

ARIZONA SUPREME COURT

LANE DRAPER,

Crime Victim/Petitioner,

vs.

HON. JO LYNN GENTRY, JUDGE
OF THE SUPERIOR COURT OF
THE STATE OF ARIZONA, in and
for the County of Maricopa,

Respondent Judge,

STATE OF ARIZONA,
JORDAN LEE NEZ,

Real Parties In Interest.

Arizona Supreme Court No. CR-
22-0175-PR

Court of Appeals Division One
No. 1 CA-SA 22-0096

Maricopa County Superior Court
No. CR2020-127377-001

**(FILED WITH CONSENT OF THE
PARTIES)**

***BRIEF OF AMICUS CURIAE ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE IN SUPPORT OF REAL PARTY IN INTEREST***

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I. Identity and Interest of Amicus Curiae Arizona Attorneys for Criminal Justice

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 the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens’ rights, the criminal justice system, and the role of the defense lawyer.

Amicus AACJ offers this brief in support of Real Party in Interest because preservation and protection of due process in criminal trials touches the core of the mission of AACJ to protect individual rights guaranteed by the Federal and State Constitutions and to resist all efforts to curtail such rights. This is especially relevant in cases where a witness and possible third-party wrong doer might leverage his status as a statutory victim in a manner that could thwart the truth-seeking function of the criminal process.

II. Introduction

Contrary to Petitioner's assertion, the question is not the standard for disclosure of information to a defendant, but the standard for *in camera* review.

This Court should reject Petitioner's invitation to create a new rule out of whole cloth that would upend discovery in the state. Instead, this Court should determine that the standard established in [R.S. v. Thompson](#) adequately protects victim's rights consistent with the Victims Bill of Rights and the Fourth Amendment.

The parties' briefs before this Court reflect different understandings of the procedural background of this case. The trial court order at issue states:

The Defendant seeks a direct disclosure of the GPS data from the 2014 Chevrolet Silverado. **The court will not order a direct disclosure but will allow the data to be extracted and submitted to the court for an *in camera* review.**

...

With the Court acting as a gatekeeper, information disclosed can be redacted to include only the GPS data of the 2014 Chevy Silverado from July 16, 2020 at 2:15 a.m. until 8:40 a.m.

(Petitioner's Appendix at APP-157, 04/06/22 Minute Entry at 2 (emphasis added).)

This Order is narrowly crafted and follows this Court's recent guidance in [R.S. v. Thompson](#), 251 Ariz. 111 (2021), under which a defendant who establishes a "substantial need" for discovery material that cannot be obtained by other means and a "reasonable possibility" the information would be material to the defense or necessary for cross-examination may be granted in-camera review of the requested material.

The Respondent Judge accurately applied the guidance of this Court, and in doing so balanced the Defendant's due process rights with the victim's rights; the Court should not disturb trial court's decision.

III. Defining the Parties' Rights

While the Petition and Petitioner's Supplemental Brief both frequently refer to various constitutional provisions, the rights at issue in this case are the same that were at issue in [Thompson](#): The victim's rights under Arizona's Victims' Bill of Rights ("VBR") and the defendant's federal due process right to present a complete defense and cross-examine witnesses.

A. A Defendant's Discovery Rights

Neither party disputes that a defendant has a due process right to present a complete defense and to cross-examine witnesses. See [Thompson](#), 251 Ariz. at 117 ¶ 13; [State v. Mott](#), 187 Ariz. 536, 554 (1997) ("Indeed, the fabric of due process is spun from the thread of such fundamental principles as those guaranteeing the right of a criminal defendant to put the state's case to a meaningful adversarial test and to rebut each element of the charged offense with competent, credible, and relevant evidence.").

A defendant can implement this right by, among other options, seeking discovery under Arizona Rule of Criminal Procedure 15.1(g); it states:

On the defendant's motion, a court may order **any person** to make available to the defendant material or information not included in this rule if the court finds:

- (A) the defendant has a substantial need for the material or information to prepare the defendant’s case; and
- (B) the defendant cannot obtain the substantial equivalent by other means without undue hardship.

Id. Whether a defendant has met these requirements is within the sound discretion of the trial court, which is in the best position, acting as a gatekeeper, to evaluate the defendant’s needs and any alternative sources of information. See [Thompson](#), 251 Ariz. at 119 ¶ 27 (noting that trial courts “are adept” at their gatekeeping roles with regard to safeguarding parties’ rights).

B. A Victim’s Rights to Refuse Discovery Requests

A victim, meanwhile, has a state constitutional right to “refuse an interview, deposition, or other discovery request by the defendant” [Ariz. Const. art. 2, § 2.1\(5\)](#). When the victim’s state constitutional right to refuse discovery requests conflicts with a defendant’s federal constitutional right to due process, the defendant’s right takes priority. [Thompson](#), 251 Ariz. at 118 ¶ 20 (“federal constitutional rights trump state constitutional and statutory rights . . . and a victim’s right to refuse discovery under the [victims’ bill of rights] is not absolute”). This Court balanced these competing rights by providing that when a defendant seeks discovery from a victim, a court may grant *in camera* review of the requested material if the defendant shows “a *reasonable possibility* that the information sought includes evidence that would be material to the defense or necessary to cross-examine a witness.” ¶ 1 (emphasis added).

Petitioner now contends, however, that he is entitled to heightened protections under the Fourth Amendment of the federal constitution and under Arizona's constitutional right to privacy. Specifically, he argues that the Court should require a defendant to establish "probable cause" or "a substantial probability" that the requested material would be material or necessary before granting a motion to compel discovery. (Petitioner's Supplemental Brief at 14.) But Petitioner's Fourth Amendment and privacy arguments are red herrings the Court should not entertain.

Petitioner concedes that the test announced in [Thompson](#) is constitutionally sufficient when a court orders *in camera* discovery from a victim.¹ (See Petitioner's Supplemental Brief at 1 (conceding that [Thompson](#) applies if the trial court ordered in-camera review of the GPS data)) This should be the end of the matter, given that the order below was for *in camera* review. See [R.L. Augustine Constr. Co. v. Peoria Unified Sch. Dist. No. 11](#), 188 Ariz. 368, 370 (1997) (Court "will not reach a constitutional question if a case can be fairly decided on nonconstitutional grounds") (collecting cases).

Even so, Petitioner fails to offer any reason the Fourth Amendment or right to privacy under the Arizona Constitution provide special heightened protections to *victims*. Neither provision applies differently to crime victims than to any other

¹ Indeed, the [Thompson](#) standards for in camera review provide a layer of protection greater than the warrant application process, which is not only *ex parte*, but does not first go to a neutral magistrate before there may be a disclosure.

individual. Accordingly, were this Court to fashion the new, heightened protections from the Fourth Amendment or Arizona Constitution that Petitioner proposes, these new standards would apply to all court-ordered discovery; this would burden every type of case whether criminal, civil, or otherwise. This case is not the proper vehicle to overhaul the law of discovery. The Court need not, and should not, reach these issues.

Furthermore, if the Court were to address Petitioner's Fourth Amendment arguments, it must conclude either that the Fourth Amendment does not apply or that this Court's Rules of Procedure satisfy the Fourth Amendment's reasonableness standard. It is well established that "[t]he Fourth Amendment limits searches conducted by the government, not by a private party, unless the private party acts as an 'instrument or agent' of the government." *United States v. Young*, 153 F.3d 1079, 1080 (9th Cir. 1998). Petitioner has the burden to establish that Defendant is seeking Petitioner's GPS data as an agent of the government, *see id.* ("A [party] challenging a search conducted by a private party bears the burden of showing the search was governmental action."), and he has not done so.

Defendant is a private party seeking discovery in his own self-interest. He is not an agent of the government—*i.e.*, he is not an agent of the body prosecuting him, and he is not an agent of the superior court managing his criminal case. Moreover, the fact that the trial court ordered Petitioner to produce his vehicle to a third-party company does not change this analysis: "Mere governmental

authorization of a particular type of private search in the absence of more active participation or encouragement is . . . insufficient to require the application of fourth amendment standards.” [United States v. Walther](#), 652 F.2d 788, 792 (9th Cir. 1981) (citing [United States v. Stevens](#), 601 F.2d 1075 (9th Cir. 1979); [United States v. Goldstein](#), 532 F.2d 1305 (9th Cir. 1976)). The trial court’s decision to grant Defendant’s motion to compel GPS data for *in camera* review does not implicate the Fourth Amendment.

Even if the Fourth Amendment applied, the touchstone of the Fourth Amendment is reasonableness—not probable cause or “substantial probabilities.” See [State v. Adair](#), 241 Ariz. 58, ¶ 13 (2015). The trial court’s discovery order, which is limited in scope, requires in-camera review of the GPS data requested, and requires only 1-2 hours of Petitioner’s time, is reasonable for purposes of the Fourth Amendment.

Finally, Arizona has consistently noted that Arizona’s constitution, unlike the federal constitution, provides a distinct right to privacy that is more protective than the implied federal right to privacy. See, e.g., [State v. Wilson](#), 237 Ariz. 296, 301 ¶ 23 (2015); [Rasmussen v. Fleming](#), 154 Ariz. 207, 214 (1987); [State v. Murphy](#), 117 Ariz. 57, 60 (1977). The Court should continue to do so.² But here, where

² This is particularly true as the federal and state constitutional rights to privacy continue to diverge. Compare [Murphy](#), 117 Ariz. at 60 (“Although the right of privacy is not specifically mentioned in the United States Constitution, the United States Supreme Court has found it implicit in various rights guaranteed in

Petitioner has merely cited his rights under the Arizona Constitution without meaningfully distinguishing between those rights and the Fourth Amendment, the Court need not address this issue. See [State v. Jean](#), 243 Ariz. 331, 342 ¶ 39 (2018); also [State v. Hernandez](#), 244 Ariz. 1, ¶ 23 (2018) (declining to find additional protections under art. II, § 8 beyond the home); [State v. Sisco](#), 239 Ariz. 532, ¶ 24 (2016).

Neither the Fourth Amendment nor the right to privacy under the Arizona Constitution prohibit a private company from conducting a court-ordered search of Petitioner’s GPS data and then providing that data to the trial court for in-camera review.

C. Complying with a court-ordered discovery request does not violate a victim’s rights to be free from harassment.

Petitioner summarily states that having to comply with a discovery request would violate his right as a victim to be free from harassment. (Petitioner’s Supplemental Brief at 14.) Complying with a discovery order is not inherently “extremely intrusive and harassing” and does not violate a victim’s rights to fairness, respect, or dignity.

As a practical matter, discovery is a routine part of the legal process, both criminal and civil, which is governed by the Rules of Professional Conduct.

the Bill of Rights, but only in connection with the exercise of certain personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty.’”), with [Dobbs v. Jackson Women’s Health Org.](#), 142 S. Ct. 2228, 2302 (2022) (Thomas, J., concurring).

Petitioner has provided no basis for his allegations that complying with the discovery order in this matter would subject him to any inappropriate or unprofessional treatment on the part of anyone.

IV. The Applicable Balancing Test

Under *Thompson*, once a defendant demonstrates a substantial need for the information sought, “the trial court must balance the competing rights and interests of the defendant and the victims and may order production of the information for its in-camera review.” *Thompson*, 251 Ariz. at 116 ¶ 12.

When balancing the rights of a victim and defendant, the Court should allow broad discretion to a trial court to look at all relevant factors, which may include *inter alia* the nature of the information sought, the method and scope of disclosure, and the victim’s relationship, if any, in the alleged criminal act. Here, the totality of factors weighs heavily in favor of upholding the trial court’s order.

A. The Nature of the Information Sought

When balancing the rights and interests of a defendant and victim, trial courts should consider the nature of the information sought, including the source of the information and whether the information is otherwise protected. This case involves GPS data. Unlike the medical records at issue in *Thompson*, GPS data is not otherwise privileged. Furthermore, even if the data were otherwise considered confidential in nature, Petitioner himself placed the GPS data at issue by

volunteering to law enforcement that he had used it to return to the crime scene on the night of the murder.

While it is not dispositive that GPS data is not otherwise privileged and Petitioner volunteered this information, these facts weigh in favor of permitting *in camera* disclosure. Cf. [Catrone v. Miles](#), 215 Ariz. 446, 456 ¶ 30 (App. 2007) (listing factors to consider when determining whether to permit the disclosure of confidential documents, including considering whether the party opposing disclosure waived any privileges by putting the documents “at issue” in the case).

B. Method and Scope of Disclosure

Relevant factors also include the trial court’s options for selecting an appropriate method and scope for the disclosure. For example, [Thompson](#) only provides for in-camera review, as was ordered in this case, because it is “less intrusive” than direct disclosure. 251 Ariz. at 119 ¶ 24. The trial court below further protected the information by limiting in-camera review to the relevant period, spanning from 2:15 a.m. until 8:40 a.m. on the morning of the murder.

Furthermore, the trial court placed limits on the method of the disclosure. A third party would handle the data extraction and send the data to the Court, and the process is limited in time to no more than two hours. This mere inconvenience to Petitioner is a minimal intrusion at best. The trial court’s ability to implement these limitations further weighs in favor of permitting the disclosure.

C. The Victim's Relationship to the Alleged Criminal Act

Finally, our courts should consider the victim's relationship to the alleged crime because doing so supports the court's "ultimate goal" of furthering "the truth-seeking function of judicial proceedings" and guards against the risk of wrongful convictions. See [Thompson](#), 251 Ariz. at 117 ¶ 13.

Victims, as defined by statute, include "a person against whom the criminal offense has been committed," but if the person "is killed or incapacitated," the victim may instead be "the person's spouse, parent, child, grandparent or sibling, any other person related to the person by consanguinity or affinity to the second degree or any other lawful representative of the person." See [A.R.S. § 13-4401](#)(19). While this definition does exclude the person "accused" of the crime, it does not prevent a victim from being otherwise involved in the crime. When a reputed victim is a witness or otherwise possesses relevant evidence, there is a heightened risk that immunizing such person from discovery will interfere with discovering the truth.

Often times, a victim under Arizona law may be a family member who was not a witness or otherwise had no relationship to the crime itself. A court may be rightfully skeptical, for example, of discovery requests for documents from a statutory victim who lived in another state from the decedent and did not witness, and was not otherwise allegedly involved in, the crime. Here, however, the victim's role in the alleged criminal conduct is largely unknown—he recalls

fighting with his brother and then blacked out from consuming alcohol during time of the murder—the Court’s truth-seeking responsibilities weigh heavily in favor of disclosure. As a witness and possible subject of a third-party wrongdoer defense, the information Petitioner possess is highly relevant and his status as a statutory victim must carry less weight. The trial court properly balanced the competing interest of Defendant and Petitioner.

V. Conclusion

This Court should reject Petitioner's invitation to rewrite the Rules governing discovery in our state and, instead, should determine that the standard established in [Thompson](#) adequately protects a victim's rights under the VBR and the Fourth Amendment. As such, the trial court did not abuse its discretion when it concluded Defendant established a “substantial need” for Petitioner’s GPS data, which cannot be obtained by other means, because there is a reasonable possibility that data will be material to his defense and necessary for cross-examination. Amicus supports Real Party in Interest in his request that the Court uphold the trial court’s order.

Respectfully submitted this 14th day of October, 2022.

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