IN THE SUPREME COURT OF GEORGIA
CASE NO. S23G0955

MARK JOSEPH TATUM,

Appellant,

v.

THE STATE,

Appellee.

On Writ of Certiorari to the Court of Appeals of Georgia
in Case No. A23A0526

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF GEORGIA AS AMICI CURIAE IN SUPPORT OF APPELLANT

Xinge Hong*
American Civil Liberties Union
Foundation, Inc.
New York, NY 10004

Cory Isaacson
Georgia Bar No. 983797
American Civil Liberties Foundation
of Georgia, Inc.
P.O. Box 570738
Atlanta, GA 30357

Counsel for Amici Curiae

* *Motion for pro hac vice admission forthcoming*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

The police conducted an illegal, warrantless search of Mark Tatum's cell phone and then cited incriminating evidence from that illegal search in an application for a warrant to again search that very same phone. This was unlawful. But the Court of Appeals nevertheless held that evidence from the second search—obtained with the help of evidence gained from the first illegal search—was properly admitted at Mr. Tatum's trial. Citing the "independent source" doctrine, the Court of Appeals reasoned that, despite the State's reliance on unlawfully obtained evidence, the second search was valid because if, hypothetically, the illegal evidence had been "excised" from the warrant application, the remaining evidence would have established probable cause. This interpretation of the independent source doctrine is wrong; it is contrary to U.S. Supreme Court case law, to case law from this Court, and to the rationale for the exclusionary rule.

The "exclusionary rule" prohibits the State from using unlawfully obtained evidence to prosecute someone, serving as a critical tool for promoting law enforcement compliance with the Constitution. The "independent source" doctrine is a narrow exception to that exclusionary rule—one, as both Mr. Tatum

and the Georgia Association of Criminal Defense Lawyers ("GACDL") have argued, that only applies when law enforcement acquired evidence through means that were truly "independent" of any prior, unlawful search or seizure. *Murray v. United States*, 487 U.S. 533, 542 (1988); *see* Appellant's Br. 5; Br. of GACDL as Amicus Curiae, 4–6. But, as already explained by Mr. Tatum and GACDL, that is not what happened here. The American Civil Liberties Union ("ACLU") and the ACLU of Georgia write separately to clarify the rationales for these doctrines, and to explain what the State must prove to establish "genuine independence" under this narrow exception.

Proving "genuine independence" requires the State to demonstrate that an illegal search or seizure did not have "any effect"—*any*—in producing a warrant. *Murray*, 487 U.S. at 542 n.3. Consistent with case law prohibiting the government from using the "fruit of the poisonous tree," this test requires a reviewing court to consider the effect of unlawfully obtained evidence on a subsequent warrant application. *Segura v. United States*, 468 U.S. 796, 804 (1984); *see also Reaves v. State*, 284 Ga. 181, 183 (2008). The State must prove that information obtained during an illegal search or seizure *neither* "prompted" law enforcement to seek a warrant *nor* "was presented to the Magistrate and affected his decision to issue

the warrant." *Murray*, 487 U.S. at 542. Here, the State has not made and could not make those showings; to the contrary, its warrant application expressly cited incriminating information generated from an illegal search.

The Court of Appeals' contrary holding, if upheld, would substantially undermine respect for constitutional rights in Georgia. When law enforcement officers believe they have developed probable cause to conduct a search or seizure, they should apply for a warrant. But it is unclear why they would do that if, as the Court of Appeals held, they could first conduct an illegal search and seizure, see if their illegal conduct turns up useful evidence, and then, if it does, go get a warrant. This Court should reverse the Court of Appeals and, in so doing, ensure that Georgia's law enforcement officers are not incentivized to make end runs around the U.S. and Georgia Constitutions.

INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to protecting the principles embodied in the state and federal Constitutions and our nation's civil rights laws. The ACLU frequently litigates

and files amicus curiae briefs in cases involving the fundamental rights protected by the Fourth Amendment and its state constitutional analogue.

The ACLU of Georgia is a non-profit organization that works to enhance and defend the civil liberties and rights of all Georgians through legal action, legislative and community advocacy, and civic education and engagement. The ACLU of Georgia envisions a state that guarantees all persons the civil liberties and rights contained in the United States and Georgia Constitutions and Bill of Rights, and works to make that vision a reality.

ARGUMENT

I. The independent source doctrine is a narrow exception to the exclusionary rule.

The exclusionary rule is a critical protection that promotes law enforcement compliance with the Constitution. To maintain that protection, exceptions to the rule, like the independent source doctrine at issue here, are narrow and principled.

A. The exclusionary rule plays a vital role in deterring police misconduct.

The United States and Georgia Constitutions protect the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures." U.S. Const. amend. IV; Ga. Const. art. I, § I, ¶ XIII. To give these words effect, the U.S. Supreme Court has announced an exclusionary rule as a matter of doctrine, and the Georgia Assembly has enacted such a rule into law. *Weeks v. United States*, 232 U.S. 383, 398 (1914); *Boyd v. United States*, 116 U.S. 616, 638 (1886); Ga. Code Ann. § 17-5-30. At a criminal trial, the exclusionary rule excludes not only evidence that is itself uncovered during an illegal search, but also "derivative evidence" that is acquired "as an indirect result of the unlawful search." *Teal v. State*, 282 Ga. 319, 323 (2007); *see also Murray*, 487 U.S. at 536–37.

The exclusionary rule serves vital purposes. Most important, it "operates as a deterrent to unlawful conduct by the police." *State v. Lejeune*, 277 Ga. 749, 754 (2004). "Ever since its inception," the exclusionary rule "has been recognized as a principal mode of discouraging lawless police conduct." *Terry v. Ohio*, 392 U.S. 1, 12 (1968). By preventing police officers from using evidence acquired in violation of the Fourth Amendment, the rule seeks to "compel respect for the" Fourth Amendment "by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). To be sure, excluding evidence in a criminal case often impairs the State's ability to prosecute an alleged crime. But the exclusionary rule rests, among other things, "on the judgment that the importance of deterring police [mis]conduct . . . outweighs the importance of securing the conviction of the specific defendant on trial." *United States v. Caceres*, 440 U.S. 741, 754 (1979); *see also Teal*, 282 Ga. at 323. Significantly, the rule seeks to deter all unlawful searches or seizures, "whether it be negligent or intentional." *State v. Stringer*, 258 Ga. 605, 606 (1988).

The exclusionary rule's benefits extend well beyond the criminal cases in which it is applied. The rule also protects, through general deterrence, the rights and "the personal security of our citizenry," ensuring that "unlimited numbers

of innocent persons [are not subject] to the harassment and ignominy incident to involuntary detention" or unlawful searches. *Davis v. Mississippi*, 394 U.S. 721, 726 (1969). It is an especially critical tool for general deterrence given that people who are subjected to those searches but never charged with crimes often have no meaningful remedy available to them, let alone a remedy capable of deterring police misconduct. *See, e.g.*, Blum, Chemerinsky, & Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 Tuoro L. Rev. 633, 651–56 (2013) (explaining the development of immunity doctrines has made it more difficult to challenge police misconduct in section 1983 actions); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014) (studying 44 of the country's largest jurisdictions over a six-year period and finding that, due to indemnification, police officers contributed "just .02%" of the amounts paid via settlements and judgments in civil rights damages actions).

B. The independent search doctrine is narrow and applies only when an illegal search or seizure did not have "any effect" on law enforcement's decision to seek, and a magistrate's decision to issue, a warrant.

The independent source doctrine is a narrow exception to the exclusionary rule. In applying that exception, this Court is bound, at a minimum, to limit its reach to the scope of the exception as defined by the U.S. Supreme Court. *Martin*

v. Hunter's Lessee, 14 U.S. 304, 315 (1816); *Elliot v. State*, 305 Ga. 179, 187 (2019). The U.S. Constitution sets the floor, and the Georgia Constitution may not go below that floor—though it is free to go above it and provide broader protections for individual liberty than exist under the U.S. Constitution. *See, e.g.*, *Elliot*, 305 Ga. at 187–89, 209–10 (comparing the right against self-incrimination under the Fifth Amendment to the U.S. Constitution and Paragraph XVI of the Georgia Constitution). Any attempt to salvage evidence based on the independent source doctrine must therefore comply with the decisions of both the U.S. Supreme Court and this Court.

Under the U.S. Supreme Court's articulation of the independent source doctrine, "evidence initially discovered during, or as a consequence of, an unlawful search" may only be introduced where that same evidence is "later obtained independently from activities untainted by the initial illegality." *Murray*, 487 U.S. at 537; *see also Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). Generally, this occurs when an illegal search is later followed by a legal search authorized by a warrant. *See, e.g.*, *Segura v. United States*, 468 U.S. 796, 814 (1984). The doctrine rests on 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" absent the illegal conduct. *Murray*, 487 U.S. at 542.

But this exception is narrow. Justice Scalia, writing for the majority in *Murray*, explained that the independent source doctrine cannot apply unless the police acquired the evidence at issue through means that were "genuinely independent" of a prior, unlawful search or seizure. *Id.* at 542. Justice Scalia further explained that, to demonstrate a "genuinely independent" source, the government must satisfy two factors. First, it must prove that its agents' "decision to seek [a] warrant" was not "prompted by what they had seen" during an illegal search or seizure. *Id.* Second, the government must prove that "information obtained" during the unlawful search or seizure was not "presented to the Magistrate and affected his decision to issue the warrant." *Id.*

In *Murray*, the government had indisputably satisfied the second of those factors (the illegally obtained information was not presented to the magistrate), while the first factor (whether the illegal search prompted the decision to seek a warrant) was in dispute. 487 U.S. at 543. Federal agents had observed two people drive vehicles into a warehouse and then leave the warehouse twenty minutes later. *Id.* at 535. The initial drivers then turned over their vehicles to other

drivers, who were lawfully stopped. *Id.* The stop revealed that both vehicles contained marijuana. *Id.* Thereafter, agents illegally entered the warehouse without a warrant and observed, in plain view, "numerous burlap-wrapped bales that were later found to contain marijuana." *Id.* The agents then sought a warrant to search the warehouse, excluding all information acquired during the illegal, warrantless search from their warrant application. *Id.* at 535–36. Specifically, the warrant application "did not mention the prior entry, and did not rely on any observations made during that entry." *Id.* at 536. Thus, it was undisputed that the magistrate who issued the warrant had not been swayed *in any way* by the prior illegal search. *Id.*

But the U.S. Supreme Court held that insulating the warrant-issuing magistrate from the prior, warrantless search was, without more, insufficient to justify an exception to the exclusionary rule. Instead, Justice Scalia explained, evidence arising from the execution of the search warrant still had to be suppressed unless "the agents' decision to seek the warrant was [not] prompted by what they had seen during the initial entry." *Id.* at 542. That is, it was not enough for the agents to simply follow an unlawful search with a warrant application that excluded the fruits of the warrantless search. "What counts," the

Court explained, was "whether the actual illegal search had *any effect* in producing the warrant." *Id.* at 542 n.3 (emphasis added). Thus, even if an officer has probable cause to obtain a search warrant absent the unlawfully obtained evidence, the evidence yielded by the search will be suppressed unless the officer satisfies the "burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it." *Id.* at 540.

This Court's cases, too, acknowledge that the independent source doctrine can be invoked only if "no information obtained during [an unconstitutional] warrantless search"—none—"was used to obtain the warrants." *Reaves*, 284 Ga. at 183. This is simply an application of the normal rule that the State may not use, either directly or indirectly, the illegal "fruits" of unconstitutional searches and seizures. In *Johnson v. State*, 310 Ga. 685 (2021), this Court upheld a search of the defendant's phone, despite a prior warrantless search, because "nothing in the [search warrant] affidavit reference[d] the information derived from the pre-warrant search of [the] phone, and so the trial court properly concluded that the evidence obtained pursuant to the warrant was not . . . the 'fruit of the poisonous tree.'" *Id.* at 695 (citing *Reaves*, 284 Ga. at 183); *see also State v. Lejeune*, 277 Ga. 749,

755 (finding that unlawful searches yielding certain evidence did not preclude admission of same evidence uncovered during subsequent searches pursuant to warrants obtained independently of initial searches); *Price v. State*, 270 Ga. 619, 622–23 (1999) (even if initial search was unlawful, same evidence discovered in course of lawful consent search was admissible).

II. The independent source doctrine does not apply to this case.

Because the State can use "no information" from an illegal search to get a warrant, the independent source doctrine "typically operates when evidence discovered as the result of an initial unlawful search is later discovered in a second search conducted by lawful means using information gained independently of the initial search." *Wilder v. State*, 290 Ga. 13, 16 (2011). That is not the situation here.

Far from demonstrating that "no information" from the illegal search was used to obtain the warrant to search Mr. Tatum's phone, *Reaves*, 284 Ga. at 183, and that the illegal search did not have "any effect" in producing the warrant, *Murray*, 487 U.S. at 542 n.3, the record demonstrates precisely the opposite. The illegal search of Mr. Tatum's phone produced incriminating evidence, which prompted the police to seek a warrant, and which the police leveraged by explicitly citing that evidence in their warrant application.

As the Court of Appeals noted, the search warrant affidavit expressly described the video that the police officer observed on Mr. Tatum's phone during the illegal search. This evidence demonstrates both that the illegally obtained evidence influenced law enforcement's decision to seek a search warrant and that the magistrate knew of the illegal evidence when issuing the warrant. That record flunks both parts of the *Murray* test, which prohibits applying the independent source doctrine if the illegal evidence either (i) "prompted" law enforcement to seek a warrant *or* (ii) was "presented to the Magistrate and affected his decision to issue the warrant." *Murray*, 487 U.S. at 542.

Although *Murray* clearly provides that the independent source doctrine does not apply so long as tainted evidence played *some* role on law enforcement's decision to seek a warrant or a magistrate's decision to issue one, in Mr. Tatum's case it is worth noting that the tainted evidence likely played not just some role but a *central* role in those decisions. The evidence that the police illegally viewed during their illegal search of Mr. Tatum's phone—a video of "a female standing in a bedroom with her breasts exposed," *Tatum v. Townsend*, 356 Ga. App. 439, 440 (2023)—was directly cited in their subsequent warrant application, and was

exactly the sort of evidence that the police presumably hoped to "find" through that warrant It also was likely the most significant piece of evidence in Tatum's subsequent prosecution. Unlike in *Murray*, *Reaves*, and *Johnson*, this illegally obtained evidence played a direct and substantial role in securing the warrant. Since its earliest days, the exclusionary rule has applied where, as here, "a second search is undertaken to acquire precisely the same information the authorities obtained under an earlier, illegal search." Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 11.4(f) (6th ed. 2020) (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390–92 (1920) (involving officers who unlawfully seized certain documents and then subpoenaed them)).

In reaching a contrary result, the Court of Appeals reasoned that if the police had "excised" the illegally acquired information from the warrant application, that hypothetical application would still have contained sufficient information to establish probable cause. *Tatum*, 367 Ga. App. at 443. The court asserted that this approach found support in this Court's decision in *Brundige v. State*, 291 Ga. 677 (2012), and the Court of Appeals' decision in *Stephens v. State*, 346 Ga. App. 686 (2018); *Tatum*, 367 Ga. App. at 443. But neither of those cases supports the decision below.

In *Brundige*, law enforcement obtained two warrants. 291 Ga. at 678. The first was for thermal imaging of the defendant's home. *Id.* After gathering evidence from the first search, law enforcement obtained a second warrant to search the home. *Id.* This Court held that the thermal imaging search conducted pursuant to the first warrant was unlawful because it was not authorized by statute but that the home search conducted pursuant to the second warrant was lawful because "excising the evidence improperly obtained, probable cause nonetheless exists to issue a warrant." *Id.* at 682. But because *Brundige* held only that the initial search violated a statute—not the Constitution—that case does not appear to have involved the independent source doctrine as articulated in *Murray*. *Id.*; *cf. Virginia v. Moore*, 553 U.S. 164, 176 (2008) (holding that law enforcement's violation of a state regulation does not necessarily entail a violation of the Fourth Amendment).

What is more, the first warrant demonstrated that law enforcement had, *in fact*, applied for a warrant, and a magistrate, *in fact*, found probable cause and issued a warrant *before* the police illegally acquired any information from the thermal imaging search. *Brundige*, 291 Ga. at 678. Thus, although the information from the thermal imaging search was included in the second warrant

application, the record established—not just hypothetically, but actually—that a magistrate had previously found probable cause without relying in any way on the information from the thermal imaging search. *Id.* Likewise, in *Stephens*, the Court of Appeals stated that the search warrant for the defendant's cell phone "was not based upon any information derived from the [initial warrantless] download" of the phone's contents. 346 Ga. App. at 693.

Regardless, neither *Brundige* nor *Stephens* could have overruled the U.S. Supreme Court's pronouncement that the independent source doctrine hinges on "whether the search pursuant to warrant was *in fact* a genuinely independent source of the information," *Murray*, 487 U.S. at 542 (emphasis added), not on whether a reviewing court can imagine a counterfactual scenario in which law enforcement did not use the fruit of the poisonous tree to get a warrant. Here, because law enforcement expressly relied on information from an illegal search in seeking the warrant that produced the information at issue, and because that information was presented to the magistrate in the warrant application, the suppression of that information was required by *Murray*, *Reaves*, and *Johnson*.

III. Applying the independent source doctrine in this case would undermine constitutional rights in Georgia.

The Court of Appeals' approach to this case, if upheld, would invite gratuitous law enforcement misconduct and substantially undermine individual rights.

The exclusionary rule's deterrent effect to unreasonable searches and seizures is most effective when the police conduct is "sufficiently deliberate . . . and sufficiently culpable." *Herring v. United States*, 555 U.S. 135, 144 (2009). In *Murray*, both the majority and the dissent expressed concern about a specific kind of deliberate, culpable police misconduct: "confirmatory searches." *See Murray*, 487 U.S. at 540 (majority opinion); *id.* at 547 (Marshall, J., dissenting). These are deliberately unconstitutional warrantless searches "conducted for the precise reason of making sure it is worth the effort to obtain a search warrant." LaFave, *supra*.

Yet, if the Court of Appeals' analysis is upheld, the independent source doctrine in Georgia would countenance—and even promote—unconstitutional confirmative searches. The constitutional process demands that once police officers believe they have developed probable cause to support a search or seizure, they should "get a warrant." *Carpenter v. United States*, 138 S. Ct. 2206,

2221 (2018). But, under the Court of Appeals' approach, they wouldn't have to. They could instead choose to deliberately violate the Constitution and conduct the search without a warrant–and if the illegal search turns up nothing, the police will simply move on, most likely without consequence.[1] If, instead, the illegal search turns up incriminating evidence, the police will then—and only then—apply for a warrant. And the magistrates in receipt of those warrant applications will be likely to grant them because the magistrates will know, in advance, that executing the warrant will turn up the incriminating evidence that the police obtained in their first illegal search. As a result, the exclusionary rule will lose its power to deter misconduct, and there will be little to stop police officers from performing unlawful searches just to see what might come up.

Beyond being contrary to *Murray*, this would be a recipe for widespread violations of Georgians' constitutional rights. This Court should prevent that from happening.

[1] "[T]he remedy for many Fourth Amendment search violations in the civil context is minimal and the barriers to litigation are high." Nancy Leong, *Making Rights*, 92 B.U. L. Rev. 101, 173 (2012). "Even when the intrusion on privacy is egregious, it may be difficult for the defendant to show harm that translates into money damages." *Id.*; *see also* Marc L. Miller & Ronald F. Wright, C*riminal Procedures: The Police: Cases, Statutes, and Executive Materials* 425 (3d. ed. 2007) (explaining that civil lawsuits "have not become a common method of dealing with improper searches or seizures").

CONCLUSION

The ACLU and the ACLU of Georgia respectfully submit that the decision of the Court of Appeals should be reversed.

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

This submission does not exceed the word-count limit imposed by Rule 20. Excluding the parts of the document exempted under Rule 20(6), this amici brief contains 3,742 words as shown by Microsoft Word.

DATE: January 31, 2024

Respectfully submitted,

/s/ Cory Isaacson
Cory Isaacson
Georgia Bar No. 983797
American Civil Liberties Foundation
of Georgia, Inc.
P.O. Box 570738
Atlanta, GA 30357
(404) 594-2723
cisaacson@acluga.org

Xinge Hong*
American Civil Liberties Union
Foundation, Inc.
New York, NY 10004
(202) 548-6601
xhong@aclu.org

Counsel for Amici Curiae

** Motion for pro hac vice admission forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2024, I have served a true and correct copy of the foregoing *Brief of the American Civil Liberties Union and the American Civil Liberties Union of Georgia as Amici Curiae in Support of Appellant* electronically upon all the following counsel of record:

John Jay McArthur
McArthur & McArthur, P.A.
P.O. Box 893
Athens, Georgia, 30603-0893
Telephone: (706) 353-7736
Email: john@mcarthurlaw.net
Counsel for Appellant

D. Parks White, District Attorney
Northern Judicial District
P.O. Box 515
Hartwell, Georgia, 30643
Telephone: (706) 376-3128
Email: dpwhite@pacga.org

Jeff C. Lee, Chief Assistant District Attorney
Northern Judicial Circuit
P.O. Box 843
Danielsville, Georgia, 30633
Telephone: (706) 283 1716
Email: jlee@pacga.org

Counsel for Appellee

s/ Cory Isaacson
Cory Isaacson
Georgia Bar No. 983797