

FILED
SUPREME COURT
STATE OF WASHINGTON
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NO. 102214-0

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

PETITIONER'S REPLY

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TABLE OF CONTENTS

A. ARGUMENT 1

 1. The prosecution’s repeated efforts to undo the Court of Appeals ruling suppressing illegally seized evidence is intimately connected to the fruits of their violation of Mr. Phillip’s attorney-client privilege 1

 a. The independent source doctrine requires examining the methods and purposes of State actors who have violated a person’s constitutional rights 1

 b. The prosecution misrepresents the facts of the attorney-client privilege violation 5

 c. The attorney-client violation is an important part of the independent source analysis..... 7

 2. The Court of Appeals’ application of the independent source doctrine to this case undermines the protections enforced by article I, section 7 and merits review 8

B. CONCLUSION..... 10

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Betancourth, 190 Wn.2d 357, 365, 413 P.3d 566
(2018)..... 3

State v. Mayfield, 192 Wn.2d 871, 434 P.3d 58 (2019) 3

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

United States Supreme Court

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

United States Constitution

Fourth Amendment 2

Washington Constitution

Article I, section 7 i, 2, 8

Court Rules

RAP 10.1 4

RAP 10.10 4

RAP 12.4 4

A. ARGUMENT.

1. The prosecution's repeated efforts to undo the Court of Appeals ruling suppressing illegally seized evidence is intimately connected to the fruits of their violation of Mr. Phillip's attorney-client privilege.

a. The independent source doctrine requires examining the methods and purposes of State actors who have violated a person's constitutional rights.

The Court of Appeals granted discretionary review after the trial court certified the issue to the Court of Appeals under RAP 2.3(b)(4). The trial court found there is substantial ground for a difference of opinion on whether the prosecution's novel efforts to obtain previously suppressed, unlawfully seized evidence complied with the constitution. CP 247-48.

The nub of the legal issue is whether the State's efforts to re-seize unconstitutionally obtained cell phone records -- records that were pivotal to its investigation into and prosecution of Mr. Phillip -- are genuinely independent of the information gained from the prior unconstitutional seizure.

Under the United States Supreme Court’s formulation of the independent source doctrine, the State bears the heavy burden of proving it relies on “a genuinely independent source of the information and tangible evidence” and its decision to seek the new 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.*

As this Court has explained, the federal constitution’s independent source doctrine may be compatible with article I, section 7, but due to the fundamental differences between the Fourth Amendment and article I, section 7, 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. *State v. Winterstein*, 167 Wn.2d 620, 632, 632, 220 P.3d 1226 (2009).

The illegal search must have “in no way contributed” to a later warrant. *State v. Betancourth*, 190 Wn.2d 357, 365, 368, 413 P.3d 566 (2018); *see also State v. Mayfield*, 192 Wn.2d 871, 891-92, 434 P.3d 58 (2019) (describing independent source doctrine as demanding evidence come from a source “completely independent” of any illegality).

The attorney-client privilege violation that occurred in this case is a necessary part of the independent source inquiry. It presents key information of the State’s motivation in pursuing this unlawfully seized evidence and therefore has particularly important relevance under current circumstances. It is not presented merely to decide whether this violation alone requires dismissal, as was litigated in the original direct appeal.

The fact that Mr. Phillip addressed the attorney-client privilege violation in a Statement of Additional Grounds for Review does not mean the issue is not properly before the Court. The Court of Appeals invited the Statement of Additional Grounds, accepted it without any objection, and

discussed it in its ruling on the merits. Mr. Phillip set forth the issue at length, legally and factually. The prosecution had a full and fair opportunity to respond to the Statement of Additional Grounds but chose not to.

While the Court of Appeals may request additional briefing from counsel for issues raised in a Statement of Additional Grounds, the prosecution is not required to wait for an invitation from the Court of Appeals to respond. *Compare* RAP 10.10(f) (appellate court may invite additional briefing for issues in Statement of Additional Grounds), *with* RAP 12.4(d) (prohibiting party from answering a motion for reconsideration “unless requested by the appellate court”); *see generally* RAP 10.1(h) (allowing parties to seek permission to file any additional briefs). As a matter of practice, some prosecutors choose to respond to Statements of Additional Grounds while others do not. The fact the prosecution here opted to ignore the Statement of Additional Grounds does not permit the State to take advantage of its inaction now. Its claim that the issue

was not fully briefed incorrectly disregards Mr. Phillip's thorough discussion of the issue and misrepresents its decision not to respond while in the Court of Appeals.

b. The prosecution misrepresents the facts of the attorney-client privilege violation.

The purposeful nature of the attorney-client privilege violation is plain from the record. The prosecution's response to the motion for discretionary review misleads this Court by merely citing to a prior Court of Appeals summary of the issue, but that ruling did not purport to comprehensively recite the underlying facts.

While investigating the case, lead detective Jason Blake reviewed the data extracted from Mr. Phillip's cell phone and discovered an email Mr. Phillip sent to a lawyer shortly after Mr. Frankel was killed. 2/24/14RP 20-21, 23; Statement of Additional Grounds at 3-4. The detective immediately alerted the prosecutor, Wyman Yip, about the content of this email. 2/24/14RP 40; Statement of Additional Grounds at 3-4.

Mr. Yip responded by email to the detective, saying, “Holy crap.” 2/24/14RP 40. The detective agreed, saying “God bless cell phones and stupid people.” *Id.* Mr. Yip asked the detective to “forward” the emails to him to review more closely. 9/30/13RP 19; 2/24/14RP 43-44. The detective continued looking through the emails Mr. Phillip sent, including looking for further communication with this lawyer, and summarized them in a report. 2/24/14RP 40, 44-45.

“Hours” after receiving this privileged communication between Mr. Phillip and a lawyer, the prosecutor rewrote the earlier search warrant for Mr. Phillip’s cell phone data in an effort to shore up a flaw in that warrant. Statement of Additional Grounds at 21; 2/24/14RP 45-47. This conduct demonstrates the closely related nature of the attorney-client privilege violation and the importance the State placed on gaining access to this cell phone evidence.

The trial court ruled that the State purposefully intruded into attorney-client communications and chastised the

prosecutor and detective for engaging in this “risky” behavior. 9/30/13RP 74-75; 2/25/14RP 105; 2/26/14RP 5. The prosecution misleads the Court by minimizing the knowing violation of privileged information and the underlying importance of the knowledge gained in shaping the State’s motive to prosecute Mr. Phillip.

c. The attorney-client violation is an important part of the independent source analysis.

As Mr. Phillip correctly explained in the Court of Appeals, the State’s motivation for seizing suppressed, unlawfully gathered evidence is central to the independent source doctrine analysis. Statement of Additional Grounds at 21-22. The State’s motivation includes incriminating information it learned through the attorney-client privilege violation. As the trial prosecutor effectively conveyed after reading the privileged email, “Holy crap,” this information cemented the State’s desire to pursue this prosecution even though they had very little evidence outside this suppressed

cell phone information. And even with this cell phone evidence, the case resulted in a mistrial the first time it was tried. Slip op. at 6.

The Court of Appeals erroneously disregarded Mr. Phillip's argument that the attorney-client privilege violation prejudiced the 2020 search warrant and was an improper driving force in the on-going prosecution. Statement of Additional Grounds at 21. This Court should grant review because the Court of Appeals decision constitutes probable error that substantially alters the status quo.

2. The Court of Appeals' application of the independent source doctrine to this case undermines the protections enforced by article I, section 7 and merits review.

The prosecution's response pretends this case is controlled by settled law, completely overlooking its own stipulation that discretionary review was appropriate due to the unsettled nature of this law and the probability that the trial court's decision was wrong. CP 247.

The Court of Appeals decision refuses to recognize the constraints on extending the independent source doctrine to the circumstances in this case, where the Court of Appeals previously suppressed evidence that was the linchpin of the case precisely because it was seized without probable cause. With the benefit of hindsight, the prosecution claims Mr. Phillip was always the primary suspect, but at the time, the police admitted they were fishing for suspects and had no idea who the perpetrator was. CP 429. The cell phone data drove the prosecution, and the attorney-client privilege violation cemented the State's motivation to prosecute Mr. Phillip. And without the cell phone data, the prosecution would have little to offer the jury.

This Court should grant review because the Court of Appeals decision, like the trial court decision, reflects obvious and probable error about the application of the independent source doctrine to a case where the police undisputedly invaded a person's private affairs without authority of law, used the

information gathered as the centerpiece of its investigation and trial, and after this unlawfully seized information was suppressed, remain motivated to re-seize this unconstitutionally obtained information based on illegally gained information that includes a violation of attorney-client privilege.

This error substantially affects the status quo and Mr. Phillip's ability to act. Mr. Phillip has been in county jail awaiting retrial since the Court of Appeals ordered a new trial in 2016, because the prosecution has repeatedly sought this suppressed evidence and refused to retry the case without it.

B. CONCLUSION.

Mr. Phillip respectfully requests this Court grant review of the Court of Appeals decision.

Counsel certifies this brief complies with RAP 18.17 and contains approximately 1521 words.

DATED this 13th day of September 2023.

A handwritten signature in black ink, appearing to read "Nancy P. Collins". The signature is fluid and cursive, with the first name "Nancy" and last name "Collins" clearly distinguishable.

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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. 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:

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WASHINGTON APPELLATE PROJECT

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