No. 94273-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HOLLIS BLOCKMAN,

Petitioner.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, and WASHINGTON DEFENDER ASSOCIATION

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 75,000 members and supporters, 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 both as *amicus curiae* and as counsel to parties.

The Washington Association of Criminal Defense Lawyers ("WACDL") is a nonprofit association of over 1100 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL's objectives include "to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights." WACDL has filed numerous *amicus* briefs in the Washington appellate courts.

The Washington Defender Association ("WDA") is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders, and those who are committed to seeking improvements in indigent defense. WDA is a not-for-profit corporation with 501(c)(3) status. The WDA's objectives and purposes are

defined in its bylaws and include: protecting and insuring by rule of law those individual rights guaranteed by the Washington and Federal Constitutions and to resist all efforts made to curtail such rights; promoting, assisting, and encouraging public defense systems to ensure that all accused persons receive effective assistance of counsel. WDA representatives frequently testify before the Washington House and Senate on proposed legislation affecting indigent defense issues. WDA has been granted leave on prior occasions to file *amicus* briefs in this Court. WDA represents 30 public defender agencies and has over 1,200 members comprising criminal defense attorneys, investigators, social workers and paralegals throughout Washington.

ISSUE TO BE ADDRESSED BY *AMICI*

Whether a warrantless "protective sweep" of a person's home by a law enforcement officer violates Article 1, Section 7 when conducted outside the context of an arrest.

STATEMENT OF THE CASE

Officers went to an apartment to talk with a resident as part of an investigation of a reported robbery. After the resident invited the officers inside, the officers announced that they were going to walk through the rest of the apartment. As they did so, they saw Hollis Blockman, apparently in the midst of conducting an illegal drug transaction.

Blockman was arrested and charged. Division One of the Court of Appeals held that the search of the apartment was allowed under a "protective sweep" exception to the warrant requirement. *See State v. Blockman*, 198 Wn. App. 34, 392 P.3d 1094 (2017).

This case asks whether Article 1, Section 7 of the Washington State Constitution allows for such warrantless searches of a home when an officer is simply questioning a resident with the resident's consent.

ARGUMENT

A. Warrantless Protective Sweeps Outside the Arrest Context Violate Article 1, Section 7

Article 1, Section 7 guarantees privacy to Washingtonians, both in their private affairs and especially in their homes. *See, e.g., State v. Ruem*, 179 Wn.2d 195, 313 P.3d 1156 (2013). The ordinary authority of law necessary to invade this privacy is a warrant, and exceptions to the warrant requirement must be narrowly drawn. *See, e.g., State v. Baird*, 187 Wn.2d 210, 218, 386 P.3d 239 (2016).

The State claims that Washington courts have recognized a "protective sweep" exception to the warrant requirement, applicable both to arrest and non-arrest contexts. Supp. Br. of Resp. at 11-14. This claim is belied by the very cases cited. *See State v. Smith*, 165 Wn.2d 511, 519, 199 P.3d 386 (2009) ("we need not address whether the 'community

caretaking' and 'protective sweep' exceptions apply")[1]; *State v. Boyer*, 124 Wn. App. 593, 601, 102 P.3d 833 (2004) (rejecting validity of protective sweep—"In Washington, as in most other jurisdictions, the protective sweep has not been extended to the execution of search warrants"); *State v. Hopkins*, 113 Wn. App. 954, 55 P.3d 691 (2002) (rejecting application of protective sweep exception to search of shed); *State v. Chambers*, 197 Wn. App. 96, 387 P.3d 1108 (2016) (rejecting protective sweep of house when defendant arrested on its porch). Only a single cited case upheld a protective sweep, and it was the most prototypical of sweeps—cursory inspection of adjoining rooms after the arrest of the defendant. *See State v. Sadler*, 147 Wn. App. 97, 193 P.3d 1108 (2008).

In the present case, the Court of Appeals applied a "protective sweep" exception to the warrantless search of a home at issue, and held that it was valid even though there was no arrest in process at the time the sweep was initiated. To the contrary, the Court of Appeals held that the mere presence of police in the home, along with general concerns for officer safety, sufficed to justify the warrantless intrusion into private areas of the home. In other words, rather than narrowly drawing the

[1] The three justices that did address the question would have summarily held "that the 'protective sweep' exception was inapplicable because the search of the home was not incident to an arrest." *Id.* at 523 (Sanders, J., dissenting).

exception, the Court of Appeals instead broadly expanded its scope, well beyond arrests. This expansion is incompatible with the privacy protections of Article 1, Section 7.

This Court's "decisions have consistently reflected the principle that the home receives heightened constitutional protection." *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994). There has been no doubt that searches of a home under circumstances similar to this case are unlawful. A good illustration is *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011). There, the police developed probable cause to arrest a young man for burglary, but did not obtain an arrest warrant. When they arrived at his home, they were invited inside by the suspect's father. The officers proceeded upstairs without consent and arrested the suspect. The trial court found that the arrest exceeded the scope of the consent and concluded the arrest was illegal. Although the primary issue on appeal was whether the subsequent confession was attenuated from the illegal arrest, this Court had no difficulty agreeing with the trial court "that the arrest was unlawful." *Id.* at 912; *see also id.* at 930 ("any illegality occurred when the deputies exceeded the scope of Eserjose's father's consent and went upstairs") (Madsen, C. J., concurring); *id.* at 935 ("the constitutional violation here is not at issue") (C. Johnson, J., dissenting). If one instead followed the logic of the Court of Appeals, the officers would have been

justified in going upstairs, as a "protective sweep," simply because there was reason to believe that Eserjose was present.[2]

As part of its recognition of the heightened constitutional privacy for homes, and the need to narrowly draw exceptions to the warrant requirement, this Court has long been concerned about home searches authorized by consent. *See, e.g., State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998) (requiring warnings to be given before consent to a warrantless search is valid); *State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005) (rejecting "apparent authority" as a basis for consent, and requiring explicit consent to be obtained from all present cohabitants). An expansive "protective sweep" exception, as applied by the Court of Appeals, would undercut these protections.

Both *Eserjose* and the present case involve situations where officers entered a home with the consent of a resident. The residents had the right to "lawfully refuse to consent," to "revoke, at any time, the consent that they give," and to "limit the scope of the consent to certain areas of the home." *Ferrier*, 136 Wn.2d at 118. Not surprisingly, especially since the residents were not informed of these rights prior to the sweeps, neither resident explicitly stated the exact scope of their consent;

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[2] The constitutional violation in the present case is even more egregious given there was no probable cause to arrest an occupant in the home when the police conducted their sweep.

the officers were simply invited inside. Most Washingtonians will agree to talk with law enforcement officers who arrive at their doorstep, and even invite them inside for that discussion. But willingness to have a discussion in a room where guests are sometimes received (e.g., a living room) is far different from a willingness to have officers search the whole home, including looking into more private areas such as bedrooms—and that intrusion into private areas is what actually happened in both cases. Accordingly, the trial courts in both *Eserjose* and the present case appropriately determined that the officers exceeded the scope of consent granted.

That should have been the end of the matter in the present case, but instead both the trial court and Court of Appeals decided the search was proper as a "protective sweep," even though it exceeded the scope of consent, and the officers simply announced they were going to conduct the search rather than offering the resident any choice. That holding makes a mockery of a resident's right to "limit the scope of the consent to certain areas of the home." *Ferrier*, 136 Wn.2d at 118. If the resident here had declined to let the officers in at all, she would have been within her rights, and the officers would have had no recourse except to seek a warrant. But the lower courts bootstrapped her courteous consent to allow the officers inside while talking—consent that the courts recognized as limited—into a

foundation to allow a sweep of the entire home. In essence, the lower courts held that mere consent to let officers enter a home in order to *talk* is sufficient to enable officers to walk throughout a house, and look through every room and closet.

There are no logical limits on that holding. The prototypical justification for a protective sweep is to prevent confederates from launching an unexpected attack. *See Maryland v. Buie*, 494 U.S. 325, 333, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). Here, the Court of Appeals found that the officer had a reasonable belief that people might "jump out" during his questioning, and held that belief justified a search of the home. *Blockman*, 198 Wn. App. at 40. Exactly the same reasoning would allow searches even when civilians initiate encounters, perhaps requesting help or reporting themselves as victims of or witnesses to a crime, whenever other people are or might be in the vicinity. It might also allow a "protective sweep" when civilians agree to talk with officers *outside* their homes, as long as they are nearby—no limitation on the "people jumping out" fear is offered by the lower courts, and confederates could just as easily jump out of a nearby dwelling's door or window as they could emerge from a closet.

The same logic would even apply when there is no encounter with a civilian at all, when officers are simply walking a beat. There are far too

many instances in which law enforcement officers feel threatened in today's society, and can point to articulable facts to support that feeling of danger. While those dangers and feelings are real, they cannot justify the routine invasion of Washingtonians' privacy—privacy that is constitutionally protected, and which Washingtonians are entitled to expect. Such a result cannot be reconciled with a narrow drawing of exceptions to the warrant requirement.

B. The Fourth Amendment Reasonableness Requirement Is Inapposite to Analysis Under Article 1, Section 7

Here, Division One did not consider *Eserjose* or conduct any analysis under Article 1, Section 7, but looked instead solely at opinions of the federal appellate courts, decided under the Fourth Amendment. *See Blockman*, 198 Wn. App. at 38-40. That is a questionable approach when considering any constitutional privacy issue. "It is well established that article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections." *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). But that approach is especially ill-advised in the present case, considering the underpinnings of the Fourth Amendment jurisprudence allowing protective sweeps outside the arrest context.

One of the most thorough examinations of the question can be found in *United States v. Gould*, 364 F.3d 578, 581-87 (5th Cir. 2004).

Gould emphasizes that the question should be decided based on "the general reasonableness standard calculated by balancing the intrusion on Fourth Amendment interests against the promotion of legitimate governmental interests." *Id.* at 583-84. Under that standard, *Gould* held "that arrest is not always, or *per se*, an indispensable element of an in-home protective sweep." *Id.* at 584. Similarly, the Second Circuit held that limiting protective sweeps to arrest contexts would be a "contravention of the pragmatic concept of reasonableness embodied in the Fourth Amendment." *United States v. Miller*, 430 F.3d 93, 100 (2nd Cir. 2005).

That entire line of reasoning is inapposite to analysis under Article 1, Section 7. "[T]he word 'reasonable' does not appear in any form in the text of article I, section 7." *Morse*, 156 Wn.2d at 9. This is not simply a linguistic oversight. It reflects a different philosophy, so that "our constitution focuses on the rights of the individual, rather than on the reasonableness of the government action." *Id.* at 12. And it dictates an entirely different approach to analysis. 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 prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional. This creates an almost absolute bar to warrantless arrests, searches, and seizures, with only

> limited exceptions.... The privacy protections of article I, section 7 are more extensive than those provided under the Fourth Amendment.

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

There is no question that Blockman's private affairs were disturbed. Whether or not the search was "reasonable"—and, as discussed below, there is disagreement about that among the federal circuits—it was not allowed under Article 1, Section 7 unless conducted with authority of law. No such authority existed; there was neither a warrant nor an exigency, and the search exceeded the scope of consent given by the apartment's resident.[3]

To be clear, this does not mean that officers have no options to protect themselves from dangers when talking with witnesses, suspects, or victims. Officers have long utilized a variety of techniques to minimize danger both to themselves and others. Those techniques may include

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[3] Neither this Court nor the Court of Appeals has ever analyzed the existence of a "protective sweep" exception under Article 1, Section 7, even in the arrest context. All cases discussing "protective sweeps" have merely cited to Fourth Amendment jurisprudence, especially *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), where the United States Supreme Court first recognized the exception. *Buie* itself was decided using a "reasonableness" analysis, so it has minimal relevance to Article 1, Section 7. The present case, however, does not require this Court to decide whether a "protective sweep" is allowed under Article 1, Section 7 as part of an arrest. Even assuming, *arguendo*, that such an exception to the warrant requirement exists, here there was no arrest, so the exception could not apply unless its scope is expansive rather than being narrowly drawn.

searches, but only with a warrant or under an established exception to the warrant requirement (e.g., consent or exigent circumstances). Prior to this case, those techniques have not involved warrantless "protective sweeps" outside the arrest context in Washington. Similarly, officers have been explicitly prohibited from utilizing such "protective sweeps" in some federal circuits. *See, e.g., United States v. Torres-Castro,* 470 F.3d 992 (10th Cir.2006); *United States v. Reid*, 226 F.3d 1020 (9th Cir. 2000). There is no evidence that officers in any of those jurisdictions face graver dangers. Officer safety is, of course, a serious concern, and the use of constitutionally acceptable techniques to minimize threats should be encouraged. But under Article 1, Section 7 officers may not perform a warrantless "protective sweep" of a home merely because they assert it is reasonable.

C. Washington Should Join the Ninth Circuit and Hold that Protective Sweeps Are Only Allowed by the Fourth Amendment During Arrests

If this Court chooses to decide this case under the Fourth Amendment as well as Article 1, Section 7, *amici* respectfully urge the Court to similarly reject the validity of the "protective sweep" at issue here. While there is no doubt that protective sweeps are allowed under the Fourth Amendment during an arrest, *see, e.g.*, *Buie*, the same cannot be

said of sweeps conducted outside the arrest context, especially following consensual entry into a home.

The federal circuits are split on this question. Several allow protective sweeps in any context. *See, e.g., United States v. Patrick*, 959 F.2d 991 (D.C. Cir. 1992); *United States v. Gould*, 364 F.3d 578 (5th Cir. 2004). Others limit protective sweeps strictly to arrests. *See, e.g., United States v. Torres-Castro*, 470 F.3d 992 (10th Cir.2006); *United States v. Reid*, 226 F.3d 1020 (9th Cir. 2000). At least one circuit that allows protective sweeps in some non-arrest circumstances has expressed doubt about their applicability to consensual entries. *See United States v. Gandia*, 424 F.3d 255, 262 (2d Cir.2005) ("Although we do not decide this issue, we do note that when police have gained access to a suspect's home through his or her consent, there is a concern that generously construing *Buie* will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home.").

The State claims that the Ninth Circuit is itself split, citing *United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993). But the question of protective sweeps was not before the *Garcia* court. Instead, the issue was when the defendant was arrested, and whether probable cause existed at the time of arrest. The opinion makes only a passing mention that a protective sweep was conducted prior to the actual arrest in the case, with

no consideration of whether such a sweep comported with the Fourth Amendment. *See id.* at 1282. That bit of *dictum* has no precedential value. Contrast that with *Reid*, where the government directly argued that the search at issue was allowed as a protective sweep. The court rejected that argument, primarily because the defendant was not under arrest at the time of the search. *See Reid*, 226 F.3d at 1027. [4] As core support for its holding, therefore, *Reid* created binding precedent that an arrest is a necessary predicate in the Ninth Circuit for a valid protective sweep. *See also United States v. Job*, 851 F.3d 889, 899 (9th Cir. 2017) (rejecting protective sweep where record didn't show it was incident to an arrest).

This Court is, of course, not bound by the Ninth Circuit's decision. But, mindful of Washington's long history of strong privacy protections, *amici* respectfully urge the Court to be persuaded by the Ninth Circuit. If this Court were to allow protective sweeps without an arrest, it would create a truly anomalous situation where Washingtonians have fewer privacy protections in state courts than in federal courts. They would be protected against federal officers conducting non-arrest protective sweeps, as those officers are bound by the Ninth Circuit's *Reid* decision, but would not be protected by state courts against state officers conducting the same

[4] As secondary support, the court noted that "[a]dditionally, the government did not point to any facts" demonstrating danger. *Id.*

searches. It would also put state law enforcement officers in an untenable position; conducting a non-arrest protective sweep would be approved by state courts, but would subject the officers to liability under 42 U.S.C. § 1983 in federal court. These difficulties can be avoided if this Court joins the Ninth Circuit, and holds that the search here violated not only Article 1, Section 7, but also the Fourth Amendment.

CONCLUSION

For the foregoing reasons, *amici* respectfully request the Court to reverse the Court of Appeals, hold that non-arrest "protective sweeps" are not an exception to the warrant requirement under either Article 1, Section 7 or the Fourth Amendment, and suppress the evidence.

Respectfully submitted this 29th day of September 2017.

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