NO. 102622-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHIGNTON,
Petitioner,

vs.

MARY M. MERCEDES,
Respondent.

BRIEF OF WACDL, ACLU-WA, AS AMICI CURIAE

JAMES HERR, WSBA # 49811
james@jamesherrlaw.com
4500 Ninth Ave NE, Suite 300
Seattle, WA 98103
Tel: (206) 866-7001

MARK MIDDAUGH, WSBA #51425
mark@middaughlaw.com
600 University Street, Suite 3020
Seattle, WA 98101
Tel: (206) 919-4269

ATTORNEYS FOR WACDL

JONATHAN NOMAMIUKOR, WSBA #53324
jnomamiukor@aclu-wa.org
American Civil Liberties Union of Washington
PO Box 2728
Seattle, WA 98111
Tel: (206) 624-2184

Georgia Burns, Legal Intern
American Civil Liberties Union of Washington
PO Box 2728
Seattle, WA 98111
Tel: (206) 624-2184

ATTORNEYS FOR ACLU-WA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

CONSTITUTIONAL PROVISIONS:

OTHER AUTHORITY

A. IDENTITY AND INTEREST OF AMICI

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of Respondent Mary Mercedes.

WACDL is a professional bar association that was founded in 1987. Its membership is comprised of private criminal defense lawyers, public defenders, and related professionals. WACDL promotes the fair and just administration of criminal justice, works to ensure due process, and defends the rights secured by law for all persons accused of crimes. It regularly files amicus briefs in cases addressing important questions for criminal defendants and the criminal justice system in Washington. It files this brief in pursuit of that mission.

The American Civil Liberties Union of Washington (ACLU-WA) is a statewide, nonpartisan, nonprofit organization with over 150,000 members and

supporters, dedicated to the preservation of civil liberties and the principles of liberty and equality embodied in the Washington and United States Constitutions and federal and state civil rights laws. The ACLU-WA has long worked towards and supported various efforts to both uphold privacy rights and protect against law enforcement overreach. In this effort, the ACLU-WA routinely participates in cases that will disproportionately affect the rights of People of Color, especially in the context of the criminal legal system.

B. ISSUES OF CONCERN TO AMICI

1. Should the high expectation of privacy that rural dwellers have in their property require *Ferrier* warnings before searching that property?

2. Do *Ferrier*, and its progeny, resolve this matter by establishing protections against warrantless knock-and-talk searches for Washingtonians and their curtilage?

3. Given our nation's history of racially biased policing, should this Court take further steps toward racial equity for police encounters by ensuring adequate

warnings are given before officers employ knock-and-talk investigations of the area surrounding the home?

C. STATEMENT OF THE CASE

Ms. Mercedes lived in rural Stanwood, with her home at the end of a long gravel driveway. *State v. Mercedes*, No. 84469-5-I, 28 Wn. App. 2d 1048, at *1 (Court of Appeals Division I, November 3, 2023) ("Opinion Below"). The driveway has two gates, one at the top near the road, and another near the house. RP 72. The entire property is not visible from the driveway. RP 55. Adjacent to the home is a large, fenced area, where Ms. Mercedes kept two horses. RP 15.

Two uniformed, armed law enforcement officers went to the property multiple times, often going through the fenced area to physically feel the horses. CP 22-29; RP 59, 62, 65, 75, 89; Opinion Below, at *6. One officer described these warrantless investigations as a "knock-and-talk procedure" intending to obtain information to

determine if a crime had been committed. RP 8, 25. The officers obtained Ms. Mercedes permission to enter the field and feel the horses, but did not inform her she could limit, withdraw, or refuse permission to enter the pasture or feel the horses. CP 22; RP 12. On at least one such occasion, the gate was closed and locked, and the officer obtained Ms. Mercedes permission to enter through the gate, again without any warnings. RP 41, 60, 68, 72, 78-79; CP 8-9.

After the State charged Ms. Mercedes with two counts of animal cruelty deriving from evidence obtained from the warrantless investigations, she moved to suppress the warrantless evidence because she was not given *Ferrier*[1] warnings prior to the officers' intrusion into her home and private affairs. CP 123-25, 154. The trial court, attuned to the privacy expectations

[1] *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

of fellow Snohomish County residents, agreed, finding that "[f]enced private farmland is property in which citizens of our State enjoy constitutional protections against warrantless searches, and *Ferrier* warnings must be given in order to enter through such fences." CP 30. The trial court also noted that "[o]wners of fenced-in enclosures such as this have a privacy expectation in the areas they choose to fence." CP 29.

Without the evidence from the warrantless knock-and-talk investigations, the trial court concluded there was no probable cause supporting the search warrant. CP 32. Without that evidence, the court dismissed the charges. RP 144-45. The State appealed, and Division I of the Court of Appeals reversed. Opinion Below, at 15.

D. ARGUMENT AND AUTHORITY

1. Rural residents' expectations of privacy mandate *Ferrier* warnings before obtaining 'consent' to search surrounding property.

Rural residents have different expectations of privacy than urban residents, especially for the land surrounding their homes. "The usual way a property owner attempts to preserve privacy in rural areas is by way of fences and signs," and so "the presence of such devices is generally of consequence in most discussions as to whether a government agent unreasonably intruded into a defendant's private affairs on rural property." *State v. Thorson*, 98 Wn. App. 528, 533, 990 P.2d 446 (1999). Unlike most city residents, rural residents do not usually have a next-door neighbor close enough to peer into their fenced-in yard from the second story window. Indeed, many individuals moved to rural areas precisely because they wanted to prevent such intrusions into their private affairs.

This expectation of privacy in the land surrounding the home demonstrates the need for

Ferrier warnings when officers employ a "knock-and-talk" procedure to search for evidence of a crime in fenced-in rural property. Rural residents may use the land surrounding their home for activities that would be inconceivable in an urban setting, such as storing valuable personal property. They may have private property and engage in private activities in the land surrounding their home precisely because they expect to have privacy in that area. The home flows into the surrounding area. Because of the nature of those activities (like raising livestock), rural residents are subject to criminal investigations for crimes solely occurring in the land surrounding the home—a Seattle resident is not going to be charged with animal cruelty for their treatment of the horses in their backyard.

The purpose of *Ferrier* warnings is to ensure that when police show up on a person's doorstep and ask for

permission to come inside and look around, that person must give informed consent to search their home because "any knock and talk is inherently coercive to some degree." *Ferrier*, 136 Wn.2d at 115. For Ms. Mercedes and countless other individuals in our State, the "long gravel driveway" that leads to her home is conceptually equivalent to the front door of the home in a suburb. And after several warrantless intrusions down her driveway by law enforcement, Ms. Mercedes did not feel able to refuse their 'knock and talk' request to search her pasture.

a. Rural residents have a heightened expectation of privacy.

All three divisions of the Court of Appeals (and at least one federal judge) have recognized the heightened expectation of privacy that rural Washingtonian residents have in the property surrounding their homes. Rural residents utilize their property for many

intimate, private activities that city residents do not. In *Thorson*, Division I noted that where the defendant lived was "rural and sparsely populated….it is rarely visited by nonresidents, and strangers are neither welcome nor expected." *Thorson*, 98 Wn. App. at 535. As a result, "[p]rivacy is carefully protected by the community, perhaps partly because to a great extent, residents of the island conduct their daily domestic activities outdoors." *Id.* This was well-illustrated by Thorson, whose property contained not only a building labeled the 'house,' but also had "scattered about Thorson's property, separate structures identified as a cook shack, kitchen area, bed shacks, bathtub, laundry, and privy, wherein Thorson conducts the corresponding daily activities." *Id.*

Division II similarly embraced the increased expectation of privacy that rural residents have in

State v. Johnson, 75 Wn. App. 692, 708, 879 P.2d 984 (1994). The court found that DEA agents, working in tandem with state law enforcement agents, violated the Johnsons' right to privacy by entering their property via a dirt road that was closed by a gate and had 'no trespassing' signs. *Id.* The Johnson court highlighted that:

> In many parts of the country, landowners feel entitled to use self-help in expelling trespassers from their posted property There is thus a serious risk that police officers, making unannounced, warrantless searches of 'open fields,' will become involved in violent confrontations with irate landowners, with potentially tragic results.

Id. (quoting *State v. Crandall*, 39 Wn. App. 849, 861, 697 P.2d 250 (1985) (J. McInturff, dissenting).

Division III has also affirmed the heightened privacy expectations that rural residents have in their property. In *Jesson*, the Court of Appeals reversed the trial court and suppressed evidence obtained by law

enforcement who violated Jessen's right to privacy when they trespassed on his property to investigate a crime. *State v. Jesson*, 142 Wn. App. 852, 860, 177 P.3d 139 (2008). Division III noted the property was "located in a remote, sparsely populated and heavily forested area," was "down a long and rough, primitive driveway," and had a closed (but not locked) gate. *Id.* at 859. Based on these facts, Division III held that "a reasonable, respectful citizen seeking to contact an occupant would not believe he had consent to enter the property." *Id.* at 860.

This heightened expectation of privacy was also recognized by Judge Shea of the Federal District Court for the Eastern District of Washington. In *United States v. Vargas*, Judge Shea suppressed evidence obtained by law enforcement who secretly recorded Vargas' front yard for thirty days. No. CR-13-6025-

EFS, 2014 WL 12982411 (E. D. Wash., Dec. 15, 2014).[2] The court found that "society recognizes Mr. Vargas' subjective expectation of privacy in his front yard as a reasonable expectation of privacy." *Id.* at *9. The court highlighted that Vargas "chose to live in a rural area: an area mixed with farmland and undeveloped, sagebrush land," that "his rural home sits off a gravel road, and his front yard has a sense of enclosed space given a gated driveway and cyclone fence separating it from the gravel road." *Id.*

Here, the trial court (who carefully evaluated the privacy expectations of fellow county residents) found that the privacy expectations of Mercedes in her pastureland, combined with the coercive nature of the 'knock and talk' practices engaged in here, necessitated Ferrier warnings. The trial court's conclusion was

[2] Unpublished opinion, cited pursuant to GR 14.1.

grounded in long-standing precedent recognizing the specific privacy expectations of rural residents and the ways rural residents utilize the property surrounding their houses for intimate activities, similar to the house itself.

b. Rural residents use of surrounding property for intimate household activities subjects them to increased law enforcement scrutiny.

Rural residents utilize the property surrounding their houses in different ways than urban residents. These uses (found in the cases cited above) include growing plants, target practice, and raising livestock—activities which are difficult (if not outright prohibited) in cities and towns. The animal cruelty charges at issue here stemmed from an investigation about the way Mercedes was caring for her horses in the pastureland surrounding her house. This presents a conflict: the fact that Mercedes utilizes her property for

private activities (raising livestock) subjects her to increased government intrusion because of those private activities.

The result is that rural residents are targeted for government investigation for their private activities and affairs occurring on land adjacent to their houses in ways that urban residents are not. Urban residents do not use their yards (if they have one) for things like large-scale agricultural pursuits, and so urban residents will typically feel less concern about government intrusion into their backyard than a rural resident would about intrusion into a pasture.

The nature of the two places—yard versus pasture, urban versus rural—contrasts the need for privacy protections for rural residents. The increased government intrusion and investigation onto their property necessitates appropriate protections. Here,

those protections should include *Ferrier* warnings that the individual is free to deny consent to search a pasture, even though the officer has already driven down the long driveway and is essentially sitting on their front door step.

2. The Washington Supreme Court developed Ferrier warnings to limit the coercive nature of 'knock and talks.'

a. Washington Courts have routinely protected the reasonable expectation of privacy of a Washingtonian's curtilage.

Under article I, section 7 of the Washington Constitution, a search occurs "when the government disturbs 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. Budd*, 185 Wn.2d 566, 572, 374 P.3d 137 (2016) (citing *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9

(2014)). *Ferrier* was developed to ensure those privacy rights covered under article I, section 7 remain intact. *See State v. Ferrier*, 136 Wn.2d 103, 118, 960 P.2d 927 (1998) ("We are satisfied that public policy supports adoption of a rule that article I, section 7 is violated whenever the authorities fail to inform home dwellers of their right to refuse consent to a warrantless search.").

Although the *Ferrier* Court was silent on whether the warnings extended to the outside of a home, this Court has determined that the outside of a home falls within the protections provided by article 1, section 7 and the Fourth Amendment. *See State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000) (noting that the home "has generally been viewed as the area most strongly protected by the Constitution" and the curtilage of a home is "so intimately tied to the home

itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection.).

b. This case is resolved by *Ferrier* and related case law.

Officers conducted knock-and-talks, on several occasions, to gain access to Ms. Mercedes' home without providing her with *Ferrier* warnings. Simply because officers limited their searches to the outside of the home does not eliminate the necessity, stressed in *Ferrier*, for officers to expressly disclose Ms. Mercedes' right to deny the searches. *See Ferrier*, 136 Wn.2d at 116 (recognizing that without requiring *Ferrier* warnings when officers conduct a knock and talk the Court "would not be satisfied that a home dweller who consents to a warrantless search possessed the knowledge necessary to make an informed decision.") In *Ferrier*, officers received a tip regarding illegal activity at the Ferrier home and conducted a knock and

talk to gain entry without obtaining a search warrant. *Id.* at 107. Ferrier was not warned that she had the right to deny the officers' search of her home and this Court developed *Ferrier* warnings in order prevent officers from using coercive police tactics to evade a search warrant. *Id.* at 109.

Just like in *Ferrier*, officers approached Mercedes' home in response to a complaint made about the condition of Mercedes' horses. It is undisputed that officers went to Mercedes' home and conducted a knock and talk to obtain access to her enclosed pasture. Mercedes was not told that she had the right to refuse their searches, which led to several additional searches. The *Ferrier* analysis is applicable to Mercedes case because the same constitutional issues occurred when officers became intimately involved with Mercedes' home without warning her of right to deny

their searches. This Court has recognized that when individuals are unaware of their privileges, "warning[s] are needed simply to make them aware of the threshold requirement for an intelligent decision as to is exercise." *Budd*, 185 Wn.2d at 576 (citing *Ferrier*, 185 Wn.2d at 116-17).

This Court has routinely held that *Ferrier* warnings are limited to knock and talks. *See State v. Budd*, 185 Wn.2d at 573 ("we have consistently limited *Ferrier* warnings to knock and talk procedures) (collecting cases); *see also State v. Ruem*, 179 Wn.2d 195, 206, 313 P.3d 1156 (2013); *State v. Khounvichai*, 149 Wn.2d 557, 562-64, 69 P.3d 862 (2003). After all, this procedure is often used as a tactic to evade a search warrant and obtain evidence of a crime without advising citizens of their constitutional right. This Court's decision in *Ferrier* was based on the concern

that people "confronted with a surprise show of government force and authority" believe that they have no choice but to consent to a search. *Ferrier*, 185 Wn.2d at 115-16.

c. The intention of *Ferrier* warnings was tied to the Court's focus on ensuring the consent to search was actually voluntary.

The intention of *Ferrier* warnings is "to ensure that residents have a fair chance to reject an officer's request and protect their privacy interests." *Ferrier*, 185 Wn.2d at 115-16. This Court made it a requirement for officers to warn individuals of their constitutional right to refuse a warrantless search because without *Ferrier* warnings "the State would never be able to prove voluntary consent." *Budd*, 185 Wn.2d at 576. The utility of *Ferrier* warnings was not its relationship to the home; instead the Court was most concerned with ensuring that individuals faced

with a knock and talk made an informed decision. *See Ferrier*, 136 Wn.2d at 115 ("Central to our holding is our belief that any knock and talk is inherently coercive to some degree."); *See Budd*, 185 Wn.2d at 577 (noting that "*Ferrier* warnings are intended to ensure that residents have a fair chance to reject the officers' requests").

This Court in *Ferrier* acknowledged, and research supports, that most people faced with a surprise show of authority, like a knock and talk, will provide consent without questioning the absence of a warrant. *Ferrier*, 136 Wn.2d at 115; *see also* R. Sommers and V. Bohns, *Consent searches and underestimation of compliance: Robustness to type of search, consequences of search, and demographic sample*, 21 J. of Empirical L. Studies 4 (2023) (noting that "most police searches today are authorized by citizens' consent, rather than probable

cause or reasonable suspicion"). For instance, when an individual is confronted with a request to search, despite a desire to deny that request, they will likely consent due to the psychological pressure they feel to conform. *See Ferrier*, 136 Wn.2d at 115-16 (the Court was not surprised by an officer's testimony that "virtually everyone confronted by a knock and talk accedes to the request"); *see also* Sommers and Bohns (2023) (researchers requested to look through study subjects' internet history and in each of the three studies at least 92% of the subjects agreed to allow the search despite the researchers' hypothesis that people would be unlikely to agree to such a request).

Moreover, because many Americans lack knowledge regarding their constitutional rights,[3] the

[3] *See* American Bar Association, *ABA Survey of Civic Literacy: The findings* (May 2019) (survey conducted to determine people's knowledge of constitutional rights

public will only benefit from a requirement that officers divulge their rights to deny a search. This Court's decision in *Ferrier* is not undermined by extending the warnings to apply to fenced yards; instead, public policy supports this extension in order to maintain the purpose of the warnings.

3. This Court should continue to ensure citizens are adequately informed of their right to privacy in the face of police investigations to account for racial bias in our criminal legal system and the relationship between police and BIPOC.

In *State v. Sum*, this Court recognized that people of color have a unique relationship with law enforcement which requires their race to be considered

---

found that many people do not know basic constitutional information); *See also* Annenberg Public Policy Center, *Many Don't Know Key Facts About U.S. Constitution, Annenberg Civics Study Finds* (Sep. 14, 2023) (finding only two-thirds of American can name all three branches of government and 77% of Americans can only name one right protected under the First Amendment).

during police interactions. *State v. Sum*, 199 Wn. 2d 627, 643, 511 P.3d 92, 103 (2022). Notably, this Court acknowledged the constant goal to "striv[e] for better," particularly when it comes to police encounters with BIPOC. *Id.* at 640. The Sum analysis is applicable here because race is a critical consideration when examining a BIPOC's interacting with police. *See Sum*, 199 Wn.2d at 641 ("It would be nonsensical to hold that a person's race and ethnicity, … are irrelevant to the question of how the person was brought into the criminal justice system in the first place."); *See also United States v. Mendenhall*, 446 U.S. 544, 558, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (holding that age and race are relevant to whether a police encounter was consensual).

Our nation has a dark history of utilizing racial violence to dissuade BIPOC communities–particularly

Black people[4]–from, exercising their constitutional rights.[5] Afterall, simply being BIPOC increases the likelihood of having a dangerous interaction with law enforcement in our country. Mapping Police Violence, https://mappingpoliceviolence.org/ (last visited July 5, 2024) (finding that, as of July 5, 2024, police have killed 443 BIPOC so far this year). Moreover, BIPOC peoples

---

[4] Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125, 129 (2017) (discussing how, empowered by misguided interpretations of Fourth Amendment, police disproportionately interact with Black people, exposing them "not only to the violence of ongoing police surveillance and contact[, and social control,] but also to the violence of serious bodily injury and death").

[5] See Jalila Jefferson-Bullock & Jelani Jefferson Exum, *That Is Enough Punishment: Situating Defunding the Police Within Antiracist Sentencing Reform*, 48 Fordham Urb. L.J. 625, 636 (2021) ("U.S. policing, with its focus on racial profiling and racially biased enforcement strategies, regularly inflicts trauma on Black people and 'undermines effective policing.'" (quoting William M. Carter, Jr., A Thirteenth Amendment Framework for Combatting Racial Profiling, 39 Harv. C.R.-C.L. L. Rev. 17, 24 (2004)).

are frequently impacted by coercive police tactics like unlawful searches and seizures as well as knock and talks. *See Utah v. Strieff*, 579 U.S. 232, 254, 136 S.Ct. 2056, 195 L. Ed. 2d 400 (2016) (Sotomayor, J., dissenting) (when it comes to police encounters without reasonable suspicion, "it is no secret that people of color are disproportionate victims of this type of scrutiny.").

Recognizing the coercive nature of this police tactic, the Washington Supreme Court developed *Ferrier* warnings to ensure that individuals confronted by a knock and talk would understand the full extent of their rights before granting a search of their home. Individuals faced with a show of authority that is utilized to gain access to their private affairs are likely to grant the request when they are unaware of their right to deny. People of color are particularly vulnerable to police coercion due to the longstanding history of

racially biased policing.

That said, the requirement under *Ferrier* that an officer inform an individual that they have the right to decline a search may serve as a counterbalance to prevent racialized police impropriety. When giving a *Ferrier* warning, an officer must first inform a civilian of their right to refuse a search. In doing so, an officer is reminding both themselves, and a civilian, of the limitations of their power to search and investigate under specific circumstances. If applied lawfully, the issuance of *Ferrier* warnings creates a natural pause in police-civilian interactions that promotes the actualization of one of our country's constitutional tenants: due process.

In an effort to follow the Court's intention of requiring officers to expressly divulge an individual's constitutional rights, this Court should require law

enforcement to provide *Ferrier* warnings when officers request to search the outside of a home.

E. CONCLUSION

Amici urge the Court to reverse the Court of Appeals and affirm the ruling and reasoning of the trial court—that the expectations of privacy rural residents have in the land surrounding their houses necessitates *Ferrier* warnings.

Respectfully submitted this 9th day of August, 2024.

/s/ James Herr
James Herr, WSBA #49811

/s/ Mark Middaugh
Mark Middaugh, WSBA #51425
Attorneys for WACDL

/s/ Jonathan Nomamiukor
Jonathan Nomamiukor, WSBA #53324
Georgia Burns, Legal Intern
Attorneys for ACLU-WA

This document contains 4,167 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images.

CERTIFICATE OF SERVICE

I, James Herr, hereby declare under penalty of perjury under the laws of the State of Washington that on this date, I caused a true and correct copy of the foregoing document to be served on the following in the manner(s) indicated:

Via Electronic Filing
Amanda Campbell
Amanda.campbell@co.snohomish.wa.us
Snohomish County Prosecuting Attorney
Diane.Kremenich@co.snohomish.wa.us

Washington Appellate Project
wapofficemail@washapp.org
Nancy P. Collins
nancy@washapp.org
Matthew Evan Catallo
matthew@washapp.org

Dated: This 9 Day of August, 2024.

/s/ James Herr
_____
James Herr, WSBA# 49811

LAW OFFICE OF JAMES HERR

August 09, 2024 - 4:12 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,622-6
Appellate Court Case Title:	State of Washington v. Mary Margaret Mercedes
Superior Court Case Number:	18-1-02109-4

The following documents have been uploaded:

- 1026226_Briefs_20240809160829SC301705_9588.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Mercedes Amicus Brief WACDL ACLU.pdf
- 1026226_Motion_20240809160829SC301705_0162.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Mercedes Amici Motion WACDL ACLU.pdf

A copy of the uploaded files will be sent to:

- Amanda.campbell@co.snohomish.wa.us
- Diane.Kremenich@co.snohomish.wa.us
- Matthew@washapp.org
- diane.kremenich@snoco.org
- nancy@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: James Herr - Email: james@jamesherrlaw.com
Address:
4500 9TH AVE NE STE 300
SEATTLE, WA, 98105-4762
Phone: 206-866-7001

Note: The Filing Id is 20240809160829SC301705