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STATE OF WASHINGTON

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NO. 82210-7

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CORYELL ADAMS,

Petitioner.

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**STATE OF WASHINGTON'S ANSWER TO  
ACLU *AMICUS CURIAE* BRIEF**

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## I. BACKGROUND

The State of Washington adopts the factual and procedural background set forth in the Brief of Respondent below, the opinion of the Court of Appeals, and the Supplemental Brief of Respondent.

## II. OVERVIEW

In this brief, the State responds to claims by *amicus curiae* that article I, § 7 precludes the adoption of a good faith exception to the exclusionary rule. *Amicus* primarily relies on State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982). The State's response is four-fold:

First, as this Court has previously and explicitly recognized, the article I, § 7 discussion in White is *dicta*. It is *dicta* not only because it was not necessary for the Court's decision, but because the exclusionary rule has never been evaluated pursuant to the criteria set forth in State v. Gunwall. It is clear that the exclusionary rule has historically been interpreted consistently under both the state and federal constitutions.

Second, the recent opinions of this Court in Potter and Brockob make clear that the article I, § 7 analysis in White has been superseded. In Potter and Brockob, under facts remarkably similar to White, the Court explicitly stated that it was applying the federal good faith exception to the exclusionary rule set forth in Michigan v. DeFillippo.

Third, even under the standard set forth in White – which clearly contemplates that the exclusionary rule is to be invoked only when an individual’s constitutional rights are unreasonably violated – the good faith exception to the exclusionary rule applies in this case. There was nothing unreasonable about law enforcement officers relying on the numerous prior opinions of this Court that approved of vehicle searches incident to arrest. This reliance is objectively reasonable and does not implicate the concerns expressed in White that the test is governed by the officer’s subjective conclusion concerning the validity of the law.

Finally, the position advocated by the State in its supplemental brief (and again in this brief) was recently endorsed by Division I of the Court of Appeals in State v. Riley, \_\_\_ Wn. App. \_\_\_, 2010 WL 427118 (February 8, 2010). The State adopts the well-reasoned and detailed analysis set forth in that opinion.

### III. ARGUMENT

#### A. THE ARTICLE I, § 7 ANALYSIS IN STATE v. WHITE IS BOTH DICTA AND INCORRECT.

In State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), this Court stated for the first time that “whenever the right [under Article 1, section 7] is unreasonably violated, the [exclusionary] remedy must follow.”<sup>1</sup>

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<sup>1</sup> The analysis of White is discussed in more detail in the State’s supplemental brief and will not be repeated here. See Supp. Brief of Respondent, p. 12-14.

White, 97 Wn.2d at 110. This statement was part of an alternative holding. The Court's primary holding was that the arresting officer had not acted in good faith in making an arrest for violation of an ordinance because the ordinance was "so grossly and flagrantly unconstitutional" that a person of reasonable prudence would be bound to see its flaws. Of particular concern was that the Court had recently struck down a remarkably similar ordinance as unconstitutional. Id. at 103.

Subsequently, in State v. Murray, 110 Wn.2d 706, 709, 757 P.2d 487 (1988), this Court explicitly recognized that the alternative holding in White was *dicta*. The language of Murray is so significant that it is worth quoting in detail:

The Court of Appeals opinion touches on a matter of substantial import to the law of search and seizure in this state. This is the extent to which the exclusionary rule of Const. art. 1, § 7 exists and functions independently of the remedy of exclusion courts apply when the government violates citizens' rights under the Fourth Amendment to the United States Constitution. In the context presented here, cases from the Courts of Appeals are divided over this question. . . .

This division reflects a broad interpretive uncertainty that exists about the nature of the article 1, section 7 exclusionary rule. *Some dicta have issued from this court in favor of an absolute rule of exclusion when evidence is obtained in a manner violative of article 1, section 7 rights. State v. White*, 97 Wash.2d 92, 111, 640 P.2d 1061 (1982); *State v. Bonds*, 98 Wash.2d 1, 11, 653 P.2d 1024 (1982). Yet we have never firmly relied on these dicta as a basis for a suppression order. Moreover, we have not had occasion to test these dicta against recently articulated

*principles of constitutional analysis*, according to which our interpretations of state constitutional provisions are to be guided by well reasoned federal law precedents. *See State v. Gunwall*, 106 Wash.2d 54, 60-61, 720 P.2d 808 (1986). . . .

Murray, 110 Wn.2d at 709 (citations omitted, emphasis added).<sup>2</sup>

The article I, § 7 analysis in White was *dicta* for two reasons.

First, the Court in White had already found that the officer was not acting in good faith because the stop and identify statute was “grossly and flagrantly” unconstitutional. Second, and perhaps more importantly, the *dicta* had not been tested in light of the “Gunwall factors” subsequently adopted by the Court for evaluating the interpretation of state constitutional provisions.

That White’s article I, § 7 analysis was *dicta* was subsequently confirmed by Justice Madsen in her concurring opinion in State v. Kirwin, 165 Wn.2d 818, 834, 203 P.3d 1044, 1052 (2009). After noting that the analysis in White was “somewhat confusing” and “seemingly inconsistent” Justice Madsen stated: “[I]t is arguable that the first section of the opinion is dispositive, particularly given that it does not in any way

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<sup>2</sup> In the present case, Petitioner Adams agrees that the article I, § 7 language in White was “arguably” *dicta*. See Second Supp. Brief of Petitioner, p. 6.

Further, *amicus* specifically recognizes that “the question of the good faith exception under Article I, Section 7 putatively remains open.” Amicus Brief, p. 6 (citing State v. Canady, 116 Wn.2d 853, 857-58, 809 P.2d 203 (1991); State v. Groom, 133 Wn.2d 679, 947 P.2d 240 (1997); State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005)).

indicate that it is limited to an analysis under the federal constitution and does not contain in its heading any indication of the scope of the discussion. If so, *the balance of the opinion was unnecessary to the court's decision and thus dicta.*" Kirwin, 165 Wn.2d at 834 (Madsen, J., concurring).

Murray's conclusion that the White article I, § 7 analysis was *dicta* makes sense when one considers the inadequate support mustered in White for the proposition that the "important place of the right to privacy in Const. art. 1, § 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow." White, 97 Wn.2d at 110. The four cases relied upon in White do not support this conclusion at all.

Two of the cases cited by White stand for the "well-settled principle" that the State may not use, for its own profit, evidence that has been obtained in violation of law. State v. Gunkel, 188 Wash. 528, 534, 63 P.2d 376, 379 (Wash.1936); State v. Cyr, 40 Wn.2d 840, 842, 246 P.2d 480 (1952). Gunkle and Cyr say nothing about the scope of article I, § 7 vis-à-vis the Fourth Amendment, except to recognize that the exclusionary rule has been applied under both the state and federal constitutions.

The remaining two cases cited in White, however, make it clear that the language of article I, § 7 has historically been interpreted

consistently with the Fourth Amendment. In State v. Miles, the Court stated:

It will be observed that the fourth amendment to the constitution of the United States, and § 7 of Art. I of our state constitution, *although they vary slightly in language, are identical in purpose and substance.*

State v. Miles, 29 Wn.2d 921, 190 P.2d 740 (1948) (emphasis added).

Moreover, in State v. Gibbons, after quoting the Fourth Amendment and article I, § 7, the Court emphasized:

*We thus quote from both the federal and state Constitutions to show that these guaranties are in substance the same in both, making the law upon the subject as expounded by the Supreme Court of the United States, presently to be noticed, a proper aid in our present inquiry. . . .*

State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922) (emphasis added).

In light of these unequivocal statements that article I, § 7 and the Fourth Amendment are coextensive, it is not surprising that the Court in Murray, upon review of the cases relied upon in White, concluded that the conclusion in White was *dicta*.

Moreover, the White analysis has never been tested in light of State v. Gunwall's "six nonexclusive neutral criteria." Gunwall requires a case by case review of "whether, in a given situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution." Gunwall, 106 Wn.2d at 61. As the Court recognized in Murray, this analysis was

not done in White (which pre-dated Gunwall). To this day, in the context of the exclusionary rule, a Gunwall analysis has never been performed. Nor has petitioner offered a Gunwall analysis in this case.<sup>3</sup>

If a Gunwall analysis is performed it becomes immediately clear that in the context of the exclusionary rule, the state and federal constitutions have been interpreted consistently.<sup>4</sup> Indeed, the first time this Court considered an exclusionary rule, it refused to create one:

Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. *The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.*

State v. Royce, 38 Wash. 111, 117, 80 P. 268 (1905) (emphasis added).

Seventeen years later, without mentioning this case, the Court recognized the existence of an exclusionary rule. This was not, however, based on any new discoveries concerning the history of the Washington constitution: it was based on new *federal* case law that was construed as establishing an exclusionary rule. State v. Gibbons, 118 Wash. 171,

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<sup>3</sup> Justice Utter, who wrote the Gunwall opinion, and who was instrumental in advocating for the adoption of an independent state constitutional analysis, joined in Murray's conclusion that White's article I, § 7 analysis was *dicta*.

<sup>4</sup> For a more detailed survey demonstrating how the Washington exclusionary rule has generally matched its federal counterpart, see Supp. Brief of Respondent, p. 23-25.

184-85, 203 P. 390 (1922) (citing Amos v. United States, 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 2d 654 (1921)).

In subsequent cases, the Washington Supreme Court held that “it is beneath the dignity of the state, and contrary to public policy, for the state to use for its own profit evidence that has been obtained in violation of law.” See e.g., State v. Buckley, 145 Wash. 87, 89, 258 P. 1030 (1927).

The Court did not, however, recognize the exclusionary rule as absolute.

To the contrary, it said that the rule served primarily a *deterrent* purpose:

The constitutional restraints (*both United States Constitution, amendment 4, and Washington State Constitution, art. 1, s 7*) against unreasonable searches and seizures extend not only to evidence directly obtained, but also to derivative evidence. . . .

We have consistently adhered to the exclusionary rule expounded by the United States Supreme Court, State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922); State v. Biloche, 66 Wash.2d 325, 402 P.2d 491 (1965), and have likewise embraced the ‘fruit of the poison tree’ doctrine in extending it to secondary evidence. In re McNear v. Rhay, 65 Wash.2d 530, 398 P.2d 732 (1965).

The exclusionary rule is neither a statutory enactment nor an express provision of the fourth amendment to the United States Constitution. It is rather a command, judicially implied, intended to impose restraints upon law enforcement officers *and to discourage abuse of authority when constitutional immunity from unreasonable search is involved*. In each case, *the rights of the accused must be balanced against the public*.

State v. O'Bremski, 70 Wn.2d 425, 429, 423 P.2d 530 (1967) (citations omitted, emphasis added). The Court applied this reasoning equally under both the Fourth Amendment and article 1, § 7. See id. at 428.

In sum, the Court in Murray correctly concluded that the analysis in White concerning the scope of the exclusionary rule was *dicta*. Specifically, in Murray, the Court recognized that the conclusions in White had not been tested against the later-established principles of constitutional analysis set forth in Gunwall. Murray, 110 Wn.2d at 709. Ultimately, the *dicta* in White cannot stand against the holdings in Miles, Gibbons, Royce, O'Bremski and numerous other cases that establish that the exclusionary rule under the state and federal constitutions has been consistently interpreted.

This is not to say that in other contexts article I, § 7 does not provide greater constitutional protection than the Fourth Amendment. But the point of Gunwall is that each situation must be evaluated on its own merits under article I, § 7. Gunwall, 106 Wn.2d at 61 (six nonexclusive neutral criteria are “relevant to determining whether, *in a given situation*, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution”) (emphasis added). A Gunwall evaluation has never occurred for the exclusionary rule and it is not sufficient to simply

articulate the words “greater protection” and conclude that the good faith exception to the exclusionary rule does not exist under article I, § 7.<sup>5</sup>

**B. POTTER & BROCKOB HAVE OVERRULED WHITE.**

Whether or not the article I, § 7 analysis in White is *dicta*, this portion of White has been overruled by subsequent decisions of this Court. In State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006), and State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006), this Court held that law enforcement officers may rely on the presumptive validity of a statute unless the law is so “grossly and flagrantly unconstitutional” by virtue of

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<sup>5</sup> The State respectfully submits that the failure to conduct a Gunwall analysis in the context of the exclusionary rule, and the subsequent reliance on the *dicta* in White, has led the Court astray in other cases. For example, in State v. Winterstein, \_\_\_ Wn.2d \_\_\_, 220 P.3d 1226, 2009 WL 4350257, 6 (2009), the Court rejected the “inevitable discovery” exception to the exclusionary rule. In doing so, the Court relied on White (or cases that in turn relied upon White) without recognizing that in Murray the Court had previously characterized the White conclusions as *dicta* and that no Gunwall analysis of the exclusionary rule has ever been conducted.

In Winterstein, the Court relied on White for the fundamental proposition (central to its conclusion) that article I, § 7 “clearly recognizes an individual’s right to privacy with no express limitations.” Winterstein, 220 P.3d at 1231 (citing White, 97 Wn.2d at 92). But this is the precise proposition that remains untested under Gunwall. Likewise, the Court relied upon State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832, 837 (2005), for the proposition that article I, § 7 provides greater protection of privacy rights than the Fourth Amendment. But Morse simply cites to White. See Winterstein, 220 P.3d 1231 (citing Morse, 156 Wn.2d at 10 (citing White, 97 Wn.2d at 110)). Winterstein also relied heavily on State v. Boland, 115 Wn.2d 571, 800 P.2d 1112, 1118 (1990). But Boland again merely quotes the untested conclusion of White. See Winterstein, 220 P.3d at 1231 (citing Boland, 115 Wn.2d at 582 (citing White, 97 Wn.2d 110)).

The rest of Winterstein contains repeated references to White to buttress its conclusion that no exception to the exclusionary rule is justified. Indeed, the *dicta* in White is characterized as a “mandate.” See Winterstein, 220 P.3d at 7. No case prior to White is cited in this section of the Winterstein opinion. Had the Court conducted a true Gunwall analysis, as opposed to relying on the *dicta* from White, the Court would likely have concluded that the exclusionary rule under article I, § 7 has never been interpreted in the absolutist manner suggested by Winterstein.

prior dispositive judicial holdings that it can not serve as a basis for a valid arrest. Indeed, in these two cases the Court specifically endorsed the federal good faith exception to the exclusionary rule set forth in DeFillippo and rejected the reading of White urged by petitioner and *amicus* in the present case.<sup>6</sup>

Here is the critical language from Potter:

Petitioners rely on State v. White. . .where we recognized a *narrow exception to the general rule* that police are charged to enforce laws until and unless they are declared unconstitutional. Under this general rule, an arrest under a statute that is valid at the time of the arrest and supported by probable cause *remains valid even if the basis for the arrest is later held unconstitutional*. The rule *comes from the United States Supreme Court holding in Michigan v. DeFillippo*, 443 U.S. 31, 38, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), that “[t]he 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.” 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 842 (citations omitted, emphasis added).

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<sup>6</sup> See Supplemental Brief of Respondent, p .14-17.

Rather than repeat the argument already set forth in the supplemental briefing, Justice Madsen's analysis of Potter and Brockob in State v. Kirwin nicely summarizes the State's position:

. . . The defendants in Potter contended that under article I, section 7 evidence of controlled substances found in their vehicles during searches incident to their arrests had to be suppressed as a result of the illegal arrests.

In a unanimous decision, *we applied the DeFillippo rule under article I, section 7*, and held that an arrest under a statute valid at the time of the arrest and supported by probable cause remains valid even if the basis for the arrest is later found unconstitutional. . . .

. . . .  
With respect to the statute criminalizing driving while license suspended, we noted that the statute that made it unlawful to drive while license suspended remained a valid statute, unlike the statute held unconstitutional in White. Then, with respect to the statutory licensing procedures held unconstitutional in Moore, we reasoned that unlike the circumstances in White, *there were no prior cases holding that license suspension procedures in general were unconstitutional and therefore these statutory provisions were not grossly and flagrantly unconstitutional. Id.*

Similarly, in State v. Brockob. . . one of the defendants contended that his arrest for driving while his license was suspended and a search incident to that arrest were unlawful for the same reason claimed in Potter. The defendant also relied on White. The court rejected the defendant's argument . . .

. . . .  
While Potter and Brockob may have overlooked the third section in White and the discussion under article I, section 12, *these cases nevertheless have had the effect of overruling White (unanimously, in Potter) insofar as White can be read to reject the DeFillippo rule.*

Kirwin, 165 Wn.2d at 836 (Madsen, J., concurring) (citations omitted, emphasis added).

In State v. Riley, \_\_\_ Wn. App. \_\_\_, 2010 WL 427118 (2010), the Court of Appeals Division I examined Potter and Brockob and reached the same conclusion;

In both [Potter and Brockob], the court refused to suppress the evidence even though the basis for the arrests was unconstitutional. In both cases, the court also rejected the defendants' reliance on White, characterizing that case as one involving "a law 'so grossly and flagrantly unconstitutional' that any reasonable person would see its flaws."

....

We take from these cases two principles relevant to this case: (1) an arrest based on an obviously-unconstitutional statute is illegal, and the evidence seized in a search incident to arrest based on that statute will be suppressed; and (2) *where the statute is presumptively valid, the police may rely on it to make an arrest and search, and that evidence will not be suppressed*. While the court has not explicitly said so, it would appear that the rationales for the exclusionary rule articulated in White that do not involve deterring illegal police behavior are not actually implicated where the statute on which the police rely to make an arrest is presumptively valid. *That is, an arrest based on a statute that appears valid does not offend either privacy rights or the integrity of the judicial process*.

The court's reliance in both Brockob and Potter on the decision in DeFillippo bolsters this conclusion because that decision relied solely on the deterrence rationale for the exclusionary rule.

Riley, 2010 WL 427118 at 5-6 (emphasis added).

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 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, and does not require suppression of the evidence obtained in the course of the arrest or search.

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 has no bearing on the analysis: the judicial opinions of the United States Supreme Court and the Washington Supreme Court must be viewed as least as presumptively valid as legislative enactments, especially when they purport to establish constitutional boundaries.

**C. APPLYING WHITE, THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE APPLIES.**

As discussed above, the article I, § 7 analysis in White has been recognized by this Court as *dicta*. Moreover, petitioner's interpretation of White has been rejected by Potter and Brockob which endorsed and

applied the federal good faith rule of DeFillippo. However, even assuming that White's analysis of article I, § 7 remains good law, the good faith exception to the exclusionary rule applies under the facts of this case.

Most basically – and despite attempts by both *amicus* and petitioner to recast this holding – White did not adopt a blanket prohibition against exceptions to the exclusionary rule. Indeed, the Court in White carefully and repeatedly emphasized that the exclusionary rule was to be applied only when an individual's constitutional rights under article I, § 7 are *unreasonably* violated.<sup>7</sup>

For example, after discussing the origin, history, and case law interpreting article I, § 7, the Court concluded: “The important place of the right to privacy in Const. art. 1, § 7 seems to us to require that whenever the right is *unreasonably* violated, the remedy must follow.” White, 97 Wn.2d at 110 (emphasis added). Likewise, the Court later stated: “Without an immediate application of the exclusionary rule whenever an individual's right to privacy is *unreasonably* invaded, the

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<sup>7</sup> While space does not permit a detailed discussion of this point, the State will simply observe that the phrase “right to privacy” misrepresents the historical contours of article I, § 7. No such right existed at the time of ratification of the Washington Constitution. Until recently, the concept was consistently rejected by this Court. See e.g., Hillman v. Star Publishing Co., 64 Wash. 691, 117 P. 594 (1911) (rejecting existence of right); State ex rel. Hodde v. Superior Court, 40 Wn.2d 502, 244 P.2d 668 (1952) (rejecting claims that the activities of the legislative investigative committees violated a “right to privacy”); State v. James, 36 Wn.2d 882, 221 P.2d 482 (1950) (same); Lewis v. Physician's & Dentists Credit Bureau, Inc., 27 Wn.2d 267, 177 P.2d 896 (1947) (tracing the origin of the phrase “right to privacy”).

protections of the Fourth Amendment and Const. art. 1, s 7 are seriously eroded.” White, 97 Wn.2d at 112 (emphasis added).

Thus, pursuant to White, the inquiry when considering whether the exclusionary rule applies is: was the defendant’s right to privacy under article I, § 7 unreasonably violated?

In practice, this is a high standard and in most cases an illegal search will be an unreasonable violation of a privacy right. For example, it would be unreasonable for an officer to fail to follow existing case law governing a search or seizure. Evidence obtained in that circumstance will be, and has always been, suppressed (absent some other exception to the exclusionary rule). Likewise, in White, the Court determined that the defendant’s right to privacy was unreasonably violated because the statute for which he was arrested was grossly and flagrantly unconstitutional and that it was unreasonable for an officer not to recognize this fact.

By contrast, in the present case there was nothing unreasonable about the reliance by law enforcement on the numerous judicial opinions of this Court that specifically approved vehicle searches incident to arrest. Indeed, these opinions controlled the officer’s actions at the time of the search. As Division I recently observed in State v. Riley:

*Judicial doctrine is no less binding on police officers than are statutes.* The same concern noted by the DeFillippo court that officers not speculate on the constitutionality of

statutes applies equally to case law announced by the judiciary. As we indicated earlier in this opinion, following Belton, it has long been the law in Washington that officers may search unlocked portions of the passenger compartment of a vehicle even though the defendant is secured in the patrol car. *This is not a situation in which the case law authorizing the arrest was "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."* Indeed, no one argues that Gant was not a clear break from established precedent. As the State points out, *the case law permitting the search in this case is not even an untested law like those involved in DeFillippo, Brockob, and Potter. It is a doctrine that has been endorsed and reaffirmed by the state and federal courts for over 20 years.*

. . . . Applying the good faith exception recognizes that officers must comply with judicial decisions dictating their rights and responsibilities in the field. *To rule otherwise would raise the spectre of police officers reaching their own conclusions about the wisdom and validity of judicial rulings*

Riley, 2010 WL 427118 at 7 (footnotes omitted, emphasis added).

Further, examining the article I, § 7 analysis of White in more detail, it is clear that the Court was rejecting a specific interpretation of the good faith exception to the exclusionary rule: to wit, that an officer's *subjective* good faith (i.e., his personal belief or opinion as to the validity of the search) is sufficient to circumvent the exclusionary rule. The Court in White believed that the subjective test was the rule applied by the federal courts.

For example, in support of this conclusion that the good faith rule was unworkable, White stated:

The officer's "good faith" in Michigan v. DeFillippo. . . required a showing only that he enforced a presumptively valid statute in the good faith belief it was valid. The incorporation of a *subjective good faith test* is unworkable in situations not directly addressed by Chief Justice Burger's opinion.

White, 97 Wn.2d 107, n.6 (citation omitted, emphasis added).

The Court in White repeated this point toward the end of its opinion, in slightly different language: "(W)e can no longer permit it (the right to privacy) to be revocable *at the whim of any police officer* who, in the name of law enforcement itself, chooses to suspend its enjoyment."

White, 97 Wn.2d at 112 (quoting Mapp v. Ohio, 367 U.S. 643, 660, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (emphasis added)).

The State agrees that an officer's subjective belief as to the validity of the search or seizure is irrelevant and is not a basis to vitiate the exclusionary rule.<sup>8</sup> Leaving aside whether a subjective good faith test was ever the rule adopted by the federal courts under the Fourth Amendment,

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<sup>8</sup> Both *amicus* and petitioner place heavy reliance on two cases, Morse and Eisfeldt, that simply reiterate that an officer's subjective belief cannot be used to validate a warrantless search. *Amicus* Brief, p. 6; Petitioner's Second Supp. Brief, p. 6-11. Both cases simply refer back to White for this proposition. See State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005) (citing White, 97 Wn.2d at 92). See State v. Eisfeldt, 163 Wn.2d 628, 639, 185 P.3d 580, 586 (2008) (citing Morse, 156 Wn.2d at 9 (citing White, 97 Wn.2d at 92)).

Neither Morse nor Eisfeldt helps petitioner's argument because the State has never argued, and indeed does not agree, that an officer's *subjective* belief is enough to either justify an illegal search or to invoke the good faith exception to the exclusionary rule.

*it is not now the rule under the federal constitution and is not the test that should be applied under article I, § 7.*

That the federal courts employ an objective test is made clear by the recent United States Supreme Court opinion in Herring v. United

States:

The pertinent analysis of deterrence and culpability is *objective, not an “inquiry into the subjective awareness of arresting officers,” . . . . We have already held that “our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal” in light of “all of the circumstances.”*

Herring v. United States, \_\_\_ U.S. \_\_\_, 129 S. Ct. 695, 703, 172 L. Ed. 2d 496 (2009) (citations omitted, emphasis added); see also United States v. Leon, 468 U.S. 897, 906, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); United States v. McCane, 573 F.3d 1037, 1044-45 (10<sup>th</sup> Cir., 2009) (“The refrain in Leon and the succession of Supreme Court good-faith cases is that the exclusionary rule should not be applied to ‘objectively reasonable law enforcement activity.’”).

The State agrees with the Court’s conclusion in White that a subjective test in determining whether the good faith exception applies is unworkable and inappropriate. Rather, the test for evaluating good faith should be whether the officer’s actions were *objectively reasonable*. This is entirely consistent with White’s emphasis that the exclusionary rule

should be enforced whenever privacy rights are unreasonably violated and with its rejection of a subjective good faith test.

**D. THE GOOD FAITH EXCEPTION IS THE REMEDY GIVEN RETROACTIVE APPLICATION OF GANT.**

*Amicus* also contends that application of the good faith exception to the exclusionary rule will undermine the retroactivity doctrine. This argument fails because it confuses the underlying violation with the remedy. This is the conclusion adopted by the Tenth Circuit in United States v. McCane, 573 F.3d 1037, 1045, n.5 (10<sup>th</sup> Cir., 2009):

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).

Other courts have reached the same conclusion as McCane. See e.g., United States v. Grote, 2009 WL 2068023 (E.D.Wash 2009) (holding that good faith exception applies as an alternative basis to deny defendant's motion for reconsideration of trial court ruling that evidence found following a pre-Gant arrest remains admissible after Gant ), and United States v. Allison, 637 F.Supp.2d 657, 666 (S.D.Iowa 2009) (holding that the exclusionary rule does not apply where deputy relied on pre-Gant case law), and United States v. Owens, 2009 WL 2584570 (N.D.Fla. Aug.20, 2009) (denying motion to suppress based on good faith exception to the exclusionary rule), and United States v. Lopez, 2009 WL 2840490 (E.D. Ky. Sept 1, 2009) (agreeing with McCane's analysis).

Some courts have declined to apply the good faith exception. See State v. Gonzales, 578 F.3d 1130 (9<sup>th</sup> Cir., August 24, 2009); State v. McCormick, \_\_\_ Wn. App. \_\_\_, 216 P.3d 475 (Div. II, Sept. 23, 2009); United States v. Buford, 623 F.Supp.2d 923, 925 (M.D.Tenn.2009) (granting motion to suppress evidence found after a pre-Gant arrest); and People v. Arnold, 394 Ill.App.3d 63, 81, 333 Ill.Dec. 331, 914 N.E.2d 1143 (2009) (affirming trial court suppression of evidence obtained

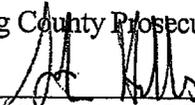
following a pre-Gant arrest). The State submits that the cases that have declined to apply the good faith exception, and in particular Gonzales (upon which many of the other cases rely), are flawed for precisely the reason set forth in McCane: they fail to ask what the remedy should be upon the retroactive application of Gant.

The Washington Court of Appeals, Division I, has recently conducted an in-depth analysis of this issue. See State v. Riley, 2010 WL 427118, 2-4 (2010). The Court of Appeals concluded that: “we remain faithful to Griffith when we retroactively apply the rule announced in Gant to hold that [the officer] violated the Fourth Amendment even though he was relying on existing case law. And we also remain faithful to the ‘integrity of judicial review’ principle relied on by Griffith by applying current good faith exception law to the case before us.” Riley, 2010 WL 427118 at 4. The State respectfully requests that this Court adopt Division I’s well-reasoned analysis of this issue as set forth in State v. Riley.

DATED this 17<sup>th</sup> day of February, 2010.

Respectfully submitted,

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AMICUS CURIAE, in STATE v. CORYELL ADAMS, Cause No. 82210-7, in  
the Supreme Court for the State of Washington, directed to:

DANA LIND at LindD@nwattorney.net (attorney for petitioner)

DOUGLAS KLUNDER at klunder@aclu-wa.org (attorney for amicus curiae)

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

  
Name \_\_\_\_\_

Done in Seattle, Washington

Feb. 12<sup>th</sup>, 2010  
Date \_\_\_\_\_