. Lamb*, 116 Ariz. 134, 138 (1977). This analysis involves no speculation; it

“focuses on demonstrated historical facts capable of ready verification or impeachment” *Nix*, 467 U.S. at 444 n.5.

Independent source, on the other hand, is: “The rule providing—as an exception to the fruit-of-the-poisonous-tree doctrine—that evidence obtained by illegal means may nonetheless be admissible if that evidence is also obtained by legal means unrelated to the original illegal conduct.” *Black’s Law Dictionary* (11th ed. 2019), *independent-source rule*. As the Supreme Court explained in *Utah v. Strieff*, “the 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). The independent source, however, must be from “activities untainted by the initial illegality.” *Murray v. U.S.*, 487 U.S. 533, 537 (1988).

The difference comes in how the evidence came into (or would have come into) law enforcement’s control. Under the independent source doctrine, law enforcement must have separately secured the evidence by untainted means. It must actually be in their possession. Under the inevitable discovery doctrine, regular police work already in progress must have been ready to discover the evidence independent of the taint.

The majority below, however, sews the doctrines together. The majority claims: “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.” [Mitcham, 256 Ariz. 104, ¶ 47](#).

The majority’s claim is the state would have inevitably discovered a lead.

This is not enough. Both doctrines focus on the *evidence*. The inevitable discovery of a lead is not the inevitable discovery of evidence. A lead requires impermissible speculation of what officers would have done with the lead.

More to the point, the state has still not independently secured Ian’s DNA profile. The DNA profile entered into CODIS was from the buccal swab taken because of the tainted warrant. The state conceded this in both their Opening Brief and their Response to the Petition for Review. OB 2 n.2; Resp. PFR 15.

Rather than explain how they have an “independent source,” the state derides any criticisms, and claims the lack of an independent source amounts to the sort of “technical error in the pleadings or proceedings” disapproved by the Arizona Constitution. Resp. PFR 15 (citing [Ariz. Const. Art. 6, § 27](#)).

But the state’s argument does nothing to identify an independent source. The independent source doctrine requires that the state has actually acquired the evidence free from the taint of their misconduct. They have not. The only profile in CODIS stems from Lockerby’s decision to bypass the Fourth Amendment.

This demonstrates just how speculative the state’s argument—and the lower court’s decision—is. The state has not proved that they independently secured (or would have inevitably secured) untainted evidence. They’ve argued that, had things gone differently, they maybe could have secured a lead. Based on that lead, they then could have possibly gotten a warrant for a swab. Once they got that warrant, they might have followed up and gotten the swab. Once they got the swab, they could have sent it out for testing. And so—four steps later—there is a path by which the state could have secured what they improperly obtained to start with.

The state’s claimed path is marked by guesswork and discretion at every step. The sort of guesswork and discretion our court of appeals said was insufficient for inevitable discovery in *State v. Snyder*, 240 Ariz. 551 (App. 2016). There, the court ruled that a backpack search could not be deemed inevitable when the officer had discretion whether to book the defendant for shoplifting. *Id.* at ¶ 28.

Law enforcement had a chance to follow the law, and they took a shortcut around the Fourth Amendment. We cannot assume police would have followed the law the next time.

Finally, this is not a defect in pleadings or proceedings; this is a defect in evidence. The state knew they did not have an actual independent source. This is why the state’s argument—and the majority’s ruling below—has muddled the two standards. It is only when the two standards are stitched together that the state can

try to bypass the warrant requirement on the grounds that officers *could* have, in theory, secured an independent source. That's not the law. The law requires an actual independent source.

4. The Arizona Constitution provides stronger protection.

Arizona's privacy provision provides even greater support for enforcing the limits of Ian's consent and limiting the application of warrant exceptions.

Article 2, Section 8 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." [Ariz. Const. Art. 2, § 8](#).

This private affairs clause sets Arizona's Constitution apart from its federal counterpart, as well as most states. *See* Timothy Sandefur, [The Arizona "Private Affairs" Clause](#), 51 *Ariz. St. L. J.* 723, 723 (2019).

In *State v. Ault*, this Court relied on Section 8 when it refused to apply the inevitable discovery exception. [State v. Ault](#), 150 *Ariz.* 459, 466 (1986). This Court noted two ways Section 8 differs from the Fourth Amendment: Section 8 is "specific in preserving the sanctity of homes and in creating a right of privacy." *Id.* Because "exceptions to the warrant requirement are narrow," this Court chose not to expand them in violation of Section 8's protection. *Id.*

Section 8 thus plays two important roles here. First, it ensures exceptions like inevitable discovery and independent source are narrowly construed. Second,

