No. 99062-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

REECE BOWMAN,

Respondent/Cross-Petitioner.

BRIEF OF WACDL, ACLU-WA, WDA AND KING COUNTY DPD AS AMICI CURIAE IN SUPPORT OF PETITIONER

David T. Sulzbacher, #51555
david@sulzbacherlaw.com
Attorney for Washington Ass'n of Criminal Defense Lawyers
1037 NE 65th Street, # 80304
Seattle, WA 98115
Ph: (206) 734-4615

Mark Middaugh, #51425
mark@middaughlaw.com
Washington Ass'n of Criminal Defense Lawyers Amicus Comm.
600 University Street, Suite 3020
Seattle, WA 98101
Ph: (206) 919-4269

La Rond Baker, #43610
lbaker@kingcounty.gov
King County Dep't of Public Defense
710 2nd Ave Ste 200
Seattle, WA 98104-1703
Ph: (206) 296-7662

Nancy Talner, #11196
talner@aclu-wa.org
American Civil Liberties Union of Washington Foundation
P.O. Box 2728
Seattle, WA 98111
Ph: (206) 624-2184

Alexandria Hohman, #44104
ali@defensenet.org
Washington Defender Ass'n
110 Prefontaine Pl. S., Suite 610
Seattle, WA 98104
Ph: (206) 623-4321

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICI 1

II. ISSUES OF CONCERN TO AMICI 1

III. ARGUMENTS AND AUTHORITY 1

A. THE COURT'S DECISION IN *HINTON* CONTROLS AND MANDATES SUPPRESSION OF THE UNLAWFULLY OBTAINED EVIDENCE AGAINST BOWMAN 3

1. Under Hinton, it was reasonable for Bowman to expect privacy in his text messages he reasonably believed were sent to his associate Schabell. 5

2. Schabell's consent to search his phone does not materially distinguish *Hinton* 9

3. Agent Dkane's use of his own phone does not materially distinguish *Hinton* because the right to privacy is not confined to a protected places analysis 10

B. THE WARRANT REQUIREMENT IS A FUNDAMENTAL PROTECTION AGAINST GOVERNMENTAL INVASIONS OF PRIVACY, NOT A MERE ADMINISTRATIVE INCONVENIENCE. 13

C. WEAKENING THE WARRANT REQUIREMENT AS ADVOCATED BY THE STATE WOULD LEAD TO INEVITABLE ABUSES, INCLUDING SYSTEMATIC OPPRESSION OF PEOPLE OF COLOR 15

IV. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886) .. 14

Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206, 2213 (2018) 11

City of Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988)..... 14

Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971) 14

Missouri v. McNeely, 569 U. S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) 15

Riley v. California, 573 U.S. 373, 134 S.Ct. 2473 (2014)..... 6, 13, 14, 15

Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)... 14

State v. Blake, No. 96873-0, slip op., 481 P.3d 521 (Wash. Feb. 25, 2021) 16, 17

State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990)..... 12

State v. Butterworth, 48 Wn. App. 152, 737 P.2d 1297 (1987)..... 13

State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018)..... 18

State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) 6

State v. Hinton, 179 Wn.2d 862, 319 P.3d 9 (2014) ..... passim

State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007)..... 12

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999) 14

State v. Muhammad, 194 Wn.2d 577, 451 P.3d 1060 (2019)..... 6, 7

State v. Myrick, 102 Wn.2d 506, 688 P.2d 151 (1984)..... 11, 12

State v. Reichenbach, 153 Wn. 2d 126, 101 P.2d 80 (2004) 10

State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994) 12

Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981) 15

United States v. Jacobsen, 466 U.S. 109, 104 S. Ct. 1652 (1984)..... 11

United States v. Jones, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) 4, 11

Utah v. Strieff, ___ U.S. ___, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016) 18

Other Sources

Beckett, Katherine, *Race and Drug Law Enforcement in Seattle: A Report for the American Civil Liberties Union and The Defender Association* (Sept. 2008) 18

Brenan, Megan, *Amid Pandemic, Confidence in Key U.S. Institutions Surges*, Gallup (Aug. 12, 2020)..... 16

Liu, X., et al., *Evaluation of Secure Messaging Applications for a Health Care System: A Case Study*, Appl Clin Inform., vol. 10(1): 140–150 (Jan. 2019) 2

Newport, F., *The New Era of Communication Among Americans*, Gallup (Nov. 10, 2014) 1

Pew Research Center, *America's New Drug Policy Landscape: Two-Thirds Favor Treatment, Not Jail, for Use of Heroin, Cocaine* (Apr. 2, 2014)..... 16

Research Working Grp. of Task Force on Race & Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U.L. Rev. 623 (2012) 18

Washington Supreme Court Letter to Members of the Judiciary and the Legal Community (June 4, 2020) 17

I. IDENTITY AND INTEREST OF AMICI

Amici Curiae Washington Association of Criminal Defense Lawyers (WACDL), American Civil Liberties Union of Washington Foundation (ACLU-WA), Washington Defenders Association (WDA), and King County Department of Public Defense (DPD) are all involved in the criminal justice system in various capacities and share a commitment to promoting its fair and just administration. The identities and interests of *amici* are set forth more fully in the Motion for Leave to File *Amici Curiae* Brief filed herewith and incorporated by reference.

II. ISSUES OF CONCERN TO AMICI

Whether the constitutional rights to privacy and to be free from unreasonable searches and seizures require law enforcement to obtain a warrant, or rely on a recognized exception to the warrant requirement, before engaging in electronic communication with an individual while impersonating that individual's family members, friends, or associates for the purpose of discovering evidence of a crime?

III. ARGUMENTS AND AUTHORITY

Text message communication is the most prevalent form of communication for Americans under the age of 50.[1] Text messaging is

[1] Newport, F., *The New Era of Communication Among Americans*, Gallup (Nov. 10, 2014), available at https://news.gallup.com/poll/179288/new-era-communication-americans.aspx.

frequently used to transmit sensitive private information, including healthcare information.[2] Law enforcement's impersonation of Mike Schabell (Schabell), an associate of Reece Bowman (Bowman) to elicit incriminating statements intruded into Bowman's private affairs. Because law enforcement failed to obtain a warrant for this investigation, and no exception to the warrant requirement applies, the Court of Appeals correctly held that the investigation violated Bowman's rights to privacy.

Additionally, public policy considerations weigh heavily in favor of steadfastly applying the warrant requirement to investigations such as that employed against Bowman. Contrary to the State's representations, the warrant requirement, a fundamental protection against unreasonable governmental intrusion into individuals' private lives, does not endanger public safety and does not unduly hamper investigation into serious crime. If exigent circumstances or another recognized exception to the warrant requirement are present, the State may proceed with its investigation. If no exception applies, the State must simply get a warrant.

On the other side of the ledger, law enforcement agencies throughout the country have repeatedly demonstrated that they will abuse policies that encourage or authorize warrantless invasions of privacy in

[2] See Liu, X., et al., *Evaluation of Secure Messaging Applications for a Health Care System: A Case Study*, 10(1) Appl Clin Inform. 140-150 (Jan. 2019) ("The use of text messaging in clinical care has become ubiquitous.")

non-exigent circumstances, and that minority communities overwhelmingly bear the brunt of such systemic abuse.

A. The Court's Decision in *Hinton* Controls and Mandates Suppression of the Unlawfully Obtained Evidence Against Bowman.

In *State v. Hinton*, this Court established that a defendant's constitutional rights are violated when police, impersonating an associate of the defendant without a warrant or applicable exception to the warrant requirement, elicit and intercept the defendant's private text messages. 179 Wn.2d 862, 865-66, 319 P.3d 9 (2014). Because the Department of Homeland Security supervisory agent (Agent Dkane) involved in Bowman's case, like the detective in *Hinton*, used a subterfuge specifically designed to ensure that Bowman believed his communications were private, the facts in Bowman's case are not materially distinguishable from the facts in *Hinton* and require the same result.

In *Hinton*, the defendant reasonably believed he was sending text messages to his associate, Daniel Lee. *Id.* at 865-66. Unbeknownst to Hinton, police previously arrested Lee for heroin possession and seized his cell phone. *Id.* After seizing the phone, a detective read the incoming text messages appearing on the notification screen, including messages from Hinton. *Id*. The detective responded to the messages while impersonating Lee and arranged a drug transaction. *Id*. The detective met Hinton at the

time and place agreed upon for the transaction and arrested the defendant. *Id*.

Because text messages "expose[] a 'wealth of detail about [a person's] familial, political, professional, religious, and sexual associations,'" and because Hinton reasonably believed he was communicating with his associate, the Court held that the government's impersonation of Hinton's associate, without a warrant or applicable exception to the warrant requirement, violated Hinton's constitutional privacy rights. *Hinton*, 179 Wn.2d at 869-70 (quoting *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 955, 181 L.Ed.2d 911 (2012) (Sotomayor, J., concurring) (discussing GPS monitoring)). The Court declared that "[f]orcing citizens to assume the risk that the government will confiscate and browse their associates' cell phones tips the balance too far in favor of law enforcement at the expense of the right to privacy." *Id.* at 877.

The analysis in *Hinton* turned on whether the defendant's text messages were private affairs. Bowman's messages to someone he believed to be his friend Schabell – just like Hinton's messages to his associate Lee – were private. Accordingly, *Hinton* controls and mandates the same result in Bowman's case.

The State nonetheless seeks to distinguish the present case from *Hinton* because "(1) a person [Schabell] voluntarily provided their device to law enforcement knowing it would be used for a criminal investigation; and (2) a detective [Agent Dkane] then used their own phone to contact the defendant." Pet. for Review at 7. These distinctions, however, are not material to the Article I, section 7 analysis conducted in *Hinton*, and do not justify reaching the opposite result here for three reasons (1) the dispositive inquiry is Bowman's reasonable belief that he was engaging in private communications, not the means through which law enforcement obtained his contact information, (2) Schabell did not consent to being impersonated, even if he could so consent, and (3) Agent Dkane's use of his own phone is immaterial to the constitutional analysis because this Court is analyzing Bowman's privacy rights, not the rights of anyone else.

1. Under *Hinton*, it was reasonable for Bowman to expect privacy in his text messages he reasonably believed were sent to his associate Schabell.

Bowman reasonably believed that his communications with his associate would be private to the same degree and extent as Hinton. In *Hinton*, the Court framed the issue presented as "[w]hether individuals have an expectation of privacy in the content of their text messages…" *Hinton*, 179 Wn.2d at 867. The analysis of that issue, in turn, considers the "'nature and extent of the information which may be obtained as a result

of the government conduct' and … the historical treatment of the interest asserted.'" *Id.* at 869 (citations omitted).

This Court and the United States Supreme Court have repeatedly emphasized the weighty privacy interests implicated by government interception of individuals' electronic communications and other data. *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) (noting Washington's "long history of extending strong protections to telephonic and other electronic communications."); *Riley v. California*, 573 U.S. 373, 403, 134 S.Ct. 2473, 2485 (2014) (requiring a warrant to search a cell phone because "a cell phone search would typically expose to the government far more than the most exhaustive search of a house" given the vast array of data that individuals can and do store on their cell phones). Text messages and other cell phone data "can encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that have historically been strongly protected under Washington law…" *Hinton*, 179 Wn.2d at 869-70.

Recognizing the strong privacy interest in electronic data stored on and transmitted from cellular phones, the Court has deemed a one-time "ping" of the defendant's cell phone used to ascertain his location to constitute a search and intrusion into the defendant's private affairs. *State v. Muhammad*, 194 Wn.2d 577, 586, 451 P.3d 1060 (2019). Despite the

comparatively limited nature of the intrusion, the Court held "[t]he ability of law enforcement to pinpoint any cell phone user's location at any moment would intrude on privacy in the same way as allowing police to listen in on an ongoing phone call or to peruse a text message conversation." *Id*.

The one-time ping, held to constitute a privacy intrusion and search, is if anything less intrusive than Agent Dkane's solicitation and reading of text messages that Bowman reasonably believed he was sending to Schabell. Indeed, in *Muhammad*, the State argued in its briefing that "[t]he limited information obtained from the ping in this case … distinguishes it from cases in which this Court has held that the *contents* of cell phones are private affairs protected by [A]rticle I, section 7" because "the location of a cell phone at a single point in time reveals no intimate details of a person's life." Supp. Br. Of Resp't at 5, *Muhammad*, 194 Wn.2d 577 (No. 9609-1)[3] (emphasis in original).

Applying the State's own reasoning here, Bowman had a reasonable belief in the privacy in his text messages that exceeds the privacy interest deemed constitutionally protected in *Muhammad* because

[3] Available at https://www.courts.wa.gov/content/Briefs/A08/960909%20Resp's%20Supp%20Brief.pdf (accessed on Jan. 25, 2021).

the contents of Bowman's electronic communications with his associate are the sort of data likely to reveal intimate details of a person's life.

Moreover, the fact that Agent Dkane tricked Bowman into sending him private information cannot be considered voluntary. The *Hinton* Court stated:

> Unlike a phone call, where a caller hears the recipient's voice and has the opportunity to detect deception, there was no indication that anyone other than Lee possessed the phone, and Hinton reasonably believed he was disclosing information to his known contact. The disclosure of information to a stranger, Detective Sawyer, cannot be considered voluntary.

Id. at 876.

In this case, like *Hinton*, Agent Dkane's actions were specifically calculated to maintain Bowman's reasonable belief that he was continuing to communicate with Schabell, and the text messages sent by Bowman were not voluntary disclosures. Agent Dkane refused Bowman's request to speak over the phone, deceiving Bowman with the lie that he was unavailable to speak because he was "with my old lady." CP 4, 100. Agent Dkane also provided a reasonable explanation for responding from a different number (his old phone broke so he was using a "burner") and referenced an interaction between Bowman and Schabell earlier that day. This subterfuge deprived Bowman of the opportunity to detect deception

and left Bowman with the reasonable belief that he was communicating only with a known contact.

These basic facts, present in both this case and *Hinton*, formed the cornerstone of the *Hinton* decision, and mandate the same result here.

2. Schabell's consent to search his phone does not materially distinguish *Hinton*.

The State attempts to distinguish this case from *Hinton* on the grounds that Schabell consented to a search of his phone. This is a distinction without a difference. This Court rejected a nearly-identical prosecution theory in *Hinton*, and should do so again here.

The State argued in *Hinton* that law enforcement's initial access to Hinton's text messages was lawful and justified the actions that followed. *Hinton*, 179 Wn.2d at 875. In *Hinton*, the State relied on the plain view doctrine, as Hinton's initial texts appeared on the notification screen of Lee's phone which required no manipulation of the device to be seen. *Id*. Addressing this argument, the *Hinton* Court concluded that, even if the initial texts observed were in plain view, "describing the subsequent text messages as 'in plain view' denies the scope and extent of the detective's intrusive conduct, which involved operating the phone and posing as Lee to send text messages back and forth with Hinton." *Hinton*, 179 Wn.2d at 875.

Likewise, in Bowman's case, even if Schabell gave consent to access his phone, describing the subsequent text messages as having been obtained pursuant to Schabell's consent, which involved posing as Schabell to send text messages back and forth with Bowman, denies the scope and extent of Agent Dkane's intrusive conduct. *See State v. Reichenbach*, 153 Wn. 2d 126, 133, 101 P.2d 80 (2004) ("A consensual search may go no further than the limits for which the consent was given."). In both cases, the existence of a potential legal justification to access the phone at the outset, consent and plain view, respectively, did not authorize law enforcement to thereafter impersonate the phone's owner in communications with the owner's friends, family members, and associates.[4]

3. Agent Dkane's use of his own phone does not materially distinguish *Hinton* because the right to privacy is not confined to a protected places analysis.

The State's argument that Agent Dkane's use of his own phone materially distinguishes Bowman's case from *Hinton* is based on a "protected places" or "common law trespass" understanding of the

[4] The State further challenges the Court of Appeals questioning of whether Schabell had the authority to consent to being impersonated for the purpose of obtaining incriminating text messages from Bowman. Pet. for Review at 8. *Amici* submit that the Court of Appeals correctly concluded that Schabell lacked authority to consent to being impersonated by law enforcement because he was not a party to the ensuing communications with Bowman. However, this issue is purely hypothetical and need not be addressed in this case because, as the Court of Appeals concluded, the record does not show that Schabell provided such consent.

constitutional rights at issue. Traditionally, the Supreme Court viewed search and seizure under the Fourth Amendment through a lens of "common-law trespass." *See Jones*, 565 U.S. at 405. However, the Court has recognized that the Fourth Amendment protects people, not just places. When an individual "seeks to preserve something as private" and that expectation is "one that society is prepared to recognize as reasonable." *Carpenter v. United States*, 585 U.S. ___, 138 S. Ct. 2206, 2213 (2018) (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652 (1984).

As recognized in *Hinton*, "[t]he right to privacy under the state constitution is not confined to "a 'protected places' analysis," or 'to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives.'" *Hinton*, 179 Wn.2d at 876 (quoting *State v. Myrick*, 102 Wn.2d 506, 513, 688 P.2d 151 (1984)). When analyzing Article I, section 7, "the inquiry focuses on 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" *State v. Young*,

123 Wn.2d 173, 181, 867 P.2d 593 (1994) (quoting *Myrick*, 102 Wn.2d at 511).

The State's argument that this case can be distinguished from *Hinton* on the grounds that Agent Dkane used his own phone thus fails. As this Court squarely held in *Hinton*, the Washington Constitution does not countenance the argument that a defendant has "lost his privacy interest in the text message communications because he sent them to a device over which he had no control." *Hinton*, 179 Wn.2d at 873. Law enforcement took proactive steps to ensure that Bowman's text messages would end up on the phone of a third-party, Agent Dkane.

Indeed, this Court has consistently applied the private affairs analysis to reject attempts by the State to put the location of the evidence at the forefront of the constitutional analysis, instead consistently relying upon the privacy interests of our State's citizens as the touchstone. *See State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990) (holding that although someone placing garbage can expect scavengers to snoop through it, "[p]eople reasonably believe that police will not indiscriminately rummage through their trash bags to discover their personal effects"); *State v. Jorden*, 160 Wn.2d 121, 156 P.3d 893 (2007) (inspection of a motel registry constitutes an intrusion into private affairs of motel guests); *State v. Miles*, 160 Wn.2d 236, 249, 156 P.3d 864 (2007)

(bank records are private affairs as they "potentially reveal[] sensitive information"); *State v. Butterworth*, 48 Wn. App. 152, 155, 737 P.2d 1297 (1987) (unpublished telephone listing also a private affair). In accord with this line of cases, Bowman reasonably believed that the communications he was sending to a friend would be private, regardless of Agent Dkane's subterfuge to redirect Bowman's messages from one device over which he had no control to another.

B. The Warrant Requirement is a Fundamental Protection Against Governmental Invasions of Privacy, Not a Mere Administrative Inconvenience.

The State asserts that it requires the authority to impersonate any individual whose phone contacts, text messages, or emails they are able to access, without a warrant, for the purpose of gathering evidence against that individual's friends, family members, and associates in order to protect the public. To the extent such investigations are necessary to thwart or investigate crime, the answer to the question of what police must do before intruding on the private affairs of individuals in this manner is "simple - get a warrant." *Riley*, 134 S Ct. at 2495. The Court of Appeals holding in this case is not that the State is disallowed from employing ruses of this type; "it is instead that a warrant is generally required before such a search…" *Id*. at 2493.

The State's suggestion that the warrant requirement is an onerous burden that should be discarded in this context for the sake of public safety is abhorrent to basic constitutional principles, the purpose of which are to guard against the abuses that inevitably follow from placing "the liberty of every man in the hands of every petty officer." *Stanford v. Texas*, 379 U.S. 476, 481-82, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965) (quoting *Boyd v. United States*, 116 U.S. 616, 625, 6 S.Ct. 524, 29 L.Ed. 746 (1886)). The Fourth Amendment was a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley*, 134 S Ct. at 2495. "The warrant requirement is especially important under article I, section 7, of the Washington Constitution as it is the warrant which provides the 'authority of law' referenced therein." *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988)).

In Bowman's case, there was no concern that obtaining a warrant would "be a needless inconvenience [or] dangerous—to the evidence or to the police themselves." *Coolidge v. New Hampshire*, 403 U.S. 443, 468, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971) (plurality portion). Under circumstances such as those presented here, "the inconvenience incurred

by the police [in obtaining a warrant] is simply not that significant" if probable cause exists. *Steagald v. United States*, 451 U.S. 204, 216, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981).

Additionally, as the Supreme Court has recognized, the same technological advances that have presented novel search and seizure issues to the courts "have, in addition, made the process of obtaining a warrant itself more efficient." *Riley*, 134 S. Ct. at 2493 (citing *Missouri v. McNeely*, 569 U. S. 141, 133 S. Ct. 1552, 1573, 185 L. Ed. 2d 696, 720 (2013)). It is therefore prudent to err on the side of rigorous enforcement of the warrant requirement in the face of ever-increasing technological means by which the government can intrude into the private affairs of individuals. *See Riley*, 134 S.Ct. at 2485 (holding that obtaining a warrant to search data on a cell phone should be the rule because "data on the phone can endanger no one").

C. Weakening the Warrant Requirement as Advocated by the State Would Lead to Inevitable Abuses, Including Systematic Oppression of People of Color.

Providing the State with authority to conduct investigations predicated on electronic ruses and subterfuge without a warrant or a recognized exception to the warrant requirement would have at best a *de minimus* impact on public safety while greatly curtailing civil liberties and further eroding the level of trust in law enforcement agencies, which

already fell to a record low in the past year. *See* Brenan, Megan, *Amid Pandemic, Confidence in Key U.S. Institutions Surges*, Gallup (Aug. 12, 2020).[5]

In recent years, the type of governmental action at issue in this case, namely, the expenditure of federal and state resources on surveilling, arresting, and incarcerating (disproportionately minority) Americans for victimless crimes in the name of the expensive policy failure known as the "War on Drugs" has become increasingly unpopular. *See State v. Blake*, No. 96873-0, slip op. at *26, 481 P.3d 521, 533 (Wash. Feb. 25, 2021)[6] ("The drug statute that they interpreted has affected thousands upon thousands of lives, and its impact has hit young men of color especially hard."); Pew Research Center, *America's New Drug Policy Landscape: Two-Thirds Favor Treatment, Not Jail, for Use of Heroin, Cocaine* (Apr. 2, 2014)[7] ("The public appears ready for a truce in the long-running war on drugs. […] Just 26% think the government's focus should be on prosecuting users of […] hard drugs.").

Implicitly recognizing the deep unpopularity of its actions in this case, the State argues that it nonetheless must be permitted to engage in

[5] Available at https://news.gallup.com/poll/317135/amid-pandemic-confidence-key-institutions-surges.aspx (accessed on Jan. 24, 2021).
[6] Available at https://www.courts.wa.gov/opinions/pdf/968730.pdf.
[7] Available at https://www.pewresearch.org/wp-content/uploads/sites/4/legacy-pdf/04-02-14-Drug-Policy-Release.pdf (accessed on Jan. 24, 2021)

the warrantless impersonation of arrestees because such authority could theoretically be used to prosecute crimes that the public actually wants to see prosecuted, such as child rape and murder-for-hire. Pet. for Review at 9-10. But history illustrates that governmental intrusions into citizen's private affairs of the nature conducted in Bowman's case inevitably produce many problematic outcomes for society including "[t]he systemic oppression of [B]lack Americans…" and other marginalized populations. *See Washington Supreme Court Letter to Members of the Judiciary and the Legal Community* (June 4, 2020)[8] (denouncing "racialized policing and the overrepresentation of [B]lack Americans in every stage of our criminal and juvenile justice systems" and "[t]he systemic oppression of [B]lack Americans" and calling on the legal community to "work together to eradicate racism").

Recently, in striking down Washington's strict liability drug possession statute, this Court acknowledged that "disproportionate minority representation in Washington's prisons is largely 'explained by facially neutral policies that have racially disparate effects…" *Blake*, No. 96873-0, slip op. at *14, n.10, 481 P.3d 521 (quoting Research Working Grp. of Task Force on Race & Criminal Justice Sys., *Preliminary Report*

[8] Available at http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf (accessed on Jan. 24, 2021).

on Race and Washington's Criminal Justice System, 35 Seattle U.L. Rev. 623, 627-28, 651-53 (2012)); *see Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056, 2070, 195 L. Ed. 2d 400 (2016) (Sotomayor, J., dissenting) ("[t]he white defendant in this case shows that anyone's dignity can be violated" by unconstitutional searches, "[b]ut it is no secret that people of color are disproportionate victims of this type of scrutiny.")

The ruling the State seeks in this case is precisely the type of facially race-neutral ruling that government agencies, including law enforcement groups in the Washington, have historically abused to systematically oppress people of color, and there is no reason to believe a different result would occur in this instance. *See State v. Gregory*, 192 Wn.2d 1, 5, 427 P.3d 621 (2018) (plurality opinion) (holding Washington's death penalty provisions unconstitutional as applied because the State executed prisoners in an arbitrary and racially biased manner over a period of decades); *see also* Beckett, Katherine, *Race and Drug Law Enforcement in Seattle: A Report for the American Civil Liberties Union and The Defender Association* (Sept. 2008)[9] (finding that Seattle arrests Black residents at a rate 13.6 times higher than whites, despite similar rates of drug activity between the two groups).

[9] Available at https://lsj.washington.edu/research/publications/katherine-beckett-2008-race-and-drug-law-enforcement-seattle (accessed on Jan. 24, 2021).

Given the privacy ramifications of creating an environment in which individuals, particularly in oppressed and marginalized communities, would have to remain ever wary that the government is impersonating their friends, family members, and associates when communicating via electronic means, requiring the government to establish probable cause before engaging in this course of conduct is not an onerous burden. To the contrary, it is a fundamental constitutional mandate, crucial for enforcement of the rights to be free of unreasonable governmental intrusion into private affairs.

IV. CONCLUSION

For the foregoing reasons, the Court of Appeals correctly held that the State's impersonation of Bowman's associate constituted a warrantless intrusion into Bowman's private affairs to which no exception to the warrant requirement applies. *Amici* respectfully request that the Court of Appeals decision be affirmed.

Respectfully submitted this 5th day of April, 2021.

/s/ Nancy Talner
Nancy Talner, WSBA #11196
Attorney for Amicus Curiae American Civil Liberties Union of Washington

/s/ David T. Sulzbacher
David T. Sulzbacher, WSBA #51555

/s/ Mark Middaugh
Mark Middaugh, WSBA #51425

Attorneys for Amicus Curiae Washington Association of Criminal Defense Lawyers

/s/ Alexandria Hohman
Alexandria Hohman, WSBA #44104

Attorney for Amicus Curiae Washington Defenders Association

/s/ La Rond Baker
La Rond Baker, WSBA #44104

Attorney for Amicus Curiae King County Department of Public Defense

I certify that on the 5th day of April, 2021, I caused a true and correct copy of this document to be served on all parties by e-filing this document through the Washington State Appellate Courts' Secure Portal.

s/Mark Middaugh

MIDDAUGH LAW, PLLC

April 05, 2021 - 9:59 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99062-0
Appellate Court Case Title:	State of Washington v. Reece William Bowman

The following documents have been uploaded:

- 990620_Briefs_20210405082424SC823618_4269.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Bowman - Amicus Brief.pdf
- 990620_Motion_20210405082424SC823618_7976.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Bowman - Motion to File.pdf

A copy of the uploaded files will be sent to:

- ali@defensenet.org
- david@sulzbacherlaw.com
- dsulzbac@gmail.com
- gavriel.jacobs@kingcounty.gov
- lbaker@kingcounty.gov
- mark@middaughlaw.com
- paoappellateunitmail@kingcounty.gov
- richard@washapp.org
- talner@aclu-wa.org
- tweaver@tomweaverlaw.com
- wapofficemail@washapp.org

Comments:

Sender Name: Mark Middaugh - Email: mark@middaughlaw.com
Address:
600 UNIVERSITY ST STE 3020
SEATTLE, WA, 98101-4105
Phone: 206-919-4269

Note: The Filing Id is 20210405082424SC823618