

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Sep 22, 2014, 4:37 pm  
BY RONALD R. CARPENTER  
CLERK

No. 90598-3

---

RECEIVED BY E-MAIL  
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,  
Respondent,

v.

MARK TRACY MECHAM,  
Appellant.

FILED  
OCT - 1 2014

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

---

ON APPEAL FROM DIVISION ONE OF THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

---

AMICUS MEMORANDUM PURSUANT TO RAP 13.4(h)  
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS

---

D. Jack Guthrie, WSBA 46404  
Suzanne Lee Elliott, WSBA 12634  
Amicus Committee  
Washington Association of Criminal Defense Lawyers  
705 Second Avenue, Suite 1300  
Seattle, WA 98104  
(206) 623-0291

ORIGINAL

**TABLE OF CONTENTS**

I. ARGUMENT WHY REVIEW SHOULD BE GRANTED .....1

    A. THE DECISION OF THE COURT OF APPEALS IS IN  
        CONFLICT WITH NUMEROUS DECISIONS OF THE  
        WASHINGTON SUPREME COURT AND THE UNITED  
        STATES SUPREME COURT. RAP 13.4(B)(1). .....2

    B. THE DECISION OF THE COURT OF APPEALS IS IN  
        CONFLICT WITH NUMEROUS OTHER DECISIONS OF  
        THE COURT OF APPEALS. RAP 13.4(B)(2). .....4

    C. WHETHER *TERRY* SHOULD BE EXPANDED OR  
        OVERRULED IS A SIGNIFICANT QUESTION OF LAW  
        UNDER THE WASHINGTON STATE AND UNITED  
        STATES CONSTITUTIONS. RAP 13.4(B)(3).....5

    D. THE PETITION INVOLVES ISSUES OF SUBSTANTIAL  
        PUBLIC INTEREST AND SHOULD BE REVIEWED BY  
        THIS COURT. RAP 13.4(B)(4). .....6

II. CONCLUSION .....7

## TABLE OF AUTHORITIES

### Cases

<i>Adams v. Williams</i> , 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).....	3, 4
<i>Minnesota v. Dickerson</i> , 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).....	2
<i>Sibron v. New York</i> , 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).....	4
<i>State v. Bailey</i> , 109 Wn. App. 1, 34 P.3d 239 (2000).....	4
<i>State v. Collins</i> , 121 Wn.2d 168, 847 P.2d 919 (1993).....	4
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006), <i>review denied</i> , 162 Wn.2d 1014, 178 P.3d 1032 (2008).....	5
<i>State v. Hudson</i> , 124 Wn.2d 107, 874 P.2d 160 (1994).....	4
<i>State v. Lennon</i> , 94 Wn. App. 573, 976 P.2d 121, <i>review denied</i> , 138 Wn.2d 1014, 989 P.2d 1139 (1999).....	5
<i>State v. Mecham</i> , 331 P.3d 80 (2014).....	passim
<i>State v. Miller</i> , 91 Wn. App. 181, 955 P.3d 810, <i>opinion amended</i> , 961 P.2d 973, <i>and review denied</i> , 136 Wn.2d 1016, 966 P.2d 1277 (1998).....	4
<i>State v. Nagel</i> , 320 Or. 24, 880 P.2d 451 (1994).....	4
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)....	passim

### Rules

RAP 13.4.....	passim
---------------	--------

**Constitutional Provisions**

Const., art. I, § 7..... 2  
U.S. Const., amend. IV ..... passim

**I.**  
**ARGUMENT WHY REVIEW SHOULD BE GRANTED**

In *State v. Mecham*, 331 P.3d 80 (2014), the Court of Appeals concluded that the State could argue to a jury that a defendant's refusal to perform voluntary field sobriety tests was evidence of guilt. To reach this conclusion, the Court necessarily found that law enforcement, during an investigative detention under the rationale set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), could search an arrestee for evidence of guilt. *Mecham*, 331 P.3d at 88.

*Mecham* creates a new exception to the warrant requirement and ignores all of the privacy concerns set forth in *Terry*. The Court effectively creates a new investigative device: a *Mecham* detention. During such a detention, law enforcement, upon reasonable suspicion, can detain a suspect and search him for weapons and evidence of a crime without a warrant. As discussed below, such a ruling conflicts with other decisions from the Washington Appellate Courts, the Washington Supreme Court, and the United States Supreme Court.

Not only are there significant conflicts between *Mecham* and other cases from Washington and Federal courts, but the underlying practices and procedures at play in *Mecham*, specifically how law enforcement may detain citizens and conduct traffic stops, implicates significant questions

of law under both the Washington State Constitution and the United States Constitution, as well as raising issues of substantial public interest that should be determined by the court of last resort in the State of Washington.

Because *Mecham* strongly implicates all of the Considerations Governing Acceptance of Review to this Court, RAP 13.4(b), discretionary review should be granted in this case.

A. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH NUMEROUS DECISIONS OF THE WASHINGTON SUPREME COURT AND THE UNITED STATES SUPREME COURT. RAP 13.4(B)(1).

The warrant requirement in the Fourth Amendment to the Constitution of the United States mandates that law enforcement secure a court's authorization before searching a suspect's person or property, unless an exception applies. Article I, section 7 of the Washington State Constitution provides Washingtonians with the assurance that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." An investigative stop, under the rationale of *Terry*, constitutes an exception to the Fourth Amendment's warrant requirement and authority of law for the purposes of article I, section 7. *Minnesota v. Dickerson*, 508 U.S. 366, 372-373, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993); *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003).

The United States Supreme Court's opinion in *Terry* attempted to find a proper balance between an individual's rights under the Fourth Amendment, the government's interest in investigating and deterring crime, and individual officers' interests in their personal safety. *Terry*, 392 U.S. at 22-28. The compromise the Court reached allows for officers to detain suspects for questioning when their suspicion of illegal activity is supported by reasonable and articulable suspicion. *Id.* at 20. During that investigative detention, if the officer has reasonable suspicion to fear for their personal safety, they may conduct a limited search of the suspect's person for weapons. *Id.* at 31. That search for weapons may not turn into a warrantless search for evidence of a crime. *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

The Court of Appeals' decision in *Mecham* eviscerates the Fourth Amendment and article I, section 7 protections inherent in *Terry* by allowing searches for evidence during an investigative stop, so long as they are reasonable. *Mecham*, 331 P.3d at 88.<sup>1</sup> Such a test was rejected in

---

<sup>1</sup> In support of the Court of Appeals' determination that the search of Mr. Mecham was reasonable, the Court discussed Mr. Mecham's danger to the public as a drunk driver. The Court of Appeals either ignores or forgets that Mr. Mecham was already under arrest on an unrelated arrest warrant at the time the arresting officer first suspected that Mr. Mecham could be under the influence of alcohol. One is therefore left to question

*Terry. Terry*, 392 U.S. at 17-18. *Mecham* approves of searches<sup>2</sup> for evidence of a crime on no more lawful authority than a *Terry* stop, which also conflicts with well-established Washington State and United States Supreme Court decisions. *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *Adams*, 407 U.S. at 146; *State v. Collins*, 121 Wn.2d 168, 847 P.2d 919 (1993); *State v. Hudson*, 124 Wn.2d 107, 112-113, 874 P.2d 160 (1994).

B. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH NUMEROUS OTHER DECISIONS OF THE COURT OF APPEALS. RAP 13.4(B)(2).

As stated in the preceding section, *Mecham* is in conflict with *Terry* and investigative detention lines of case law. This naturally places *Mecham* in tension with innumerable Washington Appellate Court decisions. See, e.g., *State v. Bailey*, 109 Wn. App. 1, 34 P.3d 239 (2000); *State v. Miller*, 91 Wn. App. 181, 955 P.3d 810, *opinion amended*, 961 P.2d 973, *and review denied*, 136 Wn.2d 1016, 966 P.2d 1277 (1998);

---

how an arrested inebriant could pose the same degree of danger to society as a drunk driver behind the wheel of a car.

<sup>2</sup> While Washington has never ruled on whether FSTs constitute a search, the *Mecham* court assumed for the purposes of the opinion that an FST constituted a search for the purposes of the Fourth Amendment and article I, section 7. See *Mecham*, 331 P.3d at 85 (citing *State v. Nagel*, 320 Or. 24, 31, 36, 880 P.2d 451 (1994)).

*State v. Lennon*, 94 Wn. App. 573, 976 P.2d 121, *review denied*, 138 Wn.2d 1014, 989 P.2d 1139 (1999); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006), *review denied*, 162 Wn.2d 1014, 178 P.3d 1032 (2008).

Additionally, in only the span of a few months, *Mecham* is being used not only in Division I, but throughout the State. See *State v. Robert Alan Griswold*, Kitsap Co. Dist. Ct. No.: 15337503 (2014); *City of University Place v. Gary Shaw Jr.*, Lakewood Mun. Ct. No.: 12U00349, *appeal docketed*, No. 14-1-02482-9 (Pierce Co. Sup. Ct. 2014). Statewide reliance upon *Mecham* will result in frequent conflicting opinions within the trial courts and Courts of Appeal. Review of *Mecham* now is therefore appropriate.

C. WHETHER *TERRY* SHOULD BE EXPANDED OR OVERRULED IS A SIGNIFICANT QUESTION OF LAW UNDER THE WASHINGTON STATE AND UNITED STATES CONSTITUTIONS. RAP 13.4(B)(3).

When Washington obtained statehood and established its own Constitution, it incorporated the substance of the Fourth Amendment into its own Bill of Rights in article I, section 7: "Invasion of Private Affairs or Home Prohibited. No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Few rights enjoyed by Washingtonians are more important.

The Court's opinion in *Mecham* profoundly affects the protections of article I, section 7 and the Fourth Amendment by way of allowing police to search a person for evidence of a crime, without a warrant, solely on the basis of reasonable suspicion. *Mecham*, 331 P.3d at 85-86. Such a profound a change in search and seizure jurisprudence should be reviewed by the court of last resort in the State of Washington.

D. THE PETITION INVOLVES ISSUES OF SUBSTANTIAL PUBLIC INTEREST AND SHOULD BE REVIEWED BY THIS COURT. RAP 13.4(B)(4).

For 45 years *Terry* has governed the manner in which law enforcement in the United States may question civilians in order to investigate crime. *Terry*, 392 U.S. at 1. The delicate balance described in *Terry* has allowed law enforcement to do its duty to investigate crime while respecting the rights of civilians to be free from unwarranted searches for evidence of crime. Any decision that disturbs this long-established and well-seated set of rules that govern the way civilians and law enforcement interact ought to be reviewed by the court of last resort.

Additionally, the Court's opinion in *Mecham* also implicates the manner in which law enforcement are able to search individuals for evidence of the crime of Driving While Under the Influence. *Mecham*, 331 P.3d at 80-88. More arrests are made in Washington for that single crime than any other. Crime in the United States 2012,

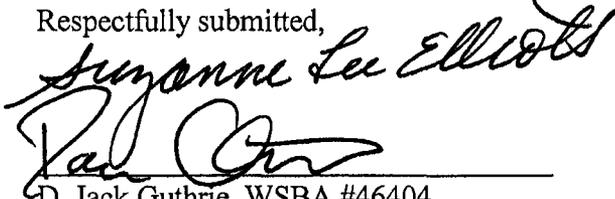
<http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/69tabledataadecpdf> (last visited Sep. 18, 2014). In fact, in 2012, the year for which the most up to date statistics are available, 30,501 individuals were arrested in Washington State on suspicion of Driving While Under the Influence. *Id.* Nearly 18% of all arrests in the State of Washington were for suspicion of Driving While Under the Influence. *Id.* Law enforcement and the public therefore have a compelling interest in having the highest court in the land provide certainty of what conduct is impermissible and what evidence will later be admissible in a prosecution for Driving While Under the Influence.

## **II. CONCLUSION**

This Court should grant Mr. Mecham's petition for review on this important issue relating to fundamental rights contained within the Bills of Rights of the Washington State Constitution and the United States Constitution.

DATED this 18th day of September, 2014.

Respectfully submitted,



D. Jack Guthrie, WSBA #46404

Suzanne Lee Elliott, WSBA #12634

Attorneys for Amicus Washington Association of  
Criminal Defense Lawyers

#### CERTIFICATE OF SERVICE

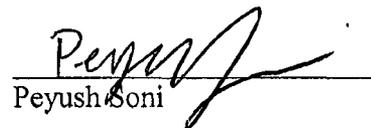
I hereby certify that on the date listed below, I served by First  
Class United States Mail, postage prepaid, one copy of the foregoing brief  
on the following:

Ms. Erin Becker  
King County Prosecutor's Office  
516 Third Avenue, Suite W554  
Seattle, WA 98104  
AND VIA EMAIL:  
Erin.Becker@kingcounty.gov

And

Ms. Jennifer Sweigert  
Nielsen Broman & Koch PLLC  
1908 E Madison St  
Seattle, WA 98122-2842  
SweigertJ@nwattorney.net

09/22/2014  
Date

  
Peyush Soni

## OFFICE RECEPTIONIST, CLERK

---

**To:** Christina Albouras  
**Cc:** Suzanne Elliott; Jack Guthrie  
**Subject:** RE: State v. Mecham, No. 90598-3

Received 9-22-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Christina Albouras [mailto:calbouras@hotmail.com]  
**Sent:** Monday, September 22, 2014 4:35 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Suzanne Elliott; Jack Guthrie  
**Subject:** State v. Mecham, No. 90598-3

September 22, 2014

Dear Clerk:

Please file the attached Motion to File Amicus Brief and Amicus Memorandum of the Washington Association of Criminal Defense Lawyers (WACDL) in *State v. Mark Tracy Mecham*, No. 90598-3. Please contact me with any questions. Thank you.

Sincerely,  
Christina Alburas  
Certified Paralegal  
(206) 538-5301

\* \* \* \*

Law Office of Suzanne Lee Elliott  
Suite 1300 Hoge Building  
705 Second Avenue  
Seattle, WA 98104  
Fax (206) 623-2186

### CONFIDENTIALITY NOTICE

*This email, including all attachments, is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521. It is therefore legally privileged and confidential and is intended only for the use of the individual(s) to whom it has been directed. If you are not the intended recipient, you are hereby notified that any review, retention, dissemination, distribution, or copying of this email is strictly prohibited. If you have received this email message in error, please immediately notify the sender via reply email or the telephone number above, and delete and/or destroy all copies of the original message and any attached files. Thank you.*