NO. 102409-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY HARTMAN,

Petitioner.

ANSWER TO PETITION FOR REVIEW

MARY E. ROBNETT
Pierce County Prosecuting Attorney

ERICA EGGERTSEN
Deputy Prosecuting Attorney
WSB # 40447 / OID #91121
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-6625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

I. INTRODUCTION

Gary Hartman raped and murdered 12-year-old MW. Police developed a DNA profile from the bodily fluids Hartman abandoned on her body. That DNA was compared to genetic information that relatives of Hartman had voluntarily published in an open-source Internet site which explicitly permitted law enforcement access. Police identified Hartman as MW's killer, and he was convicted of murder.

The court of appeals correctly concluded that Hartman lacked any legitimate expectation of privacy in his own abandoned DNA or in the genetic information his relatives voluntarily publicized. No significant constitutional question arises from the application of this Court's well-settled precedent on the abandonment doctrine and standing. Neither does Hartman raise an issue of substantial public interest when the legislature is the appropriate regulator of police use of public genetic information. The State respectfully requests that this Court deny Hartman's petition for review.

II. RESTATEMENT OF THE ISSUES

A. Did the court of appeals properly reject the request to discard this Court's long-standing precedent and create a new privacy interest in DNA voluntarily abandoned by perpetrators of violent crimes on the bodies of their victims?

B. Did the court of appeals correctly apply this Court's well-settled precedent in holding that an individual has no standing to challenge police examination of information third parties have voluntarily exposed to the public?

C. Did the court of appeals properly conclude that the legislature is the appropriate regulator of future police use of public DNA information?

D. If review is granted, should this Court find that Hartman's request for reversal of his conviction is precluded by his failure to challenge the search warrant for his DNA that confirmed he was the perpetrator of the murder?

III. STATEMENT OF THE CASE

In 1986, Gary Hartman raped and murdered 12-year-old MW before leaving her body in the ravine of a Tacoma park. CP 323-29. Hartman discarded semen on multiple areas of MW's body. CP 325 (FF 11). Tacoma Police Department (TPD) detectives worked diligently over subsequent decades to identify her killer. CP 240 (FF 15-17).

In 2016, TPD sent the killer's DNA to a genetic genealogist. CP 241 (FF 19, 20, 22). The DNA was uploaded to GEDmatch, an open-source public genealogical website focusing exclusively on genealogical research. CP 242 (FF 27). At the time, GEDmatch permitted law enforcement to use its services to identify the perpetrator of a violent crime. *State v. Hartman*, No. 56801-2-II, slip op. at 5 (Aug. 22, 2023). GEDmatch has since modified its terms of service to require users to explicitly opt-in to allow law enforcement access to DNA. *Id*. at 7.

GEDmatch identified two potential familial matches for MW's killer. CP 172, 243 (FF 28). These matches, along with public genealogical information, were used to create a family tree that included Hartman. CP 172-77, 244-45 (FF 32, 33, 38). Police subsequently collected paper napkins and a coffee cup discarded by Hartman and confirmed his DNA matched that left within the semen on MW's body. CP 246 (FF 43, 44).

The trial court denied Hartman's motion to suppress the familial DNA analysis. CP 232, 252 (CL 22). The court agreed with Hartman's concession that he had no state constitutional privacy interest in the DNA he abandoned at the crime scene. CP 248, 252 (CL 6, 20); (2/15/22)RP 7. The court concluded that Hartman's privacy rights were not implicated by law enforcement's examination of publicly accessible DNA data voluntarily uploaded to the Internet by his relatives. CP 247, 249-52 (CL 2, 8, 13, 17, 18, 19).

The parties proceeded to trial on stipulated facts. CP 271-80; (3/22/22)RP 82-98. The court found Hartman guilty of first-degree murder predicated on first-degree rape. CP 253, 323; (3/22/22)RP 98. Hartman appealed. *Hartman*, slip op. at 2.

The court of appeals affirmed Hartman's conviction, finding Hartman had no privacy interest in DNA he abandoned at the crime scene, nor in DNA his relatives voluntarily uploaded to a public database permitting law enforcement access. *Id*. Consequently, Hartman lacked standing to challenge the

comparison of DNA he left on MW's body with genetic information in the GEDmatch database. *Id*.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals Correctly Concluded That the Washington Constitution Permits Police Use of Voluntarily Abandoned DNA to Identify the Perpetrator of a Violent Sexually Motivated Murder

No significant question of constitutional law stems from the court of appeals' conclusion that Hartman lacked any privacy right in the DNA he voluntarily abandoned on the 12-year-old girl he raped and murdered. The court of appeals correctly rejected Hartman's request for creation of an unprecedented privacy interest in purposefully discarded bodily fluids at violent crime scenes. Review by this Court is unwarranted on procedural grounds and under RAP 13.4(b)(3).

1. Hartman failed to raise and preserve any claim related to privacy in his abandoned DNA

Hartman conceded at the trial court and in appellate briefing that he had abandoned any privacy interest in his semen at the crime scene. (2/15/22)RP 7; *Hartman*, slip op. at 13. At

oral argument, he alleged for the first time that he retained a privacy interest in DNA discarded on the victim's body. *Hartman*, slip op. at 13. The court of appeals acknowledged that this argument had not previously been raised but in its discretion addressed the claim. *Id*. at 13, 26-29.

Bases for suppression of evidence must be raised in the trial court. *See State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); RAP 2.5. Late arguments prevent full factual development, impair full response by the opposing party, and deprive the court of fully developed argument. *See*, *e.g.*, *Dang v. Ehredt*, 95 Wn. App. 670, 677, 977 P.2d 29 (1999). This Court should not grant review of an unpreserved claim first raised in oral argument to the court of appeals.

2. The court of appeals correctly concluded that Hartman forfeited any privacy interest in his DNA by abandoning it at the crime scene

The court of appeals correctly recognized that the abandonment doctrine is well-settled law in Washington. *Hartman*, slip op. at 27. Law enforcement complies with the state

constitution when examining voluntarily abandoned property. *See State v. Samalia*, 186 Wn.2d 262, 273, 375 P.3d 1082 (2016) (proper search of abandoned cell phone); *State v. Evans*, 159 Wn.2d 402, 407-08, 150 P.3d 105 (2007) (proper search of abandoned briefcase); *State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001) (proper search of abandoned coat). Hartman had no privacy interest in the bodily fluids he abandoned on MW pursuant to this doctrine.

This Court has specifically held that the abandonment doctrine applies to DNA extracted from voluntarily discarded bodily fluids. *State v. Athan*, 160 Wn.2d 354, 367-68, 158 P.3d 27 (2007). Police may use abandoned DNA for the narrow purpose of identifying the perpetrator of a crime. *Id*. at 368. Consistent with *Athan*, the court of appeals correctly concluded that no constitutional violation occurred when police examined Hartman's DNA "to determine the killer's identity and nothing more." *Hartman*, slip op. at 28. Hartman's DNA and personal characteristics were relevant to his identification. *Id*.

No significant question of constitutional law warrants review of the straightforward application of the abandonment doctrine to the semen Hartman abandoned on his victim. The issues raised by the dissent in *Athan* are inapplicable to Hartman. In that case, investigators invented a ruse to obtain Athan's saliva on an envelope. *Athan*, 160 Wn.2d at 361. Athan argued he had an expectation of privacy in the envelope because he believed he was corresponding with an attorney. *Id*. at 375. The dissent characterized Athan's exposure of his saliva as involuntary based on the ruse. *Id*. at 404.

No such concerns exist in Hartman's case. As the court of appeals observed, "[b]y ejaculating on MW's body, Hartman lost 'any privacy interest' in the semen he left behind or the DNA it contained." *Hartman*, slip op. at 28. Unlike Athan, Hartman purposefully and voluntarily exposed his DNA to the public when he abandoned it on MW's body. *See also State v. Carter*, 151 Wn.2d 118, 126, 86 P.3d 887 (2004) (no expectation of privacy when property "has voluntarily been placed in open view

of the public"). Hartman had no legitimate expectation of privacy in material he left behind at a crime scene he knew police would relentlessly investigate.

Hartman also fails to establish a conflict between *Athan* and other decisions of this Court. His comparison of purposefully abandoned DNA to the facts in *State v. Boland*, 115 Wn.2d 572, 800 P.2d 112 (1990) is inapt. In *Boland*, the defendant placed garbage in his covered private container "in expectation that it would be picked up by a licensed garbage collector." *Boland*, 115 Wn.2d at 578. Accordingly, this Court found that Boland had a legitimate expectation of privacy in the items he did not intend to expose to the public. *Id*. Hartman, in contrast, purposefully left his bodily fluids in a crime scene in a public park. The *Boland* court's recognition of a privacy interest in personal refuse bins does not establish a privacy interest in murder victims as repositories of DNA.

To encourage review, Hartman paints an unsubstantiated picture of police using advanced technology to learn intimate

details of private citizens' lives, and perhaps even constructing an unauthorized government DNA database of all citizens. This dystopic application of DNA has already been precluded by this Court's decision in *Athan*, which specifically limits police use of abandoned bodily fluids to identification of perpetrators of crime. *Athan*, Wn.2d at 368.

The uncontested findings of fact establish that police used direct-to-consumer DNA testing available to all citizens, including Hartman's relatives who had voluntarily uploaded their own DNA to GEDmatch. CP 94-95, 114, 169, 171, 243. Police did not use Hartman's discarded DNA to learn intimate information unrelated to identity. The court of appeals correctly observed that "[a]ll of the steps that police took in this case were for the purposes of identifying MW's killer, including narrowing the suspect pool by learning the killer's identifying characteristics." *Hartman*, slip op. at 28. Police did not engage in surreptitious efforts to monitor civilians, but rather transparently uploaded an abandoned DNA profile in full

compliance with GEDmatch's published terms of service regarding law enforcement. Police properly used Hartman's abandoned DNA to identify MW's killer in accordance with this Court's well-settled precedent. Hartman fails to establish a basis for review.

B. The Court of Appeals Properly Concluded Hartman Lacked Standing to Challenge Police Examination of Public Genetic Information Voluntarily Disclosed by Third Parties

No significant question of constitutional law stems from the court of appeals' conclusion that Hartman lacked standing to challenge law enforcement's use of the public DNA information in GEDmatch. A defendant has standing to challenge a search only when (1) law enforcement's actions implicated private affairs protected by the Washington constitution; and (2) the private affairs affected were the defendant's own. *State v. Surge*, 160 Wn.2d 65, 71, 156 P.3d 208 (2007). The court of appeals correctly applied this Court's precedent in finding that neither circumstance applied to Hartman's case. Review is unwarranted under RAP 13.4(b)(3).

1. No state constitutional privacy interest attaches to genetic information private citizens voluntarily upload to a public Internet site

The court of appeals properly concluded that public and voluntarily disclosed genetic information is not a protected private affair under article I, section 7 of the Washington constitution. *Hartman*, slip op. at 15. To determine whether government action implicates privacy interests, courts examine: (1) the nature of the information sought; (2) the protections it has been historically afforded; and (3) the location of the information and the purposes for which it is kept. *State v. Jorden*, 160 Wn.2d 121, 127, 156 P.3d 893 (2007). Analysis of each of these factors supports the court of appeals' conclusion.

The nature of the information sought in this case was public. No expectation of privacy attends information "voluntarily … placed in open view of the public." *Carter*, 127 Wn.2d at 841; *see also State v. Goucher*, 124 Wn.2d 778, 787, 881 P.2d 210 (1994). Even potentially sensitive DNA

information loses constitutional protections if voluntarily exposed to the public. *Athan*, 160 Wn.2d 354.

The undisputed findings of fact in Hartman's case establish that the DNA in GEDmatch was public. CP 242-433 (FF 26-28), 247 (CL 2-3); 326 (FF 24). Law enforcement looked at genetic information private individuals had voluntarily and purposefully uploaded for the express "purpose of *sharing with strangers* […] private information." *Hartman*, slip op. at 19 (emphasis in original). No precedent of this Court establishes a state constitutional privacy right applying to public information.

There are no historical protections for DNA information shared in the public sphere. *Athan*, 160 Wn.2d at 367, 387. Washington state recently declined to pass legislation requiring law enforcement to obtain consent or "valid legal process" before accessing consumer genetic databases. H.B. 2485 § 2(1)(c), 66th Leg. Reg. Sess. (Wash. 2020). Outside of Washington, legislatures have permitted law enforcement searches of government and public DNA databases under certain

circumstances. *Hartman*, slip op. at 23. Case law and statutes protecting against nonconsensual bodily intrusions and DNA analysis are inapplicable to publicly shared information. *See*, *e.g.*, *State v. Garcia-Salgado*, 170 Wn.2d 176, 183, 240 P.3d 153 (2010). No precedent shows a historical protection of DNA or familial information shared with the public.

The location of the genetic information on a public Internet site further establishes the DNA information as outside the purview of the state constitution. Hartman's relatives "made the information available to the public on the Internet … at a time that GEDmatch's terms of service expressly stated that it would let law enforcement use its service to identify perpetrators." *Hartman*, slip op. at 24. This circumstance distinguishes Hartman's case from others where this Court has protected private information in the hands of third parties. *See Jorden*, 160 Wn.2d at 131 (motel registries); *State v. Hinton*, 179 Wn.2d 862, 864, 319 P.2d 9 (2014) (personal text communications); *State v. Muhammad*, 194 Wn.2d 577, 586, 451 P.3d 1060 (2019) (cell

site location information) (citing *Carpenter v. United States*, 585 U.S.__, 138 S. Ct. 2206, 2217, 201 L. Ed. 2d 507 (2018)).

Unlike the defendants in these cases, the individuals who uploaded their DNA information to GEDmatch did not intend to preserve the information as private. *See Carpenter*, 138 S. Ct. at 2217 ("what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."). As the court of appeals observed, "the DNA profiles uploaded into GEDmatch were expressly available for the public to analyze, unlike the motel registry list in *Jorden*, cell site location information in *Carpenter*, and the text messages in *Hinton*, all of which were revealed to specific businesses or individuals but were not posted on the Internet or made broadly available for public access." *Hartman*, slip op. at 24. The additional cases cited in Hartman's petition for review are inapplicable for the same reason. The banking records and electronic consumption records addressed in *State v. Miles*, 160 Wn.2d 236, 156 P.3d 864

(2007) and *State v. Maxfield*, 133 Wn.2d 332, 945 P.2d 196 (1997), were not voluntarily placed in public view.

Police investigating MW's rape and murder accessed the information on GEDmatch in the same manner available to any other interested member of the public. The court of appeals correctly found that law enforcement acted consistently with state constitutional protections. Police examination of public information is not a significant constitutional issue warranting review.

2. There is no state constitutional right to privacy in the bodies or genetic codes of other individuals

The court of appeals properly found that Hartman lacked a right to privacy in the genetic codes of his distant relatives. Standing to challenge a search requires a personal, "justifiable, reasonable, or legitimate expectation of privacy that has been invaded by governmental action." *Goucher*, 124 Wn.2d at 787. A legitimate expectation of privacy exists when there is: (1) "an actual (subjective) expectation of privacy by seeking to preserve something as private"; and (2) that society recognizes that

expectation as reasonable. *Evans*, 159 Wn.2d at 409. Hartman demonstrates neither.

Constitutional rights are personal. *Goucher*, 124 Wn.2d at 787. Hartman had no actual subjective expectation that his own interests had any bearing on his relatives' choices with respect to their bodies and DNA. Nor would society recognize such an expectation as reasonable. An individual may permit law enforcement access to their own private affairs even if it reveals private information about another person. *See State v. Bowman*, 198 Wn.2d 609, 618, 498 P.3d 478 (2021).

Hartman wrongly analogizes similar DNA to a shared apartment or joint tenancy. He asks this Court to accept review to find that police must treat DNA like an apartment with multiple tenants, requiring consent from all those present to conduct a search. Under this analysis, Hartman contends that police were required to ask for his consent before searching his relatives' DNA. Under Hartman's proposed rule, a freely given DNA sample could be impeded by a suspect's assertion of

ownership rights to similar DNA. Such a rule is unprecedented, untenable, and contrary to our society's respect for individual rights. The court of appeals properly concluded Hartman lacked standing to challenge police examination of public DNA information pertaining to third parties. No significant question of constitutional law warrants review.

C. The Court of Appeals Correctly Concluded That the Legislature is the Appropriate Regulator of Police Use of Publicly Available DNA Information in Future Investigations

Review is not warranted under RAP 13.4(b)(4). No issue of substantial public interest exists where the factual scenario in *Hartman* is unlikely to reoccur. Since the investigation, GEDmatch has changed its terms of service to require users to explicitly consent to law enforcement use of DNA for genealogical comparisons. *Hartman*, slip op. at 7, 26 fn. 3. This Court's review of the court of appeals' well-reasoned decision is unwarranted where any future scenario involving genetic genealogy will be factually dissimilar to the investigation here.

The *Hartman* opinion properly points to the legislature as the appropriate future regulator of public DNA information. *Hartman*, slip op. at 2, 22 fn. 2, 26 fn. 3. The legislature has successfully and comprehensively regulated other advances in technology and public information that allows police to gather more exacting information from public sources than was available in the past. *See* RCW 43.386 (statutory scheme regulating government use of facial recognition technology). The legislature has already considered police use of open-source DNA information and may do so again. *See Hartman*, slip op. at 22, fn. 2. The concerns Hartman raises in his petition as to the future scope of government use of public genetic information are appropriately directed to legislature. They do not warrant invention of new state constitutional privacy interests contrary to this Court's well-established and long-standing principles permitting police examination of abandoned evidence and information freely available in the public sphere. No significant issue of substantial public interest requires this Court's review.

D. If Review is Granted, This Court Should Find That Reversal of Hartman's Conviction is Precluded by His Failure to Challenge the Search Warrant Below

Should this Court determine that review is warranted based on Hartman's petition, the State seeks review pursuant to RAP 13.4(d) of the appellate court's determination that Hartman's request for reversal of his conviction can be adjudicated on the available record. *Hartman*, slip op. at 12-13. Hartman did not challenge the warrant used to obtain DNA confirming his identity as MW's killer, nor was that warrant made part of the record on review. CP 328 (FF 36, 38, 39).

A defendant bears the burden of establishing that a search pursuant to a warrant was unlawful. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). A reviewing court gives great deference to and resolves all doubts in favor of the warrant. *Id*. The warrant affidavit in this case cannot be evaluated because it was not examined at the suppression hearing and is not part of the appellate record. *See*, *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995); RAP 2.5. Consequently, there is

no factual or legal basis supporting reversal of Hartman's conviction. That appellate decisions are based on sufficiently developed legal and factual foundations is a significant legal and public interest issue under RAP 13.4(b)(3) and (4). The State seeks review of this issue only if review is otherwise granted.

V. CONCLUSION

Hartman does not establish a significant question of constitutional law or issue of substantial public interest warranting review of the court of appeals' decision under RAP 13.4(b)(3) or RAP 13.4(b)(4). The court of appeals correctly concluded that Hartman lacked any legitimate expectation of privacy in his own abandoned DNA or in the genetic information his relatives voluntarily publicized. For the foregoing reasons, this Court should deny Hartman's petition for review.

This document is in 14 point font and contains 3,464 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 20th day of November, 2023

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ Erica Eggertsen
ERICA EGGERTSEN
Deputy Prosecuting Attorney
WSB # 40447 / OID #91121
Pierce County Prosecutor's Office
930 Tacoma Avenue South, Rm. 946
Tacoma WA 98402-2171
Telephone: (253) 798-6625
Fax: (253) 798-6636
erica.eggertsen@piercecountywa.gov

Certificate of Service:
The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

11-20-23	*s/Therese Nicholson*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

November 20, 2023 - 2:35 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,409-6
Appellate Court Case Title:	State of Washington v. Gary Charles Hartman
Superior Court Case Number:	18-1-02411-2

The following documents have been uploaded:

- 1024096_Answer_Reply_20231120143350SC255478_0165.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Hartman.PRV.Answer.FINAL.pdf

A copy of the uploaded files will be sent to:

- marietrombley@comcast.net
- pcpatcecf@piercecountywa.gov
- valerie.marietrombley@gmail.com

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us
Filing on Behalf of: Erica Eggertsen Ruyf - Email: erica.eggertsen@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20231120143350SC255478