IN THE SUPREME COURT OF GEORGIA

MARK JOSEPH TATUM,	*	
	*	**CASE NO.: S23G0955**
Petitioner,	*	
	*	
v.	*	
	*	
	*	
STATE OF GEORGIA,	*	
	*	
Respondent.	*	

BRIEF OF PETITIONER/APPELLANT ON GRANTED WRIT OF CERTIORARI

Appellant submits his brief after this Court granted the writ of certiorari.

Statement of Case. This Court granted the writ of certiorari on October 11, 2023 to review the April 17, 2023 decision of the Court of Appeals that affirmed Appellant's conviction of peeping tom and invasion of privacy and held that the trial court had not erred in denying a motion to suppress, with the Court of Appeals decision being based upon the "independent source" doctrine.

Statement of Facts. Mark Joseph Tatum, twenty-three years old [T7-14], was arrested on July 15, 2018 near his home at 1019 Virginia Lane, Hull, Georgia where he lived with his father [R2-45; T7-11]. Madison County Deputy William Townsend ("the arresting deputy") confronted Mr. Tatum walking along a nearby public street after responding to a report from Mr. Tatum's eighteen-year-old neighbor that, while folding clothes in her bedroom, she saw a cellphone with a camera being held up to the room's screened window by an unidentified person [R2-45; T4-3]].

While being questioned by the deputy, Mr. Tatum initially denied that he had a cellphone with him but, after the deputy pointed out that there was apparently one in his pants pocket, Mr. Tatum stated he had forgotten it was there [T7-45]. The deputy asked Mr. Tatum to show him "the first picture" on the camera roll [T4-6]. Mr. Tatum declined but, after the deputy told him he "had enough to detain him and obtain a search warrant on the phone", Mr. Tatum produced the cellphone and began powering it up [T4-6,7]. The deputy testified that, when he thought Mr. Tatum may have been trying to delete something from the

cellphone, he grabbed it away from him, then saw a video "thumbnail" of "a girl standing in a window", and handcuffed Mr. Tatum [T4-13,14].

The deputy again examined the cellphone video while in his patrol car without a search warrant, although he knew he needed to have a search warrant to access contents of a cellphone [T4-14]. The events described above were recorded on the deputy's body cam recorder [T4-8,9; T6].

Some five days later, Investigator Scott Rice with the Madison County Sheriff's Department made an affidavit to obtain a search warrant for a forensic examination of Mr. Tatum's cellphone which revealed a video of the woman who had made the 911 call "folding laundry while not wearing a shirt, leaving her breasts exposed" [T6]. That affidavit described the encounter between the arresting deputy and Mr. Tatum with the crucial detail being the deputy's observation of the video that he illegally accessed from the cellphone. The balance of the affidavit recited boilerplate information regarding examination of electronic devices for evidence [T6].

The trial court found Appellant guilty of peeping tom and invasion of privacy but not guilty of tampering with evidence after a bench trial [T7-7; R2-69] upon stipulation of facts [R2-45].

Question Posed by Court. Does the independent source doctrine allow the admission of cell-phone 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 cell-phone?

Enumeration of Error. The Court of Appeals erred in relying on the "independent source" doctrine to uphold the trial court's denial of a motion to suppress without considering whether the decision to seek a search warrant was prompted by a previous illegal warrantless search of the cellphone.

Argument and Citation of Authority.

Preface to argument. The Georgia Association of Criminal Defense Lawyers has filed an *amicus curiae* brief that cogently and trenchantly analyzes the relevant authority; therefore, Appellant's

counsel will not replow that ground in this brief but will offer a brief argument.

The short and simple answer to the question posed by the Court in granting the writ of certiorari is **"No"**.

As cited in the *amicus brief*, well-settled authority establishes that whether the officer seeking the search warrant would have done so without knowledge obtained illegally during a previous warrantless search is an essential factor in considering the applicability of the "independent source doctrine". *United States v. Barron-Soto*, 820 F.3d 409 (11th Cir. 2016); *United States v. Noriega*, 676 F.3d 1252, (11th Cir. 2012); *see also, Murray v. United States,*487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed. 2d 472 (1988).

The Court of Appeals did not so in this case.

The trial court entered a cursory order denying the motion to suppress without addressing whether the investigator seeking the search warrant would have done so without knowing that the arresting deputy had already viewed presumably incriminating content of Appellant's cellphone without a warrant [R41]. Likewise, the state did

not adduce any evidence at the hearing on the motion to suppress that the investigator would have sought the search warrant without that knowledge. [T, Motion Hearing].

The affidavit for the search warrant states: "Townsend viewed the video and observed a topless white female inside her room being viewed from outside." [T, Motion Hearing, Exhibit] It is evident that this information was considered crucial to obtaining the search warrant, which was the reason for the investigator's including it in the application for the search warrant. Otherwise, the affidavit would have been insufficient.

Reversal, rather than remand for further fact-finding, is the appropriate remedy. The State had the burden of proving the two elements necessary to avail itself of the "independent source doctrine" [*O.C.G.A. §17-5-30(b)*] and it did not do so. The record is clear that the State could not have shown the search warrant would have been sought absent the illegal warrantless access of the cellphone's contents.

Conclusion. The importance of this case is not limited to cellphones. If the holding is that law enforcement can illegally search

without a warrant and then utilize the "independent source doctrine" to sanitize the taint by obtaining a search warrant, the exclusionary rule becomes worthless.

The Court should reverse.

THIS 14th day of November, 2023.

MCARTHUR & MCARTHUR, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Brief Of Petitioner/Appellant On Granted Writ Of Certiorari upon Respondent by filing with the electronic court system and by emailing opposing counsel, viz.: Hon. Parks White, District Attorney and Hon Jeff C. Lee, Senior Assistant District Attorney, Northern Judicial Circuit, and upon Counsel For Amicus Curiae, viz.: Hunter J. Rodgers, GACDL Amicus Curiae Chair, V. Natasha Perdew Silas, GACDL President and Brandon A. Bullard, Esq., all in the manner provided by law and by rule.

[signature on following page]

This 14th day of November, 2023.

/s/ John Jay McArthur
JOHN JAY MCARTHUR

SUPREME COURT OF GEORGIA
Case No. S23G0955

October 25, 2023

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARK JOSEPH TATUM v. THE STATE.

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until November 07, 2023.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, every interim review which is granted pursuant to Rule 37, appeals following the grant of petitions for writ of certiorari, applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court, where oral argument is mandatory. Rule 50(1) -(2). No extensions of time for requesting oral argument will be granted. Rule 51(1).

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk

SUPREME COURT OF GEORGIA
Case No. S23G0955

October 31, 2023

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARK JOSEPH TATUM v. THE STATE.

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until November 14, 2023.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, every interim review which is granted pursuant to Rule 37, appeals following the grant of petitions for writ of certiorari, applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court, where oral argument is mandatory. Rule 50(1) -(2). No extensions of time for requesting oral argument will be granted. Rule 51(1).

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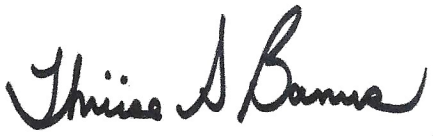

, Clerk