IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellant, v. IAN L. MITCHAM, Appellee.	No. CR-23-0236-PR Court of Appeals No. 1 CA-CR 23-0014 Maricopa County Superior Court No. CR 2018-118086-001

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE (AACJ) IN SUPPORT OF APPELLEE

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INTRODUCTION

In its petition-stage brief, *amicus curiae* Arizona Attorneys for Criminal Justice (AACJ) covered several issues related to the privacy interests in DNA, the various exceptions to the exclusionary rule, and reasons why this Court should give greater breadth to the scope of the state constitutional exclusionary rule. In this brief, AACJ will concentrate on the inevitable discovery exception, since that is the only exception that could even arguably fit the facts of this case. As it turns out, that exception is also the least developed doctrinally.

This brief first explores why inevitable discovery has been historically a difficult doctrine for lower courts to apply and then argues that this Court needs to expound upon or clarify the sound principles it has already endorsed to assist the lower courts and practitioners (including adoption of a state constitutional rule). Second, based on the principles this Court has already affirmed, this brief describes the two branches of thought that other jurisdictions have explored that could help articulate what this Court has intended to communicate in the past. Those branches include (1) the unimpeachable historical fact analysis, and (2) active pursuit analysis, which were first implied by *Nix v. Williams*, 467 U.S. 431 (1984), and then adopted (though not in name) by this Court after *Nix*. Third, to demonstrate the effectiveness of these clarifying rules, this brief applies them to Mitcham's facts, which helps explain exactly how the court of appeals erred when applying *Nix*'s doctrine.

ARGUMENTS

I. This Court's inevitable-discovery jurisprudence is sound but needs clarification.

Nix recognized "the 'vast majority' of all courts, both state and federal," had already implemented at least some variation of what would become known universally as the inevitable discovery doctrine. 467 U.S. at 440. *See State v. Lamb*, 116 Ariz. 134, 138 (1977) (listing examples). This Court had articulated its own test in terms of reasonable probabilities without emphasis on historical facts. Those cases referenced what this Court supposed would be the "normal course of police investigation," as opposed to actual historical facts regarding officer intent, *id.* at 138, and determined whether "officers lawfully *could* have" found the same evidence through other, lawful means. *State v. Hein*, 138 Ariz. 360, 365 (1983) (emphasis added).

In *Nix*, the Supreme Court affirmed that an inevitable discovery doctrine exists, 467 U.S. at 440, but it made no effort to wade into the morass of different rules employed by the various jurisdictions. *See United States v. Cherry*, 759 F.2d 1196, 1204 (5th Cir. 1985) ("[N]o attempt was made in that case to define the contours of that exception. The Supreme Court especially provided no guidance as to what, beyond the specific facts of *Williams* itself, constitutes an 'inevitable'

discovery.").[1] As a result, it left those lower courts guessing as to whether their own rule survived. Instead, *Nix* only provided its own, two-part test: 1) the counterfactual discovery of evidence must have been a lawful inevitability; and 2) the government must prove that inevitability by a preponderance of the evidence. 467 U.S. at 444.

As to this test's application, only three facets of the opinion provide any illumination. First, the inevitability discussed in *Nix* was definite and ongoing at the time of the illegality: two hundred volunteers actively searching in the area where the body was dumped. *Id.* at 435. Second, in a footnote, the majority explained that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Id.* at 444 n.5. Third, as to the burden of proof, no jurist involved in the case ever considered anything less than the preponderance-of-evidence standard for proving an "inevitability." The Eighth Circuit below, though it did not resolve the issue, had posited that it should be either a preponderance of, or clear and convincing, evidence. *Id.* at 439-40. Although the Supreme Court ultimately adopted the lower standard, the dissent contemplated the clear-and-convincing standard as an alternative—not something lower. *Id.* at 459 (Brennan, J., dissenting).

Because these three facets of *Nix*—active pursuit, historical facts, and an

[1] *See also* Tonja Jacobi and Elliot Louthen, *The Corrosive Effect of Inevitable Discovery on the Fourth Amendment*, 171 U. Penn. L. Rev. 1 (2022).

evidentiary floor set at the preponderance—were not expressly incorporated into *Nix*'s recitation of its rule, and because the opinion makes no effort to sort through the various rules already existing in subordinate jurisdictions, lower courts struggled to apply *Nix*. For example, the Fifth Circuit applied its own precedent on the doctrine, which it erroneously found "fully consistent with *Nix v. Williams*":

> In *United States v. Brookins*, 614 F.2d 1037 (5th Cir. 1980), we set forth the prerequisites to the invocation of the inevitable discovery exception in this circuit. *Brookins* involved the admissibility of voluntary testimony of a witness, the identity of whom was obtained by means of an illegal interrogation. We held that, for the testimony to be admissible under the inevitable discovery exception, the prosecution had to demonstrate (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, (2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct, and (3) that the police also prior to the misconduct were actively pursuing the alternate line of investigation. *Id*. at 1042 n.2.

Cherry, 759 F.2d at 1204. *See also United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984), *superseded by statute on other grounds as stated in United States v. Edwards*, 728 F.3d 1286, 1292 & n.2 (11th Cir. 2013) (also following *Brookins* rule). The Fifth Circuit recognized the implied "active pursuit" component of *Nix*, which was consistent with its own prior iteration of the doctrine. But in so doing, it kept the bathwater with the bath: it concluded that a mere "reasonable probability" was also sufficient to satisfy *Nix*. This brief will discuss *Cherry* in more detail below, but the point is many jurisdictions struggled—and continue to struggle—with *Nix*.

This Court, however, reformed its recitation of the doctrine lockstep with *Nix*.

Instead of discussing whether officers "could" have found the evidence in a counterfactual (*i.e.*, the subjunctive mood of "can"), *Hein*, 138 Ariz. at 365, this Court began using the word "would" (the subjunctive of "will"). *State v. Ault*, 150 Ariz. 459, 465 (1986). This Court has applied the doctrine in cases where independent, active investigations are ongoing and where there is no unaccounted-for human volition that could interfere with the inevitability—something as certain as the sun rising at daybreak. *See State v. Jones*, 185 Ariz. 471, 482 (1996) (Las Vegas inventory search inevitable despite Bullhead City police's illegal search); *State v. Castaneda*, 150 Ariz. 382, 387 (1986) (missing body 100 yards away would be found once the sun rose). Moreover, this Court has driven home the point that "historic facts" include the offending officer's intent or course of conduct—and that it will not accept attempts to reimagine that intent. *See State v. Davolt*, 207 Ariz. 191, 204 ¶ 37 (2004) ("Here, there is hard evidence they did not."). *See also State v. Snyder*, 240 Ariz. 551, 558-59 ¶ 28 (App. 2016) (rejecting inevitability when officer had "discretion" as to future conduct). When the Court addresses this point, though, it is usually more succinct: "The exception does not turn on whether the evidence would have been discovered had the deputy acted lawfully in the first place," *Brown v. McClennen*, 239 Ariz. 521, 524-25 ¶ 14 (2016), and therefore the state cannot argue "that police would have done it right had they not done it wrong." *Davolt*, 207 Ariz. at 204 ¶ 37.

Despite this Court's fealty to *Nix*'s dictates, Arizona's lower courts and practitioners, like the courts in other jurisdictions, have still struggled to apply *Nix*. There are several potential causes for this predicament. Neither *Nix* nor this Court ever expressly adopted the "active pursuit" rule, despite hints from both courts that active pursuit is, indeed, a prerequisite. Also, application of *Nix*'s dual-probabilities test—a preponderance of evidence on top of inevitability—is akin to similar stacked probability tests that this Court has needed to clarify in the past. *See State v. Ring*, 204 Ariz. 534, 560 ¶ 79 (2003) (considering what a jury "could" have done, beyond a reasonable doubt). In addition, the prohibition in *Davolt* and *Brown*, which precludes the state from arguing "police would have done it right had they not done it wrong," is much easier to say than to apply.

The court of appeals' opinion in this case is a prime example of outstanding confusion surrounding inevitable discovery. Accordingly, AACJ urges this Court to expressly adopt the proposals described below to assist practitioners and the lower courts when grappling with this nuanced doctrine.

II. Inevitable discovery requires inevitability, not a probability.

Despite the nuanced dual-probabilities rule in *Nix*—asking courts to find an inevitability based on the preponderance of the evidence—there is no doubt what the *Nix* Court intended. It is exactly what this Court corrected in *Ault* in 1986: using a "would" standard instead of "could" for demonstrating inevitability.

> The significance of the word "would" cannot be overemphasized. It is not enough to show that the evidence "might" or "could" have been otherwise obtained. Once the illegal act is shown to have been in fact the sole effective cause of the discovery of certain evidence, such evidence is inadmissible unless the prosecution severs the causal connection by an affirmative showing that it would have acquired the evidence in any event.

6 Wayne R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment*, § 11.4(a) (6th ed. 2024) (quoting McGuire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. Crim. L., C. & P. S. 307, 315 (1964)).

This concept is not novel. "The ultimate or inevitable discovery exception to the exclusionary rule is closely related in purpose to the harmless-error rule ...." *Nix*, 467 U.S. at 443 n.4. *See also United States v. Watkins*, 13 F.4th 1202 (11th Cir. 2021) (quoting *Nix*). The harmless-error rule requires the government to prove beyond a reasonable doubt that the error did not contribute to the result. *State v. Bible*, 175 Ariz. 549, 588 (1993). *See also State v. Glissendorf*, 235 Ariz. 147, 153 ¶ 23 (2014) ("Once Glissendorf had shown error, the burden shifted to the State to prove that the error was harmless beyond a reasonable doubt.").

Regardless of this clear intent, many courts still operate with a watered-down standard, applying the subjunctive form of "can" instead of "will." This is attributable not only to the thin reasoning of *Nix* but also to a misconstruction of a parenthetical in *Bourjaily v. United States*, 483 U.S. 171, 176 (1987), where the Supreme Court briefly cited the preponderance standard for proving inevitable

discovery in a string citation covering myriad evidentiary situations.

For example, while citing the harmless-error standard, the Eleventh Circuit in *Watkins* suggested an altogether different standard. Relying on *Bourjaily*, it stated: "The [predictive] standard is not whether the evidence in fact 'would have' been discovered, but whether the preponderance of the evidence indicates it would have been—whether it more likely than not would have been." 13 F.4th at 1212. *Bourjaily* does not support *Watkins*' reasoning. If *Watkins* were correct, the rule would not be called "inevitable discovery," but "likely discovery." The Supreme Court has explained in other contexts that "reasonable probability" is even less than a preponderance standard. *See Strickland v. Washington*, 466 U.S. 668, 693-94 (1984) (prejudice standard of "reasonable probability" that result of trial would be different absent ineffective assistance of counsel is not as high as "more likely than not").

Many courts have recognized the danger of this appealing logical fallacy—*i.e.*, the "reasonable probability" standard—and taken corrective steps:

> There are, of course, semantic problems in using the preponderance of the evidence standard to prove inevitability. To say that more probably than not event "X" would have occurred is to say only that there is a 50% + chance that "X" would have occurred. Clearly, the doctrine of inevitable discovery requires something more where the discovery is based upon the expected issuance of a warrant. Otherwise, it would result in illegally seized evidence being received when there was a 49% chance that a warrant would not have issued or would not have issued in a timely fashion, hardly a showing of inevitability.

United States v. Cabassa, 62 F.3d 470, 474 (2d Cir. 1995). The Second Circuit later

observed that this semantic problem is compounded when considering a series of factual predicates that would be required to arrive at a counterfactual discovery of evidence. "[E]ven if each event in a series is individually more likely than not to happen, it still may be less than probable that the final event will occur." *United States v. Vilar*, 729 F.3d 62, 84 (2d Cir. 2013).[2]

A decade after *Cabassa*, the Second Circuit clarified its reasoning as it considered the inevitability of a warrantless arrest and a corresponding search incident to arrest:

> [W]e conclude that illegally-obtained evidence will be admissible under the inevitable discovery exception to the exclusionary rule only where a court can find, *with a high level of confidence, that each of the contingencies necessary to the legal discovery of the contested evidence would be resolved in the government's favor*.

United States v. Heath, 455 F.3d 52, 59 n.6 (2d Cir. 2006). *See also United States v. Thomas*, 524 F.3d 855, 861 (8th Cir. 2008) (Colloton, J., concurring) (citing *Cabassa* and *Heath* as persuasive). Other courts have adopted the *Cabassa*/*Heath* formulation, whether directly or indirectly.[3]

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[2] As one set of scholars has observed, "This should be obvious to anyone who understands basic statistics: if X is 55% likely to occur and Y is also 55% likely to occur, each is individually probable, but the chance of X and Y both occurring is only 30.25% (or the 55% probably of X multiplied by the 55% probability of Y)." Jacobi and Louthen, 171 U. Penn. L. Rev. at 29-30.

[3] *United States v. Almeida*, 434 F.3d 25, 29 (1st Cir. 2006); *United States v. Alexander*, 54 F.4th 162, 175 (3d Cir. 2022) (quoting *Heath*); *United States v. Alston*, 941 F.3d 132, 138 (4th Cir. 2019) (quoting *United States v. Bullette*, 854 F.3d 261, 265 (4th Cir. 2017) ("'Lawful means' include an inevitable search falling within an

AACJ asks this Court to adopt the Second Circuit's "high level of confidence" requirement for determining inevitability. It is consistent with one hundred years of Supreme Court cases, since *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), that require suppression of evidence unless there is an independent source. This clear rule would further prevent our courts from speculating in contravention of *Nix*.

III. Inevitable discovery requires active pursuit of independent investigative leads.

A. Extrajurisdictional analysis shows the wisdom of such a rule.

Inevitable discovery "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings." *Nix*, 467 U.S. at 444 n.5. To ensure this hefty standard is satisfied, many courts have applied an "active pursuit" test, using various factors to test the validity and impeachability of the factual contingencies supporting a proposed inevitability.

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exception to the warrant requirement ... that would have inevitably uncovered the evidence in question."); *United States v. Souza*, 223 F.3d 1197, 1205 (10th Cir. 2000) ("[A] court may apply the inevitable discovery exception only when it has a high level of confidence that the warrant in fact would have been issued and that the specific evidence in question would have been obtained by lawful means.") (citing *Cabassa*); *People v. Hughston*, 168 Cal.App.4th 1062, 1072, 85 Cal.Rptr.3d 890, 899 (2008) (quoting *Cabassa* standard favorably); *State v. Correa*, 264 A.3d 894, 936-37 (Conn. 2021) (recognizing adoption of *Cabassa* standard); *Williams v. State*, 813 A.2d 231, 255 (Md. 2002) (citing *Cabassa* standard favorably).

Many jurisdictions have provided helpful explanations of this test, as described below.[4] For example, the Second Circuit has stated:

> [P]roof of inevitability is made more convincing when the areas of the search or investigation are well-defined, the government effort is planned and methodical, and a direct causal relationship and reasonably close temporal relationship exist between what was known and what had occurred prior to the government misconduct and the allegedly inevitable discovery of the evidence.

United States v. Eng, 971 F.2d 854, 859 (2d Cir. 1992). In *Eng*, the court was concerned with the fact of a subpoena as a route to inevitability:

> While we decline to draw a bright line, it is essential that there be a substantial degree of directness in the government's chain of discovery argument, rather than a hypothesized "leapfrogging" from one subpoena recipient to the next until the piece of evidence is reached. Further, the government must show that both issuance of the subpoena, and a response to the subpoena producing the evidence in question, were inevitable. Particular care is appropriate where, as here, subpoenas are issued after or at the time of the unlawful search, an issue that *Roberts* did not present. We share the Ninth Circuit's view that subpoenas must not serve as an after the fact "insurance policy" to "validate" an unlawful search under the inevitable discovery doctrine.

Id. at 860-61 (citing *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 755 (9th Cir. 1989)).

In *Cherry*, the Fifth Circuit acknowledged police had probable cause to seek a search warrant for the defendant's barracks; however, "uncontradicted testimony

[4] Though such cases are helpful to the extent they articulate the "active pursuit" factors, many still fall victim to temptation of an erroneous "reasonable probability" standard. *See Cherry*, 759 F.2d at 1204; *Satterfield*, 743 F.2d at 846; *Watkins*, 13 F.4th at 1212; *Thomas*, 524 F.3d at 858.

elicited at the second suppression hearing ma[de] clear that, at the time Cherry's barracks and ceiling were searched for the second time, the agents had not even begun taking notes for the purpose of drafting an affidavit, a necessary prerequisite to the procurement of a warrant," and therefore, the exception could not apply to the discovery of the murder weapon in the false ceiling. 759 F.2d at 1206. While the evidence found in the ceiling was required to be suppressed, the court found that because Cherry would inevitably be arrested legally based on other evidence discovered through lawful means, he would have been fingerprinted and that evidence could be admitted under the inevitable discovery doctrine. *Id*. at 1207-08.

In *Satterfield*, the Eleventh Circuit stated that

> if evidence is obtained by illegal conduct, the illegality can be cured only if the police possessed and were pursuing a lawful means of discovery at the time the illegality occurred. The Government cannot later initiate a lawful avenue of obtaining the evidence and then claim that it should be admitted because its discovery was inevitable.

743 F.3d at 846. In response to the government's argument that it could have obtained a search warrant, the court responded, "Because a valid search warrant nearly always can be obtained after the search has occurred, a contrary holding would practically destroy the requirement that a warrant for the search of a home be obtained before the search takes place." *Id*. *See also Brown*, 239 Ariz. at 524-25 ¶ 14.

The Florida Supreme Court has held that "[i]nevitability under this rule

essentially requires the State to show that at the time of the constitutional violation an investigation was already under way." *Rodriguez v. State*, 187 So.3d 841, 845-46 (Fla. 2015) (cleaned up). Noting its "clear" jurisprudence "that the inevitable discovery doctrine does not apply when the prosecution cannot demonstrate an active and independent investigation," it "conclude[d] that permitting warrantless searches without the prosecution demonstrating that the police were in pursuit of a warrant is not a proper application of the inevitable discovery rule." *Id*. at 848. It found that applying inevitable discovery where police did not actively seek a warrant would encourage rather than deter police misconduct. *Id*. at 849-50.[5]

The Eighth Circuit also requires the government show it "was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation." *Thomas*, 524 F.3d at 858. In *Thomas*, the court found that the search of the defendant's pocket was illegal at the time it was conducted, but the evidence would have been inevitably discovered because officers had discovered a warrant for his arrest almost simultaneously and he would have been searched incident to arrest.[6]

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[5] The court also noted: "[E]ven the federal courts that would not absolutely require pursuit of a warrant nevertheless require showing more than the existence of probable cause to obtain a warrant." *Id*. at 848 (citing cases showing that the warrant certainly would have issued, as opposed to probably would have issued).

[6] This is similar to the situation in *Lamb*, where the search of a cigar box was illegal, but the evidence found in the box inevitably would have been discovered after a frisk revealed the weapon that in turn would have led to an arrest and a search incident to

Other courts require active pursuit of other investigative leads as well in order to avoid reliance on speculation. *See, e.g.*, *People v. Burola*, 848 P.2d 958, 963 (Colo. 1993) ("If evidence is obtained by illegal conduct, the illegality can be cured only if the police possessed and were pursuing a lawful means of discovery at the time the illegality occurred.") (quoting *Satterfield*); *Mobley v. State*, 834 S.E.2d 785, 799-800 (Ga. 2019) (requiring police to be actively preparing search warrant application); *Maxim v. State*, 454 P.3d 543, 551 (Idaho 2019) ("The inevitable-discovery doctrine presupposes parallel paths leading toward the inevitable discovery of evidence.")

B. Arizona already employs such a rule in practice.

The attractiveness of requiring active pursuit is three-fold. It reduces the level of speculation that a court can entertain. It is very easy to say that an officer would have explored the purported line of investigation absent the illegal conduct, but how can the officer prove that without relying on post hoc rationalization? Also, active pursuit is the corollary to this Court's rule in *Brown*, requiring a court to consider other, independent officers' intent as opposed to creating a counterfactual based solely on the offending officer's hypothetical conduct. *See* 239 Ariz. at 524-25 ¶ 14 ("The exception does not turn on whether the evidence would have been discovered

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arrest based on the independent information learned during the active investigation. 116 Ariz. at 137-38.

had the deputy acted lawfully in the first place."). Furthermore, in the absence of an active pursuit of other investigative leads, the seized evidence is almost certainly fruit of the poisonous tree and not truly from an independent source.

The only dicta from this Court that might conflict with active pursuit is *Davolt*, where this Court stated, "Arizona has adopted the broad view of the inevitable discovery rule. Under that view, the State is not required to demonstrate that police initiated lawful means to acquire evidence prior to its seizure." 207 Ariz. at 204 ¶ 37. In support of that statement, however, it offered no analysis[7] and cited only one case of the court of appeals, *State v. Paxton*, 186 Ariz. 580, 586 (App.1996). *Paxton* not only is silent on this question, but its facts suggest the opposite to be the case. During a voluntary stationhouse interview, the detective demanded Paxton's shoes and seized them prior to arresting him—which the detective had planned to do at the conclusion of the interview anyway, since there was already ample probable cause for murder. *Id*. at 583. The court found the blood stains on the shoes would inevitably be discovered because the independent investigation revealed that the shoes would be relevant and the detective testified that it was standard procedure to test clothing in cases like this. *Id*. at 585. The *Paxton* court implicitly applied the requirement of

[7] The lack of analysis was understandable since this Court held suppression appropriate on another line of reasoning, finding that "[t]he deterrence rationale of the exclusionary rule is especially important in this case in which constitutional violations occurred on three separate occasions, that is, the two interrogations and the motel entry and search." *Id*.

active pursuits.

AACJ suggests this Court adopt the requirement that, in the case of searches where inevitability rests on volitional decisions by officers, the State must show that officers were independently and actively pursuing leads that would have yielded the same evidence. This rule is flexible enough to recognize there are circumstances where officers conduct searches or inquiries that are unrelated to the evidence ultimately obtained but are inevitable nonetheless.

Two recent court of appeals decisions, and the present case, provide helpful illustrations of how this rule is already being applied in Arizona and the clarity such a rule would provide when applying inevitable discovery. First, in *Snyder*, an overzealous loss prevention officer broke the kneecap of a shoplifter, requiring the suspect to be taken to the hospital, and police searched his backpack even though it was in another room. 240 Ariz. at 554 ¶¶ 2-6. The court held that the warrant exception for searches incident to arrest did not apply since Snyder was separated from his backpack. *Id*. at 555-57 ¶¶ 14-22. The court reversed the trial court's finding that the backpack would inevitably be searched under the inventory exception when Snyder was transported to jail, because Snyder was taken to the hospital first and because he was not arrested for any misdemeanor offense related to the shoplifting but only for the felonious possession of the contents of the backpack (guns and drugs). *Id*. at 557-59 ¶¶ 23-31. This is an example of a court recognizing no other

active pursuit was occurring at the time of the illegality.

This lack of inevitability stands in stark contrast to the facts in *State v. Rojers*, 216 Ariz. 555 (App. 2007), where a person was arrested for driving on a suspended license and the car was then searched. Even though the original justification for the search (a search incident to arrest) was invalid, the court found that the drugs and paraphernalia would have been inevitably discovered during an inventory search. *Id.* at 561-62 ¶¶ 27-32. Commentators have recognized that valid inventory searches are an appropriate use of inevitable discovery. Jacobi and Louthen, 171 U. Penn. L. Rev. at 43-51; David J. Euchner & Barbara E. Bergman, ARIZONA CRIMINAL PRACTICE MANUAL, § 14:5 (2023-24 ed.). This case also provides a helpful demonstration of what an active pursuit, existing before an illegality, looks like.

In this case, the State relies on another form of administrative- or policy-based searches: that Mitcham's DNA would have been collected and extracted when he was booked into jail for murder. Response to Petition at 7; State Supp. Brief at 11-14. Other than rely on the court of appeals' majority opinion, it provides little argument to support this claim. And with good reason, as the facts do not support the State's argument. Not only was it not inevitable that Mitcham would be arrested for murder based solely on the evidence lawfully obtained, but the record conclusively demonstrates that Mitcham was not arrested on that evidence. On the contrary, police determined that Mark Mitcham had a father and three brothers living

in the vicinity. Police had not yet begun to investigate the other two brothers or the father, and other than determining that Ian had been arrested for DUI in Scottsdale and that a blood sample was still available, Lockerby had conducted no other lawful investigation into Ian that would produce probable cause for an arrest. Furthermore, unlike the facts in *Cherry* where the murder had just occurred and the investigation was rapidly developing, this case had gone cold by the time police learned of the familial DNA. The record provides no evidence that this Court can rely upon, with a high degree of confidence, that Mitcham could have been arrested, let alone *would* have been arrested. On the contrary, Lockerby waited until he had the results from the DNA testing of Mitcham's DUI sample before arresting him.

Moreover, the record does not contain any evidence whether Maricopa County Jail personnel actually swab all inmates who are required to provide DNA samples under A.R.S. § 13-610(K) & (O)(3). It is not uncommon for laws to require action that government agencies fail to take due to staff shortages or other practical considerations. Not only does the State fail to cite where the record shows a swab was taken, but Mitcham's statutory argument seems to suggest that the record belies the State's claim. *See* Mitcham Supp. Brief at 14. Therefore, the trial court correctly determined that the State's arguments about inevitable discovery were based on speculation and not on historical facts that could be readily confirmed or impeached.

IV. This Court should ground its inevitable discovery jurisprudence in the state constitution.

The Supreme Court created the inevitable discovery exception forty years ago and has never revisited it, leading federal and state courts to apply it differently. This lack of certainty of federal constitutional law is a compelling reason for this Court to ground its decision in article 2, section 8 of the Arizona Constitution. This Court has previously held it is appropriate to rely on the state constitutional protections where it is unclear how the U.S. Supreme Court would apply the Fourth Amendment. *Ault*, 150 Ariz. at 464; *State v. Bolt*, 142 Ariz. 260, 264 (1984). It is especially appropriate here, since *Ault* has already invoked the state constitution to protect against overextending inevitable discovery into the home.

It is true that this Court has never explicitly held that article 2, section 8 applies in any context outside home searches. *See State v. Mixton*, 250 Ariz. 282, 290 ¶ 32 (2021) (citing *State v. Peltz*, 242 Ariz. 23, 30 ¶ 24 n.3 (App. 2017)). In *Mixton*, however, this Court was focused on corporate records, *id*. at 291 ¶ 34, not DNA. Given the several distinct issues presented in this case, deciding the case on independent state grounds would give Arizonans the certainty they deserve.

Many state courts have required clear and convincing evidence, disagreeing with *Nix*. *E.g.*, *Smith v. State*, 948 P.2d 473, 479-80 (Alaska 1997) (collecting cases); *State v. Sugar (Sugar III)*, 527 A.2d 1377, 1379 (N.J. 1987). Others have carved out additional elements for the test. *Smith*, 948 P.2d at 481 ("[W]e believe that the

exception should not be available in cases where the police have intentionally or knowingly violated a suspect's rights.") (quoting *State v. Phelps*, 297 N.W.2d 769, 775 (N.D. 1980)). This Court may consider such additional elements appropriate.

CONCLUSION

This Court should find that inevitable discovery requires a high level of confidence commensurate with its name, and that if the lawful means of discovering evidence is based on volitional decisions, the State must show there was active pursuit of investigative leads. Furthermore, this Court should apply these standards through article 2, section 8 of the Arizona Constitution to provide clarity in the law.

RESPECTFULLY SUBMITTED this 11th day of June, 2024.

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