

NO. 62568-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER GREGORY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN LUM

BRIEF OF RESPONDENT

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## I. ISSUES PRESENTED

1. What is the effect of the recent United States Supreme Court decision in Arizona v. Gant on cases involving a vehicle search incident to arrest that are currently pending in trial courts and on appeal?
  - a. Does the “good faith” exception to the exclusionary rule under the Fourth Amendment require suppression of evidence obtained when officers conducted a search under authority of presumptively valid state and federal case law?
  - b. Does article I, § 7 of the Washington constitution require suppression of evidence obtained when officers conducted a search under authority of presumptively valid state and federal case law?
  - c. Were the officers acting in good faith reliance on established United States and Washington Supreme Court case law when conducting the vehicle search incident to arrest?
  
2. Is the Gant rule that a vehicle may be searched when it is reasonable to believe that evidence relevant to the crime of arrest may be found inside the vehicle valid under article I, § 7 of the Washington constitution?
  - a. Was this rule adopted by the Washington Supreme Court in State v. Patton?

3. Was the vehicle search proper under pre-Gant case law?
  - a. Was there a close physical and temporal proximity between the arrest and the vehicle search?
4. Was counsel ineffective for failing to challenge the search warrants?
  - a. Did defense counsel in fact challenge the validity of the warrant for the cell-phone?
  - b. Were the warrants for the cell-phone and residence supported by probable cause?
5. Was the stop of Gregory's vehicle a pretext?
  - a. Can the execution of an arrest warrant be pretextual?
  - b. Does the totality of the circumstances indicate that the execution of the arrest warrant was pretextual?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL BACKGROUND.**

Christopher Gregory was charged with one count of violating the Uniform Controlled Substances Act, RCW 69.50, possession with intent to deliver methamphetamine. CP 80. A jury found Gregory guilty as charged. CP 81. Gregory received a standard range sentence and has filed a timely appeal. CP 112, 119-20. After filing an opening brief, Gregory was given permission to file a supplemental opening brief adding an additional argument to his claims on appeal.

**B. FACTUAL BACKGROUND.**

**1. CrR 3.6 hearing.<sup>1</sup>**

On May 29, 2008, Bellevue Police Department (“BPD”) officers stopped a Honda Accord for a traffic infraction. Matthew Logstrom was the driver and Tina Bottroff was the passenger. 1RP 50-51, 75. During this stop Logstrom was arrested and a search incident to arrest found suspected methamphetamine and other items possible associated with selling drugs. 1RP 8, 30-32. Logstrom gave a statement to police in which he admitted he was a methamphetamine dealer. 1RP 320-33. After Logstrom’s arrest, BPD Ofc. Halsted drove passenger Tina Bottroff to the Newport Hills Townhomes and saw her enter Unit 44.<sup>2</sup> Bottroff told Ofc. Halsted that she lived with “Chris” and Laura” in Unit 44. 1RP 86-87.

Logstrom was subsequently interviewed by BPD Detective Christiansen. 1RP 8-9. During the interview, Det. Christiansen learned that Bottroff had been living with Christopher Gregory at the Newport Hills Townhomes, Unit 44.<sup>3</sup> 1RP 9, 12, 34. Det. Christiansen knew and

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<sup>1</sup> The State adopts the method of referring to the report of proceedings used by Gregory on appeal: 1RP (Sept. 15, 2008), 2RP (Sept. 16, 2008), 3RP (Sept. 17, 2008), 4RP (Sept 18, 2008), and 5RP (Sept. 19, 2008).

<sup>2</sup> See also 4RP 130 (trial testimony).

<sup>3</sup> Detective Christiansen looked up Laura Vetter’s name in a police database and learned that Gregory had been a passenger in a vehicle driven by Vetter that was involved in a traffic accident. This confirmed that for the detective that there was a connection between Vetter and Gregory. 1RP 12-13, 38.

confirmed that Gregory had an outstanding Department of Corrections felony escape warrant. 1RP 9-12, 34-37, 67-68, Pre-Trial Ex. 1.

Previously, in November of 2007, a confidential informant had told Det. Christiansen that Christopher Gregory was actively involved with stolen cars and was trying to get into the “methamphetamine business.” 1RP 48-49, Ex. 4, p. 3. The detective asked the informant to determine where Gregory was living, but the informant was unable to do so. 1RP 49.

On June 13, 2008, Detective Christiansen set up a surveillance operation hoping to locate Gregory at the Newport Hills Townhomes. 1RP 12, 51. Three officers were involved in the surveillance and they rotated watching the apartment in unmarked cars from a parking lot across the street.<sup>4</sup> 1RP 13. From this position the parking lot and the walkway to Unit 44 could be seen. 1RP 14, 51-52, 55.

The surveillance began at approximately 9:00 a.m. 1RP 15, 51. Shortly afterward, Bottroff drove up to the apartment complex in a red two-door Honda Accord. Det. Christiansen saw Bottroff make several trips from the apartment to the car. Bottroff then remained in the apartment. 1RP 15-16.

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<sup>4</sup> Testimony at trial made it clear that this surveillance position was on the other side of the road from Unit 44. 4RP 12-14.

In the afternoon, Det. Christiansen switched locations with Ofc. Halsted. 1RP 16. The detective moved down the street to the intersection of 60<sup>th</sup> and 119<sup>th</sup> and Ofc. Halsted assumed the “eye” position.<sup>5</sup> 1RP 16. At approximately 2:30, Ofc. Halsted informed Det. Christiansen by radio that Gregory had left the apartment and was getting into the car. 1RP 16. There was no attempt to arrest Gregory from the point at which he left the apartment to when he got into the Honda. 1RP 54-55. Det. Christiansen saw the Honda as it drove out of the parking lot onto 60<sup>th</sup>. 1RP 16-17.

Det. Christiansen testified that, for safety reasons, law enforcement does not like to make an arrest in front of someone’s residence. 1RP 16. Detective Christiansen followed the vehicle for a very short distance, down 60<sup>th</sup> and onto 119<sup>th</sup>. 1RP 18, 58-59. Moments later the Honda pulled onto 119<sup>th</sup>, turned into a Service Station, and pulled up to a pump.<sup>6</sup> 1RP 18, 39, 59. Det. Christiansen stopped behind the Honda and Ofc. Halsted blocked the car from the front. 1RP 18-19. Det. Christiansen activated the flashing lights in his car. 1RP 19, 40-41.

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<sup>5</sup> See also 4RP 16-18 (trial testimony : the purpose of this secondary surveillance position was so that the primary “eye” did not have to immediately follow the suspect vehicle).

<sup>6</sup> See Ex. 2 (map drawn by Det. Christiansen for pre-trial hearing). As the drawing shows, the Honda drove only a very short distance before being stopped. At trial, during cross-examination by Gregory’s attorney, it was established that the Honda travelled approximately 900 feet from the apartment to the service station before it was stopped. 4RP 80-81.

Det. Christiansen immediately got out of his car. At the same time Gregory was getting out of the Honda on the passenger side. 1RP 19, 41, 59. Tina Bottroff was the driver. The detective recognized Gregory from prior contacts. 1RP 20. Det. Christiansen said, "Please stop." Gregory did so. 1RP 20-21, 41, 61. Gregory had shut the door to the Honda. 1RP 61-62.

Gregory was arrested on the warrant, handcuffed, and placed in Ofc. Halsted's car. 1RP 21-23. During a search of Gregory's person incident to his arrest a cell phone was found in his pocket. 1RP 23, 44.

Det. Christiansen asked Bottroff to get out of the car. He told her that he was going to conduct a search of the area in the car where Gregory had been sitting. 1RP 21. This search was limited to the areas in the vehicle that Gregory would have been able to reach from the passenger seat. This included areas accessible to the front passenger on the driver's side of the car. 1RP 21-23, 63-65. Prior to the search, the detective did not see drugs or weapons inside the car in plain view. 1RP 62.

In the driver's side door pocket, Det. Christiansen found a paper bag containing several small plastic baggies, one of which contained a substance he recognized as methamphetamine. 1RP 23-24, 43. In the vehicle's center console, Det. Christiansen discovered a small digital scale and items bearing Bottroff's name. 1RP 24, 43.

Det. Christiansen advised Ofc. Halsted to arrest Bottroff for possession of methamphetamine. 1RP 24-25, 43. Bottroff was searched and two baggies of methamphetamine were found in her right front pocket.<sup>7</sup> 1RP 25-26. In the bag Bottroff had been seen carrying to the car, Officers recovered approximately 50 unused small baggies with the same logo as the ones recovered from her pocket.<sup>8</sup> 1RP 25.

On June 13, 2008, the same day on which Gregory was arrested, the police obtained a search warrant and searched Unit 44. 1RP 26-29, 45-46. Although a search of the apartment on that day found drugs and drug paraphernalia, Det. Christiansen did not believe that these items could be conclusively linked to Gregory. 1RP 46.

Subsequently, on June 26, 2008, Det. Christiansen obtained a search warrant for the cell phone recovered from Gregory. 1RP 27, 46-47.

## **2. Trial testimony.**

At trial, Detective Christiansen testified consistently with the testimony he gave during the CrR 3.6 hearing. 4RP 7-47.

Gregory's cell-phone, taken from him after his arrest, was admitted into evidence. 4RP 28. The cell phone had a photograph of Gregory on it.

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<sup>7</sup> The methamphetamine weighed eight grams and tested positive for the presence of methamphetamine. Based on Detective Christiansen's training and experience he estimated that the eight grams of drugs could be split into forty "hits" of methamphetamine, a common amount of distribution.

<sup>8</sup> See also 4RP 84-85 (trial testimony).

4RP 73. When the cell phone is activated, the initials “CEG” appear on the screen.” 4RP 74.

There were multiple text messages on the cell phone on the date June 13, 2009, the day Gregory was arrested. 4RP 56-57. These included the following text messages between Gregory and individual calling himself “Vic” (Detective Christiansen’s explanation to the jury of some terms is added in parenthesis):

**Incoming message from “Vic”, 6-13-09, 11:54 a.m.:**  
“Anything good on yo side”

**Response by Gregory:** “Not at this time, but that is subject to change really soon.”

**Incoming message from Vic:** “All depends on the price. If the price is rite then we be all the way nice.”

**Incoming message from Vic:** “QTR.” (Detective: this is a reference to a quarter ounce of narcotics).

**Response by Gregory:** “350 for that ticket.” (Detective: reference to paying \$350 for a quarter ounce of methamphetamine, a reasonable price for a pre-street, wholesale deal).

**Incoming message from Vic:** “If it’s the stuff Tina has then I’m coo uce cuz I talked to her and she said there’s quite a bit of blowoff.” (Detective: “Uce” is Gregory’s nickname; “blowoff is cutting agent added to drug).

**Incoming message from Vic:** “Naw I’m gitin this shit from someone else.” (Detective: Vic will buy better quality drug from another person.)

**Incoming message from Vic, 1:04 p.m.:** “No break no luve tryna com up uce. Or is that what you are getting charged?” (Detective: Vic wants a price break.)

**Response by Gregory:** “Well, actually I would only make 25 on that.” (Detective: Gregory is claiming he will only make \$25 on the deal.)

**Incoming message from Vic:** “Uce I know you well enough that if it isn’t good you wouldn’t fuck with it. So what can happen with three Cnotes.” (Detective: “3notes means \$300.)

**Response by Gregory:** “6.5.” (Detective: \$300 will buy 6.5 grams of methamphetamine.)

**Response by Gregory:** “Yeah nothing good about fluffy stuff and I do not subscribe to it.” (Detective: Gregory is claiming he is not selling drugs that have been cut down.)

**Incoming message from Vic:** “So how can we do this.”

**Response by Gregory:** “I’m waiting to get it then I’ll text you.”

**Incoming message from Vic:** “Okay uce.”

4RP 66-72. Detective Christiansen tried to reverse the phone number but it was not possible to locate “Vic.” 4RP 90-91.

At approximately 1:50 p.m., about ten minutes after the last message, an individual in a white Ford van arrived at the Newport Townhomes apartments, entered Unit 44, and stayed until approximately 2:50 p.m. 4RP 114-15.

Approximately 15 minutes later, Ofc, Halsted, across the street, saw Bottroff walk out to the Honda and get inside. 4RP 135. Gregory then walked out of the apartment and to the car. Gregory returned briefly to the apartment and then went back to the Honda and got inside the car.

4RP 135-36. Bottroff drove away and was subsequently stopped by Detective Christiansen and Ofc. Halsted, as described above. 4RP 115.

Documents in the name of Christopher Gregory were located during the search of the Unit 44. 4RP 75, 120-21. Electronic scales, glass pipes, and suspected methamphetamine were also found in the apartment. 4RP 118-19, 141-47. No drugs were found in the apartment.

The methamphetamine recovered from the Honda, from Bottroff's pockets, and in Unit 44 was admitted into evidence. 4RP 31-32, 134, 145-46. The parties stipulated to the admission of the lab report which confirmed that these substances all contained methamphetamine. 4RP 156-58.

### **III. ARGUMENT: ARIZONA v. GANT**

#### **A. OVERVIEW.**

Gregory argues that his conviction must be reversed because the search of the vehicle incident to arrest is prohibited pursuant to the recent United States Supreme Court opinion in Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710 (2009).<sup>9</sup> It is the State's position that even if Gant is

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<sup>9</sup> Since the filing of Gregory's opening brief, the State Supreme Court decided State v. Patton, \_\_\_ Wn.2d \_\_\_, 2009 WL 3384578 (Oct. 22, 2009), in which it adopted the holding of Gant under article I, § 7 of the Washington Constitution. Patton does not change the analysis of this issue. It remains the State's position that the officers relied in good faith existing case law in conducting the vehicle search. Moreover, under both federal and state law, the good faith exception has been recognized. For convenience, references in this briefing to Gant should be considered as referencing Patton as well.

applied retroactively, and even assuming that the search in this case was improper under Gant, the exclusionary rule should not be applied under either the Fourth Amendment or article I, § 7 of the Washington constitution because the search was conducted by an officer in reasonable reliance presumptively valid case law.

As a preliminary matter, the State notes that if the vehicle search was improper under pre-Gant case law, it remains improper. In such a circumstance, there is no need to reach the question of the effect of Gant on the case. The search is invalid and the evidence must be suppressed.

Assuming the search is proper under pre-Gant case law, the question of the application of Gant to this case must be addressed. The State agrees that Gant applies retroactively to all non-final cases pending in trial courts and on appeal. Gant, however, does not require reversal of every vehicle search conducted incident to arrest. Gant allows vehicle searches under a variety of circumstances and the facts must be examined on a case-by-case basis to determine whether the search remains valid even under a retroactive application of Gant.

Even if there is no basis to uphold the validity of the search under Gant, the State respectfully submits that evidence obtained during vehicle searches conducted in reliance on pre-Gant case law should not be suppressed. Searches conducted pursuant to presumptively valid case law

remain valid despite the fact that the case law is subsequently deemed to be unconstitutional.

Because Gant was decided under the Fourth Amendment, and did not purport to address or overrule state constitutional law, the analysis should focus on the federal exclusionary rule. The federal exclusionary rule has long recognized reversal is not required when officers relied in good faith on a statute that is subsequently deemed unconstitutional.

The same result holds true, however, under article I, § 7 of the Washington Constitution. As the Washington Supreme Court has recently recognized, convictions obtained under a statute that is subsequently deemed unconstitutional remain valid. The same reasoning applies in this case. There is no basis to suppress the evidence when officers have relied on long-standing and presumptively valid federal and state case law that allows vehicle searches incident to arrest.

**B. RELEVANT PROCEDURAL FACTS.**

The underlying search at issue in this case occurred on June 13, 2008. Gregory was found guilty on September 19, 2008. CP 81

On April 21, 2009, the U.S. Supreme Court decided Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710 (2009), which restricted the permissible scope of vehicle searches incident to arrest.

On September 3, 2009, Gregory filed his opening brief in the Court of Appeals, arguing that the search of the car was improper under Gant.

**C. SUMMARY OF ARIZONA v. GANT.**

In Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710 (2009), the United States Supreme Court adopted two new rules concerning vehicle searches incident to arrest. The first is that police may search a vehicle incident to arrest only when the passenger is unsecured and within reaching distance of the vehicle's passenger compartment. Gant, 129 S. Ct. at 1714. The second is that a vehicle search incident to arrest is allowed when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. Id.

Gant also recognized that vehicle searches might be proper for other reasons, including probable cause to believe that evidence of a crime was present in the vehicle, officer safety, and exigent circumstances. Gant, 129 S. Ct. at 1721.

**D. APPLICATION OF GANT TO PENDING CASES.**

The State agrees that Gant must be applied to cases currently pending in trial courts and on direct appeal.<sup>10</sup> Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (a new rule for the

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<sup>10</sup> Because Gant articulated a new constitutional rule that represents a clean break from the past it will not apply to cases on collateral review. Teague v. Lane, 489 U.S. 288, 298, 311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past); Teague v. Lane, 489 U.S. 288, 302-04, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); In re St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992).

The analysis, however, does not end with the simple “retroactive” application of Gant. First, under the rules articulated in Gant, the search of a vehicle incident to arrest may still be proper because Gant permits vehicle searches under several alternative grounds. That is, it will be necessary in pending cases to determine whether – under the rules articulated in Gant – the search was nevertheless proper.<sup>11</sup>

Second, there is a separate question as to whether the exclusionary rule requires suppression of the evidence found during a vehicle search conducted prior to the Gant decision. The State respectfully suggests that under the federal “good faith” exception to the exclusionary rule there is no basis to suppress the evidence obtained in good faith reliance on pre-Gant case law. Moreover, under article I, § 7 of the Washington constitution, when officers conducted a search of a vehicle under authority

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<sup>11</sup> Under the facts of the present case, the State agrees there was no basis to search the vehicle under the rules set forth in Gant.

of presumptively valid case law in effect at the time of the search, the evidence obtained during the vehicle search should not be suppressed.

**E. EVIDENCE OBTAINED IN RELIANCE ON PRESUMPTIVELY VALID PRE-GANT CASE LAW SHOULD NOT BE SUPPRESSED.**

**1. The Fourth Amendment good faith exception to the exclusionary rule.**

Absent an exception to the warrant requirement, a warrantless search is impermissible under the Fourth Amendment to the U.S. Constitution. The exclusionary rule is “a judicially created remedy *designed to safeguard Fourth Amendment rights generally through its deterrent effect*” by excluding evidence that is the fruit of an illegal, warrantless search. United States v. Calandra, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) (emphasis added). Evidence derived directly or indirectly from illegal police conduct is an ill-gotten gain, “fruit of the poisonous tree,” that should be excluded from evidence. Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Nevertheless, the United States Supreme Court has recognized that evidence obtained after an illegal search should not be excluded if it was not obtained by the exploitation of an initial illegality. Wong Sun, 371 U.S. at 488.

Consistent with these basic principles, the United States Supreme Court in Michigan v. DeFillippo, 443 U.S. 31, 38, 99 S. Ct. 2627, 61

L. Ed. 2d 343 (1979), held that an arrest (and subsequent search) under a statute that was valid at the time of the arrest remains valid even if the statute is later held to be unconstitutional.

In DeFillippo, the Court stated:

At that time [of the underlying arrest], of course, there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. *A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.*

*Police are charged to enforce laws until and unless they are declared unconstitutional.* The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality – with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. *Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.*

DeFillippo, 443 U.S. at 37-38 (emphasis added). The Court further noted:

[T]he purpose of the exclusionary rule is to deter unlawful police action. *No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search.* To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

DeFillippo, 443 U.S. at 38, n.3 (emphasis added). The Court recognized a “narrow exception” when the law is “so grossly and flagrantly

unconstitutional that any person of reasonable prudence would be bound to see its flaws.”<sup>12</sup> DeFillippo, 443 U.S. at 37-38.

Accordingly, in DeFillippo, the Supreme Court upheld the arrest, search, and subsequent conviction of the defendant even though the statute that justified the stop was subsequently deemed to be unconstitutional. DeFillippo, 443 U.S. at 40; see also Illinois v. Krull, 480 U.S. 340, 349-50, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987) (upholding warrantless administrative searches performed in good-faith reliance on a statute later declared unconstitutional).

The only difference between DeFillippo and the present case is the nature of the legal authority relied upon by the officer conducting the search. In DeFillippo, the arrest was based on a presumptively valid statute that was later ruled unconstitutional. In the present case, the search was conducted pursuant to a procedure upheld as constitutional by well-

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<sup>12</sup> DeFillippo is entirely consistent with the U.S. Supreme Court’s traditional exclusionary rule analysis. As the Court noted in a recent opinion:

[E]xclusion “has always been our last resort, not our first impulse,” ... and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it “result[s] in appreciable deterrence.” ... We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.... Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future....

Herring v. United States, \_\_\_ U.S. \_\_\_, 129 S. Ct. 695, 700, 172 L. Ed. 2d 496 (2009) (citations omitted).

established and long-standing judicial pronouncements. This distinction does not justify a different result.

Law enforcement officers should be entitled to rely on established case law – from both the federal and state courts – in determining what searches are deemed constitutional. Indeed, in the area of search and seizure it is the courts that establish the “rules,” not the legislative bodies. Judicial decisions, particularly those of the Supreme Court, as to the constitutionally permissible scope of searches and seizures are clearly entitled to respect, deference, and reliance by officers in the field.

The good faith exception has been applied by the United States Supreme Court in many contexts involving the reliance by law enforcement officers on presumptively valid assertions by the judiciary.<sup>13</sup> See e.g., United States v. Leon, 468 U.S. 897, 922, 104 S. Ct. 3405 (1984) (when police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted “in objectively reasonable reliance” on the subsequently invalidated search warrant); Massachusetts v. Sheppard, 468 U.S. 981, 991, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984) (exclusionary rule does not apply when a warrant was invalid because a judge forgot to make “clerical corrections”); Arizona v.

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<sup>13</sup> For a recent discussion of federal cases recognizing the “good faith” exception to the exclusionary rule, see Herring, 129 S. Ct. at 704.

Evans, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (applying good-faith rule to police who reasonably relied on mistaken information in a court's database that an arrest warrant was outstanding).

Given this history, there is no reason to conclude that law enforcement officers are not entitled to rely on the ultimate presumptively valid judicial assertion: opinions issued by the United States Supreme Court and the Washington State Supreme Court.<sup>14</sup>

**2. Under article I, § 7, a search conducted in reliance on presumptively valid case law should not be suppressed.**

Under article I, § 7, the exclusionary rule has been extended beyond the original Fourth Amendment context. See e.g., State v. Bond, 98 Wn.2d 1, 10-13, 653 P.2d 1024 (1982) (and cases cited therein) (“we view the purpose of the exclusionary rule from a slightly different perspective than does the United States Supreme Court”). However, even under the more stringent article I, § 7 analysis, when officers obtain evidence in reasonable reliance on presumptively valid statute, the exclusionary rule does not apply. The same result should apply when law enforcement officers rely on presumptively valid judicial authority.

In State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), the Washington Supreme Court addressed a situation involving an arrest

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<sup>14</sup> See the discussion in the “recent developments” section below for citations to case law that has reached this same conclusion.

premised upon a flagrantly unconstitutional “stop and identify” statute that negated the probable cause requirement of the Fourth Amendment. Id. at 106. The Court concluded that article I, § 7 provided greater protection than the Fourth Amendment, that the officer’s subjective good faith in relying on the statute was not relevant, and that the federal subjective “good faith” exception to the exclusionary rule was not applicable in Washington. Id. at 110.

Nevertheless, the Court in White specifically stated that the remedy of exclusion should be applied only when the underlying right to privacy is “unreasonably violated.” White, 97 Wn.2d at 110-12. Three specific concerns justifying the application of the exclusionary rule were articulated: (1) to protect privacy interests of individuals from unreasonable governmental intrusions, (2) to deter the police from acting unlawfully in obtaining evidence, and (3) to preserve the dignity of the judiciary by refusing to consider evidence obtained by unlawful means. White, 97 Wn.2d. at 109-12; Bond, 98 Wn.2d at 12.

In addition, the Court has emphasized that in applying the exclusionary rule under article I, § 7 it is also appropriate to consider the costs of doing so. See e.g., Bond, 98 Wn. App. at 14 (“we have little hesitation in concluding that the costs [of excluding the evidence are] clearly outweighed by the limited benefits that would be obtained from

excluding the confessions because of the illegal arrest.”) As is discussed in detail below, none of these concerns are implicated under the facts of the present case.

White involved a flagrantly unconstitutional statute. It did not assess a statute or judicial opinion that was presumptively valid.<sup>15</sup> More recently, however, the Court has explicitly held in two cases that an arrest or search conducted in reliance on a presumptively valid statute that was subsequently deemed unconstitutional does not require suppression of the evidence. See State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006); State v. Brockob, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006).

In State v. Potter, the defendants maintained that they were unlawfully arrested for driving while their licenses were suspended because, subsequent to their arrests, the State Supreme Court held that the statutory procedures by which the Department of Licensing suspended licenses were unconstitutional.<sup>16</sup> The defendants in Potter argued that under article I, § 7 evidence of controlled substances found during searches of their vehicles incident to arrest had to be suppressed because their arrests were illegal.

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<sup>15</sup> For a critique of the White analysis, see State v. Kirwin, 203 P.3d 1044, 1051-54 (2009) (Madsen, J., concurring).

<sup>16</sup> The defendants in Potter were relying on City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004).

In a unanimous decision, the Court applied the DeFillippo rule under article I, § 7, and held that an arrest under a statute valid at the time of the arrest remains valid even if the basis for the arrest is subsequently found unconstitutional. Potter, 156 Wn.2d at 843. The Court stated:

In White, we held that a stop-and-identify statute was unconstitutionally vague and, applying the United States Supreme Court's exception to the general rule from DeFillippo, excluded evidence under that narrow exception for a law "so grossly and flagrantly unconstitutional" that any reasonable person would see its flaws.

Potter, 156 Wn.2d at 843 (quoting White, 97 Wn.2d at 103 (quoting DeFillippo, 443 U.S. at 38)).

Under the facts presented in Potter, because there were no prior cases holding that license suspension procedures in general were unconstitutional, there was no basis to assume that the statutory provisions were grossly and flagrantly unconstitutional. Accordingly, applying DeFillippo, the Court affirmed the convictions despite the fact that the statutory licensing procedures at issue had subsequently been held to be unconstitutional. Potter, 156 Wn.2d at 843.

Similarly, in State v. Brockob, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006), a defendant contended that his arrest for driving while his license was suspended and a search incident to that arrest were unlawful

for the reasons claimed in Potter. The Court rejected the defendant's argument, stating that:

White held that police officers may rely on the presumptive validity of statutes in determining whether there is probable cause to make an arrest unless the law is “so grossly and flagrantly unconstitutional’ by virtue of a prior dispositive judicial holding that it may not serve as the basis for a valid arrest.”

Brockob, 159 Wn.2d at 341 n.19 (quoting White, 97 Wn.2d at 103 (quoting DeFillippo, 443 U.S. at 38)). As in Potter, the Court held that the narrow exception did not apply “because no law relating to driver’s license suspensions had previously been struck down.” Brockob, 159 Wn.2d at 341, n.19.

Potter and Brockob recognize that White was addressing a unique situation: what should be the remedy when an arrest or search is conducted pursuant to a flagrantly unconstitutional statute. Such arrests and searches are presumptively unreasonable, regardless of the officer’s subjective good faith reliance on a statute. White did not address reliance on a presumptively valid statute. As Potter and Brockob make clear, however, reliance on the presumptively valid statute is reasonable, does not implicate article I, § 7 because the search was conducted pursuant to authority of law, and does not require suppression of the evidence obtained in the course of the arrest or search.

As discussed above, the only difference between Potter and Brockob and the present case is that the present scenario involves presumptively valid case law, as opposed to a presumptively valid statute. This distinction should have no bearing on the analysis: the judicial opinions of the United States Supreme Court and the Washington Supreme Court should be viewed as least as presumptively valid as legislative enactments.

**3. Under the facts of this case, the officers were relying on presumptively valid pre-Gant case law and the evidence should not be suppressed.**

The vehicle search incident to arrest in this case was conducted before the United State Supreme Court decision in Arizona v. Gant, decided on April 21, 2009. Prior to that date, numerous federal and state judicial opinions law allowed vehicle searches incident to arrest of the driver or passenger. Accordingly, those searches should be upheld because they were conducted pursuant to presumptively valid case law.

There is no doubt that prior to Gant, federal and state courts had unequivocally endorsed the constitutional validity of vehicle searches incident to arrest. This is not a situation such as White where there was a prior suggestion that the rule being applied might be unconstitutional. It is not even the situation addressed in Potter and Brockob where the constitutionality of the statute had never been addressed before (and was

thus “presumptively” valid). Instead, this is a situation in which the highest federal and state courts had specifically and repeatedly endorsed the procedures used by law enforcement.

Prior to Gant, federal case law clearly approved a bright-line test allowing the search of a vehicle incident to the lawful arrest of a passenger or occupant. See e.g., Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). This was made clear in Gant which recognized that the Court’s prior opinions have “*been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search . . .*” and that “lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception.”<sup>17</sup> Gant, 129 S. Ct. at 1718 (emphasis added).

Likewise, the constitutionality of the search incident to arrest rule had been repeatedly endorsed and affirmed by the Washington Supreme Court over the past twenty-three years. See e.g., State v. Stroud, 106 Wn.2d 144, 153, 720 P.2d 436 (1986); State v. Fladebo, 113 Wn.2d 388,

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<sup>17</sup> That the majority in Gant spent considerable time arguing that the new rule was justified in spite of the doctrine of *stare decisis* is further evidence that the court was promulgating a new rule. Gant, 129 S. Ct. at 1722-24.

779 P.2d 707 (1989); State v. Parker, 139 Wn.2d 486, 489, 987 P.2d 73 (1999); State v. Johnson, 128 Wn.2d 431, 441, 909 P.2d 293 (1996); State v. Vrieling, 144 Wn.2d 489, 28 P.3d 762 (2001).

Thus, this case does not fit within the narrow exception, recognized in DeFillippo and White, precluding officers from relying upon laws that are “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” The pre-Gant cases may now be viewed as flawed, but the repeated judicial reliance on them for almost 30 years demonstrates that the search incident to arrest rule was neither grossly nor flagrantly unconstitutional.

There can be little doubt that law enforcement officers can rely on these specific judicial pronouncements when conducting vehicle searches. To conclude otherwise would be equivalent of asserting that officers could never rely on judicial authority. In this regard, it is noteworthy that the majority in Gant emphasized that officers had reasonably relied on pre-Gant precedent and were thus immune from civil liability for searches conducted in accordance with the Court’s previous opinions. Gant, 129 S. Ct. at 1723 n.11.

Moreover, the most basic purpose of the exclusionary rule is not furthered in any way by suppression of the evidence in this case. As the Court in DeFillippo noted, no conceivable deterrent effect would be

served by suppressing evidence which, at the time it was found, was the product of a lawful search. Prior to April 21, 2009, officers understood that they could search a vehicle incident to the arrest of a recent occupant. After April 21, 2009, officers will know that they cannot conduct such searches and Gant will deter such conduct. But the retroactive application of the exclusionary rule has no deterrent value at all.

Nor is the preservation of judicial integrity, the other basis sometimes relied upon when applying the exclusionary rule, implicated in these circumstances.<sup>18</sup> In the context of the reliance by law enforcement officers on judicially created evidentiary rules, judicial integrity is not enhanced by failing to recognize that officers act in reliance on judicial authority. Rather, integrity is preserved by recognizing that law enforcement officers must rely on judicial opinions to guide their behavior and cannot be expected to do otherwise. Integrity is preserved by consistency; it is undermined if officers (and citizens) conclude that they can no longer rely in good faith on clearly articulated judicial pronouncements. Moreover, integrity is not sacrificed when the judiciary

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<sup>18</sup> This rationale was first articulated by Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 483-85, 48 S. Ct. 564, 574-75, 72 L. Ed. 944 (1928). Justice Brandeis argued that when the government is permitted to use illegally obtained evidence in courts of law, the integrity of the judiciary itself is tarnished. See also Stone v. Powell, 428 U.S. 465, 485, 96 S. Ct. 3037, 3048, 49 L. Ed. 2d 1067 (1976), where judicial integrity is mentioned as a secondary rationale); White, 97 Wn.2d at 110.

changes its mind on a constitutional principle, upon fresh examination of its reasoning, but minimizes the impact of its new ruling as to those who relied on its earlier pronouncements.

Finally, there is a clear cost in this and similarly-situated cases that is not outweighed by any deterrent effect in applying the rule. Evidence of criminal activity was validly obtained pursuant to a vehicle search incident to arrest. There is no deterrent effect on law enforcement whatsoever by retroactively enforcing a rule the officers knew nothing about. The costs of excluding evidence obtained in all pending post-Gant cases are not justified by the potential benefit in deterrence.<sup>19</sup>

In sum, the United States Supreme Court has recognized that the application of the exclusionary rule serves no purpose when officers relied in good faith on a presumptively valid statute. In Potter and Brockob, the Washington Supreme Court has also recognized that the exclusionary rule

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<sup>19</sup> As the U.S. Supreme Court has noted, the benefits of the deterrent effect when applying the exclusionary rule should outweigh the costs:

In addition, the benefits of deterrence must outweigh the costs. . . . “We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.” . . . “[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.” . . . The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that “offends basic concepts of the criminal justice system.” . . . “[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” . . .

Herring v. United States, \_\_\_ U.S. \_\_\_, 129 S. Ct. 695, 700-01, 172 L. Ed. 2d 496 (2009) (citations omitted); see also Bond, 98 Wn.2d at 14.

does not apply when officers relied on a presumptively valid statute. This same reasoning should apply to judicial opinions of long-standing duration. The evidence obtained during the search in the present case should not be suppressed.

**4. The article I, § 7 exclusionary rule has traditionally been interpreted consistently with the federal rule.**

That White is an application of the federal exclusionary rule is entirely consistent with the fact that Washington courts have historically interpreted the exclusionary rule in a manner that is consistent with federal law. The Washington State Constitution, adopted in 1889, provides that, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, § 7. At common law, courts took no notice of whether evidence was properly seized; if relevant, it was admissible.<sup>20</sup> Commonwealth v. Dana, 43 Mass. 329 (2 met. 1841); 4 J. Wigmore, Evidence § 2183 (2<sup>nd</sup> ed. 1923). This was the rule recognized in Washington as early as 1889. State v. Nordstrom, 7 Wash. 506, 35 P. 382 (1893); State v. Burns, 19 Wash. 52, 52 P. 316 (1898).

In 1886, the United States Supreme Court appeared to signal a different approach when it suppressed private papers seized pursuant to a court order, holding that seizure and use of the private papers as evidence

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<sup>20</sup> The meaning and scope of a constitutional provision is determined by examining the law at the time of enactment. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003).

was tantamount to compelling the defendant to testify against himself. Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). But the United States Supreme Court essentially repudiated Boyd in Adams v. New York, 192 U.S. 585, 598, 24 S. Ct. 372, 48 L. Ed. 575 (1905) (“...the English, and nearly all the American, cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent”).

Like most courts at that time, the Washington Court specifically rejected Boyd and held that relevant evidence was admissible, regardless of its source. State v. Royce, 38 Wash. 11, 80 P. 268 (1905) (evidence derived from improper search of burglary suspect need not be suppressed).

Nine years later, the United States Supreme Court reintroduced an exclusionary rule. Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). The next year, the Washington Supreme Court followed the U.S. Supreme Court’s lead and announced that an exclusionary rule would be recognized in Washington. State v. Gibbons, 118 Wash. 171, 184-85, 203 P. 390 (1922).

The ensuing decades of exclusionary rule jurisprudence can only be described as chaotic, as both state and federal courts struggled to find the proper balance between the need to protect constitutional rights and the interest in admitting relevant evidence. See e.g. State v. Young, 39

Wn.2d 910, 917, 239 P.2d 858 (1952).<sup>21</sup> Nonetheless, the Washington Supreme Court has generally followed the application of the rule in federal courts. As the Washington Supreme Court said in State v. O'Bremski, 70 Wn.2d 425, 423 P.2d 530 (1967): “We have consistently adhered to the exclusionary rule expounded by the United States Supreme Court...” See also State v. Biloché, 66 Wn.2d 325, 327, 402 P.2d 491 (1965) (“The law is well established in this state, consistent with the decisions of the U.S. Supreme Court, that evidence unlawfully seized will be excluded...”) (emphasis added).

In sum, Washington’s exclusionary rule has followed the general contours, progression, and application of the federal exclusionary rule. The Washington Supreme Court’s recognition in Potter and Brockob that the decision in White was simply an application of the narrow exception to the DeFillippo good faith rule is both appropriate and justified.

#### **F. RECENT AND OUT-OF-JURISDICTION DEVELOPMENTS.**

The argument in favor of the good faith exception outlined above was originally presented by the State in an amicus brief filed with the Washington Supreme court shortly after the Gant decision was issued.

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<sup>21</sup> “We do not wish to recede one iota from our [previous holding]. It is the duty of courts to protect citizens from unwarranted, arbitrary, illegal arrests by officers of the law. But we should not permit our zeal for protection of constitutional rights to blind us to our responsibility to other citizens who have the right to be protected from those who violate the law.” Young, 39 Wn.2d at 917.

Subsequently, the Tenth Circuit Court of Appeals in State v. McCane, 573 F.3d 1037 (10<sup>th</sup> Cir., July 28, 2009), has upheld the good faith exception. Significantly, the Tenth Circuit after conducting a detailed analysis of the interaction between the good faith exception and retroactivity, noted:

McCane argues the retroactivity rule announced in Griffith v. Kentucky, 479 U.S. 314, 322-23, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), requires application of the Supreme Court's holding in Gant to this case. *The issue before us, however, is not whether the Court's ruling in Gant applies to this case, it is instead a question of the proper remedy upon application of Gant to this case.* In Leon, the Supreme Court considered the tension between the retroactive application of Fourth Amendment decisions to pending cases and the good-faith exception to the exclusionary rule, stating that retroactivity in this context "has been assessed largely in terms of the contribution retroactivity might make to the deterrence of police misconduct." 468 U.S. at 897, 912-13, 104 S. Ct. 3405. *The lack of deterrence likely to result from excluding evidence from searches done in good-faith reliance upon settled circuit precedent indicates the good-faith exception should apply in this context.* See Krull, 480 U.S. at 360, 107 S.Ct. 1160 (declining to apply a court decision declaring a statute unconstitutional to a case pending at the time the decision was rendered and instead applying the good-faith exception to the exclusionary rule because the officer reasonably relied upon the statute in conducting the search).

McCane, 573 F.3d at 1045. n. 5 (emphasis added).

The Ninth Circuit Court of Appeals has declined to apply the good faith exception. See State v. Gonzales, 578 F.3d 1130 (9<sup>th</sup> Cir., August 24, 2009). The State respectfully submits that the Ninth Circuit analysis was

incorrect for precisely the reason set forth in McCane: it fails to ask what the remedy should be upon the retroactive application of Gant.

The Washington Court of Appeals, Division II, has recently rejected the good faith exception in State v. McCormick, \_\_\_ Wn. App. \_\_\_, 216 P.3<sup>rd</sup> 475 (Div. II, Sept. 23, 2009). The State respectfully suggests that Division II's conclusion is flawed. First, McCormick seems to be rest exclusively on the holding in Gonzales, with no discussion of the differing view set forth in McCane. McCormick fails to recognize that simply stating that Gant is applied retroactively does not end the analysis. The Court must still address the question of the appropriate remedy. McCormick is devoid of any discussion of the deterrent benefit of suppressing the evidence. Second, the State in McCormick erroneously conceded that White was controlling on the issue of whether the good faith exception applied. McCormick contains absolutely no discussion of the on-point cases of Potter and Brockob which, as discussed above, have clearly limited the scope of the good faith exception under White.

#### **G. CONCLUSION**

The State respectfully requests that this court uphold of the validity of the search of the Honda Accord incident to arrest of Gregory because the officers were acting pursuant to presumptively valid pre-Gant case law at the time the vehicle search was conducted. Because there is no possible

deterrent benefit to be obtained by suppressing the evidence, the exclusionary rule should not be applied in this context.

#### IV. ARGUMENT: ARTICLE 1, SECTION 7

Gregory has filed a two-page supplemental brief in which he asserts that “article 1, section 7 must now, at a minimum be read to prohibit searches incident to arrest under the conditions set forth in Gant.” App. Supp. Brief, p. 1-2. Although there is essentially no argument in support of this assertion, the State takes this to mean that Gregory is asserting that the court should reject the rule set forth in Gant that a search of a vehicle may take place if it is “reasonable to believe that evidence relevant to the crime of arrest” may be found inside the vehicle.

As a preliminary matter, the Washington Supreme Court has recently rejected this claim in State v. Patton, \_\_\_ Wn. 2d \_\_\_, 2009 WL 3384578 (Oct. 22, 2009). In Patton, the court reached the same conclusion as the Court in Gant under article I, § 7. See Patton note 9 (“our decision is consistent with United States Supreme Court’s recent holding in Gant”). Significantly, the Washington Supreme Court explicitly applied the new Gant rule and addressed whether it was reasonable to believe that there was evidence of the crime of arrest in the vehicle. Under the facts of Patton, the Court determined that “there was no basis to believe evidence relating to Patton’s arrest would have been found in the car.” Id. at ¶ 27.

This makes it clear, contrary to Gregory's assertion, that the Washington Supreme Court has adopted the crime of arrest rule from Gant.

In any event, it is not necessary to reach this issue in the present case. Under the facts of this case, the State is not asserting that the search of the Honda Accord was justified on the grounds that it was reasonable to believe that there was evidence of the crime of arrest inside the car. Rather, the State argues that the search was justified based on Detective Christiansen's objectively reasonable good faith on pre-Gant case law.

**V. ARGUMENT: ACCESS TO VEHICLE**

Gregory argues that the search of the Honda Accord was unconstitutional because he "did not have immediate access to the car's passenger compartment." App. Brief, p. 37. The State understands this argument to be a claim that, even under pre-Gant case law, Gregory is asserting the vehicle search was improper. However, pursuant to the pre-Gant bright-line rule set forth in Stroud and subsequent cases Gregory's claim is without merit.

**A. RELEVANT FACTS.**

Detective Christiansen followed the Honda as it pulled into a service station. 1RP 18. The station had two sets of pumps, the Honda pulled next to the pumps that were closest to the entrance to the service station. 1RP 18, 56, 59. The detective pulled in behind the Honda and

immediately activated the concealed emergency lights in his vehicle. 1RP 18-19, 40, 57-58.

As Detective Christiansen opened the door to his vehicle, Gregory opened the passenger door to the Honda. 1RP 19, 58. As Gregory got out of the vehicle, he looked back and made eye contact with the detective. 1RP 19-20. Gregory closed the door to the Honda. 1RP 20-21, 61-62. The detective believed Gregory recognized him. 1RP 41. Gregory walked toward the door of the service station and began to open it. 1RP 60-61. Detective Christiansen said, "Please stop." 1RP 20. Gregory closed the door and got down on the ground. 1RP 60. Gregory was placed under arrest. 1RP 21, 60-61. Gregory was searched and the cell-phone found in his pocket. 1RP 23.

Detective Christiansen then approached the Honda and told the driver, Bottroff, that he was going to search the vehicle incident to Gregory's arrest. 1RP 21, 42. Bottroff got out of the vehicle and the search of the Honda was commenced. 1RP 22. During the search, Gregory was handcuffed in Ofc. Halsted's car. 1RP 22-23.

The trial court – after discussing the relevant legal authorities made the following verbal findings and concerning the search incident to arrest:

In our particular case, we have a situation where the person was not arrested three hundred feet away from the car, but he was, the testimony was, from eight to ten feet. Eight to

ten feet is very close. Its not quite as close as the situation in Adams, but still, its not like we're talking 20 feet. Eight to ten feet is fairly close proximity to the vehicle.

The testimony in our case was that the officers made eye contact with the defendant, the defendant continued to walk just briefly toward the door. The officers testified that they had previous contact with the defendant, that is, in terms of personal contact. Both police vehicles had essentially blocked the vehicle in at the pump. And, indeed, the defendant was taken and went to the ground approximately eight to ten feet away from the passenger door. Presumably the contact would have occurred slightly before the eight to ten feet location. But regardless, we're talking about very close proximity to the vehicle within moments of being contacted and the door being unlocked.

2RP 47-48.

**B. LEGAL STANDARD: PRE-GANT VEHICLE SEARCH INCIDENT TO ARREST.**

A refusal to suppress evidence will be affirmed if substantial evidence supports the court's findings of fact, and those findings support the court's conclusions of law. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Appellate court's review the trial court's conclusions of law de novo. Ross, 106 Wn. App. at 880.

Prior to Gant, the state of the law concerning vehicle searches was efficiently summarized by this court in State v. Adams:

A warrantless search is unreasonable per se and can be justified only if it falls within one of the "jealously and carefully drawn" exceptions to the warrant requirement. One of these exceptions is the search of an automobile

pursuant to a lawful custodial arrest. Under federal law, this exception justifies search of the entire passenger compartment, including any containers within it, even when the suspect has exited the vehicle before his or her arrest. In State v. Stroud, our Supreme Court held that article 1, section 7 of the Washington Constitution does not permit the search of locked containers within the passenger compartment.

The rationale for vehicle searches incident to arrest “rests in part on traditional justifications that a suspect might easily grab a weapon or destroy evidence.” Also important is the “the need for a clear rule, readily understood by police and not depending on differing estimates of what items were or were not within an arrestee’s reach at any particular moment.” *Thus, Washington law permits automobile searches incident to arrest “immediately subsequent to the suspect’s being arrested, handcuffed, and placed in a patrol car,” even though, presumably, the exigencies justifying the search no longer exist.*

*While the ability to search “does not depend on an arrestee being in the vehicle when police arrive,” there must be “a close physical and temporal proximity between the arrest and the search.”*

State v. Adams, 146 Wn. App. 595, 599-600, 191 P.3d 93 (2008), review granted, 165 Wn.2d 1036, 205 P.3d 131 (2009) (emphasis added, citations and footnotes omitted); see also State v. Fore, 56 Wn. App. 339, 347, 783 P.2d 626 (1989) (While the ability to search “does not depend on an arrestee being in the vehicle when police arrive,” there must be “a close physical and temporal proximity between the arrest and the search.”).

Recently, the Washington Supreme Court conducted a review of recent case law on this issue and concluded that even when a suspect flees from a vehicle there is still a nexus between the arrest and the search. The

Supreme Court specifically held that a vehicle search incident to arrest was proper (under pre-Gant law) when an individual is arrested while standing next to the vehicle in which he was stopped:

*These cases should not be read broadly to suggest that the initiation of an arrest is ineffective so long as the fleeing suspect eludes physical restraint. To adopt Patton's argument that he was not arrested until he was chased down and restrained would send a dangerous message and jeopardize peaceable arrest. It would encourage flight as the means to avoid a search incident to arrest and concomitantly encourage greater force by law enforcement at the first moment of the arrest process to eliminate flight as an option. We have previously held that under article I, section 7, an individual cannot avoid seizure by failing to yield to a show of authority. State v. Young, 135 Wash.2d 498, 957 P.2d 681 (1998). We conclude the same is true of attempts to avoid arrest by fleeing instead of yielding to an officer's exercise of authority to arrest. *The Court of Appeals correctly held that Patton was placed under arrest as he stood beside his car.**

State v. Patton, \_\_\_ Wn.2d \_\_\_, 2009 WL 3384578, ¶ 13 (Oct. 22, 2009)

(emphasis added).

**C. THE SEARCH INCIDENT TO ARREST WAS PROPER.**

Under the pre-Gant case the search of the Honda Accord was clearly proper incident to Gregory's arrest. The fact that Gregory was ten feet away from the car when he obeyed the detective's command to stop, or that he was subsequently handcuffed while the search was carried out, are irrelevant. All that was required was that was a close proximity

between the arrest and the search, a requirement clearly satisfied in this case.

Here, there was both a close physical and temporal proximity between the arrest and the search. The search happened immediately after Gregory's arrest, there was literally no delay before it occurred. In addition, there was extremely close physical proximity between Gregory and the vehicle that was searched. Gregory was at best ten feet away from the vehicle when he was arrested. Although the door to his car was closed, it was not locked.

Gregory seeks to distinguish Adams, supra, relied upon by the trial court below. In doing so, however, Gregory neglects to mention a crucial fact: in Adams the defendant had closed and locked the door to his car. 146 Wn. App. at 595. Nevertheless, despite this fact the Court of Appeals upheld the search. Id. at 606. Contrary to Gregory's claim on appeal, Adams is not distinguishable on the grounds that defendant Adams was four to five feet away and hostile. Adams confirms that it is irrelevant whether the defendant was restrained or handcuffed or otherwise unable to reach inside the vehicle; the search is valid so long as there was a close physical proximity between the arrest and the search.<sup>22</sup>

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<sup>22</sup> As noted above, the Supreme Court has accepted review in Adams. Review was accepted prior to the Gant decision and was presumably to address the validity of the search of a locked vehicle.

Gregory suggests that State v. Stroud, supra, is distinguishable. This is clearly incorrect. In Stroud both defendant were outside the vehicle when they were contacted by police. Significantly, Stroud was further away from the vehicle, next to the open door of a vending machine. Stroud closed the door to the machine and pulled out the key. An officer asked Stroud for the key and he handed over a homemade key apparently designed to open vending machine locks. The officers decided to frisk both defendants, and found a second homemade key on Stroud and found the other defendant's coat pocket contained several dollars worth of change. The officers arrested the defendants for theft, advised them of their rights, handcuffed them, and placed them in the back of the patrol car. After the defendants were in the patrol car, the officers saw a weapon on the back seat and conducted a search of the passenger compartment, including the glove compartment.

In upholding the validity of this search, the Supreme Court adopted the bright-line rule that: "During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence." Stroud, 106 Wn.2d at 152.

In terms of the Gregory's proximity to the Honda, his case is essentially indistinguishable from Stroud. In both cases the defendants were a short distance away from the vehicle that was searched. In both cases the time between the arrest and search was negligible. Most significantly, in both cases there was no real opportunity for either Stroud or Gregory to access the vehicle to destroy evidence or obtain a weapon. Yet, pursuant to the rule set forth in Stroud, the search was proper.

The cases relied upon by Gregory to support his argument are readily distinguishable. In general, they either involve situations in which the defendant has locked the vehicle or has moved a great distance away from the vehicle prior to his being seized and arrested. Neither of these scenarios occurred in the present case.<sup>23</sup>

In State v. Rathbun, 124 Wn. App. 372, 101 P.3d 119 (2004), the defendant saw police approaching and ran 40 to 60 feet away from the truck he was working on, hopping over a fence along the way. Id. at 375. The Court of Appeals concluded that under these circumstances, the exigencies supporting a vehicle search incident to arrest no longer exist. Id. at 380.

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<sup>23</sup> In one case referenced by Gregory in passing, a search was deemed invalid when evidence is insufficient to determine arrestee's distance from car. See State v. Johnston, 107 Wn. App. 280, 285-86, 28 P.3d 775 (2001).

In State v. Perea, 85 Wn. App. 339, 932 P.2d 1258 (1997), police, with emergency lights activated, followed the defendant into his driveway because he was driving with a suspended license. The defendant parked his car, locked it, and walked towards his house, ignoring the officer's commands to return to his vehicle. The Court of Appeals held that the search was invalid because the defendant was not seized until he was actually arrested. The court held that because the defendant was not seized, he had the right to lock his car, and the officers were not permitted to search the locked car incident to arrest.<sup>24</sup> Id. at 344.

State v. Quinlivan, 142 Wn. App. 960, 176 P.3d 605 (2008). In Quinlivan, a deputy stopped the defendant for infraction violations. Quinlivan asked if his truck would be towed, and the deputy answered "yes." Id. at 606. Quinlivan got out of his truck, locked it, put the keys in his pocket, and walked towards the deputy, who had gone back to his motorcycle. Id. When the deputy told Quinlivan to get back in his

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<sup>24</sup> Division One has questioned the validity of the analysis in Perea, noting that it improperly "focuses on the arrestee's proximity to the vehicle at the time of seizure, rather than at the time of arrest. But officer safety and evidence preservation concerns *incident to arrest* provide the rationale for the search. It is the circumstances at the time of arrest, not seizure, that are relevant." Adams, 146 Wn. App. at 604.

In any event, the continued validity of the analysis in Perea is questionable, because Division Two relied on the combined subjective-objective analysis for seizure under the Fourth Amendment, relying on California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), which our state Supreme Court explicitly rejected in State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998), one year after the Perea decision.

vehicle, Quinlivan sat down on the curb. At that time, Quinlivan was at least six to twelve feet, but possibly as much as 50 feet, away from his truck. Id. at 607. The deputy walked over to Quinlivan, told him he was under arrest, and asked for the keys to the truck. Quinlivan told the deputy he did not want the truck searched and that the deputy would need a search warrant. Id. The deputy arrested Quinlivan, took his keys, and searched the truck, finding methamphetamine. Id. at 606, 608. The Court of Appeals held that the search of the truck was unlawful for three reasons: Quinlivan was seized when he was stopped and told that his truck would be towed; he was not arrested until he had lawfully left and locked his truck; and he walked “some distance” away from the truck before he was arrested. Id., at 608-10.

The facts of the present case are different than Rathbun, Perea, and Quinlivan. In Perea and Quinlivan the defendant locked his vehicle (and indeed had done so before he was arrested). In Rathbun, the defendant had moved at least 40 feet away from the vehicle and hopped over a fence. He was not arrested until that time and clearly had no access to the vehicle at the point of his arrest. Here the nexus between the arrest is far closer and more direct: Gregory was arrested as he stepped out of his vehicle. He neither fled nor locked his car. Under these facts, the search incident to arrest was clearly proper.

## **VI. ARGUMENT: SEARCH WARRANT**

Gregory argues that his attorney was ineffective for failing to challenge the validity of the search warrants for his residence and cell phone. This argument is without merit because – as Gregory’s counsel below undoubtedly recognized – both search warrants were supported by probable cause.

### **A. PROCEDURAL BACKGROUND: SEARCH WARRANTS.**

Det. Christiansen obtained two search warrants in this case. On June 13, 2008, the day Gregory was arrested, he obtained a search warrant for Unit 44. Pre-trial Ex. 6. On June 26, 2008, Det. Christiansen obtained a search warrant for Gregory’s cell-phone. CP 49-58; Pre-Trial Ex. 4. At trial, counsel for Gregory challenged the validity of the search warrant for the cell-phone, arguing that it was stale and lacked probable cause.

Gregory’s attorney filed a detailed memorandum challenging the validity of the search warrant on the grounds that it lacked probable cause. CP 36-58. Gregory’s motion to suppress the evidence obtained through the execution of the warrant (the cell-phone text messages) was denied by the trial court. 2RP 41-42. Gregory’s attorney did not challenge the validity of the search warrant for his residence.

**B. LEGAL STANDARD: INEFFECTIVE ASSISTANCE OF COUNSEL.**

To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both that defense counsel's representation was deficient and that the deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The test for deficient representation is whether counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. Thomas, 109 Wn.2d. at 225. The prejudice prong of the test requires the defendant to show a "reasonable probability" that but for counsel's error, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

Competency of counsel is determined based upon a review of the entire record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). To overcome this presumption, the defendant must show that counsel had no legitimate strategic or tactical rationale for his or her conduct. McFarland, 127 Wn.2d at 336; State v. Summers, 107 Wn. App. 373, 382, 28 P.3d 780 (2001).

**C. LEGAL STANDARD: SEARCH WARRANTS AND PROBABLE CAUSE.**

A magistrate may issue a search warrant only upon a showing of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause requires “facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” Id.; State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997) (citing Wayne R. LaFave, Search and Seizure § 3.7(d), at 372 (3d ed.1996)); Thein, 138 Wn.2d at 140.

“The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit.” State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). A magistrate can consider the nature of the crime, the evidence sought and reasonable inferences about where such items can normally be found. See generally 2 Wayne R. LaFave, Search and Seizure § 3.7(d), at 425-30 (4<sup>th</sup> ed. 2004). The search warrant affidavit should be interpreted in a “common-sense, practical manner,” rather than applying a hyper-technical standard. State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997).

A magistrate’s probable cause determination and decision to issue a warrant is reviewed for abuse of discretion. State v. Smith, 93 Wn.2d

329, 352, 610 P.2d 869 (1980). Thus, where an investigating officer properly seeks a search warrant and a judge issues the warrant after determining that the application establishes probable cause to search, any “[d]oubts should be resolved in favor of the validity of the warrant” on appeal. State v. Garcia, 63 Wn. App. 868, 871, 824 P.2d 1220 (1992). The assessment of probable cause is an issue of law that is review de novo. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

**D. COUNSEL CHALLENGED THE CELL-PHONE WARRANT.**

The gravamen of Gregory’s complaint on appeal is that his attorney was ineffective for not challenging the validity of the search warrants. In fact, however, Gregory’s trial counsel did challenge the validity of the cell-phone search warrant on the grounds that it lacked probable cause. CP 41-42. Trial counsel’s attack was much more vigorous than the challenge Gregory makes on appeal, and argued that the combination alleged of staleness, consideration of improper evidence, and the lack of information to evaluate the credibility of the informant meant that the warrant lacked probable cause. CP 41-42.

The trial court denied the motion to suppress, stating:

The fifth motion relates to the warrant for the cell-phone. And I’ll find that the warrant for the cell-phone was properly issued and executed and I’m going to deny the motion to suppress the warrant. There is a lot of discussion about the informant in that particular search warrant

affidavit. But it is not the only information in the warrant application. We have all of the information which is contained, which talks about the actual arrest itself of Mr. Gregory and Ms. Bottroff, which updates the arguably stale information given by the informant.

Now, if you just had the informant's information alone, defense would have a pretty good argument that's stale. But if you update it with the other information in the warrant affidavit, I think there's a sufficient basis to issue that particular warrant. So I'll deny the motion to suppress.

2RP 41-42.

Gregory's counsel challenged the cell-phone warrant below and was not ineffective for failing to do so. Failing to bring a motion to suppress evidence when a search warrant is invalid on its face would represent ineffective assistance. State v. Reichenbach, 153 Wn.2d 126, 130-31, 101 P.3d 80 (2004) (counsel knew facts that rendered the warrant invalid on its face: the police received information that negated probable cause before the warrant was executed). But here, Gregory does not contend the warrant here was invalid on its face. He challenges instead the nexus between the criminal activities and the cell-phone – a legal conclusion based on the facts of the affidavit. Both the reviewing magistrate and the trial court below found that the warrant was supported by probable cause.

**E. THE SEARCH WARRANTS WERE SUPPORTED BY PROBABLE CAUSE AND THE REQUIRED “NEXUS.”**

**1. The search warrant for the residence.**

The residence search warrant contained, amongst other information, the following facts:

- That on the May 29, 2009, traffic stop of Tina Bottroff’s red Honda Accord (Washington license plate 679-VAE) with Logstrom the driver and Bottroff the passenger. The search of the vehicle uncovered suspected methamphetamine (field tested positive), small plastic bags associated with packaging narcotics, an electronic scale, and a notebook detailing narcotics transactions.
- That detectives learned that Christopher Gregory and Tina Bottroff lived at 12240 S.E. 60th Street, Unit 44. This included the fact that an officer drove Bottroff to Unit 44 and watched her open the front door with her key. This also included information from Logstrom that Christopher Gregory lived in Unit 44. Logstrom identified Gregory from a photograph.
- That Det. Christiansen had previously arrested Gregory for possession of stolen vehicles and possession of stolen property. That the detective had received reliable information from a confidential informant that Gregory was stealing cards so that he could “come up” (i.e., get enough money) to begin dealing methamphetamine.
- That Gregory had an outstanding Department of Corrections arrest warrant.
- That during the surveillance of Unit 44 on June 13, 2008, Det. Christiansen saw Bottroff drive up to Unit 44 in the same red Honda Accord (Washington license plate 679-VAE). That the detective saw Bottroff leave the vehicle carrying a small black purse and a white dog-carrying bag. Over the next few hours, Bottroff

went back and forth from the apartment to the Honda Accord twice more.

- That at approximately 1500 hours on June 29, 2009, Bottroff left Unit 44 and got into the Honda. She was carrying the black purse and dog carrier, which she put inside the car. Gregory left Unit 44 and got into the car with Bottroff.
- That officers stopped the Honda Accord minutes later and arrested Gregory on the outstanding warrant. That the search of Gregory recovered a cell phone in his pocket. The screen of the cell-phone had a photograph of Gregory and his girlfriend on it.
- That the search of the Honda Accord incident to Gregory's arrest uncovered a brown paper bag in the driver's side door holder that contained small 1 inch by 1 inch Ziploc bags. One of these bags contained a small amount of suspected methamphetamine. A digital scale and items bearing Bottroff's name were found in the center console.
- That Bottroff was placed under arrest and the search of the Honda continued. Inside the black colored purse that Det. Christiansen had seen Bottroff carrying earlier were approximately 100 unused 1 inch by 1 inch Ziploc baggies.
- A search of Bottroff, incident to her arrest, recovered two Ziploc baggies in her pants pocket, both containing methamphetamine (field tested positive). There were .40 grams of methamphetamine, with a street value of \$720. The baggies in Bottroff's pocket had the same logo as the baggies found in the Honda.

Pre-Trial Ex. 6, p. 1-6.

This factual information establishes a nexus between the criminal activity (drug dealing) and Unit 44. Bottroff was found with drugs and items associated with selling drugs in her car prior to June 29. On June

29, shortly after leaving Unit 44, she was again found with drugs and items associated with selling narcotics (Ziploc baggies and an electronic scale) in her car. She was with an individual (Gregory) that a reliable confidential informant had told police was involved in selling drugs. Bottroff lived in Unit 44. Under these circumstances it is reasonable to conclude that there might be items relevant to the crime of possession or sale of narcotics in Unit 44.

Gregory cites to State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999). Thein held that a warrant to search for drugs in a particular place must be based on more than generalized notions of the supposed practices of drug dealers. Rather, the warrant must contain specific facts tying the place to be searched to the crime. Id. at 147. Thein does not stand for the proposition that a nexus between the criminal activity and the place to be searched requires some showing that the contraband actually went into the place to be searched. Id. at 146-48. Thein only requires some nexus between the individual arrested and the place to be searched. Id. at 147.

Moreover, in this case the affidavit supporting this warrant did not simply rely on generalized beliefs about the habits of drug dealers as in Thein. The warrant was to search the place Bottroff and Gregory had departed from immediately before they were arrested and found in possession of methamphetamine. This was a nexus that established

probable cause to believe that there was relevant evidence in Unit 44.

There was no ineffective assistance of counsel in this case since a challenge to the warrant would have failed.

## **2. The search warrant for the cell-phone.**

The search warrant for the cell-phone contained the same facts as set forth in the previous section, plus the following additional information based on Det. Christiansen training and experience:

- That individuals involved in manufacturing and selling drugs commonly maintain in cell-phones the names and addresses of associates in the drug trade.
- That individuals involved in manufacturing and selling drugs often send text messages using cell-phones to communicate with suppliers, customers, and accomplices. These messages are often in code to avoid law enforcement detection. Some cell phones store incoming and outgoing text messages, which can be retrieved sometime seven after it has been deleted.
- Based on discussions with BPD Detective Robert Dentz, Det. Christiansen described the need for a forensic examiner to conduct the examination of the cell phone.

Pre-Trial Exhibit 4, p. 5-6.

Again, a reasonably prudent person would conclude that items of evidentiary value would be found in the cell phone. Gregory was identified by a reliable confidential informant as being involved in selling methamphetamine. He was arrested in a vehicle in which methamphetamine was found and in which there were items associated

with dealing that drug. The individual with whom he was arrested had methamphetamine in her possession. There was probable cause to conclude that Gregory was involved in this criminal activity. It was also reasonable to conclude that there might be information related to the sale of narcotics on Gregory's cell phone. Drug dealers must communicate with their clients and suppliers. It is reasonable to conclude that Gregory did so using his cell phone. Indeed, Det. Christiansen's observations concerning drug dealers use of cell phones is hardly specialized knowledge, but rather simple common sense.

Gregory relies on State v. Nordlund, 113 Wn. App. 171, 183, 53 P.3d 520 (2002), to support his argument. Nordlund held that police lacked probable cause to search a defendant's computer for evidence relating to his assaults against two women outside of his home. In Nordland, the State seized the defendant's computer to search for evidence of his whereabouts on the day he allegedly attacked two young women, not to look for pornography or evidence of child molestation supported by other evidence in the affidavit. Nordlund, 113 Wn. App. at 183. There was no nexus in Nordland because the search was based solely on general statements that sex offenders tend to keep evidence of their crimes on their personal computers.

This case is factually distinguishable from Nordlund. Nordlund applied additional scrutiny to the challenged search warrants based on First Amendment considerations inherent in the search for pornography. Nordlund, 113 Wn. App. at 182. But Gregory raises no First Amendment claims in this case.

More significantly, in Nordlund the State seized the defendant's computer to search for evidence of his whereabouts on the day he allegedly attacked two young women, not to look for pornography or evidence of child molestation supported by other evidence in the affidavit. Nordlund, 113 Wn. App. at 183. Thus, there was no nexus at all between the crime charged (assault) and the computer. Indeed, as the court on appeal pointed at, at best the information on the computer could prove Nordland's innocence, not guilt, because it could only provide a sort of electronic alibi. Id.

In contrast, in the present case there was probable cause to believe that Gregory was involved in criminal activity related to drug dealing. The police sought to search the cell phone for evidence of that activity. The cell phone clearly belonged to Gregory. It was, as discussed above, reasonable to conclude that Gregory had used his cell phone to conduct narcotics transactions. Finally, unlike the situation in Nordland, the search

had the possibility of uncovering evidence that would incriminate Gregory, not simply exonerate him.

In essence, Gregory is arguing that the search of the cell phone is improper because it is based on generalized statements by Det. Christiansen concerning the habits of drug dealers. But such statement may be considered by the magistrate reviewing the warrant. Thein simply held that “generalized statements contained in the affidavits in this case were, standing alone, insufficient to establish probable cause.” Thein at 149 (emphasis added). Gregory ignores the “standing alone” portion of the ruling. In this case the training and experience of the officer is valuable when examined as part of entire contents of the affidavit.

Finally, the State would point out that drawing the nexus requirement too tightly under these facts would have potentially serious consequences. The reality is that in many cases it is reasonable to conclude that a cell phone in a suspect’s possession might have relevant information on it, but yet at the same time it may be impossible to point to specific facts establishing that the suspect actually used the cell phone. To this extent, a cell phone is different than the physical “place” to be searched as discussed in Thein. It is reasonable to require factual evidence supporting a connection between a physical location and criminal activity before a search is approved. It is not reasonable to require, as a

prerequisite for conducting a search of the cell phone, that the defendant actually used the cell phone to facilitate the crime for which he has been arrested.

The test for whether there is a proper nexus is whether it is possible to make reasonable inferences from the facts and circumstances that there is a nexus between the criminal activity and the item to be searched. That inference was satisfied under the facts of this case. There can be no ineffective assistance of counsel in failing to pursue an argument that is without merit.

## **VII. ARGUMENT: PRETEXT STOP**

Gregory asserts that the evidence obtained during the search of the Honda Accord should be suppressed because it was obtained as part of a “pretextual stop.” This argument is without merit. As a preliminary matter, it is certainly not clear under Washington law that the execution of a valid arrest warrant can be “pretextual.” In any event, even applying the test adopted in State v. Ladson for evaluating pretextual stops, the stop of the car in which Gregory was riding was proper.

### **A. BACKGROUND: CrR 3.6 MOTION TO SUPPRESS.**

At trial, Gregory moved to suppress the evidence found during the search of the Honda on the grounds that the stop of the vehicle was pretextual. The trial court held a CrR 3.6 hearing and which testimony

was taken. The trial court denied the motion to suppress and found that the stop was not pretextual, stating:

The second argument is that the stop was pretextual. And I must say that the Court would find that the pretext doctrine doesn't really apply in this case. The pretext doctrine, as first announced in Ladson [sic] and then refined in several cases, really talks about the officers creating a pretext for stopping or arresting individuals in the first place. In other words, there existed no reason to stop the person and the officers came up with a pretext to stop the person to arrest the person, suspecting they could generate additional evidence on the basis of the pretext stop or arrest.

*In this particular case, the officers already had a reason to stop and arrest the defendant Gregory. There was already a valid arrest warrant. So they didn't need a pretext. So they didn't need to create a pretext, they didn't need to create a reason to stop and arrest him. They didn't need to create probable cause to arrest because they already had it. So the pretext doctrine line of cases really doesn't apply to this particular case.*

But there have been a number of arguments that some how the stop or arrest should have went down in a different manner. *But I don't know of any authority which would have the court require to have the officers arrest the defendant the moment he stepped out the door.* And, indeed, as a practical matter, the officer testified that is not condoned by Bellevue Police Policy.

And frankly, that makes a lot of common sense. If the Court were to adopt that rule, the officers would be put at great risk in other cases, of course not involving Mr. Gregory. But in other cases what you would have is folks arguably running back and forth into their houses, potentially creating barricade situations. You don't know who's in the house, what kind of weapons they might have.

2RP 39-40 (emphasis added).

**B. LEGAL STANDARD: PRETEXTUAL ARREST WARRANT.**

On appeal, Gregory frames his pretext argument in terms of the Washington Supreme Court's opinion in State v. Ladson, 138 Wn.2d 343, 353, 979 P.2d 833 (1999). Indeed, virtually all of the cases cited by Gregory either cite to Ladson or were referenced by the Court when it decided Ladson. Ladson, however, is not the proper starting point for analyzing the issue raised by Gregory.

Ladson involved the issue of pretextual traffic stops. Indeed, Ladson explicitly recognized that it was concerned with situations different those in which there was an arrest or search warrant: "The question [is] whether the fact that someone has committed a traffic offense, such as failing to signal or eating while driving, justifies a warrantless seizure which would not otherwise be permitted absent that 'authority of law' represented by a warrant." Ladson, 138 Wn.2d at 352 (footnotes omitted, emphasis added). In the present case, officers had a warrant to arrest Gregory and were not enforcing the traffic code. The arrest warrant provided the authority of law for the stop. Clearly, the "pretextual stop" reasoning of Ladson is not the proper point at which to begin the analysis.<sup>25</sup>

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<sup>25</sup> By focusing on Ladson, Gregory improperly introduces several factors which have no bearing on whether the stop in this case was pretextual.

Rather, in the context of this case there are two distinct questions that need to be addressed: First, whether the execution of a valid arrest warrant can be a “pretext” for conducting an otherwise valid search of a vehicle. Second, if so, what test should be used to evaluate whether the use of the warrant was pretextual? These are issues that have not been squarely answered by Washington courts.

The closest the Washington Supreme Court has come to addressing this issue appears to be the following statement in State v. Hatchie, 161 Wn.2d 390, 66 P.3d 698 (2007):

Similarly, the police cannot use an arrest warrant – misdemeanor or otherwise – as a pretext for conducting a search or other investigation of someone’s home. . . . Here while Hatchie at times alluded to a pretext argument, he never specifically raised such an argument so we do not consider it. But we do note that the police cannot use arrest warrants as a guise or pretext to otherwise conduct a speculative criminal investigation or a search. State v. Michaels, 60 Wash.2d 638, 644, 374 P.2d 989 (1962) (“An arrest may not be used as a pretext to search for evidence.” (citing United States v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932); Taglavore v. United States, 291 F.2d 262 (9th Cir.1961))); see Ladson, 138 Wash.2d at 353, 979 P.2d 833 (“Just as an arrest may not be used as a pretext to search for evidence, a traffic infraction may not be used as a pretext to stop to investigate for a sufficient reason to search even further.”).

161 Wn.2d at 401 (footnote and citation to briefing omitted). This statement is clearly dicta in the context of the Hatchie opinion.

The primary issue in Hatchie was whether an officer may enter a home to execute a misdemeanor arrest warrant. The Court held that an arrest warrant constitutes “authority of law” which allows the police the limited power to enter a residence for an arrest, as long as the entry is reasonable, the entry is not a pretext for conducting other unauthorized searches or investigations. 161 Wn.2d 392-393.

Interestingly, the case cited in Hatchie for the position that arrest warrants may not be pretextual is not on point because it did not involve an arrest warrant at all. State v. Michaels, 60 Wn.2d 638, 642, 374 P.2d 989 (1962), was a stop making a turn without a signal, no warrant was involved. In other words, it was a pure Ladson scenario.

The other out-of-jurisdiction cases relied upon by Gregory also are not persuasive. Gregory cites to State v. Hoven, 269 N.W.2d 849 (Minn. 1978). Subsequently, however, the Minnesota Supreme Court has explicitly and repeatedly disavowed the analysis in Hoven:

As a preliminary matter, we have no hesitancy in affirming the trial court's denial of the motion to suppress. Defendant's argument that his arrest was an unlawful “pretext” arrest, an argument based on State v. Hoven, 269 N.W.2d 849 (Minn.1978), is answered by decisions of this court subsequent to Hoven in which we have held that if there is an objective legal basis for it, an arrest or search is lawful even if the officer making the arrest or conducting the search based his or her action on the wrong ground or had an improper motive. See, e.g., State v. Everett, 472 N.W.2d 864, 867-68 (Minn.1991), and State v. DeWald,

463 N.W.2d 741, 748 n. 2 (Minn.1990), relying on Scott v. United States, 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978).

State v. Olson, 482 N.W.2d 212, 214 (Minn.1992).<sup>26</sup>

Gregory also relies on U.S. v. Carriger, 541 F.2d 545, 547 (6<sup>th</sup> Cir. 1976). Carriger, however, was decided on different grounds: “We hold that because the officer did not have probable cause to arrest appellant or his accomplice before he invaded an area where appellant had a legitimate expectation of privacy, the subsequent arrest and seizure of narcotics were invalid.” Carriger, 541 F.2d at 547 (emphasis added). The rest of Carriger, including the portions relied upon by Gregory, are simply dicta and contingent on the specific facts of that case.

Likewise, Gregory relies on Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968), case which was subsequently overruled by an en banc panel of the Fifth Circuit. See U.S. v. Causey, 834 F.2d 1179 (C.A.5 1987) (en banc).

Finally, McKnight v. U.S., 183 F.2d 977, 977-978 (C.A.D.C. 1950), is also distinguishable. In McKnight the government had an arrest warrant but concedes delaying the arrest until the defendant was inside a house for which they did not have a search warrant in order to conduct a

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<sup>26</sup> Hoven is also distinguishable on its facts. In Hoven no traffic violations occurred before the suspect was pulled over and the state conceded that the warrants upon which the arrest was made were “fatally deficient.” Hoven, 269 N.W.2d at 851.

search. 183 F.2d at 977-78. Not surprisingly, given this admission the court found that the search violated the Fourth Amendment. Id. at 978.

In sum, there is certainly no clear authority that a search incident to arrest pursuant to a valid warrant can be pretextual. If the search is otherwise legal (as prior to Gant it clearly was in this case) and if the arrest warrant is valid (a point not disputed in this case), then it is difficult to see how executing the legal warrant and conducting a subsequent legal search is improper.

**C. THE STOP WAS NOT PRETEXTUAL.**

Assuming for the sake of argument that the execution of a valid arrest warrant may be pretextual, and also assuming that the Ladson test for whether the stop was improper applies, Gregory's arrest was not "pretextual." In considering whether a stop is pretextual pursuant to Ladson courts consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior. Ladson, 138 Wn.2d at 359. Evaluating the totality of the circumstances in this case, the vehicle search was not pretextual.

First, and most basically, it is undisputed that Det. Christiansen had a valid warrant for Gregory's arrest. This is a purely objective factor and an appropriate reason to stop Gregory. On its face, this distinguishes

Ladson and its progeny; cases in which the officer decides to stop for one reason and then make up another reason to do justify the stop.

Second, it was well within Det. Christiansen's responsibility as a detective to arrest individuals on outstanding warrants. The detective testified that he was part of a special team that focused on recurring crimes, including auto theft. 1RP 6; 4RP 8. That process clearly involves arresting individuals on warrants, particularly those individuals the officer suspects may be involved in criminal activity. This is not a situation such as Ladson where officers were doing something outside of their regular scope of duties (i.e., stopping individuals on traffic violations when they were not part of a traffic enforcement unit).

Third, if the detective was truly in seeking potentially incriminating evidence, he could have chosen to enter Unit 44 and execute the warrant inside the home, perhaps taking advantage of opportunity to see if there was incriminating evidence in plain view during the arrest. Entering a residence to execute an arrest warrant was explicitly approved in Hatchie. Rather than do this, the detective waited until Gregory left the apartment where it was less likely he would find incriminating evidence.

Fourth, as detective Christiansen testified, for "safety reasons. . . [police] do not like to make arrest[s] in front of someone's residence." 1RP 16. As the trial judge elaborated in his oral ruling, this is simply common-

sense. The danger of arresting someone outside their home is obvious. It was both objectively and subjectively reasonable to wait until Gregory was away from the apartment to execute the warrant.<sup>27</sup>

Fifth, under the facts of this case, Det. Christiansen was not even present when Gregory exited Unit 44. He was no longer in the “eye” position but was further down the street. The detective was the individual who knew Gregory from prior contacts and waiting until he could be present during the arrest was clearly appropriate.

Sixth, the officer who was observing Unit 44 was in another parking lot across the street. There was no possibility that he could cut across the street and arrest Gregory before he got into the Honda, which is precisely what Gregory suggests should have occurred. It is certainly unreasonable to require an officer to wait in potential dangerous situation close to the residence simply so that he can effectuate a “quick” arrest.

Seventh, the officer in the “eye” position was the only officer who had Unit 44 under surveillance when Gregory left. The detective and another officer were some distance away. Simply safety concerns dictate that police wait until they have all officers present before stopping

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<sup>27</sup> There are other valid reasons why law enforcement officers might choose not to arrest someone in front of their home. For example, officers may wish to return later to execute a search warrant at the home and desire to avoid tipping off their presence to observers inside the residence. Or they might simply want to keep the home under observation to see if any other criminal activities occur.

multiple individuals. It was both objectively and subjectively reasonable to wait until more officers were available to make the arrest.

Eighth, the stop occurred at the earliest opportunity, minutes (perhaps less) from Unit 44. If Det. Christiansen was truly motivated by an improper purpose, he could have followed the Honda to see where it went, what other activity the occupants engaged in, and perhaps who they met or spoke to. This did not occur.

Ninth, as discussed above, under pre-Gant case law the detective clearly had a legitimate basis to search the car. This is not a case in which the detective, for example, entered a home to arrest someone and then conducted a search of the home without a warrant.

In sum, the actions of Det. Christiansen and his fellow officers were objectively reasonable. To hold otherwise would effectively create a rule that required officers to arrest someone at a time when they were “least guilty” or when there was the “least amount” of incriminating evidence – an approach that is obviously unworkable. There is no case law that requires officers to time the use of an arrest warrant in this manner. Det. Christiansen executed a valid warrant and then conducted a legal (at the time) search of the car. The trial court correctly found that there was no “pretextual” stop under these facts.

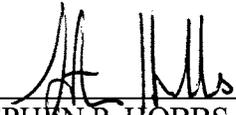
**VIII. CONCLUSION**

For the reasons stated above, the State of Washington respectfully requests that Christopher's Gregory's conviction for possession with intent to deliver methamphetamine be affirmed.

DATED this 12<sup>th</sup> day of November, 2009.

Respectfully submitted,

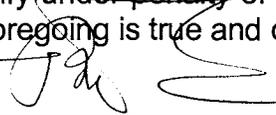
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By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to CASEY GRANNIS, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE v. CHRISTOPHER GREGORY, Cause No. 62568-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Name  
Done in Seattle, Washington .

11-12-2009  
Date

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