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Supreme Court No. 97616-3
(COA No. 77175-2-I)
Corrected copy

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

WILLIAM PHILLIP, JR.,

Respondent.

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

Corrected ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. INTRODUCTION

In 2016, the Court of Appeals ruled the State illegally obtained data from William Phillip Jr.'s cell phone records and ordered the exclusion of this invalidly obtained information as a remedy. The prosecution returned to the trial court and sought a subpoena for the very same private data the Court of Appeals had suppressed.

Although the trial court agreed to issue this subpoena, it certified its decision to do so to the Court of Appeals and the Court of Appeals granted discretionary review. The Court of Appeals ruled the prosecution mispresented factual information to the trial court and misrepresented the constitutional privacy protections accorded a person's cell phone location data. It also ruled the subpoena did not satisfy the threshold requirements necessary to invade a person's private affairs and did not establish valid legal authority for the court to authorize a search of Mr. Phillip's cell phone data.

The Court of Appeals resolved these issues based on settled law. The petition for review fundamentally exaggerates the ruling below in an effort to press this Court to grant review. This overblown depiction of the decision should be ignored and the petition for review denied.

B. IDENTITY OF RESPONDENT AND DECISION BELOW

Mr. Phillip asks this Court to deny the State's petition for review of the Court of Appeals decision issued August 5, 2019, for which neither party sought reconsideration. If this Court grants review, Mr. Phillip also asks this Court to review related issues identified below. RAP 13.4(d).

C. ISSUES PRESENTED FOR REVIEW

1. It is well-settled that the prosecution may only invade a person's private affairs based on a valid warrant or narrowly drawn exception to the warrant requirement. After the Court of Appeals ruled the State used an invalid warrant to seize private cell phone data, the prosecution asked the trial court to issue a subpoena for the same information. The Court of Appeals ruled this subpoena did not contain the mandatory protections of a warrant that are necessary to constitute the authority to law to invade a person's private affairs. Should this Court deny review when the Court of Appeals decision is soundly supported by established case law and constitutional rules?

2. A consequence of an illegal seizure of private information is that this information must be suppressed and no further seizure is permitted unless the prosecution proves a subsequent search is wholly independent of the original search and the court was not motivated by the

illegally obtained information to grant this later search. The petition for review complains that the Court of Appeals placed requirements on its subpoena request mandated as part of a search warrant and to ensure compliance with the independent source doctrine. Did the Court of Appeals accurately rule that the prosecution's request for constitutionally protected personal information that has been previously suppressed must meet the essential requirements of a warrant as well as the dictates of the independent source doctrine?

3. The Court of Appeals reversed the trial court's subpoena without reaching the merits of the independent source doctrine's application to the case at bar. The trial court's subpoena order is contrary to the protections of article I, section 7 and conflicts with this Court's decision in *State v. Mayfield*, 192 Wn.2d 871, 883, 434 P.3d 58 (2019) and the Court of Appeals decision in *State v. Miles*, 159 Wn. App. 282, 291, 244 P.3d 1030, *rev. denied*, 171 Wn.2d 1022 (2011). If this Court grants review, should it also review the intertwined issue of the application of the independent source doctrine to the subpoena obtained, when review cannot be adequately conducted without also addressing the application of this doctrine to the case at bar?

D. STATEMENT OF THE CASE

In May 22, 2010, Auburn police found Seth Frankel in his apartment, having died of several stab wounds. 3/11/14RP 152-53.

William Phillip Jr. was accused of causing Mr. Frankel's death, but his first trial ended in a hung jury. CP 127 n.7. His second trial resulted in a conviction that was reversed by the Court of Appeals because the prosecution's case rested cell phone records that were illegally seized by a search warrant that lacked probable cause. CP 127, 132. The trial court had also invalidated an initial search warrant for this same information due to the lack of probable cause. CP 117. This Court denied review. CP 1.

Before starting a third trial, the prosecution sought a subpoena for the very same cell phone records that the Court of Appeals ruled were illegally seized and must be suppressed. CP 29. It filed a memorandum that repeatedly insisted Mr. Phillip had no legitimate privacy interest in the records it sought. CP 45-46. It also insisted it did not need probable cause to obtain this information. CP 47, 49.

The State's subpoena request prominently recounted the substance of the illegally seized cell phone records. CP 34-36. It also attached copies of other search warrant applications that included pages of information taken directly from the illegally seized cell phone records. CP 58, 81-83,

103. It listed other search warrants that had been granted but did not mention the warrant a judge denied, finding the application lacked probable cause. It contended the prior trial court judge entered a ruling that the Court of Appeals deemed to be "law of the case," when the Court of Appeals had not reached that decision. CP 48-49, 132; Slip op. at 8 n.7.

The trial court granted the subpoena request without testimony. CP 142-44. It explained its ruling rested on the "full panoply of facts *now known*." CP 142 (emphasis in original). The trial court summarily ruled "there is probable cause" that Mr. Phillip "was involved with Frankel's murder and that evidence of the crime is likely to be found in the records requested." CP 142. It did not explain what it relied on for these findings. The trial court certified its decision to the Court of Appeals for discretionary review, noting there was a "substantial ground for a difference of opinion" and the evidence at issue was key to the case. CP 147-48. The trial court stayed the proceedings pending appeal. CP 149.

Pertinent facts are further discussed in Appellant's Opening Brief, pages 4-9, and are detailed in the argument sections of the Opening and Reply Briefs.

E. ARGUMENT.

1. The Court of Appeals appropriately reviewed the prosecution's unprecedented efforts to escape the ramifications of multiple illegal searches. The decision below does not meet the criteria for review.

a. The prosecution concocted of a novel method for obtaining previously suppressed private information that the Court of Appeals appropriately rejected.

After the Court of Appeals remanded the case to the trial court in 2016 following two failed warrants for cell phone records, the prosecution requested the court issue a subpoena that would authorize the State to seize the same records that the Court of Appeals had ruled were illegally obtained and ordered suppressed under the exclusionary rule of article I, section 7. CP 132, 137.

The exclusionary rule is a "constitutionally mandated" dictate requiring suppression of illegally obtained evidence. *State v. Winterstein*, 167 Wn.2d 620, 632, 635, 220 P.3d 1226 (2009); *see also Mayfield*, 192 Wn.2d at 883 (explaining state has "independent exclusionary rule that broadly protects the right to individual privacy").

In order for the State to re-seize illegally obtained and suppressed private materials, it was imperative for the prosecution to prove that its new intrusion into Mr. Phillip's private affairs was wholly and "genuinely" independent of the prior illegality. *Mayfield*, 192 Wn.2d at 883.

The prosecution called its request for Mr. Phillip's suppressed cell phone records a "subpoena" rather than a search warrant. CP 29. It told the court Mr. Phillip "does not have a privacy interest" in the cell phone records it sought. CP 45. It argued it did not need judicial authorization or probable cause to obtain these records. CP 45-47. It claimed it had "probable cause" for obtaining these records even though it did not need it. CP 45, 47, 49. It did not present an affidavit or sworn testimony to the judge as would occur under the requirements of a search warrant. It supplied the judge with a host of previously issued search warrants that cited to and relied on the illegally obtained cell phone data. CP 29-111.

The Court of Appeals took issue with several aspects of the prosecution's behavior in the trial court. The prosecutor mispresented the earlier Court of Appeals opinion to the trial judge, a judge who had not previously been involved in the case and had no familiarity with the prior proceedings. Slip op. at 8. The prosecution wrote a memorandum in support of the opinion that quoted at length the illegally seized records. Slip. op. at 16. The prosecution argued that cell phone records are subject to a lesser degree of privacy protections than other private affairs. Slip op. at 8. The prosecution's subpoena attached a litany of improperly obtained

information but no sworn statement explaining the basis of the warrant. Slip op. at 14-16.

b. The subpoena sought by the prosecution did not comply with this Court's required protections necessary to allow the State authority to invade a person's private affairs.

The petition for review is simply incorrect in claiming the Court of Appeals opinion is contrary to other decisions that permit the State to use subpoenas to invade a person's private affairs. If a subpoena, rather than a warrant, is the authority of law to search a person's private affairs, it must meet the legal requirements for a search akin to a warrant. Slip op. at 15, citing *State v. Garcia-Salgado*, 170 Wn.2d 176, 183, 240 P.3d 153 (2010).

The Court of Appeals did not rule that subpoenas may never be used as a mechanism to obtain authority to invade a person's private affairs. Instead, it said that under *Garcia-Salgado*, any court order used in place of a warrant to obtain constitutionally protected materials must "meet[ ] constitutional requirements." Slip op. at 15, *quoting Garcia-Salgado*, 170 Wn.2d at 186.

As the Court of Appeals explained, in *Garcia-Salgado* this Court held that if a court order is used to seize constitutionally protected private information, the order:

> must be entered by a neutral and detached magistrate, must describe the place to be searched and items to be seized; and must

> be supported by probable cause based on oath or affirmation, and there must be a clear indication that the desired evidence will be found, the method of intrusion must be reasonable, and the intrusion must be performed in a reasonable manner.

Slip op. at 15-16, *quoting Garcia-Salgado*, 170 Wn.2d at 186.

Here, the prosecution did not meet the requirements set forth in *Garcia-Salgado*. The Court of Appeals found this error fatal. The petition for review does not explain that it actually met these requirements, but rather complains about any requirements being imposed on its subpoena request.

In *Garcia-Salgado*, a prosecutor asked a judge for a court order that the defendant submit to a DNA test during a pending prosecution. 170 Wn.2d at 181. The prosecutor based its request on inaccurate information that was not under oath. Id. at 170 n.3, 188. This Court ruled that when using a court order to obtain a person's constitutionally protected private information, that order must meet all essential requirements of a search warrant, including being based on a sworn affidavit that contains the basis for the search and the limitations of the search. *Id*. at 188-89.

Similarly, in *State v. Miles*, 160 Wn.2d 236, 247, 156 P.3d 864 (2007), this Court rejected an administrative subpoena used to obtain bank records. A "[w]arrant application" limits governmental invasion into private affairs because it "ensures" a court has limited the "scope of the

invasion" to that which is "authorized by the authority of law." *Id*. And while a special inquiry judge's subpoena to seize bank records on less than probable cause was allowed in *State v. Reeder*, 184 Wn.2d 805, 818, 365 P.3d 1243 (2015), this limited subpoena authority applied only where no charges had been filed. *Id*. at 818-19, 822-23 (noting limits and protections of special inquiry judge subpoena proceedings). *Reeder* does not direct courts to issue subpoenas as opposed to warrants as a matter of general practice in pending criminal cases. *Id*. at 824.

Here, the prosecution cited CrR 4.8 and RCW 10.96 as authority of law to issue a subpoena. CP 29, 41-42; CP 140 (court's order). However, CrR 4.8(b)(5) says any subpoena request is subject to "privacy protections" under "other applicable law." RCW 10.96 authorizes a court to grant an application for "criminal process" involving records, but defines "criminal process" as "a search warrant or legal process" issued under statutory authority. RCW 10.96.010(3) (defining criminal process); RCW 10.96.060 (giving court authority to issue criminal process).

In the context of searching a cell phone and its data, it is undisputable that the warrant requirement applies under the Fourth Amendment and article I, section 7. *Riley v. California*, 573 U.S. 373, 401, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014); *Carpenter v. United States*,

585 U.S. _, 138 S. Ct. 2206, 2221, 201 L. Ed. 2d 507 (2018); *State v. Hinton*, 179 Wn.2d 862, 871-72, 874, 319 P.3d 9 (2014); *see also State v. Keodara*, 191 Wn. App. 305, 317, 364 P.3d 777 (2015) (holding warrant authorizing search of call phone was overbroad and violated particularity requirement because it permitted search for items for which there was no probable cause).

In *Carpenter,* the Supreme Court ruled that cell phone data reveals intimate detail of a person's movements over lengthy periods of time, as well as collecting detailed history of calls or texts made or received. 138 S. Ct. at 2217-18. The government may not search the extensive, private information from a person's cell phone usage without a properly issued judicial warrant resting on probable cause. *Id.* at 2221.

Carpenter undermines the prosecution's insistence that any subpoena, even without judicial permission or probable cause was needed, even though it also claimed it had probable cause. CP 45. The Court of Appeals properly faulted this approach.

The prosecution did not offer sworn testimony, in support of its subpoena, even though it is well-established that "the deputy prosecutor's assertions cannot support the court's determination of probable cause." *Garcia-Salgado*, 170 Wn.2d at 188. A sworn declaration is critical

because the reviewing court considers "only the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested." *Id*. at 187, quoting *State v. Murray*, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988); *see also Kalina v. Fletcher*, 522 U.S. 118, 131, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) ("the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause.").

The requirements of a warrant enable the reviewing court to determine whether the State made material misrepresentations under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). The warrant application further enforces the requirements of particularity and non-speculative assertions that are necessary for a valid warrant. *State v. Thein*, 138 Wn.2d 133, 145-46, 977 P.2d 582 (1999); see, e.g., *Keodara*,191 Wn. App. at 317 (invalidating warrant for cell phone search as overbroad and insufficiently connected to specific evidence for which there was probable cause).

The subpoena process used in this case does not provide the protections of a warrant are required by article I, section 7. The Court of Appeals correctly rejected this subpoena because it failed to comply with the essential requirements of a warrant or valid exception to the warrant

requirement, and therefore did not provide the authority of law necessary to invade Mr. Philip's private affairs. The Court of Appeals applied settled precedent to rule that the authority of law to invade a person's private affairs must come from a judicially authorized order that meets the essential requirements of a warrant.

c. The prosecution's assertion that the Court of Appeals erred by quoting the United States Supreme Court decision in Carpenter is not a basis for granting review.

The prosecution does not assert the Court of Appeals decision conflicts with *Carpenter*. But the petition for review complains that by quoting *Carpenter*, the Court of Appeals opinion "will sow confusion." Pet. for Rev. at 12. This illogical argument is not a basis for review.

In *Carpenter,* the Supreme Court held that requesting months of cell phone site data requires a warrant under the Fourth Amendment. 138 S. Ct. at 2214, 2221. Article I, section 7 is at least as protective as the Fourth Amendment. Should the State seek cell phone data without a warrant in the future, it will need to either get a warrant or prove that an exception to the warrant requirement applies. The Court of Appeals decision in this case enforces settled law.

In the trial court in this case, the prosecution's request for a subpoena repeatedly asserted that Mr. Phillip "does not have a privacy

interest" in his cell phone records, including location data or calls made and received. CP 45; CP 46 ("Phillip does not have a legitimate expectation of privacy" in any cell site location data his phone generated); CP 47 ("Phillip did not have a legitimate expectation of privacy in any of the information contained in AT&T's cell phone usage records" and they are not "private affairs" under article I, section 7).

The trial court's order granting the subpoena echoed the State's argument, and observed that Mr. Phillip could be viewed to have a lower expectation of privacy in information generated by his cell phone than other private affairs such as his apartment. CP 144.

Carpenter undermines the arguments the prosecution made in support of its subpoena. Even the State acknowledged it would have to "abandon" this argument after *Carpenter*. Brief of Respondent, p. 35 n. 7. The Court of Appeals accurately quoted *Carpenter*'s holding when explaining errors made in the trial court.

The prosecution stretches the Court of Appeals opinion out of context in an effort to obtain this Court's review. The Court of Appeals did not say no person may ever obtain records by virtue of a subpoena. It ruled, as this Court ruled in *Garcia-Salgado*, court orders issued in any

criminal case must comply with the privacy protections the law requires. Slip op. at 15-16; *Garcia-Salgado*, 170 Wn.2d at 188-89; CrR 4.8(b)(5).

d. The factual basis for the order authorizing a search of a person's private affairs must rest on legitimately obtained information, as the Court of Appeals recognized.

The petition for review complains that the Court of Appeals added requirements to the specific information that a search warrant must contain. Petition at 15-16. This argument is not only contrary to settled law, but it rests on a fundamental misrepresentation of the circumstances in the case at bar.

Any warrant must be supported by probable cause and set out the scope of the authorized search with particularity. *Kentucky v. King*, 563 U.S. 452, 459, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011); *State v. Besola*, 184 Wn.2d 605, 610, 614-15, 359 P.3d 799 (2015). This constitutional rule limits the authority to search to the specific areas and things for which there is probable cause to search, and ensures a search will be carefully tailored to its justifications. *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987).

The petition for review contends it was "obvious" that a person's cell phone data records could connect that person to a crime, so any time there is probable cause to suspect a person of the crime, there is probable

cause to search any data generated by a cell phone. Petition at 15. This argument is flawed because there is no finding of probable cause entitling the State to rummage through two months of Mr. Phillip's cell phone data. The trial court has not found probable cause based on untainted evidence, and this finding is mandatory under the independent source doctrine.

The prosecution is not permitted to search months of a person's cell phone data any time they suspect the person committed a crime. *Carpenter*, 138 S. Ct. at 2217-18; CP 29 (prosecution requesting two months of cell phone data). The prosecution cites no authority for this proposition. Petition at 15-16. *Carpenter* expressly held that the Fourth Amendment forbids this rummaging without complying with the warrant requirement. *Carpenter*, 138 S. Ct. at 2221.

The prosecution's failure to cite any authority in support of its sweeping claims that the Court of Appeals erred by requiring a particularized showing of the basis for searching a month of a person's cell phone data, or requiring a court's subpoena explain the factual basis and legal limits of its ruling, is telling. It demonstrates there is no legal conflict and shows this claim does not meet the criteria for review. RAP 13.4(b).

e. The petition for review denigrates the Court of Appeals decision on false premises.

The Court of Appeals was not deciding this case in a vacuum, but the petition for review presents the legal issues in this case without the necessary context as where two search warrants have been ruled invalid. CP 117, 132.

The State is barred from using any illegally obtained information as the basis for authorizing an intrusion into a person's private affairs. This Court's recent decision in *Mayfield* underscores the narrow grounds under which the State may use illegally seized evidence to justify a further intrusion into a person's private affairs. 192 Wn.2d at 898-99.

To guard against violating the exclusionary rule, the prosecution bears the heavy burden of proving its request for illegally obtained private information was genuinely independent of the prior illegality. *Id*. at 898. Our state's attenuation doctrine mandates an "unforeseeable intervening act [that] genuinely severs the causal connection between the official misconduct and the discovery of the evidence." *Id*.

To satisfy the independent source doctrine, the prosecution must also establish that "information obtained" from the illegal search was not "presented to the magistrate and affected his decision to seek the warrant." *Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 101 L. Ed.

2d 472 (1988). For example, in *Murray*, the police did not use their illegal observations to convince the judge to order a warrant. *Id*. at 535-36 ("In applying for the warrant, the agents did not mention the prior entry, and did not rely on any observations made during that entry."). The independent source doctrine requires the State to prove "whether the actual illegal search had any effect in producing the warrant." *Id*. at 542 n.3

The reason the Court of Appeals explained the record needed to make clear the basis for ordering a search of Mr. Phillip's cell phone data is because the court could not order this search without making clear the genuinely independent basis for this search. The Court of Appeals decision does not place any burden on the prosecution that is does not have under existing law as defined by this Court.

2. The prosecution's efforts to obtain a subpoena to access the identical information it unlawfully seized undermines the exclusionary rule mandated by article I, section 7 and is patently contrary to this Court's precedent.

The Court of Appeals reversed the order for a subpoena without addressing whether the prosecution met its heavy burden under the narrow and carefully drawn independent source doctrine. Slip op. at 10; *see* Opening Brief at 14-33. The application of the independent source doctrine is inextricably intertwined with authority for the State to seize Mr.

Phillip's private cell phone information following the suppression of this information due to an illegal seizure.

If this Court grants review, it should also consider whether the independent source doctrine and article I, section 7 permit the prosecution to return to the trial court, use the "full panoply" of all information gathered following an illegal seizure of records, and obtain an order for the same information that was illegally seized. Under the independent source doctrine, an illegal search must "in no way contribute" to a later search. *State v. Betancourth*, 190 Wn.2d 357, 365, 413 P.3d 566 (2018). The trial court's order granting a subpoena rested on analysis that is contrary to this Court's decision in *Mayfield*, 190 Wn.2d at 889, and the Court of Appeals decision in *Miles*, 159 Wn. App. at 288, 296, both of which stressed the necessity of a later search being wholly independent of the prior illegality. The independent source doctrine is a necessary constraint on the court and prosecution that is an essential aspect of the case and should be addressed if review is granted.

E. CONCLUSION

Based on the foregoing, William Phillip, Jr. respectfully requests this Court deny the State's petition for review and, if review is granted, also review of the issues he raises pursuant to RAP 13.4(b).

DATED this 15th day of October 2019.

Respectfully submitted,

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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. 97616-3**, 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:

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