NO. 102134-8

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MALCOLM MCGEE,

Petitioner.

RESPONDENT'S REPLY TO AMICUS CURIAE

Treated as Petitioner's Answer to Amicus Curiae

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Other Authorities

A. ISSUES PRESENTED

1. Have amici failed to establish that a narrow attenuation exception to the exclusionary rule based on an unforeseeable superseding event would incentivize police misconduct?

2. Can the State's proposed application of attenuation co-exist with the analytically distinct independent source doctrine?

B. STATEMENT OF THE CASE

The State continues to rely on the statement of facts contained in its prior pleadings. The State notes, however, that amici's statement of facts incorrectly asserts that Ayson's body was found "[s]everal days" after Detective Hawley's June 3, 2017, detention of McGee. Brief of Amici at 4. Ayson's body was discovered over a month later, on July 11, 2017. RP 1171 (4/5/2021); RP 1431-33 (4/6/2021).

C. ARGUMENT

1. RULING FOR THE STATE WOULD NOT INCENTIVIZE POLICE MISCONDUCT.

Amici claim reversing the Court of Appeals would create a "weak" exclusionary rule that would embolden police officers to illegally detain passersby at random and interrogate them with no legal basis to propagate a "Big Brother-like database," cataloguing personal details for the benefit of hypothetical future prosecutions that would disproportionately impact people of color. Brief of Amici at 10. This argument misstates the scope and impact of the State's proposed rule.

The State's proposed rule is a narrow application of pre-existing doctrine, not a license to arbitrarily detain anyone police come across. There is simply no reason to suspect that a ruling for the State would have any impact on broader policing patterns.

The State does not dispute that Black and Latinx citizens are detained at higher rates than their White counterparts, but

the reasons behind this phenomenon are complex, and often have little to do with conscious biases of individual officers. See, generally, Johann Gaebler, et al, Police stop Black drivers more often than Whites. We found out why., The Washington Post (September 15, 2022) (finding disparity in traffic stops attributable to geographic areas in which officers were assigned to patrol).

Amici's statistics provide little insight for this case because they fail to distinguish between lawful and unlawful detentions. Brief of Amici at 15. The attenuation doctrine operates only in cases where evidence is found during an *illegal* search. But much information is obtained in *lawful* stops, and thus will not be impacted by this case one way or the other.

Moreover, to the extent amici assert that applying attenuation without requiring new evidence would encourage illegal detentions, this belief is unsupported. In fact, the available data suggests that "[a]fter nearly a century of study, there is still no reliable evidence that the threat of exclusion of

evidence deters bad cops in the field from committing Fourth Amendment violations." Andrew Carter, Good Cops, Bad Cops, and the Exclusionary Rule, 23 U. Pa. J. Const. L. 239, 242 (April 2021).

The limitation on the attenuation doctrine at issue in this case is the burdensome requirement of a legally superseding cause, which the state's proposed rule does not "weaken." Given this requirement, and the fact that it assumes the attenuating event was unforeseeable, no rational police officer would use the attenuation doctrine as an excuse to illegally mine data from the population.

The odds that any particular detention will produce associative evidence useful in a future prosecution for an as-yet uncommitted crime are infinitesimal. See U.S. v. Scios, 590 F.2d 956, 989 (D.C. Cir. 1978) ("the discovery of a potential witness' name is much less likely than the discovery of tangible objects to eventuate in useful evidence…"). Weighed against this distant possibility are the much more likely consequences

that: (1) evidence of a more immediate crime will be found but will be rendered inadmissible; (2) the officer and their department will be exposed to civil (or even criminal) liability; or (3) a court will find the strict requirements of attenuation unmet even if a future crime does occur. An unforeseeable event creates no incentive for systemic misconduct. See Murray v. U.S., 487 U.S. 533, 539-40, 108 S. Ct. 2529, 101 L.Ed.2d 472 (1988) (in independent source context: "[w]e see the incentives differently. An officer with probable cause…would be foolish to enter the premises first in an unlawful manner.").

Contrary to amici's characterization, chronology is not the defining feature of the State's position. Brief of App. at 22. Unlawfully obtained evidence will not always be admissible simply because it pertains to a future crime. The State simply asserts that the primary requirement of attenuation is the presence of a superseding event, which may occur either before or after the discovery of evidence.

2. THE INDEPENDENT SOURCE DOCTRINE IS IRRELEVANT TO THE STATE'S PROPOSED APPLICATION OF ATTENUATION.

Amici claim that authorizing attenuation without requiring the discovery of new evidence "would eviscerate the independent source doctrine and its protections of the right to privacy." Brief of Amici at 20. This assertion is incorrect; independent source and attenuation as applied in this case can easily coexist.

Otherwise tainted evidence is admissible if it is "ultimately [] obtained pursuant to…lawful means independent of the unlawful action." State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). An independent source is rehabilitative unless the "illegally obtained information affected (1) the magistrate's decision to issue the warrant or (2) the decision of the state agents to seek the warrant." State v. Betancourth, 190 Wn.2d 357, 365, 413 P.3d 566 (2018).

Amici claim the State's reading of attenuation would render the second independent source prong "obsolete" because it "no longer matters if the illegally-obtained information influenced the State's decision to seek the warrant." Brief of Amici at 20-21. This argument illogically conflates attenuation with independent source. Attenuation requires an affirmative condition – the presence of an unforeseeable superseding event. Independent source, by contrast, requires only negative conditions – that the tainted evidence did not influence the decision-making process. Thus, independent source is based on the subjective intent of law enforcement, whereas the applicability of attenuation is entirely outside of police control.

Most attenuation cases will not implicate independent source, and vice versa. For example, the independent source doctrine did not apply in this case because there was no legally independent source for the information discovered by Detective Hawley. Likewise, the attenuation doctrine as proposed here

would not have applied in a case like Betancourth because there was no superseding event.

Amici incorrectly restates the State's position as "two wrongs make a right." But this seemingly clever rhetorical quip is misplaced, as it imputes a moral judgment where none exists. Attenuation applies not because the State's prior misconduct is morally redeemed, but because the exclusionary rule is no longer sound policy when the use of evidence has been entirely disconnected from the unlawful police conduct. Tyner v. State Dept. of Social and Health Services, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000).

D. CONCLUSION

The State respectfully requests this Court reverse the Court of Appeals and reinstate McGee's murder conviction.

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DATED this 30th day of January, 2024.

Respectfully submitted,

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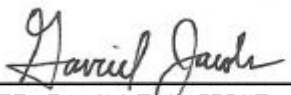
By: 
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