No. _____

IN THE

Supreme Court of the United States

IAN MITCHAM,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari
To the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For nearly four decades, courts have grappled with interpreting the inevitable discovery doctrine.

Some courts, including the Second, Fifth, Eighth, and Eleventh Circuits, require the prosecution to prove that law enforcement was actively pursuing an alternative line of investigation at the time of the illegal conduct. In contrast, the First, Sixth, Seventh, and Ninth Circuits reject the active pursuit requirement, instead focusing on whether discovery would have occurred inevitably, regardless of ongoing police efforts.

In this capital case, law enforcement violated Ian Mitcham's Fourth Amendment rights when they developed a DNA profile from blood obtained for the limited purpose of a misdemeanor driving-under-the-influence investigation.

But the Arizona Supreme Court applied the inevitable discovery doctrine and declined to adopt an active pursuit requirement. Instead, relying on a "broad view" of the inevitable discovery doctrine, the court concluded that Ian's DNA would have inevitably been discovered through two felony convictions—entered more than four years after the unlawful search, and under the pressure of a pending death penalty case.

Does inevitable discovery require an independent alternative investigation that is in progress at the time of the illegal search?

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INTRODUCTION

For four decades, courts have been divided as to how to apply the inevitable discovery exception. Heeding this Court's demand that inevitable discovery focus on "historical facts capable of ready verification or impeachment," *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984), some courts require proof that law enforcement was actively pursuing an independent line of investigation at the time of the illegal conduct. This approach has been adopted by the Second, Fifth, Eighth, and Eleventh Circuits, as well as by multiple states. Others have rejected any active pursuit requirement, including the First, Sixth, Seventh, and Ninth Circuits, along with Arizona and other states.

This Court should grant certiorari to settle this split.

In doing so, this Court should adopt the active pursuit requirement. First, this requirement is more consistent with the Fourth Amendment. At its core, the Fourth Amendment mandates that law enforcement obtain a warrant before conducting a search. Exceptions to the warrant requirement are narrow and closely guarded. Without an active pursuit requirement, however, the inevitable discovery doctrine functions as a broad exception that undermines the core protections of the Fourth Amendment. Second, the active pursuit requirement adheres to this Court's directive that inevitable discovery analyses focus on historical facts capable of ready verification and impeachment. Allowing the government to incorporate any and all facts—even years removed from the investigation—permits after-the-fact rationalization and encourages courts to ignore constitutional violations.

PETITION FOR WRIT OF CERTIORARI

Ian Mitcham petitions this Court for a writ of certiorari to review the judgment of the Arizona Supreme Court when it overturned an order that suppressed evidence in his case.

DECISIONS BELOW

The decision of the Arizona Supreme Court is available at *State v. Mitcham*, 559 P.3d 1099 (Ariz. 2024). The decision of the Arizona Court of Appeals is available at *State v. Mitcham*, 535 P.3d 948 (Ariz. App. 2023).

JURISDICTION

This Petition is timely, and this Court has jurisdiction under 28 U.S.C. § 1257(a). The Arizona Supreme Court issued its decision on December 17, 2024.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. 4.

The Fourteenth Amendment provides, in pertinent part, "… nor shall any State deprive any person of life, liberty, or property without due process …." U.S. Const. Amend. 14.

STATEMENT

Law enforcement violated Ian Mitcham's rights under the Fourth Amendment. During a driving-under-the-influence investigation, Ian gave law enforcement limited consent to take his blood and analyze it for drugs or alcohol. Three years later, and after Ian pled guilty to the misdemeanor DUI, police used the preserved blood sample to develop a DNA profile. Law enforcement did not get a warrant. The Maricopa County Superior Court, Arizona Court of Appeals, and Arizona Supreme Court all agreed this violated the Fourth Amendment.

But the Arizona Supreme Court has let this violation slide, concluding that law enforcement would have inevitably discovered Ian's DNA profile because he was convicted of two felony offenses—more than four years after the illegal search.

1. Law enforcement violates Ian Mitcham's Fourth Amendment rights when they develop a DNA profile from his blood.

The starting point in this case is a Fourth Amendment violation.

Police arrested Ian Mitcham for misdemeanor driving under the influence in 2015. *State v. Mitcham*, 559 P.3d 1099, ¶ 3 (Ariz. 2024).

During that investigation, Ian consented to a blood draw for the limited purpose of testing his blood for drugs or alcohol. *Id.* This was due in part to an implied consent law in Arizona. *Id.* Officers drew two samples of Ian's blood. *Id.* at ¶ 4. The state would test the first sample for drugs or alcohol. *Id.* Police also informed Ian that the second sample would be destroyed if he did not ask for independent testing within 90 days. *Id.*

Ian later accepted responsibility for the misdemeanor DUI; he never asked for independent testing. *Id.*

But police retained Ian's blood sample. *Id.* at ¶ 7.

Three years later, police were investigating a cold murder. *Id.* at ¶ 6. They ran a familial search through a DNA database and got a hit. *Id.* They learned that an unknown profile from the crime scene likely belonged to a first-degree male relative of an incarcerated individual named Mark Mitcham. *See id.* The familial results included Mark Mitcham's two sons and three brothers. *Id.* Two of those brothers—Craig and Ian Mitcham—lived together in the Phoenix area. *See id.*

But police did not conduct an investigation to develop probable cause. They did not test any other first-degree relatives of Mark Mitcham to identify a potential match to the DNA evidence. Instead, they took a shortcut. *Id.* at ¶ 7. Upon discovering that Ian's 2015 DUI blood was still in police possession, the lead officer directed the lab to create a DNA profile without a warrant—exceeding the scope of Ian's consent. *Id.* Lab results revealed Ian's profile was consistent with the DNA left at the murder scene. *Id.*

Relying on the unlawful DNA match, officers obtained a warrant to collect a buccal swab from Ian. *Id.* at ¶ 8. The profile developed from the buccal swab also matched. *Id.* at ¶ 9.

2. Law enforcement enters a tainted DNA profile into the Combined DNA Index System and never develops an untainted DNA profile.

The State charged Ian with first-degree murder in 2018 and they are pursuing the death penalty. Following his arrest, law enforcement uploaded Ian's DNA profile—obtained through the buccal swab warrant, which was based on the tainted DNA—into CODIS, the Combined DNA Index System. *Id.* at ¶ 39-40. When the police improperly developed his DNA profile, Ian was facing felony charges in two cases. *State v. Mitcham*, 559 P.3d 1099, ¶ 38 (Ariz. 2024). He had not yet been convicted. *Id.*

In 2022, more than four years had passed since the unlawful search and the filing of the murder charges. Facing the pressure of his looming capital case—Ian pled guilty to the two non-homicide felonies after the court ordered those cases to be tried before the capital case. *Id.* Ian was convicted after pleading straight to the court, as the state did not extend any plea offers in light of the pending capital case. Arizona law requires that a person's DNA profile be uploaded into CODIS within 30 days following a conviction. *Id.* at 39; Ariz. Rev. Stat. § 13-610(A), (O). But because Ian's DNA profile was already in CODIS—the profile flowing from the state's illegal conduct—the state never took a new DNA sample. *Mitcham*, 559 P.3d 1099, ¶ 41.

3. The trial court grants Ian's motion to suppress the tainted DNA.

Six months after Ian pled guilty to the non-homicide offenses, he moved to suppress both the DNA profile from the unlawful search and the subsequent profile

collected under a warrant that relied on the illegal results. *State v. Mitcham*, 559 P.3d 1099, ¶¶ 10, 38 (Ariz. 2024).

The state urged the trial court to apply the inevitable discovery doctrine. Appendix A, 4a (Minute Entry 12/19/2022).

The trial court rejected the state's arguments. *Id.* at 4-6. The court first concluded that the state presented no evidence to support their assertion that they could have collected a DNA sample through surveillance or ruse. *Id.* at 4. The court second found that "the State cannot demonstrate that it would have been able to get [Ian's] DNA sample through the disposition of his pending cases without assuming that Defendant was guilty of those offenses." *Id.* "Because the State failed to demonstrate by a preponderance of the evidence that it would have been able to lawfully obtain Defendant's DNA sample by surveillance, ruse, or through the disposition of his pending criminal cases, inevitable discovery is not appropriate." *Id.* at 4.

The trial judge was particularly troubled by the lead investigator's choice to take a shortcut around the Fourth Amendment. *Id.* at 6. Although further investigation might have developed further evidence sufficient for a warrant, "Lt. Lockerby chose a different path forward and secured the analysis of Defendant's blood without securing a warrant." *Id.* "Such action," the court ruled, "could be fairly characterized as deliberate, but it was at least a reckless violation of Defendant's constitutional rights." *Id.*

4. Arizona's appellate courts reverse, relying on the inevitable discovery exception.

The state appealed and the Arizona Court of Appeals reversed the trial court. *State v. Mitcham*, 535 P.3d 948, ¶ 37-51 (Ariz. App. 2023). In addition to a makeshift probable-cause exception that has since been vacated, the majority reasoned the profile was admissible under a hybrid theory of the independent source and inevitable discovery exceptions. *Id.* at ¶ 48. The Appeals Court theorized that the state could have inevitably discovered an independent source for the DNA because of Ian's felony convictions. *Id.*

On review, the Arizona Supreme Court agreed that the inevitable discovery doctrine applied. *State v. Mitcham*, 559 P.3d 1099, ¶¶ 37-47 (Ariz. 2024). The court rejected Ian's request that the court extend its earlier requirement that police be in active pursuit of an independent line of investigation. *Id.* at ¶¶ 42-47. And while the Arizona Supreme Court recognized that some courts restrict their analysis to the circumstances as they existed at the time of the illegal conduct, the court opted to assess the evidence as it stood at the time of the evidentiary hearing—more than four years after the unlawful search. *Id.* at ¶ 43.

The Arizona Supreme Court thus reversed the initial order suppressing evidence and remanded the case to the trial court. *Id.* at ¶ 48.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition to resolve a 40-year-old split as to whether inevitable discovery requires proof that police were actively pursuing an independent line of investigation at the time of the illegality. This case is an ideal vehicle for resolving the split because that inquiry determines whether the inevitable discovery exception applies here.

1. Courts are split on whether the inevitable discovery exception requires law enforcement to be actively pursuing an independent line of investigation at the time of the illegal search.

This Court adopted the inevitable discovery exception forty years ago in *Nix v. Williams*, 467 U.S. 431 (1984). There, believing that Mr. Nix had murdered a child, officers obtained an arrest warrant and began a systematic search for the child's body. *Id.* at 434-35. Mr. Nix surrendered himself, was arraigned, and hired counsel. *Id.* Police assured his counsel they would transport Mr. Nix to a different city without questioning him. *Id.* But during the drive, an officer started a conversation with Mr. Nix, leading him to reveal the location of the child's body. *Id.* at 435-36. This Court concluded exclusion was unnecessary because the search would have soon found the child's body. *Id.* at 449-50.

The inevitable discovery exception, this Court reasoned, fell in line with the independent source exception. *Id.* at 443-44. The exclusionary rule seeks to deter officers from violating the Constitution. *Id.* at 442-43. But when "the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so little basis that the

evidence should be received." *Id.* at 444. This determination "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment …." *Id.* at 444 n.5.

The *Nix* Court did not, however, define the contours of the inevitable discovery exception. The decision left unresolved key questions, such as whether law enforcement must be actively pursuing an independent line of investigation at the time of the unlawful conduct.

Lower courts immediately split on whether law enforcement had to be actively pursuing an independent line of investigation for the exception to apply.

A few months after *Nix*, the Eleventh Circuit required active pursuit in *U.S. v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984). "To qualify for admissibility, there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued *prior* to the occurrence of the illegal conduct." *Id.* (emphasis original). *Satterfield* relied on a Fifth Circuit case that predated *Nix*: *U.S. v. Brookins*, 614 F.2d 1037 (5th Cir. 1980).

The following year, the Fifth Circuit affirmed its active pursuit requirement in *U.S. v. Cherry*, 759 F.2d 1196, 1204 (5th Cir. 1985). There, the Court set forth three requirements for applying 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.*

But one year after *Cherry,* the First Circuit rejected the active pursuit requirement in *U.S. v. Silvestri*, 787 F.2d 736, 745 (1st Cir. 1986). The court reasoned that this requirement was unnecessary when an unlawful search was followed by a valid warrant, as the warrant addressed concerns related to inevitability and evidence discovery. *Id.* This reasoning, of course, relied on the assumption that the illegal search had no impact on the issuance of the warrant. The Court acknowledged, however, a concern voiced in *Satterfield*: "where a warrant is only sought after an illegal search reveals evidence of criminal activity, we begin to worry whether the later warrant is truly inevitable and independent of the police misconduct." *Id.* The First Circuit ultimately concluded that, while requiring the police to have leads at the time of the misconduct was essential for deterrence, imposing an active-pursuit requirement went too far. *Id.*

Since *Cherry* and *Silvestri*, courts have continued to split on whether to require active pursuit of an independent line of investigation.

The Second and Eighth Circuits have joined the Fifth and Eleventh in requiring active pursuit. So too have Georgia, Florida, Connecticut, and Illinois.

- Second Circuit: "For inevitable discovery to be demonstrable, it must be the case that the evidence would have been acquired lawfully through an independent source absent the government misconduct." *U.S. v. Eng*, 971 F.2d 854, 859 (2d Cir. 1992). "Inevitable discovery analysis logically must begin with the progress of the investigation at the time of the government misconduct." *Id.* at 861.

- Eighth Circuit: "To succeed under the inevitable-discovery exception to the exclusionary rule, the government must prove by a preponderance of the evidence … that the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation." *U.S. v. Connor*, 127 F.3d 663, 667 (8th Cir. 1997).

- Georgia: "But for this exception to apply … the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct." *State v. Wood*, 884 S.E.2d 596, 600 (Ga. App. 2023) (quotation marks omitted).

- Florida: "Our jurisprudence has been clear thus far that the inevitable discovery doctrine does not apply when the prosecution cannot demonstrate an active and independent investigation." *Rodriguez v. State*, 187 So. 3d 841, 848 (Fla. 2015).

- Connecticut: "To qualify for admissibility the state must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued *prior* to the occurrence of the constitutional violation." *State v. Badgett*, 512 A.2d 160, 171-72 (Conn. 1986) (emphasis original).

- Illinois: "For the inevitable discovery doctrine to apply, three criteria must be met: … (2) the evidence would have been found by an independent line of investigation untainted by the illegal conduct; and (3) the independent line of investigation must have already begun when the evidence was discovered illegally." *People v. Baker*, 181 N.E.3d 271, ¶ 21 (Ill. App. 2020).

Conversely, the Sixth, Seventh and Ninth Circuits, along with several states, have joined the First Circuit in either rejecting or expanding the active-pursuit requirement.

- Sixth Circuit: "Our cases recognize two scenarios in which inevitable discovery operates. First, the doctrine applies when there is 'an independent, untainted investigation' that was bound to uncover the same evidence…. Inevitable discovery also applies when 'other compelling facts' demonstrate that discovery was inevitable." *U.S. v. Cooper*, 24 F.4th 1086, 1091 (6th Cir. 2022).

- Seventh Circuit: "An attractive middle ground is to require the government, if it wants to use the doctrine of inevitable discovery to excuse its failure to have obtained a search warrant, to prove that a warrant would certainly, and not merely probably, have been issued had it been applied for." *U.S. v. Tejada*, 524 F.3d 809, 813 (7th Cir. 2008).

- Ninth Circuit: "At the outset, however, we reject the restriction on the inevitable discovery doctrine offered by the appellant. He asserts that the doctrine applies only if two independent investigations or searches were in progress, one of which was lawful and would have uncovered the information." *U.S. v. Boatwright*, 822 F.2d 862, 864 (9th Cir. 1987).

- Virginia: "Again, we find nothing in the Supreme Court's opinion in *Nix* or our opinions in *Warlick* and *Keeter* requiring a showing that the police were actively pursuing an alternative line of investigation." *Commonwealth v. Jones*, 593 S.E.2d 204, 207 (Va. 2004).

- Wisconsin: "Demonstrated historical facts proving active pursuit of an alternative line of investigation at the time of the constitutional violation certainly help the State to substantiate its claim that discovery of otherwise excludable evidence was inevitable. However, requiring proof *in all cases* of active pursuit at the time of the constitutional violation risks exclusion of evidence that the State might demonstrate that it inevitably would have discovered." *State v. Jackson*, 882 N.W.2d 422, ¶ 65 (Wisc. 2016) (emphasis original).

- Arizona: "Second, Mitcham asserts that the inevitable discovery exception applies only when 'regular police work already in progress' at the time of the illegal search demonstrates that the evidence would have been inevitably discovered…. We disagree." *State v. Mitcham*, 559 P.3d 1099, ¶ 42 (Ariz. 2024).

These cases highlight the ongoing split between courts. This conflict has significant practical implications, as criminal case outcomes often hinge on a jurisdiction's stance on active pursuit. A solution is needed, and this Court can provide the necessary clarity to resolve this longstanding issue.

2. This split has continued for nearly 40 years.

This split has persisted since the First Circuit's 1986 decision in *Silvestri* and has been widely recognized by federal circuits and state courts. The Sixth Circuit has said, "Whether an independent line of investigation is required for the inevitable discovery exception to apply is a question that has divided the circuits." *U.S. v. Kennedy*, 61 F.3d 494, 498 (6th Cir. 1995). The First Circuit has also acknowledged, "Other circuits are divided over whether to impose this requirement." *U.S. v. D'Andrea*, 648 F.3d 1, 12 n.16 (1st Cir. 2011). And state courts in Alabama, Colorado, and Maryland have recognized the split. *Kabat v. State*, 867 So.2d 1153, 1157 n.2 (Ala. Crim. App. 2003); *People v. Burola*, 848 P.2d 958, 962 (Colo. 1993); *Williams v. State*, 813 A.2d 231, 250 n.10 (Md. App. 2002).

Academics have also debated the split for over 35 years.

One article noted the divide in 1988—just two years after the split had developed. R. Bradley Lamberth, *The Inevitable Discovery Doctrine: Procedural Safeguards to Ensure Inevitability*, 40 Baylor L. Rev. 129, 142 (1988). That article found the active pursuit requirement "of paramount importance to the satisfactory determination of inevitability." *Id.* at 146.

A decade later, another article noted the growing split and urged this Court to either narrow the doctrine's scope or mandate the active pursuit rule. Troy E. Golden, *The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment, Nix, and Murray, and the Disagreement Among the Federal Circuits*, 13 BYU J. Pub. L. 97, 126 (1998).

Academics continued to observe the divide in the 2000s. Mattias Luukkonen, Ph.D., *Knock, Knock. What's Inevitably There? An Analysis of the Applicability of the Doctrine of Inevitable Discovery to Knock and Announce Violations*, 35 McGeorge L. Rev. 153, 169-70 (2004). This author, however, analyzed a different issue and did not address the active pursuit requirement.

Articles have continued to recognize the split in the last decade. Reginald R. Lewis, *A Common Sense Understanding of Inevitable Discovery: Why* Nix v. Williams *Does Not Require Active Pursuit in the Application of the Inevitable Discovery Doctrine*, 85 Miss. L.J. 1691, 1702 (2017); Tonja Jacobi & Elliot Louthen, *The Corrosive Effect of Inevitable Discovery on the Fourth Amendment*, 171 U. Pa. L. Rev. 1, 18-19 (2022). One of these articles opined that active pursuit should not be required under the inevitable discovery exception. Lewis, *A Common Sense Understanding of Inevitable Discovery*, 85 Miss. L.J. at 1693. The other concluded that an active pursuit requirement "is arguably overly restrictive …." Jacobi & Louthen, *The Corrosive Effect of Inevitable Discovery on the Fourth Amendment*, 171 U. Pa. L. Rev. at 71.

And several certiorari petitions have urged this Court to resolve whether the inevitable discovery doctrine requires active pursuit. For instance, in *Florida v. Rodriguez*, the question presented was "Whether, in the context of warrantless searches, the prosecution may invoke the inevitable discovery doctrine adopted in *Nix v. Williams*, 467 U.S. 431 (1984) if police were not actively pursuing a search warrant or some alternative line of investigation before conducting the warrantless

search?" *Florida v. Rodriguez*, Cert. Pet., 2016 WL 3345345, i, No. 15-1505. One year earlier, another Florida case asked "Whether 'active pursuit' is an element of the 'inevitable discovery' doctrine." *Crasper v. Florida*, Cert. Pet., 2015 WL 410707, i, No. 14-918. A case from the Seventh Circuit also raised the issue: "Did the Circuit Court improperly interpret the inevitable discovery doctrine when it affirmed the admission of evidence seized during a warrantless search, where at the time of the search the police were not actively pursuing other lawful means to obtain a search warrant?" *Daniels v. U.S.,* Cert. Pet., 2010 WL 1256456, i, No. 09-1191. And similar questions were asked in *Lee v. Louisiana*, Cert. Pet., 2008 WL 2384713, i, No. 07-1536; and *Wallace v. U.S.*, Cert. Pet., 2008 WL 2050800, i, No. 07-1403.

Four decades have passed and our courts remain split. Scholars have debated the issue extensively, offering different views and interpretations of the inevitable discovery doctrine. And the lack of a uniform approach continues to create uncertainty, prompting litigants to regularly seek clarity from this Court.

3. This Court should require active pursuit of an independent line of investigation as a prerequisite to the inevitable discovery exception.

The active pursuit requirement is the best way to safeguard the protections of the Fourth Amendment and prevent unjustified intrusions. Requiring active pursuit of an independent investigation aligns more closely with the core principles of the Fourth Amendment and the mandates set forth in *Nix,* ensuring that reviewing courts consider only concrete, historical evidence.

a. Active pursuit is more consistent with the Fourth Amendment.

Foremost, the Fourth Amendment provides a strong protection for U.S. citizens: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. 4.

Under this protection, Ian's right to be secure "shall not be violated."

The plain language of the Fourth Amendment also outlines the preferred process: the warrant process.

This too protects Ian by limiting the scope of government intrusion. It requires an oath or affirmation, mandates a determination of probable cause before issuance, and ensures that the warrant itself is narrowly tailored in its scope.

Requiring the active pursuit of an independent line of investigation best aligns with the plain language of the Fourth Amendment. Without this requirement, illegal searches can be excused by after-the-fact speculation about what law enforcement might have done had they not violated the Fourth Amendment in the first place.

Requiring active pursuit is also consistent with the Fourth Amendment's principle that exceptions to the warrant requirement must be narrowly construed. When this Court discusses exceptions to the Fourth Amendment's warrant requirement, this Court explains that the exceptions should be narrowly construed

and closely guarded. As this Court noted in *Arizona v. Gant*, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. U.S.*, 389 U.S. 347, 357 (1967)); *accord Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971), *holding modified by Horton v. California*, 496 U.S. 128 (1990). But when this Court addresses exceptions to the exclusionary rule, this Court says that our system favors admission: "Suppression of evidence, however, has always been our last resort, not our first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

There is an inherent tension between a preference for admission and the exclusionary rule in our Fourth Amendment jurisprudence. This tension may exist because the exclusionary rule is often applied beyond Fourth Amendment violations. Indeed, *Nix* dealt with a Sixth Amendment violation.

But when the violation concerns only the Fourth Amendment, as here, exceptions to the exclusionary rule function as exceptions to the warrant requirement. This blending of concepts undermines the original intent of the exclusionary rule and weakens the very protections the Fourth Amendment was designed to uphold.

This concern has led some jurisdictions to require evidence that the illegal search was not conducted with the goal of accelerating the discovery of evidence. In *State v. Holly*, for example, the North Dakota Supreme Court required the state to

prove that "the police have not acted in bad faith to accelerate the discovery of the evidence in question." *State v. Holly*, 833 N.W.2d 15, ¶ 54 (N.D. 2013) (quoting *State v. Phelps*, 297 N.W.2d 769, 775 (N.D. 1980)). This ensures that the inevitable discovery doctrine is not misused to justify intentional violations of constitutional rights.

This exact concern is evident in the present case. Instead of following standard investigation procedures, the police took a shortcut. They developed a DNA profile from Ian's blood sample—far exceeding the scope of his limited consent. As the trial court observed, this conduct "could be fairly characterized as deliberate, but it was at least a reckless violation of Defendant's constitutional rights." Appendix A, 6a (Minute Entry 12/19/2022).

Law enforcement's conduct became even more egregious when they used the unlawfully obtained DNA results to secure a buccal swab warrant. Their intentional reliance on evidence obtained in violation of constitutional rights highlights their blatant disregard for the Fourth Amendment. *See U.S. v. Silvestri*, 787 F.2d 736, 745 (1st Cir. 1986) (rejecting the active pursuit requirement when a valid warrant was obtained, provided that the illegal search did not influence the warrant's issuance). Absent Ian's unlawfully obtained DNA results, the buccal swab warrant lacked probable cause, particularly given the existence of multiple other potential matches. The exclusionary rule is intended to prevent "deliberate, reckless, or grossly negligent conduct," like the conduct at issue here—where police relied on

illegally obtained DNA to later secure a warrant. *See Herring v. U.S.*, 555 U.S. 135, 144 (2009).

Mandating that law enforcement be in active pursuit of an alternate line of investigation ensures accountability and deters officers from acting in bad faith to accelerate the discovery of evidence through shortcuts. Requiring active pursuit for inevitable discovery—especially where there is a warrantless search—reaffirms the foundational principles of the Fourth Amendment. This approach reinforces the need for judicial oversight and the commitment to deterring unlawful government conduct. An active-pursuit requirement is the best way to uphold and protect the rights guaranteed by the Fourth Amendment.

b. An active pursuit requirement ensures courts view the evidence in light of historical facts.

In *Nix*, this Court made clear that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment …." *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984). Because the facts in *Nix* were verifiable and not speculative, this Court concluded that "the deterrence rationale has so little basis that the evidence should be received." *Id.* at 444.

An active pursuit requirement maintains the focus on "historical facts" and eliminates speculation. In this way, active pursuit of an independent line of investigation is more consistent with the goal to deter gamesmanship and after-the-fact rationalization that could otherwise justify unconstitutional searches.

A common principle in applying the inevitable discovery rule, regardless of whether the court adheres to the active pursuit requirement, is that the analysis must center on the evidence as it existed at the time of the unlawful act.

The Second Circuit discussed this in *U.S. v. Eng*, 971 F.2d 854, 861 (2d Cir. 1992). Looking at *Nix*, the Second Circuit concluded, "inevitable discovery analysis logically must begin with the progress of the investigation at the time of the government misconduct." *Id.* "This point of departure is fixed," the Court reasoned, "by the requirement that an inevitable discovery inquiry focus on 'demonstrated historical facts' so as to keep speculation to an absolute minimum …." *Id.* (quoting *Nix*, 467 U.S. at 444 n.5). To ensure this focus, and to protect against investigations tainted by illegal conduct, the Second Circuit required the prosecution to prove law enforcement were actively pursuing an alternate line of investigation. *Id.* The Eleventh Circuit similarly ruled that the district court had to assess inevitable discovery "prior to the unlawful conduct, based on the information possessed and investigations being pursued at such time." *U.S. v. Drosten*, 819 F.2d 1067, 1070 (11th Cir. 1987).

Even courts that reject the active pursuit requirement still focus on the circumstances at the time of the illegal conduct and assess whether the officers would have discovered the tainted evidence through routine procedures. In the Sixth Circuit, for example, inevitable discovery "requires the district court to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred." *United States*

v. Kennedy, 61 F.3d 494, 500 (6th Cir. 1995) (quoting *Eng*, 971 F.2d at 961)). The Ninth Circuit also adopted the requirement that trial courts look at the information and investigations as they existed "prior to the unlawful conduct." *U.S. v. Lang,* 149 F.3d 1044, 1047 (9th Cir. 1998).

The active-pursuit rule automatically requires this. When prosecutors can prove that law enforcement was actively pursuing an independent line of investigation that would have inevitably discovered evidence, the trial court's focus is on the facts investigators knew at the time of the illegal search. This ensures that the inevitable discovery analysis is based on objective, verifiable facts rather than speculation.

But the Arizona Supreme Court rejected this common principle. *State v. Mitcham*, 559 P.3d 1099, ¶ 44 (Ariz. 2024). The court opined, "Relying exclusively on investigative facts and procedures available to police at the time of the illegal search to assess inevitable discovery is unnecessarily restrictive." *Id.* Instead, the Arizona Supreme Court ruled that the focal point was the suppression hearing, which took place more than four years after the unlawful search: "The key inquiry is whether verifiable facts exist from which the court can find, at the time of the suppression hearing, that the evidence would have been lawfully discovered despite the illegal search and independent of it." *Id.*

This does not hold up to scrutiny, and it defies the foundation of *Nix*. Expanding an inevitable discovery analysis to the date of a suppression hearing—over four years after the unlawful search—eliminates any boundaries and allows

the prosecution to claim almost anything is inevitable. Constitutional enforcement becomes a matter of timing, not law. This case proves the point. Under the Arizona Supreme Court's reasoning, the outcome of this case hinges on when the motion to suppress was filed. Had Ian moved to suppress the evidence before entering his guilty pleas, suppression would have been appropriate. The non-homicide felony convictions would not have existed, and the trial court would have been right to rely on the presumption of innocence. The reason Ian loses, according to the Arizona Supreme Court, is because he filed his motion to suppress *after* he made a strategic decision (under the pressure of a capital case) to plead guilty.

Active pursuit anchors the inevitable discovery doctrine in concrete, contemporaneous actions rather than speculative future events. It is consistent with this Court's demand that the inevitable discovery inquiry avoid speculation and focus "on demonstrated historical facts capable of ready verification or impeachment …." *Nix*, 467 U.S. at 444 n.5. It ensures that law enforcement decisions are not tainted by illegal conduct. *Eng*, 971 F.2d at 861. It deters law enforcement from breaking the law to expedite discovery or act on mere hunches.

4. This case is an ideal vehicle to resolve the split.

Finally, this case is a perfect vehicle to determine whether active pursuit is necessary for two reasons: (1) This case is on direct appeal and was decided on federal grounds, and (2) Active pursuit is the crux of this case.

a. This case is on direct review and rests on a federal constitutional analysis of the inevitable discovery exception.

First, this case is on direct appeal—the procedural posture needed to resolve this issue—and does not rest on independent state grounds.

This issue cannot be resolved on habeas review. Under the Antiterrorism and Effective Death Penalty Act, habeas review is only proper if a state court issued a decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). This Court has yet to clearly establish whether the inevitable discovery exception requires that law enforcement be in active pursuit of an independent line of investigation—hence the entrenched split among state and federal courts. Any habeas review would thus be futile; the appropriate time to consider a question of this sort "would be on direct review, not in a habeas case governed by § 2254(d)(1)." *See White v. Woodall*, 572 U.S. 415, 427 (2014); *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013).

This also illustrates one fundamental problem with the Arizona Supreme Court's decision—their reliance on a habeas case. The court found persuasive the Seventh Circuit's decision in *Sutton v. Pfister*, 834 F.3d 816 (7th Cir. 2016). *See State v. Mitcham*, 559 P.3d 1099, ¶ 44 (Ariz. 2024). But *Sutton* was a habeas case. *Sutton*, 834 F.3d at 817. And as noted above, the Seventh Circuit had already rejected active pursuit in favor of its "intermediate test." *U.S. v. Tejada*, 524 F.3d 809, 813 (7th Cir. 2008). The Seventh Circuit's decision in *Sutton* was thus not a reasoned assessment of whether inevitable discovery should require active pursuit.

Habeas cases cannot provide a mechanism for this Court to review the issue. Habeas relief must be rejected when a legal claim is unsettled. The established split is proof that the application of the active pursuit doctrine is unsettled.

Unlike *Sutton*, this case is on direct review—the procedural posture necessary to address the issue.

And this case is not based on independent state grounds. Indeed, the Arizona Supreme Court refused to address Ian's arguments raised under the Arizona Constitution. *State v. Mitcham*, 559 P.3d 1099, ¶ 47 (Ariz. 2024). This case hinges entirely on the Fourth Amendment.

b. Active pursuit is the lynchpin of this case; had active pursuit been required, the resolution would have been different.

Active pursuit is at the heart of the inevitable discovery exception in this case. The juxtaposition between the trial court's ruling and the Arizona Supreme Court's ruling illustrates this difference.

The trial court's ruling was based on the lack of any active investigation at the time of the illegal search. *See* Appendix A, 4a (Minute Entry 12/19/2022). At the trial level, the prosecutor argued that the inevitable discovery exception applied. *Id.* The prosecution's theory was that police would have secured Ian's DNA profile through surveillance or a ruse. *Id.* The court rejected this assertion because the prosecutors presented no evidence to support their claim. *Id.* As an alternative, the state asserted it would have inevitably gotten the DNA evidence as a result of Ian's eventual convictions. *Id.* The trial court rejected this as speculation: "the State

cannot demonstrate that it would have been able to obtain his DNA sample through the disposition of his pending cases without assuming that Defendant was guilty of those offenses." *Id.* The trial court determined that all the prosecutor's claims were speculation. *Id.* And inevitable discovery cannot be based on speculation. *Id.* The trial court reached these decisions because it viewed the evidence at the time of the illegality. When the lead detective violated Ian's Fourth Amendment rights, there was no plan for surveillance or a ruse. *Id.* And Ian had not yet been convicted of the non-homicide felonies. *Id.* The court thus concluded Ian was entitled to the presumption of innocence. *Id.*

But the Arizona Supreme Court applied the inevitable discovery exception by rejecting an active pursuit requirement. *State v. Mitcham*, 559 P.3d 1099, ¶ 42 (Ariz. 2024). Ian had argued that inevitable discovery required proof of "regular police work already in progress" when the illegal search was conducted. *Id.* The Arizona Supreme Court rejected this. *Id.* Instead, the court ruled that "Arizona has adopted the broad view of the inevitable discovery rule …." *Id.* at ¶ 43. Under this broad view, "the State is not required to demonstrate that police initiated lawful means to acquire evidence prior to its seizure." *Id.* The court below saw "no reason to require the State to prove the exception by projecting investigative outcomes using only facts available to the police before the illegal search." *Id.* Rather, the Arizona Supreme Court focused on "whether verifiable facts exist from which the court can find, at the time of the suppression hearing, that the evidence would have been lawfully discovered despite the illegal search …." *Id.*

Active pursuit of an independent line of investigation was the distinction. The trial court did not find discovery inevitable because, at the time of the illegal search, there was no independent line of investigation that would have inevitably led law enforcement to Ian's DNA. The Arizona Supreme Court applied the inevitable discovery exception because they rejected any active pursuit requirement and looked at the evidence at the time of the suppression hearing, not the time of the illegal search.

This separates this case from prior certiorari petitions like *Daniels* and *Lee*.

In *Daniels v. U.S.*, "the district court found in the alternative that the officers' search for the AK-47 was justified by exigent circumstances, and petitioner does not challenge that ruling in his petition." *Daniels v. U.S.*, Br. in Opp. 6.[1] Also, the active pursuit requirement was met. *Id.* at 10. Police were asking for consent while they were asking the petitioner about weapons. *Id.* And the district court "upheld the validity of petitioner's wife's consent in a ruling that petitioner did not challenge in the court of appeals and does not challenge here." *Id.* Thus, while the respondent agreed courts were split, they argued that the case was "not an appropriate vehicle for resolution of that issue both because the officers' search for the weapon was justified by exigent circumstances and because the arrest team's pre-search request for petitioner's wife's consent to search the house satisfied any active-pursuit requirement that might apply." *Id.* at 11-12.

[1] The Brief in Opposition is available at https://www.justice.gov/osg/media/198206/dl?inline (last accessed February 3, 2025).

Lee v. Louisiana suffered from a similar problem. As the Brief in Opposition pointed out, the Louisiana Supreme Court concluded that the prosecution had shown that "law enforcement was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation." *Lee v. Louisiana*, Br. in Opp. 29, 2008 WL 2744314; *see also State v. Lee*, 976 So.2d 109, 131 (La. 2008).

Here, active pursuit is central. The trial court concluded that it could not determine inevitability without speculating and rejecting the presumption of innocence. This was because officers were not actively pursuing an independent line of investigation. The Arizona Supreme Court reached a different decision because it rejected an active pursuit requirement. Active pursuit was the turning point.

CONCLUSION

Courts have been split for 40 years about whether the inevitable discovery exception requires proof that officers were actively pursuing an independent line of investigation that would have led to the evidence. The active pursuit requirement ensures the inevitable discovery exception does not swallow the exclusionary rule. This is crucial in Fourth Amendment scenarios, where inevitable discovery operates as an additional exception to the warrant requirement. And active pursuit focuses trial courts on the proper inquiry: whether the prosecution can prove that discovery was indeed demonstrable at the time of the illegal conduct based on historical facts.

This Court should grant certiorari and hold that the inevitable discovery exception requires proof that law enforcement was actively pursuing an independent line of investigation.

Respectfully submitted this 4th day of February, 2025.

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