

NO. 88083-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM JOHN KIPP, JR.,

Appellant.

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ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 39750-1-II
Superior Court No. 08-1-01272-5

RESPONDENT'S ANSWER TO BRIEF OF AMICUS CURIE
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Amicus' arguments that the well established definition of the term "private" (as it is used in Washington's Privacy Act) and the "Clark" factors (that are used in determining whether a conversation is "private") should be overturned or reconsidered is without merit and must be rejected when: (1) The definition of "private" and the "Clark" factors are well established by numerous prior decisions of this Court and the Amicus has failed to show that these prior decisions were both wrongly decided and harmful; and (2) The argument that these prior opinions should be overturned was not raised by the Appellant, and it is well-settled that this Court does not consider issues raised first and only by amici?

III. ARGUMENT

- A. **THE AMICUS' ARGUMENTS THAT THE WELL ESTABLISHED DEFINITION OF THE TERM "PRIVATE" (AS IT IS USED IN WASHINGTON'S PRIVACY ACT) AND THE "CLARK" FACTORS (THAT ARE USED IN DETERMINING WHETHER A CONVERSATION IS "PRIVATE") SHOULD BE OVERTURNED OR RECONSIDERED IS WITHOUT MERIT AND MUST BE REJECTED BECAUSE: (1) THE DEFINITION OF "PRIVATE" AND THE "CLARK" FACTORS ARE WELL ESTABLISHED BY NUMEROUS PRIOR DECISIONS OF THIS COURT AND THE AMICUS HAS FAILED TO SHOW THAT THESE PRIOR DECISIONS WERE BOTH WRONGLY DECIDED AND HARMFUL; AND (2) THE ARGUMENT THAT THESE PRIOR OPINIONS SHOULD BE OVERTURNED WAS NOT RAISED BY THE APPELLANT, AND IT IS WELL-SETTLED THAT THIS COURT DOES NOT CONSIDER ISSUES RAISED FIRST AND ONLY BY AMICI.**

The Amicus argues that there is a "state of confusion" over what constitutes a private conversation under the Privacy Act. Brief of Amicus, at 2-3. The State strongly disagrees, as the definition of the term "private," as it is used in the Privacy Act is well established under Washington law. Furthermore, this Court has clearly laid out the test for determining what constitutes a "private" conversation under the Act. In addition, the Amicus has failed to show that the numerous prior opinions of this Court on these issues were both wrongly decided and harmful.

The definition of the term “private” as used in the Privacy Act.

The Amicus claims that previous decisions by this Court incorrectly quoted the definition of “private.” The Amicus further argues that a proper definition of “private” should not include words like “secret,” and that the “correct definition focuses instead on the intent of the parties, and whether the conversation was meant to be open to all.” Brief of Amicus, at 3. This argument is unpersuasive for several reasons.

First, as the Amicus notes, Washington Courts has previously held that the term “private” is to be given its ordinary and usual meaning, namely:

... belonging to one's self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message; a private communication ... secretly; not open or in public.

State v. Forrester, 21 Wn.App. 855, 861, 587 P.2d 179 (1978), *review denied*, 92 Wn.2d 1006 (1979)); *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996); both cited by the Amicus at page 4. In fact, this definition of “private” is well-settled under Washington law and has repeatedly been cited by the Court. *See, e.g., State v. Modica*, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008)(“The privacy act does not define ‘private,’ but we have previously found it means ‘belonging to one's self ... secret ...

intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or public.');

Lewis v. State, Dept. of Licensing, 157 Wn.2d 446, 458, 139 P.3d 1078 (2006)(same); *State v. Christensen*, 153 Wn.2d 186, 192-93, 102 P.3d 789 (2004)(same); *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002)(same); *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 189-90, 829 P.2d 1061 (1992); *See also, State v. D.J.W.*, 76 Wn.App. 135, 140-41, 882 P.2d 1199 (1994) (same); *State v. Mankin*, 158 Wn.App. 111, 118, 241 P.3d 421 (2010) (same).

To the extent that the Amicus invites this Court to overrule or modify the well-settled definition of the word “private” as it is used in the Privacy Act, this Court should decline the invitation for several reasons.

First, it is well-settled that this Court does not consider issues raised first and only by amici. *Madison v. State*, 161 Wn.2d 85, 104, 163 P.3d 757, 769 (2007). The Defendant in the present case has not argued that the well-settled definition of “private” should be overruled or that cases using that definition were wrongly decided or harmful. To the contrary, the Defendant cited this Court’s well settled definition with approval. *See*, Petition for Review at 14 (“The Supreme Court has defined the word ‘private’ within the context of the Act as ‘belong to one’s self ...

secret ... intended only for the persons involved ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or public.”). Thus the argument or suggestion by the Amicus that this Court should overturn the well-established definition of “private” must be rejected as this issue was raised for the first and only time in the Amicus brief.

Furthermore, the Amicus has failed to show that the long line of case establishing the definition of “private” were both wrongly decided and harmful. The doctrine of stare decisis, of course, requires a clear showing that an established rule is incorrect and harmful before it is to be abandoned. *See, e.g., In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

In addition, the claim by the Amicus that the definition of “private” is based on an inaccurate definition or misquotation of the definition of the word “private” is both unpersuasive and incorrect. At its core, the argument of the Amicus is that courts have erred by including the word “secret” in the definition of “private.” Brief of Amicus at 4-6. The Amicus contends that this is erroneous and that the term “private” should merely be defined by the intent of the parties and whether they intended that the conversation be open to all. Brief of Amicus at 3-4, 6. This argument is unpersuasive because the Webster’s definition discussed by

the Amicus (and attached as an appendix to the Amicus brief) defines the word “private,” in part, as “not open: secret.” Thus the Amicus utterly fails to show how the long line of cases cited above have misquoted or otherwise misconstrued the dictionary definition of the word “private.”

In addition, the claim that the term “private” should be defined merely by the intent of the parties would lead to absurd consequences, as a person’s subjective intent can obviously be completely unreasonable. It would be absurd to hold that the Privacy Act (which imposes, among other things, criminal and civil liability) would define the word merely by examining a person’s subjective intent, and thus potentially impose criminal liability for recording a conversation wherein the speaker subjectively intends that their words be private yet broadcasts their words in a public manner. It would similarly be absurd to hold that a conversation should be deemed “private” merely because a speaker hopes or wishes his or her words would remain private even though that speaker knows full well that his or her words will be immediately passed on to others. In addition, this Court has specifically rejected a subjective test that is limited *solely* to an examination of the intent or desires of the non-consenting party. Specifically, nearly 20 years ago this Court explained that,

In deciding whether a particular conversation is private, we

consider the subjective intentions of the parties to a conversation. But our inquiry does not stop there because any defendant will contend that his or her conversation was intended to be private. We also look to other factors bearing upon the reasonable expectations and intent of the participants.

Clark, 129 Wn.2d at 225 (internal citation omitted); *See also, Lewis*, 157 Wn.2d at 458-59 (same); *Modica*, 164 Wn.2d at 88 (“a communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable”); *Townsend*, 147 Wn.2d at 673 (same); *Christensen*, 153 Wn.2d at 193 (same). The Amicus has failed to show that these cases were both wrongly decided and harmful.

In short, the well-settled definition of “private” that has long been used in Washington fairly captures the ordinary definition of the word, and this Court should decline to overrule or modify the long line of cases employing that definition; especially when none of the parties in the present case has asked this Court to adopt a different definition.¹

¹ The Amicus also repeatedly refers to what it calls the presumption of privacy and suggests that the Privacy Act itself contains such a presumption. *See*, Brief of Amicus at 10 (“But the language of the Act, as discussed above, requires that examination to begin with a presumption of privacy – the same presumption of privacy recognized *Modica*, 164 Wn.2d at 89.”) This claim, however, is utterly unsupported by the actual language of the Privacy Act, which contains no such presumption. The State acknowledges that in *Modica*, 164 Wn.2d at 89, this Court briefly stated, with no citation to the statute or other authority, that the Court “will generally presume that conversations between two parties are intended to be private.” This dictum from *Modica*, however, appears to be the only time this Court has made such a pronouncement. The State urges this court to disavow this brief comment from *Modica* for several reasons. First, the brief comment in *Modica* was dicta, as thus is not controlling on future cases. *See, e.g., Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 320, 352 P.2d 1025 (1960) (statements in an opinion that were “not

The “Clark” Factors.

Similarly, this Court should decline to overrule the test (and its factors) that this Court has previously set out for determining whether a particular conversation is “private” under the Privacy Act.

As noted by the Amicus, this Court has previously identified several factors that are to be used in determining whether a particular conversation was “private” under the Act. *See, Clark*, 129 Wn.2d at 225; cited by the Brief of Amicus at 10.

As outlined above, in *Clark* this Court explained that in determining whether a particular conversation is private, the subjective intentions of the parties to the conversation is one factor that a court can consider. *Clark*, 129 Wn.2d at 225. However, because most defendants would contend that their conversations are private, a court must also look to several factors bearing on the reasonable expectations and intent of the parties. *Id.* This Court then identified three factors bearing on the

necessary to the decision in [the] case” are dicta and do not control future cases). Secondly, the State is unaware of any provision of the Privacy Act that creates such a presumption, and the State is unaware of any other cases that have recognized the existence of such a presumption. Thirdly, it is important to remember that the Privacy Act is not merely an evidentiary rule. Rather, the Act creates criminal liability, as well as civil liability, for a person who violates its provisions. To say that an appellate court is to generally *presume* that a conversation is private (and thus more likely to create a potential criminal violation) is utterly unsupported by the language of the Act itself or traditional concepts of statutory construction. Thus this brief comment in *Modica* was both wrongly and harmful, especially when one considers the potential criminal liability created by such a presumption. In any event, the claim by the Amicus that “the language of the Act” contains such a presumption is simply untrue.

reasonable expectations and intent of the parties (1) duration and subject matter of the conversation, (2) location of conversation and presence or potential presence of a third party, and (3) role of the non-consenting party and his or her relationship to the consenting party. *Clark*, 129 Wn.2d at 225–27. The use of these factors is now well-established under Washington law. *See, e.g., Lewis*, 157 Wn.2d 446, 458-59 (outlining and applying the “*Clark*” factors); *Modica*, 164 Wn.2d at 88 (same); *Christensen*, 153 Wn.2d at 193 (same); *Townsend*, 147 Wn.2d at 673-74 (same).

The Amicus argues that the well-established test used to determine whether a particular conversation is “private” should be “updated” or “reconsidered.” Brief of Amicus at 10. This Court should decline to overrule the well-established test for several reasons.

First, neither the Appellant nor the Respondent has asked the Court to abandon or alter the “*Clark*” factors. In fact, the Appellant has cited the “*Clark*” factors at length without ever asking this Court to alter them in any way. *See*, Petition for Review at 9-15. In fact the Appellant’s Petition for Review was premised on the argument that the trial court and the Court of Appeals *improperly applied* the factors previously established by this Court. *See*, Petition for Review at 9.

As outline above, the argument or suggestion by the Amicus that

this Court should overturn the well-established “*Clark*” factors must be rejected as this issue was raised for the first and only time in the Amicus brief. Furthermore, the Amicus has failed to show that the long line of case establishing and applying those factors have been both wrongly decided and harmful. Stare decisis thus requires this Court to reject the Amicus’ invitation to overturn the “*Clark*” factors.

At the end of the day, the actual issue before this Court in the present case is relatively straightforward. As outlined above, the definition of the term “private” as it is used in the Privacy Act is well settled, and this Court has clearly established several factors that a trial court can apply when the court is called on to determine whether a particular conversation is “private” under the Act. The trial court in the present case, consistent with Washington law, applied the well established “Clark” factors when it closely examined the conversation at issue. RP 62-64.

The Amicus suggests that the conversation at issue should be characterized as “conversation between family members about a sensitive matter.” Brief of Amicus at 2. The State strongly disagrees with this characterization of the conversation. A conversation between family members about marital discord, financial difficulties, or an embarrassing health issue might properly be characterized as “sensitive matters.” A

confrontation between the father of two victims and the man who has sexually abused the two children, including acts which constituted two counts of Rape of Child in the Second Degree (a Class A felony) as well as Child Molestation in the Second Degree, cannot fairly be brushed off as a mere conversation about a “sensitive matter.” This was a confrontation about serious criminal acts of sexual abuse against Joseph T’s two daughters. RP 62-64. It was an outrageous and appalling matter, not a mere “sensitive matter.”

Not surprisingly, the trial court did not view the conversation as a mere “sensitive matter” as suggested by the Amicus. Rather, the trial court viewed the conversation in its proper context and applied the Clark factors. RP 62-64. With respect to the nature of the relationship between the two parties, the trial court specifically explained,

The third factor that is outlined by the courts is the role of the nonconsenting party and his or her relationship to the consenting party. And again, we’ve got a couple of things going on; they are family members, and typically that would be private. But they weren’t talking as family members; they weren’t talking as brothers-in-law. They were talking as father of a daughter and the accused molester. And I think that’s really the nature of the relationship.

RP 64. While the Defendant and the Amicus have attempted to frame the conversation in a different light, the trial court’s analysis here is grounded

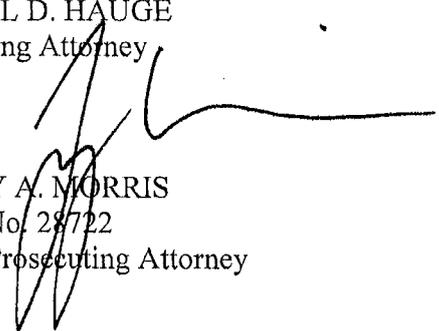
in common sense and represents a proper application of well-established Washington law. Furthermore, the trial court properly characterized the conversation based on its true essence: a confrontation between the father of two victims of serious sexual abuse and the man who had abused them. In short, the trial court did not abuse its discretion.

IV. CONCLUSION

For the foregoing reasons, Amici's argument should be rejected and the Defendant's conviction and sentence should be affirmed.

DATED September 9, 2013.

Respectfully submitted,
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Attached, please find the "Respondent's Answer to Brief of Amicus Curie American Civil Liberties Union of Washington" in the case of
State v William John Kipp, Jr., No. 88083-2.

Sincerely,

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