

No. 68019-6-I

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JERDALE JACKSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Regina Cahan

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In violation of Jackson's Fourth Amendment and article I, section 7 right to be free from unlawful searches and seizures, the trial court erred in refusing to suppress evidence acquired as a result of a warrantless search of his residence.

2. The trial court's admission of hearsay evidence that Jackson "refused" to sign a no-contact order violated his Sixth Amendment and article I, section 22 right to confrontation.

3. The trial court erred in entering "undisputed" finding of fact 1(e) pursuant to CrR 3.6. CP 77.

4. The trial court erred in entering "undisputed" finding of fact 1(g) pursuant to CrR 3.6. CP 77.

5. The trial court erred in entering conclusion of law 3 pursuant to CrR 3.6. CP 79.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Fourth Amendment, a person has a legitimate expectation of privacy in the place where he lives and thus has standing to challenge an unlawful search of his

residence. A no-contact order prohibited Jackson from having contact with his girlfriend, but did not bar him from contact with any particular address. Where the undisputed evidence established that Jackson lived in the Federal Way apartment that was searched, did he have standing to challenge the search's legality? Did the trial court err in ruling otherwise? (Assignments of Error 1 and 5)

2. Under article I, section 7, privacy rights are at their apex in the home. Further, because it is well-established that article I, section 7 provides greater protection than its federal counterpart, no analysis pursuant to State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), need be conducted to establish a violation of the state constitutional provision. Did the trial court err in refusing to consider Jackson's state constitutional claim under article I, section 7 because no Gunwall analysis had been performed? (Assignments of Error 1 and 5)

3. Unlike the Fourth Amendment, which utilizes a flexible "reasonableness" standard that balances subjective expectations of privacy against other interests such as

effective law enforcement and officer safety, the Washington Constitution requires that all invasions into individual privacy be done under authority of law – i.e., a valid warrant or one of the narrow exceptions to the warrant requirement. Should this Court hold that the Fourth Amendment’s “protective sweep” rule, which permits a search without a warrant, probable cause, or, in some cases, reasonable suspicion, is contrary to article I, section 7’s requirement of authority of law? (Assignments of Error 1 and 5)

4. Under the Fourth Amendment, a general suspicion that someone may be hiding in a home is insufficient to justify the warrantless intrusion on privacy occasioned by a “protective sweep.” Should this Court conclude that the “protective sweep” that occurred in this case, which was based solely on police officers’ general suspicions rather than articulable facts, violated the Fourth Amendment? (Assignments of Error 1 and 5)

5. An accused person has the right under the Sixth Amendment and article I, section 22 to confront the witnesses against him. The admission of testimonial

hearsay violates an accused person’s right to confrontation. The United States Supreme Court and the Washington Supreme Court have held that certificates prepared by a court or clerk for the purposes of establishing some core fact are testimonial and require confrontation. In this case, the trial court admitted a no-contact order on which someone had inscribed “refused” above the signature line. Did the court’s failure to redact this language violate Jackson’s right to confrontation? (Assignment of Error 2)

C. STATEMENT OF THE CASE

On March 30, 2011, Federal Way police officer Benjamin Tseng responded to a 9-1-1 call of physical domestic violence. 1RP 23.¹ At an apartment complex, he contacted 16-year-old Daniel Valdez,² who reported that his step-father “J-Ride” had struck him once on the thigh with his hand while it was wrapped in a telephone cord. Id.

¹ The verbatim report of proceedings is referenced in this brief as follows:

November 8, 2011	-	1RP
November 9, 2011	-	2RP
November 10, 2011	-	3RP
November 18, 2011	-	4RP

² Because Daniel Valdez and his mother, Michelle Valdez, share a last name, Daniel Valdez is referred to in this brief by his first name. No disrespect is intended.

Tseng observed a transient mark on the boy's thigh, but the skin was not broken and Tseng determined that the blow was reasonable parental discipline. 1RP 25, 36-37. Nevertheless Tseng decided he wanted to speak with Daniel's parents.

At Daniel's nearby residence, Tseng asked to speak with Michelle Valdez, Daniel's mother. According to Tseng, Valdez was initially friendly. 1RP 25-26. She permitted Tseng and his fellow officer to enter and asked if Daniel was in trouble. Id. Tseng asked where Valdez's husband was. 1RP 38. Valdez stated that she was not married, and so Tseng asked where her boyfriend was. 1RP 26. Valdez asked Tseng why they wished to speak with him, but Tseng refused to answer her. 1RP 38. She was unwilling to provide information about her boyfriend.

Tseng found Valdez's behavior suspicious. 1RP 28. He attempted to pass through the hallway but Valdez blocked his path. 1RP 27, 39. A fellow officer forcibly moved Valdez by grasping her arm and moving her to the couch.

1RP 29, 39, 41. The officers then conducted a “protective sweep” of the apartment. 1RP 28.

Appellant Jerdale Jackson was standing in a back bedroom. Tseng asked why Jackson did not come out when they were in the front room, and he said he was in the bathroom and did not hear them. 1RP 29. They asked if he was “J-Ride” and he said he was not. 1RP 30. The officers eventually identified him and determined there was a no-bail felony warrant for his arrest. 1RP 31. A records check also disclosed the existence of a Colorado no-contact order, but the officers were unable to confirm its status. 1RP 33, 54.

Detective Matthew Leitgeb, who arrived at the scene while the officers were questioning Valdez and Jackson, asked Valdez how long Jackson had been staying at the apartment, and she told him that he had been living there for about a month. 1RP 52.

Jackson was arrested. At the time of his arrest, the officers still were unable to confirm the status of the Colorado protection order. 1RP 34. Tseng told Jackson that they would charge him with violating the order if they could

not confirm its status, and he responded that he was not afraid of going back to prison. *Id.* He stated, “Colorado can’t tell me who I can be with or not, neither can Washington, you record that and put that as my statement.” *Id.*

Based upon these events, the King County Prosecuting Attorney charged Jackson, *inter alia*, with felony violation of a court order – domestic violence.³ CP 1. After the trial court denied Jackson’s motion to suppress evidence,⁴ Jackson proceeded to a jury trial. The jury convicted Jackson as charged. CP 66; 3RP 3. Jackson appeals. CP 81-96.

³ A second charge for assault in the fourth degree against Daniel Valdez was dismissed on the State’s motion. CP 9-10.

⁴ Further facts regarding Jackson’s motion to suppress and motion to exclude evidence purporting to indicate that he had “refused” to sign the Colorado protection order are recited in the argument sections to which they pertain.

D. ARGUMENT

1. **In violation of the Fourth Amendment and article I, section 7, law enforcement unlawfully entered and conducted a warrantless search of Jackson's residence, requiring suppression of all after-acquired evidence.**
 - a. Jackson moved to suppress evidence acquired as a result of the unlawful search of his residence.

Prior to trial, Jackson moved to suppress evidence arising as a result of the unlawful search of his and Valdez's home. CP 10-22. It was conceded that the officers did not believe that a crime had occurred when they entered Valdez's home, nor were they investigating a crime when they decided to conduct a "protective sweep" of the residence. 1RP 25, 36-37. Tseng also acknowledged that Valdez attempted to block their ingress into the hallway and so in order to conduct their "protective sweep" the officers had to physically move her out of their path. 1RP 29, 39, 41. Additionally, the evidence established that Jackson had been living at the apartment for at least a month when the officers entered the home without a warrant. 1RP 52.

Nevertheless, the trial court denied Jackson's motion to suppress. 1RP 106-110. The court first ruled that under the Fourth Amendment, Jackson lacked standing to challenge the lawfulness of the search.⁵ 1RP 110. The court ruled in the alternative that the officers had a lawful predicate to conduct a "protective sweep" after Valdez "became less cooperative . . . given the change in circumstances." CP 79; 1RP 110. The court in part relied upon its view that Valdez had "consented" to the officers' presence. CP 79. The court's ruling was incorrect, and the court's order denying suppression should be reversed.

b. Jackson had standing to challenge the unlawful search of his residence.

The trial court's first reason for denying Jackson relief was its belief that he lacked standing because he did not have the right to have contact with Valdez. The court reasoned that because Jackson was prohibited from having contact with her, he was not legally on the premises and so could not challenge the protective order. In so ruling, the

⁵ On the basis that neither party had conducted a Gunwall analysis, the court declined to analyze the issue under article I, section 7. 1RP 110.

court relied primarily on State v. Jacobs, 101 Wn. App. 80, 2 P.3d 974 (2000), but its ruling was based upon a misapplication of the holding in that case and a misunderstanding of the pertinent Fourth Amendment rule regarding standing. Moreover, to the extent that the court's ruling was based upon the absence of a Gunwall analysis, the court disregarded the well-established rule that in the context of the protections of article I, section 7, no Gunwall analysis is required. The order denying the suppression motion must be reversed.

- i. *Constitutional protections against warrantless searches are at their apex in the home.*

Warrantless searches of constitutionally protected areas are presumptively invalid unless one of the narrow exceptions to the warrant requirement applies. Katz v. United States, 389 at 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999); U.S. Const. amend. IV; Const. art. I, § 7. "Exceptions to the warrant requirement are to be jealously and carefully drawn." State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) (citation omitted). The State bears the burden of

establishing an exception to the warrant requirement by clear and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); State v. Ibarra-Raya, 145 Wn. App. 516, 187 P.3d 301 (2008).

Under both the Fourth Amendment and article I, section 7, the home is afforded the highest protection against government intrusion. “This constitutional protection is at its apex ‘where invasion of a person's home is involved.’” State v. Einfeldt, 163 Wn.2d 628, 635, 185 P.3d 580 (2008) (citation omitted). “The closer officers come to intrusion into a dwelling, the greater the constitutional protection.” State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011).

ii. *Under the Fourth Amendment, a person who is an overnight guest has standing to challenge the constitutionality of a search of a home.*

In Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990), the Supreme Court held that under the Fourth Amendment, an overnight guest has “an expectation of privacy in the home that society is prepared to recognize as reasonable.” 495 U.S. at 97; accord State v. Link, 136 Wn. App. 685, 692, 150 P.3d 10 (2007). In so

holding, the Supreme Court rejected the premise that the question of standing should turn on whether the person challenging the search has legal authority over the place searched: “guests . . . are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household.” Olson, 495 U.S. at 99.

- iii. *The existence of the no-contact order between Valdez and Jackson does not vitiate his standing to challenge the lawfulness of a search of his home.*

The trial court ruled:

Under the Fourth Amendment the defendant lacks standing to raise a claim as his presence in the apartment was wrongful. The defendant was specifically prohibited from being at the residence of Michelle Valdez by the protection order. So he had no legal authority to be in the apartment and his presence there was criminal.

CP 79 (Conclusion of Law 3).

Contrary to the trial court’s logic, under the Fourth Amendment, the question does not turn upon extraneous considerations of predicate legal entitlement. Indeed, it was

precisely this type of “needlessly complex” analysis that the Court disavowed in Olson. Olson, 495 U.S. at 96-97.

As noted, the trial court relied upon Division Two’s opinion in Jacobs, which in turn cited a decision of the United States Supreme Court, Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Jacobs, 101 Wn. App. at 87 (citing Rakas, 439 U.S. at 143). But neither opinion stands for the broad proposition for which it was cited by the trial court.

Rakas involved a search of an automobile in which the defendants had been passengers. 99 S.Ct. at 129-30. In evaluating the question of standing, the Court devoted substantial attention to whether a preexisting rule conferring standing upon anyone who was “legitimately on the premises” should be abrogated. Id. at 140-44 (discussing Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)). The Court disavowed the rule, but reaffirmed that “‘wrongful’ presence at the scene of a search would not enable a defendant to object to the legality of the search.” Rakas, 99 S.Ct. at 141 (citing Jones, 362 U.S. at

267). As an example, the Court cited “[a] burglar plying his trade in a summer cabin during the off season [who] may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as ‘legitimate.’” Id. at 143 n. 12.

In Jacobs, the Court relied in part upon Rakas to hold that the defendant, the respondent of a no-contact order, lacked standing to challenge the search of the no-contact order petitioner’s residence. 101 Wn. App. at 79-80. However the question ultimately turned not upon the existence of the no-contact order, but upon whether Jacobs “was an ‘overnight guest’ in the residence, with a legitimate expectation of privacy under [Olson].” Id. at 88; see also State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007).

In Wilson, the defendant was prohibited by a no-contact order from contacting the victim, Charlene Sanders, but while the order listed her address, it did not specifically prohibit Wilson’s presence there. 136 Wn. App. at 600. Following entry of the order, Wilson and Sanders co-signed a lease and resumed living together. Id. at 601. Wilson

subsequently assaulted and threatened Sanders within the residence, and was charged and convicted of first-degree burglary, violation of a no-contact order, and felony harassment. Id. The trial court dismissed the burglary conviction, and the State appealed. Id. at 602.

Similar to here, relying upon Jacobs, the State contended that the no-contact order made Wilson's presence in the residence unlawful as a matter of law. Id. at 607-08. The Court distinguished Jacobs "because, unlike Wilson, Jacobs did not live at the residence where he contacted the subject of the no-contact order." Id. at 608 n. 5. The Court further noted that Wilson's presence at the residence would not have been unlawful if Sanders had not been home at the time.

In this case, the evidence presented at the CrR 3.6 hearing established that Jackson had been living at the Federal Way residence for at least a month. 1RP 52. He thus had an expectation of privacy under the Fourth Amendment. Olson, 495 U.S. at 97; Link, 136 Wn. App. at 692.

Further, this expectation of privacy was not extinguished by the mere fact of the no-contact order. The Colorado no-contact order prohibited Jackson from having contact with Valdez, but the order did not specifically exclude him from the residence where he was arrested. Exhibit 2. As in Wilson, Jackson's presence at the *residence* was not wrongful, and the State could not have proven a violation of the no-contact order if Valdez had not been home at the time. Jackson had standing to challenge the unlawful search.

iv. *No Gunwall analysis is required in the context of article I, section 7.*

As established, even under the Fourth Amendment doctrine, Jackson had a legitimate expectation of privacy in his home which conferred upon him standing to contest the lawfulness of the police search, even though he was prohibited from having contact with someone who also was living there. The trial court misinterpreted and misapplied pertinent Fourth Amendment doctrine in ruling otherwise.

After ruling that Jackson could not claim a violation of his Fourth Amendment rights, the court also declined to

consider the issue under article I, section 7 because the parties did not conduct an analysis under Gunwall. But no Gunwall analysis is necessary where a party advocates that a Fourth Amendment doctrine under article I, section 7. See e.g. McNabb v. Department of Corrections, 163 Wn.2d 393, 180 P.3d 1257 (2008) (concluding it is unnecessary to engage in a Gunwall analysis where prior caselaw establishes a state constitutional provision has an independent meaning from the corresponding federal provision, and reaffirming that no Gunwall analysis is therefore required under article I, section 7); State v. Athan, 160 Wn.2d 354, 365, 158 P.3d 27 (2007) (noting it is “well-settled” that article I, section 7 “qualitatively differs” from the Fourth Amendment and in some areas provides greater protection than the federal provision, and therefore “a Gunwall analysis is unnecessary” to establish the Court should undertake an independent constitutional analysis); State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003) (same).

v. *Article I, section 7's absolute protection of "private affairs" and strict exclusionary rule compel the conclusion that Jackson had the right to challenge the search of his home.*

Under the Fourth Amendment, to determine whether a search necessitating a warrant has taken place, the inquiry is whether the defendant possessed a reasonable expectation of privacy. State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984) (quoting Katz, 389 U.S. at 357). In Washington, however, "due to the explicit language of [article I, section 7], . . . the relevant inquiry for determining when a search has occurred is whether the state unreasonably intruded into the defendant's 'private affairs.'" Myrick, 102 Wn.2d at 510.

Thus,

while article I, section 7 necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment, its scope is not limited to subjective expectations of privacy but, more broadly, protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant."

State v. Parker, 139 Wn.2d 486, 493-94, 987 P.2d 73 (1999) (quoting Myrick, 102 Wn.2d at 510).

“In no area is a citizen more entitled to privacy than in his or her home.” State v. Kull, 155 Wn.2d 80, 84, 118 P.3d 307 (2005). “[A] person’s home is a highly private place,” subject to rigorous constitutional protection. Id. Jackson was entitled to claim the protection of our state constitution against the officers’ warrantless entry into his home.

This conclusion is reinforced by article I, section 7’s exclusionary rule. In Rakas, the Supreme Court’s holding was animated in part by the narrow scope of the exclusionary rule under the Fourth Amendment:

Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected. . . . Since our cases generally have held that one whose Fourth Amendment rights are violated may successfully suppress evidence obtained in the course of an illegal search and seizure, misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations.

Rakas, 439 U.S. at 137-38.

By contrast, in Washington, “[t]he constitutionally mandated exclusionary rule provides a remedy for

individuals whose rights have been violated and protects the integrity of the judicial system by not tainting the proceedings with illegally obtained evidence.” State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009). Indeed, the Washington Supreme Court has held that the specific language used by the framers of the Washington Constitution “mandate[s] that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.” State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Instead, because the intent of the exclusionary rule is to protect privacy rather than deter unlawful government action, “whenever the right is unreasonably violated, the remedy must follow.” Id.

This Court should conclude that under either the Fourth Amendment or article I, section 7, Jackson had standing to challenge the search of his home.

- c. The “protective sweep” exception to the warrant requirement violates article I, section 7.

Having established that Jackson had standing to challenge the unlawful search of his home, this Court must

next decide whether the “protective sweep” conducted by the police was permissible. This Court should conclude that the Fourth Amendment’s protective sweep exception to the warrant requirement violates article I, section 7. In the alternative, this Court should conclude that even applying the Fourth Amendment rule, the predicate for a protective sweep was not established.

- i. *A “protective sweep” permits a warrantless intrusion upon the privacy of the home.*

Under both the Fourth Amendment and article I, section 7, warrantless searches of constitutionally protected areas are presumptively invalid unless one of the narrow exceptions to the warrant requirement applies. Katz, 389 U.S. at 357; Ladson, 138 Wn.2d at 349; U.S. Const. amend. IV; Const. art. I, § 7. The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV (emphasis added). By contrast, article I, section 7 provides an unambiguous and inflexible mandate that “[n]o person shall be disturbed in his

private affairs, or his home invaded, without authority of law.” Const. art. I, § 7.

Thus, the right to privacy within the home notwithstanding, one of the exceptions to the Fourth Amendment’s requirement of a warrant founded upon probable cause is the so-called “protective sweep,” recognized in Maryland v. Buie, 494 U.S. 325, 334, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). In Buie, the Court held that “as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” Id. With regard to spaces “beyond that,” the Court requires only a showing of reasonable suspicion, as in Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed 2d 1201 (1983).

The Court held that for a protective sweep of other areas of the home to be lawful,

[T]here must be articulable facts which, taken together with the rational inferences from those

facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Buie, 494 U.S. at 334. The Court reasoned that the officers' interest in taking "reasonable steps to ensure their safety" after and while making an arrest was "sufficient to outweigh the intrusion such procedures may entail." Id.

Unlike the Fourth Amendment, article I, section 7 "clearly recognizes an individual's right to privacy with no express limitations." State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (quoting State v. Simpson, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980)). Where the Fourth Amendment is concerned with whether the defendant possessed a "reasonable expectation of privacy," article I, section 7 "focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." Myrick, 102 Wn.2d at 510-11.

No Washington court has considered the question whether a "protective sweep exception" to the warrant requirement exists under article I, section 7. This Court

should hold that because a protective sweep may be conducted without a warrant or probable cause, and turns upon considerations of “reasonableness” which do not exist under our state constitution, it violates article I, section 7.

- ii. *The Fourth Amendment’s “reasonableness” analysis is inconsistent with article I, section 7’s absolute requirement of authority of law.*

The touchstone of any analysis under the Fourth Amendment is reasonableness. “It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures.” Buie, 494 U.S. at 331; see also Einfeldt, 163 Wn.2d at 634 (“The Fourth Amendment protects only against ‘unreasonable searches’ by the State, leaving individuals subject to any manner of warrantless, but reasonable searches.”); Schultz, 170 Wn.2d at 758 (“Article I, section 7 does not use the words ‘reasonable’ or ‘unreasonable.’”); Morse, 156 Wn.2d at 9 (same).

In determining whether a given search violated the Fourth Amendment guaranty, a court will balance the intrusion upon the individual’s Fourth Amendment rights against its promotion of legitimate government interests.

Buie, 494 U.S. at 331; see also Terry, 392 U.S. at 21. This balancing was critical to the Court’s analysis in Buie. See 494 U.S. at 330 (analogizing the “protective sweep” to the Terry “frisk” and noting that under the Fourth Amendment, “there is ‘no ready test for determining reasonableness other than by balancing the need to search ... against the invasion which the search ... entails” (quoting Terry, 392 U.S. at 21)); 494 U.S. at 332 (“[t]he ingredients to apply the balance struck in Terry and Long are present in this case”); 494 U.S. at 334 n. 2 (observing that permitting a protective sweep based upon reasonable suspicion “strikes the proper balance between officer safety and citizen privacy”).

However, “[u]nlike in the Fourth Amendment, the word “reasonable” does not appear in any form in the text of article I, section of the Washington Constitution.” Morse, 156 Wn.2d at 9. “Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington.” Eisfeldt, 163 Wn.2d at 635. Article I, section 7, instead, “focuses on the rights of the individual rather

than on the reasonableness of the government action.”

Morse, 156 Wn.2d at 12.

Under the explicit language of article I, section 7, “the warrant requirement is especially important as it is the warrant which provides the requisite ‘authority of law.’” Ladson, 138 Wn.2d at 350. Thus, Washington courts have scrupulously guarded against warrantless police intrusion into a residence, even where under the Fourth Amendment such intrusion might be “reasonable.” Morse, 156 Wn.2d at 11-12 (invalidating Fourth Amendment’s “apparent authority” doctrine); State v. Ferrier, 136 Wn.2d 103, 115, 960 P.2d 927 (1998) (“knock and talk” procedure violated warrant requirement of article I, section 7); City of Seattle v. McCready, 123 Wn.2d 260, 270-72, 868 P.2d 134 (1994) (no authority of law for magistrates to issue search warrants for peoples’ homes on less than probable cause); Young, 123 Wn.2d at 181-82 (warrantless infrared surveillance of home violated article I, section 7); State v. Chrisman, 100 Wn.2d 814, 821-22, 676 P.2d 419 (1984) (no authority of law for

police to follow arrestee into apartment absent a valid warrant or some exigency).

A “protective sweep” is justified by neither a warrant, nor probable cause, nor, for the areas immediately surrounding the searching officers, reasonable suspicion. Buie, 494 U.S. at 334. But under article I, section 7, the Court has steadfastly refused to dilute the constitutional mandate of authority of law as expressed by a valid warrant or recognized exception to the warrant requirement. This Court should conclude that the Fourth Amendment’s “protective sweep” exception is contrary to article I, section 7.

- d. The State failed to establish grounds for a protective sweep under the Fourth Amendment.

Even assuming that a “protective sweep” does not violate article I, section 7’s command that government intrusions upon individual privacy occur only under “authority of law,” the State did not establish the necessary predicates to show the protective sweep exception applies.

- i. *Under settled Supreme Court precedent, Valdez's mere acquiescence to the officers' request to enter did not confer consent to search.*

Because the officers' entry into Jackson's home was done without a warrant, the trial court ruled that the officers were legally on the premises on the basis that Valdez consented to their entry. This is not a correct determination of the facts, and in any event does not give rise to a basis to conduct a "protective sweep."

At the suppression hearing, Tseng testified that when the officers knocked on the door of the apartment, Valdez allowed them to enter.⁶ 1RP 25. This testimony is reflected in Finding of Fact 1(d).⁷ CP 77. The court ruled that this gave the officers "a legal basis to be there," and that

⁶ In Finding of Fact 1(e), the court found, "the officers had two purposes in being at the residence: (1) to make the parents aware of Daniel's 911 call and (2) to discuss the situation with the parents and confirm this was discipline and not a crime. CP 77. Tseng in fact testified that after he spoke with Daniel, he concluded no crime had been committed and the reported "assault" was reasonable parental discipline. 1RP 37. The finding is unsupported by the evidence and must be stricken. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994) ("A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal").

⁷ Despite the testimony, Conclusion of Law 3, states that the officers were "invited in." CP 79. To the extent that the Conclusion of Law incorrectly resolves disputed factual issues, the Conclusion of Law must be stricken. Hill, supra n. 6.

although Valdez attempted to block their ingress into the apartment,⁸ they were entitled to conduct a “protective sweep.” CP 79.

In Schultz, the Supreme Court emphasized that article I, section 7 “requires ‘authority of law’ before the State may pry into the private affairs of individuals.” 170 Wn.2d at 757 (quoting State v. Day, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007)). “These important constitutional protections cannot easily be brushed aside by representatives of the government.” Schultz, 170 Wn.2d at 757. The Supreme Court thus rejected the contention that acquiescence is consent. Id. at 759.

In this case, moreover, even though Valdez may have acquiesced to the officers’ initial entry into the apartment, she plainly signaled her lack of consent for them to come in further and conduct a search. The officers had to physically move her out of the way in order to conduct her protective

⁸ Finding of Fact 1(e) states in relevant part, “Ms. Valdez proceeded to somewhat block the hallway.” CP 77. This is an understatement of the testimony. See 1RP 27, 29, 39, 41 (Tseng acknowledges that Valdez moved into their path as if to block the hallway, and his companion officer had to physically move her out of the way so the officers could conduct their “protective sweep.”

sweep. 1RP 37. Under no reasonable construction of the facts can this be deemed consent.

The officers were not investigating a crime and, in fact, believed that no crime had occurred. The Washington Supreme Court has been “quite explicit” that under article I, section 7, “the burden is on the police to obtain consent from a person whose property they seek to search.” Morse, 156 Wn.2d at 13. Although initially Valdez was willing to speak with the officers because she was concerned that her son may have gotten in trouble, she was not interested in speaking with them once they began to question her about Jackson and certainly was unwilling to permit them to proceed further into the apartment.

Once it became clear to the officers that Valdez did not want them in the hallway, they simply had no right to push past her to conduct a “protective sweep.” The officers were not investigating a crime and did not even have a reasonable suspicion of criminal activity. If they were concerned for their safety, the appropriate course would have been simply to leave, rather than violate Valdez and Jackson’s privacy

rights and the warrant requirement. This Court should conclude that Valdez's initial willingness to discuss her son with the officers did not somehow confer upon them an unbridled license to search her home.

- ii. *The officers did not possess the requisite reasonable suspicion that the apartment harbored a dangerous person.*

Alternatively, this Court should invalidate the search because it was not supported by the requisite "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the . . . scene" required under Buie. Buie, 494 U.S. at 337.

Tseng's sole reason for conducting for the sweep was Valdez's uncooperative demeanor when they began to question her about Jackson. 1RP 28; see also CP 77 (Findings of Fact 1(f), (g), and (h)). Although she may have been unwilling to answer the officers' questions, she was neither belligerent nor threatening. At first, Valdez simply wanted to know why they were asking for Jackson. 1RP 38. They refused to answer her, even when she repeated the question. Id.

Valdez did not say that someone was hiding in the apartment. 1RP 41. The officers did not hear any suspicious noises. Id. Tseng could not point to any specific basis to believe the officers were in danger, as required to support a “protective sweep.” Instead he testified, “it’s kind of the hair on the back of your neck kind of stands up when something doesn’t feel right.” 1RP 41-42.

“[A] ‘general desire to be sure that no one is hiding in the place to be searched is not sufficient’ to justify a protective sweep outside the immediate area where an arrest has occurred.” State v. Hopkins, 113 Wn. App. 954, 960, 55 P.3d 691 (2002) (quoting State v. Schaffer, 133 Idaho 126, 131, 982 P.2d 961 (Idaho App. 1999)); see also State v. Spencer, 848 A.2d 1183, 1196 (Conn. 2004) (“The generalized *possibility* that an unknown, armed person may be lurking is not . . . an articulable fact sufficient to justify a protective sweep”) (emphasis in original). Further,

allowing the police to conduct protective sweeps whenever they do not know whether anyone else is inside a home creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a house in order to conduct a protective sweep.

United States v. Colbert, 76 F.3d 773, 778 (6th Cir. 1996).

The “protective sweep” in this case was invalid.

- e. Jackson is entitled to suppression of all after-acquired evidence.

Whenever the rights protected by article I, section 7 are violated, the exclusionary remedy must follow.

Winterstein, 167 Wn.2d at 632; White, 97 Wn.2d at 110.

The exclusionary rule demands suppression of all evidence obtained as a result of the warrantless search. ““The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.” Garvin, 166 Wn.2d at 254.

But for the officers’ aggressive and unconstitutional intrusion into Jackson’s home, they would not have observed him in the back bedroom. Thus, in addition to the statements obtained from Jackson as a result of the illegal entry, the exclusionary rule requires suppression of their observations made when they forced their way into the bedroom; i.e., their observations that they saw him in proximity to Valdez, allegedly in violation of the no-contact

order. This observation is no different from drugs observed as a result of an unconstitutional entry into a protected area. Cf. Morse, 156 Wn.2d at 6 (officers' unconstitutional entry into Morse's bedroom resulted in their viewing suspected methamphetamine on his dresser). In either instance, suppression of the observations is required. Because the remaining evidence is insufficient to support a conviction, Jackson's conviction should be reversed and dismissed.

2. **The trial court's failure to redact language from the Colorado protection order indicating that Jackson had "refused" to sign the order violated his Sixth Amendment right to confront the witnesses against him and evidentiary prohibitions against hearsay.⁹**

- a. Jackson moved to exclude hearsay "evidence" that he had refused to sign a no-contact order.

At trial, the State introduced a certified copy of a no-contact order from Pueblo county, Colorado. Exhibit 2. On the signature line, someone had written, "Refused." Id.

Prior to trial, Jackson moved to redact this language on the basis that it was hearsay and its admission violated his Sixth Amendment right to confrontation. 1RP 14. The

⁹ Jackson raises this issue in the event that this Court does not reverse the order denying his motion to suppress.

court ruled that the entry, “refused” was not hearsay. 1RP 100. The court remarked, “it doesn’t matter,” and stated that what the court found relevant was the finding that Jackson was personally served and given reasonable notice and an opportunity to be heard. Id. The court also was disinclined to redact the document because “if defendants . . . can refuse to sign orders that the court issues and then have that later be used to say they didn’t have receipt of it, that would undermine how these orders are served daily.” 1RP 105.

In closing argument, the State in fact relied upon the alleged refusal for its hearsay value, in keeping with an overarching theme that Jackson allegedly believed he was above the law. 2RP 128-130.

- b. The admission of evidence that Jackson allegedly had “refused” to sign the Colorado no-contact order violated his Sixth Amendment right to confrontation.

Under the Sixth Amendment, an accused has a right to confront the witnesses against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); State v. Jasper, 174 Wn.2d 96, 271 P.3d 876,

883 (2012).¹⁰ “The principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.” Crawford, 541 U.S. at 50.

In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the Supreme Court held that “certificates of analysis” introduced in a criminal prosecution were used for the purpose of establishing a fact at trial and thus were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” 129 S.Ct. at 2532 (citation omitted).¹¹ In Jasper the Washington Supreme Court followed suit, holding that certificates of driving records were likewise affidavits, falling within the “core class of testimonial statements,” “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” and requiring confrontation

¹⁰ At the time of this writing, only citations to the Pacific Reporter were available on Westlaw.

¹¹ At the time of this writing, only citations to the Supreme Court reporter were available on Westlaw.

to comport with the Sixth Amendment. Jasper, 271 P.3d at 886.

Significant here, the Court stressed,

the certificates go beyond mere *authentication* of otherwise admissible public records. They “furnish, as evidence for the trial of a lawsuit, [the clerk's] interpretation of what the record contains or shows, [and] certify to its substance or effect.”

Jasper, 271 P.3d at 886 (quoting Melendez-Diaz, 129 S.Ct. at 2539 (emphasis in original)).

In this case, some unknown person – perhaps a prosecutor, perhaps a clerk – inscribed the word “refused,” above the signature line of the no-contact order, presumably to indicate that Jackson had refused to sign the order. This evidence was introduced before the jury and argued for this purpose. The evidence was testimonial and required confrontation. This Court should hold its admission violated the Sixth Amendment.

c. The remedy is reversal of Jackson’s conviction.

A violation of the right to confrontation is reviewed under the constitutional harmless error standard. Jasper,

271 P.3d at 887. Under this standard, the State must show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Here, the State cannot prove the error was harmless. The State emphasized and reemphasized that Jackson “refused to sign” the Colorado no-contact order. 2RP 128-130. The State used the argument to bootstrap its claim that he had received notice of the order and simply decided not to comply with it. This Court should conclude the Confrontation Clause violation was prejudicial. Jackson’s conviction should be reversed.

E. CONCLUSION

This Court should hold that Federal Way police officers unconstitutionally entered Jackson’s home without a warrant and conducted an illegal search. The after-acquired evidence must be suppressed, and Jackson’s conviction reversed and dismissed. In the alternative, this Court should conclude that Jackson’s right to confrontation was

violated by the admission of testimonial hearsay. Because the error was not harmless, Jackson is entitled to a new trial.

DATED this 31st day of May, 2012.

Respectfully submitted:


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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68019-6-I
v.)	
)	
JERDALE JACKSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MAY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS, DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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STATE OF WASHINGTON

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APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104 | (X)
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HAND DELIVERY
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| <input checked="" type="checkbox"/> JERDALE JACKSON
803742
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520 | (X)
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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF MAY, 2012.

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