

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
7/26/2023 12:24 PM  
BY ERIN L. LENNON  
CLERK

NO. 102134-8

SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Petitioner,

v.

MALCOLM MCGEE,

Respondent.

---

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

The Honorable Leroy McCullough, Judge

---

ANSWER TO STATE'S PETITION FOR REVIEW

---

JARED B. STEED  
Attorney for Respondent  
NIELSEN KOCH & GRANNIS, PLLC  
The Denny Building  
2200 Sixth Avenue, Suite 1250  
Seattle, Washington 98121  
206-623-2373

**TABLE OF CONTENTS**

	Page
A. <u>INTRODUCTION</u> .....	1
B. <u>IDENTITY OF RESPONDENT AND COURT OF APPEALS DECISION</u> .....	2
C. <u>COUNTERSTATEMENT OF THE ISSUE</u> .....	2
D. <u>COUNTERSTATEMENT OF THE CASE</u> .....	2
1. <i>Trial Evidence</i> .....	2
2. <i>Motion to Suppress</i> .....	17
3. <i>Court of Appeals Decision</i> .....	20.
E. <u>ARGUMENT WHY REVIEW SHOULD BE DENIED</u> .....	21
<b>The Court of Appeals decision is fact specific and consistent with the narrow, Washington-specific attenuation doctrine articulated by <u>State v. Mayfield</u></b> .....	21
1. <i>There is no significant constitutional issue that remains undeveloped under Washington’s attenuation doctrine</i> .....	21
2. <i>There is no issue of substantial public interest</i> .....	26
F. <u>CONCLUSION</u> .....	28

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

State v. Aydelotte  
35 Wn. App. 125, 665 P.2d 443 (1983) ..... 24

State v. Brown  
40 Wn. App. 91, 697 P.2d 583 (1985) ..... 24

State v. Elwell  
199 Wn.2d 256, 505 P.3d 101 (2022) ..... 21, 27

State v. Mayfield  
192 Wn.2d 871, 434 P.3d 58 (2019) ..... 2, 21, 23, 24, 25, 27, 28

State v. Mierz  
72 Wn. App. 783, 866 P.2d 65 (1994) ..... 24

**FEDERAL CASES**

Miranda v. Arizona  
384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) ..... 18

**RULES, STATUTES AND OTHER AUTHORITIES**

RAP 13.4 ..... 2

Const. Art. I, § 7 ..... 21

A. INTRODUCTION

Police unlawfully seized Malcolm McGee, questioned him, searched him, and collected his phone number and other information. In a later murder investigation, the State relied on that unconstitutionally gathered evidence to connect McGee to the crime and obtain multiple warrants for his phone records, cell site location information, and his arrest, all leading to McGee's conviction for second degree murder.

The Court of Appeals correctly recognized the murder was not a superseding act which genuinely severed the causal connection between the unlawful seizure and illegally obtained evidence because the murder was not the cause of any evidence discovered from the prior unlawful seizure. The Court of Appeals opinion involves a straightforward application of Washington's narrow attenuation doctrine to the particular facts of McGee's case. It does not present any conflict with precedent, issue of public interest, or significant constitutional issue warranting review.

B. IDENTITY OF RESPONDENT AND COURT OF APPEALS DECISION

Respondent Malcolm McGee files this answer to the state's petition for review of the Court of Appeals' published decision in State v. McGee, no. 83043-1-I.

C. COUNTERSTATEMENT OF THE ISSUE

Should the petition for review be denied when the Court of Appeals' decision is consistent with Washington's attenuation doctrine, this Court's opinion in State v. Mayfield<sup>1</sup>, and this case does not meet any of the criteria for review under RAP 13.4(b)?

D. COUNTERSTATEMENT OF THE CASE

1. *Trial Evidence.*

On June 3, 2017, plain clothed narcotics detective Alexander Hawley saw someone he later identified as Keith Ayson, pacing on a sidewalk outside a library while looking at his cellphone. 4RP 2308-09. Hawley watched as a silver Chrysler Sebring pulled up and Ayson got inside. 4RP 2309-10, 2313,

---

<sup>1</sup> State v. Mayfield, 192 Wn.2d 871, 434 P.3d 58 (2019).

2335-36. Hawley could not see who was driving. 4RP 2313, 2316. The car drove one block before stopping. 4RP 2313-14, 2328. After two minutes, Ayson got out of the car and put something into his pocket. 4RP 2316-18, 2329.

Hawley followed the car as it drove to the Whisperwood apartments. 4RP 2317-19. Hawley contacted the driver who identified himself as McGee. 4RP 2319-21. McGee provided Hawley with his phone number, ending in 1592, and agreed to serve as a confidential informant and provide drug information to police. 4RP 2320-22, 2336-37, 2340. McGee acknowledged knowing Ayson, but the confidential agreement specified no persons that McGee was to provide information about. 4RP 2320-21, 2388; Trial Ex. 116. Hawley did not hear from McGee again. 4RP 2322-23, 2340.

On July 11, 2017, Ronald Elliott discovered Ayson's badly decomposed body in a ravine near his home. 4RP 1235, 1279-80, 1318, 1430-31, 1442, 1460-61, 1480, 1799, 1960-61. Shell casings were found near Ayson's body and an examination

revealed unhealed injuries to two of his ribs and one vertebra. 4RP 1186-88, 1200, 1258-61, 1265, 1292-94, 1299-1300, 1334-35, 1817-18, 1849-50, 1880, 1883, 1932-33, 1936-41, 2034-37, 2114, 2116, 2124-25. The injuries were roughly in line with defects observed in Ayson's clothing. 4RP 1241-42, 1252, 1801, 2106-10, 2116.

Forensic anthropologist, Kathy Taylor, and forensic pathologist, Brian Mazrim, opined Ayson's injuries were caused by a bullet. 4RP 1279-80, 2114-16, 2127. It was not determined whether the injuries were caused by multiple gunshots, or the same bullet. 4RP 1309, 1312-13, 1317, 1364, 1372, 1375-76, 2122-23, 2125-26. Mazrim opined Ayson's cause of death was multiple gunshot injuries. 4RP 2117-18, 2122-23, 2148-50. Taylor, however, could not say whether the gunshot wounds occurred before or after Ayson was deceased. 4RP 1373.

Neither Mazrim nor Taylor could pinpoint Ayson's specific time of death. 4RP 1290, 1320, 1357-59, 2121, 2130, 2150. Police were likewise uncertain whether Ayson died where his

body was found or if it was moved to the ravine after the fact. 4RP 1192, 1249, 1251, 1870-71, 2039-40.

It was not uncommon for police to receive calls about gunshots in the area. 4RP 1516. Elliott had called 911 several times previously to report criminal and transient activity. 4RP 1469-72, 1481-82. On June 4, 2017, Elliott called 911 after hearing several gunshots. 4RP 1417, 1425-26, 1442, 1446, 1829-30. Elliott did not see who shot the gun and did not see anyone associated with the shots at the time. 4RP 1418, 2040. Earlier, after returning home with friend, Nancy Roberts, both had noticed an unfamiliar parked car and two men walking down the road. 4RP 1412-15, 1430, 1449, 1551, 1556, 1592, 1594, 1607. Elliott believed the men were black, while Roberts described them as Hispanic. 4RP 1413, 1430, 1449, 1557, 1597-98. Elliott and Roberts did not see anyone get out of the car, could not identify any distinguishing facial features, and could not hear anything the men might have said to each other. 4RP 1415-16, 1449-50, 1458, 1467-68, 1554-56, 1563-64, 1595-98.



About one minute after hearing the shots, Elliott saw what he believed was the parked car drive away quickly. 4RP 1420, 1422-23, 1425-27, 1442, 1450-51, 1453, 1455-56, 1472. Roberts also saw a car driving away about 10 minutes later. 4RP 1566-67, 1588, 1599-1602, 1606. Roberts was uncertain it was the same car that had been parked. 4RP 1600-01. Elliott and Roberts did not see anyone get inside the car, could not tell how many people were inside, and gave conflicting descriptions of the make and model. 4RP 1420-22, 1427, 1450-51, 1452-53, 1455-56, 1461, 1472, 1484-86, 1556, 1566-67, 1585-86, 1588, 1594, 1599-1602, 1606-07.

Several officers responded to Elliott's 911 call. 4RP 1491-93, 1497, 1508, 1533-35. Police spent nearly 30 minutes in the area looking for evidence related to the reported shooting, but found nothing. 4RP 1494, 1501-02, 1504, 1517, 1520, 1538-40, 1545, 2028-29. A road crew doing work in the area also observed nothing. 4RP 1213-14.

Police obtained transaction records for an electronics benefit (EBT) card found with Ayson's body. 4RP 1812-14, 2051, 2605-06. The last card transaction occurred around 10:34 a.m. on the morning of June 4, 2017. 4RP 1628-30, 1640. Separate deposits were placed on the card on both June 30 and July 23, 2017, but there were no subsequent withdrawals. 4RP 1629, 1640.

Police were unable to extract data from the cellphone found in Ayson's pocket because it was damaged from human decomposition. 4RP 2273-75. They were able to remove the cellphone SIM card and obtained T-Mobile call records for that telephone number, ending in 4399. 4RP 1815, 2607-08, 2264-68, 2275-77, 2283, 2303. The account associated with that number was prepaid with money having been placed on the account on June 4, 2017. 4RP 2365, 2422. The last outgoing call from that number was made at 3:34 p.m. on June 4, 2017. 4RP 2431.

Police also interrogated Ayson's girlfriend, Desiree Burchette. 4RP 1656-59, 2219, 2500-01. They first spoke with

her on July 11. Although they told her they were investigating Ayson's disappearance, they failed to inform her that his body had, in fact, already been found. 4RP 1948-50, 2009-10, 2016, 2500-01, 2514. Burchette did not know where Ayson was at that time. 4RP 2054. Burchette was able to converse, but was "rattled, disorganized in her thought process, in her ability to communicate with [police]." 4RP 1950, 1965, 2014-15, 2500, 2514. At the time Burchette was homeless and abusing alcohol, heroin, and marijuana. 4RP 1673-74, 1701-02, 1707-09, 1763, 1916, 2245-46.

Police spoke with Burchette a second time on July 19. 4RP 1964, 2009-10, 2016, 2501. Burchette was told that Ayson had been murdered. 4RP 1964. Burchette expressed a belief that two people were involved and that Ayson's body was moved after his death. 4RP 2043, 2054. Burchette told police the last time she saw Ayson was on June 10, 2017. 4RP 2044, 2052-53. She also stated that Ayson had taken her phone on June 5. 4RP 2044. Despite this, police ruled out those dates because Ayson's EBT

card and cellphone activity had ceased on June 4. 4RP 2053. During the interview, police also showed Burchette a single photo of McGee from a jail booking database. 4RP 1965-68, 1986. King County Sheriff detective James Belford had obtained McGee's name through the police database and from conversations with Hawley. 4RP 1966.

Burchette identified McGee as someone she and Ayson had previously interacted with. 4RP 1987, 2504-05, 2514. On June 4, Burchette recalled being given a ride by a man who picked her up not far from the Boulevard Park Library. 4RP 1665, 1671, 1717, 1743, 1746-47, 1768, 1910. The man had long dread locks, was "older," had "real dark skin" and was heavysset. 4RP 1666-67, 1684, 1740-41, 1907, 2017-18. This description did not match the photograph of McGee shown to Burchette by police. 4RP 2018-19. Burchette recognized the man as someone that Ayson had previously conversed with inside the car and obtained drugs from. 4RP 1665-66, 1672-75, 1716-17, 1744,

1763. Burchette admitted to wanting to buy drugs from the man herself. 4RP 2021-22.

Burchette did not know the man's phone number and had never interacted with him before. 4RP 1676-77, 1717. Still, Burchette got into the man's car, which was dark gray with dark tinted windows. 4RP 1671, 1718. Burchette had previously identified the car as four different colors at various times, including as a "white four-door, big, older type car." 4RP 1723, 1726, 1734-37, 2017

The man offered Burchette five dollars for a sexual act, prompting her to get out of the car. 4RP 1673, 1677, 1911-12. Ayson became angry when Burchette told him that the man had propositioned her. 4RP 1678-69. Ayson used Burchette's phone to call the man and tell him they needed to talk. 4RP 1678-81, 1711, 1747, 1765. Burchette watched as Ayson left the library and got into a car that she recognized as the man's. She did not see Ayson again after that. 4RP 1678-81, 1711, 1747, 1765.

Later, Burchette watched someone get arrested near the Boulevard Park Library. 4RP 1896-99. Burchette testified that police showed her two pictures after this, which included a “light-skinned guy” and “Malcolm”. 4RP 1899, 1917. Burchette told the police that she did not recognize either the man, or the car they were arrested in. Burchette was confident the man was “definitely not” the man who had previously propositioned her, however. 4RP 1899-1906, 2010-13.

Police subsequently requested the cellphone records for number 1592. 4RP 2523, 2607-08, 2617. Five text messages and one telephone call were placed between numbers 1592 and 4399 on June 4, 2017. 4RP 2374-75. The context of the text messages was not disclosed, but the cellphone records indicated which cellphone towers were used during calls. 4RP 2359, 2373, 2383-84. According to the records, number 1592 connected to a cellphone tower located two-tenths of a mile away from the ravine shortly after 4:00 p.m. on June 4, 2017. 4RP 2432.

Based on this information, police went to the Whisperwood apartments on August 1, 2017, looking for the silver Chrysler Sebring. 4RP 2498-99, 2505. McGee was arrested that day and forcibly removed by police from the two-door car. 4RP 1860-64, 1890, 1947, 2506-07. Both the car and a cellphone were seized. 4RP 1862-67, 1889, 2280. While being driven to the precinct by police, McGee stated that he had not contacted Hawley again because the person he was going to provide information about had been murdered. 4RP 2508.

McGee was interrogated by police that same day. 4RP 2509, 2523, 2562; Trial Exhibit 146. Police had been given the T-Mobile cellphone records before the interview. 4RP 2523, 2526-27. Although untrue, police told McGee they had determined from the call records that numbers 1592 and 4399 were together on June 4, 2017. In fact, “it [was] impossible to tell if two phones were in the exact, same location based on the records[.]” 4RP 2550-51.

A search of the cellphone seized from McGee during his arrest contained pictures of himself and a silver 2005 Chrysler Sebring. 4RP 2621. Two calls were placed to the cellphone from number 4399 at 3:29 p.m. and 3:43 p.m. on June 4, 2017. 4RP 2629. Approximately 13,900 text messages were sent from the phone between June 1 and August 1, 2017. 4RP 2625. There were no outgoing text messages between 2:56 and 5:48 on June 4, 2017. 4RP 2629, 2645-47, 2655-56. An outgoing text message sent at 6:37 p.m. to a number associated with McGee's girlfriend, stated "I will come. I just got into some shit." 4RP 2648-50. An outgoing text message sent at 9:41 p.m. stated, "You're a trip. I'm going through something way more important[.]" 4RP 2653. Police could not determine which person had sent the text messages or made the calls from the phone 4RP 2304-05.

Federal Bureau of Investigation agent, Jennifer Banks, conducted a historical cell site analysis in 2018 for telephone numbers 4399 and 1592. 4RP 2409. Banks analyzed the call records from June 4, 2017, between 2:00 p.m. and 5:00 p.m. 4RP



2410, 2464-65. Banks focused on which cell towers would provide coverage for the Whisperwood apartments and ravine where Ayson's body was found. 4RP 2410-11.

Number 1592 moved frequently, even within a few hours' time. 4RP 2477. Calls involving number 1592 began on June 4, 2017, around 2:20 p.m., with a tower that would provide cell coverage to the Boulevard Park Library, facilitating calls at 2:46 p.m. and 2:48 p.m. 4RP 2425, 2427. Number 1592 then moved south of that tower between 2:55 p.m. and 3:34 p.m. 4RP 2427.

Banks opined that number 4399 used a tower that would provide cell coverage to the Boulevard Park Library to call number 1592 at 3:20 p.m. and 3:43 p.m. 4RP 2424-25, 2428, 2431. Number 1592 moved north between 3:34 p.m. and 4:15 p.m. when it used tower sectors 84942-3 and 84883-2, 22, which could also have provided coverage to 17<sup>th</sup> Place South. 4RP 2428-32, 2437, 2443. Banks also opined that two towers, 92467 and 84974, located across Boeing Field, would provide coverage to 17<sup>th</sup> Place South. 4RP 2437-39, 2449. Number 1592 connected

to tower 92467 at 4:17 p.m. on June 4, 2017. 4RP 2438-39. Banks acknowledged that number 1592 would not have to be on 17<sup>th</sup> Place South to connect to those towers, and she could not say exactly where the phone was located during those times. 4RP 2476, 2481, 2578-79.

Banks also opined that tower 84883 would not provide cell coverage to the Whisperwood apartments. 4RP 2439-41, 2479. Banks did not, however, do a full drive test however and took no readings from the inside of any apartments or even every apartment parking lot. 4RP 2440-41, 2451-52, 2458-60, 2469, 2474, 2477-78.

Number 4399 received an incoming call on June 8, 2017, at 9:50 a.m. using tower 97535-12. 4RP 2436, 2454. The call was of “zero duration,” and Banks opined it would be consistent with the phone holder lying in the ravine on 17<sup>th</sup> Place South. 4RP 2436-37. As Banks acknowledged, however, during her testing she did not connect to tower 97535-12 when at the ravine. 4RP 2454-55.

Digital forensic analyst, Terry Lahman, disagreed with Banks' conclusion as to which cell towers would provide coverage at the Whisperwood apartments. 4RP 2674, 2688, 2692, 2696, 2737. Although Banks opined that tower 84883 would not provide cell coverage to the apartments, Lahman maintained there was "no scientific or digital evidence to support" that conclusion. 4RP 2745-46. For example, Lahman's own testing showed that four different cell tower sectors handled calls when exiting the Whisperwood apartment parking lot. One of those towers also provided service to the Boulevard Park Library. 4RP 2694-98. Lahman opined that more than one cell tower could provide coverage to the Whisperwood apartments. 4RP 2696, 2737.

Lahman agreed that it was possible to connect to towers 84883 and 97535 at 17<sup>th</sup> Place South, and towers 97551 and 84974 at the Whisperwood apartments. 4RP 2733-36. But Lahman opined tower 84883 could transmit a cell signal from more than two miles away. 4RP 2717. Although Lahman never

connected to tower 84883 during his own testing, as he explained, this simply demonstrated that “different results can occur on different days on different locations of the antenna. Any number of factors can affect the results of these drive tests.” 4RP 2721-22, 2740, 2754-55. Indeed, although Lahman explained that it was impossible to pinpoint the exact location of a phone during a call, number 1592 connected to tower 84883 37 times between May 8 and June 4, 2017. 4RP 2727, 2733.

2. *Motion to Suppress.*

McGee moved to suppress the June 3 arrest at his first trial, arguing Hawley lacked specific individualized facts to justify the investigatory detention. CP 581-93. The trial court concluded there was no reasonable articulable suspicion to stop McGee, and the drugs found on McGee were suppressed. Ultimately, the possession charge was dismissed. CP 547 (FF u); 1RP 553-54.

Over McGee’s objection however, the trial court ruled that to exclude the motive evidence would violate the exclusionary rule’s purpose of ensuring that the dignity of the court is

maintained. 1RP 905. The trial court ruled that evidence of the drugs and possession charge were not admissible, but that other evidence from the June 3 stop was admissible, including “fact of the arrest,” “general chronology,” “the confidential agreement that followed,” and “who was there during the time of the arrest.” 1RP 903-04, 906-08, 1242-43; CP 547-48 (FF u). Additionally, informing McGee of his Miranda<sup>[2]</sup> rights was held to be “an intervening act and the illegal stop did not taint McGee’s waiver of his Miranda rights.” CP 674 (conclusion of law h).

Before the start of his second trial, McGee moved to suppress evidence discovered through his arrest and the execution of four search warrants on July 13, 28, and August 1 and 3, 2017. CP 336-432. McGee argued the warrants relied on evidence obtained through the illegal June 3 stop and lacked sufficient independent evidence to justify their issuance. As a result, McGee argued all the evidence had to be suppressed as fruit of the

---

<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

poisonous tree. CP 336-432; 3RP 38-40, 70, 105-10; 4RP 738-47, 751-52, 755-59, 779-82.

The trial court denied McGee's motion to suppress evidence discovered from his arrest and the execution of the search warrants. CP 545-49; 4RP 957-69. Noting that McGee's telephone number was in the King County Sheriff database from a prior March 15, 2017 contact, the trial court concluded that the search warrants were not completely based on the illegal June 3 stop. 4RP 960-63; CP 548 (Conclusion of Law a). As a result, the court reasoned that both of those sources of information were independent from the illegal stop. CP 548 (Conclusions of Law f-k).

The trial court concluded that investigation into Ayson's death, including the cellphone in his pocket, were independent of McGee's illegal June 3 stop and were therefore sufficiently attenuated to sever the causal connection between the June 3 misconduct and the cellphone evidence. 4RP 963-65; CP 548 (Conclusion of Law d-e).

3. *Court of Appeals Decision.*

The Court of Appeals concluded the State failed to show the homicide attenuated the taint of Hawley's unconstitutional conduct. As the Court of Appeals reasoned, the homicide was not an intervening act amounting to a superseding cause, because it was not what caused any of the State's June 3 evidentiary discoveries. Rather, the homicide only led the State to look again at the evidence it had already unlawfully obtained from McGee. Slip op. at 11-13.

The Court of Appeals recognized that if Hawley's June 3 discoveries from McGee cannot be used under the attenuation doctrine, then each subsequent warrant fails. Because each subsequent warrant including the August 1, 2017 arrest warrant depended on information gathered from the June 3 seizure for probable cause, the Court of Appeals suppressed all information learned from these warrants, including McGee's custodial statements on August 1, 2017. Slip op. at 13-14. Because the State failed to show there was "untainted evidence admitted at

trial” that was “so overwhelming that it necessarily leads to a finding of guilt,” the Court of Appeals reversed McGee’s conviction. Slip op. at 14 (citing State v. Elwell, 199 Wn.2d 256, 270, 505 P.3d 101 (2022)).

The prosecution has asked this Court to grant review. McGee now files this answer to the petition under RAP 13.4(d).

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

**The Court of Appeals decision is fact specific and consistent with the narrow, Washington-specific attenuation doctrine articulated by State v. Mayfield.**

1. *There is no significant constitutional issue that remains undeveloped under Washington’s attenuation doctrine.*

Mayfield has already addressed the applicability of the attenuation doctrine to Article 1, section 7. Washington follows a “nearly categorical” rule of excluding from trial evidence obtained in violation of article, section 7 with “no exceptions that rely on speculation, the likelihood of deterrence, or the reasonableness of official misconduct.” Mayfield, 192 Wn.2d at 888. Thus, Washington law permits no exception to the



exclusionary rule if that exception would allow the state to benefit from an illegal search. Id. at 891.

Mayfield has also answered the question of how to employ that doctrine to determine whether an intervening act is sufficiently attenuating. 192 Wn.2d at 897-98. “The only question is whether unforeseeable intervening actions genuinely severed the causal connection between official misconduct and the discovery of evidence.” Id. 898-99. This is a “highly-fact-specific inquiry that must account for the totality of the circumstances” in keeping with the “narrowly and carefully applied” article I, section 7, attenuation doctrine. Id.

Consistent with these principles, the Court of Appeals decision properly concludes the homicide was not an intervening act amounting to a superseding cause, because it was not what caused any of the State’s June 3 evidentiary discoveries. Rather, the homicide only led the State to look again at the evidence it had already unlawfully obtained from McGee. Slip op. at 11-13.

While the prosecution contends this is a novel application of Washington's attenuation doctrine, it concedes it is not an expansion of it. State's Pet. at 18-19. In fact, it is neither. The Court of Appeals opinion merely recognizes the multiple problems inherent in the prosecution's argument.

First, permitting the State to benefit from the unlawful June 3 seizure just because evidence gathered therefrom becomes relevant after the fact, would improperly allow the prosecution to benefit from the illegal search in violation of Washington's exclusionary rule. Mayfield, 192 Wn.2d at 891.

Second, even assuming the State's reevaluation of already illegally obtained evidence can be construed as a "new discovery" the fact remains that it was illegally obtained in the first instance. The State does not satisfy its burden of proving that intervening circumstances severed the causal connection between official misconduct and the discovery of evidence by merely showing that *additional* proximate causes of the discovery of evidence exist. Mayfield, 192 Wn.2d at 898.

Finally, as the Court of Appeals correctly recognizes, if the June 4 homicide was the cause of the State's "derivative use" of its June 3 discoveries, then this amounts to an improper inevitable discovery argument. Slip op. at 13. In short, the Court of Appeals correctly recognizes that because the homicide occurred after the June 3 evidentiary discoveries, the homicide was not the cause of any of those discoveries, even if the evidence became relevant in a different way after the fact. Slip op. at 11-12.

The prosecution nonetheless argues the Court of Appeals opinion is inconsistent with other cases which hold that police misconduct can become legally actionable given subsequent events. See State's Pet. at 20 (citing State v. Aydelotte, 35 Wn. App. 125, 133, 665 P.2d 443 (1983); State v. Mierz, 72 Wn. App. 783, 794, 866 P.2d 65 (1994); State v. Brown, 40 Wn. App. 91, 96, 697 P.2d 583 (1985)). Each of these cited cases predates Mayfield by decades, analyzes the issue under the federal exclusionary rule, if at all, and focuses on conduct affecting the

safety of police officers; conduct which is not constitutionally protected and is therefore outside the scope of the exclusionary rule.

Moreover, as the Court of Appeals properly recognized, in each of those cases, admission of the illegal police action was attenuated by a defendant's new act of free will, rather than law enforcement's coercion. Slip op. at 10-11. Here, however, McGee's alleged actions were induced by the unlawful June 3 seizure. He was facing criminal charges and forced to work as a confidential informant to avoid prosecution. The prosecution's entire "theory of the case is that the defendant killed the victim because he believed the victim was responsible for his arrest and may also be working with police." CP 617; 1RP 891-93. This "theory" was the entire basis for admitting McGee's illegal June 3 seizure as evidence of motive in his murder trial. Thus, the illegal June 3 discoveries and the subsequent events are causally linked.

The Court of Appeals opinion here is consistent with Mayfield and limited to the particular facts of McGee's case. As

the prosecution concedes, the Court of Appeals decision is neither an improper expansion of Washington's attenuation doctrine, nor likely to reoccur given that McGee's case involves a "rarely occurring factual context." State's Pet. at 18, 20.

2. *There is no issue of substantial public interest.*

The fact the Court of Appeals correctly applied the attenuation doctrine, to the prosecution's detriment, does not cause this case to rise to the level of substantial public interest. The parade of horrors on display in the prosecution's petition does not change this. Although the prosecution contends this case will "render[] every piece of information in government database a potential ticking time bomb[,]" this is mere hyperbole.

In reality, police database information is only at risk of exclusion when, as here, it was found to have been obtained illegally in the first instance, and then also, exclusively relied upon in a subsequent investigation involving the very same person from which it was illegally obtained. In short, the scope of the Court of Appeals' opinion here is extremely limited and

will only arise in situations nearly factually identical to McGee's. See State's Pet. at 20 (recognizing McGee's case involves a "rarely occurring factual context.").

The prosecution argues the Court of Appeals opinion will permit McGee to escape accountability. State's Pet. at 21. This is not the proper inquiry under Mayfield. 192 Wn.2d at 897-99. The prosecution had the opportunity to meet its burden of proving the "untainted evidence admitted at trial" was "so overwhelming that it necessarily leads to a finding of guilt." Slip Op. at 13-14 (quoting State v. Elwell, 199 Wn.2d 256, 270, 505 P.3d 101 (2022)). It failed to do so.

In any event, the opinion draws a clear distinction between that evidence which was suppressed and that which was not. While the Court of Appeals suppressed information learned from the search and arrest warrants, it left room for the trial court to determine on remand whether other information learned by Hawley on June 3 is admissible. This potentially includes

information gathered by Hawley via an “unaided eye from a nonintrusive vantage point.” Slip op. at 15.

The Court of Appeals opinion is correct based on the facts and law. There is no conflict in any area of substantial public importance that warrants review.

F. CONCLUSION

The Court of Appeals decision is thorough, limited in scope, and correctly decided under Mayfield. It presents no new questions of substantial public interest. This Court should deny the State’s petition.

**I certify that this document contains 4,544 words, excluding those portions exempt under RAP 18.17.**

DATED this 26<sup>th</sup> day of July, 2023.

Respectfully submitted,  
NIELSEN KOCH & GRANNIS, PLLC



JARED B. STEED  
WSBA No. 40635  
Office ID No. 91051  
Attorneys for Respondent

**NIELSEN KOCH & GRANNIS P.L.L.C.**

**July 26, 2023 - 12:24 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 102,134-8  
**Appellate Court Case Title:** State of Washington v. Malcolm Otha McGee

**The following documents have been uploaded:**

- 1021348\_Answer\_Reply\_20230726122307SC729423\_4487.pdf  
This File Contains:  
Answer/Reply - Answer to Petition for Review  
*The Original File Name was ATPFR 102134-8.pdf*

**A copy of the uploaded files will be sent to:**

- gaviel.jacobs@kingcounty.gov
- leesa.manion@kingcounty.gov
- nielsene@nwattorney.net
- paoappellateunitmail@kingcounty.gov

**Comments:**

---

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

**Filing on Behalf of:** Jared Berkeley Steed - Email: steedj@nwattorney.net (Alternate Email: )

Address:  
2200 Sixth Ave. STE 1250  
Seattle, WA, 98121  
Phone: (206) 623-2373

**Note: The Filing Id is 20230726122307SC729423**