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SUPREME COURT
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2011 DEC 22 P 3:58

No. 86203-6

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMAR MENESESE,

Petitioner.

FILED
SUPREME COURT
STATE OF WASHINGTON
2012 JAN -4 P 3:41
BY RONALD R. CARPENTER
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BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES
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FILED AS
ATTACHMENT TO EMAIL

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 19,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs. It also has long advocated for the constitutional rights of public school students in Washington. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself, including in cases specifically involving the privacy rights of students.

The Washington Defender Association (“WDA”) is a statewide non-profit organization with 501(c)(3) status. WDA has more than a thousand members and is comprised of public defender agencies, indigent defenders, and those who are committed to seeing improvements in indigent defense. One of the primary purposes of WDA is to improve the administration of justice and to stimulate efforts to remedy inadequacies or injustice in substantive or procedural law. WDA and its members have previously been granted leave to file amicus briefs on many issues relating to criminal defense and representation of the indigent.

ISSUE TO BE ADDRESSED BY *AMICI*

Whether Wash. Const. Article 1, Section 7 allows a warrantless search of a student's belongings, when the search is conducted by a police officer for law enforcement purposes, simply because the search takes place within a school.

STATEMENT OF THE CASE

The following facts are taken from the parties' briefs. Bellevue Police Department stationed an officer in the local high school, designating him a "school resource officer" or "SRO." On February 4, 2009, the SRO was patrolling a school restroom, and discovered Jamar Meneese with marijuana and a locked backpack. The SRO seized the marijuana and backpack, and told Meneese he was under arrest. The SRO proceeded to search the backpack (opening it with a key seized from Meneese), without consent or a warrant. The Court of Appeals held that this search was allowed under the "school search" exception to the warrant requirement. *See State v. J.M.*, 162 Wn. App. 27, 255 P.3d 828, *review granted*, 172 Wn.2d 1017, 262 P.3d 64 (2011).

ARGUMENT

If Meneese had been arrested by a police officer anywhere other than his school, the warrantless search of his locked backpack would have been unconstitutional. The officer had no probable cause to believe the

backpack contained evidence of criminal activity, nor did any exigency exist that would justify a warrantless search.

The State argues that the search is constitutional simply because the officer is normally stationed at the school and the arrest took place there. In affirming Meneese's conviction, the Court of Appeals sanctioned a practice that violates this Court's tradition of upholding the privacy rights of students. There is no valid reason to exempt a police officer's search of a student's belongings from the constitutional rules that would apply outside the school, particularly when the officer has arrested the student. The Court of Appeals' decision was made despite contrary precedent from this Court, and without consideration of the broad impact such a policy would create, given today's routine police presence in our school system.

A. Article 1, Section 7 Prohibits Warrantless Searches of Students by Police Officers

Analysis of this case must start with the oft-repeated maxim that "[s]tudents do not shed their constitutional rights at the schoolhouse door." *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 303, 178 P.3d 995 (2008) (quotations omitted). One of those rights is the right to be free from warrantless searches, "unless it fits within one of the 'jealously and carefully drawn exceptions' ... rooted in the common law." *Id.* at 310. The

State cannot meet its heavy burden of proving one of those exceptions to the warrant requirement applies here. *State v. Schultz*, 170 Wn.2d 746, 761, 248 P.3d 484 (2011).

The State asserts that the search of Meneese's backpack fell within the "school search" exception recognized by this Court's decision in *State v. McKinnon*, 88 Wn.2d 75, 558 P.2d 781 (1977), even though this Court has never extended that exception to police officers exercising law enforcement authority against students. Indeed, this Court clarified in *York* that the scope of a "school search" exception to Article 1, section 7's warrant requirement, if it exists at all, is quite narrow and does not apply to law enforcement activities. In addition, *McKinnon* was decided solely under the Fourth Amendment, so it does not control this Court's analysis of the greater protections afforded by Article 1, Section 7.

1. A "School Search" Exception to Article 1, Section 7 Does Not Extend to Police Officers

In order to resolve the present case, the Court does not need to decide the general viability of a "school search" exception to Article 1, Section 7. To the extent that such an exception exists, *York* made it clear that it would not apply to searches conducted by a police officer. The

York majority¹ and concurring opinions disagreed about whether a “special needs” exception is compatible with Article 1, Section 7. They agreed, however, that any “special needs” or “school search” exception must be divorced from law enforcement purposes.

The majority was clearest: “For there to be a special need, not only must there be some interest beyond normal law enforcement but also any evidence garnered from the search or seizure should not be expected to be used in any criminal prosecution against the target of the search or seizure.” *York*, 163 Wn.2d at 311. Justice Madsen’s concurrence described a slightly broader exception, applicable to searches conducted by school administrators and coaches, but still found two necessary conditions. First, “the purpose of the search is other than the detection or investigation of a crime.” *Id.* at 319 (Madsen, J., concurring). Second, “the traditional requirement of a warrant and probable cause must be inadequate to fulfill the purpose of the search.” *Id.*

McKinnon itself emphasized the difference between true “school officials” and law enforcement activities by a police officer:

The high school principal is not a law enforcement officer. His job does not concern the discovery and prevention of crime. His duty as the chief administrator of the high

¹ Although the opinion authored by Justice Sanders was subscribed to by only four justices, it was referred to as the “majority” in the concurring opinions, and this brief will use the same terminology.

school includes a primary duty of maintaining order and discipline in the school. In carrying out this duty, he should not be held to the same probable cause standard as law enforcement officers.

McKinnon, 88 Wn.2d at 81. Significantly, the search there was upheld only because the principal “acted independently” of law enforcement in deciding to search the students. *Id.* at 82.

Plainly, none of these views of a “school search” exception would extend to a situation such as in the present case. Here, the search was initiated and conducted by a police officer, as part of a criminal investigation, after the suspect was already arrested and the backpack was secured. The officer was easily in a position to obtain a warrant, if supported by probable cause, just as he would have done if Meneese had been arrested outside the school. *See, State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436 (1986), *overruled on other grounds by State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009) (holding post-arrest searches of locked containers by police officers generally must be authorized by a valid search warrant; by locking a container, an individual shows that he or she reasonably expects the contents to remain private, and the danger that an individual could destroy or hide evidence located within the container before an officer has an opportunity to obtain a warrant is minimal). In the circumstances here, adherence to the requirement of a

warrant and probable cause is the normal rule for police conduct, not an “impracticable” rule. *York*, 163 Wn.2d at 323-24.

None of this Court’s prior school search cases involve a police officer engaged in activities like this, and there is no reason for the Court to distort the meaning of “school official” beyond the meaning it rationally had in the prior cases: school administrators, teachers, coaches, band directors and the like.² The State attempts to obscure the issue by equating “violation of school rules” and “criminal activity,” Supplemental Brief of Respondent at 10, and claiming that only “reasonable grounds” are required for all searches done by police officers “to enforce school rules and prevent crime,” *id.* at 14. The State supports its argument with reference to *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), which explicitly encompasses both violations of school rules and violations of the law. *T.L.O.*, however, was decided solely under the Fourth Amendment, which, as discussed below, has minimal precedential value for an analysis under Article 1, Section 7. And, as discussed above, under Article 1, Section 7, this Court has explicitly repudiated the “school search” exception for a criminal investigation. *See*

² *See also, State v. EKP*, 162 Wn.App. 675, 255 P.3d 870 (2011) (Division Two allows school principal to conduct search of student’s backpack without complying with rules for informant tips to police – clearly distinguishing the rules for police searches from those that apply to a principal.)

York, 163 Wn.2d at 311; *York*, 163 Wn.2d at 319 (Madsen, J., concurring).

Similarly, the State confuses the issue by creating a straw man of non-police security guards, assuming that such guards would be treated as “school officials,” and suggesting that would somehow lead to less student privacy. Supplemental Brief of Respondent at 14. This case is not about non-police security guards. It is about a police officer arresting a student and conducting a warrantless search of his locked backpack where the officer used the evidence seized in connection with a criminal investigation for a criminal prosecution, and where it was offered in court to support a criminal charge. That is far different from a case about school security guards who are not police officers. Police officers have arrest powers and the authority to bring the full weight of the criminal justice system onto an individual. *York* properly excluded law enforcement activity like that here from a “school search” exception. If another case comes along involving non-police security guards in schools, their status should be addressed at that point, but not on the very different factual record in the case at bar.

2. Fourth Amendment Precedent Has Minimal Relevance to the State Constitutional Privacy Issue Posed in this Case

In the lower courts, the State claimed that Wash. Const. Article 1, Section 7 affords no greater privacy protection to students than the Fourth

Amendment. Brief of Respondent at 10 (citing *State v. Brooks*, 43 Wn. App. 560, 568, 718 P.2d 837 (1986)). It does not renew that patently incorrect claim³ in its supplemental briefing, but nonetheless continues to base its argument primarily on Fourth Amendment case law from the federal courts and other states. Specifically, the State relies on *T.L.O.* for the proposition that a “school search” exception extends to searches for evidence of criminal activity, Supplemental Brief of Respondent at 9, and relies upon a variety of decisions from other jurisdictions for the proposition that SROs should be considered “school officials” for search purposes,⁴ *id.* at 12-14.

This reliance is misplaced because the warrant requirement and exclusionary rule are treated differently under the Fourth Amendment and the Washington Constitution. “[T]he underlying command of the Fourth

³ As explained in the ACLU’s Memorandum in Support of Petition for Review, the State’s claim does not withstand scrutiny in light of *York*, which held that drug testing of student athletes violates Article 1, Section 7 even though it is allowed under the Fourth Amendment, see *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).

⁴ The State fails, however, to cite the several Georgia rulings which would support suppression here even under the Fourth Amendment. See, *Patman v. State*, 537 S.E.2d 118 (Ga. App. 2000) (holding that a police officer assigned to a school as an SRO is not a “school official” and requires probable cause to search a student); *State v. Scott*, 279 Ga.App. 52, 630 S.E.2d 563 (Ga. App. 2006) (suppression granted under “traditional Fourth Amendment principles” applicable to police when SRO stops car in front of the school, on school property); *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (1975) (drawing bright line between searches conducted solely by school officials and those involving a law enforcement officer); and *State v. K.L.M.*, 278 Ga.App. 219, 628 S.E.2d 651 (2006) (“[A]ction by school officials will pass constitutional muster only if those officials are acting in their proper capacity and the search is free of involvement by law enforcement personnel.”)

Amendment is always that searches and seizures be reasonable.” *T.L.O.*, 469 U.S. at 337. But “the word ‘reasonable’ does not appear in any form in the text of article I, section 7.” *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005). This is a significant difference. As this Court has explained,

Thus, where the Fourth Amendment precludes only unreasonable searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs without authority of law. This language ... creates an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions....

State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (quotations, citations, and footnotes omitted).

As this Court has reiterated many times, the “authority of law” demanded by Article 1, Section 7 is satisfied only by a warrant or “a few jealously guarded exceptions.” *E.g., York*, 163 Wn.2d at 306. This jealous protection of privacy applies not only to the *number* of exceptions to the warrant requirement, but also to their *scope*. “In contrast to the Fourth Amendment, article I, section 7 protects privacy interests without express limitation and exceptions to the warrant requirement must be narrowly applied.” *Id.* at 323 (Madsen, J., concurring).

Applying the foregoing established principles of Article 1, Section 7 jurisprudence, the State has not met its heavy burden to show that a “school search” exception, if it exists at all, extends beyond the scope

delineated in *McKinnon*, as clarified by *York*, to the officer's conduct here. The State has not shown how "the constitutional text, the origins and law at the time our constitution was adopted, and the evolution of that law and its doctrinal development" would support such an expansion of this exception to the warrant requirement. *Valdez*, 167 Wn.2d at 773. Accordingly, this Court need only look to its precedent and hold that the scope of a "school search" exception cannot extend to a police officer involved in a criminal investigation.

B. A Clear Rule Separating Non-Police School Officials' Search Powers from Police Officers' Criminal Law Enforcement Authority is Essential to Avoid the Abuses of Law Enforcement Authority which Accompany the Increased Placement of Police in Schools.

1. The School Environment Requires Scrupulous Adherence to Constitutional Rules

The State claims the need "to maintain order and discipline" in schools supports relaxed search rules for police engaged in law enforcement activities in schools, citing cases involving prisoners, probationers and airports. Supplemental Brief of Respondent at 6, 8. It should be self-evident that schools and prisons cannot be equated for constitutional purposes. *See T.L.O.*, 469 U.S. at 339. If anything, there is a greater need for strict enforcement of our constitutional limitations on government when police are dealing with students than when they are interacting with adults. Schools are entrusted with preparing our children

to become full participants in a democratic society. As found by our Legislature, “[p]reparation for citizenship is as important as preparation for college and a career.” Laws of Washington (2009), ch. 223, § 1. Thus, the Legislature has mandated instruction in the Washington Constitution, RCW 28A.230.170, including specifically the “[r]ights and responsibilities of citizens addressed in the Washington state and United States Constitutions,” RCW 28A.230.093(2)(b).

Requiring police who arrest students in school to comply with the constitutional search rules that apply to police outside of school is consistent with this mandate. As Justice Brandeis stated in a case involving the constitutional limits on the government’s power to conduct searches in response to an alleged substance abuse “emergency” 80 years ago, “Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. ... If the government becomes a law-breaker, it breeds contempt for law;...” *Olmstead v. United States*, 277 U.S. 438, 468, 48 S.Ct. 564, 72 L.Ed. 944 (1928), *overruled in part by Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Brandeis, J., dissenting).

In a more recent case again involving a claimed substance abuse emergency, Justice Scalia reiterated Justice Brandeis’s point: “[T]he impairment of individual liberties cannot be the means of making a point;

that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.”

Treasury Employees v. Von Raab, 489 U.S. 656, 687, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) (Scalia, J., dissenting). And this Court quoted the

same principle with approval in the school search context in *Kuehn v.*

Renton Sch. Dist. No. 403, 103 Wn.2d 594, 601, 694 P.2d 1078 (1985):

“That [the schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *See also*,

Jacobsen v. City of Seattle, 98 Wn.2d 668, 674, 658 P.2d 653 (1983)

(ruling that a policy allowing suspicionless searches of every patron attending a concert at a public facility was unconstitutional and noting it was particularly offensive to constitutional values that the persons being frisked were young people.) If we routinely expose our children to police officers searching them in school halls, without following the usual rules that apply to police outside the school, we are teaching them the

“contempt” for the constitution that Justice Brandeis was describing. This Court should adhere to its tradition of protecting students’ constitutional right to privacy, and promote school safety within the bounds of the Constitution, by ruling that the SRO’s search here was unconstitutional.

The courts have required police to comply with other constitutional rules when engaged in law enforcement activities against students, such as interrogation. *State v. D.R.*, 84 Wn.App. 832, 930 P.2d 350 (1997) (eighth-grader's conviction for incest reversed because statements to police officer at school were not preceded by *Miranda* warnings; the Court quoted with approval the following: "Given that the school setting is more constraining than other environments, it is especially important that police interviews with children, when carried out in that setting, are conducted with due appreciation of the age and sophistication of the particular child.") Police and prosecutors have claimed, like the State does here, that requiring police to give *Miranda* warnings before interrogating students will cause harmful delays. But, as in *D.R.*, the courts have repeatedly rejected such claims in the interrogation context.

Most recently, in *J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394, 180 L.Ed.2d 310 (2011), the United States Supreme Court ruled that police, when conducting questioning at a school of a child suspected of committing a crime, must take the suspect's age into account and may have to provide *Miranda* warnings in circumstances that would not require the warnings to be given to an adult suspect. The Court made clear that police interacting with students at school in a law enforcement capacity must follow the constitutional requirements for police, because children

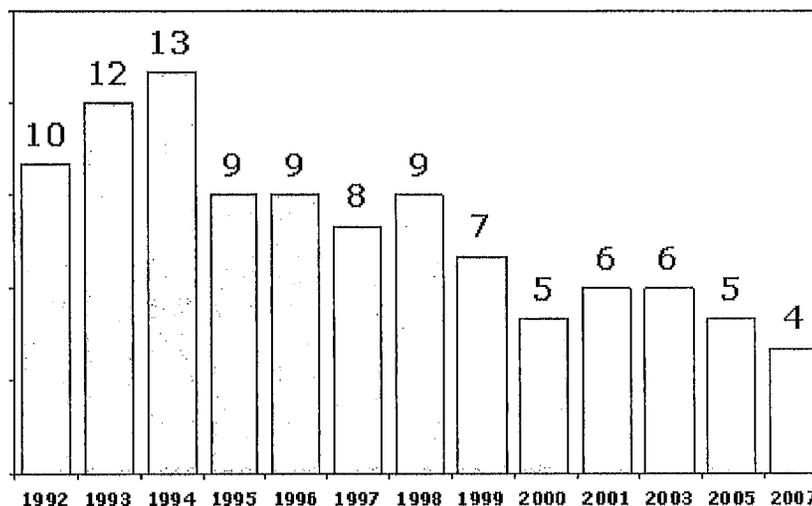
are different from adults and especially vulnerable to coercion from authority figures in this context. The same reasoning supports the conclusion that SROs acting in circumstances like those here must adhere to the state constitution's warrant requirement. The warrant requirement and exclusionary rule, like the *Miranda* rule, are measures designed to safeguard fundamental constitutional guarantees. *See, J.D.B.*, 131 S.Ct. at 2401; *State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009); *State v. Boland*, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990).

2. Increased Police Presence in Schools Without Strict Limits Has Led to Abuses of Authority that Harm Students

As described in the ACLU Amicus Memorandum in Support of Review, and the briefs of other *amici* in this case, there has been a tremendous expansion of police presence in the schools in recent years. The deployment of law enforcement in schools has been accompanied by dramatic increases in school-based arrests. *See e.g.*, The Advancement Project, *Education on Lockdown: The Schoolhouse to Jailhouse Track* at 15-16, 23 (2005) http://www.advancementproject.org/sites/default/files/publications/FINAL_EOLrep.pdf (noting significant increases in Philadelphia County from 2000-2003 and in Houston from 2001-2002, and a 71% increase in Denver between 2000 and 2004). In at least one school district, "the major cause

of the increase in [school-related charges] was a result of law enforcement (SROs) within the schools.” Clayton County Pub. Sch. [GA], *Executive Report of the Blue Ribbon Commission on School Discipline* at 47 (2007) <http://www.clayton.k12.ga.us/departments/student-services/handbooks/BlueRibbonExecutiveReport.pdf> (noting increase in such charges from 90 in 1996 to 1,200 in 2004).

However, there is no crime or safety emergency requiring relaxed search rules for the police engaged in law enforcement activity in the schools, contrary to the State’s invitation to the Court to create such a rule. As other *amici* point out, juvenile crime rates have decreased in recent years. Student reported incidents of violence and theft is at the lowest levels since 1993. National Center for Education Statistics, “Indicators of School Crime and Safety, 2010,” (2010) <http://bjs.ojp.usdoj.gov/content/pub/pdf/iscs10.pdf>. Regarding serious violent crime in schools specifically, the data shows a significant reduction:



Serious Violent Crime Rate per 1,000 students Ages 12-18.

(<http://youthviolence.edschool.virginia.edu/violence-in-schools/national-statistics.html> (relying on United States Department of Justice data).

Studies do not indicate that there is any correlation between this crime reduction and the presence of police officers in schools; there is no clear evidence that employing SROs make schools safer or improve student behavior. Justice Policy Institute, *Education Under Arrest: The Case Against Police in Schools* at 9-12 (2011)

http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf. This data shows there is no valid basis for the Court to depart from its tradition of protecting student privacy despite the claim that adolescent drug use justifies relaxing those protections. See, *Kuehn v. Renton School District* and *York, supra*. School safety is

compatible with, not contradictory to, compliance with the strong privacy mandate of the state constitution.

Based on incidents across the country, the harms inflicted on students by blurring the lines between criminal law enforcement activity and the educational mission of school officials could not be clearer. Police officers are trained to handle criminal activity, and are more likely to see ordinary schoolchild behavior (and misbehavior) as criminal in nature. A few recent examples in the headlines make the point. *See*, “Student Arrested for Burping During Class” <http://abcnews.go.com/blogs/headlines/2011/12/student-arrested-for-burping-during-class/> (December 2, 2011, article describes how teacher in New Mexico called in SRO to deal with 13 year old who burped in class and the SRO arrested student for interfering with public education.) *And see*, “Data: More than 700 Students Arrested in Connecticut Schools in 2010” <http://www.middletownpress.com/articles/2011/12/14/news/doc4ee803fc73888356507997.txt> (describes fifth-grader arrested for giving girl a wedgie on the school bus, a high school student Tased by an SRO for allegedly taking an extra food item at the school cafeteria without paying, and arrests of students for refusing to take off a hat or wearing pants too low).

As disturbing as it is that it has become commonplace for our children to be arrested, it is even more disturbing that this harm is borne disproportionately by students of color. ACLU of Connecticut Report “Hard Lessons: School Resource Office Programs and School-Based Arrests in Three Connecticut Towns” at 9-10, 25-26 (2008) http://www.aclu.org/pdfs/racialjustice/hardlessons_november2008.pdf (in one town, African-American and Latino students were one-quarter of the student population but two-thirds of the town’s public school arrests, and although white students committed more assaultive offenses than African-American students, it was the African-American students who were arrested more for those offenses). See also, *Education Under Arrest*, *supra*, at 21. This data makes clear the compelling need for the Court to rein in the activities of police in schools by strictly enforcing the state constitution’s search rules against them.

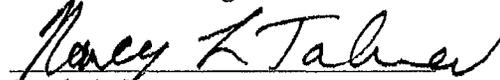
CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court hold that law enforcement officers, regardless of whether they are stationed in schools or designated as “school resource officers,” may not search a student’s belongings without a warrant or exigency. Therefore,

evidence found in Meneese's backpack should have been suppressed.

Respectfully submitted this 22nd day of December 2011.

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Subject: RE: State v. Meneese, Case No. 86203-6

Rec. 12-22-11

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From: Maly Oudommahavanh [<mailto:moudommahavanh@aclu-wa.org>]
Sent: Thursday, December 22, 2011 4:07 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Sarah Dunne; Doug Klunder; Nancy Talner; William.Doyle@kingcounty.gov; GibsonC@nwattorney.net; Jim.Whisman@kingcounty.gov; perezd@seattleu.edu; nicole.mcgrath@teamchild.org; david.huneryager@teamchild.org; kambrose@u.washington.edu; stearns@defensenet.org
Subject: State v. Meneese, Case No. 86203-6

Dear Supreme Court Clerk,

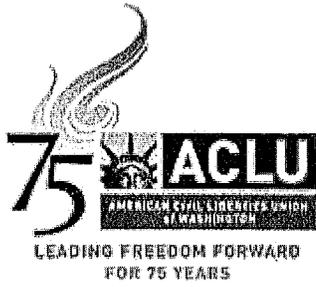
Please accept by email filing the attached documents in Case No. 86203-6, State v. Meneese:

1. Motion of American Civil Liberties Union of Washington and Washington Defender Association for Leave to Participate as Amici Curiae; and
2. Amici Curiae Brief of American Civil Liberties Union of Washington and Washington Defender Association.

With consent of the parties and other known amici copied on this email, this email constitutes proof of electronic service of the attached documents.

Sincerely,
Maly Oudommahavanh
Legal Assistant
ACLU of Washington Foundation
moudommahavanh@aclu-wa.org
206.624.2184 ext. 222

Our address:
901 Fifth Avenue, Suite 630
Seattle WA 98164



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