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No. 91529-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Petitioner,

vs.

MICHAEL ALLEN BUDD,
Respondent.

ANSWER

~~REPLY~~ TO AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON

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REPLY TO AMICUS CURIAE STATEMENT OF THE CASE

Although *Amicus* does provide by footnote that the officer told Mr. Budd that she “could and would obtain a search warrant”, this should be properly reflected as part of the *Statement of the Case*. The Grant County Superior Court judge noted in his ruling:

“In Washington, an assertion by a peace officer that he will request a warrant if consent is withheld does not constitute an assertion of such authority. *State v. Smith*, supra at 115 Wash. 2d 790. Threats to obtain a search warrant may, however, invalidate consent subsequently given if grounds for obtaining the warrant did not exist. Police officers may not misrepresent the scope or extent of their authority to obtain a search warrant. *State v. Apodaca*, 67 Wash. App. 736, 738, 839 P.2d 352 (1992), o'ruled on other grounds, *State v. Mierz*, 127 Wash. 2d 460, 901 P.2d 286, SO A.L.R. 5th 921 (1995).”

“While Detective Holmes' report, submitted as an attachment to the affidavit establishing probable cause in this case, recites that the detective represented to the Defendant that she “could and would obtain a search warrant”, that report is not part of the evidence before the court. Had Detective Holmes asserted to the Defendant that she in fact would have received a warrant when there was insufficient probable cause for issuance, that might have constituted a false assertion of authority.”

CP 42

The parties stipulated to the record to be considered by the trial court on bench trial. This stipulation included Detective Holmes' probable cause statement. CP 107

ARGUMENT

Washington is within a minority of states which require a warning of the right to refuse or limit consent to entry of the home following a law enforcement "knock and talk" encounter.¹

This Court has repeatedly held that Article I, Section 7 of the Washington Constitution provides greater protections than the fourth amendment to the U.S. Constitution. *State v. Ladson*, 138 Wn. 2d 343, 350, 979 P. 2d 833 (1999) (" . . . our state constitution . . . provides unique and substantially greater protection than the Fourth Amendment of the United States Constitution").

Similarly to the Washington State Constitution's Article I, Section 7, Article II, Section 2 of the Arkansas Constitution includes a provision protecting "Individual Liberty," declaring certain "inherent and inalienable

¹ See *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998); *State v. Brown*, 156 S.W.3d 722, 726 (Ark. 2004)

rights.” These include “enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing . . . happiness.”

The “knock and talk,” procedure allows law enforcement officers, in the words of the 9th Circuit, to “openly and peaceably, at high noon, . . . walk up the steps and knock on the front door of any man’s ‘castle’ with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law.”² However, asking questions is often no longer necessarily the primary purpose of a knock and talk, as is demonstrated by Mr. Budd’s case. The intent in contacting Mr. Budd’s was not to talk but to obtain consent to search for evidence of a crime after police work had failed to disclose any probable cause.

Law enforcement misuse of the knock and talk caused great concern that the protections against warrantless searches are being eroded. This Court in *Ferrier* stated: “Indeed, we are not surprised that, as noted earlier, an officer testified that virtually everyone confronted by a knock and talk accedes to the request to permit a search of their home.” *Ferrier* at 113.

² *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964)

This Court in *Ferrier* found following its own *Gunwall*³ analysis that the privacy right protected was local in nature and found no need for Washington State to accede to any notion of “national uniformity” by eroding our state's well-established protections against "unreasonable governmental intrusions." *Ferrier* at 113, citing, *State v. Jackson*, 102 Wn.2d 432, 443, 688 P.2d 136 (1984).

With the inclusion of these responsive points, Mr. Budd takes no exception to the argument presented by the Amicus Curiae.

CONCLUSION

This Court should uphold the suppression of evidence and dismissal of Mr. Budd's charges by the Court of Appeals.

³ *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986)

Respectfully submitted this 14th day of October, 2015.

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CERTIFICATE OF SERVICE

I certify that on the 14th day of October, 2015, I caused to be sent electronically a copy of *REPLY TO AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON* to:

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