No. S23C0955

In the Supreme Court of Georgia

MARK JOSEPH TATUM,
Petitioner,

v.

THE STATE,
Respondent.

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

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

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INTRODUCTION

A more-than-casual observer of judicial opinions might suggest that Georgia is undergoing a Fourth Amendment renaissance: Not overlong before the pandemic, this Court decided *Mobley v. State*, 307 Ga. 59 (834 SE2d 785) (2019). *Mobley* considered, *inter alia*, the continuing vitality of *Gary v. State*, 262 Ga. 573 (422 SE2d 426) (1993) , wherein this Court rejected the good-faith exception to the exclusionary rule that the Supreme Court of the United States had adopted in *United States v. Leon*, 468 U.S. 897 (104 SCt 3405, 82 LEd2d 677) (1984). While *Mobley* did not dispense

with *Gary*, it did clarify that only the exclusionary-rule exception at issue there—an officer's good-faith reliance on an invalid warrant—had been foreclosed. 307 Ga. at 75–76(4)(b) & n.21. The intervening years have seen a rise in opinions focusing on the exclusionary rule, many citing *Mobley* and acknowledging that exclusionary rule exceptions that the criminal bar had presumed not to be in play were. E.g., *Outlaw v. State*, 311 Ga. 396, 400 n.4 (858 SE2d 63) (2021); *Hurston v. State*, 310 Ga. 818, 828 n.15 (854 SE2d 745) (2021); *Lofton v. State*, 310 Ga. 770, 784 nn.17–18 (854 SE2d 690) (2021), disapproved of on other grounds by *Outlaw*, supra; *Medina-Hernandez v. State*, 364 Ga.App. 68, 73 n.3 (874 SE2d 127) (2022). As the lower courts consider exclusionary-rule exceptions with more frequency, clarity from this Court is essential to ensuring that they do so with appropriate rigor. And certiorari will be ripe when an exception gets short shrift on the face of an opinion.

Pending before the Court is such a case. The sole issue in *Tatum v. State*, No. A23A0526 (Apr. 17, 2023) was whether the superior court erred in overruling Petitioner's motion to suppress the fruits of a warrantless search of his cellphone, which had disclosed the principal evidence against him on the charges of peeping tom (OCGA § 16–11–61(a)) and invasion of privacy (OCGA § 16–11–62(2) & (3)). Slip op. at 1–2. The Court of Appeals affirmed, concluding that the independent-source doctrine exempted the cellphone's contents from exclusion because they were also the fruits of a later-obtained warrant. *Tatum*, slip op. at 3–4. Even if the warrant affidavit

were sufficient without reference to the cellphone's contents to authorize a search, however, the panel's opinion does not indicate that the deputy would have sought the warrant notwithstanding the initial, unlawful search—a requirement supported by the federal caselaw that the panel cited to support its position.

Interest of Amicus Curiae

A frequent friend of this Court, the Georgia Association of Criminal Defense Lawyers (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]

[1] Amicus's brief is timely under this Court's Rule 23(1), as it was filed on 23 May 2023, less than ten days after the 19 May 2023 petition for a writ of certiorari that it supports.

VIEWS OF AMICUS CURIAE

Amicus joins Petitioner in urging the Court to address the issue of "great gravity, importance, and concern to the public." Ga. Sup. Ct. R. 40.

> The exclusionary rule … is often the only remedy effective to redress a Fourth Amendment violation. Civil liability will not lie for the vast majority of Fourth Amendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice Criminal prosecutions or administrative sanctions against the offending officers and injunctive relief against widespread violations are an even farther cry.
>
> *Herring v. United States*, 555 U.S. 135, 153(II)(B) (129 SCt. 695, 172 LEd2d 496 (2009) (Ginsburg, J., dissenting) (citations omitted and punctuation altered).

Understandable is the reluctance to extend the exclusionary rule beyond its deterrent purpose. See *id.* at 140–43(II)(B). But neither should courts be lax about what the State must prove to benefit from an exclusionary-rule exception, lest they incentivize foul play: The more that the exceptions erode the rule, the less they will deter future Fourth Amendment violations.

(1) The State cannot benefit from the independent-source exception to the exclusionary rule unless it shows that the second search was both constitutionally sufficient *and independent of* the initial search.

Perhaps the first articulated exception to the exclusionary rule, the Supreme Court created the independent-source doctrine in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (40 SCt 182, 64 LEd 319) (1920). The exception 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 independent-source 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-Soto*, 820

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[2] The independent-source doctrine is an older cousin to the inevitable-discovery doctrine. See *Nix v. Williams*, 467 U.S. 431, 441–46(II)(B) (104 SCt 2501, 81 LEd2d 377) (1984). 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[e 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*, 307 Ga. at 76(4) (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*

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 independent source doctrine allows admission of evidence that has been discovered by means *wholly independent* of any constitutional violation." (emphasis added)). 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 whim and, having found evidence they thought useful, reverse engineer a

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States v. Terzado-Madruga, 892 F.2d 1099, 1114(A) (11th Cir. 1990)); The Eleventh Circuit, in turn, traces its reasonable-probability line of cases back to when it 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 in this case, then at the earliest practicable opportunity.

warrant affidavit to insulate the evidence from constitutional taint. Thus, invoking an exception to the "exclusionary rule 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 this case only upon the first element. The 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, slip op. at 3–4.

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*, 310 Ga. 770;
- *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).

Of the state opinions cited, only *Teal* gives the second element any serious treatment. 282 Ga. at 323–25.

To be sure, a discussion of the second element was unnecessary in the four latter cases, *Wilder*, *Brown*, *Stephens*, and *Clare*. In each, 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.

But apparent constitutional sufficiency is only half the battle. And the converse is not necessarily so: Even if the warrant affidavit supported a finding of probable cause sans any reference to the cellphone's contents, 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. See *Murray*, 487 U.S. at 543.

Indeed, it was for that reason that the Supreme Court vacated and remanded the judgment in *Murray*:

> 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 likewise, 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 the Court did in *Murray*, not to affirm.

As *Tatum* and the opinions cited therein demonstrate, consideration of the independent-source doctrine's second element is largely absent from state decisional law (and of likely consequence, state trial-court practice). *Tatum* is an appropriate vehicle to remedy the deficiency. And Amicus hopes the Court will do so.

CONCLUSION

Because the other remedies available to redress a Fourth Amendment violation are all but ephemeral, only the accused in a criminal trial has

[4] The Court of Appeals' analysis would have been the correct one had Petitioner 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.

much of an incentive to insist on the rights it protects, and only then to exclude from evidence something that is admittedly relevant and inculpatory. But the exclusionary rule is more than a tool in defense counsel's strategic arsenal. The rule's purpose is to quell the police excesses and command respect for everyone's constitutional rights—guilty and innocent alike. Whether the rule is functional or aspirational is impossible to say. Certain, however, is that the rule will be neither unless courts keep its exceptions in check.

For those reasons, Amicus joins Petitioner in asking this Court to issue a writ of certiorari.

[signature page follows]

Respectfully submitted on 23 May 2023 by:

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Certificate of Service

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