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DIVISION II

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

KAREN SMITH,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 08-1-00987-2

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED September 9, 2009, Port Orchard, WA \_\_\_\_\_  
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

    A. PROCEDURAL HISTORY.....1

    B. FACTS .....1

III. ARGUMENT .....3

    A. THE STATE CONCEDES THAT, PURSUANT TO *ARIZONA V. GANT*, THE SEARCH OF SMITH’S CAR VIOLATED THE FOURTH AMENDMENT. AS EXPLAINED BELOW, HOWEVER, THE EVIDENCE SHOULD NOT BE EXCLUDED.....3

    B. THE “GOOD FAITH” EXCEPTION TO THE EXCLUSIONARY RULE SHOULD APPLY IN THE PRESENT CASE AND THE EVIDENCE SHOULD NOT BE SUPPRESSED BECAUSE THE EVIDENCE WAS OBTAINED IN GOOD FAITH RELIANCE ON PRE-*GANT* CASE LAW AND BECAUSE THE OFFICER CONDUCTED THE SEARCH OF SMITH’S VEHICLE UNDER AUTHORITY OF PRESUMPTIVELY VALID CASE LAW IN EFFECT AT THE TIME OF THE SEARCH.....5

        1. The Fourth Amendment Good Faith Exception To The Exclusionary Rule Applies.....6

        2. Under article I, § 7 a search conducted in reliance on presumptively valid case law should not be suppressed. ....10

        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. ....15

        4. The article I, § 7 exclusionary rule has

traditionally been interpreted consistently with the  
federal rule. ....19

IV. CONCLUSION.....22

**TABLE OF AUTHORITIES**  
**CASES**

*Adams v. New York*,  
192 U.S. 585,,24 S. Ct. 372,,48 L. Ed. 575 (1905).....20

*Arizona v. Evans*,  
514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995).....9

*Arizona v. Gant*,  
162 P.3d 640 (Ariz., 2007).....2

*Arizona v. Gant*,  
\_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)3, 4, 5, 16, 17

*Boyd v. United States*,  
116 U.S. 616, 6 S. Ct. 524,,29 L. Ed. 746 (1886).....20

*Chimel v. California.*,  
395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).....15

*Commonwealth v. Dana*,  
43 Mass. 329 (2 met. 1841) .....19

*Griffith v. Kentucky*,  
479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).....4

*Herring v. United States*,  
\_\_\_ U.S. \_\_\_ 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).....8, 9

*Illinois v. Krull*,  
480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987).....8

*Massachusetts v. Sheppard*,  
468 U.S. 981, 104 S. Ct. 3423, 82 L. Ed. 2d 737 (1984).....9

*Michigan v. DeFillippo*,  
443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).....6, 7, 8

<i>New York v. Belton</i> , 453 U.S. 454, 101 S. Ct. 2860,,69 L. Ed. 2d 768 (1981).....	15
<i>In re St. Pierre</i> , 118 Wn. 2d 321, 823 P.2d 492 (1992).....	4
<i>State v. Biloche</i> , 66 Wn. 2d 325,,402 P.2d 491 (1965).....	21
<i>State v. Bond</i> , 98 Wn. 2d 1, 653 P.2d 1024 (1982).....	10, 11
<i>State v. Brockob</i> , 159 Wn. 2d 311, 150 P.3d 59 (2006).....	12
<i>State v. Brockob</i> , 159 Wn. 2d 311, 150 P.3d 59 (2006).....	13, 14
<i>State v. Burns</i> , 19 Wash. 52, 52 P. 316 (1898).....	19
<i>State v. Fladebo</i> , 113 Wn. 2d 388, 779 P.2d 707 (1989).....	16
<i>State v. Gibbons</i> , 118 Wash. 171,,203 P. 390 (1922).....	20
<i>State v. Johnson</i> , 128 Wn. 2d 431,,909 P.2d 293 (1996).....	16
<i>State v. Kirwin</i> , 165 Wash.2d 818, 203 P.3d 1044 (2009).....	11
<i>State v. Nordstrom</i> , 7 Wash. 506,,35 P. 382 (1893).....	19
<i>State v. O'Bremski</i> , 70 Wn. 2d 425,,423 P.2d 530 (1967).....	21
<i>State v. Parker</i> , 139 Wn. 2d 486,,987 P.2d 73 (1999).....	16

<i>State v. Potter</i> , 156 Wn. 2d 835, 132 P.3d 1089 (2006).....	12, 13
<i>State v. Royce</i> , 38 Wash. 11,,80 P. 268 (1905).....	20
<i>State v. Stroud</i> , 106 Wn. 2d 144, 720 P.2d 436 (1986).....	16
<i>State v. Vrieling</i> , 144 Wn. 2d 489, 28 P.3d 762 (2001).....	16
<i>State v. White</i> , 97 Wn. 2d 92, 640 P.2d 1061 (1982).....	10, 11
<i>State v. Young</i> , 39 Wn. 2d 910,,239 P.2d 858 (1952).....	21
<i>Teague v. Lane</i> , 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).....	4
<i>United States v. Calandra</i> , 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974).....	6
<i>United States v. Leon</i> , 468 U.S. 897, 104 S. Ct. 3405 (1984).....	9
<i>Weeks v. United States</i> , 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).....	20
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).....	6

## **I. COUNTERSTATEMENT OF THE ISSUES**

1. The State concedes that, pursuant to *Arizona v. Gant*, the search of Smith's car violated the Fourth Amendment. As explained below, however, the evidence should not be excluded.

2. Whether the "good faith" exception to the exclusionary rule should apply in the present case and the evidence should not be suppressed when the evidence was obtained in good faith reliance on pre-*Gant* case law and when the officer conducted the search of Smith's vehicle under authority of presumptively valid case law in effect at the time of the search?

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

### **A. PROCEDURAL HISTORY**

Karen Smith was charged by information filed in Kitsap County Superior Court with one count of possession of methamphetamine. CP. 1. Smith was convicted following a bench trial, and the trial court imposed a standard range sentence. CP 27, 30, 42. This appeal followed.

### **B. FACTS**

On September 5, 2008, Officer Halstead of the Poulsbo Police Department stopped a car being driven by Smith after officer Halstead had determined that the registered owner had a suspended license. CP 1-5. Officer Halstead then approached the car and found that Smith was the only occupant. CP 1-5. When Smith provided her driver's license, Officer

Halstead informed the Defendant that her license was suspended, had her step out of the car, and placed her under arrest for driving with a suspended license. Officer Halstead then handcuffed Smith and placed her in the back seta of his patrol car. CP 1-5.

Officer Halstead then searched Smith's car incident to the arrest. CP 1-5. The officer found a baggie containing ¼ gram of a crystal substance that field tested positive for methamphetamine, and also found several baggies containing a crystal residue. CP 1-5. After finding these items, Officer Halstead returned to his patrol car and informed Smith of her Miranda rights. CP 1-5. Smith then admitted that she had been using methamphetamine. CP 1-5.

Prior to trial, Smith filed a motion to suppress the evidence found in the car and to suppress the statements she had made to the officer. CP 7-18. In particular, Smith argued that the search of her vehicle incident to her arrest violated the Fourth Amendment, and also cited the case of *Arizona v. Gant*, 162 P.3d 640 (Ariz., 2007), in which Arizona Supreme Court had held that a similar search violated the Fourth Amendment. Although the United States Supreme Court had granted review of *Gant*, that Court had not yet issued its opinion at the time Smith's suppression motion was heard by the Kitsap County Superior Court.

The trial court ultimately denied Smith's motion, noting that the law in Washington allowed such a search. CP 24, RP (11/19/06) 31-33. This appeal followed. Shortly thereafter, the United States Supreme Court issued its opinion holding that a search incident to arrest of a vehicle violated the Fourth Amendment when the arrest had been for driving with a suspended license and when there was no indication that the defendant posed a risk to the arresting officer since the defendant had been secured in a police vehicle at the time of the search. *See Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

### III. ARGUMENT

**A. THE STATE CONCEDES THAT, PURSUANT TO *ARIZONA V. GANT*, THE SEARCH OF SMITH'S CAR VIOLATED THE FOURTH AMENDMENT. AS EXPLAINED BELOW, HOWEVER, THE EVIDENCE SHOULD NOT BE EXCLUDED.**

Smith argues that the search of her car violated her constitutional rights. The State concedes that, pursuant to *Arizona v. Gant*, the search in the present case violated the Fourth Amendment.

The facts of the present case are virtually indistinguishable from the facts in *Gant* as both cases involved a search of a vehicle following an arrest for driving with a suspended license. *Gant*, 129 S.Ct. at 1714. In addition, there was nothing in either case that demonstrated that the defendant posed a

risk to the officer since at the time of the search the defendants in both cases had been secured in handcuffs and placed in the back of a patrol car. *Gant*, 129 S.Ct. at 1714.

Absent any meaningful facts that distinguish the present case from *Gant*, the State concedes that the search in the present case violated the Fourth Amendment pursuant to the United States Supreme Court's ruling in *Gant*.

Furthermore, although the search in the present case took place before the Supreme Court issued its opinion in *Gant*, the State also concedes that the holding in *Gant* applies to all cases that were not yet final at the time the Supreme Court issued its ruling. *See, e.g., Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L.Ed.2d 649 (1987) (a new rule for the conduct of criminal prosecutions applies retroactively to all cases, state or federal, pending on direct review or not yet final); *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, 823 P.2d 492 (1992). As the present case is not yet final, the State is also required to concede that *Gant* applies to the present case and that the search, therefore, violated the Fourth Amendment.<sup>1</sup> The analysis, however, does not end with the simple “retroactive” application of *Gant*.

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<sup>1</sup> Because *Gant* articulated a new constitutional rule that represents a clean break from the past it will not apply to case on collateral review. *Teague v. Lane*, 489 U.S. 288, 298, 311,

**B. THE “GOOD FAITH” EXCEPTION TO THE EXCLUSIONARY RULE SHOULD APPLY IN THE PRESENT CASE AND THE EVIDENCE SHOULD NOT BE SUPPRESSED BECAUSE THE EVIDENCE WAS OBTAINED IN GOOD FAITH RELIANCE ON PRE-*GANT* CASE LAW AND BECAUSE THE OFFICER CONDUCTED THE SEARCH OF SMITH’S VEHICLE UNDER AUTHORITY OF PRESUMPTIVELY VALID CASE LAW IN EFFECT AT THE TIME OF THE SEARCH.**

Smith next claims that the evidence found in the present case and the subsequent statements made after the search must be suppressed given the unlawful search. This claim should be rejected because 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.<sup>2</sup> Moreover, under article I, § 7 of the Washington constitution, when officers conducted a search of a vehicle under authority of presumptively valid case law in effect at the time of the search, the evidence obtained during the vehicle search should not be suppressed.<sup>3</sup>

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109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989).

<sup>2</sup> The issue presented in this case is also currently before the Washington Supreme Court in the consolidated cases of *State v. Ruiz* and *State v. Valdez*, No. 80091-0. According to the Supreme Court’s website, that case has been argued and the parties have responded to the Court’s request for further briefing regarding the applicability of *Gant*.

<sup>3</sup> The Washington Supreme Court has not yet reversed its longstanding position that vehicle searches incident to a lawful arrest are valid under article I, § 7. Although Smith argues that the outcome of this case is controlled by article I, § 7 of the Washington constitution, this argument is currently unsupported by Washington law. In addition, *Gant* was decided purely on Fourth Amendment grounds. *Gant*, 129 S.Ct at 1714. Absent any basis to address state constitutional issues, the Fourth Amendment analysis is controlling, and the present case

**1. *The Fourth Amendment Good Faith Exception To The Exclusionary Rule Applies.***

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 the 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 a subsequent search) under a statute that

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should be reviewed solely under federal Fourth Amendment analysis. The State, nevertheless, addresses the good faith exception under both the Fourth Amendment and article I, § 7.

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 that:

[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 (footnote 3). 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.”  
*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 which justified the stop was subsequently deemed to be unconstitutional.<sup>4</sup> *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 that in *DeFillippo* the Court was addressing an arrest based on a presumptively valid statute that was later ruled unconstitutional, whereas here the situation involves a search upheld as constitutional by well-established and long-standing judicial pronouncements. This distinction does not justify a different result.

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<sup>4</sup> *DeFillippo* is entirely consistent with the Supreme Court’s exclusionary rule analysis. As the U.S. Supreme 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).

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 generally the courts that establish the “rules,” not the legislative bodies. Judicial decisions, particular 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>5</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. 3423, 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. Evans*, 514 U.S. 1, 10, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995)(applying good-faith rule to police who reasonably

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<sup>5</sup> For a recent discussion of federal cases recognizing the “good faith” exception to the exclusionary rule, see *Herring*, 129 S.Ct. at 704.

relied on mistaken information in a court's database that an arrest warrant was outstanding).

Given this history, suppression should not be required where law enforcement officers reasonably relied on presumptively valid assertions by the United States Supreme Court and the Washington Supreme Court upholding searches of vehicles incident to arrest.

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

Under article 1, § 7, the exclusionary rule has at times 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 a 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 premised upon a flagrantly unconstitutional “stop and identify” statute that negated the probable cause requirement of the Fourth Amendment. *Id.* at

106. The Washington Supreme 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 Washington Supreme 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. In addition, the Washington Supreme Court has emphasized that in applying the exclusionary rule under article I, § 7 it is also appropriate to consider the costs of doings so. *See. e.g.. Bond*, 98 Wn. 2d. 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 later cases have discussed, it is noteworthy that *White* involved a flagrantly unconstitutional statute and did not assess a statute or judicial opinion that was presumptively valid.<sup>6</sup>

More recently, the Washington Supreme Court has retreated from the broad language in *White* and has explicitly held in two cases that an arrest or

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<sup>6</sup> For a critique of the *White* analysis, see *State v. Kirwin*, 165 Wash.2d 818, 833-37, 203

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*, 156 Wn.2d 835, 132 P.3d 1089 (2006), 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. 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.

In its unanimous decision, the Washington Supreme Court applied the *DeFilippo* 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 Washington Supreme 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 *DeFilippo*, excluded evidence under that narrow exception for

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P.3d 1044 (2009)(Madsen, J., concurring).

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 *DeFilippo*, 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 *DeFilippo*, the Washington Supreme 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 Washington Supreme 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 *DeFilippo*, 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 the 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: 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 the present case was conducted before the United State Supreme Court's April 21, 2009 decision in *Arizona v. Gant*. Prior to April 21, numerous federal and state judicial opinions law allowed vehicle searches incident to arrest. Accordingly, those searched should be upheld because the search was 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). Indeed, *Gant* 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>7</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. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2001); *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. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989).

Thus, this case does not fit within the narrow exception, recognized in *DeFilippo* and *White*, that precludes 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

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<sup>7</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

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 significant that the majority opinion in *Gant* emphasized that officers reasonably relied on pre-*Gant* precedent and were 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 *DeFilippo* 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.

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new rule that represented a clear break from prior precedent. *Gant*, 129 S.Ct. at 1722-24

Nor is the preservation of judicial integrity, the other basis sometimes relied upon when applying the exclusionary rule, implicated in these circumstances. 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 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 the evidence obtained in all pending cases with a possible *Gant* issue are not justified by the potential benefit in deterrence.

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. The Washington Supreme Court has recognized that the exclusionary rule 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 generally 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." Const. art. I, § 7. At common law, courts took no notice of whether evidence was properly seized; if relevant, it was admissible. *Commonwealth v. Dana*, 43 Mass. 329 (2 met. 1841); 4 J. Wigmore, Evidence § 2183 (2nd ed. 1923). This was the rule recognized in Washington in 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 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, 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 Supreme 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). Nonetheless, the Washington Supreme Court has generally followed the application of the rule in federal courts, as the Court said in *State v. O'Bremski*, 70 Wn.2d 425,423 P.2d 530 (1967), “[w]e have consistently adhered to the exclusionary rule expounded by the United States Supreme Court...” *See also State v. Biloche*, 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. . .”).

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 *White* was simply an application of the narrow exception to the *DeFillippo* good faith rule is both appropriate and justified.<sup>8</sup>

Applying the analysis from *DeFillippo*, *Potter*, and *Brockob*, the good faith exception to the exclusionary rule should apply in the present case. As

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<sup>8</sup> Stated another way, *Potter* and *Brockob* can be viewed as having had the effect of overruling *White* (unanimously, in *Potter*) insofar as *White* can be read to reject the

previously discussed, there were an overwhelming number of judicial opinions affirming the validity of vehicle searches incident to arrest. This case law was presumptively valid at the time the defendant was arrested. The narrow exception to *DeFillippo* does not apply; that is, there was no gross or flagrant unconstitutionality. Accordingly, the search incident to arrest of the Smith's vehicle should be upheld because the search was conducted in good faith, under authority of law, and pursuant to presumptively valid case law.

#### IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that, for the reasons outlined above, this Court uphold of the validity of the search of the vehicle incident to arrest because the officer was acting pursuant to presumptively valid case law at the time the search was conducted. Smith's conviction and sentence, therefore, should be affirmed.

DATED September 9, 2009.

Respectfully submitted,

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*DeFillippo* "good faith" exception.