No. 93923-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner,

v.

JOHN GARRETT SMITH, Respondent,

MEMORANDUM OF AMICUS WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

OFFICE OF THE AUBURN CITY ATTORNEY

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I. INTRODUCTION

In *State v. Smith,* 196 Wn. App. 224, 382 P.3d 721 (Div. II, 2016), the Court of Appeals, found an inadvertent recording of a series of shouts, screams, and a statement that Mr. Smith would kill Ms. Smith was made in violation of RCW 9.73.030, and, thus, vacated Mr. Smith's conviction. The decision was based on a unilateral review of the facts, without the aid of briefing or prepared argument by the parties, and in contravention of prior decisions by this Court and the Court of Appeals. More importantly, the Court of Appeals' decision has real consequences for public safety and privacy. For the reasons stated below, this Court should grant review, vacate the decision of the Court of Appeals and affirm the trial court decision.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association of Municipal Attorneys (WSAMA) is a nonprofit Washington corporation that provides education and training in the area of municipal and criminal law to attorneys who represent cities and towns and prosecute misdemeanor crime. WSAMA also works to advance knowledge of criminal law at the state-level to assist judicial and legislative decision-making that impacts effective law enforcement and prosecution of crime for the benefit of residents throughout the State of Washington. This brief of *amicus curiae* is provided by WSAMA in furtherance of these purposes.

WSAMA requests that this Court grant review of the decision of the Court of Appeals, Division II, vacate Division II's decision, and remand the matter for further proceedings. WSAMA makes its request because: (1) the

Court of Appeals deprived the State of a meaningful opportunity to be heard, thereby implicating fundamental fairness; (2) the decision of the Court of Appeals conflicts with prior decisions of the Supreme Court and the Court of Appeals; and (3) the decision of the Court of Appeals negatively impacts the public in important ways.

III. STATEMENT OF FACTS

The Washington State Association of Municipal Attorneys adopts the Statement of Facts provided by the State of Washington in its Petition for Review. *Petition for Review,* 2-10.

IV. ARGUMENT

Rule of Appellate Procedure (RAP) 13.4(b) set forth the reasons for which review "will be accepted by the Supreme Court." In relevant part, a petition for review will be accepted by the Supreme Court if:

> (1) a significant question of law under the constitution of the State of Washington or of the United States is involved;
> (2) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, or
> (3) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. [RAP 13.4(b).]

Division II's decision implicates all three.

1. This Court Should Grant Review to correct the Court of Appeals' deprivation of the State's right to fundamental fairness.

Court Rules "are designed to further the due process of law that the Constitution guarantees," *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000), and "[t]he opportunity to present reasons, either in person or in

writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *see also Morrison v. State Dept. of Labor & Industries*, 168 Wn. App. 269, 273, 277 P.3d 675 (2012) ("An essential principle of due process is the right to notice and a *meaningful* opportunity to be heard.") (citing *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)). This is no less true in Washington, *see State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976) (noting importance of a complete record before the trial court). Pivotal to American jurisprudence is the doctrine of fairness that includes providing all litigants an opportunity to respond. This protects the trial court judge, as well as the parties. *Haslund v. City of Seattle,* 86 Wn.2d 607, 614, 547 P.2d 1221 (1976) ("The trial court, in our view, should have had the benefit of vigorous and detailed objections... giving it an opportunity to correct the error, if any.").

When the Court of Appeals raised and resolved an issue not introduced (by either party) at trial or cited as an assignment of error—and subsequently refused to allow supplemental briefing—the State was deprived of a *meaningful* (or, in fact, any) opportunity to be heard. It was not given notice of the Court's interest in whether "*John* recorded a private conversation." *State v. Smith*, 196 Wn. App. 224, 232, ¶15, 328 P.3d 721 (2016) (emphasis added); *Petition for Review*, p. 9. The State was not able to adequately research, prepare, or argue its position on Mr. Smith's conduct instead of Ms. Williams.' CP 12; CP 73; CP 91-92. The State was not even

allowed to set forth for the court its position after oral argument through supplemental briefing. *Petition for Review*, p. 9 n. 4; RAP 12.1. There is no "meaning" in an opportunity to be heard when a party has "no opportunity to prepare a response." *State v. Kirwin*, 137, Wn. App. 387, 394, 153 P.3d 883 (2007).

The fundamental features of our justice system are: (1) neutral, passive decision makers, and (2) party presentation of evidence and arguments.[1] Party identification of the issues is at its core.[2] This Court should accept review to correct the Court of Appeal's violation of these tenets, and give the State a meaningful opportunity to be heard, consistent with fundamental fairness.

2. This Court Should Grant Review to correct the Court of Appeals' conflict with prior decisions of the Supreme Court and the Court of Appeals

"A petition for review will be accepted by the Supreme Court... if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court" or "the Court of Appeals." RAP 13.4(b)(1-2). Here, the decision of the Court of Appeals created a conflict with the past decisions of the Supreme Court, including *State v. Smith*. In a single conclusory sentence, the Court of Appeals deviated from the Supreme Court's prior decision "because of its *sui generis* nature." *State v. Smith*, 196 Wn. App.

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[1] Stephan Landsman, *Readings On Adversarial Justice: The American Approach To Adjudication*, 2-4 (1988).

[2] *See* Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering* Miranda, 149 U. PA. L. REV. 251, 252 (2000) ("[A] central tenet of our adversarial system is that (save for jurisdictional issues) the parties to a case—not the judges deciding the case—raise the legal arguments.").

224, 233, ¶ 18, 382 P.3d 721 (2016). But, as this case shows, indiscriminate shouts are not *sui generis*.

Instead of characterizing indiscriminate shouts as *sui generis*, the Supreme Court and the Court of Appeals have previously found that, "inconsequential conversations [that] are inadvertently intercepted" are not-uncommon. *Kadoranian by Peach v. Bellingham Police Dept.*, 119 Wn. 2d 178, 187, 829 P.2d 1061 (1992). Nor are shouts and screams of the victim within the definition of "private conversation." *State v. Cunningham*, 23 Wn. App. 826, 843-44, 598 P.2d 756 (1979) (overruled on other grounds).

The Supreme Court should accept review to align this matter with prior decisions, including *Kadoranian by Peach*, and *Cunningham*.[3]

3. This Court Should Grant Review to clarify the meaning of the word "conversation," the scope of "privacy" and the purpose of Washington's Privacy Act as matters of substantial public interest

Lastly, "[a] petition for review will be accepted by the Supreme Court... if the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The Court of Appeals' decision involves three issues of substantial public concern: (a) the scope of the concept of privacy, (b) the scope of the concept of a conversation, and (c) the criminalization of inadvertent conduct. The Court

[3] Also of note, the Court of Appeals diverged from the U.S. Supreme Court when it concluded, without explanation, that the iPhone was a device designed to record or transmit such conversation. Although an iPhone does make telephone calls, it is not clear that it is *designed* for that sole purpose. Instead, as the U.S. Supreme Court acknowledged, modern smartphones are essentially computers; not simply a mechanism for transmitting conversations. *See Riley v. California*, 573 U.S. ___, 134 S.Ct. 2473 (2014).

of Appeals addressed each of these aspects without due attention to the impact on public policy. The Supreme Court should accept review to provide the public with more thorough guidance on the Privacy Act.

a. The scope of "privacy" protected by the Privacy Act does not include shouts, indiscriminate screaming, and chaos

RCW 9.73.030(1)(b) makes it "unlawful for any individual... to... record any *private* conversation, by any device... designed to record or transmit such conversation." RCW 9.73.030(1)(b) (emphasis added). "'A communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable.'" *State v. Smith*, 196 Wn. App. at 235, ¶ 23 (quoting *State v. Kipp*, 179 Wn. 2d 718, 729, 317 P.3d 1029 (2014)). In assessing both prongs simultaneously, the Court of Appeals found a subjective and reasonable manifestation of an expectation of privacy because "the dispute did not occur until Williams left" and "occurred between two married persons in the privacy of their home." *Id*, at ¶ 25. In fact, the Court of Appeals went so far as to say "none of the considerations in *Kipp* dispute its privacy." *Id.*

The Supreme Court should grant review to provide a more thorough and accurate analysis. The privacy element of RCW 9.73.030, for example, reveals that the *Kipp* factors weigh against *any* privacy interest in this matter. While true that "the dispute did not occur until Williams left" (*ibid*), it was equally true that Williams left *because* tensions between the Smiths were already high and Mr. Smith was argumentative. CP 23, lines 12-14. There is little to no factual support for the Court of Appeals conclusion that

the Smiths manifested an expectation of privacy in this context.

The Court of Appeals also characterized the recorded event as a "domestic dispute in the privacy of their own home." *State v. Smith*, 196 Wn. App. at 235, ¶ 24. Despite acknowledging that subject matter is a *Kipp* factor, the Court of Appeals' conclusion of "domestic dispute" does little to identify any subject matter. Is the subject matter of the recorded incident the location of Mr. Smith's phone, is it the injuries of Ms. Smith, is it the consequences of Mr. Smith's actions, or is it who or what "Zoie" means? CP 78-81. Division II was, at best, arbitrary; and as a practical matter, provided little guidance to lower courts and litigants.

The Court's analysis is equally superficial with respect to the privacy of the location of the recorded event. The recorded event included shouting, indiscriminate screaming, and the sounds of Mr. Smith inflicting injury upon Ms. Smith. CP 78-81; *Petition for Review*, p. 5. Yet the Court of Appeals does not address the *reasonableness* of any expectation of privacy under these circumstances. Most would agree that as the volume increases, the expectation of privacy decreases.[4] Similarly, the expectation of privacy decreases as the proximity of neighbors increases.[5]

A thorough and accurate assessment of the *Kipp* factors—which would have led to the conclusion that there was no reasonable expectation

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[4] *See*, e.g., *State v. White*, 18 Or. App. 352, 525 P.2d 188 (1974); *State v. Shellenbarger*, 140 Idaho 185, 90 P.3d 935 (2004).

[5] *See*, e.g., Herrero, Enrique Garcia Juan, *Percieved Neighborhood Social Disorder and Attitudes Toward Reporting Domestic Violence Against Women*, Journal of Interpersonal Violence, Vol. 22, Issue 6, 2007.

of privacy—was necessary, but not done. This Court should accept review to furnish better guidance, which will yield more principled results.

b. "Conversation," in the context of the Privacy Act, does not include shouts, indiscriminate screaming, and chaos

RCW 9.73.030(1)(b) makes is "unlawful for any individual... to... record any private *conversation*, by any device... designed to record or transmit such conversation." RCW 9.73.030(1)(b) (emphasis added). The Court of Appeals defined a conversation as "an oral exchange of sentiments, observations, opinions, ideas: colloquial discourse." *State v. Smith*, 196 Wn. App. at 231, ¶ 16. Yet it neither explained how the recorded event was an *exchange* of sentiments, observations, opinions or ideas; nor how the recorded event was *discourse*. In fact, the Court of Appeals noted that the recorded event included Mr. Smith "asking 'Where is my Phone?' and Sheryl screaming 'Look at what you have done to me!'" *State v. Smith*, 196 Wn. App. at 234, ¶ 19. Plainly, there was no discourse here; one statement does not respond, reinforce, influence, persuade, or support the other. They are, at most, simultaneous monologues. There is no other context in which the recorded event would be considered a conversation.[6]

The Supreme Court should accept review to furnish more appropriate guidance than the unworkable and impossible standard set forth by Division II.

[6] Every day in superior court, judges strike statements that are unrelated to the preceding statement as non-responsive. *See generally State v. Vassar*, 188 An. App. 251, 258, 352 P.3d 856 (2015).

c. The purpose of the Privacy Act does not include the criminalization of inadvertent conduct.

Lastly, the Court of Appeals acknowledged that it was Mr. Smith who recorded the event, but provides no analysis whatsoever as to how the act of recording is not, by itself, consent. The Court of Appeals completely sidesteps the issue; stating that "whether John inadvertently or purposely recorded himself is beside the point; the statute requires no specific mental state for a person to improperly record a conversation." *State v. Smith*, 196 Wn. App. at 237, ¶ 30.[7] If the Privacy Act did not require any specific mental state, there would, by definition, be no need for courts to assess what conduct constitutes consent. Instead, the courts have regularly reviewed conduct to determine if consent is present. Critically, use of a device known to record has been identified as implied consent. *State v. Townsend*, 105 Wn. App. 622, 629, 20 P.3d 1027 (2001). The implied consent in *Townsend* is analytically identical to Mr. Smith's implied consent when he used a device he knew to have recording features.

Furthermore, the Court of Appeals' conclusion more generally frustrates the purpose of the Privacy Act - by criminalizing inadvertent conduct - and the purpose of RCW 9.73.030(2) specifically, by allowing Mr. Smith to benefit and reap relief by *his own violation* of the Privacy Act.

[7] The Court of Appeals relies on *Lewis v. Dept. of Licensing* and *Haymond v. Dept. of Licensing* to assert that the Privacy Act requires no mental state, but neither case is applicable. In *Lewis*, the officer violated a statute requiring an affirmative statement that the conversation was being recorded. *Lewis v. Dept. of Licensing*, 157 Wn. 2d 446, 469, 139 P. 3d 1078 (2006). There is no affirmative requirement in this matter. Likewise, in *Haymond* the Court affirmed the admission of a recording made without consent. *Haymond v. Dept. of Licensing*, 73 Wn. App. 758, 872 P. 3d 61 (1994).

"The primary purpose of the privacy act is the protection of individuals' privacy from public dissemination." *State v. Corliss*, 67 Wn. App. 708, 710, 838 P.2d 1149 (1992). There is no evidence that the Legislature intended to criminalize inadvertent conduct, like the infamous "pocket dial," because the harm to individuals comes not through the inadvertent recording, but through deliberate recording and dissemination thereof. This inherently requires something more than inadvertence.

Furthermore, the Legislature created an exception to the Privacy Act's requirements for recorded threats. Added by Senate Bill No. 2419 in 1977, it serves the important public safety purpose of ensuring the prosecution of domestic violence—such as what occurred in this matter. The Supreme Court should grant review because the Court of Appeals' decision thwarts this public safety purpose.

V. CONCLUSION

WSAMA respectfully asks this Court to grant review because the Court of Appeals deprived the State of a meaningful opportunity to respond and brought the case law into conflict with other court decisions, to the detriment of state citizens, including domestic violence victims. The Court of Appeals' decision should be vacated, and the trial court should be affirmed.

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Signed this 10th day of February, 2017.

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