No. 80091-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JESUS DAVID BUELNA VALDEZ, et al.,

Respondents.

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

DOUGLAS B. KLUNDER, WSBA #32987
ACLU of Washington Foundation
705 2nd Avenue, Suite 300
Seattle, WA 98104
(206) 624-2184

Attorney for *Amicus Curiae*
American Civil Liberties Union of Washington

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 20,000 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 has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether a suspicionless search of a vehicle, both manually and with a dog, violates Article 1, Section 7 when conducted incident to the arrest of the driver on an outstanding warrant.

STATEMENT OF THE CASE

On the night of May 10, 2005, Jesus David Buelna Valdez was driving a minivan with Reyes Rio Ruiz as a passenger. Valdez was stopped because one of his headlights wasn't working. The officer discovered an outstanding arrest warrant for Valdez as the result of a records check. Valdez was arrested, handcuffed, and placed in the back of the patrol car.

The officers then searched Valdez's van without a warrant. This search was undertaken even though it was not supported by the justifications behind the search incident to arrest exception to the warrant requirement. First, there was no possibility of Valdez destroying evidence of the crime for which he was arrested.[1] Valdez was already handcuffed and secured in the patrol car, and could not have destroyed evidence even if it were present in the van. Second, the officers did not articulate any reason to believe there were weapons in the van, even if Valdez were somehow to escape from custody and run to his van.

The initial search of the van did not reveal any contraband or weapons. All it showed was that some of the interior panels were loose, missing screws, or attached with temporary fasteners that are commonly used in the automotive industry. One of the officers announced that he felt something wasn't right, and they called for assistance of a drug-sniffing dog. The dog arrived about 10 minutes later. It sniffed the exterior of the van, as well as the interior area where the officers had noticed loose paneling, and did not alert. The officers nonetheless had the dog search the remainder of the interior van, and the dog alerted on the driver's side of the second row of seats. The officers then conducted another thorough

[1] The record does not indicate what offense the outstanding arrest warrant was for. As a warrant for a previous offense, it is probable that there was no likelihood whatever that evidence of that offense could be found in the van.

manual search, and eventually popped out a cupholder in the third row of seats. Upon removing insulation from behind the cupholder, the officer discovered packages of methamphetamine.

Both Valdez and Ruiz were charged with unlawful possession of a controlled substance with intent to deliver. The trial court denied suppression motions and both were convicted. The court held the searches by both human and canine were encompassed within the search incident to arrest rule as announced in *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), which allows a search of the entire passenger compartment of a vehicle (except for locked containers) incident to the arrest of its driver. The Court of Appeals reversed, holding the second search by the dog was not within the bounds of a search incident to arrest. *See State v. Valdez*, 137 Wn. App. 280, 152 P.3d 1048 (2007).

The parties and courts below focus on whether or not use of the dog exceeded the scope of the *Stroud* exception to the warrant requirement. *Amicus* agrees with the Court of Appeals and with respondents that use of the dog unconstitutionally exceeded the scope of searches allowed under *Stroud*. However, *amicus* respectfully suggests that it is not necessary to decide whether the use of the dog constituted a second search. *Stroud* has not retained its vitality as a correct interpretation of Article 1, Section 7 of the Washington State Constitution,

so even the initial suspicionless search by the officers was unconstitutional.

ARGUMENT[2]

Although the trial court and Court of Appeals ultimately differed in the suppression of evidence found in Valdez's van, both courts allowed fishing expeditions based on no suspicion whatever. The mere fact that a person is arrested for an outstanding warrant cannot justify a search of his vehicle, looking for evidence of unrelated criminal activity. The lower courts erred in failing to consider more recent precedent from this Court that calls into question *Stroud's* continued vitality.

A. *Stroud* Is Inconsistent With the Privacy Guarantees of Article 1, Section 7

Modern interpretation of Article 1, Section 7 began in the early 1980's, when this Court "indicated that [it] will protect Washington citizens' right to privacy in search and seizure cases more vigorously than they would be protected under the federal constitution." *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986) (citing the few previous instances: *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980); *State v.*

[2] This argument has considerable overlap with the arguments submitted by *amicus* in its Memorandum in Support of the Petition for Review in *State v. Lopez*, No. 81325-6, and in its Amicus Brief in *State v. Patton*, No. 80518-1. The argument is repeated here for the convenience of the Court rather than incorporated by reference.

White, 97 Wn.2d 92, 640 P.2d 1061 (1982); *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), *overruled in part by Stroud*; *State v. Myrick*, 102 Wn.2d 506, 688 P.2d 151 (1984)). *Stroud* itself was a modest example of that greater privacy protection. It generally followed the Fourth Amendment rule which permits a search of the entire passenger compartment incident to the arrest of the driver, *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Giving only slightly greater deference to privacy, the rule announced in *Stroud* allows a search of the entire passenger compartment except for locked containers. *Stroud*, 106 Wn.2d at 152.

As one of the early Article 1, Section 7 cases, *Stroud* had little previous jurisprudence to draw upon in determining the appropriate scope of Article 1, Section 7's greater privacy protections. In the decades since *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)—a decision announced the same day as *Stroud*—Washington courts have developed a great deal of case law interpreting Article 1, Section 7 and recognized that it is one of the country's strongest constitutional privacy provisions. The *Stroud* rule is incompatible with this subsequent jurisprudence.

Although it has long been recognized that Article 1, Section 7 is more protective of privacy than the Fourth Amendment, it is only recently that the overarching philosophy of the difference in interpretive

approaches has been formulated. "In short, while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article I, section 7 we focus on expectations of the people being searched." *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). If this basic approach had been recognized in 1986, it is unlikely *Stroud* would have been decided the same way. The focus there was on determining reasonable guidelines for police actions, rather than on delineating the reasonable expectation of privacy that drivers have in their vehicles. Article 1, Section 7 prohibits the invasion of that privacy without authority of law; invasion cannot be justified in the absence of exigent circumstances simply because officers act "reasonably."

Several other states that have considered the issue in recent years have drawn much different conclusions than *Stroud* under their own state constitutions. Rejecting *Belton* entirely, they allow vehicle searches incident to arrest only when necessary "to ensure police safety or to avoid the destruction of evidence." *State v. Eckel*, 185 N.J. 523, 539, 888 A.2d 1266 (2006); *see also Commonwealth v. White*, 543 Pa. 45, 669 A.2d 896 (1995); *Camacho v. State*, 119 Nev. 395, 75 P.3d 370 (2003); *State v. Pittman*, 139 N.M. 29, 127 P.3d 1116 (N.M. Ct. App. 2005); *State v. Bauder*, 924 A.2d 38 (Vt. 2007). The weight and trend of these decisions, combined with Washington's usual status as a national leader in state

constitutional privacy guarantees, suggests that it is time for this Court to reconsider *Stroud* with the benefit of the substantial Article 1, Section 7 jurisprudence that has been developed since *Stroud* was decided.

Stroud was a pragmatic experiment, attempting to create a bright line rule to guide law enforcement and courts, even with some cost to individuals' privacy. But the *Stroud* rule has failed to provide clarity; this Court alone has since dealt with a variety of cases involving searches of vehicles incident to arrest, and the Court of Appeals has dealt with numerous others. *See, e.g., State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989) (purse is not equivalent of locked container); *State v. Johnson*, 128 Wn.2d 431, 909 P.2d 293 (1996) (sleeping unit in truck is part of "passenger compartment"); *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999) (cannot search passenger's belongings incident to arrest of driver); *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2001) (entire motor home is part of "passenger compartment"); *State v. Jones*, 146 Wn.2d 328, 45 P.3d 1062 (2002) (reaffirming *Parker*); *see also State v. Lopez*, 142 Wn. App. 930, 176 P.3d 554 (2008); *State v. Patton*, *review granted*, No. 80518-1, __ Wn.2d __ (Apr. 1, 2008).

The experience of two decades shows that *Stroud's* bright line rule has not operated as intended to balance privacy against the needs posed by exigent circumstances. *Stroud*, 106 Wn.2d at 152. Instead, it has allowed

searches where there are *no* exigent circumstances, and has encouraged fishing expeditions and pretextual searches. The *Stroud* rule is incompatible with continued Article 1, Section 7 jurisprudence, as well as state constitutional interpretations in other jurisdictions. *Amicus* respectfully urges this Court to reconsider *Stroud* and overrule it, instead allowing searches of vehicles incident to arrest only when there truly are exigent circumstances—either a reasonable threat to officer safety or a reasonable likelihood of destruction of evidence related to the crime that is the basis of the arrest.

B. The Dog Search of the Van Violated *Stroud*

Even should this Court decide to retain the *Stroud* rule, that rule cannot justify the use of a dog to search[3] Valdez's van. Article 1, Section 7 prohibits invasion of private affairs without "authority of law," which normally requires a warrant or subpoena issued by a neutral magistrate. *See State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007). Exceptions to the warrant requirement, including the exception for searches incident to

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[3] This Court is currently scheduled to decide whether a warrantless dog sniff is a search. *See State v. Neth*, No. 81361-2. *Amicus* has submitted a brief in *Neth* which argues that warrantless dog sniffs are unconstitutional. Whether or not that argument prevails, there can be no doubt that the use of a dog in this case was a search. It went far beyond a sniff from a public vantage point, and included physical intrusion into the van. All parties and courts below have properly treated this as an intrusion into private affairs, requiring the support of "authority of law."

arrest, must be narrowly construed. *See, e.g., Jones*, 146 Wn.2d at 335. The Court of Appeals correctly held that the use of a drug-sniffing dog did not fall within a reasonable construction of the *Stroud* rule, which was intended to balance exigencies against the privacy interests of Washingtonians in their automobiles.

This Court recognized long ago that Washingtonians have a strong privacy interest in their automobiles, and there is no Washington "automobile exception" allowing a search without a warrant. *See State v. Gibbons*, 118 Wash. 171, 203 P. 390 (1922); *Ringer*, *supra*. Motor vehicles are "necessary to the proper functioning of modern society," and Washingtonians are entitled to use them without sacrificing their right to privacy. *State v. Boland*, 115 Wn.2d 571, 581, 800 P.2d 1112 (1990). Valdez did not sacrifice his right to privacy by driving a van, even a van with a broken headlight.

On the opposite side of the balance, there were no exigencies. The trial court's interpretation of the *Stroud* rule would allow an unfettered search, although "this court has consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition." *State v. Jorden*, 160 Wn.2d 121, 127, 156 P.3d 893 (2007). By the time they called for a drug-sniffing dog, officers had already searched Valdez's van—and found

nothing. There were neither weapons nor evidence of criminal activity. The officers had seen some loose panels and screws, and had a hunch that something was wrong, but no reasonable basis for the hunch; there are many explanations for loose panels that have nothing to do with criminal activity. The canine search of the van was simply a fishing expedition, hoping to find evidence of some unknown criminal activity.

The use of a dog was a particularly invasive intrusion into Valdez's private affairs. "[U]sing a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to 'see through the walls.'" *State v. Dearman*, 92 Wn. App. 630, 635, 962 P.2d 850 (1998). The entire reason the officers used the dog was because it could reveal information that would not otherwise be accessible to the officers themselves.

This goes far beyond meeting the exigencies deferred to in *Stroud.* The drug-sniffing dog could not detect weapons, or otherwise protect officer safety. Nor was it designed to detect readily destructible evidence—the officers had already searched the van and determined that no evidence was easily accessible. Instead the dog was used to unnaturally enhance the senses of the officers, and to intensively search for contraband. Human officers are neither capable of searching at this level of intensity, nor constitutionally allowed to do so absent a warrant—

exceptions to the warrant requirement, such as a search incident to arrest, allow searches only to the degree necessary to accomplish the needs for which the exception was created. Warrants are always the preferred "authority of law," as they provide for oversight by the judicial system, ensuring individual rights are protected. *See Miles*, 160 Wn.2d at 247.

In fact, use of a dog inherently goes beyond the level of search allowed by the exception to the warrant requirement created in *Stroud*. Searches are limited to the passenger compartment of a vehicle and searches of locked containers or locked areas of the vehicle are prohibited. *See Stroud*, 106 Wn.2d at 155. The purpose of a dog sniff is to detect hidden contraband, not contraband readily available to a human search. The dog's nose cannot, nor is it intended to, respect locked containers or areas of a vehicle. Dogs sniff, and are intended to sniff, all areas—whether open, locked, fastened with screws, or welded shut. Dogs are incapable of respecting privacy rights, even to the minimal extent required by *Stroud*.

This is demonstrated by the current case. The dog was used to obtain information about an object that was outside the passenger compartment of the van, in the void between the interior panels demarcating the passenger compartment and the exterior wall of the van. Even if that area is considered part of the passenger compartment, it is clearly within the functional equivalent of a locked area—searches of

which are equally prohibited by *Stroud*. A lock is not a constitutional talisman, but instead was used by *Stroud* to exemplify two constitutional principles, heightened expectation of privacy and minimal risk of destruction of evidence:

> First, by locking the container, the individual has shown that he or she reasonably expects the contents to remain private. Secondly, the danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the container.

Id. at 152. Here, the object was stored in a manner that required disassembly of part of the van to access it. This demonstrates an expectation of privacy at least as great as would be shown by placing the item in a locked container. And it was at least as difficult to destroy the evidence—requiring the driver or passenger to vault over an intervening row of seats and disassemble part of the van—as it would have been if the object were located in a locked glove compartment. A human officer would not have been allowed to constitutionally search this area, and a search via the dog's nose was likewise unconstitutional.

If the officers actually believed they were likely to find contraband in protected areas of the van, Article 1, Section 7 provides clear guidance on the procedure to follow: apply for a warrant. In this case, nothing

prevented the officers from delaying the search until they had telephonically obtained a search warrant—except that a neutral magistrate would find no support for a warrant on the slim facts available to the officers. *See Valdez*, 137 Wn. App. at 280. And that is exactly why the warrant requirement exists:

> Warrant application and issuance by a neutral magistrate limit governmental invasion into private affairs. In part, the warrant requirement ensures that some determination has been made which supports the scope of the invasion. The scope of the invasion is, in turn, limited to that authorized by the authority of law. The warrant process, or the opportunity to subject a subpoena to judicial review, also reduces mistaken intrusions.

Miles, 160 Wn.2d at 247 (citations omitted).

The State would eliminate this requirement of intervention of a neutral magistrate and allow intrusions into private affairs based solely on the hunch of a law enforcement officer. This type of suspicionless search of the environs would clearly be unconstitutional if Valdez had been arrested anywhere other than in a motor vehicle. Even in a motor vehicle, after the exigencies of officer safety and potential destruction of evidence had been satisfied by the initial search of the officers, *Stroud* does not provide a basis for the further intrusion—by a dog, no less—into Valdez's private affairs without the intervention of a neutral magistrate.

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests the Court to affirm the Court of Appeals, and hold that Article 1, Section 7 prohibited the search of Valdez's van.

Respectfully submitted this 12th day of May 2008.

By 

Douglas B. Klunder, WSBA #32987
ACLU of Washington Foundation

Attorney for *Amicus Curiae*
American Civil Liberties Union of Washington