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STATE OF WASHINGTON

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BY RONALD R. CARPENTER

Court of Appeals No. 33653-7-II

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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

REYES RIOS RUIZ,

Respondent.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. RESPONSE	2
1. <u>The decision of the Court of Appeals is not in conflict with <i>State v. Stroud</i>.</u>	2
a. <i>The Court of Appeals' decision does not modify the permissible scope of a search of the passenger area of a car incident to the arrest of an occupant.</i>	3
b. <i>The Court of Appeals' decision does not create a set of rules that would not "work in the real world."</i>	3
2. <u>The decision of the Court of Appeals is not in conflict with <i>State v. Boursaw</i>.</u>	4
3. <u>The Court of Appeals decision does not call into question the permissible scope of the search of the passenger compartment of a vehicle incident to the arrest of an occupant.</u>	6
III. CONCLUSION	7

TABLE OF AUTHORITIES

Page

Washington Cases

State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986).....2, 4

State v. Valdez, ___ Wn.App. ___, 152 P.3d 1048 (2007).....3, 4, 6, 7

Other Authorities

RAP 13.41

I. Introduction

The State of Washington has petitioned this court to review the Court of Appeals decision in *State v. Valdez*, ___ Wn.App. ___, 152 P.3d 1048 (2007).

Under RAP 13.4(b), this Court may accept discretionary review of a Court of Appeals decision terminating review only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The State makes three arguments as to why this court should accept review of the Court of Appeals' decision: (1) the decision of the Court of Appeals is in conflict with *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986); (2) the decision of the Court of Appeals is in conflict with the Division One decision in *State v. Boursaw*, 94 Wn.App. 629, 976 P.2d 130 (1999); and (3) the decision of the Court of Appeals draws into question the permissible scope of a search of a passenger compartment of a vehicle incident to the arrest of an occupant. State's Motion for

Discretionary Review, p. 2-3. The State's arguments fail.

For purposes of this Response, Respondent Ruiz adopts and incorporates the facts as set forth in the decision of the Court of Appeals.

II. Response

1. The decision of the Court of Appeals is not in conflict with *State v. Stroud*.

In *Stroud*, this court held that:

During the arrest process...officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.... [T]he danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the container.

Stroud, 106 Wn.2d at 152, 720 P.2d 436.

The State argues that the Court of Appeals' decision is in conflict with *Stroud* in two ways: (1) the decision of the court of appeals modifies the scope of the area police officers search in a vehicle pursuant to the arrest of an occupant (State's Motion, p. 12-19); and (2) the Court of Appeals' conclusion that the search of the minivan constituted a second search violates *Stroud*'s mandate for a set of "rules that would work in the practical world." State's Motion, p. 18-19. The State's argument's fail.

- a. *The Court of Appeals' decision does not modify the permissible scope of a search of the passenger area of a car incident to the arrest of an occupant.*

In its decision, the Court of Appeals cited *Stroud* and correctly stated that, during a search of a vehicle incident to the arrest of an occupant, police may lawfully search passenger compartment of the vehicle excluding locked containers. *Valdez*, ___ Wn.App. ___, 152 P.3d at 1051-1052. In his Opening Brief, Mr. Ruiz had challenged the search of the minivan as exceeding the permissible scope of a search of the passenger compartment in that the area where the drugs were found was not a part of the passenger compartment. However, in applying *Stroud* to the facts of this case, the Court of Appeals "assum[ed], without deciding, that the searched area here was accessible from the passenger area." *Valdez*, ___ Wn.App. ___, 152 P.3d at 1052. Thus, the Court of Appeals simply did not address the issue of the definition of the passenger area for purposes of searching a vehicle incident to the arrest if an occupant. The Court of Appeals' decision comports with *Stroud* perfectly.

- b. *The Court of Appeals' decision does not create a set of rules that would not "work in the real world."*

The Court of Appeals' ruling in this case is nothing more than a reaffirmation of the principle that,

The ultimate teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or

seizure under a narrow exception to the warrant requirement when the reason for the search of seizure does not fall within the scope of the reason for the exception.

Valdez, ___ Wn.App. ___, 152 P.3d at 1051, *citing State v. Ladson*, 138 Wn.2d 343, 357, 979 P.2d 833 (1999).

The State mischaracterizes the Court of Appeals' ruling as a ruling that would "undermine the bright-line rule set forth in *Stroud* and create major difficulties in implementing many of these concepts in the field." State's Motion, p. 18. The Court of Appeals' ruling was clear and its application is simple: if the initial search of the vehicle is complete, the police may not conduct a second more thorough search based on mere suspicions that more evidence may be found. Put simply, the police get one bite at the "search incident to arrest apple."

The Court of Appeals' ruling does not violate *Stroud*'s call for an easily applicable bright-line rule. Rather, the Court of Appeals' ruling reaffirms the *Stroud* court's concern with balancing police officers' need to secure a scene and prevent destruction of evidence with the heightened privacy protections afforded to Washington citizens under the Washington State Constitution. *See Stroud*, 106 Wn.2d at 151-152, 720 P.2d 436.

2. The decision of the Court of Appeals is not in conflict with *State v. Boursaw*.

As clearly set forth in the Court of Appeals' decision, *Boursaw* is

factually distinguishable from this case and the *Boursaw* court specifically limited its holding to the facts of that case:

In *Boursaw*, the defendant was stopped for a traffic infraction and was arrested because he was driving with a suspended license. The arresting officer handcuffed the defendant and placed him in the back of the patrol car. When the officer searched the defendant's car incident to his arrest he "found plastic ziplock bags and several needles" in an unlocked glove box. The officer then called for a K-9 unit that arrived at the scene within 10 minutes. The dog alerted to an area under the front ashtray. The officer removed the ashtray and discovered a plastic bag containing a substance that tested positive for methamphetamine. Division One of this court upheld the search, holding that the delay was reasonable and "the area behind the ashtray is within the reach of the occupants of the automobile." But *Boursaw* turned "on what constitutes activities related to 'the securing of the suspect and the scene,' and at what point is the scene sufficiently secured." Moreover, Division One limited *Boursaw* "to the facts of this case." And the original search of the vehicle in *Boursaw* revealed evidence of illegal drug possession.

"Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." In *Boursaw* the officers had, in addition to a brief interlude between the arresting officer finding drug paraphernalia and the K-9 search of the front passenger area, probable cause that evidence of illegal activity could be found in the vehicle.

Here, the State argues that the K-9 search was justified because (1) the driver had been arrested; (2) "the dashboard was missing screws and plastic fasteners, and that it had appeared to be tampered with,"; and (3) Valdez inconsistently told the officer that he had just come from Fourth Plain and from Las Vegas. In addition, the officer

knew that a headlight was out on the minivan.

But before Dennison called for a K-9 unit he had placed Valdez in the patrol car; there was another officer on the scene; and he had completed his search of the passenger compartment of the vehicle for weapons or destructible evidence. Unlike the officer in *Boursaw*, he found no weapons, destructible evidence, or evidence of drugs or illegal activity other than loose plastic paneling under the dash. At that point, concerns about officer safety and destruction of evidence did not provide on-going exigent circumstances allowing another warrantless search.

Furthermore, it was not until the drug dog alerted while searching the vehicle that probable cause existed to search for the presence of a controlled substance. "Generally, an 'alert' by a trained dog is sufficient to establish probable cause for the presence of a controlled substance." But here, the drug dog alerted during a second search following Dennison's initial search after both the driver and passenger were removed from the vehicle; the scene had been secured by two officers; and the initial search only revealed missing screws and loose front seat-area paneling.

Valdez, ___ Wn.App. ___, 152 P.3d at 1052-1053 (internal citations omitted).

Boursaw was limited to the facts of that case and the facts of this case are sufficiently distinguishable from *Boursaw* so that the Court of Appeals' decision is not in conflict with *Boursaw*.

3. The Court of Appeals decision does not call into question the permissible scope of the search of the passenger compartment of a vehicle incident to the arrest of an occupant.

The State argues that the Court of Appeals' decision modifies the

legal definition of the “passenger area” such that the Court’s decision violates the definition of the “passenger compartment” adopted in Washington under *Stroud* and its progeny. However, as discussed above, a review of the Court of Appeals’ decision reveals that the Court did not address the issue of the definition of the passenger area for purposes of searching a vehicle incident to the arrest of an occupant. In fact, the Court of Appeals dealt with this issue in a manner favorable to the State by ignoring Mr. Ruiz’s arguments that the drugs were found in an area not part of the passenger compartment and assuming that the drugs were found in the passenger compartment. *Valdez*, ___ Wn.App. ___, 152 P.3d at 1052.

III. CONCLUSION

The decision of the Court of Appeals in this case is not in conflict with *Stroud* or *Boursaw*. Further, the decision does not modify or alter the definition of a passenger compartment for the purposes of searches of vehicles incident to the arrest of an occupant. This court should deny the State’s Motion and affirm the decision of the Court of Appeals.

DATED this 7th day of May, 2007

Respectfully submitted,

Reed Speir, WSBA No. 36270
Attorney for Reyes Rios Ruiz

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CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 7th day of May, 2007, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. Reyes Ruiz, DOC# 885057
Larch Corrections Center
15314 N.E. Dole Valley Road
Silver Star E 9
Yacolt, WA. 98675

And, I mailed a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Michael C. Kinnie
Clark County Deputy Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666

Signed at Tacoma, Washington this 7th day of May, 2007.

Reed Speir, WSBA No. 36270

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Thanks for the notice.

Reed Speir

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Attached, please find the Answer to the State's Motion for Discretionary Review I am filing on behalf of my client, Mr. Reyes Ruiz. The case name is State v. Ruiz, Court of Appeals Cause No. 33653-7-II.

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