

IN THE SUPREME COURT OF  
THE STATE OF ARIZONA

LANE DRAPER,	)	
	)	Arizona Supreme Court No. CR-
Petitioner,	)	22-0175-PR
	)	
vs.	)	
	)	Court of Appeals Division One
HON. JO LYNN GENTRY, JUDGE OF	)	No. 1 CA-SA 22-0096
THE SUPERIOR COURT OF THE	)	
STATE OF ARIZONA, in and for the	)	Maricopa County Superior Court
County of Maricopa	)	No. CR2020-127377-001
	)	
Respondent Judge,	)	
	)	<b>BRIEF OF <i>AMICI CURIAE</i></b>
	)	<b>NATIONAL CRIME VICTIM</b>
STATE OF ARIZONA,	)	<b>LAW INSTITUTE AND THE</b>
JORDAN LEE NEZ,	)	<b>ARIZONA CRIME VICTIM</b>
	)	<b>RIGHTS LAW GROUP IN</b>
Real Parties In Interest.	)	<b>SUPPORT OF PETITION FOR</b>
	)	<b>REVIEW<sup>1</sup></b>
	)	

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<sup>1</sup> This brief is filed under Rule 16(b)(1)(C) of the Arizona Rules of Civil Appellate Procedure. Counsel for Amici Curiae did not receive consent from Real Parties in Interest. Motion for Leave to File Brief of *Amici Curie* accompanies this brief.

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## INTERESTS OF *AMICI CURIAE*

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote victims' voices and rights in the justice system through crime victim-centered legal advocacy, education and resource sharing. NCVLI accomplishes its mission through education and training of judges, prosecutors, victims' attorneys, advocates, law students and community service providers; providing legal assistance on cases nationwide; analyzing developments in crime victim law; and advancing victims' rights policy. As part of its legal assistance, NCVLI participates as *amicus curiae* in select state, federal and military cases that present victims' rights issues of broad importance. This is one of those cases; presenting issues on the application of the Fourth Amendment right to be free from an unreasonable search and seizure, and the fundamental rights to dignity and privacy.

The Arizona Crime Victim Rights Law Group (AZCVRLG) is an Arizona nonprofit organization that represents victims of crime helping them to assert all of their rights protected by the Arizona Constitution and related Arizona state statutes. Counsel with AZCVRLG enters appearances as counsel of record on behalf of crime victims in criminal proceedings in all courts throughout the State of Arizona. The AZCVRLG also participates as *amicus curiae* on victim issues when

issues of importance arise affecting victims statewide offering a victim-centric input into all issues affecting the constitutional and statutory rights of crime victims.

No persons or entities other than NCVLI and AZCVRLG provided financial resources for the preparation of this brief.

## **INTRODUCTION**

This Court has a duty to safeguard the constitutional rights of all persons, including their right to be protected from unreasonable searches and seizures. “[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (“persons, houses, papers, and effects”) it enumerates.” *United States v. Jones*, 565 U.S. 400, 406 (2012). Since *Jones*, there is “no doubt” that physical intrusion upon a person’s vehicle for the purpose of obtaining information is a “search” that is protected by the Fourth Amendment. *Id.* at 405-06. The Court must reject the proposition that well-established search and seizure analysis does not apply in this case simply because the target of the proposed search is the crime victim, not the defendant.

The facts of this case makes clear that the proposed search is not supported by probable cause. Therefore, the Court must reverse the trial court’s order on the ground that enforcement of the order would constitute an unreasonable search under the Fourth Amendment.

## ARGUMENT

### I. STANDARD OF REVIEW

This Court reviews de novo interpretations of rules, statutes, and constitutional provisions. *State v. Hansen*, 215 Ariz. 287, 289 ¶ 6 (2007).

Whether a challenged action “comports with the Fourth Amendment is a mixed question of law and fact that [this Court] review[s] de novo.” *State v. Cheatham*, 240 Ariz. 1, 2 ¶ 6 (2016).

### II. THE COURT ORDER AUTHORIZING DEFENDANT TO EXTRACT DRAPER’S TRUCK GPS DATA VIOLATES DRAPER’S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE.

#### A. The Trial Court’s Order is State Action that Implicates the Fourth and Fourteenth Amendments.

This case involves state action. The fact that the search request was initiated by defendant and would be conducted by defendant’s extraction expert—not law enforcement—does not remove the conduct from Fourth Amendment scrutiny.

The court order compelling Draper to allow the extraction constitutes the requisite state action for purposes of the Fourth and Fourteenth Amendments. *See, e.g., Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018) (finding a violation of the Fourth Amendment where the cell phone location records were acquired pursuant to court orders under the Stored Communications Act); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33–34 (1984) (recognizing a court order prohibiting disclosure of discovered information before trial—an order requested by parties in

a civil defamation lawsuit—constitutes state action that “implicates the First Amendment rights of the restricted party”); *Shelley v. Kraemer*, 334 U.S. 1, 14-19 (1948) (observing that “the action of the States to which the [Fourteenth] Amendment has reference, includes action of state courts and state judicial officials”); *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 108 ¶ 11 (App. 2007) (recognizing “a court order is state action that is subject to constitutional restraint” and a discovery order “compelling disclosure of the identities of anonymous internet speakers raises First Amendment concerns”); *Barker v. Barker*, 909 So. 2d 333, 337 (Fla. Dist. Ct. App. 2005) (stating “[c]ourt orders compelling discovery of personal medical records constitute state action that may impinge on the [state] constitutional right to privacy”); *In re Maurer*, 15 S.W.3d 256, 260 (Tex. Ct. App. 2000) (stating that ““a court order which compels or restricts pretrial discovery constitutes state action which is subject to constitutional limitations””); *Stenger v. Lehigh Valley Hosp. Ctr.*, 609 A.2d 796, 801 n.8 (Pa. 1992) (stating that “[i]t is acknowledged that court orders which compel, restrict or prohibit discovery constitute state action which is subject to constitutional limitations”).

As the United States Supreme Court explained in another context, “[t]he test [for state action under the Fourteenth Amendment] is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (citing



*Ex parte Virginia*, 100 U.S. 339, 346-67 (1879)); *see also Ex parte Virginia*, 100 U.S. at 346 (emphasis added) (stating the Fourteenth Amendment is directed “against State action, however put forth, whether that action be executive, legislative, *or judicial*”).

Here, pursuant to United States Supreme Court precedent, the trial court’s order is state action; it cannot escape constitutional scrutiny.

**B. The Requested Search Is Unreasonable Under the Fourth Amendment.**

Under the Fourth Amendment, all individuals have a constitutional right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. Crime victims, no less than an accused person, are protected against unreasonable searches and seizures. *See United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (“The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. . . . Its protection extends to offenders as well as to the law abiding.”), *abrogated on other grounds recognized, Arizona v. Grant*, 556 U.S. 332, 351 (2009). Where Fourth Amendment protection applies, the search is reasonable only if conducted pursuant to a warrant issued upon a finding of probable cause, or pursuant to the application of an established exception to the warrant requirement. *See, e.g., Katz v. United States*, 389 U.S. 347, 357 (1967).

The Fourth Amendment protects an individual’s possessory interest in property as well as their reasonable expectations of privacy from unreasonable government intrusion. *See Jones*, 565 U.S. at 406-09 (recognizing two ways to establish a right to Fourth Amendment protection—one by way of “the trespassory-search” test for those with a possessory interest in a vehicle and the other by way of the “reasonable-expectation-of-privacy” test under *Katz*); *State v. Jean*, 243 Ariz. 331, 335 ¶ 12 (2018) (emphasis in original) (observing “[t]he [Jones] Court explained that ‘[t]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test’” (quoting *Jones*, 565 U.S. at 409)). “[P]hysical intrusion” of a “property for the purpose of obtaining information” is a “search.” *Jones*, 565 U.S. at 404; *accord Jean*, 243 Ariz. at 335 ¶ 12 (recognizing that “a ‘search’ occurs when the government physically trespasses on ‘persons, houses, papers and effects’ to obtain information”). Case law makes clear that actual ownership of a property is not required for Fourth Amendment purposes. *See, e.g., Jones*, 565 U.S. at 404 n.2 (finding that defendant-target, while not the registered owner of the vehicle, had property rights in the vehicle because he “was ‘the exclusive driver’”).

In this case, Draper, like the driver in *Jones*, is an authorized driver of a vehicle with a possessory interest that is protected by the Fourth Amendment.<sup>2</sup>

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<sup>2</sup> *See* APP-052 (stating the registered owner of the truck is Draper’s father-in law

The action directed by the trial court’s order—authorizing the use of extracting equipment to attach to Draper’s truck to retrieve the GPS data—would be a physical trespass and a search under *Jones*. *See Id.* at 404, 410 (concluding that the act of installing a GPS device on the target’s car for the purpose of obtaining information was a physical trespass protected by the Fourth Amendment).<sup>3</sup>

Because Fourth Amendment protection applies, the search is reasonable only if it is conducted pursuant to a warrant issued upon a finding of probable cause or pursuant to application of an established exception to the warrant requirement. Here, the record is clear: there is no finding of probable cause, no warrant and no application of an established exception to the warrant requirement.

In fact, the record shows law enforcement declined to search Draper’s truck GPS data because there was no probable cause. *See* APP-145-46 [2/8/22 Hearing Transcript]. As the prosecutor informed the court:

I even reached out to the Phoenix Police Department to see if they would be willing to extrapolate this – extract this evidence, judge. And the case agent said that based on their investigation, they would not do that. And, in addition, they -- he did not believe he even had probable cause to do that.

*Id.*

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and Draper is “the main driver and co-insured”).

<sup>3</sup> While Draper also has a reasonable expectation of privacy in his truck’s GPS movement data, Amici focus on his possessory interest because this case is readily resolved by application of the trespass test.

Under these circumstances, the trial court’s order authorizes a search that is unreasonable under the Fourth Amendment. This Court must reverse to prevent the violation of Draper’s federal constitutional right.

### **III. THE TRIAL COURT’S “REASONABLE POSSIBILITY” FINDING DOES NOT SATISFY FOURTH AMENDMENT’S PROBABLE CAUSE STANDARD.**

Despite Draper having raised his Fourth Amendment argument in writing and during oral argument below, the trial court’s order authorizing the search does not address the Fourth Amendment. *See* APP-156-57. Instead, the trial court found only that defendant has “show[n] a reasonable possibility that the information sought includes evidence that would be material to the defense or necessary to cross-examine a witness,” a finding that is in line with the “reasonable possibility standard” set forth in *R.S. v. Thompson* for *in camera* review of privileged mental health records. APP-157.<sup>4</sup> Reasonable possibility that the

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<sup>4</sup> *Thompson* does not apply for several reasons. First, *Thompson* did not address the Fourth Amendment—the critical issue in this case. *See R.S. v. Thompson*, 251 Ariz. 111 (2021). Second, as demonstrated below, *see infra* pp. 9-10, *Thompson*’s reasonable possibility standard falls short of the probable cause standard.

In addition, *Thompson* should be limited to its facts as it rests on a flawed due process analysis that expands criminal defendants’ federal due process rights beyond what the U.S. Supreme Court has recognized. None of the federal case law upon which *Thompson* relies shows defendants’ right to due process entitles them to pretrial discovery from private, non-government witnesses with constitutional and statutory rights to refuse disclosure. *See, e.g., id.* at 117 ¶ 13 (citing the following cases): *Crane v. Kentucky*, 476 U.S. 683, 685-86 (1986) (arising from a court’s order granting the State’s motion “to prevent the defense from introducing any testimony bearing on the circumstances under which the confession was

information sought might be helpful to the defense is constitutionally insufficient to establish probable cause.

The Supreme Court recently held similarly. *See Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018). In *Carpenter*, the government sought access to “wireless carrier cell-site records that would reveal the location of [defendant’s] cell phone whenever it made or received calls”—a type of tracking that shares “many of the qualities of the GPS monitoring” at issue in *Jones*. *Id.* at 2215, 2216. The trial court in *Carpenter* granted the government’s request concluding that it complied with the Stored Communications Act (the Act), which authorizes such discovery upon a showing of “‘specific and articulable facts showing that there are reasonable grounds to believe’ that the records sought ‘are relevant and material to

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obtained”); *California v. Trombetta*, 467 U.S. 479, 482–83 (1984) (arising from defendants’ argument that their breath test results should be suppressed where law enforcement had failed to preserve breath samples to allow them to “impeach the incriminating Intoxilyzer results” at trial); *Chambers v. Mississippi*, 410 U.S. 284, 293–94 (1973) (arising from a court’s denial of defendant’s requests to (i) cross-examine a witness based on a “voucher” rule and (ii) introduce testimony from witnesses who would have supported his defense). *Thompson’s* reliance on *United States v. Nixon*, 418 U.S. 683 (1974), was also misplaced. *Nixon* is concerned White House records and recordings of conversations involving defendants and the President, an unindicted coconspirator. *Nixon* explicitly stated that the case “address[es] only the conflict between the President’s assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.” 418 U.S. at 712 n.19. *Nixon* examined the President’s claim of a “generalized interest in confidentiality,” as opposed to “weighty and legitimate competing interests” such as the privilege against self-incrimination protected by the Fifth Amendment and other “privileges against forced disclosure[] established in the Constitution, by statute, or at common law.” *Id.* at 710, 711.

an ongoing criminal investigation.” *Id.* at 2212 (quoting 18 U.S.C. § 2703(d)). The Supreme Court found “[t]hat showing falls well short of the probable cause required for a warrant.” *Id.* at 2221. The Supreme Court reasoned that probable cause “requires ‘some quantum of individualized suspicion’” that evidence of a crime is present, but the Act’s “‘reasonable grounds’” standard only requires showing that the requested evidence “might be pertinent to an ongoing investigation—a ‘gigantic’ departure from the probable cause rule.” *Id.*

Here, the trial court’s “reasonable possibility” finding is almost identical to the *Carpenter* trial court’s “reasonable grounds” finding. No authority supports a finding of probable cause for a search based on the possibility—even an arguably reasonable one—that a defendant might find relevant and material evidence to support their own investigation of possible defense arguments. Allowing the trial court’s order to withstand Fourth Amendment scrutiny would represent “a ‘gigantic’ departure from the probable cause rule,” *id.*, and make Arizona an outlier in Fourth Amendment jurisprudence.

#### **IV. THE TRIAL COURT’S ORDER VIOLATES DRAPER’S RIGHTS TO BE TREATED WITH FAIRNESS, RESPECT AND DIGNITY.**

Crime victims have state constitutional rights to justice and due process and “[t]o be treated with fairness, respect and dignity . . . throughout the criminal justice process.” Ariz. Const. art. II, § 2.1(A)(1). These rights, among others,

must, at a minimum, include a right to have Arizona courts properly analyze and resolve constitutional arguments raised by victims.

Despite the constitutional magnitude of the protection to which Draper was entitled and the clarity of process necessary, the trial court issued an order authorizing a search of his vehicle without a finding of probable cause (or even mentioning the need for probable cause), and without addressing the Fourth Amendment. Such an outcome gives the defendant unprecedented power to conduct a state sanctioned fishing expedition<sup>5</sup> of Draper's vehicle without giving even the slightest consideration to the Fourth Amendment or to Draper's separate state constitutional rights. The court's outcome cannot be considered just; nor does it give Draper any process due him as a victim of crime.

The trial court's failure to analyze Draper's right to be free from unreasonable search and seizure, even though the issue was fully briefed and addressed during oral argument, is an affront to Draper's dignity and certainly is not fair treatment. It is unimaginable that an accused person's claim to Fourth Amendment protection would have been similarly ignored. The trial court's

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<sup>5</sup> The requested search is clearly a fishing expedition. Draper, the surviving victim of his brother's homicide, has been investigated and cleared by the police. The police interviewed the witness who observed Draper asleep in the parking lot; the police searched Mr. Draper's vehicle; and the trial court was aware that the police do not believe they have probable cause to search the truck's GPS data. *See, e.g.*, APP-038, 145-46.

silence on Draper’s Fourth Amendment rights while issuing an order authorizing a search of Draper’s vehicle violates his state constitutional right to be treated with fairness, dignity and respect.

### **CONCLUSION**

Protection from government overreach is a fundamental value of this country, and crime victims—no less than any other person—must be afforded full protection under the law. *Cf. State v. Maestas*, 244 Ariz. 9, 16 ¶ 30 (2018) (Bolick, J., concurring) (“When the judiciary fails to interpret and enforce constitutional rights and limits, it shrinks from its central duty and drains the Constitution of its intended meaning.”). In this case, Draper’s assertion of the right to be free from an unreasonable search is consistent with the fundamental values protected by the United States Constitution as well as his right to be treated with fairness, respect and dignity guaranteed by the Arizona Constitution. For the reasons stated above, the Court must grant Draper’s petition and reverse.



## **CERTIFICATE OF SERVICE**

Copies of the Brief of Amici Curiae National Crime Victim Law Institute and the Arizona Crime Victim Rights Law Group in Support of Petition for Review were e-mailed this 19th day of August, 2022 to:

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