No. 94273-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HOLLIS BLOCKMAN,

Petitioner.

MEMORANDUM OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, and WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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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, and whether such searches have such broad public impact that review by this Court is warranted.

STATEMENT OF THE CASE

Officers went to an apartment to talk with the resident as part of an investigation of a reported robbery. When the resident invited the officers inside, they announced that they were going to walk through 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*, ___ Wn. App. ___, 2017 WL 1094619 (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.

ARGUMENT

A. The Court of Appeals Decision Involves a Constitutional Matter of Significant Public Interest on Which this Court's Guidance Is Needed

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). As part of this narrow drawing of exceptions, this Court long ago recognized that the heightened privacy of the home means that additional safeguards are necessary when applying exceptions to the warrant requirement. *See 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).

The search at issue here cannot fit within a properly narrow exception to the warrant requirement, whether that exception is labelled as "consent," "protective sweep," or something else. Experience shows that 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. Yet that is exactly what Division One's holding allows, using the "protective sweep" term to enable officers to walk throughout a house, looking through every room and closet, based solely on the resident's agreement to *talk with* the officers.

Logically, that holding would also allow a "protective sweep" when civilians agree to talk with officers *outside* their homes, as long as they are nearby. After all, 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, Division One 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. But confederates could just as easily jump

out of a nearby dwelling's door or window as they could emerge from a closet.

In fact, 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. 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.

This is a matter of substantial public interest. All Washingtonians have homes of some sort, and "the expectation of privacy in the home is clearly one which a citizen of this state should be entitled to hold." *Ferrier*, 136 Wn.2d at 118 (quotations omitted). If Division One's opinion is allowed to stand, that expectation of privacy will be put at great risk.

B. Division One's Opinion Conflicts with Division Three, and with the Weight of Legal Authority

Division One's opinion, holding that "protective sweep" searches are not limited to the arrest context, stands in direct opposition to the only other published opinion deciding the question, *State v. Boyer*, 124 Wn. App. 593, 102 P.3d 833 (2004). In *Boyer*, Division Three specifically refused to allow a protective sweep as part of the execution of a search warrant—a context far closer to arrests than the voluntary discussion between officers and a resident in the present case. *Boyer* recognized that there was some split of opinion, but agreed with "the weight of authority specifically limiting protective sweeps to arrests or to executions of arrest warrants." *Id.* at 602.

Prior to the decision in this case, Washington courts have always treated as a foregone conclusion that searches of a home under the circumstances of this case is 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, but only into the entryway. 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). The illegality and 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 "protective sweep."

Here, Division One did not consider *Eserjose* or *Boyer*, but looked instead solely at opinions of the federal appellate courts, decided under the Fourth Amendment. *See Blockman*, 2017 WL 1094619 at *2-*3. Even there, it did not recognize the split of opinion, and cited only those cases that took a broad view of the protective sweep exception. In actuality, there are equally as many circuits that have held that protective sweeps are limited to arrests. *See United States v. Reid*, 226 F.3d 1020 (9th Cir. 2000); *United States v. Torres-Castro*, 470 F.3d 992 (10th Cir. 2006); *United States v. Waldner*, 425 F.3d 514 (8th Cir. 2005).

"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). As such, combined with the requirement to narrowly draw exceptions to the warrant requirement, Division One should have adopted the more privacy-protective view, and limited the protective sweep exception to the arrest context. Instead, Division One created a truly anomalous situation where federal officers, bound by the Ninth Circuit's *Reid* decision, cannot conduct "protective sweeps" outside the arrest context, but state officers, following *Blockman*, are able to invade the privacy of the home under the same circumstances.

CONCLUSION

For the foregoing reasons, *amici* respectfully request the Court to accept Blockman's Petition for Review. It meets multiple criteria of RAP 13.4(b): the decision of the Court of Appeals conflicts with another published opinion of the Court of Appeals, it involves a significant question of law under the Washington Constitution, and it is a matter of substantial public interest.

Respectfully submitted this 4th day of May 2017.

By s/ Douglas B. Klunder

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