No. 24-6511

IN THE

Supreme Court of the United States

IAN MITCHAM,
Petitioner,
v.
STATE OF ARIZONA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ARIZONA SUPREME COURT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The State of Arizona's officers violated Ian Mitcham's Fourth Amendment rights by unlawfully obtaining his DNA profile. Nevertheless, the Arizona Supreme Court held that the illegally obtained evidence need not be suppressed because the evidence would have been inevitably discovered four years after it was unlawfully obtained, after the investigation and charging of the underlying case here was complete, and after an unforeseeable intervening guilty plea on unrelated charges. The Arizona Supreme Court's broad interpretation of the inevitable discovery exception would swallow the exclusionary rule, requiring nothing more than a prosecutor's ability to creatively theorize a way that the evidence could have been lawfully obtained at some point in the intervening time period between the illegal search and the eventual suppression hearing.

This Court's precedents demand more, but courts are intractably divided on how to apply those precedents. Some courts, now including Arizona, do not require prosecutors to demonstrate that the unlawfully obtained evidence would have been inevitably discovered through an independent investigation active at the time of the illegal search. Meanwhile others, more steadfastly hewing to this Court's doctrinal principles, require that the inevitable discovery result from an independent and active investigation. This Court should grant certiorari to resolve this persistent and deepening split on an issue of critical importance in this capital case.

I. This Court Has Jurisdiction.

The State claims that the decision below is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a) because Ian's criminal case remains pending. BIO

10. But Arizona law specifically permits immediate appeal to and final resolution of motions to suppress in the Arizona Supreme Court. Ariz. Rev. Stat. § 13-4032(6). Such appeals and decisions are not considered interlocutory under Arizona law. *See State v. Limon*, 270 P.3d 849, 851 (Ariz. Ct. App. 2011) ("[T]he plain language of § 13-4032 allows the state to appeal from an 'order granting a motion to suppress' without distinguishing between interlocutory or final orders.").

The Arizona Supreme Court decision below therefore represents the final resolution of the question presented. The Arizona trial court cannot revisit the federal question of whether Ian's DNA profile should be excluded at trial or after trial, and neither can the Arizona Court of Appeals or the Arizona Supreme Court. *See In re Monaghan's Estate*, 227 P.2d 227, 228 (Ariz. 1951) (law of the case prevents review of issues already decided); *see also Copper Hills Enters., Ltd. v. Arizona Dep't of Revenue,* 153 P.3d 407, ¶ 15 (Ariz. Ct. App. 2007) (same). As this Court explained in *Cox Broadcasting Corp. v. Cohn*, "the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come," and consistent with "the purposes of 28 U.S.C. § 1257 … has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. 469, 477 (1975). Simply put, this federal issue is finally

decided. The Court's jurisdiction therefore is not a bar to resolving the important question presented that is dividing courts throughout the country.[1]

It is particularly curious here that the State would raise a jurisdictional issue when its abnormal actions below manufactured the supposed jurisdictional flaw. Typically, when the State appeals a trial court's suppression ruling under the Arizona statute, it "dismisses prosecutions to pursue direct appeals" and then refiles the charges, if it wishes, once the appeals are resolved. Ariz. Ct. App. State Opening Br. 4; *e.g.*, *State v. Gasbarri*, 463 P.3d 243, ¶ 6 (Ariz. Ct. App. 2020); *State v. Morris*, 435 P.3d 1060, ¶ 7 (Ariz. Ct. App. 2019). If the State had followed its usual process, no case would be pending, and there would be no question as to jurisdiction under § 1257. In fact, on appeal in state court, the State specifically claimed that its decision not to dismiss, as it typically would, "should not affect" the Arizona appellate court's "jurisdiction under § 13-4032(6)." Ariz. Ct. App. State Opening Br. 4-5. Having gotten what it wanted from the Arizona state courts, the State now seeks to cut off the review by claiming a jurisdictional bar before this Court. This Court should not permit the State's jurisdictional sleight of hand.

II. There Is An Entrenched Split On Whether Invoking The Inevitable Discovery Exception Requires Establishing Active Pursuit.

The State does not dispute that both federal circuit and state supreme courts are intractably divided over the inevitable discovery exception. *See* BIO 21-22. The inevitable discovery doctrine may be "long applied" (BIO 16), but the split over *when* to

[1] This Court has regularly addressed state court decisions regarding suppression of evidence, treating them as final under 28 U.S.C. § 1257. *E.g.*, *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984); *Arkansas v. Sullivan*, 532 U.S. 769, 771 n.* (2001).

apply it is just as long-standing, dating nearly to this Court's 1984 adoption of the doctrine in *Nix v. Williams*, 467 U.S. 431 (1984). *See* Pet. 14-15.

As the Petition outlines, at least four circuits and four states now hold that states may establish entitlement to the exception only if they can show they had "an active and ongoing investigation … in progress at the time of [the] unlawful search" that would have inevitably resulted in discovery of the illegally obtained evidence. *In re 650 Fifth Ave. & Related Props.*, 830 F.3d 66, 103 (2d Cir. 2016); *see* Pet. 15-17. In contrast, at least four circuits and two states—now joined by Arizona—permit states to claim inevitable discovery as grounds for the introduction of illegally obtained evidence even if the state was not actively pursuing any independent investigation to obtain the evidence at the time of the illegal search. *See* Pet. 17-18.

Contrary to the State's suggestion, *see* BIO 22, this split is current. The State's broad interpretation of the inevitable discovery rule is just the most recent decision to join the First, Sixth, Seventh, and Ninth Circuits and at least two other states that have declined to require active pursuit of an alternate line of investigation. And courts on the other side of the split continue to affirm their own embrace of an active pursuit requirement.[2] *See, e.g.*, *In re 650 Fifth Ave. & Related Props.*, 934 F.3d 147, 164 (2d Cir. 2019); *United States v. Virden*, 488 F.3d 1317, 1323 (11th Cir. 2007)

[2] The State implies otherwise by highlighting two Fifth Circuit cases questioning "continuing vitality of the active-pursuit" requirement within that circuit. BIO 22 (quoting *United States v. Jackson*, 596 F.3d 236, 242 (5th Cir. 2010) and citing *United States v. Lamas*, 930 F.2d 1099, 1104 (5th Cir. 1991)). But the Fifth Circuit's dicta questioning the rule in "case[s] that [do not] turn[] on that question" does not alter its own rule, let alone undermine the broader split between jurisdictions. *Lamas*, 930 F.2d at 1104; *see United States v. Zavala*, 541 F.3d 562, 579-80 (5th Cir. 2008) (citing with approval *United States v. Cherry*, 759 F.2d 1196 (5th Cir. 1985), which reaffirmed the active pursuit requirement).

("[W]e have continued to strictly apply th[e] [active pursuit] requirement."); *State v. Wood*, 884 S.E.2d 596, 600 (Ga. Ct. App. 2023); *State v. Correa*, 264 A.3d 894, 935-36 (2021); *see* Pet. 17 (collecting cases).

The State "admit[s]" (at BIO 20) that the decision below explicitly takes a side in the split: The Arizona Supreme Court rejected an active pursuit requirement and instead held that inevitable discovery depends on the verifiable facts "at the time of the suppression hearing," rather than the time of the illegal search. Pet. App. 2 16 ¶¶ 42-43. And the court itself acknowledged that its conclusion was in tension with that of several circuits. Pet. App. 2 17-18 ¶ 46.

III. The Inevitable Discovery Exception Does Not Apply.

As the Petition established (Pet. 22-23), under longstanding Fourth Amendment principles and this Court's precedent, Ian's DNA profile should be excluded from the trial in his current case because the evidence was unlawfully obtained. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). The State does not contest here that it violated Ian's Fourth Amendment rights by failing to destroy Ian's blood sample within 90 days of a DUI arrest in 2015 and then unlawfully using that sample to create a DNA profile three years later without a warrant or consent. Pet. 9-10. Nevertheless, the State seeks to avoid the exclusion of the DNA evidence by attempting to squeeze this evidence into an exception to the exclusionary rule—here, the inevitable discovery exception. BIO 17-23. But, contrary to the Arizona Supreme Court's holding, that exception properly construed does not apply.

The inevitable discovery exception is a limited exception to the exclusionary rule that applies when discovery of the evidence at issue would have been truly

"inevitable" absent the illegal actions. *Nix*, 467 U.S. at 444. It is limited to circumstances where the ultimate discovery "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Id.* at 444 n.5; *see also Cherry*, 759 F.2d at 1205 n.10. Without that limitation, the inevitable discovery exception would allow states to circumvent the exclusionary rule by merely theorizing some lawful means by which the evidence could have been obtained.

The State claims that the suppressed evidence here fits the inevitable discovery exception because Ian's "DNA profile would have inevitably been extracted and put in CODIS from an independent source and then searched through CODIS" after his plea on the unrelated charges four years after the DNA profile was unlawfully created. BIO 18. But that conclusion is full of speculation. *Contra Nix*, 467 U.S. at 444 n.5. Discovery was not even possible, let alone inevitable until after Ian pled guilty to unrelated charges in 2022—well after he was investigated and charged in the case at issue here and years after the illegal search. The Arizona Supreme Court's holding below requires that courts conduct the inevitability inquiry from the time of the suppression hearing, but that is an arbitrarily determined date with no relationship to the gathering of evidence. And where, as here, lawfully obtaining the suppressed evidence requires an intervening plea or conviction, the State's rule additionally errs in requiring courts to forego the presumption of innocence and speculate that conviction is inevitable merely because charges are filed.

This case demonstrates precisely how, if allowed, states will use the inevitable discovery exception to completely avoid the exclusionary rule. Indeed, that is precisely what the State's BIO proposes. BIO 17-19. The State makes no claim that officers had a legal basis for creating the DNA profile at the time it was created, or for the four years thereafter. It was not until Ian pled guilty to unrelated charges in 2022 that the State would have been lawfully permitted to collect his DNA. Pet. App. 2 14 ¶ 38. The happenstance of timing—that the 2022 plea preceded the suppression hearing—is the only reason that the State has even a dubious claim to the inevitable discovery exception. *Id.* If the suppression hearing had occurred prior to Ian's plea, the State would have had no factual predicate for its inevitable discovery argument. The Arizona Supreme Court's rule permits a decision on whether to suppress unconstitutionally obtained evidence to be determined by the timing of the suppression hearing. That arbitrary rule cannot be permitted to stand.

The Arizona Supreme Court's rule, which allows admissibility to turn on nothing more than a prosecutor's creativity, underscores why this Court should confirm that the inevitable discovery exception applies only to circumstances where officers are in active pursuit of an independent line of investigation. Whether unconstitutionally obtained evidence is suppressed should not be controlled by prosecutors' ability to theorize some way the evidence could have been lawfully obtained, but by whether there is some good reason not to suppress the evidence, i.e., the evidence was in fact separately obtained in a lawful manner (independent source exception) or officers are on the precipice of lawfully obtaining the same evidence in a lawful manner

(inevitable discovery exception). Instead of accepting that neither of these exceptions avoids the exclusion of Ian's DNA profile, the State attempts to blur the line between these two exceptions. BIO 19 (both acknowledging that the independent source doctrine does not apply and suggesting that this Court can apply it). This Court's intervention is necessary to prevent law enforcement from continuing to obscure the line between these two exceptions to avoid the exclusionary rule.

IV. This Case Is An Excellent Vehicle.

This case, with a final decision below rejecting an active-pursuit requirement in Arizona and finally resolving the federal suppression question in this case, presents a clear opportunity to address the question presented. Pet. 28-33.

The State argues that the inevitable discovery doctrine would permit admitting the DNA evidence even under an active-pursuit requirement. The State's theory is that, because the unrelated felony charges that could have resulted in DNA collection on conviction "were pending *before* the search deemed unlawful occurred," the active-pursuit requirement was met here. BIO 20; *see* BIO 21-22.

But the State's pending-charges theory is not what the Arizona Supreme Court held below. The court never found the facts *at the time of the unlawful search* sufficient to establish inevitable discovery. The court held only that the "verifiable facts … *at the time of the suppression hearing*" were. Pet. App. 2 16 ¶ 43 (emphasis added). Active-pursuit jurisdictions require "viewing [the facts] as they existed at the instant before the unlawful search"—not at the time of a subsequent suppression hearing. *United States v. Eng*, 971 F.2d 854, 861 (2d Cir. 1992). Rejection of an active-pursuit requirement therefore was in fact "necessary for [the court's] holding" (BIO 20).

Notably, the State never defends the Arizona Supreme Court's decision to focus on the facts at the time of the suppression hearing, an arbitrary distinction with no foundation in the Fourth Amendment or either exclusionary exception. *See* BIO 20.

In any event, the State's proposed substitute holding equally fails to meet the standard for active pursuit. Active pursuit requires the State to demonstrate that there was "an active and ongoing investigation … in progress" through which "obtaining the challenged evidence was, at least to some degree, imminent, if yet unrealized at the time of the unlawful search." *Correa*, 264 A.3d at 935-36. In other words, there must be some other active investigation that itself offers a means of obtaining the evidence.

Unsurprisingly, the State cites no cases that have considered criminal charges filed at the time of an illegal search to qualify as an "active and ongoing investigation." Criminal charges are not a line of investigation leading to the production of evidence; they are the end of the line in an investigation. And they do not offer a "means of obtaining the challenged evidence." *Id.* (citation omitted). Under undisputed Arizona law, the *charges* Ian faced did not permit the legal collection of DNA evidence. Only his later *plea* on those charges did. *See supra* 6-7; Ariz. Rev. Stat. § 13-610(A), (O). Ian's plea occurred in 2022, after his indictment on the capital charges stemming from illegal search at issue here.[3] In an active-pursuit jurisdiction,

[3] Significantly, while Ian's 2015 charges were independent of the illegal search, his 2022 convictions on those charges cannot be separated from the illegal search. Ian chose to plead guilty on the long-pending 2015 charges only after he was indicted in this capital case based on the illegally obtained evidence. With the capital case pending, Ian was under unique pressure to resolve the other charges—and the State did not offer plea options, as it may have had the capital case not been pending. Had he

the plea therefore could not have provided grounds for invoking the inevitable discovery doctrine to excuse the police's illegal search years earlier.

The State's remaining vehicle arguments only underscore the indefensibility of the decision below.

First, again declining to defend the Arizona Supreme Court's analysis, the State instead stresses that that the inevitable discovery exception separately applies because Ian "was a suspect" and it "would have used another method to obtain [Ian's] DNA" had it not conducted the illegal search. BIO 20-21. But the Arizona Supreme Court did not adopt the State's alternative-method argument; its holding rests solely on the 2022 convictions. Should the Court grant certiorari and determine that the Arizona Supreme Court erred in finding inevitable discovery established based on the 2022 plea, it can remand for the Arizona Supreme Court to address the State's arguments that it inevitably would have discovered the DNA evidence through surveillance, a ruse, or some other lawful method. Whatever other purported lawful method argument the State is contemplating, the correct legal standard for inevitable discovery requires demonstrating active pursuit of an independent legal investigation at the time of the illegal search.[4]

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not been facing capital charges, he may well have chosen not to plead guilty to the pending 2015 charges as felonies, and the State may have never been authorized to obtain DNA evidence.

[4] The State also argues that it could not collect Mitcham's DNA because "A.R.S. § 13-610(G) prohibits double collection of DNA samples …." BIO 17-18. But the State fails to mention that the only reason it is in this position is because it illegally retained Ian's DNA sample. Pet. 9-10. The State cannot now use its own illegal behavior to justify an additional violation of Ian's Fourth Amendment rights.

Second, turning even farther from the decision below, the State tells this Court that it could affirm the Arizona Supreme Court's ruling on the alternative grounds that the suppressed evidence satisfies the independent source exception. BIO 19. But the State's suggestion is curious. As the State itself recognizes, the independent source doctrine does not apply here because officers did not in fact take a new DNA sample from Ian after his plea to the unrelated charges in 2022. *Id.* The State's suggestion then is an invitation to blur the lines between two doctrines that are separate and distinct—one that permits otherwise unlawfully obtained evidence to be admitted when it is actually acquired in a second lawful manner (independent source exception) and one that permits unlawfully obtained evidence to be admitted when there is no doubt that it would be lawfully obtained in a second lawful manner (inevitable discovery exception). *See Utah v. Strieff*, 579 U.S. 232, 238 (2016) (distinguishing between the two exceptions). This Court should decline the State's invitation to conflate these doctrines or expand the inevitable discovery exception.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the Petition should be granted.

Respectfully submitted,

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