FILED
SUPREME COURT
STATE OF WASHINGTON
7/28/2023 4:19 PM
BY ERIN L. LENNON
CLERK

Supreme Court No. 102214-0
(COA No. 82748-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

WILLIAM PHILLIP JR.,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. IDENTITY OF PETITIONER AND DECISION BELOW 2

C. ISSUES PRESENTED FOR REVIEW 2

D. STATEMENT OF THE CASE 5

E. ARGUMENT 9

1. After the State unconstitutionally obtains evidence, article I, section 7's exclusionary rule requires suppression and demands completely independent grounds for re-obtaining this suppressed evidence 9

a. Article I, section 7's exclusionary rule operates independently from the Fourth Amendment 9

b. The independent source doctrine applies only when evidence is obtained from a truly independent and genuinely severed source 12

c. The prosecution did not meet the genuine independence required to overcome the taint that follows an unconstitutional search and seizure 14

d. The court must take article I, section 7's protections into account following an unconstitutional search. 18

2. The Court of Appeals improperly disregarded the presumptively prejudicial impact of invading Mr. Phillip's privileged attorney-client communications in

the State's relentless efforts to pursue suppressed, unconstitutionally seized, cell phone data 22

a. The on-going taint of an attorney-client privilege violation remains presumptively prejudicial 22

b. The attorney-client privilege violation continues to prejudice Mr. Phillip and this prejudice must be accounted for under the independent source doctrine 25

F. CONCLUSION 29

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010)........ 11, 20

State v. Betancourth, 190 Wn.2d 357, 413 P.3d 566 (2018) .. 13, 14, 16

State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010) 17

State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005)...... 13, 20

State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) 10

State v. Mayfield, 192 Wn.2d 871, 434 P.3d 58 (2019) 9, 10, 11, 12, 16

State v. Morgan, 193 Wn.2d 365, 440 P.3d 136 (2019) 16

State v. Pena Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014) . 22

State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992) 21

State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982)................ 10

State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009).. 11, 16, 20

Washington Court of Appeals

State v. Myers, _ Wn.App.2d _, 530 P.3d 257 (2023) 22, 23, 24, 25

State v. Phillip, 9 Wn. App. 2d 464, 452 P.3d 553 (2020) ... 5, 7, 15

United States Supreme Court

Davis v. United States, 564 U.S. 229, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011) 10

Hudson v. Michigan, 547 U.S. 586, 99 S. Ct. 2159, 165 L. Ed. 2d 56 (2006).. 11

Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988). 12, 17, 20

Utah v. Strieff, 579 U.S. 232, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016).. 11

United States Constitution

Fourth Amendment.....2, 3, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21

Sixth Amendment.. 22

Washington Constitution

Article I, section 7 ..2, 3, 9, 10, 11, 13, 14, 15, 16, 17, 18, 20, 21

Article I, section 22 22

Court Rules

RAP 13.4 29

RAP 2.3 9

Other Authorities

Comm. v. Katona, 240 A.3d 463 (Pa. 2020) 19

Comm. v. Mason, 637 A.2d 251 (Pa. 1993) 19

State v. Bain, 872 N.W.2d 777 (Neb. 2016) 23

State v. Holland, 823 A.2d 38 (N.J. 2003) 19

State v. Kosuda-Bigazzi, 250 A.3d 617 (Conn. 2020) 27

State v. Wagoner, 24 P.3d 306 (N.M. Ct. App.), *cert. denied*, 130 N.M. 213 (N.M. 2001). 18

A. <u>INTRODUCTION</u>

In 2010, the police admitted they were fishing for evidence when they got a warrant for extensive data from William Phillip's cell phone. This data became the centerpiece of the State's investigation and prosecution. But the Court of Appeals ruled the warrant lacked probable cause and ordered its fruits suppressed. Since that 2016 ruling, the prosecution has delayed re-trying Mr. Phillip and instead sought various ways to re-seize this suppressed evidence.

Under the independent source doctrine, the prosecution must prove a new warrant to obtain evidence that was unconstitutionally seized and searched is genuinely untainted by any prior illegality, including an untainted motive to pursue this evidence. The prosecution has not met this burden because its motivation for refusing to abide by a suppression order rests both on its knowledge of the content of the suppressed evidence and illegally obtained privileged attorney-client communications.

The courts below misapplied the independent source doctrine, disregarded the presumptively prejudicial effect of the attorney-client privilege violation, and refused to account for the qualitatively different protections of article I, section 7 as opposed to the Fourth Amendment.

B. IDENTITY OF PETITIONER AND DECISION BELOW

William Phillip Jr., petitioner here and below, asks this Court to accept review of the Court of Appeals decision dated May 30, 2023, affirming the trial court after granting discretionary review, for which reconsideration was denied on June 27, 2023, copies of which are attached.

C. ISSUES PRESENTED FOR REVIEW

1. Once the State unconstitutionally invades a person's private affairs, the fruits of that invasion must be suppressed under article I, section 7's broad exclusionary rule. The State may access suppressed evidence only if it proves it gained no benefit from and was not in any way motivated by unconstitutional acts.

On direct appeal, the Court of Appeals suppressed unconstitutionally obtained cell phone data that was the centerpiece of the State's case. But the prosecution then obtained a new warrant for this same suppressed cell phone data, relying on the same tainted investigation. The prosecution's motivation for pursuing this suppressed data included its unlawful access to this data and knowledge it gained from violating Phillip's attorney-client privilege while searching his cell phone.

Do the strict requirements of the independent source doctrine under article I, section 7 prohibit the State from benefitting from an illegal search and obtaining suppressed evidence?

2. This Court has cautioned that the Fourth Amendment's independent source doctrine may erode the protections of article I, section 7 if construed to permit the State to benefit from an initial unlawful seizure. This Court has not articulated a test to differentiate the state constitution's

independent source doctrine despite ample case law emphasizing the qualitative differences between the exclusionary rules required by article I, section 7 and the Fourth Amendment. Here, the trial court did not know what test to apply under article I, section 7. Should this Court grant review to address this significant constitutional issue?

3. The Sixth Amendment and established case law prohibit the State from receiving any benefit from its access to privileged attorney-client information and presume any violation is prejudicial. Here, a lead detective and lead prosecutor reviewed privileged attorney-client communications, discussed them, and searched for more. Should this Court grant review to address the on-going presumptively prejudicial effect of the State's violation of the attorney-client privilege when it necessarily impacts the State's strategic decisions, including its motivation to persistently pursue the cell phone data that was unconstitutionally seized at the outset of the case?

D. STATEMENT OF THE CASE

On May 22, 2010, police officers found Seth Frankel was stabbed multiple times in his home and died. *State v. Phillip*, 9 Wn. App. 2d 464, 467, 452 P.3d 553 (2020). He had many cuts on his arms and hands and there was a substantial amount of blood near him. 3/12/14RP 24; 4/7/14RP 153-4.

Lacking a suspect and fishing for evidence, the police got search warrants for cell phone location data, calls made and received, and all subscriber information from April 1 to May 26, 2010, for two men who had friendly or flirtatious text messages with Mr. Frankel's girlfriend Bonny Johnson. CP 420; 9 Wn. App. 2d at 468.

The police obtained Mr. Phillip's cell phone data on June 20, 2010. They immediately detailed this information in warrants for Mr. Phillip's home, phone, and motorcycle, and later his DNA, obtaining these warrants less than two days later. CP 66-67. Without this cell phone data, a court had rejected the State's effort to get a warrant for Mr. Phillip's

DNA. CP 66. Each subsequent warrant application included substantial details from the cell phone records to connect Mr. Phillip and the crime.

In 2012, the State recognized its 2010 warrant for cell phone data lacked probable cause and obtained a second warrant for this same evidence. CP 63-64. The trial court agreed the first warrant lacked probable cause but it found the 2012 warrant was valid. CP 63; 10/15/13RP 63.

The State painted this cell phone data as a "major portion of the evidence that we're relying on" and its case could be "dead in the water" without it. 10/17/13RP 116-17. At trial, it recounted these ill begotten records in great detail in its closing argument and told the jury these records were "extremely strong evidence" and "extremely damning." 4/9/14RP 76-81, 149; CP 454 (prosecution's motion explaining "cell phone records play an extremely important role in this case" and include "very detailed information" against Mr. Phillip).

Even with this evidence, the jury was unable to reach a verdict after the first to trial in 2013, but after a second trial, a jury convicted Mr. Phillip of first-degree murder. 11/18/13RP 25; 4/11/14RP 3.

The Court of Appeals ruled the 2012 warrant lacked probable cause connecting Mr. Phillip to the crime and ordered its fruits suppressed. 9 Wn. App. 2d at 470.

After the Court of Appeals reversed Mr. Phillip's conviction due to this unconstitutional search and seizure, the prosecution used a judicial subpoena to get this same cell phone data. 9 Wn. App. 2d at 472. On discretionary review, the Court of Appeals rejected the subpoena as constitutionally invalid. *Id*. at 479, 481. It again ruled the State did not have lawful authority to access this cell phone evidence. *Id*. at 481.

Following this failed effort to obtain the cell phone data, the prosecution prepared a warrant for the identical evidence. App. 63-78. This 2020 warrant relies on the same information

gathered by the same investigators as have been involved in the case from the outset. CP 10-22, 65, 83.

During the investigation, the State violated Mr. Phillip's attorney-client privilege when a detective read materials directed to an attorney, notified the lead prosecutor and discussed their content with him, and, at the prosecution's request, searched for more such information. *See State v. Phillip*, 195 Wn. App. 1051, 2016 WL 4507473 *3 (2016) (unpublished, explaining attorney-client privilege violation); 2/24/13RP 40. In the 2016 decision, the Court of Appeals ruled this violation of attorney-client privilege did not require reversal without tangible proof the State used the improperly gathered information to affirmatively advance its case. 2016 WL 4507473 *3.

In the most recent Court of Appeals decision, the court refused to revisit the impact of the State's violation of Mr. Phillip's attorney-client privilege on its renewed, persistent efforts to invade Mr. Phillip's private affairs. Slip op. at 21-22.

The trial court granted the warrant but certified its ruling for review under RAP 2.3(b)(4), finding substantial ground for a difference of opinion whether suppression was required. CP 247-48.

The Court of Appeals ruled the 2020 warrant was valid because the content of the suppressed cell phone data could be simply excised from a search warrant and thereby provide independent authority of law.

E. ARGUMENT

1. After the State unconstitutionally obtains evidence, article I, section 7's exclusionary rule requires suppression and demands completely independent grounds for re-obtaining this suppressed evidence.

a. Article I, section 7's exclusionary rule is independent from the Fourth Amendment.

Once evidence is obtained "as a direct or indirect result of an article I, section 7 violation" it is excluded and may not be used by the State in a criminal case. *State v. Mayfield*, 192 Wn.2d 871, 889, 434 P.3d 58 (2019). Suppressing the fruits of

an unlawful search "is an integral component of the right to privacy itself, and 'whenever the right is unreasonably violated, the remedy must follow.'" *Id*. at 887 (quoting *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)).

The origins of article I, section 7's exclusionary rule are independent from the federal rule. *Mayfield*, 192 Wn.2d at 885. Though the federal exclusionary rule's scope has eroded over time, this state's rule has not. *Id*. No *Gunwall* analysis is required to show article I, section 7's exclusionary rule is independent and more protective of individual privacy than the Fourth Amendment. *Id*. at 879 (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)).

The "sole purpose" of the Fourth Amendment's exclusionary rule "is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236-37, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011). Suppression of evidence is the "last resort" under the Fourth Amendment. *Hudson v. Michigan*, 547 U.S. 586, 591, 99 S. Ct. 2159, 165 L. Ed. 2d 56

(2006). It is called for "only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant." *Utah v. Strieff*, 579 U.S. 232, 241, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016).

Unlike the Fourth Amendment, article I, section 7 contains a "constitutionally mandated" exclusionary rule that is "nearly categorical," and not "selectively applied." *State v. Winterstein*, 167 Wn.2d 620, 632, 635, 220 P.3d 1226 (2009). It is not premised on deterring the police. *Mayfield*, 192 Wn.2d at 882. Its primary purpose is to rectify a privacy violation, protect individual privacy to the full extent the constitution requires, and safeguard "the integrity of the judicial system by not tainting the proceedings with illegally obtained evidence." *Id*. When personal information is seized without authority of law, "any evidence seized unlawfully will be suppressed." *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010).

This Court has "strongly caution[ed]" that any exception to the mandatory exclusionary rule "must be carefully and narrowly applied." *Mayfield*, 192 Wn.2d at 883.

b. The independent source doctrine applies only when evidence is obtained from a truly independent and genuinely severed source.

The Fourth Amendment test for satisfying the independent source doctrine requires the prosecution to prove "a genuinely independent source of the information and tangible evidence" exists and the government's decision to seek the warrant was not "prompted by" what it learned from an illegal search. *Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988). Additionally, it must prove that "information obtained" from the illegal search was not "presented to the magistrate" and did not "affect[] his decision to seek the warrant." *Id*.

In *Murray*, the court was "absolutely certain" officers' illegal entry into a building "in no way contributed in the slightest" to the later search warrant. 487 U.S. at 542. The

warrant constituted an independent source under the Fourth Amendment because it was based on a pre-existing investigation wholly unrelated to any knowledge gained by the illegal entry.

This Court said the independent source doctrine is compatible with article I, section 7 in *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 (2005), where substantial pre-existing investigation led to a car stop and arrest of the occupants. The police obtained a search warrant and the parties agreed it was valid. *Id*. But one sentence of the four-page search warrant mentioned the police had glanced into the car's locked trunk and saw a possible firearm. *Id*. While this "glance" was unlawful, the search warrant satisfied the independent source doctrine because it was a trivial part of a valid warrant where there was strong pre-existing grounds for searching the car. *Id*. at 718, 721.

In *State v. Betancourth*, 190 Wn.2d 357, 370-71, 413 P.3d 566 (2018), this court ruled a jurisdictional flaw in an

initial warrant did not affect the revised warrant, citing the independent source doctrine. Notably, both warrants were supported by the same, valid probable cause. *Id*. at 370.

Although the jurisdictional flaw in *Betancourth*'s initial warrant did not require suppression of the records at issue, this Court cautioned against applying this remedy to another set of facts. *Id*. at 372. It explained that if the initial seizure had been unlawful and the question involved the fruit of a poisonous tree, the evidence would be likely inadmissible under the independent source rule. *Id*. This Court further warned against applying the independent source doctrine in a manner that could "risk eroding the protections of article I, section 7." *Id*.

c. The prosecution did not establish the genuine independence required to overcome the taint that follows an unconstitutional search and seizure.

Mr. Phillip explained to the trial court that article I, section 7 is more protective of personal privacy than the Fourth Amendment and demands genuine independence of a later warrant when the police obtained evidence without authority of

law. CP 67-68, 87-91; *see Phillip*, 9 Wn. App. 2d at 479. But the trial court ruled the Fourth Amendment's "independent source exception to the exclusionary rule is the same under article I, section 7." CP 261 (COL 3(a)(ii)). Then it said, "even if the test under article I, section 7 was more demanding, the search warrant in this case would still meet the requirements of the independent source doctrine." *Id*. But the court never explained what potentially "more demanding" test it considered.

Instead, when the defense asked the court to address its arguments about article I, section 7's more stringent protections of individual privacy, the court admitted it did not apply any stricter test. It said, "I'll be honest, I really focused on the arguments related to the independent source document[sic] more so. But I did look at it and I wasn't persuaded by defense arguments." RP 291.

Like the attenuation doctrine, "a narrow, Washington-specific" analysis is required for the independent source

exception to the exclusionary rule due to the fundamental differences between article I, section 7 and the Fourth Amendment. *Mayfield*, 192 Wn.2d at 897. Its requirements must be construed strictly and narrowly, giving full effect to the necessary evidence of genuine independence as the basis for the search as well as the motive for the search. *Winterstein*, 167 Wn.2d at 632. The illegal search must have "in no way contributed" to a later warrant. *Betancourth*, 190 Wn.2d at 365; *see also Mayfield*, 192 Wn.2d at 891-92 (describing independent source doctrine as demanding evidence come from a source "completely independent" of any illegality).

As Mr. Phillip explained to the trial court, article I, section 7 strictly enforces its privacy protections by requiring the prosecution to prove an exception to the exclusionary rule by clear and convincing evidence. CP 68-70; *see Mayfield*, 192 Wn.2d at 898 (explaining State's burden of proving attenuation doctrine rests on same standard for search cases); *see also State v. Morgan*, 193 Wn.2d 365, 370, 440 P.3d 136 (2019) (holding

State must prove validity of warrantless search "by clear and convincing evidence"); *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010) ("State must establish the exception to the warrant requirement by clear and convincing evidence"). The Fourth Amendment uses a preponderance of evidence standard. *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984).

The Court of Appeals superficially ruled the existence of subsequent warrants meant the prosecution proved it had enough evidence to go forward with the case and that sufficed to establish independent evidence. But article I, section 7 demands complete independence, and even the Fourth Amendment test requires genuine independence.

Further, this independence is not merely a matter of citing other evidence. It is independence in their motivation in pursing the evidence, such that information gleaned from the illegality does not affect the State's actions. *Murray*, 487 U.S. at 542. The State fails this test. This Court should grant review.

d. The court must take article I, section 7's protections into account following an unconstitutional search.

As Mr. Phillip explained to the trial court, other state courts also apply a heightened test before admitting evidence under the independent source doctrine because their state privacy protections do not rest on the Fourth Amendment's focus on police deterrence. CP 69-70, 87-90. New Mexico courts hold that mentioning illegally obtained information in a warrant application is not a genuinely independent source under its state constitution. *State v. Wagoner*, 24 P.3d 306, 315 (N.M. Ct. App.), *cert. denied*, 130 N.M. 213 (N.M. 2001). This approach protects individual privacy, assuring the accused person is returned to the same position as they were in before the illegal conduct and the police receive no benefit from illegal conduct. *Id*.

Similarly, New Jersey courts specify that the prosecution's probable cause showing must be "wholly independent from the knowledge, evidence, or other

information acquired as a result of the prior illegal search." *State v. Holland*, 823 A.2d 38, 48 (N.J. 2003). In addition, the prosecution must prove by clear and convincing evidence that the police would have sought a warrant without tainted knowledge or evidence obtained and there was no flagrant police misconduct involved. *Id*. Courts must "scrupulously" enforce each prong of the test. *Id*.

Pennsylvania courts "impose additional constraints" on the independent source doctrine beyond the Fourth Amendment's requirements to safeguard individual privacy under state law. *Comm. v. Katona*, 240 A.3d 463, 476 (Pa. 2020) (citing *Comm. v. Mason*, 637 A.2d 251, 256 (Pa. 1993)). The independent source must be "truly independent from both the tainted evidence and the police or the investigative team which engaged in the misconduct by which the tainted evidence was discovered" anytime the police acted with malfeasance. *Mason*, 637 A.2d at 257-58.

Like these state constitutions, article I, section 7's "paramount concern" is protecting individual privacy and remedying any violation of it. *Afana*, 169 Wn.2d at 180. It does not permit speculation about police conduct and rejects the related doctrine of inevitable discovery because it requires a court to speculate about whether the police would have lawfully obtained authority for a search under different circumstances. *Winterstein,* 167 Wn.2d at 633-36.

In *Gaines* and *Murray*, the courts were absolutely certain no tainted evidence played any role in the motivation to gather or ability to obtain authority to seize this evidence. This absolute certainty arises when the government obtained warrants that either did not mention the illegality or merely included a brief and uncontestedly minor mention of it, coupled with substantial separate and unrelated evidence establishing a valid basis for the search. On the other hand, the independent source doctrine does not apply when the unconstitutionally obtained evidence played a substantive role in the investigation

and prosecution. *See State v. Perrone*, 119 Wn.2d 538, 560, 834 P.2d 611 (1992) (holding warrant cannot be severed even when partially valid due to significant role of invalid portion).

Here, the court did not recognize that article I, section 7 is different from and more protective than the Fourth Amendment. It gave no weight to the extensive, highly personal details exposed by the unlawful search that motivated the request for a warrant. It did not hold the State to a burden of proving the independent source by clear and convincing evidence. Instead, it cursorily concluded the new warrant "fits within the independent source doctrine" without ruling the new warrant was "genuinely independent" and truly severed from the prior illegal seizure as the independent source doctrine requires. CP 261.

The court's confusion about the requirements of article I, section 7 in this context, when the fruits of illegal activity plainly affected the trial evidence and the State's on-going

motivation to seek another vehicle for getting access to the suppressed evidence, shows the importance of granting review.

2. The Court of Appeals improperly disregarded the presumptively prejudicial impact of invading Mr. Phillip's privileged attorney-client communications in the State's relentless efforts to pursue suppressed, unconstitutionally seized, cell phone data.

a. The on-going taint of an attorney-client privilege violation remains presumptively prejudicial.

When the State violates an accused person's attorney-client privilege, the court must find "no possibility of prejudice to the defendant" for the prosecution to avoid severe sanction such as dismissal. *State v. Pena Fuentes*, 179 Wn.2d 808, 819, 318 P.3d 257 (2014); *State v. Myers*, _ Wn.App.2d _, 530 P.3d 257, 265 (2023); U.S. Const. Amend. 6; Const. art. I, § 22. Even when the prejudice is not immediately apparent, the "presumption of prejudice remains unless and until the State proves beyond a reasonable doubt that there was no prejudice suffered by the defendant due to the Sixth Amendment

violation." *Myers*, 530 P.3d at 265 (quoting *Pena Fuentes*, 179 Wn.2d at 819-20).

Prejudice is not limited to situations where the prosecution gains tangible evidence it introduces at trial. *See Id*. at n.9. Harm to the attorney-client relationship may suffice. *Id*.; *see also State v. Bain*, 872 N.W.2d 777, 792 (Neb. 2016) (reasoning "the State's possession of a defendant's confidential trial strategy is presumptively prejudicial. And that presumed prejudice would infect more than the admission of disputed evidence.").

Here, it is illogical and unreasonable to say there is "no possibility of prejudice" from the attorney-client privilege violation when this violation informs and motivates the State's zealous efforts to continually delay the retrial the Court of Appeals ordered in 2016 until it finds a vehicle for undoing the suppression order. The State cannot establish it has not been influenced "in any way" from the breach of attorney-client privilege, as it must. *See Myers*, 530 P.3d at 266.

In *Myers*, a police officer obtained the defendant's written materials in an effort to get a handwriting sample but realized some of these materials pertained to his case and were privileged. *Id*. at 261. The officer said she stopped reading once she realized the nature of the communications but this Court noted she "never confirmed that the subsequent steps she took in the work up of Myers' case were not influenced *in any way* by the interception of his privileged communications or the information contained therein." *Id*. at 266 (emphasis added).

The *Myers* Court explained that once there was uncontroverted evidence of a state actor reading protected correspondence, the trial court was required to presume prejudice. *Id*. ay 266-67. By reading this correspondence, the State breached the confidentiality protected by the privilege. *Id*. Yet the trial court's ruling focused on whether the breach prejudiced the defendant's right to a fair trial, rather than his right to a protected attorney-client communication. *Id*. at 267-68.

In *Myers*, the trial court erred by focusing on the nature of the specific information gained, rather than considering the access the government improperly had to privileged information and the government actors' communications among themselves about privileged communications. *Id*. at 268.

"The presumption of prejudice is not triggered by a court's determination as to the 'level of egregiousness' of the incursion into this constitutionally protected relationship." 530 P.3d at 268. And it does not require an impact on the fairness of the trial. *Id*.

b. The attorney-client privilege violation continues to prejudice Mr. Phillip and this prejudice must be accounted for under the independent source doctrine.

In 2016, the Court of Appeals affirmed the trial court's ruling that despite a detective and prosecutor's deliberate efforts to obtain and discuss privileged communications between Mr. Phillip and a lawyer, the police did not take "meaningful action" or discover "new evidence" as a result, and the

privileged communication "did not affect the prosecution's trial preparation or strategy." 2016 WL 4507473 at *3.

But Mr. Phillip appears before this Court now under different circumstances and the prejudicial effect of the attorney-client privilege violation is more pronounced. The prosecution knows the content of the information it improperly uncovered, as the same prosecutor, Wyman Yip, who was involved in the original breach has been central to the efforts to pursue this search warrant. *See* 2/24/13RP 40. Throughout the direct appeal, Mr. Phillip was forced to remind everyone of the attorney-client privileged information in order to litigate the trial court's ruling. *See, e.g.*, COA 72120-8-I, Opening Brief, at 43-45. After his conviction was reversed and the case remanded due to an unconstitutional search warrant, the same prosecution team embarked on a years-long campaign to get access to suppressed cell phone records rather than re-try the case without this suppressed evidence or otherwise negotiating a resolution, as typically occurs.

"One method of curing prejudice is by appointing a new prosecutor who has not been exposed to the privileged materials" but that potential remedy never occurred in this case. *State v. Kosuda-Bigazzi*, 250 A.3d 617, 646 (Conn. 2020). The same actors continued to pursue the case against Mr. Phillip.

The lawfulness of the warrant and its genuine independence from other illegalities must account for the attorney-client privilege violation because it remains a critical motivating factor in this case. The only remedy that was ordered by the trial court was that the prosecution could not introduce the privileged information at trial. 2016 WL 4507473 at *3. Yet this information continues to color the prosecution and motivates their refusal to retry Mr. Phillip until it finds a way to use the suppressed evidence at trial. The same personnel and investigation governs this case. Having learned private information Mr. Phillip told a lawyer about the case, it necessarily impacts the on-going pursuit of a retrial and the

relentless efforts to invade Mr. Phillip's private affairs by accessing his cell phone data.

Under these circumstances, the State cannot prove no possibility of prejudice. Due to the presumptive prejudice, the 2020 warrant should be invalidated. If the case is not dismissed as a remedy, the extraordinary efforts to prosecute Mr. Phillip should be confined to the information available at the end of the first trial, without the 2020 warrant, to remove the possible prejudice resulting from the attorney-client privilege violation.

This Court should grant review of the presumptively prejudicial impact of an attorney-client privilege violation and determine whether this warrant is completely and genuinely independent of State illegality as required.

F. CONCLUSION

Petitioner William Phillip Jr. respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 4392 words and complies with RAP 18.17(b).

DATED this 28th day of July 2023.

Respectfully submitted,

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Petitioner
nancy@washapp.org

APPENDIX

FILED
5/30/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM PHILLIP, JR, Petitioner.	No. 82748-1-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — William Phillip seeks review of a May 14, 2021 oral ruling and July 14, 2021 written findings and conclusions denying his CrR 3.6 motion to suppress evidence obtained from his cell phone provider, which included cell site location information (CSLI). The State originally obtained the evidence pursuant to a 2010 warrant, and later pursuant to a 2012 warrant based on a more thorough affidavit, after which Phillip was convicted of first degree murder. On appeal, this court found the 2010 and 2012 warrants lacked probable cause, and we reversed Phillip's conviction. State v. Phillip, No. 72120-8-I, slip op. at 7, 12 (Wash. Ct. App. Aug. 23, 2016) (Phillip I) (unpublished), https://www.courts.wa.gov/opinions/pdf/721208.pdf. Following our first remand, the State served a subpoena for the evidence, which we held did not meet the warrant requirement. State v. Phillip, 9 Wn. App. 2d 464, 481, 452 P.3d 553 (2019) (Phillip II). Following our second remand, the State obtained a new 2020 warrant for the same evidence, based on an affidavit describing facts it contends were learned independently from Phillip's

cell phone records. We conclude the 2020 warrant is valid under Washington's independent source doctrine. Accordingly, we affirm and remand for proceedings not inconsistent with this opinion.

I

A

On May 22, 2010, Bonny Johnson, the girlfriend of Seth Frankel, became concerned that she had not heard from Frankel, who had plans to leave for a camping trip that morning. Johnson contacted Frankel's neighbor and requested he check on Frankel. The neighbor looked through a window and saw a person lying on the living room floor and called 911. Firefighters entered and found Frankel deceased, with wounds that did not appear to be self-inflicted. There was an 18 inch black zip tie around Frankel's right wrist. A second zip tie was found under an overturned coffee table near Frankel's body. There was only limited disturbance of the home, and valuable items remained in place. The King County Medical Examiner's office determined that Frankel died from incised wounds on his neck caused by a sharp instrument and estimated Frankel's time of death as 9:00 p.m. on May 21, 2010.

Detectives interviewed Johnson on May 22, 2010. She stated she and Phillip were co-workers and had previously dated. Johnson told detectives Phillip had not taken their breakup well, had recently expressed love for her, and was the only person she knew who had spoken ill of Frankel. Johnson told police Phillip previously served in the military and owned a motorcycle. With both Johnson's consent and a search warrant, detectives obtained Johnson's cellular phone

records on May 25, 2010. Police viewed text messages between Johnson and Phillip that appeared to be flirtatious and in which Phillip referred to Frankel as an "unhot old man."

On May 25, 2010, a Portland police detective went to Phillip's residence in Oregon to speak with him. In seeking the present warrant, police stated in the supporting affidavit that Phillip admitted to knowing Johnson, but claimed she was " 'just a friend.' " A finding of fact in the order on Phillip's CrR 3.6 motion states, "Phillip failed to mention that he had been in very recent contact with Johnson via text messaging." However, the Portland detective testified at Phillip's trial that Phillip volunteered he recently communicated with Johnson via text message during this conversation. When the detective asked Phillip if he had been to Auburn, Washington recently, Phillip replied, " 'I would like to exercise my right to counsel.' "

On May 26, 2010, Auburn detectives spoke with Johnson again. When asked if she could think of anyone who would want to hurt Frankel, she said, " 'All I can think of is [Phillip].' " She explained that Phillip was extremely upset when she broke up with him, and that she may have been leading Phillip on by continuing to tell him that she cares about him. She nevertheless expressed doubt that Phillip would have killed Frankel.

On May 27, 2010, Auburn police sought a search warrant for cell phone records associated with Phillip's cell phone number, including subscriber information, billing records, cell tower site records, text messages, and call logs,

for the time period between April 1, 2010 and May 26, 2010. The superior court approved the warrant.

On May 28, 2010, Auburn detectives contacted Phillip at his residence in Portland. Detectives noticed bruising on the fingers of Phillip's right hand and a blood-stained bandage over the webbing between his thumb and index finger. Phillip attempted to keep his right hand concealed. When asked about it, Phillip stated he had injured his hand at work. Detectives contacted Phillip again on June 2, 2010. When he answered the door, he did not have a bandage on his right hand, and detectives observed a cut where the bandage had been a few days before. Phillip agreed to meet in the common room of his building, and when he arrived he had covered the cut with a bandage.

On June 9, 2010, detectives went to the convention center where Phillip worked. Phillip's supervisor confirmed he was employed there. Detectives learned that Phillip had access to 18-inch zip ties and commonly used them in his job duties. A co-worker confirmed Phillip injured his right hand at work but stated the injury did not involve a cut.

On June 20, 2010, Phillip's wireless carrier provided Phillip's cell phone records to Auburn police. This information included CSLI from Phillip's cell phone. Auburn police reviewed the information they received. The CSLI showed that on the night of the murder, Phillip's cell phone connected to a series of cell sites suggesting travel from Portland to Auburn, near Frankel's residence, and back to Portland again. The records showed that Phillip made a phone call at 8:56 p.m. that originally connected through a cell site near Frankel's residence, lasted 2

minutes 3 seconds, and ended while connected through a cell site in Auburn by State Route 18 between I-5 and State Route 167. Two days later, on June 22, 2010, Police sought and were granted a search warrant for Phillip's apartment, motorcycle, and person.[1] The same day, they sought and obtained a search warrant for Phillip's e-mail account and search of "Verizon records" for information concerning the cell phone number Phillip dialed at 8:56 p.m. on the night of the murder. Phillip I, No. 72120-8-I, slip op. at 13-14.

On September 23, 2010, Washington State Patrol Crime Laboratory Forensic Scientist Amy Smith analyzed a bloodstained towel found at the crime scene and concluded it contained a mixed deoxyribonucleic acid (DNA) profile consistent with having originated from two individuals. One profile matched Frankel. The second was determined to be from an unknown male. On November 5, 2010, police obtained a search warrant to seize a sample of Phillip's DNA. The affidavit contained information obtained from Phillip's cell phone records. In a report dated December 8, 2010, Smith concluded that only approximately 1 in 2.2 million individuals could have contributed to the second DNA sample and that Phillip was within that set.

On March 22, 2012, at the suggestion of the deputy prosecuting attorney, police sought and were granted a second warrant for the same cell phone records that they had obtained under the May 27, 2010 warrant. The affidavit incorporated

[1] Although not mentioned by the authorities in their affidavit for the 2020 warrant, the search of Phillip's apartment further disclosed, "[i]n his journal, Phillip expressed that he was obsessed with Johnson and that Frankel was not good enough for her." Phillip II, 9 Wn. App. 2d at 469.

by reference the facts in the May 27, 2010 affidavit, and included additional information that was known to police on May 27, 2010, but had not been included in the warrant. Police obtained a second copy of the same cell phone records from Phillip's wireless carrier.

The State charged Phillip with first degree murder. A first trial ended in a hung jury. In a second trial, a jury convicted Phillip of first degree murder. Phillip appealed.

B

In Phillip I, this court held the 2010 and 2012 warrants for Phillip's cell phone records were not supported by probable cause, reversed his conviction, and remanded. No. 72120-8-I, slip op. at 1. We further suppressed information concerning the phone number Phillip had dialed the night of the murder, stating, "The phone number was known to police from Phillip's unlawfully obtained phone records." Id. at 15. However, based on the independent source doctrine, we concluded that the balance of three other warrants were valid, and affirmed the superior court's denial of Phillip's motion to suppress "the evidence seized in executing the warrants for Phillip's apartment, motorcycle, email, cell phone, person, and DNA." Id. at 14, 16.

On remand, the State moved the trial court for issuance of a subpoena duces tecum directed to AT&T for Phillip's CSLI records. Phillip II, 9 Wn. App. 2d at 472. Rather than offering a new affidavit in support of the subpoena, the State filed a memorandum that attached six previously filed affidavits including: (1) the December 8, 2010 certification for determination of probable cause that included

information from the tainted May 2010 CSLI records, (2) the affidavit for the May 22, 2010, search warrant for the CSLI records that the trial court held insufficient, (3) an unsworn June 22, 2010, affidavit for the warrant to search Phillip's apartment, vehicle, and person that included information from the tainted May 2010 CSLI records, (4) the affidavit for the November 5, 2010 warrant for Phillip's DNA, (5) the affidavit for the January 25, 2012 warrant for Phillip's cell phone that included information from the tainted May 2010 CSLI record, and (6) the affidavit for the March 22, 2012, renewed warrant for Phillip's CSLI records that included information from the tainted CSLI record and that this court held insufficient. Id. The superior court granted the subpoena for Phillip's cell phone records on July 24, 2017. Id. at 474.

This court granted discretionary review. Id. We held the subpoena failed as a matter of law under Carpenter, which held that an individual maintains an expectation of privacy in CSLI records, and the constitutionally appropriate way to obtain such records is through a warrant. See Phillip II, 9 Wn. App. 2d at 478-79 (citing Carpenter v. United States, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018)). In addition to holding the State used the wrong vehicle to obtain Phillip's cell phone records, we stated "the trial court's order also failed to include any particularized finding of what fact supported a conclusion that the State had met its probable cause burden for Phillip's cell phone records." Id. at 481. We reversed, vacated the subpoena, and remanded. Id.

On remand, on October 13, 2020, the superior court approved a new warrant for Phillip's cellular data. The 2020 warrant is supported by an affidavit of

probable cause that includes information known to law enforcement before May 27, 2010, and information contained in the three affidavits submitted in support of the warrants for Philip's apartment, vehicle, person, DNA, and phone device. The 2020 affidavit contained information learned from the warrants we approved in 2016, including the likelihood of Phillip's DNA being present at the crime scene.

The State indicated an intent for the 2020 affidavit to omit any reference to the contents of Phillip's cell phone records or information learned from them. It is not clear that the State succeeded in excising information learned from Phillip's cell phone records in one respect. The State's 2020 affidavit included the information that, on June 30, 2010, detectives spoke with Kathy Sanguino, identified as Phillip's mother. It relied on the detectives' interview with Sanguino for the fact that Phillip borrowed her vehicle on May 21, 2010, and returned it the next day. The 2020 affidavit does not describe how Sanguino became known to police. The record separately discloses that police learned from the illegally obtained records that Phillip made a phone call to a number on the night of the murder, which was later associated with Phillip's friend Mike Fowler. The record indicates that Fowler identified Phillip's mother to police. The State describes the record as "underdeveloped" on this point, and it is true the record does not indicate precisely that police learned of Fowler's number from Phillip's cell phone records—as opposed to his phone itself, whose search is not challenged. Nevertheless, the record before this court at this time suggests an inference that police learned Fowler's and Sanguino's identities from review of Phillip's cell phone records.

Phillip filed a CrR 3.6 motion to suppress the contents of his cell phone records, arguing the 2020 warrant is invalid on several grounds. The superior court ruled there was probable cause for the warrant to issue, and that the 2020 warrant was valid. It found there were no intentional or reckless omissions in the affidavit and that the warrant was proper under the independent source doctrine. Accordingly, the superior court denied Phillip's CrR 3.6 motion.

The parties stipulated and the superior court certified that its ruling involved a controlling question of law as to which there is a substantial ground for a difference of opinion, and that immediate review may materially advance the ultimate termination of litigation, under RAP 2.3(b)(4). This court granted discretionary review.

II

We first consider Phillip's argument that the 2020 warrant cannot be sustained under the independent source doctrine. We review the trial court's factual findings supporting the suppression decision for substantial evidence. State v. Hilton, 164 Wn. App. 81, 89, 261 P.3d 683 (2011). Unchallenged findings are accepted as true on appeal. Id. The trial court's conclusions of law drawn from those factual findings are reviewed de novo. Id.

Whether the facts in an affidavit support probable cause is a question of law this court reviews de novo. State v. Nusbaum, 126 Wn. App. 160, 166-67, 107 P.3d 768 (2005). "A search warrant should be issued only if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched." State v. Neth,

165 Wn.2d 177, 182, 196 P.3d 658 (2008). "It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause." State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). "An affidavit in support of a search warrant must be based on more than mere suspicion or personal belief that evidence of a crime will be found on the premises searched," and should be evaluated in a commonsense manner. Neth, 165 Wn.2d at 182-83. "[G]eneralizations do not alone establish probable cause." State v. Thein, 138 Wn.2d 133, 148-49, 977 P.2d 582 (1999). However, "[p]robable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." Id. at 140. And, "[t]he fact that there are some generalizations in the inferential chain does not defeat the reasonableness of the inference." State v. Denham, 197 Wn.2d 759, 768-69, 489 P.3d 1138 (2021).

The exclusionary rule provides for the suppression of evidence obtained from an unconstitutional search. State v. Mayfield, 192 Wn.2d 871, 874, 888, 434 P.3d 58 (2019). Under the independent source doctrine, evidence obtained through an unconstitutional search may nonetheless be admissible if it is "ultimately obtained . . . pursuant to a valid warrant or other lawful means independent of the unlawful action." State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). "To determine whether challenged evidence truly has an independent source, courts ask whether illegally obtained information affected (1) the magistrate's decision to issue the warrant or (2) the decision of the state agents

to seek the warrant." State v. Betancourth, 190 Wn.2d 357, 365, 413 P.3d 566 (2018).

A

The magistrate's decision authorizing the 2020 warrant was based on a combination of information authorities learned before they sought the 2010 warrant for Phillip's cell phone records and information they learned later, including from additional witness interviews and from the warrants we upheld in Phillip I. Although police knew more information than they relied on when they sought the 2010 warrant on May 27, 2010, after making that application Auburn police interviewed Phillip twice on May 28, 2010, and June 2, 2010, learning of the cut on his hand. They also interviewed Phillip's co-workers on June 9, 2010, learning of his potentially misleading statements about the cause of his hand injury and his regular use of zip ties like those found at the murder scene. In subsequent months they learned of Phillip's probable DNA match based on one of the warrants we upheld.

Phillip first argues any evidence discovered after the illegal search is tainted and should not be considered, including information gained pursuant to the three warrants this court found valid in Phillip I. We disagree. Phillip relies on State v. Miles, in which police obtained inculpatory bank records through an administrative subpoena, which was held to be a violation of article I, § 7, and later sought a warrant for the same information. 159 Wn. App. 282, 284, 244 P.3d 1030 (2011). In noting that there was "no dispute" that the first prong of the independent source doctrine was satisfied, the court observed that in seeking the warrant the

authorities relied "solely" on information that had been known before the invalidated administrative subpoena issued. Id. at 296. As the State points out, however, Miles did not hold that the independent source doctrine requires that the government must rely "solely" on information known before an illegal search. There is no dispute the State may rely on information it knew, but did not rely on, at the time it sought the original 2010 warrant for Phillip's cell phone records. But neither Miles nor other authority cited by Phillip holds that the State may not rely on information, if it is independent, learned after reviewing the illegally seized cell phone records.

Phillip next asks us to revisit the validity of the three warrants the court upheld in Phillip I. We decline to do so. The law of the case doctrine provides that an appellate court decision is binding in subsequent stages of the same litigation. State v. Schwab, 163 Wn.2d 664, 671-72, 185 P.3d 1151 (2008). Under RAP 2.5 (c)(2), the law of the case doctrine is discretionary:

> The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

"[T]he appellate court may reconsider a prior decision in the same case where that decision is 'clearly erroneous, . . . the erroneous decision would work a manifest injustice to one party,' and no corresponding injustice would result to the other party if the erroneous holding were set aside." Id. (alteration in original) (quoting Roberson v. Perez, 156 Wn.2d 33, 42, 123 P.2d 844 (2005)). Phillip does not

demonstrate any changes of law or circumstance have occurred since Phillip I that would cause a manifest injustice if we adhere to our 2016 decision.

Phillip asks the court to reassess the three warrants we upheld "based on the information that is now available." Phillip argues that trial testimony (which predated our 2016 opinion) "sheds further light on the facts such as the supposed cut on Mr. Phillip's hand or the nature of the zip ties." This testimony concerns only Phillip's dispute with Auburn police over the nature and significance of his injury and the alleged commonplace nature of the zip ties. This argument does not implicate the independence of the police learning about Phillip's hand injury and access to similar zip ties, which they learned before they received Phillip's cell phone records. Phillip further argues that Mayfield has been decided since Phillip I, in which the court concluded Washington's constitution did not permit recognizing an attenuation doctrine as broad as the federal courts have recognized. Mayfield, 192 Wn.2d at 874-75. Also new since Phillip I is Betancourth, in which the court held, in the particular circumstances of that case, authorities could rely on evidence originally seized pursuant to an invalid district court warrant by reseizing the evidence based on a new superior court warrant. 190 Wn.2d at 370. In Betancourth, the court was careful to observe that it was not endorsing and had not endorsed a "good faith or reasonableness" exception to the warrant requirement. Id. at 367. But neither Mayfield nor Betancourth narrowed the independent source doctrine in a manner calling for us to revisit our decision in Phillip I. We therefore apply the law of the case doctrine and decline to revisit

our decision upholding the warrants for Philip's apartment, vehicle, person, DNA, and phone device.

Phillip argues for the first time on appeal that the information stemming from the interview with Sanguino in the 2020 warrant is tainted derivative evidence. The record we have asserts that authorities learned of Sanguino's identity from Fowler, and it inferentially supports the conclusion that authorities learned of Fowler by discovering his phone number among Phillip's illegally seized cell phone records. We will assume without deciding that the authorities' knowledge of Sanguino and in turn their knowledge that Phillip borrowed her car was derivative of the suppressed cell phone records. We therefore excise the information relating to Sanguino and evaluate whether the balance of the 2020 affidavit supports probable cause to seize Phillip's cell phone records. See State v. Eserjose, 171 Wn.2d 907, 928, 259 P.3d 172 (2011) ("[E]vidence obtained pursuant to a warrant is admissible, even though the warrant recites information tainted by an unconstitutional search, provided the warrant contains enough untainted information to establish probable cause.") (citing Gaines, 154 Wn.2d at 719).

When Sanguino's statements are removed, the affidavit establishes (1) Frankel's assailant was not motivated by robbery, (2) Phillip had expressed love for Johnson, viewed Frankel with disdain, and saw him as a romantic obstacle, (3) Phillip was expressing these feelings around the time of the murder, (4) Johnson believed Phillip might have wanted to hurt Frankel, (5) zip ties found with Frankel's body were identical to those Phillip used at work, (6) Phillip lied about a laceration on his hand and tried to conceal it from detectives, (7) there was a "high degree of

probability" Phillip's DNA was present on a bloody towel found at the scene, (8) Phillip owned and used a cellular phone, (9) cellular phones track and record location data, and (10) when Phillip, who lived in Portland, was asked if he had traveled to Auburn, he asked for counsel. This information, taken together, establishes probable cause that Phillip was involved in Frankel's murder, and that evidence of his involvement was likely to be found in his cell phone records. We therefore conclude that the illegally seized cell phone records did not affect the magistrate's decision to authorize the 2020 warrant.

B

We next consider whether the illegally seized evidence affected the decision of the state agents to seek the warrant. In Phillip I, when applying the independent source doctrine to the three warrants ultimately found to be valid, we found Phillip was "a person of interest under active investigation" before June 20, 2010, when police received the cell phone records from Phillip's wireless provider. No. 72120-8-I, slip op. at 16. We stated, "based on the information gathered in their investigation prior to June 20, the police had probable cause to believe Phillip was involved in the crime and would have sought additional warrants even without knowledge of cell phone records." Id. While this is not the law of the case, as the 2020 warrant was not before this court at that time, the fact that independent motivation to investigate Phillip was found to exist before June 20, 2010 is both true and persuasive.

Phillip argues the request for the 2020 warrant is "intertwined with the original illegality and does not rest on genuinely independent investigation." Phillip contrasts Miles, in which it was undisputed "the State did not rely on any evidence obtained from the administrative subpoena previously issued by the Securities Division in obtaining the search warrant." 159 Wn. App. at 289. Miles rejected a standard a lower court had apparently applied for evaluating the motivation prong of the independent source doctrine in which the lower court analyzed whether "the State would have come upon the evidence other than from referral by the Securities Division after its flawed investigation." Id. at 289-90. The court described the motivation prong as requiring a factual determination of "whether the State's decision to seek the warrant was prompted by the illegal search or *whether the State would have sought a warrant if the Securities Division was not authorized to do so*." Id. at 297 (emphasis added). Similarly, here, the question is not whether the State was motivated to seek the 2020 warrant because the earlier warrants were invalidated, but whether the State would have sought a warrant for Phillip's cell phone records if it had not seen the tainted evidence. Similarly, Betancourth makes the inquiry depend on whether the officers' motivation to seek the subsequent warrant is tainted by what they gleaned from the initial illegal search. 190 Wn.2d at 365.

Phillip became a person of interest early in the investigation based on Johnson's disclosures that she and Phillip had been romantically involved, Phillip had been disparaging of Frankel, Phillip had been "extremely upset" that Johnson chose Frankel over him, and Phillip was the only person Johnson could think of

who might want to harm Frankel. While Phillip correctly asserts that courts cannot automatically give dispositive effect to law enforcement's assertion of their own preexisting motivation, the State points out it does not follow that police have not demonstrated an independent motivation here. Police can point to an "historically verifiable fact demonstrating that the subsequent search pursuant to a warrant was wholly unaffected by the prior illegal search—e.g., that they had already sought the warrant" before obtaining the records. United States v. Murray, 487 U.S. 533, 540 n.2, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988). Police were motivated to establish the location of Phillip's phone before they saw the contents of his cell phone data. Their motivation has not changed since before they sought the initial warrant. Case law cited by Phillip does not foreclose the possibility that compelling independent developments coming after an illegal search can provide a motivation independent of that supporting an earlier effort. Phillip cites, for instance, State v. Holland, 176 N.J. 344, 363, 823 A.2d 38 (2003), which held that "when the same officer participates in an improper search and in an arguably lawful one occurring only a short time later," establishing an independent motivation for the second search "will be most difficult." The facts of Holland do not fully accord with the facts in this case, but the probable DNA match resulting from a later, valid warrant provides additional support, independent of the cell phone records, for the police's preexisting motivation to discover Phillip's whereabouts during the night of the murder. We affirm the trial court's conclusion that the illegal seizure did not affect the authorities' decision to seek the 2020 warrant.

III

Phillip argues the 2020 warrant lacks a nexus to the crime and is overbroad. A warrant is overbroad if it "describes, particularly or otherwise, items for which probable cause does not exist." State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003), aff'd, 152 Wn.2d 499, 98 P.3d 1199 (2004).

Phillip argues the warrant for his cell phone records lacked a nexus to the crime and "rested on generalities about phone usage," in part because "the police had no reason to believe he used the phone to commit the murder." The probable cause standard requires only that evidence relating to the murder is likely to be found in the cell phone records. Because Phillip was texting Johnson around the time of the murder and had used his phone to discuss the victim, it was reasonable to infer that he had the phone on his person at that time and that cell phone records including CSLI would show if his phone, and by inference Phillip, was near the scene of the crime at the time of the murder. This is a reasonable, "commonsense"-informed inference, not a broad generalization. Thein, 138 Wn.2d at 148-49.

Phillip argues the warrant was overbroad because there was not probable cause to seize the span of records from April 1, 2010 to May 26, 2010. The trial court concluded, "In the context of a homicide investigation, it is reasonable for investigating officers to request records such as these over a span of time in order to prove the identity of the person using the phone, to establish patterns of usage, and to give context to usage. The span of the records obtained covered less than 8 weeks [and] was not overbroad."

In Denham, where the underlying crimes were second degree burglary and first degree trafficking in stolen property, a warrant authorized seizure of five months of phone records. 197 Wn.2d at 764-65. Although the breadth of the warrant was not challenged on appeal, the State acknowledged "correctly, that this was overbroad both in time and scope." Id. Denham does not imply that the eight weeks span of time authorized here was overly invasive. And if anything, the State heeded Denham in seeking only the time frame leading up to the date of the murder and immediately after. We do not find a basis to disturb the time frame covered by the warrant.

IV

Phillip argues the 2020 warrant is invalid because the affidavit contains material misrepresentations and omissions. Misstatements or omissions in affidavits for search warrants affect the warrant's validity if they are (1) material, and (2) made knowingly or intentionally or with reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). An allegation of mere negligence or innocent mistake is insufficient to impugn the warrant. State v. Garrison, 118 Wn.2d 870, 872 827 P.2d 1388 (1992). If material omissions or misstatements are shown, the court deletes or inserts evidence as appropriate and then re-evaluates the affidavit. Id. at 873. Only if probable cause becomes deficient is the defendant entitled to an evidentiary hearing. Id.

Phillip argues the warrant omitted information from the Portland detective who first interviewed Phillip on May 25, 2010. Phillip refers to the detective's trial testimony that Phillip "had no apparent injuries, scratches, or bleeding on May 25[,

2010].” Throughout his testimony, the detective never stated that Phillip did not have an injury to his right hand. The detective stated only that he did not notice one. The detective was not asked to look for wounds or injuries. In contrast, Auburn officers who interviewed Phillip on May 28, 2010 and on June 2, 2010 stated they noticed an injury. Phillip does not show an omission of fact that was made deliberately or with reckless disregard in the warrant application’s omitting the Portland detective’s equivocal testimony about not noticing an injury.

Phillip argues the warrant materially misrepresents Phillip’s description of his contact with Johnson. The affidavit states that during the May 25 interaction with the Portland detective, Phillip claimed Johnson “was ‘just a friend.’ He told [the Detective] that he had not seen Johnson in weeks” but, the affidavit continues, this was misleading because “Phillip failed to mention that he had been in very recent contact with Johnson via text messaging.” This appears in the trial court’s order. Meanwhile, the Portland detective testified at trial that Phillip volunteered that he had recently communicated with Johnson via text message. The State concedes this is a mistake. However, even if this finding is removed from the trial court’s order, it would not eliminate probable cause, and is therefore not material. Phillip also does not show that this error was made deliberately or with reckless disregard for the truth. Accordingly, the 2020 warrant is not invalid because of a misrepresentation in the supporting affidavit.

V

Phillip argues the cell phone records should be suppressed because the State would not have access to them but for the initial unlawful search. This

argument is without merit. There is no requirement that police reseize the cell phone records from Phillip's wireless carrier. In Miles, this court stated, " '[R]eseizure of tangible evidence already seized is no more impossible than rediscovery of intangible evidence already discovered. The independent source doctrine does not rest upon such metaphysical analysis, but 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 have otherwise occupied.' " 159 Wn. App. at 294-95 (quoting Murray, 486 U.S. at 541-42). While Phillip argues that his carrier would not normally have kept this information for 10 years, the State persuasively rebuts Phillip's argument. A records custodian for the carrier testified at trial that once police request records, the carrier takes steps to retain those records outside the normal retention policy. In addition, the flawed 2010 and 2012 warrants did not direct the carrier to preserve Phillip's records. The carrier chose to retain the data on its own.

VI

In a statement of additional grounds, Phillip argues his attorney-client privilege was violated when, during a valid search of his cell phone's contents, police discovered messages Phillip exchanged with a law firm inquiring about representation and delivered them to the prosecutor's office. We addressed this issue in Phillip I. At a hearing on Phillip's motion to dismiss before his first trial, the trial court ruled the State had rebutted the presumption of prejudice and the court could not find any injury to Phillip's rights to due process, counsel, and a fair trial. Phillip I, No 72120-8-I, slip op. at 6. We held, "The trial court's decision is based

on the correct legal standard and is not manifestly unreasonable. There was no abuse of discretion." Id. at 8. Phillip fails to justify our revisiting this issue.

We affirm and remand for proceedings not inconsistent with this opinion.

Birk, J.

WE CONCUR:

Bowman, J. Hazelrigg, ACJ

APPENDIX B

FILED
6/27/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. WILLIAM PHILLIP, JR, Petitioner.	No. 82748-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The petitioner, William Phillip, Jr., filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 102214-0**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Gavriel Jacobs, DPA
[gavriel.jacobs@kingcounty.gov]
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: July 28, 2023
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

July 28, 2023 - 4:19 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,214-0
Appellate Court Case Title:	State of Washington v. William Phillip Jr.

The following documents have been uploaded:

- 1022140_Other_20230728161830SC688634_8703.pdf
  This File Contains:
  Other - PETITION FOR REVIEW
  The Original File Name was washapp.072823-06.pdf

A copy of the uploaded files will be sent to:

- Jim.Whisman@kingcounty.gov
- brandon.rain@seattle.gov
- gavriel.jacobs@kingcounty.gov
- jay.beck@seattle.gov
- patrick.hinds@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Nancy P Collins - Email: nancy@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20230728161830SC688634