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

CONSOLIDATED RESPONSE TO *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND ACLU OF ARIZONA AND THE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE.

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INTRODUCTION

The State files this consolidated response to both the American Civil Liberties Union (ACLU) and the Arizona ACLU's and Arizona Attorneys for Criminal Justice's separate *amicus curiae* briefs. While the ACLU argues this case would allow the State to build a comprehensive database of citizens' DNA, the State explains below that is neither legally permissible nor practicable. Here the Scottsdale Police Department (SPD) sequenced Ian Mitcham's DNA profile from evidence obtained in a separate criminal case. This is not an example of police obtaining everyday citizens' biological material to sequence DNA profiles.

AACJ focuses its *amicus* brief on a detailed discussion of the inevitable discovery doctrine. While the State argued to apply the inevitable discovery doctrine, and the court of appeals relied in part on the doctrine here, much of AACJ's detailed discussion is unnecessary given the circumstances of this case. In formulating its argument, it appears AACJ overlooked that police obtained a warrant for Mitcham's DNA profile following the initial STR match from the 2015 DUI sample. R.O.A., Item 3, at Attach. A, p.6. Nor does AACJ offer any reason for this Court to ignore Mitcham's three subsequent felony convictions that require the State enter his DNA profile into CODIS.

Neither brief offers a compelling reason for this Court to suppress Mitcham's STR DNA profile.

I. The State Cannot Build a Comprehensive Database of Citizens' DNA.

The primary argument put forth in the ACLU Amicus Brief is not based in reality. Their argument imagines "public health" agencies uniting with law enforcement to "exploit" seemingly any blood sample a "public health" official may come to possess. Br. Of Amici Curiae Am. Civil Liberties Union & ACLU of Ariz. (hereinafter "ACLU Br."), at 2. The ACLU warns of "terrifying" consequences and envisions a state where law enforcement seeks to build "a vast DNA database of Arizonans" for its own "unfettered use" including blood samples taken from "newborn babies" and "tissues of organ donors." *Id.* While the imaginary world envisioned by the ACLU is indeed frightening, it is not based on anything actually or even potentially occurring under current Arizona law.

Unlike Mitcham, whose blood sample was given voluntarily *to law enforcement*, *for a law enforcement* purpose, the ACLU focuses on a different universe of biological samples, such as "blood submitted for medical research," "organs donated for transplant" and even the testing of athletes for performance enhancing drugs. (*Id.* at 16-18). They argue that "[u]nder the government's theory, the State could extract any person's DNA from that material, create a genetic profile, and add it to the CODIS database, free of any Fourth Amendment limits." (*Id.* at 16.) However, the State's position is based in reality, which includes the fact neither the

National DNA Index Service (NDIS) nor the Arizona DNA Index Service (AzDIS) would allow indexing DNA from those consensual circumstances.

CODIS is a generic name used to describe the system that communicates with the NDIS. *Lockett v. Wray*, 271 F. Supp. 3d 205, 209 (D.D.C. 2017) (quoting FBI declarants' descriptions of CODIS and NDIS). Federal law limits the "DNA identification records" that can be stored in NDIS to the following: (1) persons convicted of crimes;[1] (2) persons who have been charged in an indictment or information with a crime; and (3) "other persons whose DNA samples are collected under applicable legal authorities, provided that DNA samples that are voluntarily submitted solely for elimination purposes shall not be included in the National DNA Index System."[2] 34 U.S.C. § 12592(a)(1)(A)-(C). NDIS also allows the DNA obtained from the following: (1) samples from crime scenes; (2) unidentified human remains; and (3) samples voluntarily contributed by relatives of missing persons. 34 U.S.C. § 12592(a)(2)-(4).

With an exception for Defense agencies, NDIS includes only DNA identification records based on DNA profiles developed by accredited laboratories

[1] Qualifying federal offenses are generally felony offenses. 28 C.F.R. § 28.2(a).

[2] "Each state has its own laws specifying which profiles can be included in their SDIS [State DNA Index Systems]." Congressional Research Service, *The Use of DNA by the Criminal Justice System and the Federal Role: Background, Current Law, and Grants*, at 3 (April 18, 2022), *available at* https://crsreports.congress.gov/product/pdf/R/R41800/23.

submitted by, or on behalf of, criminal justice agencies. 34 U.S.C. § 12592(b)(1)-(2). Information in NDIS can be maintained only by "Federal, State, and local criminal justice agencies" and disclosed for the following purposes: (1) to criminal justice agencies for identification purposes; (2) in judicial proceedings; (3) criminal defense purposes; and (4) if anonymized, various non-criminal justice purposes. 34 U.S.C. §§ 12592(b)(3)(A)-(D), 12593(b)(1)(A)-(B). Finally, a person's DNA can be removed from NDIS if that person is acquitted, or the person is convicted of an offense that is not eligible for inclusion in NDIS. *See* 34 U.S.C. § 12592(d)(1)-(2).

Arizona's DNA database is administered by the Arizona Department of Public Safety (DPS). A.R.S. §§ 13-610(H), 41–2418. DPS has developed an extensive operating manual which limits its ability to store DNA for the following: (1) persons convicted of crimes; (2) persons whose DNA samples are collected under legal authorities ("i.e. adjudicated juveniles and certain arrestees"); (3) forensic samples; (4) samples from unidentified or missing persons; (5) voluntarily contributed samples from relatives of missing persons; (6) suspect samples. Ariz. Dep't of Pub. Safety, Scientific Analysis Bureau, *CODIS Procedures Manual*, § 3.2.1.1, at 21, *available at* https://azdps.qualtraxcloud.com/showdocument.aspx?ID=3369.[3] As

[3] The ACLU contends that Arizona lacks the statutory protections cited by the Supreme Court in *King*. ACLU Br. at 11-12. Although not statutory, DPS' CODIS Procedures Manual "is to be adhered to by all National DNA Index System (NDIS) participating laboratories in the State of Arizona." *CODIS Procedures Manual*, *supra*, at 2.

with the NDIS, it includes limitations on disclosure and lists expungement criteria. *Id.* at §§ 3.3.1.1, at 28 & 3.4.2.2, at 31-32. AzDIS also includes a matrix of authorized searches. *Id.* at § 6.1.3.1, at 43. For example, DNA obtained from relatives to identify missing persons can only be searched against the database of unknown human remains. *Id.*

6.1.3 Autosearches

6.1.3.1 Indexes to be Searched

- The SDIS indexes may be configured to be searched as follows:

	Forensic Unknown, Forensic Mixture, Forensic Partial, Forensic Targeted, AZ Searches, and Y Only*	Convicted Offender, Arrestee, and AZ Offender	Multi-allelic Offender	UHR and AZ UHR Searches	Missing Person	Relatives of Missing Person	Pedigree Tree and Single Typed Node	Suspect
Forensic Unknown, Forensic Mixture, Forensic Partial, Forensic Targeted, AZ Searches, and Y Only*	X	X	X	X	X			X
AZ Forensic Targeted	X (only Forensic Unknown)	X		X (only UHR)	X			X
Convicted Offender, Arrestee, and AZ Offender	X	X		X	X			
Multi-allelic Offender	X			X	X			
UHR and AZ UHR Searches	X	X	X	X	X	X	X	X
Missing Person	X	X	X	X	X			X
Relatives of Missing Person				X				
Pedigree Tree and Single Typed Node				X				
Suspect	X			X	X			

Arizona Department of Public Safety Crime Laboratory Justitia Per Scientiam Scientific Analysis Bureau

**Y Only DNA searches may be performed as manual keyboard searches as described in the Manual Keyboard Searches section. The Y Only Index is not typically searched against the Multi-allelic Offender Index.*

From the above, it is clear that neither the NDIS nor AzDIS would allow law enforcement to build a database of citizens' DNA profiles. Thus, the ACLU's "terrifying consequences" are overstated, and this Court need not worry about them

further. However, the State briefly addresses some of the specific scenarios raised by the ACLU.

The ACLU cites the National Institutes of Health's (NIH) Biospecimen Program. (ACLU Br. at 17). However, Section D(5)(d) clearly provides:

> All NIH staff must safeguard individual privacy rights and handle Personally Identifiable Information (PII) in accordance with the Privacy Act of 1974. . . . The purpose of the CoC is to protect the privacy of research subjects by prohibiting the disclosure of identifiable, sensitive information protected by a CoC to anyone not connected to the research, except under limited circumstances (e.g., when the subject consents to such a disclosure.

Nat'l Inst. Of Health, *NIH Human Biospecimen Program*, https://policymanual.nih.gov/3008 (June 2024).

The ACLU also cites blood samples obtained under Center for Disease Control and Prevention's (CDC) National Health and Nutrition Examination Survey. (ACLU Br. at 17). *See* NHANES - About the National Health and Nutrition Examination Survey (cdc.gov). However, not only are the blood samples provided voluntarily, the program also includes express privacy protections. Primarily, "[a]ll information that relates to or describes identifiable characteristics of individuals, a practice, or an establishment will be used only for statistical purposes." https://www.cdc.gov/nchs/data/nhanes/participant/Confidentiality-Brochure-2021.pdf.

The Anti-Doping Agency follows the World Anti-Doping Code, which has published International Standards for the Protection of Privacy and Personal Information. https://www.usada.org/wp-content/uploads/2021-WADA-ISPPPI.pdf. 21 U.S.C. § 2001(b)(1)(B) (requiring that testing follow the "World Anti-Doping Code"). That code would likely prohibit the dissemination of biological material for DNA sequencing and storage in a database. § 8.3(c), at p. 16 (limiting disclosure to law enforcement when "reasonably relevant to the offense or breach in question and cannot otherwise reasonably be obtained by the relevant authorities.").

The Arizona Department of Health Services (ADHS) Laboratory tests are generally private but may be used without patient authorization" for "law enforcement purposes unless otherwise prohibited by state or federal law." https://www.azdhs.gov/preparedness/state-laboratory/index.php#lab-privacy. Both AzDIS and NDIS would not allow Arizona to upload ADHS data. The ACLU's citation to a matter in New Jersey (ACLU Br. at 19) involving the use of blood collected from newborn babies to investigate a cold case would not have been possible in Arizona. According to ACLU's lawsuit in that case, New Jersey allowed the storage of newborn bloodspots for over 20 years. Meanwhile, in Arizona, ADHS's Guide to Laboratory Services: Newborn Screening provides the following Specimen Storage and Retention Policy:

> After the newborn screening process is complete, specimens are stored at room temperature for approximately 3 months (90 days). The patient

> information is detached and shredded and the sample portion is autoclaved and discarded. The laboratory may keep the de-identified sample portion for quality assurance testing or validating new laboratory methods for newborn screening. The samples are not used for research.

Ariz. Dep't of Health Srvs., *Guide to Laboratory Services: Newborn Screening*, at 15 (Sept. 2023), *available at* https://www.azdhs.gov/documents/preparedness/state-laboratory/newborn-screening/newborn-screening-guide-to-lab-services.pdf

The ACLU's argument that the State can build a DNA database of all residents is overstated. The State is not asking to build a database, both NDIS and AzDIS preclude such a result, and the specific programs referenced by the ACLU have sufficient privacy provisions to prevent unlimited disclosure to law enforcement. There is no need for the Court to entertain the ACLU's hypotheticals that are not presented by this case, especially when the imaginary scenarios are not reasonably possible under Arizona law.

II. Once a Biological Sample is Lawfully Seized, the Development of an STR DNA Profile for Law Enforcement Purposes does not Invade a Reasonable Expectation of Privacy.

The State contends that *Maryland v. King* held that 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). Contrary to the ACLU's position, the law enforcement use of STR DNA profiles does not offer "an intimate

window into a person's life." *Carpenter v. United States*, 585 U.S. 296, 311 (2018). The ACLU conflates DNA testing for medical purposes with DNA analysis for law enforcement purposes. They point out that "DNA tests can now expose one's likelihood for having Alzheimer's, cystic fibrosis, breast cancer, Huntington's disease, and substance use disorders." (ACLU Br. at 5). The ACLU further observes that "[c]ompanies purport to be able to use DNA profiling to identify everything from our eye, hair, and skin colors, to our food preferences and allergies, to our ancestors' likely migration patterns." *Id.*

While the applications of DNA testing to other fields are exciting and interesting, it has no relationship to the manner in which law enforcement uses one's DNA. Here, the Scottsdale Police did not test Mitcham's blood to determine his health risks or the "migration patterns" of his ancestors, nor will they ever have reason to do so. Moreover, some of the characteristics listed by the ACLU, such as "our eye, hair and skin colors" are not exactly the "intimate window into a person's life" as described in *Carpenter*, but rather readily observable traits already on display for others to see.

To support their argument about the privacy in one's DNA profile, they cite to studies that upon closer inspection do little to advance their argument. For example, the ACLU cites to Nicole Wyner, et al., *Forensic Autosomal Short Tandem Repeats and Their Potential Association with Phenotype, Frontiers in Genetics*

(Aug. 6, 2020) for the proposition that STR profiles can reveal traits beyond identity such as schizophrenia, Parkinson's disease and Down Syndrome." (ACLU Br. at 7). However, the article itself also notes specifically that "[n]one of the associations found were independently causative or predictive of disease" and "[a]t present, there has been no demonstration of forensic STR variants directly causing or predicting disease." Wyner, *supra*. Setting aside the fact that law enforcement, including the prosecution, has no interest in a suspect's pre-disposition to certain diseases, the forensic use of DNA cannot predict or identify those traits anyway.

Therefore, even more than a decade after the Supreme Court decided *King*, the Court's observation remains valid: "If in the future police analyze samples to determine, for instance, an arrestee's predisposition for a particular disease or other hereditary factors not relevant to identity, that case would present additional privacy concerns not present here." *King* at 464-65.

The ACLU also cites 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. ACLU Br. at 8 n.7. Again, the conclusions in this article were tepid and acknowledged uncertainty. Bañuelos, *supra* ("[T]hese results suggest that forensic genetic loci may reveal expression

levels and, perhaps, medical information"; "[T]he CODIS genotype may be informative about those psychiatric conditions.").

The ACLU argues that many courts around the country have holdings consistent with *Mario W. v. Kaipio*' s language that "the extraction of [a person's] DNA profile" constitutes a "serious intrusion on the[ir] privacy interests," and because it "reveal[s] . . . intimate personal information about the individual," including "individual genetics," 230 Ariz. 122, 129, ¶ 32 (2012). *See generally* ACLU Br. at 4. The ACLU cites three cases in support of this position.

The first is *United States v. Davis*, 690 F.3d 226, 246 (4th Cir. 2012). However, the *Davis* case predates the 2013 U.S. Supreme Court holding in *King*. The second case cited is *State v. Medina*, 102 A.3d 661, 682 (Vt. 2014). The *Medina* case is unavailing for the ACLU's 4th Amendment argument as the Vermont court specifically held "We repeat at the outset that our holding today pertains only to the Vermont Constitution." *Id.* at 663. Finally, the ACLU cites *People v. Buza*, 413 P.3d 1132, 1152 (Cal. 2018), noting the court was "mindful of the heightened privacy interests in the sensitive information that can be extracted from a person's DNA." Yet, just two sentences later, the California Supreme Court veered a different direction than that being advocated by the ACLU. The Court recognized the safeguards against the wrongful use of sensitive information and went on to make a point similar to that which the State makes in Section I above:

> Here, the DNA Act makes the misuse of a DNA sample a felony, punishable by years of imprisonment and criminal fines. These strong sanctions substantially reduce the likelihood of an unjustified intrusion on the suspect's privacy. Like the *King* court, we acknowledge the possibility that technological change might alter the privacy interests at stake, requiring a new constitutional analysis. But we are no more inclined than that court to decide cases on the basis of speculation about future developments that may not come to pass.

Buza, 413 P.3d at 1152 (internal citation omitted).

III. ONCE A BIOLOGICAL SAMPLE IS LAWFULLY SEIZED, THE DEVELOPMENT OF AN STR DNA PROFILE FOR LAW ENFORCEMENT PURPOSES DOES NOT REQUIRE A WARRANT.

The ACLU claims that the police did not lawfully possess the blood sample in this case arguing that the State "had exceeded the 90-day destruction period to which it had committed itself, and thus its possession of the material had become unlawful." (ACLU Br. at 9). This is not accurate.

As the concurrence noted, "Mitcham also could not have reasonably expected that the State was required to destroy his blood sample." *State v.* Mitcham, 256 Ariz. 104, ¶ 75 (App. 2024) (Catlett, J., concurring). 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 (Catlett, J., concurring). 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 (Catlett, J., concurring).

The ACLU also claims that *King* expressly recognized that the creation of a DNA profile for identification purposes *is* a Fourth Amendment search," while conceding that "it relied on a bodily intrusion rationale." (ACLU Br. at p. 11). This is a misreading of *King*. The Supreme Court never said that the creation of a DNA profile is a Fourth Amendment search. In fact, they wrote the opposite to be true.

The reason *King* relied on a bodily intrusion rationale is because the only search acknowledged by the Supreme Court was the intrusion of the buccal swab, not the development of the DNA profile.

> A buccal swab is a far more gentle process than a venipuncture to draw blood. It involves but a light touch on the inside of the cheek; and **although it can be deemed a search** within the body of the arrestee, it requires no "surgical intrusions beneath the skin." The fact than an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term.

King, at 446 (citations omitted and emphasis added).

Meanwhile, the Supreme Court held that "the processing of respondent's DNA sample's 13 CODIS loci did not intrude on respondent's privacy in a way that would make his DNA identification unconstitutional." *Id* at 464. The Court went even further to clarify that "[w]hile science can always progress further, and those

progressions may have Fourth Amendment consequences, alleles at the CODIS loci are not at present revealing information beyond identification." *Id.* Just as in *King*, it is open to dispute whether the DNA testing of Mitcham's blood can reveal "any private medical information at all." *Id.* There is no other way to read *King*. The Supreme Court believed the processing of a suspect's DNA sample's CODIS loci did not intrude into an area where one has a reasonable expectation of privacy. Thus, the creation of a DNA profile for identification purposes *is not* a Fourth Amendment search and consequently, no warrant was required.

IV. THE STATE DID NOT EXCEED THE SCOPE OF CONSENT.

The ACLU argues that SPD exceeded the scope of Mitcham's consent when, three years after he voluntarily provided a blood sample, police developed a DNA profile using only the non-coding regions of Mitcham's DNA. ACLU Br. at 13-16. But the piercing of Mitcham's arm to draw blood three years earlier was the only intrusion for which a warrant or consent (as a warrant exception) was required. At that point, the Fourth Amendment protected Mitcham against the intrusion into his body for the purpose of seizing a blood sample. Mitcham expressly consented to the blood draw. R.O.A., Item 1, Attch. A. Therefore, the police did not need Mitcham's consent three years later when developing a DNA profile that involved no additional intrusion into Mitcham's body and occurred after he had pled guilty to the DUI charge where the blood sample was used as evidence.

However, the ACLU suggests an approach that would sharply depart from our Fourth Amendment jurisprudence: "But it is worth noting that in many instances of law enforcement's collection and analysis of DNA, consent is never sought at all—for example, when it is obtained from items left in the trash—and the voluntary sharing of genetic information cannot be assumed." ACLU Br. at 15. The ACLU implies that police should not have "the ability to gather information people do not intend to share." *Id.* This of course would run contrary to the doctrine of abandonment which has been regularly applied Arizona courts, *State v. Huerta*, 223 Ariz. 424, 426, ¶ 5 (App. 2010), and other courts have applied it to the collection of biological evidence. To illustrate the point, the following cases are from just the last two years: State v. Carbo, 6 N.W.3d 114, 122 (Minn. 2024) (Carbo abandoned his subjective expectation of privacy in his genetic information); *State v. Burns*, 988 N.W.2d 352, 362 (Iowa) (No reasonable expectation of privacy in the DNA on a plastic straw defendant left at a restaurant as he abandoned the DNA on the straw by leaving it on the table and made no effort to preserve it as private, and there was no societal expectation of privacy in abandoned property.); *McCurley v. State*, 653 S.W.3d 477, 490 (Tex. Ct. App. 2022) (Defendant abandoned trash, which led to development of DNA profile).

At the outset, the State has focused its inevitable discovery doctrine analysis on the fact that SPD obtained Mitcham's buccal swab though a warrant signed on

April 9, 2018. R.O.A., Item 3, at Attach. A, p.6. While that affidavit included the results of the DNA comparison developed using the 2015 DUI sample, it included additional facts, that standing alone, supported probable case. *Id.* On those facts, the majority and concurrence agreed that "'the evidence independent of that DNA profile provided sufficient probable cause to authorize Mitcham's arrest,'" *Mitcham*, 256 Ariz. at ¶ 46, and "[i]t is clear, therefore, that the State could arrest Mitcham first based on his prior arrest record and the location of his home." *Mitcham*, 256 Ariz. at ¶ 83 (Catlett, J., concurring). At the least, the State's warrant, after setting aside the DNA match from the 2015 DUI sample gave the police probable cause to obtain a buccal swap to sequence a DNA profile. *See* State's Supp. Br. at 13 (collecting cases).

V. AACJ'S BRIEF OVERLOOKS IMPORTANT FACTS.

It is unclear from their brief, but AACJ appears to contend the police never obtained Mitcham's DNA profile from a search warrant. (AACJ Br. at 17-18) If so, AACJ is wrong. Even assuming that SPD could not sequence Mitcham's DNA profile from the 2015 DUI sample without a warrant, SPD had already developed sufficient probable cause to obtain a warrant for Mitcham's DNA, and actually did so, as discussed above. In other words, Mitcham's DNA profile "would have been discovered even without the unconstitutional source." *Utah v. Strieff*, 579 U.S. 232, 238 (2016) (citing *Nix v. Williams*, 467 U.S. 431, 443-44 (1984)). Or as this Court

held, "the evidence would have been lawfully discovered despite the unlawful behavior and independent of it." *Brown v. McClennen*, 239 Ariz. 521, 525, ¶ 14 (2016). Given that the police actually obtained a warrant that led to the confirmation of Mitcham's DNA profile, *Brown* is also factually distinguishable because there, the police never obtained a warrant. *Id.* at 523, ¶ 8.

AACJ next argues that the State's position is that "Mitcham's DNA would have been collected and extracted when he was booked into jail for murder." AACJ Br. at 17 (citing Resp. to Pet. for Rev. at 7 & State Supp. Br. at 11-14). While that is factually correct, the State has not argued for that under the inevitable discovery doctrine. The majority opinion, however, did reach that conclusion. *Mitcham*, 256 Ariz. at ¶ 46 ("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)."). Although the State disagrees with AACJ's argument that this Court should not presume law enforcement follows the law and takes buccal swabs when mandated by § 13-610(K), *see United States v. Wanless*, 882 F.2d 1459, 1463-1464 n.7 (9th Cir. 1989), it is a much more straightforward analysis to apply the inevitable discovery doctrine to the profile developed from SPD's warrant.

The remainder of AACJ's brief is admittedly perplexing. It starts by claiming that this Court misapplies the inevitable discovery doctrine by determining "whether

'officers lawfully *could* have' found the same evidence through other lawful means." AAJC Br. at 2 (citing *State v. Hein*, 138 Ariz. 360, 365 (1983)). But later recognized this Court has on multiple occasions held that the inevitable discovery doctrine applies "if the state proves by a preponderance of the evidence that the disputed evidence inevitably would have been seized by lawful means." *See Brown*, 239 Ariz. at 524, ¶ 13; AACJ Br. at 5-6. In fact, at least since 1977, this Court has held the inevitable discovery rule applies "where, in the normal course of the police investigation and absent the illicit conduct, the evidence would have been discovered anyway." *State v. Lamb*, 116 Ariz. 134, 138 (1977). It is a stretch to take a single line from *Hein*—"even without the information given by Hein at the arrest site, the officers lawfully could have made a thorough search of the car and inevitably would have discovered the gun and ammunition"—to argue that this Court has misapplied the inevitable discovery doctrine, particularly when that sentence specifically uses the "would have" language AACJ prefers. *Hein*, 138 Ariz. at 365.

AACJ next discusses at length the "reasonable probability" standard other courts have used when applying the inevitable discovery doctrine. AACJ Br. at 6-10. But as stated above, this Court has held that State must prove the inevitable discovery doctrine by "a preponderance of the evidence." *Brown*, 239 Ariz. at 524, ¶ 13. Not only does the preponderance standard come from the United States Supreme Court, *Nix*, 467 U.S. at 444, it is also the standard in Arizona Rule of

Criminal Procedure 16.2(b)(1). Or course, determining what would have happened, requires an assessment of probabilities, but courts are readily capable of such inquires. *Cf. Cullison v. City of Peoria*, 120 Ariz. 165, 168 (1978) ("Probable cause, by its very nature, implies the use of probabilities. For such determination there can be no formula, because each case is decided on its own facts and circumstances."); *State v. Morris*, 246 Ariz. 154, 158, ¶ 13 (App. 2019).

Lastly, AACJ asks this Court to require that police be in "active pursuit of other investigative leads" when the evidence was seized in violation of the Fourth Amendment. AACJ Br. at 13-15. That request is borne out of a concern that "[i]t is very easy to say that an officer would have explored the purported line of investigation absent the illegal conduct." *Id.* at 15. As *Brown* held, "the inevitable discovery exception cannot excuse the failure to secure a warrant in the first place, the exclusionary rule applies." 239 Ariz. at 525, ¶ 15. SPD had Mitcham under surveillance following the Y-STR CODIS match, and it obtained Mitcham's buccal swab with a search warrant supported by probable cause after excising the DNA match from the 2015 DUI sample. This was active pursuit which would have inevitably resulted in police identifying Mitcham's identity.

AACJ essentially asks this Court to ignore that Mitcham's DNA profile must be entered into CODIS because of his felony convictions. Although argued under the independent source doctrine, the majority opinion acknowledged that both the

"'independent source'" and "'inevitable discovery'" doctrines are closely related. *Mitcham*, 256 Ariz. at ¶ 48. As the majority noted, today, those "felony convictions are an independent and inevitable cause of the creation of his CODIS profile." *Id.* AACJ offers no compelling reason for the State to ignore Mitcham's DNA profile indefinitely. Whatever label placed on the exception to the exclusionary rule, the State should be entitled to use Mitcham's DNA profile to link him to the previously unknown biological evidence from the crime scene.

CONCLUSION

The ACLU's fears of an expansive database are unfounded and certainly not implicated by the facts of this case. Here, the creation of a DNA profile showing nothing more than identifying information, from a blood sample that law enforcement possessed as part of an unrelated DUI investigation did not infringe on Mitcham's rights. In addition, AACJ fails to appreciate that the police did in fact obtain a warrant for Mitcham's buccal swab as well as the impact of Mitcham's felony convictions. Both of the closely related doctrines of inevitable discovery and independent source provide a basis to admit the DNA evidence. Therefore, this Court should affirm the reversal of the trial court's order suppressing Mitcham's DNA evidence.

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