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SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

PETITIONER,

v.

CODY RAY FLORES,

RESPONDENT.

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PETITIONER'S REPLY  
TO BRIEF OF *AMICUS CURIAE*  
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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GARTH DANO  
PROSECUTING ATTORNEY

By: Kevin J. McCrae, WSBA #43087  
Deputy Prosecuting Attorney  
Attorney for Petitioner

PO BOX 37  
EPHRATA WA 98823  
(509)754-2011

 ORIGINAL

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## I. STATEMENT OF THE CASE

The facts of the case have been adequately described in the prior briefing. The State will refer to certain facts where appropriate in this document.

## II. ARGUMENT

### A. Amicus' argument is based on two flawed premises, and arguments correctly not advanced by Flores.

The Supreme Court will not address arguments raised only by amicus. *City of Seattle v. Evans*, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2015 Wash. LEXIS 1452 Slip op. at 5 n.5 (2015). Here amicus raises two arguments (1) Officer McCain intentionally stopped Mr. Flores and (2) that the officers were required to ignore the information about Powell pointing a gun at someone's head. Neither was raised by Mr. Flores, for good reason.

Officer McCain stopped Giovanni Powell when he called out "Geo, you need to stop." RP 72. He never stopped Mr. Flores. Instead, similar to a passenger in a car, Flores stopped when Powell stopped. Mr. Flores never attempted to simply walk away. If he had this might be a different case. Instead Mr. Flores was seized when Officer McCain ordered him to his knees to take control of the situation. Flores continued to talk to Powell after they were seized, potentially interfering with

Powell's arrest. Once Flores is inserted into the situation, McCain is forced to deal with him. Even Flores recognizes that McCain was not focused on stopping Flores. Respondent's answer to petition for review at 12.

Amicus also asserts that the officers had to completely ignore the anonymous tip that Powell was armed and had just committed a violent felony. Flores does not assert this argument for good reason, it is wrong. Amicus is correct that the tip did not provide probable cause to arrest Powell. Whether the tip provided enough reasonable suspicion to conduct a *Terry* Stop is an arguable proposition, but the answer is probably yes. In *Navarette v. California*, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014)<sup>1</sup> an anonymous caller reported a reckless driver. The court ruled that the fact that the caller identified a specific vehicle by its license plate, that the driver had correctly named the location and description of the vehicle, that the caller had reported the events soon after they occurred, and that they used the 911 system, the crime was probably ongoing and presented an immediate danger.

In this case the caller reported that Giovanni Powell had just pointed a gun at someone's head, a violent felony. Powell was the particular individual named, known to the officers, and was found in the

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<sup>1</sup> *Navarette* was decided after this case was argued in the trial court, thus was not discussed at that level.

vicinity of where the caller said he was. The officers arrived very shortly after the 911 call and did not know at the time if the crime was ongoing, but there was a reasonable possibility it was. Given the serious nature of the alleged crime and some confirming information the State has a strong argument under *Navarette* that a *Terry* stop of Powell was justified in this case. To what extent *Navarette* is applicable under Wash. Const. Art. 1 §7 may also be a matter for debate, but the Washington cases that have addressed the issue so far have followed it. *State v. Z.U.E.*, 183 Wn.2d 610, 621, 352 P.3d 796 (2015); *State v. Saggars*, 182 Wn. App. 832, 332 P.3d 1034 (2014). (Consistent with the recent decision of the United States Supreme Court in *Navarette v. California*, a 911 phone call from an unknown caller who gives a contemporaneous eyewitness account of a serious offense presenting an exigent threat to public safety may provide a valid basis for an investigatory (*Terry*) stop.)

Whether a *Terry* stop of Powell would be justified under *Navarette* is an issue that may reasonably be debated, but because of the warrant need not be reached in this case. However, amicus takes the argument one step farther, without any support whatsoever. Even if the anonymous tip did not independently justify stopping Powell, it does not follow the officers were required to ignore the tip when legitimately stopping him. Stopping Powell pursuant to the warrant was indisputably legitimate.

There is no case law or rational argument for the proposition that the officers have to completely disregard the tip, to the detriment of their own safety. The seriousness of the offense and threat to public safety is part of the analysis in a *Terry* stop. Once a stop is legitimated by a warrant, surrounding circumstances indicating danger justify a more serious response. “[T]he requirement that an anonymous tip bear standard indicia of reliability in order to justify a stop in no way diminishes a police officer's prerogative, in accord with *Terry*, to conduct a protective search of a person who has already been legitimately stopped. We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue.” *Fla. v. J.L.*, 529 U.S. 266, 274, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000).

There is absolutely no reason, and amicus offers none, that says an anonymous, partially corroborated, tip may be considered during a *Terry* stop, but must be completely disregarded during an arrest on an unrelated warrant.

If there is no justification for a stop officers can hold back, not engage, and essentially stay out of the danger. While this risks crimes going unsolved or dangerous people not being contained, this is the balance our courts and society has struck between safety and freedom from government intrusion. In this case, however, officers did not have the

choice not to engage. Powell had a warrant. Officers were directed to bring him before the court. The court cannot order the officers to ignore the danger presented to them by the report that Powell had just pointed a gun at someone's head, while at the same time ordering them to detain him. Flores correctly did not argue that the officers were required to disregard the anonymous tip. Amicus is incorrect to raise it now.

**B. *Parker* is good law.**

Amicus argues that the statement “We do conclude, however, that whether or not articulable suspicion exists sufficient to justify a pat down for weapons, the circumstance of an arrest falls squarely within the rule of *Mendez*. Thus, a vehicle stop and arrest in and of itself provides officers an objective basis to ensure their safety by ‘controlling the scene,’ including ordering passengers in or out of the vehicle as necessary” in *State v. Parker*, 139 Wn.2d 486, 502, 987 P.2d 73 (1999), is mere dicta and should be disregarded. First, it is not dicta. Even assuming it is dicta it is highly persuasive dicta, intentionally inserted into the case to provide an easily applicable rule.

*Parker* addressed three different cases. In each case the companion of an arrestee was ordered out of the car, then the companion's belongings left behind in the car were searched under the then existing search incident to arrest rule. The court could have decided the officers

were wrong to order the companion out of the car. It did not. Instead it chose to draw the line at a different place, the actual search of the companion's belongings. Thus the holding in *Parker* is not dicta, but necessary to the line drawing engaged in by the court.

However, assuming the language in *Parker* is dicta, it is still entitled to great weight. Not all dicta is created equally. Black's Law Dictionary lists four different kinds of dicta. Relevant here, judicial dictum is "an opinion by a court on a question that is directly involved, briefed and argued by counsel, and even passed upon by the court, but is not essential to the decision." *Black's Law Dictionary*, 519 (9th ed. 2009). In *Parker* the State was arguing for the federal rule that companions of an arrestee may be searched, and justifying it based on officer safety. The four justice plurality rejected the State's argument, but in a concession to officer safety provided the above rule. It was a carefully considered compromise as part of the case, not some off-hand remark. The two justice dissent wanted to adopt the federal rule. The statement the State relies on in *Parker* was a carefully thought out compromise designed to provide a clear rule to officers. If it is dicta, it is judicial dicta supported by six justices and should still be controlling law.

**C. The *Mendez* Standard is appropriate to apply in this case.**

Amicus argues that applying *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999), to this case would result in a reasonableness test, and that reasonableness tests are inappropriate under Wash. Const. Art. 1 §7. They argue that outside of the automotive context, any seizure of a detained or arrested individual should require individualized suspicion under *Terry*. Brief of Amicus at 16. But officers may face dangers from pedestrians, just as much as they may face them from motorists. *Mendez* provides an adequate framework for this issue.

*Mendez* itself is a reasonableness test. In *Mendez* the Washington Supreme Court rejected the U.S. Supreme Court's bright line rule in *Maryland v. Wilson*, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997), that held a police officer may order passengers of lawfully stopped vehicles to exit for safety purposes. Instead it applied a factors test to "balance these privacy interests against concerns for officer safety during traffic stops." *Mendez*, 137 Wn.2d at 219. "We can envision numerous factual scenarios, only slightly different from the present case, with a high potential for the situation spinning out of control and officer safety being jeopardized." *Id.* In balancing these concerns the court proposed the following factors: "the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of

the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants.” *Id* at 220. Notably the court also stated “These factors are not meant to be exclusive.” *Id. Parker* essentially added the circumstances of an arrest versus an infraction to the analysis. This is clearly a reasonableness test that is easily adaptable to the situation of pedestrians walking down the street. The presence or absence of an automobile is simply one of the unnamed factors that might be added to the list.

Which way that factor cuts will depend on the situation. The U.S. Supreme Court has recognized that people and vehicles can be separated, thus giving a weapon a place to be that is away from the person. *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). In addition people in a vehicle are contained in one spot and not moving all over the place. Arguably it is safer for the officers when a vehicle is involved.

Amicus’ alternative rule, that officers need individualized *Terry* suspicion to control anyone at the scene of a crime outside the presence of an automobile, is arbitrary, unworkable and dangerous. Officers would be unable to control crowds, order people away from crime scenes, hold witnesses until they could be spoken to, move people from a dangerous place to a not dangerous place or do any of the other things that require police authority over bystanders.

**D. Whether *Parker's* per se rule or *Mendez's* reasonableness analysis applies, the motion to suppress should have been denied.**

Under *Parker* this was incident to arrest and Flores revealed he had the gun while he was being moved by the officer. The stop and seizure were legitimate. Under *Mendez* this was an arrest for a criminal warrant, not an infraction; there was a report of violence with a firearm; Flores was found in arm's reach of Powell; Flores stopped when Powell stopped and Powell was known to associate with violent gang members. A brief detention of Flores was warranted to secure Powell's arrest. Officer McCain was busy dealing with Powell, and Officer Ouimette was not aware of how Flores was involved when he called him back. It was objectively reasonable for Ouimette to bring Flores to him while the situation was sorted out. Officers are entitled to reasonable discretion when safety is at issue, and officers were at least reasonable in this instance.

**E. *State v. Kelly*, 313 Conn. 1, 95 A.3d 1081 (2014).**

Amicus cites a Connecticut case, *State v. Kelly*, and urges the court to adopt the dissent. *Kelly* is on point and highly persuasive, but it is the majority in the five to two decision that gets the better of the argument. The Connecticut Court analyzed the pluses and minuses of the rules. The opinion also notes numerous cases from all over the country supporting

the position that a brief detention of a companion of an arrestee (or stoppee as the case may be) is justifiable without individualized suspicion of the companion. It also notes that, similar to this case “neither the defendant nor the dissent has identified a single case in which a court, either federal or state, has determined that such a protective stop of the companion was unreasonable.” *Id.* at 28-29.

Even the dissent supports the State’s position. The dissent is predicated on the fact that the defendant tried to leave. Here Flores stopped when Powell stopped. The dissent also distinguishes *Kelly* from *Trice v. United States*, 849 A.2d 1002, 1004 (D.C. 2004), in which the police received information that there had been a stabbing at a local hospital and two minutes later saw two men, including one who fit the description of the suspect, walking near the location of the stabbing. In that type of case, the companion's presence with a suspect in such geographic and temporal proximity creates a reasonable suspicion of the companion, as either a participant in or a witness to criminal activity. *Id.* at 44-45 (Eveleigh J. Dissenting). Given Flores involves a report of recent violent criminal activity, this case is more like *Trice* than *Kelly*. In addition the dissent notes that none of the officers had a reason to suspect that the suspect was armed. *Id.* at 52. Here the officers did have a reason to believe Powell was armed.

The *Kelly* dissent also distinguished *United States v. Lewis*, 674 F.3d 1298, 1309 (11th Cir. 2012), on its facts by noting that in *Lewis* there was information about the presence of a gun, while there was not in *Kelly*. Again, here there was information about the presence of a gun. Much of the dissent's reasoning is focused on the fact that there was no indication of immediate violence. In *Kelly* the primary suspect was stopped for a warrant for a parole violation. Flores is easily distinguishable from the *Kelly* dissent by the fact of the tip reporting a violent crime.

**F. The exclusionary rule advocated by the defense and amicus harms privacy rights.**

The primary criticism of the exclusionary rule is that it only benefits criminals. The response to that criticism is that the exclusionary rule polices police behavior, so that they will respect court rulings on whether they went too far, and not go too far when dealing with innocent civilians in the future. In other words the benefits of the exclusionary rule come when the courts are not looking. “[W]hile our state's exclusionary rule also aims to deter unlawful police action, its paramount concern is protecting an individual's right of privacy. *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010). The exclusion rule “accomplishes this by closing the courtroom door to evidence gathered through illegal means.” *State v. Eserjose*, 171 Wn.2d 907, 918, 259 P.3d 172 (2011). Here the

officers acted through means approved by the court. Even defense counsel acknowledged that this case was not meant to tell officers how to do their jobs and protect themselves. RP 102.

Particularly in areas such as this where the court has defined authority of law as being determined by a reasonableness analysis, suppression where the officers act reasonably harms privacy interests. When officers hear from the court and defense counsel “you did it right, do it the same way again, but we are going to suppress” officers lose confidence in the court system and its rulings lose legitimacy. More importantly, officers are unable to distinguish this type of case, where they acted reasonably but the court suppressed, from the type of cases where the court is actually trying to change officer behavior. This means that officers may not change their behavior when dealing with citizens who are actually not criminal, but have interactions with police, even though they should.

### **III. CONCLUSION**

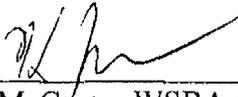
*Mendez* held that reasonableness defines the authority of law in dealing with companions to an arrestee. This is consistent with other jurisdictions that do not apply the automatic companion rule. Reasonableness must be viewed through the eyes of the officer, with reasonable discretion given to the officer. The lower courts failed to apply

these well-established principles. They should be reversed and the case remanded for trial.

Dated this 22<sup>nd</sup> day of February 2016.

Respectfully submitted,

GARTH DANO  
Prosecuting Attorney

By:   
\_\_\_\_\_  
Kevin J. McCrae – WSBA #43087  
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington,  
the undersigned declares:

On this date I e-mailed to David Bustamante, Attorney for Respondent, and hand delivered to David Bustamante's Office (Grant County Public Defender's Office), a copy of the Petitioner's Reply to Brief of *Amicus Curiae* American Civil Liberties Union of Washington in this matter.

David Bustamante  
Grant County Public Defense  
35 C Street NW – 1<sup>st</sup> Floor Annex  
Ephrata WA 98823

David Bustamante  
dbustamante@grantcountywa.gov

On this date I e-mailed to counsel for *Amicus Curiae* American Civil Liberties Union of Washington a copy of the Petitioner's Reply to Brief of *Amicus Curiae* American Civil Liberties Union of Washington in this matter pursuant to the parties' agreement:

AOKI LAW PLLC

ACLU of Washington Foundation

Russell M. Aoki  
[russ@aokilaw.com](mailto:russ@aokilaw.com)

Douglas B. Klunder  
[klunder@aclu-wa.org](mailto:klunder@aclu-wa.org)

Isham M. Reavis  
[isham@aokilaw.com](mailto:isham@aokilaw.com)

Edward Wixler  
[ewixler@aclu-wa.org](mailto:ewixler@aclu-wa.org)

Helen D. Ling  
[helen@aokilaw.com](mailto:helen@aokilaw.com)

Dated: February 25, 2016.

  
Kaye Burns

## OFFICE RECEPTIONIST, CLERK

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**To:** Kaye Burns  
**Cc:** David Bustamante; klunder@aclu-wa.org; ewixler@aclu-wa.org; russ@aokilaw.com; isham@aokilaw.com; helen@aokilaw.com  
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**Cc:** David Bustamante <dbustamante@grantcountywa.gov>; klunder@aclu-wa.org; ewixler@aclu-wa.org; russ@aokilaw.com; isham@aokilaw.com; helen@aokilaw.com  
**Subject:** State of Washington v. Cody Ray Flores - Supreme Court No. 919861

Attached for filing in the above matter is Petitioner's Reply to Brief of Amicus Curiae American Civil Liberties Union of Washington.

### ***Kaye Burns***

Administrative Assistant  
Grant County Prosecutor's Office  
PO Box 37  
Ephrata WA 98823  
(509)754-2011, ext. 3905  
(509)754-6574  
e-mail – [kburns@grantcountywa.gov](mailto:kburns@grantcountywa.gov)

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