No. S23G0955

# In the Supreme Court of Georgia

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MARK JOSEPH TATUM,
*Appellant*,

v.

THE STATE,
*Appellee.*

---

On Petition for a Writ of Certiorari
to the Court of Appeals of Georgia in
No. A23A0526

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**Brief of the Georgia Association of Criminal Defense Lawyers (GACDL) as Amicus Curiae in Support of Appellant**

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## INTRODUCTION

The Court granted certiorari to review the opinion of the Court of Appeals in *Tatum v. State*, 367 Ga.App. 439 (886 SE2d 845) (2023). *Tatum* held that the fruits of an unconstitutional cellphone search need not be suppressed in the face of proof only that the officer who conducted the initial, unlawful search, later obtained and executed a facially sufficient warrant for the same, unlawfully seized information. Those facts, the Court of Appeals explained, were sufficient to invoke the independent-source doctrine. *Id.* at 443. The independent source doctrine, which the Supreme Court of

the United States first announced in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (40 SCt 182, 64 LEd 319) (1920), allows prosecutors to overcome the presumptive suppression of unconstitutionally seized evidence upon proof that the same evidence "has [also] been discovered by means *wholly independent* of any constitutional violation." *Nix v. Williams*, 467 U.S. 431, 443(II)(B) (104 SCt 2501, 81 LEd2d 377) (1984) (emphasis added). The question here is, "Does the independent-source doctrine allow the admission of cellphone evidence obtained via search warrant without consideration of whether the decision to seek the search warrant was prompted by a prior, warrantless search of that cellphone?"

The answer concerns the strength of Georgia police officers' incentives to respect the peoples' Fourth Amendment right "to be secure in their persons, houses, papers, and effects." May an officer spackle over an unlawful search with a later-obtained-but-superficially-clean warrant? Or must the State demonstrate that the unlawfully seized evidence was also separately obtained via an independent, constitutionally satisfactory process. The answer is, for the same reason, of particular interest to amicus curiae, the Georgia Association of Criminal Defense Lawyers (GACDL).

## Interest of Amicus Curiae

A frequent friend of this Court, GACDL is a domestic nonprofit corporation whose members routinely execute the only office of the court dignified in the Bill of Rights: defending the life and liberty of the accused

against the powers of organized society and ensuring the processes of law that they are due. GACDL's membership comprises both public defenders and private counsel. They are united in their dedication to the rule of law, the fair and impartial administration of criminal justice, the improvement of our adversarial system, the reasoned and informed advancement of criminal jurisprudence and procedure, and the preservation and fulfillment of our great constitutional heritage.[1]

## VIEWS OF AMICUS CURIAE

In the name of deterring constitutional violations, the exclusionary rule presumptively suppresses evidence that police have obtained via "deliberate, reckless, or grossly negligent" breaches of a defendant's constitutional rights. *Herring v. United States*, 555 U.S. 135, 144(II)(B)(3) (129 SCt 695, 172 LEd2d 496) (2009). The State can avoid that sanction by proving that the case involves an exclusionary-rule exception—circumstances demonstrating that suppression would sufficiently deter future such violations. See *id.* at 140–44(II)(B). One such exception is the independent-source doctrine.

[1] Amicus's brief is timely under this Court's Rule 23(1), as it was filed before the brief of the party whom it supports.

**(1) To benefit from the independent-source doctrine, the State must prove that the unconstitutionally obtained evidence it seeks to introduce was also the fruit of a constitutionally sufficient, *independent* process.**

The independent-source doctrine applies when police have obtained the same piece of evidence via both lawful and unlawful means.[2] *Murray v. United States*, 487 U.S. 533, 538–39(II) (108 SCt 2529, 101 LEd2d 472) (1988) (quoting *United States v. Silvestri*, 787 F.2d 736, 739 (1st Cir. 1986)). To avail itself of the doctrine, the State must prove by a preponderance of evidence that the second search was (1) constitutional and (2) unprompted by the initial, unconstitutional search.[3] *United States v. Barron-*

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[2] The independent-source doctrine is an older cousin to the inevitable-discovery doctrine. See *Williams*, 467 U.S. at 441–46. The "'crucial difference' between the two doctrines [is,] … [w]hen properly applied, the 'independent source' exception allows the prosecution to use evidence only if it was, in fact, obtained by fully lawful means[, whereas t]he 'inevitable discovery' exception … [allows the prosecution] … to … introduce[ evidence that] … has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed." *Teal v. State*, 282 Ga. 319, 324 (647 SE2d 15) (2007) (quoting *Williams*, 467 U.S. at 459 (Brennan and Marshall, JJ., dissenting)); accord *State v. Colvard*, 296 Ga. 381, 384 n.6 (768 SE2d 473) (2015).

[3] Georgia opinions reference the State's evidentiary burden under the independent-source doctrine infrequently but say consistently that it is a preponderance of evidence. E.g., *Teal*, 282 Ga. at 323. Not so with respect to the inevitable-discovery doctrine. Georgia opinions discussing that doctrine say both that the State must prove its applicability by the preponderance-of-evidence standard, e.g., *Colvard*, 296 Ga. at 384 n.6; *Davis v. State*, 302 Ga.App. 144, 146 (690 SE2d 464) (2010), the lesser, reasonable-probability standard, e.g., *Mobley v. State*, 307 Ga. 59, 76(4) (834 SE2d 785) (2019)

*Soto*, 820 F.3d 409, 415(III)(A) (11th Cir. 2016) (quoting and then citing *United States v. Noriega*, 676 F.3d 1252, 1260(III)(C) (11th Cir. 2012)); see *Murray*, 487 U.S. at 542 n.3; *Williams*, 467 U.S. at 443(II)(B). The second element—independence of the unconstitutional taint—is critical because without it, the exception would turn the exclusionary rule on its head.

"The independent source doctrine … rest[s] … upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. *Murray*, 487 U.S. at 542. Were the State not obliged to prove the second element, police could breach suspects' Fourth Amendment rights on a

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(quoting *Taylor v. State*, 274 Ga. 269, 274–75(3) (553 SE2d 598) (2001)); see *Kyles v. Whitley*, 514 U.S. 419, 434(III) (115 SCt 1555, 131 LEd2d 490) (1995) (explaining that a reasonable probability is less than a preponderance), or both, e.g., *State v. Chulpayev*, 296 Ga. 764, 775 n.6 (770 SE2d 808) (2015). The reasonable-probability line of cases flows from this Court's adoption of that standard from the Eleventh Circuit in *Taylor*, 274 Ga. at 274–74 & n.25 (quoting *United States v. Terzado-Madruga*, 892 F.2d 1099, 1114(A) (11th Cir. 1990)). The Eleventh Circuit's reasonable-probability line, in turn, traces back to when that Court was part of the Fifth Circuit. *United States v. Satterfield*, 743 F.2d 827, 846(IV)(B) (11th Cir. 1984) (citing *United States v. Brookins*, 614 F.2d 1037, 1048(V)(C) (5th Cir. 1980)). The Eleventh Circuit recently corrected course, however, espousing a preponderance-of-evidence standard, *United States v. Watkins*, 10 F.4th 1179 (11th Cir. 2021), which was what the Supreme Court required in *Williams*, 467 U.S. at 444 & n.5, see *Bourjaily v. United States*, 483 U.S. 171, 175–76 (107 SCt 2775, 97 LEd2d 144) (1987). Amicus urges this Court to do likewise and hold that the State's evidentiary burden for invoking any exclusionary-rule exception is a preponderance of evidence, if not here, then at the earliest practicable opportunity.

whim and, having found evidence they thought useful, reverse engineer a warrant affidavit to insulate that evidence from constitutional taint. Thus, the independent-source exception to the "exclusionary rule[, so applied,] would put the police (and society) not in the same position they would have occupied if no violation occurred, but in a [*better*] one." *Murray*, 487 U.S. at 541.

**(2) The Court of Appeals' opinion disregards the independent-source doctrine's critical second element—*independence*.**

The discussion above notwithstanding, the Court of Appeals rested its affirmance in *Tatum* only upon the first element. The panel's reasoning evinces no consideration of whether the second, ostensibly constitutional search was indeed independent of the first:

> [E]ven if the information pertaining to the cell phone video [which was the fruit of the initial search] is excised from the search warrant affidavit, we nevertheless conclude that there was probable cause to support the issuance of the search warrant. In this case, Deputy Townsend encountered Tatum in the vicinity of the incident shortly after the 911 call, observed Tatum's nervousness and his initial denial that he had a cell phone on his person, as well as his furtive attempts at concealing the contents of his cell phone from Townsend's view.
>
> Accordingly, we conclude that the trial court did not err in denying Tatum's motion to suppress/motion in limine.

*Tatum*, 367 Ga.App at 443.

The Court of Appeals' elision of the second element is unsurprising because the state opinions that the Court cited by and large omit any discussion of it, i.e.:

- *Brundige v. State*, 291 Ga. 677, 682 (735 SE2d 583) (2012);
- *Wilder v. State*, 290 Ga. 13, 15–17(2) (717 SE2d 457) (2011);
- *Brown v. State*, 330 Ga.App. 488, 491(1) (767 SE2d 299) (2014) , disapproved of by *Lofton v. State*, 310 Ga. 770 (854 SE2d 690) (2021);
- *Stephens v. State*, 346 Ga.App. 686, 692–93(2) (816 SE2d 748) (2018); and
- *Clare v. State*, 135 Ga.App. 281, 285(5) (217 SE2d 638) (1975).

In fact, the panel below cited only one opinion that gives the second element any serious treatment, *Teal*. 282 Ga. at 323–25. In four of the other cited cases, *Wilder*, *Brown*, *Stephens*, and *Clare*, however, a discussion of the second element was unnecessary. In each of those, the warrant whose fruits the State sought to admit was necessarily predicated on the fruits of a prior, unconstitutional search or arrest. Because the entanglement between the prior illegality and subsequent searches in each were patent and inseverable, the State could not satisfy the first element of the independent-source doctrine—facial constitutional sufficiency. In such cases, suppression is obviously required. And only one cited case, *Brundige*, would

arguably support the Court of Appeals' holding that a facially sufficient warrant, by itself, cured the taint of a prior unlawful search.

The issue in *Brundige* was whether an unauthorized thermal-imaging scan of a suspect's home required suppressing the fruits of a later physical search of the premises. This Court held that because the warrant for the physical search was supported by probable cause, suppression was unnecessary. 291 Ga. at 682. But it gave no consideration to whether the second search would not have occurred but for the first. To the extent *Brundige* holds that a facially sufficient warrant will insulate a subsequent search rom a prior, unlawful one, this Court should overrule (or at least disapprove of) it.

So too should this Court reverse *Tatum*, which commits the identical error. Apparent constitutional sufficiency, which *Brundige* and *Tatum* held to be adequate, is only half the battle. Even if the warrant affidavit in *Tatum*, sans any reference to the cellphone's contents, supported a finding of probable cause, the deputy's having seen the cellphone video may still have prompted him to seek the warrant. The deputy's having referenced the cellphone video in the warrant affidavit would have been a basis to find that the unconstitutional search prompted him to seek the warrant. And even if the warrant affidavit in *Brundige*, sans any reference to the unlawful thermal-imaging scan, supported a finding of probable cause, the officer's having seen the results of the scan could still have prompted him to seek a warrant for the physical search. See *Murray*, 487 U.S. at 543.

It was for that very reason that the Supreme Court vacated and remanded in *Murray*. In *Murray*, the district court overruled the defendants' motions to suppress the fruits of a second search of a premises because the warrant that supported the second search made no reference to an earlier, unconstitutional search. *Id.* at 536. But there, as here, the warrant's facial independence, without more, was insufficient to invoke the independent-source doctrine:

> The District Court found that the agents did not reveal their warrantless entry to the Magistrate, and that they did not include in their application for a warrant any recitation of their observations in the warehouse. *It did not, however, explicitly find that the agents would have sought a warrant if they had not earlier entered the* warehouse. … To be sure, the District Court did determine that the purpose of the warrantless entry was in part "to guard against the destruction of possibly critical evidence," and one could perhaps infer from this that the agents who made the entry already planned to obtain that "critical evidence" through a warrant-authorized search. That inference is not, however, clear enough to justify the conclusion that the District Court's findings amounted to a determination of independent source.
>
> Accordingly, we vacate the judgment and remand these cases to the Court of Appeals with instructions that it remand to the District Court for determination whether the warrant-authorized search of the warehouse was an independent

> source of the challenged evidence in the sense we have described.

*Id.* at 543–44 (emphasis added).

Here, for the Court of Appeals to have affirmed on the reasoning that it did represent—at best—an incomplete analysis.[4] And if the record contained no finding by the superior court that the subsequent search was unprompted by the prior illegality, the proper course would have been to remand, as in *Murray*, not to affirm.

## CONCLUSION

To hold, as the Court of Appeals did, that a facially sufficient warrant affidavit, without more, is sufficient to trigger the independent-source doctrine is, in effect, the same as trusting someone because they say that they are from the government and there to help. The incentives are all wrong. A simple anecdote shows why:

Bobby has struggled all year in algebra. Anything less than an A on his final will doom him to summer school. So during the exam, when the instructor steps out of the room, Bobby steals a peek at the answer key. Bobby

[4] The Court of Appeals' analysis would have been the correct one had Appellant claimed in the superior court that the warrant had been predicated on reckless or intentional falsehoods in the affidavit. See *Franks v. Delaware*, 438 U.S. 154, 171–72(IV) (98 SCt 2674, 57 LEd2d 667) (1978). But the issue the Court of Appeals ruled on was not whether the eventual warrant violated the Fourth Amendment. It was, rather, whether the warrant was more likely than not independent of the original, unconstitutional search.

returns to his seat, finishes, and gets a perfect score. Is Bobby's having shown his work enough to prove that he didn't cheat? No—at least no more than a deputy's having drafted a facially sufficient warrant affidavit enough to prove that he didn't consider the fruits of the earlier, unconstitutional search when he did so.

Amicus joins Appellant in asking this Court to reverse the Court of Appeals' judgment, directing it to vacate the superior court's judgment and remand for consideration of whether the second search was independent of the first.

[signature page follows]

Respectfully submitted on 13 November 2023 by:

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## Certificate of Service

Consistent with this Court's Rule 14, on 13 November 2023, prior to filing I served copies of this brief via First-Class United States Mail with adequate postage affixed on:

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