

NO. 100135-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent

v.

ZACHERY K. MEREDITH,

Petitioner

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MEMORANDUM OF *AMICUS CURIAE* WASHINGTON DEFENDER  
ASSOCIATION IN SUPPORT OF REVIEW

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**I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington Defender Association (WDA) is a statewide non-profit organization that represents over 30 public defender agencies and has over 1,500 members comprising criminal defense attorneys, investigators, social workers and paralegals throughout Washington. WDA is committed to protecting the rights of people accused of crimes under the Washington and United States Constitutions. WDA representatives frequently testify before the Washington House and Senate on proposed legislation affecting indigent defense. WDA has been granted leave on many occasions to file amicus briefs in this Court. The issues in this case are important to public defenders, who represent many of the people accused of crimes in Washington.

**II. COURT OF APPEALS DECISION**

This brief is filed in support of Petitioner Meredith's Petition for Review of the published Court of Appeals decision

*State v. Meredith*, \_\_\_\_\_ Wn.App. \_\_\_\_\_, 293 P.3d 198 issued on July 26, 2021.

### **III. ISSUE WARRANTING REVIEW**

The Court of Appeals found Mr. Meredith agreed to his own seizure simply by riding a public bus and held that the agreement created constitutionally valid consent. *Meredith*, 293 P.3d at 204-06. At least one issue warrants a grant of review: Whether entry into an agreement that violates the doctrine of unconstitutional conditions by requiring an individual give up a Fourth Amendment right in exchange for the benefit of taking public transportation supplies constitutionally valid consent to a seizure.

### **IV. STATEMENT OF THE CASE**

*Amicus* adopts the facts as stated in Petitioner's statement of the case.

### **V. REASON WHY REVIEW SHOULD BE GRANTED**

A seizure of a person violates the Fourth Amendment of the United States Constitution absent reasonable suspicion,

probable cause or an exception to the warrant requirement, such as voluntary consent. An agreement by an individual to give up a Fourth Amendment right in exchange for a discretionary benefit violates the doctrine of unconstitutional conditions and therefor does not create voluntary consent. Because the Court of Appeals held such an agreement created voluntary consent, this Court should grant review.

**A. The Fourth Amendment prohibits warrantless seizures absent reasonable suspicion, probable cause or an exception to the warrant requirement, such as voluntary consent.**

The Fourth Amendment of the United States Constitution says that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” A person is seized “when, by means of physical force or a show of authority, his freedom of movement is restrained.” *U.S. v. Mendenhall*, 100 S.Ct. 1870, 1877, 446 U.S. 544, 553 (1980). Restraint amounting to a seizure may arise either from the use of physical force or

through a show of authority. *State v. Avila-Avina*, 99 Wn. App. 9, 14 (2000) (abrogated on other grounds by *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009)). A warrantless seizure is unreasonable if a State actor lacks probable cause or reasonable suspicion and no exception to the warrant requirement applies. *Terry v. Ohio*, 88 S.Ct. 1868, 392 U.S. 1 (1968).

Consent is an exception to the warrant requirement. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). A warrantless seizure is consensual only if consent was voluntarily given. *Schneckloth v. Bustamonte*, 93 S.Ct. 2041, 2059, 412 U.S. 218 (1973). To be voluntary, consent must derive from an "essentially free and unconstrained choice." *Schneckloth*, 93 S.Ct. at 2047. An individual's agreement to a search or seizure is not voluntary if made in exchange for a discretionary benefit from the State. *U.S. v. Scott*, 450 F.3d 863 (9<sup>th</sup> Cir. 2006).



**B. An individual’s agreement to a seizure in exchange for a discretionary benefit from the State violates the doctrine of unconstitutional conditions and does not create valid consent.**

Under the doctrine of unconstitutional conditions, the government may not require a person to give up a constitutional right in exchange for a discretionary benefit. *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2317, 512 U.S. 374, 385 (1994).<sup>1</sup> The doctrine prohibits the government from abusing its disproportionate power over individuals who are reliant on a government service or grant of leniency:

Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking

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<sup>1</sup> In the context of Fifth Amendment property rights, the government may sometimes exact a concession from a citizen in exchange for a benefit if there is a strong relationship between the benefit and the concession and the determination is individualized. *Dolan*, 114 S.Ct. at 2319–20. However, the Washington Court of Appeals has held an agreement violated the doctrine without addressing the relationship between the benefit and the concession. *Butler v. Kato*, 137 Wn.App. 515, 154 P.3d 259 (2007) (defendant’s agreement to an order that violated his Fifth Amendment right to remain silent and his right to autonomous decision making in exchange for pretrial release violated doctrine of unconstitutional conditions).

lopsided deals and gradually eroding constitutional protections.

*Scott*, 450 F.3d at 866–67.

The doctrine of unconstitutional conditions stems from the right to substantive due process. *MS Rentals, LLC v. City of Detroit*, 362 F.Supp.3d 404, 413 (E.D.Mich., 2019) (citing Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415-16 (1989)) (“The unconstitutional conditions doctrine is a check on the coercive power of government, and as such finds its origins as a species of substantive due process”).

An agreement violates the doctrine when it requires an individual consent to a search or seizure in order to secure a benefit from the State. *See, e.g., Scott*, 450 F.3d 863. Because the doctrine stems from substantive due process, courts have held that the mere existence of an unconstitutional agreement to give up a Fourth Amendment right does not mandate that the individual who entered into the agreement with the State prevail

on a Fourth Amendment claim. *See, e.g., Metropolitan Omaha Property Owners Association, Inc. v. City of Omaha, Nebraska*, \_\_\_\_ F.Supp.3d \_\_\_\_, 2019 WL 7049104, note 3 (D.Neb. 2019) (“The Court will not address the doctrine separately, but in the context of the alleged Fourth Amendment violation”). However, courts have refused to accept that such an agreement creates valid consent to a search or seizure. *See, e.g., Smyth v. Lubbers*, 398 F.Supp. 777, 788-89 (W.D. Mich. 1975) (students’ agreement to searches of their dormitory rooms in exchange for the opportunity to attend State college was “not the type of focused, deliberate, and immediate consent contemplated by the Constitution”); *Scott*, 450 F.3d at 868 (defendant’s agreement to random drug tests in exchange for pretrial release was not constitutionally sufficient consent).

An agreement to submit to a seizure in exchange for permission to ride public transportation violates the doctrine of unconstitutional conditions. The Court of Appeals held that a person who rides a public bus voluntarily enters into an

agreement with the State that creates voluntary consent.

*Meredith*, 492 P.3d at 204-06. Because that holding contradicts the doctrine of unconstitutional conditions, this Court should grant review.

## VI. CONCLUSION

Consent to a seizure is valid only if it complies with the doctrine of unconstitutional conditions. Because the Court of Appeals found consent that violated the doctrine created an exception to the Fourth Amendment's warrant requirement, review is warranted.

Pursuant to RAP 18.17, I certify that this memorandum contains 1,315 words.

Respectfully submitted this 22nd day of October, 2021.

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