NO. 102134-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHIGNTON,
Petitioner,

vs.

MALCOM OTHA MCGEE,
Respondent.

BRIEF OF WACDL, ACLU-WA, WDA AS AMICI CURIAE

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A. IDENTITY AND INTEREST OF AMICI

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of Respondent Malcom McGee. WACDL was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has approximately 800 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime. It files this brief in pursuit of that mission.

The American Civil Liberties Union of Washington (ACLU-WA) is a statewide, nonpartisan, nonprofit organization with over 150,000 members and supporters, dedicated to the preservation of civil

liberties and the principles of liberty and equality embodied in the Washington and United States Constitutions and federal and state civil rights laws. The ACLU-WA has long worked towards and supported various efforts to both uphold privacy rights and protect against law enforcement overreach. In this effort, the ACLU-WA routinely participates in cases that will disproportionately affect the rights of People of Color, especially in the context of the criminal legal system.

The Washington Defender Association (WDA) is a statewide non-profit organization that represents over 30 public defender agencies and has over 1,500 members comprising criminal defense Counsels, investigators, social workers and paralegals throughout Washington. WDA is committed to protecting the rights of people accused of crimes under

the Washington and United States Constitutions. WDA representatives frequently testify before the Washington House and Senate on proposed legislation affecting indigent defense. WDA has been granted leave on many occasions to file amicus briefs in this Court. The issues in this case are important to public defenders in Washington and their clients.

B. ISSUES OF CONCERN TO AMICI

1. Does a weaker exclusionary rule encourage police to conduct unlawful searches and seizures?

2. Is the State's requested relief compatible with the independent source doctrine and its requirements?

C. STATEMENT OF THE CASE

The facts as outlined by the Court of Appeals are not in dispute. Detective Hawley saw what he believed to be an illegal drug sale. He then illegally stopped Malcom McGee, interrogated him, and searched his car. From this illegal search, Hawley found cocaine,

and McGee told the detective he purchased the cocaine from Keith Ayson. After he was detained, Ayson told Hawley that McGee was the dealer, not him. Detective Hawley entered the information obtained from his illegal search and seizure, as well as his observations and belief that McGee was a drug dealer, into a police database.

Several days later, Ayson's body was found. Investigators learned of Ayson's association with McGee through Hawley's prior report in the police database. The information Hawley illegally obtained formed the basis of the police investigation, and was used to obtain search warrants for McGee's phone records and cell site location information. These phone records led to additional search warrants, and ultimately McGee's arrest and prosecution for the murder of Ayson.

At trial, the evidence Hawley illegally obtained was suppressed with respect to McGee's VUCSA charge (which was dismissed), but not for the murder charge. The trial court found that the murder of Ayson severed the causal chain between the illegal stop and the warrants. The Court of Appeals reversed, holding that there was no superseding event between the discovery of the evidence and the police misconduct, and so no break in the causal chain, because Ayson's murder (the proposed superseding event) occurred after both the illegal stop and Hawley's subsequent report.

The State contends that Court of Appeals erred—that defendant's unlawful conduct created a superseding cause that severed the chain connecting the initial illegal action and discovery to the later use of that illegally obtained evidence. Essentially, the

State argues that two wrongs make a right: by engaging in wrongful behavior, the defendant has absolved the State of its prior wrongdoing.

Amici outline several concerns with relaxing the exclusionary rule and diminishing Washingtonians' right to privacy. First, the State's proposed weaker exclusionary rule would encourage police to stop-and-frisk suspects in high volumes, with the goal of generating information in the police database to be used in further investigations of serious crimes. Second, while an increase in stop-and-frisk seizures would diminish the privacy rights of all Washington residents, it would fall especially hard on People of Color, who are already disproportionately stopped and searched by police. And third, the State's proposed expansion of the attenuation doctrine is ultimately an attempt to avoid the stringent requirements of the

independent source exception; this expansion prohibitively diminishes the right to privacy, and must be rejected alongside similar exceptions that have been rejected, such as the good faith and inevitable discovery exceptions.

D. ARGUMENT AND AUTHORITY

1. A weak exclusionary rule incentivizes police to perform more illegal searches and seizures.

The primary purpose of Washington's exclusionary rule is "to protect privacy interests of individuals against unreasonable governmental intrusions," and its secondary purpose is "to deter the police from acting unlawfully in obtaining evidence." *State v. Betancourth*, 190 Wn.2d 357, 364, 413 P.3d 655 (2018). An exception to the exclusionary rule that encourages police to act unlawfully to obtain evidence is entirely incompatible with Article 1, section 7's right

to privacy. And if the lack of exclusion encourages the unlawful seizure and search of citizens (as the State's requested relief would), then the exclusionary rule's primary purpose is thwarted, and that exception is further incompatible with Article 1, section 7.

The underlying investigation in this case highlights the serious privacy concerns posed by the weaker exclusionary rule the State seeks. Law enforcement illegally seized McGee and obtained information from him. That information was fed into a police database, which the police then used to guide their investigation into the murder of Ayson. At trial, the unlawfully-obtained evidence was suppressed with respect to the low-level drug charge, but was admitted to prove the much more serious charge of murder.

The lesson here for law enforcement is that unlawful searches and seizures can be a potent

investigatory tool: they may not lead to the prosecution of the initially-suspected low-level drug crime, but they will build a database of illegally obtained information that might assist police with solving future crimes. Here, police were able to obtain a murder conviction thanks to their prior illegal actions and the database created by these illegal searches and seizures. The State was thus able to "benefit from its officers' unconstitutional actions," in violation of Washington's Article 1, section 7 right to privacy. *State v. Mayfield*, 192 Wn.2d 871, 898, 434 P.3d 58 (2019). The scope and breadth of this police database means that illegally obtained evidence can continue paying dividends for years—the database continues to grow as more people are swept up in these illegal stops.

The State argues that "suppression in this case would serve no deterrent purpose whatsoever." Supp.

Br. of Pet. at 11. This could not be further from the truth: a failure to suppress would *encourage* and *reward* the illegal police behavior. If this evidence is not suppressed, then the message to law enforcement is clear: unlawfully seizing and searching individuals leads to a robust, Big-Brother-like database on private citizens, and police can use that database without consequence.

2. The databases of unlawfully-obtained evidence will disproportionately feature People of Color.

History teaches that any database generated by information from police detentions and investigations will necessarily be racially skewed. "When it comes to police encounters without reasonable suspicion, 'it is no secret that people of color are disproportionate victims of this type of scrutiny.'" *State v. Sum*, 199 Wn.2d 627, 644, 511 P.3d 92 (2022) (quoting *Utah v. Strieff*, 579

U.S. 232, 254, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016) (Sotomayor, J., dissenting)). The police database is created by (and so limited by) the data provided by law enforcement interactions and investigations. If those stops reflect a disproportionate focus on People of Color, then the police database will also necessarily focus disproportionately and impermissibly on those groups.

"Discriminatory law enforcement practices have resulted in people of color being arrested, convicted and incarcerated at rates that are disproportionate to their share of the general population." *Yim v. City of Seattle*, 63 F.4th 783, 788 (9th Cir. 2023) (citation omitted). Current data from the Seattle Police Department ("SPD") shows that "Black persons are stopped at a rate that is 4.1 times that of non-Hispanic white persons and Indigenous persons are stopped at a rate

that is 5.8 times that of non-Hispanic white persons." *Id.* (citation omitted). King County's jail population is approximately 36 percent Black, though the County's overall population is only 6.8 percent Black. *Id.* (citation omitted).

Seattle and King County are not alone in this trend. Data from Spokane City Police Department shows that "Black people were likely to be stopped at a rate 4.74 times that of non-Hispanic white people" and Indigenous people "were likely to be stopped at a rate 2.61 times." Task Force 2.0: Race & Crim. Just. Sys., Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court 13 (2021), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1116&context=korematsu_center. That same data showed Black drivers were twice as likely to be subjected to a search than would be expected, and

Indigenous people were almost three times as likely. *Id.* at 14.

Nationwide data shows extreme disparities in the way People of Color are treated by law enforcement and the criminal legal system. Black men are six times as likely to be incarcerated as white men; Latino men are 2.5 times as likely. Brennan Klein, et al., *COVID-19 Amplified Racial Disparities in the US Criminal Legal System*, 617 Nature 344, 344 (2023) (available at https://www.nature.com/articles/s41586-023-05980-2). Black and Latino men are also more likely to be stopped by police and incarcerated pending trial, and received more serious charges and harsher sentences. *Id.*

The effects of racist police practices on the criminal justice system is pronounced and measurable, as demonstrated by analysis of exonerations. Black

defendants make up 40 percent of those incarcerated for murder, but make up 55 percent of murder exonerations—which "means that Black people who are convicted of murder are about 80% more likely to be innocent than other convicted murderers." Samuel R. Gross, et al., *Race and Wrongful Convictions in the United States 2022*, National Registry of Exonerations, 4 (Sept. 2022), https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf. 72 percent of those exonerations included official misconduct that was readily apparent to researchers. *Id.* at 6. The rate of misconduct for prosecutors shows little variance based on race, but researchers found a wide disparity in police misconduct, with 58 percent of Black murder exonerations showing police misconduct, compared to 38 percent for whites. *Id.*

Police misconduct takes many forms. Police officers (who make up 84 percent of instances of perjury by government officials) perjured themselves at higher rates in murder cases involving Black defendants (21 percent) than white defendants (14 percent). *Id.* Exonerations of Black defendants revealed higher rates of witness tampering by police officers (42 percent of murder exonerations of Black defendants, but only 25 percent for white defendants) and threats (used by police in 52 percent "of tainted identification procedures that produced false identification of Black murder exonerees"). *Id.* at 7.

A database populated with information from police stops (whether legal or illegal) will disproportionately feature People of Color because they are disproportionately targeted by police interactions. Not only would such a database further

exacerbate the problem of People of Color facing prosecution at higher rates than white people (because the data set in the database focuses disproportionately on People of Color), but it would also cause police to incorrectly focus investigations on those individuals that are in the database, and missing white perpetrators because they (and their connections to other individuals) do not appear in the police database.

The high rate of exonerations for Black defendants demonstrate that the long-term effects are not limited to being stop-and-frisked more regularly, but the racially-focused database will be another factor increasing the disproportionate rate of wrongful convictions among Black defendants. Racial disparities in policing will persist so long as the current discriminatory police tactics provide the dataset for future police investigations.

3. The State's proposed relief is at odds with the independent source doctrine.

"Article 1, section 7 and its corresponding exclusionary rule provide uniquely heightened privacy protections." *State v. Mayfield*, 192 Wn.2d 871, 882, 434 P.3d 58 (2019). Legal scholars have concluded that Washington's "constitutionally-mandated exclusionary rule" is the result of the framers' belief that "the government's use of evidence obtained in violation of the Fourth Amendment" was the same as "compelling a defendant to give evidence (or testify) against himself in violation of the Fifth Amendment," and that any proceeding that used such evidence was "erroneous and unconstitutional." J. Charles W. Johnson & Scott P. Beetham, *The Origin of Article 1, Section 7 of the Washington State Constitution*, 31 Seattle U. L. Rev. 431, 467 (2008) (internal citations omitted). Exceptions to the exclusionary rule are few—this Court has

generally rejected exceptions permitted by other jurisdictions. *See, e.g.*, *State v. Afana*, 169 Wn.2d 169, 179-84, 233 P.3d 879 (2010) (rejecting the good faith exception); *State v. Winterstein*, 167 Wn.2d 620, 631-36, 220 P.3d 1226 (2009) (rejecting the inevitable discovery exception).

One of the few exceptions this Court has permitted is the independent source exception. This exception "recognizes that probable cause may exist for a warrant based on legally obtained evidence when the tainted evidence is suppressed." *State v. Betancourth*, 190 Wn.2d 357, 365, 413 P.3d 566 (2018). "The rationale for the rule is that the police should not be in a worse position than they otherwise would have been in because of the error." *Id.*

The test to permit evidence under an independent source asks "whether illegally obtained information

affected (1) the magistrate's decision to issue the warrant or (2) the decision of the state's agents to seek the warrant." *Id.* The evidence is admissible under the independent source exception if both the illegal search or seizure did not contribute to "the issuance of the warrant" and if law enforcement "would have sought the warrant" without the initial unlawfully-obtained evidence. *Id.*

The independent source doctrine requires the complete exclusion of the "illegally obtained information" from both the investigatory decision-making process and the ground for issuing a warrant. The independent source doctrine prevents law enforcement from benefiting from illegally obtained evidence by using it to guide their investigations; it ensures that police are not "in a worse position" than they would otherwise be in had they acted legally.

Betancourth, 190 Wn.2d at 365. The independent source doctrine provides that (as in tort law) the remedy negates or compensates for the harm inflicted. *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 154, 43 P.3d 1223 (2002) (citing Restatement (Second) of Torts § 901 (1965)). When the government infringes on a person's right to privacy, the constitutionally-mandated exclusionary rule puts police in the position they were in before their misconduct: without the evidence they unlawfully seized.

The State's proposed modification of the exclusionary rule would eviscerate the independent source doctrine and its protections of the right to privacy. Under the State's proposed expansion of the attenuation exception, the second part of the independent source test becomes obsolete: it no longer matters if the illegally-obtained information influenced

the State's decision to seek the warrant. Instead, all that would matter is if the State believes that the defendant has committed a new crime after the government's prior illegal behavior. In essence, the State argues that two wrongs make a right: regardless of how wrong the government's actions were, any future law violations by the defendant clears the government of its wrongdoing.[1]

This Court has rejected exceptions to the exclusionary rule that justify or disregard misconduct by police (such as the good faith and inevitable discovery exceptions), and instead required that any exceptions to the exclusionary rule must ensure police do not benefit from their illegal conduct. *See, e.g.*,

[1] The State is unlikely to agree with the natural corollary of this logic: that any new illegal conduct by the government clears the defendant of prior wrongdoing. The government insists that only the government's illegal actions can be ignored.

Afana, 169 Wn.2d at 179-84 (rejecting the good faith exception); *Winterstein*, 167 Wn.2d at 631-36 (rejecting the inevitable discovery exception). A lower standard encourages police abuse and diminishes the privacy rights of Washington residents by effectively sanctioning illegal stop-and-frisks, as long as the evidence obtained is only used in *future* prosecutions. This Court's stringent requirements for the independent source exception attempt to ensure the right to privacy still exists in Washington. The government's proposed exception fails to respect the right to privacy in any way.

C. CONCLUSION

Amici urge the Court to reject a further exception to the exclusionary rule that would encourage illegal stop-and-frisks, disproportionately impact People of Color, and effectively supplant the independent source

exception to the exclusionary rule. The Court should affirm the Court of Appeals, which correctly held that Article 1, section 7's mandated exclusionary rule prohibits the use of evidence obtained by illegal police conduct that has not been attenuated by a superseding event between the illegal conduct and the discovery of evidence.

Respectfully submitted this 19th day of January, 2024.

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