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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

PETITIONER,

v.

CODY RAY FLORES,

RESPONDENT.

Filed *E*
Washington State Supreme Court

FEB 05 2016

Ronald R. Carpenter
Clerk *by h*

**BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON**

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I. INTRODUCTION

In broad daylight on a residential sidewalk, Moses Lake police officers ordered Cody Ray Flores to stop, kneel on the ground facing away, and place his hands on his head. The officers had no warrant for Mr. Flores, and had no reason to suspect he had engaged in any criminal activity. Instead, they had received an anonymous tip regarding Mr. Flores's companion, whom they had come to arrest on an outstanding warrant. Just as officers were about to search Mr. Flores, he volunteered he had a gun in his waistband.

The State conceded there was no basis to detain Mr. Flores under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), but argued officers had authority to seize him to control the scene of arrest, relying on two cases arising from the arena of traffic stops: *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999), and *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). These cases allow officers to order passengers into or out of stopped cars, based on an objective rationale predicated on safety concerns—a lower standard than required by *Terry*. The trial court rejected the State's argument and granted Mr. Flores's motion to suppress the gun, and the Court of Appeals affirmed, holding the State had not met even the "objective rationale" standard. *See State v. Flores*, 188 Wn. App. 305, 351 P.3d 189 (2015).

The Court of Appeals did not go far enough. Although it reached the right result, it considered the seizure proper up to the point Mr. Flores' companion was arrested and Mr. Flores was ordered to walk backwards. It

analogized this initial seizure to the treatment of passengers in *Mendez* and *Parker*, who were necessarily stopped along with the car. It also relied on dicta from *Parker*, which states that the “objective rationale” standard is met for purposes of directing passengers’ movements whenever a driver is arrested. *See Flores*, 188 Wn. App. at 315. But the reasoning of these cases does not automatically translate from, and should not be expanded beyond, the automobile context.

Although passengers necessarily stop along with the car in which they ride, Washington law does not consider them seized for constitutional purposes. In contrast, the initial order directing Mr. Flores to stop, kneel, and put his hands on his head was clearly a seizure, which must be justified from its outset. Further, *Mendez* and *Parker* were decided based on the concerns and risks particular to the circumstances of a roadside stop. Expanding this jurisprudence from the car seat to the sidewalk would create a broad license, whenever there is a stop or an arrest, to detain nearby individuals without individualized justification. To recognize such authority would be a dangerous encroachment upon the personal privacy guaranteed by article I, section 7 of the Washington State Constitution, would invite discriminatory application, and would legitimize a belief in guilt by association.

Amicus curiae the American Civil Liberties Union of Washington urges this Court to affirm the result reached by the Court of Appeals. And in order to safeguard individual liberties within the State of Washington, this Court should hold that outside of the automotive context, there is no

per se rule allowing police to stop the companion of a lawfully detained or arrested individual—the minimum justification for the detention of a pedestrian is articulable suspicion of wrongdoing, not mere proximity to or lawful association with another individual.

II. STATEMENT OF INTEREST

The American Civil Liberties Union of Washington (ACLU) is a statewide, nonpartisan, nonprofit organization of over 50,000 members and supporters dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of article I, section 7 of the Washington State Constitution, prohibiting interference in private affairs without authority of law. It has participated in numerous privacy-related cases both as *amicus curiae* and as counsel to parties.

III. ISSUE TO BE ADDRESSED BY *AMICUS*

Whether article I, section 7 of the Washington State Constitution allows police officers to conduct suspicionless stops of the companions of a detained or arrested individual.

IV. STATEMENT OF THE CASE

The parties and the Court of Appeals have thoroughly described the facts of the case. *See Flores*, 188 Wn. App. at 308–10; Appellant’s Brief at 1–2; Respondent’s Brief at 6–11. For the convenience of the Court, we include here a summary of those facts relevant to our argument.

On November 2, 2013, Moses Lake Police responded to an anonymous call claiming Giovanni Powell had pointed a gun at

somebody's head in a residential neighborhood. Dispatch informed the responding officers the caller had provided no identifying information, but that there was an outstanding warrant for Mr. Powell's arrest.

Officer McCain arrived first, a little after 4:30 in the afternoon, and saw Mr. Powell walking down the sidewalk with Mr. Flores.

Officer McCain knew Mr. Powell from previous contacts, but did not recognize Mr. Flores. Officer McCain got out of his patrol car across an intersection from the two men, drew his gun, and ordered Mr. Powell and Mr. Flores to stop. Officer McCain then ordered them to kneel on the sidewalk with their hands on their heads. The two men complied; when Officer McCain noticed Mr. Powell and Mr. Flores talking, he ordered the men to separate, and again the two complied.

Additional officers then arrived, and one helped Officer McCain arrest Mr. Powell. The officers ordered Mr. Powell to walk backwards, keeping his hands on his head, towards their voices. He did so, then was frisked for weapons and placed under arrest. Mr. Flores did nothing to interfere, and remained kneeling on the ground, with his hands on his head and facing away from the officers, until he too was ordered to move, by Officer Ouimette. He ordered Mr. Flores to walk backwards, keeping his hands above his head, towards the sound of his voice. Mr. Flores complied. As he walked backwards, he was able to see that Officer Ouimette's gun was drawn, as were the guns of all officers present.

After Mr. Flores had walked ten or fifteen feet, he called to

Officer Ouimette, saying that Mr. Powell had given him a gun, and that it was in his waistband beneath his coat. Up to this point, officers had seen no evidence of a gun on either man. Officer Ouimette ordered Mr. Flores to continue approaching while facing away. When Mr. Flores reached Officer Ouimette, he ordered him to kneel. Mr. Flores was then handcuffed, and the gun taken from his waistband.

Mr. Flores was prosecuted in Grant County Superior Court for unlawful possession of a firearm in the first degree. The trial court granted his motion to suppress, and the Court of Appeals affirmed.

V. ARGUMENT

Though the Court of Appeals reached the correct outcome, it erred in holding that Mr. Flores's seizure was permissible up to the point that Mr. Powell was secured and Mr. Flores was ordered to walk backwards. The court held the "passenger cases" *Mendez* and *Parker* were controlling, and cited *Parker* for the proposition "[i]f the officer arrests the driver, the officer may then order an occupant from the car." *Flores*, 188 Wn. App. at 315. Based on this, it held "Moses Lake officers possessed reason to seize Cody Flores in order to secure the scene of Giovanni Powell's arrest" because Officer McCain "was entitled to take limited measures to ensure Flores would not interfere in his arrest of Powell." *Id.* at 316. This reasoning fails to properly appreciate the privacy protections of article I, section 7 and this Court's decisions interpreting it.

A. There was no authority of law under article I, section 7 to justify the seizure of Mr. Flores

Mr. Flores was seized when he was stopped by Officer McCain. A seizure occurs when an officer's behavior would communicate to a reasonable person that he or she is not free to ignore the officer's presence and walk away. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). This standard was clearly met by Officer McCain's order, called out from across an intersection and with gun unholstered, that Mr. Powell and Mr. Flores stop and kneel with their hands on their heads. And though Washington's test for a seizure does not rely on the seized individual's response, Mr. Flores did, in fact, stop and kneel.

It is well established that article I, section 7 of the Washington State Constitution provides broader protection of individual liberty against government intrusion than the federal Fourth Amendment. *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). Both the state and federal constitutions prohibit unreasonable seizure, and under both a warrantless seizure is *per se* unreasonable unless justified by a limited set of carefully drawn exceptions. *State v. Snapp*, 174 Wn.2d 177, 187–88, 275 P.3d 289 (2012); *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). But the Washington State Constitution also prohibits even reasonable seizures that are not justified by the authority of law. *Valdez*, 167 Wn.2d at 772. "This creates 'an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions'" *Id.* (quoting *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983)).

The State conceded there no articulable suspicion of wrongdoing

to support application of the *Terry* exception, but the Court of Appeals decided that Mr. Flores' seizure fell within a constitutional exception created by *Mendez* and *Parker*. *Amicus* respectfully suggests that the Court of Appeals misread and misapplied those cases. The State has failed to provide an individualized objective rationale based on safety concerns for seizing Mr. Flores and, as discussed in section B below, *Mendez* and *Parker* are inapplicable to the seizure of pedestrians such as Mr. Flores.

The Court of Appeals properly recognized that article I, section 7 requires, at a minimum, the articulation of an objective safety rationale in order to seize the companion of a detainee or arrestee. This is an example of the greater privacy provided by our state constitution than is provided by the Fourth Amendment. Under both the Fourth Amendment and article I, section 7, a police officer automatically has authority to order a driver out of a car. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977); *State v. Kennedy*, 107 Wn.2d 1, 8, 726 P.2d 445 (1986) (adopting *Mimms*). For Fourth Amendment purposes, a legitimate traffic stop also creates *per se* authority to order passengers in or out of the car. *Maryland v. Wilson*, 519 U.S. 408, 415, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997). This is because the passengers are already stopped along with the vehicle, and the officer's orders are only a minimal additional intrusion on their liberty. *Id.*; *see also Brendlin v. California*, 551 U.S. 249, 255, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) (holding passengers are seized under the Fourth Amendment when a vehicle is pulled over). The underlying justification is the legitimate and weighty need for officers to

control the scene of the stop to ensure safety. *Wilson*, 519 U.S. at 413.

But under the Washington State Constitution, passengers are not automatically considered seized. *State v. Mendez*, 137 Wn.2d at 222–23. This Court has specifically recognized that the protections of article I, section 7 are possessed *individually*. *State v. Parker*, 139 Wn.2d at 497–98 (quoting *State v. Broadnax*, 98 Wn.2d 289, 296, 654 P.2d 96 (1982) (abrogated on other grounds by *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993))). While a driver is considered seized when police signal the car to pull over, “the privacy rights of passengers in that stopped vehicle are not diminished by the stop.” *Mendez*, 137 Wn.2d at 729. Any additional intrusion on a passenger’s liberty requires individual justification.

In *Mendez*, this Court held that the standard for such an intrusion is an “objective rationale predicated specifically on safety concerns.” *Id.* at 220. This standard must be met before an officer can lawfully control the movements of the passenger of a stopped car:

An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy article I, section 7. This articulated objective rationale prevents groundless police intrusions on passenger privacy.

*Id.*¹

¹ Washington is not alone in granting passengers greater privacy protection than afforded by the Fourth Amendment. Courts in Hawaii, Massachusetts, New Jersey, Oregon, and Vermont also require articulated safety concerns or individualized suspicion before

Mendez's relaxed standard for the detention of a passenger—lower than the articulable suspicion of criminal activity normally required by *Terry*—rests on the premise that an officer's order to a passenger to get out of a stopped car, or stay in it, is only a slight imposition on the passenger's liberty because either way, the passenger will likely stay at the scene until the car is free to go. *See id.* But ordering Mr. Flores onto his knees was no *de minimis* intrusion. Further, it served no safety interest: Officer McCain could have ordered Mr. Flores to stand back while Mr. Powell was detained and arrested, or simply to leave. If Mr. Flores *had* simply walked away, *Mendez* suggests Officer McCain would have had no lawful authority to stop him. *Id.* at 222–23. *Mendez*, correctly applied, would require Officer McCain to articulate a separate and individualized objective rationale for ordering Mr. Flores to kneel along with Mr. Powell. There was no such rationale.

Officer McCain knew nothing about Mr. Flores other than he was walking with Mr. Powell. Merely associating with a person suspected of criminal activity does not give rise to reasonable suspicion. *See Broadnax*, 98 Wn.2d at 295 (“mere presence” at a private residence being searched pursuant to a search warrant failed to justify a frisk). Further, because the

allowing an officer to order a passenger in or out of a stopped car. *Commonwealth v. Gonsalves*, 429 Mass. 658, 711 N.E.2d 108, 112 (1999); *State v. Morton*, 151 Ore. App. 734, 951 P.2d 179, 182 (1997); *State v. Smith*, 134 N.J. 599, 637 A.2d 158, 167 (1994); *State v. Caron*, 155 Vt. 492, 586 A.2d 1127, 1132 (1990); *State v. Kim*, 68 Haw. 286, 711 P.2d 1291, 1292 (1985).

tip regarding Mr. Powell had come from an uncorroborated anonymous caller, there was not even a reasonable suspicion that *Mr. Powell* had been recently engaged in criminal activity, let alone Mr. Flores. *See State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) (uncorroborated anonymous tip insufficient to establish probable cause). Mr. Flores was merely in the company of someone with an outstanding warrant. Under these circumstances, Officer McCain had no cause to treat Mr. Flores with more caution than any other person.

The State argues that no consideration of the actual circumstances of Mr. Flores' seizure or the logic of the *Mendez* rule is necessary; it relies instead on *Parker* to claim an automatic right to seize Mr. Flores. In *Parker*, a fractured court suppressed evidence found during warrantless searches of passengers' belongings incident to the arrest of vehicle drivers. The actual holding of *Parker* is irrelevant here, but the State places great reliance on a single line from the lead opinion signed by four justices. Before reaching the issue at hand, the plurality wrote that

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.

Parker, 139 Wn.2d at 501. This passage, purportedly applying *Mendez*'s rule *per se* whenever a traffic stop ripens into an arrest, had no bearing on the outcome of the case. None of the other opinions analyzed or relied on the propriety of directing passengers into or out of a vehicle. Instead, "[t]he only issue before us in these consolidated cases is the permissible

scope of the search of a vehicle following a lawful custodial arrest of the driver” *Id.* at 527 (Guy, C.J., dissenting). The passage is therefore dicta, and not controlling. *See State v. Potter*, 68 Wn. App. 134, 150, 842 P.2d 481 (1992) (“Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.”).

Even if this statement in *Parker* were not dicta, it would not control here because there was no arrest at the time Mr. Flores was seized. Officer McCain waited some period of time, until other officers arrived, before frisking and arresting Mr. Powell. Until that point, there is no indication that Officer McCain informed Mr. Powell he was under arrest, or the reason he had been stopped. An officer must have an independent objective rationale for keeping a suspect’s companion on the scene—later arresting the suspect will not retroactively justify detaining the companion.

B. This Court should not extend *Mendez* and *Parker* to allow the stop of companions on foot

Mendez does not permit an officer to automatically stop the companion of a stopped suspect. And even if the Court were to allow *per se* control over vehicle passengers, as suggested by the dicta in *Parker*, that authority should not be extended beyond automobile stops. Doing so would be a dangerous encroachment on article I, section 7’s privacy protections, while lacking the practical considerations used to justify lessened constitutional protection in the automotive context.

1. The scope of the *Mendez* rule must be carefully drawn

It is axiomatic that article I, section 7 allows only a limited number of “jealously and carefully drawn exceptions” to the general warrant requirement. *State v. Duncan*, 146 Wn.2d at 171 (internal quotes and citations omitted). Accordingly, the Court should clarify that an officer’s authority under *Mendez* must at all times be constrained by the underlying safety rationale. Doing so is in keeping with established exceptions that share a safety rationale: *Terry* frisks must not exceed the scope of what is needed to detect weapons, for example, by squeezing, sliding, or otherwise manipulating objects that are not immediately apparent as weapons. *State v. Garvin*, 166 Wn.2d 242, 251, 207 P.3d 1266 (2009). Searches incident to arrest must be limited to spaces within the immediate control of the arrested person. *State v. Smith*, 119 Wn.2d 675, 681, 835 P.2d 1025 (1992). And although no Washington court has considered protective sweeps incident to executing a search warrant, *see State v. Boyer*, 124 Wn. App. 593, 602, 102 P.3d 833 (2004), other sources have suggested such searches may not extend beyond the area authorized by the warrant unless officers reasonably fear for their safety, *see* 2 Wayne R. LaFare, *Search and Seizure* § 4.10(a), at 942–45 (5th ed. 2012).

Similarly, courts should scrutinize authority exercised over passengers or companions under *Mendez* to make sure that the officer’s orders at all times are justified by safety concerns, and guard against needlessly expanding *Mendez*’s exception beyond its underlying rationale.

2. The practical safety concerns in an automotive stop are not present when making a stop or arrest outside of the automobile context

Automobiles present unique dangers to law enforcement. The occupants of a stopped car will usually be partially concealed from an approaching officer. Automobiles contain many spaces where weapons could conceivably be hidden. A moving vehicle itself can be dangerous. Roadside stops, often conducted next to busy roads, also involve some risk from passing traffic.

These considerations are not present in stops of pedestrians. When a car is initially pulled over, the passengers pull over too, even if they are not seized for article I, section 7 purposes. This has the practical (if not constitutional) effect of keeping them on the scene. In contrast, there was no practical reason that Mr. Flores could not have continued walking down the street, away from the scene. It was only Officer McCain's order that kept him from leaving—and also potentially created a concern that Mr. Flores could interfere with the detention of Mr. Powell.

3. Expansion of the *Mendez* rule would erode article I, section 7's protections and risk discriminatory application

Expanding *Mendez*'s safety exception to include non-automotive companions of detainees would be a significant step towards transforming the carefully drawn list of exceptions to article I, section 7's warrant requirement into an *ad hoc* reasonableness test. *State v. Kelly*, a recent Connecticut case, provides an example of where this could lead. 313 Conn. 1, 95 A.3d 1081 (2014).

Police observed Mr. Kelly walking with a friend, whom an officer

believed matched the description of an individual with an outstanding warrant, and officers ordered both men to stop. *Id.* at 5–6. Because Connecticut’s constitution provides no greater protection than the Fourth Amendment, *id.* at 15–16, the Connecticut Supreme Court conducted a reasonableness analysis and held that state constitution permits the seizure of a suspect’s companion, whenever the *suspect* is reasonably believed to present a threat to officer safety, *id.* at 22.

Reasonableness tests such as the one employed in *Kelly* lead inexorably to additional exceptions to the warrant requirement. *See Connecticut Supreme Court Upholds Suspicionless Street Stop of Suspect’s Companion—State v. Kelly*, 95 A.3d 1081 (Conn. 2014), 128 Harv. L. Rev. 1003, 1003–04 (2015) (characterizing such cases as “the kind of very small hole ... which customarily begins the process by which entire tapestries unravel”) (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 374 (1974)). Courts that shift away from a warrant requirement (with limited, enumerated exceptions) towards balancing tests tend to restrict rather than expand individual rights, as “government interests typically trump individual rights.” *Id.* at 1007 & n.55 (quoting Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. Rev. 1173, 1194 n.98 (1988); Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 Geo. L.J. 1, 15 (2013)).

Ad hoc warrant exceptions based on circumstance-specific reasonableness balancing—along with the erosion of protection for

individual liberty that would inevitably follow—is anathema to article I, section 7 of the Washington State Constitution, which “focuses on the rights of the individual, rather than on the reasonableness of the government action.” *State v. Morse*, 156 Wn.2d 1, 12, 123 P.3d 832 (2005). If this Court expands *Mendez* outside the automotive context and adopts the *Parker* dicta, as the State urges in this case, it raises the risk of permitting widespread “guilt by association” seizures. This would severely undermine Washington’s jurisprudence holding a stop cannot be justified by mere proximity to one suspected of a crime. *See State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980).

Exactly these concerns were raised by two dissenting justices in *Kelly*, even under the reasonableness standard, who noted that *Kelly*’s holding amounts to little more than “guilt by association.” 313 Conn. at 36 (Eveleigh, J., & McDonald, J., dissenting). The dissent raised several troubling ramifications:

For instance, if a suspect with an outstanding warrant is talking to his neighbor’s family near the property line, can the police now detain the entire family as part of the encounter with the suspect? If the suspect is waiting at a bus stop with six other strangers, can they all be detained? If the same suspect is observed leaving a house and stopped in the front yard, can the police now seize everyone in the house to ensure that no one will shoot them while they question the suspect? What if the suspect is detained in a neighborhood known to have a high incident of crime, can the police now seize everyone in the entire neighborhood to ensure their safety while they detain the suspect?

Id. at 54. Instead, the dissent concludes that the more reasonable course would have been to allow police only to request Kelly leave while they detained the suspect. *Id.* at 36.

Amicus respectfully urges this Court to follow the *Kelly* dissent when determining the rule under article I, section 7. Critically, expansion of the *Mendez* rule would also invite discriminatory application. It is not surprising that this case involves a street arrest of a man already known to police officers, and the apparent transference of suspicion onto his companion. It is unlikely that police officers would even consider the same sort of action when arresting a white-collar suspect in an office setting. Seizures of companions are much more likely to be applied on the street, disproportionately impacting poor and minority communities—and young African American and Latino men in particular. It would enable law enforcement to rely upon unfounded assumptions of guilt by association and erode what positive steps have been taken to rebuild trust between these communities and their police officers.

This Court should hold the constitutional line, and carefully constrain *Mendez*'s safety exception. Outside of the automotive context, any seizure of a detained or arrested individual's companion should require a reasonable articulable suspicion meeting the *Terry* standard.

C. The Court of Appeals correctly held that suppression was required because there was no objective rationale justifying the order to Mr. Flores to walk backwards

Even if this Court decides to expand *Mendez* and *Parker* outside of the automotive context, and even if it holds that the initial detention of Mr. Flores was allowed, it should still affirm the Court of Appeals. The Court of Appeals decided this case under *Mendez*, holding Officer Ouimette required, but lacked, an objective rationale for ordering Mr. Flores to walk backwards. In the Court's view, Officer McCain

initially possessed reason to seize Mr. Flores in order to secure the scene of Mr. Powell's detention. However, this justification "evaporated" once other officers arrived and assisted in arresting and securing Mr. Powell. From this point onward, the continued detention of Mr. Flores—and the additional imposition of Officer Ouimette's order to walk backwards with his hands raised—lacked legal authority. Because Officer Ouimette frisked Mr. Flores after his seizure had already become unlawful, the search failed under article I, section 7. The Court therefore held the gun discovered during the search had been properly suppressed.

The Court of Appeals was correct. When Officer Ouimette reached the scene, multiple officers were present and Mr. Flores was in a position of disadvantage, kneeling, with his hands behind his head. Neither Mr. Flores nor Mr. Powell had done anything to threaten or obstruct police; both had been compliant. Officer Ouimette had absolutely no information suggesting Mr. Flores might be armed. It was broad daylight. In short, as both the trial court and Court of Appeals found, there was no objective rationale under *Mendez* to justify Officer Ouimette's order that Mr. Flores walk backwards towards him. This order amounted to a seizure in violation of article I, section 7. Because a valid frisk must begin with a valid stop, *State v. Duncan*, 146 Wn.2d at 166, Officer Ouimette's search of Mr. Flores was likewise unconstitutional.

D. This Court should reject the State's request for alternative remedies to suppression

Under federal law, the exclusionary rule is primarily meant to deter

constitutional violations. *See United States v. Leon*, 468 U.S. 897, 916–18, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). But because the primary purpose of article I, section 7 is the protection of individual privacy interests, deterrence is only a secondary concern. *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010); *State v. Winterstein*, 167 Wn.2d 620, 631–32, 220 P.3d 1226 (2009). Washington has therefore rejected the “good-faith” exception to the exclusionary rule. *Afana*, 169 Wn.2d at 184. It is immaterial whether Officer McCain believed he had authority to seize Mr. Flores, or whether Officer Ouimette knew there was no basis to further intrude on Mr. Flores’ privacy; the evidence derived from his seizure must be suppressed.

The State argues that remand, rather than suppression, should be ordered because the Court of Appeals applied a novel “stop motion” standard. Petitioner’s Supplemental Brief at 4. But there is nothing novel about the Court of Appeal’s standard: it applied *Mendez*, using the time-sensitive analysis employed during any article I, section 7 review where the sequence of events is important. *See, e.g., State v. Patton*, 167 Wn.2d 379, 397, 219 P.3d 651 (2009) (justification for a car search based on officer safety or destruction of evidence evaporates once a defendant is in custody).

Because Mr. Flores’s rights under article I, section 7 were violated by his initial and continued seizure, suppression of the fruits of that seizure is required.

VI. CONCLUSION

The ACLU asks this Court to affirm the Court of Appeals on

different grounds, because there was no legal authority for Mr. Flores's initial, suspicionless seizure, and to clarify that such seizures are not allowable through mistaken analogy to passengers in a stopped car. The ACLU also asks the Court to reject *Parker*'s dicta automatically applying *Mendez* to car passengers during an arrest, and instead always require a case-by-case consideration of the objective safety concerns.

Respectfully submitted this 25th day of January, 2016.



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2. *Brief of Amicus Curiae American Civil Liberties Union of Washington*
3. *Certificate of Service*

Thank you.

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