IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, v. IAN L. MITCHAM, Appellant.	)	Court of Appeals No. 1 CA-CR 23-0014 Maricopa County Superior Court No. CR2018-118086-001

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLEE

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INTEREST OF *AMICUS CURIAE*

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 them. 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. AACJ respectfully accepts this court's invitation to participate in this case, *see* Order 4/18/2023.

DNA is not like other property, just as a cell phone is not like any other container. People have a reasonable expectation of privacy in their DNA and do not voluntarily "abandon" the cells they shed as they move around in public spaces. Likewise, people do not impliedly consent to extraction of a DNA profile when they provide a blood sample after an arrest for driving under the influence (DUI).

AACJ also asks this court to acknowledge and reaffirm the original meaning of the exclusionary rule. Even though current interpretations of the rule mandate suppression in this case, this court should breathe life into the old doctrines of the state constitutional exclusionary rule, and AACJ asks this court to do exactly that.

ARGUMENTS

I. The Testing was Unlawful because All Facets of the Warrantless Analysis of Mitcham's Blood—from the Manner of the Search to the Privacy Interest Effected—Were Unreasonable.

A. Due to the Vast Amount of Information Stored in Biological Samples and the Risk of Abuse, the DNA Testing Here Needed Judicial Oversight in the Form of a Warrant.

1. Binding Precedent Limits the State's Authority to Collect and Extract a Suspect's DNA.

The "reasonableness" of any warrantless search has many facets: the manner of the State's search, the State's need or justification for the search, the effect on the person's liberty during the search, the person's possessory interests in the subject of the search, his or her privacy interests in the same, and the potential for officers to expose and/or abuse large amounts of information, to name a few. *See State v. Jean*, 243 Ariz. 331, 333 ¶ 1 (2018) (possessory and privacy interests); *State v. Dean*, 241 Ariz. 387, 391 ¶ 16 (App. 2017) (voluminous information); *see also United States v. Place*, 462 U.S. 696, 707-10 (1983) (possessory and liberty interests); *Terry v. Ohio*, 392 U.S. 1, 28 (1968) ("manner" of seizure is "vital" to the inquiry). But no Fourth Amendment decision hinges on just one of these factors.

Maryland v. King, 569 U.S. 435 (2013), is no different. That opinion discusses the following factors when concluding the Maryland DNA Collection Act was reasonable:

(1) A neutral magistrate first finds probable cause to hold the individual on charges for a serious offense, *id.* at 443, 448;

(2) The search is administrative and applies equally across a class of individuals, as opposed to a single search conducted for criminal investigatory purposes, *id.* at 461;

(3) The administrative search has statutory guardrails prohibiting other testing or uses, *id.* at 465;

(4) The state has several compelling administrative purposes when identifying people during booking, *id.* at 450-56;

(5) An individual's privacy interest in the non-coding DNA (based on science from a decade ago) was minimal, *id.* at 442, 464;

(6) The physical intrusion caused by a cheek buccal swab is minimal, *id.* at 463-64; and,

(7) The intrusion's significance is relatively minor compared to other routine booking procedures, *id.* at 462-63.

The holding in *King* is that, when these circumstances are combined, the routine collection of DNA samples from detained people for the limited purpose of identification is reasonable.

The State's argument is fundamentally flawed to the extent it encourages this Court to hang its hat on just one factor. It claims, "[i]n the wake of *King*," individuals

have absolutely no "reasonable expectation of privacy in [their] DNA profile." OB at 3. But the Supreme Court did not reach that conclusion. *See also Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018) ("[D]iminished privacy interests does not mean that the Fourth Amendment falls out of the picture completely.") (internal citation omitted). Instead, it concluded that under all the circumstances described above—the jail setting; a non-invasive, routine administrative search; with proper statutory limitations; etc.—an individual has a "diminished" expectation of privacy that is outweighed by the State's compelling interests in routine identification procedures. *King*, 569 U.S. at 463-64.

The State's dangerous claim here—that Arizona residents have no privacy interest in their identifying DNA—is put to rest by simple hypotheticals: What if our Legislature passed a law requiring all residents to submit to a buccal swab for the purpose of creating a DNA identification database? Or, consider a *Terry* stop, wherein the officer demands a buccal swab along with a pat down for weapons. If we have absolutely no expectation of privacy in our identifying DNA—as the State claims here—then these hypotheticals could never be offensive or even questionable. Nevertheless, we are "a society which choose[s] to dwell in reasonable security and freedom from surveillance," and our society would, in fact, find the dragnet collection of even "junk" DNA to be offensive. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); *cf.* Sui-Lee Wee & Paul Mozur, "China's Genetic

Research on Ethnic Minorities Sets Off Science Backlash," NEW YORK TIMES (Dec. 4, 2019), https://www.nytimes.com/2019/12/04/business/china-dna-science-surveillance.html.

Putting aside the State's one-factor argument, what is striking about Mitcham's case is that none of the factors in *King* applies here. No neutral magistrate had found there was probable cause of an offense; the officer was motivated by a desire to prove a case, as opposed to Maryland's routine, administrative procedure; no guardrails were in place to limit the type or use of data taken from the blood; the State had no administrative purpose; the biological sample was taken by phlebotomy, not a buccal swab; and Mitcham was not already subject to other limits on his liberty at the time of the testing.

In addition, it is no longer clear that what was once considered "junk" DNA is, in fact, otherwise worthless or devoid of information. Even the *King* majority recognized the fallibility of courts defining any advancing technology, noting that "[t]he full potential for use of genetic markets in medicine and science is still being explored." *King*, 569 U.S. at 442; *see also id.* at 448 (hedging language and stating "junk" DNA was "not known to have any association" with other characteristics). AACJ will defer to others to describe these scientific advances. Instead, AACJ urges the court to apply a standard capable of weathering time, regardless of whatever scientific developments arise in the future.

The opinion in *Mario W. v. Kaipio* applies a "two-tiered" analysis when assessing a person's metaphysical Fourth Amendment interests in a biological sample and the information contained therein. 230 Ariz. 122, 127 ¶ 20 (2012). That opinion states, "The two-tiered approach is particularly appropriate in the DNA sampling and profiling context because the two searches implicate different privacy interests": intrusion into the physical body and the "uniquely identifying information about the individual's genetics." *Id*. Later, it analyzes society's expectation of privacy in genetic identifying information, including the interest in keeping this information from publication nationwide. *Id.* at 128 ¶ 27.

The problem with a "two-tiered" analysis is two-fold. First, it leaves the courts to assess the value or quantity of information that the officer has extracted in the context of a quickly evolving field of science. It is a determination continually in need of revisiting, inviting protracted battles between experts, which would leave law enforcement officers with ongoing doubt as to the validity of prior decisions. *See Jean*, 243 Ariz. 331, 340 ¶ 34 (courts seek to provide clear guidance). In fact, that problem is playing out in this very case: *Mario W.* describes the "thirteen genetic markers" as implicating a "greater privacy concern," 230 Ariz. at 128 ¶ 27; *King* concludes those "13 loci" can only be used for identification and hold no other information, 569 U.S. at 445; and the parties today are still fighting over this evolving scientific field.

Second, the "two-tiered" analysis is an imperfect fit because it is unclear whether a person has no possessory rights over biological samples once removed from the body, even if the individual's personal identity is no longer tied to the sample or data obtained therefrom. *See generally*, Petrini, Carlo, *Ethical and legal considerations regarding the ownership and commercial use of human biological materials and their derivatives*, 3 J. Blood Med. 87-96 (Aug. 7, 2012), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3440234/; *e.g.*, *Havasupai Tribe of Havasupai Reservation v. Ariz. Bd. of Regents*, 220 Ariz. 214, 220-21 ¶¶ 13, 15 (2008) (concerning the distribution and wide-ranging research of biological information obtained from Havasupai members under other pretenses). Thus, the interest at stake in the "second tier" is not only a matter of privacy and society's expectations. *See Mario W.*, 230 Ariz. at 128 ¶ 27.

2. Jones *and* Carpenter *Define Reasonable Expectations of Privacy in a World with Evolving Technology.*

Instead of *Mario W.*'s troublesome "two-tiered" analysis, AACJ proposes a holistic approach, akin to a cell phone search, which focuses on the potential risk of exposure or abuse of sensitive information, as opposed to the actual information seized. *See State v. Teagle*, 217 Ariz. 17, 25 ¶ 29 (App. 2007) (reasonableness based on "mosaic of fact and circumstances"). A warrant is needed to examine the contents of a cell phone, regardless of the officer's limited intent to seize only a small amount of information and regardless of whether that phone contains much information at

all. *Riley v. California*, 573 U.S. 373, 393-94 (2014); *see also Dean*, 241 Ariz. at 391 ¶ 16 (warrant for home must also specify computer searches under Fourth Amendment's particularity requirement). In other words, a warrant is needed before delving into a phone because of its "capacity" or potential to store information, as well as the risk of exposing or abusing that information.

In fact, a warrant is needed even though certain types of information on a cell phone could be easily accessed from other, non-protected sources. For example, an officer can obtain toll records from a phone carrier with a simple subpoena, *see Smith v. Maryland*, 442 U.S. 735 (1979), or the officer can seek a warrant to search a person's phone for the same data in its call log. *Riley*, 573 U.S. at 393-94. The nature or quantity of data might be the same, but the potential for the exposure or abuse of other private information is far greater in the context of a phone search. In the same way, searching a biological sample for information should not depend on a hypothetical officer's virtuous intent to self-limit the analysis when that sample could potentially expose vast amounts of other information. *Cf. Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 616 (1989) (wide variety of data available in urine sample). The added benefit of this holistic analysis is that, regardless of scientific advances, the rule would remain valid and easy to apply for officers into the future.

The analogy to a cell phone search also can help courts tackle facets of DNA testing that initially appear unique or difficult to resolve. First, consider the argument

that all people leave their DNA on discarded items like water bottles, and therefore no one can have a reasonable expectation of privacy in that DNA. The U.S. Supreme Court rejected analogous arguments in *United States v. Jones*, 565 U.S. 400 (2012), regarding GPS tracking of an automobile, and *Carpenter*, regarding the nature of location data generated by a cell phone and transmitted to a phone carrier. In *Jones*, the Court unanimously rejected the government's attempt to equate GPS tracking to "beeper" technology, and a majority signed or joined concurring opinions finding a reasonable expectation of privacy in the wholesale tracking of one's movements in the public sphere. Likewise, in *Carpenter*, the government argued that because phone carriers controlled the data, the third-party doctrine applied and a person could not claim an expectation of privacy over the carrier's business records. Rejecting that argument, the Court noted the vast amount of such data "chronicle[d] a person's past movements," 138 S. Ct. at 2216, and the fact that such information is "not truly 'shared' as one normally understands the term," *id.* at 2220. In other words, we do not voluntarily, or even consciously, share geolocation data simply by entering the public sphere while possessing a phone. That same reasoning applies to DNA. As we pass through public spaces, it is literally impossible not to shed biological material containing DNA. *See* Elizabeth Anne Brown, "Your DNA Can Now Be Pulled From Thin Air. Privacy Experts Are Worried," N.Y. TIMES (May 15, 2023), https://www.nytimes.com/2023/05/15/science/environmental-dna-ethics-

privacy.html.

The cell phone analogy also helps illustrate an important difference between this case and *King*: limits on discretion or guardrails. In *King*, Maryland's legislature had enacted specific limitations on the use of information extracted from a buccal swab. 569 U.S. at 465. Similarly, to satisfy the Fourth Amendment's particularity requirement, a phone warrant must specifically set forth the type of data sought. *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (particularity and general warrants); *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010) (en banc) (per curiam), *overruled in part on other grounds as recognized by Demaree v. Pederson*, 887 F.3d 870, 876 (9th Cir. 2018) (per curiam) ("[P]ressing need of law enforcement for broad authorization to examine electronic records . . . , creates a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant.").

These guardrails exclude the officer's subjective intent from the equation, thereby mitigating any risk that state power will be abused. *See Johnson*, 333 U.S. at 13 (acknowledging zealousness of officers "engaged in the often competitive enterprise of ferreting out crime"). This is exactly why routine administrative searches with no investigatory purpose are subject to a different analysis. *King*, 569 U.S. at 448 (testing "not subject to the judgment of officers whose perspective might be colored by their primary involvement.") (internal citations omitted).

Moreover, in contrast to Maryland's statute or the particularity requirement in a warrant, Mitcham's case suggests that—absent a warrant requirement—officers could do anything with a blood sample without consequence. The State unwittingly emphasizes this dangerous potential, arguing, "After police withdrew and tested Mitcham's blood, *consent no longer mattered*." OB at 29 (emphasis added). In contrast to the State's impunity when handling biological samples, the rest of society has adopted a strict regimen for regulating health-related information. *See* Health Insurance Portability and Accountability Act ("HIPAA"), 110 Stat. 1936 (1996).

B. Neither the Doctrines of Consent nor Abandonment Relieved the Officer of His Duty to Seek Judicial Authority to Test the Sample.

The law on consent in Arizona is well-developed and complementary to the holistic analysis proposed above. Like the guardrails in place in *King* or the particularity required in a search warrant, the State and its agents must adhere to any restrictions reasonably inherent in a grant of consent. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Specifically, the State has the burden to prove an officer's conduct fell within the bounds of the consent provided. *State v. Ahumada*, 225 Ariz. 544, 548 ¶ 14 (App. 2010). "[A] consensual search is limited by the items about which the officer inquired as a predicate to the search." *State v. Swanson*, 172 Ariz. 579, 583 (App. 1992). Moreover, consent to search one item—such as a home—is not necessarily sufficient to grant permission to search another item within the first—such as a cell phone. *State v. Ontiveros-Loya*, 237 Ariz. 472, 479 ¶¶ 24-25 (App.

2015). In short, like the guardrails in other contexts, this doctrine recognizes the need to protect against zealous officers broadly interpreting words of consent.

Applying that concept here, the court below was correct in treating the issue of consent as a lynchpin to this case. The officer needed Mitcham's consent, a warrant, or exigent circumstances to obtain and test the biological sample. *Schmerber v. California*, 384 U.S. 757 (1966); *Missouri v. McNeely*, 569 U.S. 141 (2013); *State v. Butler*, 232 Ariz. 84 (2013). But in this case, Mitcham granted the original consent in the context of the "Admin Per Se" form and a DUI investigation, and therefore, that context is controlling. *See Swanson*, 172 Ariz. at 583. The State cannot unilaterally expand the consent previously granted. Both Admin Per Se forms used in 2015 provide the scope of consent in unequivocal language.[1] The original form stated that biological samples were taken "*to determine alcohol concentration or drug content*." *State v. Valenzuela*, 239 Ariz. 299, 301 ¶ 5 (2016) (emphasis added). That form was amended in late 2015 to read:

> Arizona law states that a person who operates a motor vehicle at any time in this state gives consent to a test or tests of blood, breath, urine or other bodily substance *for the purpose of determining alcohol concentration or drug content*. The law enforcement officer is authorized to request more than one test and may choose the types of tests.

[1] It is unclear from the briefing when the DUI arrest occurred. The Opening Brief refers only to the year, but the Answering Brief gives January 8, 2015, as the arrest date. AB at 2. For purposes of scope of consent, the date does not matter.

State v. De Anda, 246 Ariz. 104, 105 ¶ 2 (2019) (emphasis added). Either form places a firm limitation on governmental use of the biological sample.

The State's claim—that "[a]fter police withdrew and tested Mitcham's blood, consent no longer mattered"—also appears to conflate the doctrines of consent and abandonment. Unlike consent, abandonment requires circumstances that show the person "voluntarily discarded, left behind, or otherwise relinquished his interest in the property" to such an extent that no reasonable person could believe the person retained "a reasonable expectation of privacy" in the property. *State v. Walker*, 119 Ariz. 121, 126 (1978).

Two aspects of the abandonment doctrine are germane here. First, to abandon something, the surrender must be complete. But as noted above, our society has not reached the conclusion that, after providing a third party with a biological sample for one purpose, the third party may do whatever it wishes with that sample. *See, e.g.*, *Ethical and legal considerations regarding the ownership and commercial use of human biological materials and their derivatives*, *supra*; *Havasupai Tribe*, 220 Ariz. at 217-19 ¶¶ 2-7.

Second, abandonment implicates the concept of voluntariness. Voluntariness is defined as a "conscious" act that resulted from "effort and determination." A.R.S. § 13-105(42). In other contexts, the Court has described abandonment occurring when "property has been thrown away, or was voluntarily forsaken by its owner."

Grande v. Jennings, 229 Ariz. 584, 588 ¶ 10 (App. 2012). Simply being distracted or more concerned with other matters does not indicate that the person has "abandoned" property. *See State v. Peoples*, 240 Ariz. 244, 248 ¶ 14 (App. 2016) (reversing court of appeals decision based on abandonment). In this specific case, where the State notified Mitcham that it would be destroying the biological sample—thereby leaving him with the impression the property no longer existed—it cannot be said that he made a "conscious" act through "effort and determination," or that he had discarded or "thrown away" the property.

In sum, the officer in Mitcham's case should have, but did not, consult a neutral and detached magistrate prior to conducting DNA testing. And, because no warrant was sought, the trial court correctly held that the officer's conduct amounted to a violation of Mitcham's Fourth Amendment rights.

II. Under Any Interpretation of the Exclusionary Rule, Suppression is Mandated.

A. Purpose of Exclusionary Rule is Judicial Integrity, Not Just Deterrence.

In recent years, there has been suggestion that the exclusionary rule has no basis in the Fourth Amendment. *E.g.*, *Collins v. Virginia*, 138 S. Ct. 1663, 1676-77 (2018) (Thomas, J., concurring). The Supreme Court has repeated on numerous recent occasions that the purpose of the exclusionary rule is to deter police misconduct and that it recognized the errors of past "expansive dicta." *Davis v. United States*, 564 U.S. 229, 237 (2011) (quoting *Hudson v. Michigan*, 547 U.S. 586,

591 (2006)). It "abandoned the 'reflexive' application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits." *Id*. at 238 (citing *Arizona v. Evans*, 514 U.S. 1, 13 (1995)). But as recent scholarship demonstrates, the exclusionary rule is rooted in the interplay between the Fourth and Fifth Amendments, as explained in *Boyd v. United States*, 116 U.S. 616 (1886), and it was created in *Weeks v. United States*, 232 U.S. 383 (1914), for the purpose of maintaining judicial integrity, not just police deterrence. David J. Euchner & Barbara E. Bergman, ARIZONA CRIMINAL PRACTICE MANUAL § 14:1 (2022-23 ed.).

In *Weeks*, 232 U.S. at 394, the Court explained that allowing illegally obtained evidence in court "would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *See also Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."). Illegally obtained evidence was not only inadmissible in court; it was required to be returned to the owner under the common law. *Weeks*, 232 U.S. at 398. This was true even when the seized property was contraband. *Amos v. United States*, 255 U.S. 313, 316-17 (1921).

Through the passage of time (and some selective quoting), some courts began to chip away at the original integrity-of-the-judiciary justification for the exclusionary rule. Over generations, the U.S. Supreme Court stopped reciting the full history of the exclusionary rule and, in the process of assuming its validity, merely cited *Boyd*, *Weeks*, and *Silverthorne Lumber* as established precedent. *Walder v. United States*, 347 U.S. 62, 65 (1954), was one such case; but after citing these cases, the Court added a sentence without any citation: "All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men." From this seed, the "deterrence" narrative sprouted. The following year, the Supreme Court of California cited this statement as proof positive that "the purpose of the exclusionary rule is not to provide redress or punishment for a past wrong, but to deter lawless enforcement of the law." *People v. Martin*, 290 P.2d 855, 857 (Cal. 1955). In *Elkins v. United States*, 364 U.S. 206, 217 (1960), the Court added a few more phrases: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins*'s authority for this point was a single case of the New Jersey Supreme Court decided two years earlier, *Eleuteri v. Richman*, 141 A.2d 46, 50 (N.J. 1958). That case conducted no historical analysis and instead chose to reject the exclusionary rule under New Jersey law.

In the process of applying the federal exclusionary rule to the states through the Due Process Clause in *Mapp v. Ohio*, the Supreme Court again mentioned deterring police misconduct, but not as the primary motivation for the rule:

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "(t)he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. at page 21, 150 N.E. at page 587. In some cases this will undoubtedly be the result. But, as was said in *Elkins*, "there is another consideration—the imperative of judicial integrity." 364 U.S. at page 222, 80 S. Ct. at page 1447. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

367 U.S. 643, 659 (1961); *see also* Arnold H. Loewy, *The Warren Court as Defender of State and Federal Criminal Laws: A Reply to Those Who Believe That the Court Is Oblivious to the Needs of Law Enforcement*, 37 Geo. Wash. L. Rev. 1218, 1236 (1969) ("[T]he criminal does not go free because the constable had blundered, but because he would have gone free if the constable had not blundered.").

Although the exclusionary rule had existed for a half-century prior, it was not until *Mapp* that critics began assaulting it as a Warren-Court judicial overreach, the most notable being the next chief justice. Warren E. Burger, *Who Will Watch The Watchman?*, 14 AM. U. L. REV. 1 (1964). Beginning with *United States v. Calandra*, 414 U.S. 338, 348 (1974), the Court began referring to the rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

The modern Court's characterization of the exclusionary rule as a vestige of the activist Warren Court's "expansive dicta" is simply wrong. Modern-day jurists who claim reliance on the text of the constitution cannot see an exclusionary rule in the text; but the original originalist and textualist, Hugo Black, studied the issue for twelve years and eventually found what he was looking for:

> I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.
> …
> In the final analysis, it seems to me that the *Boyd* doctrine, though perhaps not required by the express language of the Constitution strictly construed, is amply justified from an historical standpoint, soundly based in reason, and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights—an approach well set out by Mr. Justice Bradley in the *Boyd* case.

Mapp, 367 U.S. at 661-63 (Black, J., concurring).

B. Arizona Should Expand the State Constitutional Exclusionary Rule through Article 2, Section 8.

The Arizona Supreme Court has only reluctantly expanded the state constitutional exclusionary rule beyond that of the Fourth Amendment. *See State v.*

Bolt, 142 Ariz. 260, 268-69 (1984) ("[O]ne of the few things worse than a single exclusionary rule is two different exclusionary rules."). Only once has the Court expressly stated independent state grounds for the exclusionary rule, by rejecting the inevitable discovery exception for illegal home searches. *State v. Ault*, 150 Ariz. 459, 465-66 (1986). Otherwise, it has explicitly disclaimed a broader interpretation of the exclusionary rule. *State v. Hummons*, 227 Ariz. 78, 82 ¶ 16 (2011). Notably, both *Bolt* and *Ault* relied on the state constitution as a bastion of protection for Arizonans because of the U.S. Supreme Court's shrinking, revisionist interpretation of the Fourth Amendment's historical protections, as shown in *Segura v. United States*, 468 U.S. 796 (1984). *Bolt*, 142 Ariz. at 264; *Ault*, 150 Ariz. at 466.

The language of article 2, section 8 of the Arizona Constitution is borrowed from the Washington Constitution rather than the corresponding federal provision. Timothy Sandefur, *The Arizona "Private Affairs" Clause*, 51 ARIZ. ST. L.J. 723, 723 (2019); *Jean*, 243 Ariz. at 354 ¶ 96 (Bolick, J., concurring and dissenting in part). Washington has paved the way for Arizona to reinstate the original purpose of the exclusionary rule.

As explained above, the original rationale for the federal exclusionary rule was to protect the integrity of the judiciary by refusing to accept illegally obtained information. Other courts used similar reasoning. The Washington Supreme Court first recognized the exclusionary rule in *State v. Gibbons*, 203 P. 390 (Wash. 1922),

a case involving an illegal seizure of a vehicle, which turned out to be transporting liquor. The court first recognized that, because the arrest of the accused was unlawful, so was the seizure of his vehicle. *Id*. at 394. As did the U.S. Supreme Court in *Weeks*, *Gibbons* found the source of the exclusionary rule not only in the text of the Fourth Amendment and its state analog but also of the Fifth Amendment's prohibition on compelled self-incrimination, not just through *testimony* but also *evidence* against oneself. *Id*. at 395. It relied not only on the recent wave of U.S. Supreme Court cases but also on the reasoning of *People v. Marxhausen*, 171 N.W. 557 (Mich. 1919); and, like *Weeks*, it reasoned that a rule prohibiting future unconstitutional action could not possibly forgive past unconstitutional action. *Id*. at 396.

In *Wolf v. Colorado*, 338 U.S. 25 (1949), the U.S. Supreme Court rejected application of the federal exclusionary rule to the states through the Due Process Clause of the Fourteenth Amendment. In categorizing the positions of the several states, the Court considered Arizona to be among the "states which passed on the *Weeks* doctrine for the first time after the *Weeks* decision and in so doing rejected it," *id*. at 35 (Table E). The case it cited for authority, though, said no such thing. In *Argetakis v. State*, 24 Ariz. 599, 610-11 (1923), the Arizona Supreme Court found the facts of the case before it akin to those in *Adams v. New York*, 192 U.S. 585 (1904), in that no illegal search or seizure had in fact occurred. Because an illegal

search or seizure is a condition precedent to invoking the *Weeks* doctrine, there was no reason for our courts to bring it up. Thus, the Court's classification of Arizona as a state "that reject[s] *Weeks*" was erroneous. *Wolf*, 338 U.S. at 38.

After *Mapp*, states did not need to interpret their state constitutional provisions when they could rely on the Fourth Amendment. As a result, states like Washington, which had modeled their exclusionary rules on the *Weeks* rule, had no need to propound on its state constitution's independent foundation and scope.

Over the course of the next twenty years, in response to the U.S. Supreme Court eroding these protections and recasting the exclusionary rule as one focused on deterring police misconduct, the Washington Supreme Court raised its state constitutional exclusionary rule from its slumber. In *State v. White*, 640 P.2d 1061, 1066-67 (Wash. 1982), the Washington Supreme Court struck down a vague "stop-and-identify" statute not unlike that struck down in *Brown v. Texas*, 443 U.S. 47 (1979). However, the U.S. Supreme Court also held in *Michigan v. DeFillippo*, 443 U.S. 31 (1979), that the fruits of an unconstitutional stop pursuant to such a statute did not require suppression of evidence because police could not anticipate that the statute would be struck down—altering longstanding exclusionary rule jurisprudence. In *White*, the Washington Supreme Court rejected the high court's rationale at its core; given Washington's equally longstanding history of reading its corresponding state constitutional provision differently, it was necessary to reaffirm

the original, broader protection by striking out on its own. 640 P.2d at 1070-71. It concluded: "[t]he important place of the right to privacy in Const. art. 1, s 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow." *Id*. at 1071.

Giving a state constitutional interpretation to the exclusionary rule "also could provide greater certainty and predictability to defendants and law-enforcement alike than hitching our jurisprudence to often amorphous and constantly evolving U.S. Supreme Court decisions." *Jean*, 243 Ariz. at 354 ¶ 94 (Bolick, J., concurring and dissenting in part). As shown in this section, ample authority supports doing so. By unhitching its exclusionary-rule jurisprudence from the Fourth Amendment, Arizona courts can provide such certainty. AACJ requests this court recognize that the true primary purpose of the exclusionary rule is to protect the integrity of the judicial system, with deterrence of police misconduct as a secondary benefit of the rule.

C. Even under the U.S. Supreme Court's Interpretation of the Federal Constitutional Exclusionary Rule, the DNA Evidence in this Case Must be Suppressed.

AACJ agrees with the arguments presented in Mitcham's brief, AB at 25-50, and will not rehash them.[2] Nor will AACJ address every potential exception raised by the State, since most are entirely baseless and are rooted in a "kitchen sink"

[2] AACJ also agrees that Mitcham raises valid points as to waiver of various claims, AB at 27-28, though AACJ will not argue that issue here.

approach to litigation. *State v. West*, 176 Ariz. 432, 439 (1993); *see also State v. Bolton*, 182 Ariz. 290, 299 (1995) ("Instead of presenting a well-reasoned and legally supportable analysis of the record generated by this case, [the State] has attempted … to include every conceivable argument."). Instead, AACJ will highlight only a few points below.

1. Good faith.

The good faith exception to the exclusionary rule applies to reliance on established law as well as to factual issues. In *Davis*, the Court recognized that

> when binding appellate precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than "ac[t] as a reasonable officer would and should act" under the circumstances.

564 U.S. at 241. In *State v. Weakland*, 246 Ariz. 67, 70 ¶ 9 (2019), the Arizona Supreme Court modified *Davis*'s requirement of "specific authorization" and instead adopted a "reasonableness approach." The sharply divided *Weakland* Court addressed an unusual circumstance where a law enforcement practice had been specifically authorized by prior precedent, and the question was whether more recent precedent "unsettled" that law. *Id*. at 68 ¶ 1, 70 ¶ 10, 71 ¶¶ 13-14.

No decision of the U.S. Supreme Court or any Arizona appellate court has ever authorized the police practice of collecting blood samples for the purpose of DUI investigations and then using those samples in unrelated investigations, much

less DNA identification.

The State claims that reasonable reliance on *King* would allow police to extract DNA from any sample that comes into their possession, for any reason. For the reasons stated in Section I, *supra*, *King* says nothing of the sort and, in fact, is unlike Mitcham's case in all respects. For the good faith exception to apply, *King* would have needed to expressly authorize the practice, which it does not.

2. Inevitable discovery.

"The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." *Murray v. United States*, 487 U.S. 533, 539 (1988). In *Nix v. Williams*, the Court found that the police should not be in a better or worse position than if no constitutional violation had occurred: "[w]hen, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." 467 U.S. 431, 448 (1984).

Inevitable discovery is most frequently applied when "an independent search was underway" that would have revealed the same evidence but for the illegal discovery, or when the evidence would have been ultimately discovered by some routine procedure. *United States v. Boatwright*, 822 F.2d 862, 865 (9th Cir. 1987)

(citing *Nix*, 467 U.S. at 431; *United States v. Andrade*, 784 F.2d 1431, 1433 (9th Cir. 1986)). Importantly, when describing its theory of inevitability, the State cannot rely on "speculative elements" and instead must ground its arguments in "demonstrated historical facts." *Nix*, 467 U.S. at 444 n.5.

The State's argument that it would have gotten a search warrant inevitably is foreclosed by our supreme court's holding in *Brown v. McClennen*, 239 Ariz. 521, 524 ¶¶ 13-14 (2016). There, the Court rejected the State's argument "that the exception applies because if Brown had refused consent, the deputy would have obtained a search warrant and legally drawn Brown's blood," finding that "[t]he State's view of the inevitable discovery exception would swallow the rule." The court explained that for the inevitable discovery doctrine to apply, "the evidence would have been lawfully discovered despite the unlawful behavior and independent of it." *Id*. at 525 ¶ 14. "But because the inevitable discovery exception cannot excuse the failure to secure a warrant in the first place, the exclusionary rule applies. *Id*. ¶ 15. Similarly, it was not inevitable at any time when the police illegally searched the blood sample for DNA that Mitcham would have accepted a plea agreement many years later.

3. Attenuation.

"[E]vidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate

the taint.'" *Nardone v. United States*, 308 U.S. 338, 341 (1939). In *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), the Court enumerated three factors for making this determination: temporal proximity between the illegality and the evidence in question, the presence of intervening circumstances between the two, and the purpose and flagrancy of the original misconduct.

The State's brief misapplies *Brown* on all three prongs. First, its claim that "temporal proximity is not an issue because Mitcham's DNA is fungible evidence," OB at 27, has no support in law. The police immediately sought a warrant for Mitcham's buccal cells after searching the blood, extracting the DNA, and identifying a profile. Thus, temporal proximity obviously cuts against the State. Second, there was no intervening circumstance between the search of the blood and obtaining the search warrant for Mitcham's buccal cells; the felony convictions occurred years after. Finally, the State neglects that *Brown*'s third prong cuts so strongly against law enforcement. The State cannot "even claim that the police 'made an arguable mistake'" in misusing the evidence. *State v. Monge*, 173 Ariz. 279, 281 (1992). An example of action that is not purposeful or flagrant appears in *State v. Reffitt*, 145 Ariz. 452, 460 (1985), where police mistakenly relied on a third party's ability to consent to a motel room search. No such arguable mistake appears in Mitcham's case; the detective brazenly searched the blood sample without seeking legal advice from department counsel or the Maricopa County Attorney's Office.

CONCLUSION

AACJ requests this court affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 18th day of May, 2023.

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