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No. 88083-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM KIPP,

Petitioner.

**MEMORANDUM OF *AMICUS CURIAE* AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON IN SUPPORT OF
PETITION FOR REVIEW**

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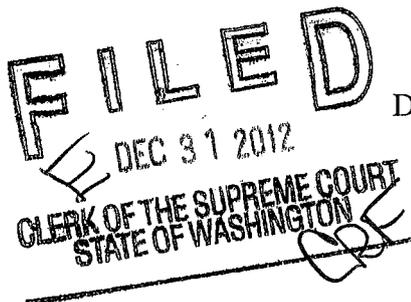
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 ORIGINAL

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports the Privacy Act, RCW 9.73, protecting private conversations against wiretapping, eavesdropping, and recording. It has participated in numerous privacy-related cases both as *amicus curiae* and as counsel to parties.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether uncertainty about the Privacy Act standards for secret recording of conversations has such broad public impact that review by this Court is warranted.

STATEMENT OF THE CASE

Kipp was accused of sexually assaulting two of his nieces. He was confronted about the allegations by their father, Kipp’s brother-in-law. Kipp and his brother-in-law spoke for about 10 minutes in the upstairs kitchen of a private residence while everybody else in the house was downstairs. Without Kipp’s knowledge or consent, his brother-in-law recorded the conversation. Over Kipp’s objection, this recording was admitted into evidence by the trial court, and Kipp was convicted. A divided Court of Appeals affirmed, holding that the conversation was not

“private.” *See State v. Kipp*, ___ Wn. App. ___, 286 P.3d 68 (2012).

This case asks whether the Privacy Act, which prohibits recording of “private conversation,” RCW 9.73.030(1)(b), applies to the undisputed facts here: conversation between family members about a sensitive matter in an otherwise deserted room of a private residence.

ARGUMENT

In his Petition for Review, Kipp thoroughly argues that his conversation with his brother-in-law was “private,” using factors enunciated by this Court. *See Lewis v. Dep’t of Licensing*, 157 Wn.2d 446, 459, 139 P.3d 1078 (2006) (citing *State v. Clark*, 129 Wn.2d 211, 225-27, 916 P.2d 384 (1996)). *Amicus* fully agrees with Kipp that the decision of the Court of Appeals is in conflict with those decisions of this Court, and that alone is sufficient to merit granting review. RAP 13.4(b)(1). We write separately, however, to further explain why this case presents an issue of substantial public interest, meriting review under RAP 13.4(b)(4).

A. There Is Considerable Public Uncertainty About Which Conversations Are Protected by the Privacy Act

It is not surprising that the Court of Appeals failed to reach consensus in this case. The existing case law interpreting the meaning of “private” in the context of the Privacy Act appears to have created more confusion than clarity. This is merely one situation out of many where the legal community, not to mention the public, is uncertain about whether

recording is prohibited by the Privacy Act.

As a preliminary matter, it is worth looking at the history of interpretation of “private.” This Court originally applied a very broad interpretation, holding that even a call made to a police emergency line, describing a shooting that had just occurred, was private and could not be recorded. *See State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977). This is, of course, entirely consistent with the language of the Act itself, which contains explicit exemptions to allow recording in some situations that very few people would consider private, such as talking to a television reporter with an obvious camera, RCW 9.73.030(4); that exemption would not be necessary unless “private conversation” was intended to encompass virtually all conversations. When *Wanrow* was decided, therefore, one could safely assume that the Privacy Act prohibited secret recording of almost all conversations.

Later cases, however, have introduced considerable uncertainty as to which conversations are covered. Some involve situations that were probably not intended to be covered by the Privacy Act. *See, e.g., Kadoranian v. Bellingham Police*, 119 Wn.2d 178, 829 P.2d 1061 (1992) (inadvertent recording of a few seconds of innocuous conversation between strangers). Others, however, are harder to reconcile with the Privacy Act’s intent.

The most problematic case is *State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996). *Clark* upheld an undercover informant's recording of brief street-level drug transactions where the informant posed as a buyer, even those where the transactions took place in the seller's vehicle. The informant had received prior judicial authorization for the recording pursuant to RCW 9.73.090(5), but *Clark* held that authorization was not required, since the transactions were not "private conversations."

Clark based its decision in part on what it characterized as the "ordinary and usual meaning" of "private." *Id.* at 224-25. Regrettably, the definition used was a *misquotation* from Webster's Third New International Dictionary that can be traced back to *State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978). The misquotation uses the term "secret" three times, and generally gives the impression that only secret or confidential communications should be considered "private." This led *Clark* to import standards from privilege law, including the likelihood of a participant passing on information, or the possibility of a third party overhearing the conversation. *See Clark*, 129 Wn.2d at 225-27. Webster's actual definition of "private" uses the word "secret" only once, however; it is less concerned with secrecy than it is with the contrast to "public." The most relevant part of the definition reads:

not known publicly or carried on in public: not open: secret
<~ negotiations> <a ~ understanding> <~ prayer>; *esp*:
intended only for the persons involved <a ~ conversation>

Webster's Third New International Dictionary (1961). Many matters are private that are not secret, and the Privacy Act is intended to protect them.

Even using the wrong definition of "private," *Clark* was intended to be read narrowly:

We emphasize that our ruling is limited to these sixteen conversations where the defendants approached a stranger for brief, routine conversations on the street about drug sales. We are not suggesting or deciding that a conversation is not private solely because it takes place on a street or solely because it relates to a commercial or illegal transaction. Clearly, there are many commercial and/or illegal transactions that may involve private conversations. These conversations may involve relationships and transactions wholly unlike the anonymous and spontaneous street-level transactions here.

Clark, 129 Wn.2d at 231-32.

Unfortunately, this caution has gone unheeded, and the *Clark* factors have been widely used in subsequent cases. *See, e.g., Lewis*, 157 Wn.2d at 459; *State v. Modica*, 164 Wn.2d 83, 88, 186 P.2d 1062 (2008); *State v. Babcock*, 168 Wn. App. 598, 605, 279 P.3d 890 (2012). The results have led to substantial uncertainty as to when recording of conversations is allowed. On the one hand, this Court continues to recognize that the Privacy Act "places great value on the privacy of communications," *Lewis*, 157 Wn.2d at 457, and refers to it as "one of the

most restrictive in the nation.” *State v. Christensen*, 153 Wn.2d 186, 198, 102 P.3d 789 (2004). Accordingly, courts should “generally presume that conversations between two parties are intended to be private.” *Modica*, 164 Wn.2d at 89. On the other hand, a broad reading of *Clark* would limit the Act’s reach to only the most secretive conversations, an approach espoused by the Court of Appeals in the present case although it is contrary to the language and intent of the statute.

This is not merely a matter of academic debate. *Amicus* is aware of at least three recent situations indicating that uncertainty about the scope of the Privacy Act is widespread. The first involves a situation where attorneys allegedly recorded a witness interview without the consent or knowledge of the witness, and then filed transcripts of portions of the interview as part of federal litigation. This prompted both a motion to strike in the federal court and filing of a separate state action for damages by the witness. Both the federal and state trial courts held that there was no violation of the Privacy Act, as the interview was not a “private” conversation, and both of those holdings are currently under appeal. *See Volcan Group v. Omnipoint Communications*, No. 12-35217 (9th Cir.); *Dillon v. Seattle Deposition Reporters*, No. 69300-0-I (Wn. App. Div. 1).

The second situation occurred during the recent political campaign season. A political activist attended a fundraiser in Everett and spoke to

the candidate, questioning the candidate's position on abortion, apparently during a mingling period before or after public comments to the audience. Unbeknownst to the candidate, the activist secretly recorded the conversation. *See* Emily Heffter, *Candidate Koster draws fire for comments on rape, abortion*, Seattle Times, Nov. 1, 2012. The recording was posted and widely distributed on the Internet. *See, e.g.*, Fuse Washington, *John Koster: No Abortion for Survivors Of "The Rape Thing"*, available at http://www.youtube.com/watch?v=sU_tqVz_bcs. *Amicus* is unaware of any litigation arising from the incident, but at least one blogger has questioned the legality of the recording. *See* Foolish Reporter, *Did @FuseWA Violate Washington State's Recording Laws?*, available at <http://foolishreporter.wordpress.com/2012/11/01/did-fusewa-violate-washington-states-recording-laws>.

Finally, there has been considerable discussion in various legislative bodies about equipping police officers with uniform-mounted cameras to make both audio and video recordings of the officers' encounters with the citizenry. A bill was heard in the Legislature last session that would authorize such devices. Senate Bill 6066 (2012). Due to the complexity of the issue (raising questions of police accountability, privacy, public disclosure, and fair trial rights) and the short legislative session, the bill did not advance in 2012, but *amicus* believes that the

Legislature is likely to revisit the topic in 2013. In the meantime, there are widely varying opinions among policy makers as to whether such recording is allowed under the existing language of the Privacy Act (i.e., whether law enforcement encounters with civilians are ever “private conversations.”). *See, e.g.,* Erica C. Barnett, *Council Public Safety Chair: McGinn's Decision Not to Fund Body Cameras Political, Not Legal*, Publicola, Oct. 4, 2012, *available at* <http://www.seattlemet.com/news-and-profiles/publicola/articles/council-public-safety-chair-mcginns-decision-not-to-fund-body-cameras-political-not-legal>.

Amicus does not take any position on the specific facts of any of those scenarios, some of which are disputed, and thus we are also unable to take a position on the legal question of whether any or all of those scenarios represent recording of “private” conversations. We do, however, believe that these situations evidence the uncertainty that currently exists with regard to the scope of the Privacy Act. We therefore respectfully request this Court to grant review in this case to clarify *Clark* in light of the lower court’s analysis here. We urge the Court to clearly limit *Clark* to its facts, and reaffirm the *Wanrow* and *Modica* guidance that the Privacy Act should be broadly interpreted to encompass most communications, with a strong presumption that conversations are “private” unless evidence clearly demonstrates the all parties intended otherwise.

B. This Court's Guidance Is Needed on the Appropriate Analysis of "Private" when One Party Consents to Recording

The recording at issue in the present case was made by Kipp's brother-in-law, one of the participants in the conversation. This is not unusual; in fact, most of the cases that have interpreted the meaning of "private" in the context of the Privacy Act, including *Kadoranian* and *Clark*, have involved situations where the recording was made by one party to the conversation; *see also Lewis*, 157 Wn.2d 446; *Forrester*, 21 Wn. App. 855; *State v. Slemmer*, 48 Wn. App. 48, 738 P.2d 281 (1987) (recording of business meeting); *Babcock*, 168 Wn. App. 598; *State v. Flora*, 68 Wn. App. 802, 845 P.2d 1355 (1992) (recording of police officer during arrest); *State v. Mankin*, 158 Wn. App. 111, 241 P.3d 421 (2010) (recording of deposition of police officers). *Amicus* respectfully suggests these cases involving one-party consent have confused the courts' analysis and interpretations of the meaning of the term "private."

Let us suppose, for example, that the exact same conversation between Kipp and his brother-in-law had been recorded by a third party, perhaps law enforcement, who had surreptitiously planted a bug in the kitchen, without knowledge or consent of either participant. Or that a third party had bugged the attorney's office in *Mankin* in order to secretly record depositions. One has to wonder if the Court of Appeals would have

gone through the same detailed analysis of the *Clark* factors and reached the same conclusions—or if instead there would have been immediate recognition that the recording was the type of intrusion prohibited by the Privacy Act. If the judiciary believes that the intentions of one party to a conversation changes the “private” nature of that conversation, it should state so directly. *Amicus* suggests, however, that view will be difficult to reconcile with the Privacy Act’s general rejection of one-party consent.

In any event, clarity in the rules for one-party consent recording is desperately needed. Unlike when the Privacy Act was enacted back in 1967, today more than half of the population routinely carries around recording technology (in the form of smartphones or other personal devices). The ubiquity of the technology, combined with the unclear jurisprudence on the meaning of “private,” means that many individuals simply have no clue about what is and is not an acceptable practice. Resolution of that uncertainty is a matter of substantial public interest.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Court to accept Kipp’s Petition for Review. It meets multiple criteria of RAP 13.4(b); the decision of the Court of Appeals conflicts with decisions of this Court, and it is a matter of substantial public interest.

Respectfully submitted this 20th day of December 2012.

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