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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL ALLEN BUDD,

Respondent.

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Washington State Supreme Court
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**BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON**

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 ORIGINAL

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 50,000 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, which prohibits interference in private affairs without authority of law. It has participated in numerous privacy-related cases both as *amicus curiae* and as counsel to parties.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether Article 1, Section 7 requires law enforcement officers to inform a suspect of the right to refuse, limit, or revoke consent before the officers request consent to seize and search a computer within a suspect’s home.

STATEMENT OF THE CASE

The parties have presented the case thoroughly, as has the Court of Appeals in its decision. The facts relevant to the issues presented in this *amicus* brief are as follows:

Law enforcement officers suspected Michael Budd of possessing child pornography and decided to do a “knock and talk.” Budd was not at home when the officers arrived, so they waited for him outside his home,

and talked to Budd in his driveway when he returned. Detective Kim Holmes told Budd why the officers were there, asked for consent to seize and search his computer, and said she would apply for a warrant if he refused to consent. Budd agreed to consent and Holmes then told him he would need to sign a waiver. The parties dispute whether or not Holmes informed Budd at that time of all of the rights he was waiving; it is undisputed that the officers and Budd went into his home to discuss the rights in detail, and Budd was inside his home when he signed the waiver. *See State v. Budd*, 186 Wn. App. 184, 188-94, 347 P.3d 49 (2015).

The Court of Appeals held that Budd was not given all warnings prior to the officers entering his home, in violation of the constitutional rule explained in *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). The dissent would have found the required warnings had been delivered in the driveway. *See Budd*, 186 Wn. App. at 208-10 (Korsmo, J., dissenting). It further questioned whether *Ferrier* warnings were even required for a request for consent to seize a single item from a home. *See id.* at 211-12. This Court granted the State's petition for review.

ARGUMENT

This case arises out of a common law enforcement practice, the so-called "knock and talk," where officers attempt to gain consent to search.

The entire purpose of a “knock and talk” is to evade the warrant requirement of Article 1, Section 7; it is used when officers either lack probable cause to justify issuance of a warrant, or simply wish to avoid the inconvenience of subjecting their justification to the scrutiny of a neutral magistrate (and risk being rejected). This Court has recognized that such an attempt to evade the constitution must be limited in order to protect the privacy guaranteed by Article 1, Section 7; in particular, the subject of a “knock and talk” must be informed of his rights to refuse, limit, and revoke consent, and those warnings must be given prior to the invasion of privacy caused by entry into a home. *See State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

Here, the parties and lower court judges strenuously dispute whether or not all *Ferrier* warnings were communicated to Budd while he and the officers were still in his driveway, prior to entry into his home. *Amicus* respectfully suggests that this Court need not resolve that factual dispute. Instead, we ask this Court to make explicit what was only implied in *Ferrier*, and require warnings to be communicated to the subject of a “knock and talk” *prior* to requesting consent to a search. We further ask the Court to affirm that warnings are required for *all* “knock and talk” procedures, including when the goal is the seizure of a single item, and especially when the goal is the search of a computer. Such requirements

are the only way to ensure that our state constitution's strong guarantee of privacy is realized in practice.

A. Waiver of Privacy Rights Requires an Informed Decision

Article 1, Section 7 guarantees that Washingtonians will not be disturbed in their homes or private affairs without “authority of law.” That authority is ordinarily a valid warrant, unless the “search or seizure falls within one of the jealously guarded and carefully drawn exceptions to the warrant requirement.” *State v. Hinton*, 179 Wn.2d 862, 869, 319 P.3d 9 (2014). The standard to determine whether privacy has been adequately protected is thus the protection afforded by a warrant; “where the police have ample opportunity to obtain a warrant, [the courts] do not look kindly on their failure to do so.” *Ferrier*, 136 Wn.2d at 115 (quotation omitted).

One recognized exception to the warrant requirement is when people voluntarily consent to warrantless searches, whether of their bodies, homes, or other property. But the key word is “voluntarily”—it is essential that consent is obtained as a true choice, not simply as resignation to a perceived show of authority. In order to be a true choice, an individual must know whether or not he has the right to refuse consent; “the waiver of the right to require production of a warrant must, in the final analysis, be the product of an informed decision.” *Id.* at 118.

This is especially true when the entire purpose of the request for consent is to “avoid the necessity of obtaining a search warrant.” *Id.* A deliberate attempt to evade the warrant requirement, as in a “knock and talk,” must therefore be closely scrutinized; while consent is a recognized exception to the warrant requirement, the parameters of consent must be carefully drawn to ensure that privacy is adequately protected. Accordingly, this Court has recognized that a person’s consent granted in response to a “knock and talk” meets constitutional requirements only if officers “prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home.” *Id.* at 118.

It is worth noting that neither the State nor the dissenting judge below questions the continued vitality of *Ferrier*. This is not surprising, since this Court has repeatedly “confirm[ed] that *Ferrier* warnings apply when police conduct a ‘knock and talk.’” *State v. Ruem*, 179 Wn.2d 195, 206, 313 P.3d 1156 (2013). The reasons for the *Ferrier* rule remain as potent as ever. “[T]he pressures inherent to a knock and talk create a risk that officers may circumvent constitutional search warrant requirements by playing on a homeowner’s surprise, fear, or ignorance of the law.” *Id.*

at 212 (Wiggins, J., concurring in result). Today, just as it was in the 1990's, a "knock and talk" is an "inherently coercive" procedure intended "to avoid the necessity of obtaining a search warrant." *Ferrier*, 136 Wn.2d at 115.

The likely reaction of people subjected to a "knock and talk" is also the same:

[T]he great majority of home dwellers confronted by police officers on their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search.

Id. Unless those persons are advised of their rights, there is no way to "be satisfied that a home dweller who consents to a warrantless search possessed the knowledge necessary to make an informed decision." *Id.* at 116.

The present case illustrates the reasons for the rule. The officers lacked probable cause to obtain a warrant to search Budd's computer. They sent multiple officers to talk to Budd, and surprised him in his driveway when he returned home. Although he apparently did inquire whether they had a warrant, the answer he received was at best equivocal, claiming that the officers would apply for a warrant if he didn't provide

consent. Viewing this in the light most favorable to the State, it shows that the officers “had ample opportunity to obtain a warrant,” *id.* at 115 (quotation omitted), and chose not to do so; alternatively, it demonstrates deliberate coercion.¹ Surprised and faced with this show of authority, and likely without knowledge of his rights, it is not surprising that Budd would consent to a search—but it is questionable whether such consent was “the product of an informed decision,” *id.* at 118. *Ferrier* rightly recognized that, at a minimum, a person in Budd’s position would need to be informed of his rights in order for any consent to be viewed as voluntarily granted.

B. To Protect Privacy, Suspects Must Be Informed of Their Rights *Before* They Are Asked to Consent to a Search

One of the most troubling aspects of this case is the undisputed fact that officers did not inform Budd of his rights before they initially asked for—and obtained—his consent to search his computer. Detective Holmes testified, “*When he agreed to give consent*, I explained to him that I had a waiver that he would need to sign, and it would give him rights as to how

¹ The police report claims that Detective Holmes said she “could and would obtain a search warrant” if Budd did not consent to a search. *Budd*, 186 Wn. App. at 190. If Holmes did, in fact, say that, it would be highly coercive and possibly deceptive. As Budd argues, the officers probably lacked probable cause to obtain a warrant. The misrepresentation that a warrant could be obtained could easily have caused Budd’s consent to be the product of a misinformed decision, rather than an informed decision, and thus not voluntary. *Amicus* takes no position on the factual question of whether Holmes misled Budd, either deliberately or inadvertently, about her ability to obtain a warrant.

much we could search, that he could stop the search.” *Budd*, 186 Wn. App. at 191 (emphasis added). Although the parties disagree about significant details, neither party claims that Budd was informed of his rights *before* Holmes initially requested consent for a search of his computer.

Amicus contends that this approach, providing warnings *after* consent has already been requested and given, violates Article 1, Section 7 because it fails to ensure that consent is voluntarily given as “the product of an informed decision.” *Ferrier*, 136 Wn.2d at 118. A common-sense reading of *Ferrier* indicates that this Court presumed that warnings would be given before the person was asked for consent; it refers to “consent given thereafter.”² *Id.* at 119. Indeed, the whole point of warnings is to ensure that a person has all necessary information before making a decision. Even in the present case, *amicus* does not understand the State to argue that Budd’s initial consent prior to any warnings was controlling; it merely argues that he was given all warnings before entry into the home, at which point he gave his consent by signing the form.

Since consent is only valid if given after receipt of warnings, it is curious that the officers here even asked for consent prior to giving Budd

² If “thereafter” is instead read to refer solely to the act of entering the home, it would lead to the conclusion that consent to search a home would be considered valid regardless of whether warnings were ever given, so long as that consent was obtained before an officer set foot in the home. Such a nonsensical interpretation would undercut the entire ruling.

the required warnings. Intended or not, the effect was coercive. Once Budd initially said “yes,” it was extremely unlikely that he would reverse that answer after being informed of his rights—even if he would have said “no” if he had received the warnings first. As a matter of human psychology, people are reluctant to revoke agreement, even when new information should cause them to question the wisdom of that agreement. Studies show that obtaining initial agreement, even on a small matter, makes it more likely that one can not only retain that agreement, but also expand it into agreement on a larger matter. *See, e.g.,* J. Edward Russo et al., *Choosing an Inferior Alternative*, 17 *Psychol. Sci.* 899 (2006) (finding people have a tendency to persist in an initial choice even when subsequent information shows it is inferior to the alternative); J. L. Freedman & S. C. Fraser, *Compliance without pressure: The foot-in-the-door technique*, 4 *J. Personality & Soc. Psychol.* 195 (1966) (finding much higher success rate in asking homeowners to allow erection of ugly billboard if they had previously been asked to allow display of tiny sign).

The powerful effect of that initial, uninformed, grant of consent is well known:

Social psychologists have long considered the desire for consistency within one’s attitudes, beliefs, and actions a central motivator of human conduct. Most people prefer to be consistent with what they have already said and done; thus, after committing themselves to a particular position—

especially when the commitment is active, public, and freely chosen—people are more likely to behave in ways that are congruent with that position. As a consequence, future behavior is likely to resemble past behavior because this past behavior occurred.

Robert B. Cialdini et al., *Compliance With a Request in Two Cultures: The Differential Influence of Social Proof and Commitment/Consistency on Collectivists and Individualists*, 25 *Personality & Soc. Psychol. Bull.* 1242, 1244 (1999) (citations omitted).

Psychologists are not the only ones aware of this dimension of the human psyche. Exploitation of people's preference for consistency and commitment is a common element of persuasive techniques used by salespeople, advertisers, and solicitors. *See, e.g.*, Robert B. Cialdini, *Influence: Science and Practice*, 51-96 (2009). And, as this case demonstrates, unless care is taken to avoid them, the same techniques can naturally be applied by law enforcement officers, with coercive effect.

In fact, the coerciveness of these techniques is enhanced when they are used by law enforcement officers, with all the force of their position of authority behind them. It has long been recognized that obedience to authority is a powerful element of human psychology. *See, e.g.*, Stanley Milgram, *Behavioral Study of Obedience*, 67 *J. Abnormal & Soc. Psychol.* 371 (1963) (all subjects in experiment, when asked by researcher, were eventually willing to administer what they believed to be intense shocks to

other people; two-thirds willing to administer dangerous shocks). Con artists deliberately dress and act as authority figures to tap into this subconscious tendency. *See, e.g.,* Cialdini, *Influence: Science and Practice* at 188-90. Law enforcement officers, of course, do not engage in such subterfuge. Nonetheless, their position gives them an inherent authority that automatically supplies extra strength to any other persuasive or coercive techniques used by the officers, whether or not intended.

Amicus respectfully asks this Court to disapprove of this type of coercion, involving a request for consent to a search when the person has not yet been informed of his or her rights. That initial request could improperly influence a later request following the required warning. Such a technique is unlawful when employed by police because it is a means of obtaining a less than voluntary waiver of constitutional rights. Our constitutional respect for privacy demands that persons know the extent of their rights *before* they are asked to waive them.

C. *Ferrier* Applies to Searches of Single Items within a Home

Before this Court, for the first time, the State argues that *Ferrier* does not apply to a “knock and talk” aimed at obtaining consent to seize and search a single item within a home, such as Budd’s computer. Petition for Review at 6-9. This argument fails.

The computer was within Budd's home, an area explicitly protected by Article 1, Section 7; as recognized by this Court, "the home receives heightened constitutional protection." *Ferrier*, 136 Wn.2d at 118 (quoting *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994)). Accordingly, *Ferrier* clearly stated that officers must inform residents of their rights "prior to entering the home." *Id.* If the only privacy concern had been related to the actual object of the search, the opinion could have easily only required the warnings to be given prior to obtaining consent to the full search. Instead, this Court rightly recognized that Article 1, Section 7's protection of privacy in one's home includes entry into the home.

The State's attempt to characterize an item within a home as somehow divorced from the nature of privacy in a home is belied by the text of our constitution. Article 1, Section 7 protects the privacy of a "home," not a "house." The privacy of a home has little or nothing to do with the physical structure of a house—the walls, floors, doors, or ceilings. Instead, it is the items within the home that are private, because they reveal the intimacies of one's life. There is no reason to distinguish between a search of one item, two items, or the myriad items that exist within a home; all fall within the constitutional protection of the privacy of a home. Nor, as a practical matter, is it possible to isolate a single item.

Retrieval and examination of that item requires entry into the home, and the view of all other items in the vicinity of the targeted item. There is no way for an officer to avert his eyes from the intimacies of the home, whether it be reading material, medicines, family photos, or just dirty laundry. Consent to seize a single item would implicitly authorize all of these related invasions of the privacy of the home, and must therefore be the product of an informed decision.

Since the officers chose to enter Budd's home to seize his computer, it was their obligation to make sure he was fully informed that he could refuse or limit entry into the home, as well as refusing or limiting the seizure and search of his computer. Thus, if Budd was not given the full *Ferrier* warnings before the officers entered the house, the search and seizure of his computer was unconstitutional, and the evidence found on it must be suppressed.

D. *Ferrier* Applies to Searches of Computers

The State also fails to properly appreciate the special characteristics of a computer, characteristics that have constitutional significance. Courts have recognized that "the wealth of personal and private information that is potentially stored on" modern digital devices requires a careful analysis of how such devices fit into existing constitutional privacy rules. *State v. Hinton*, 179 Wn.2d 862, 881, 319

P.3d 9 (2014) (C. Johnson, J., concurring). Much of this jurisprudence has involved cell phones. *See, e.g., Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (prohibiting warrantless search of cell phone incident to arrest). Less jurisprudence has involved full-fledged computers, perhaps because those are typically found within homes, and therefore already fall within the zone of greatest privacy protection.

The discussion of the privacy interests implicated by today's cell phones is nonetheless instructive of how computers should be handled. As stated by the United States Supreme Court:

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier.

...

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD.

...
Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form.

Id., 134 S. Ct. at 2489-91.

All of these characteristics also apply to home computers, but to an even greater degree. The storage capacity of the most basic home computer is typically an order of magnitude greater than the phones discussed in *Riley*. Information stored on computers often dates back considerably further than that on a phone, due to both the greater longevity of computers and the relative ease of transferring data from an old computer to a new one compared to the labyrinthine process that causes many people to simply start afresh with cell phones every couple of years. Finally, due to the greater ease of use, people are likely to use their computers more intensively than their phones, especially for word processing and web browsing; as such, computers are far more likely to contain detailed personal information, including extensive information about sensitive Internet searches.

A search of a computer can thus be at least as intrusive as a search of a home, if not more intrusive. Home searches limited to looking for specific contraband, such as Ferrier's marijuana grow operation, do not

require—or authorize—officers to examine personal papers, diaries, and the like. In contrast, a computer search will inevitably result in at least some examination of personal documents—at a minimum, the names of files and folders, which can be quite revealing as to the nature of the contents.

Accordingly, the warrant requirement is particularly important when searches of computers are at issue; arguably consent cannot serve as an adequate substitute when such heightened privacy interests are at stake.³ At a minimum, *amicus* respectfully asks this Court to require *Ferrier* warnings prior to a request for consent to search or seize a digital device such as a computer or cell phone, whether or not the device is located within a home.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court hold that warnings must be given *prior* to asking for consent to search a home (including the items within it) or to search a computer, since the request for consent evades the protections of the warrant

³ A magistrate issuing a warrant can place significant limits on the scope and method of the search. See *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1178-80 (9th Cir. 2010) (Kozinski, C. J., concurring) (providing guidelines for warrant issuance, including waiver of the plain view doctrine, use of tools and protocols to limit examination of information to that for which probable cause exists, and segregation and redaction of computer data by independent personnel). It is highly unlikely that most computer owners would or could equally specify such privacy-protective limits as a condition of consent to search.

requirement. Since such warnings were not given to Budd, his consent to search his computer is invalid, and the evidence found on that computer must be suppressed.

Respectfully submitted this 14th day of September 2015.

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