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STATE OF WASHINGTON

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No. 82600-5

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK J. AFANA,

Petitioner.

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SUPREME COURT
STATE OF WASHINGTON
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**AMICI CURIAE BRIEF OF
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
and
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS**

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ORIGINAL

TABLE OF CONTENTS

INTEREST OF <i>AMICI CURIAE</i>	1
ISSUE TO BE ADDRESSED BY <i>AMICI</i>	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	3
A. This Court Has Never Recognized a “Good Faith” Exception to the Exclusionary Rule	5
B. Article 1, Section 7 Mandates Exclusion of Evidence Obtained Through Violating Constitutional Privacy Rights	7
C. The State’s Proposed Exception to the Exclusionary Rule Would Undercut the Principle of Retroactive Application.....	10
CONCLUSION.....	12

TABLE OF AUTHORITIES

State Cases

<i>In re Pers. Restraint of St. Pierre</i> , 118 Wn.2d 321, 823 P.2d 492 (1992).....	10
<i>State v. Afana</i> , 147 Wn. App. 843, 196 P.3d 770 (2008).....	2
<i>State v. Boland</i> , 115 Wn.2d 571, 800 P.2d 1112 (1990).....	9, 10
<i>State v. Bonds</i> , 98 Wn.2d 1, 653 P.2d 1024 (1982).....	8, 9
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	7
<i>State v. Canady</i> , 116 Wn.2d 853, 809 P.2d 203 (1991).....	6
<i>State v. Coates</i> , 107 Wn.2d 882, 735 P.2d 64 (1987).....	6
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008).....	6
<i>State v. Gaines</i> , 154 Wn.2d 711, 116 P.3d 993 (2005).....	6, 10
<i>State v. Groom</i> , 133 Wn.2d 679, 947 P.2d 240 (1997).....	6
<i>State v. Morse</i> , 156 Wn.2d 1, 123 P.3d 832 (2005).....	6, 8
<i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	6
<i>State v. Patton</i> , ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3384578 (2009).....	3, 4, 11
<i>State v. Potter</i> , 156 Wn.2d 835, 132 P.3d 1089 (2006).....	7
<i>State v. Smith</i> , 119 Wn.2d 675, 835 P.2d 1025 (1992).....	6
<i>State v. White</i> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	5, 7, 8
<i>State v. Winterstein</i> , ___ Wn.2d ___, ___ P.3d ___, 2009 WL 4350257 (2009).....	passim

Federal Cases

Arizona v. Gant, 556 U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485
(2009)..... passim

Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d
649 (1987)..... 10

Michigan v. Defillippo, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d
343 (1979)..... 5

Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377
(1984)..... 5, 6

Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067
(1976)..... 9

United States v. Gonzalez, 578 F.3d 1130 (9th Cir. 2009) 4, 11, 12

United States v. Johnson, 457 U.S. 537, 102 S. Ct. 2579, 73 L. Ed.
2d 202 (1982)..... 10, 11

United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d
677 (1984)..... 5, 6

United States v. McCane, 573 F.3d 1037 (10th Cir. 2009)..... 4

Other Authorities

B. Rosenow, ed., *The Journal of the Washington State
Constitutional Convention 1889* (1962) 7

Constitutional Provisions

U.S. Const. amend. IV passim

Wash. Const. art. 1, § 7..... passim

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

The Washington Association of Criminal Defense Lawyers (“WACDL”) is a nonprofit association of over 1100 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL’s objectives include “to protect and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and to resist all efforts made to curtail such rights.” WACDL has filed numerous *amicus* briefs in the Washington appellate courts.

ISSUE TO BE ADDRESSED BY *AMICI*

Whether Article 1, Section 7 mandates the exclusion of evidence obtained through an unconstitutional and warrantless search, regardless of whether the searching officer acted in “good faith.”

STATEMENT OF THE CASE

In the early morning of June 13, 2007, Mark Afana and a woman were in a legally parked car when they were approached by Deputy Miller and asked for identification. The deputy wrote down their names and suggested they go elsewhere. As Afana began to pull away, the deputy discovered an outstanding misdemeanor warrant for the passenger. Deputy Miller stopped the vehicle, arrested the passenger, searched the car incident to arrest, and discovered drugs. Afana was charged with possession, and moved to suppress the evidence, claiming the initial request for identification was a suspicionless seizure (not a “social contact”). The trial court suppressed the evidence, but the Court of Appeals reversed, holding that an officer may approach a person in a parked car and ask for identification even though the officer has no suspicion of wrongdoing. *See State v. Afana*, 147 Wn. App. 843, 196 P.3d 770 (2008).

While Afana’s Petition for Review was pending, the United States Supreme Court issued an opinion changing the treatment of vehicle searches incident to arrest under the Fourth Amendment. *Arizona v. Gant*, 556 U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Afana’s Petition was granted by this Court, and the parties were directed to submit briefing on the effect of *Gant*. Subsequent to the filing of that briefing, this Court

further limited vehicle searches incident to arrest under Article 1, Section 7. *State v. Patton*, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3384578 (2009).

ARGUMENT

Vehicles may be searched incident to the arrest of an occupant under Article 1, Section 7 only if “the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.” *State v. Patton*, 2009 WL 3384578 at 1; *see also Arizona v. Gant*, 129 S. Ct. at 1723 (allowing searches under the Fourth Amendment “only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”)

It is clear that the search of Afana’s car was unconstitutional. There is no evidence that Deputy Miller had any concern for officer safety or feared destruction of evidence (which he could not reasonably expect to find for the outstanding misdemeanor warrant anyway). And Afana’s passenger was secured in the patrol car prior to the search. Although the State continues to vigorously assert that Deputy Miller was authorized to request identification from the legally parked car’s occupants during the

initial encounter,¹ it makes no attempt to justify the subsequent search of Afana's vehicle under the *Gant/Patton* rule.

Instead, the State asks this Court to create an exception to the exclusionary rule, allowing the admission of evidence obtained from an unconstitutional search if the search was made by an officer complying in good faith with case law in effect at the time of the search. Such an exception has already been rejected under the Fourth Amendment. *See United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009) (rejecting application of the Fourth Amendment good faith exception to exclusion of evidence obtained in circumstances virtually indistinguishable from the current case, a pre-*Gant* vehicle search incident to arrest); *but see United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009). The State's request must also be rejected in accordance with the text, history, and policy of Article 1, Section 7, which mandates an almost-absolute exclusionary rule,

¹ The State asks the Court to hold that officers may request occupants of a legally parked vehicle to identify themselves, even when it is clear they do not need assistance and there is no reasonable suspicion of wrongdoing. Respondent's Supplemental Brief at 3-9. The Court need not examine that question, since it is undisputed that the subsequent search was illegal, regardless of the legality of the request for identification. If the Court nonetheless decides to consider the merits of the issue, *amici* respectfully request the Court to strictly constrain so-called "social encounters." The only way to ensure that such encounters are truly consensual is for the officer to clearly inform individuals of their right to refuse consent, for the reasons discussed in the argument submitted by *amicus* ACLU to this Court in *State v. Harrington*, No. 81719-7, incorporated herein by reference.

far stronger than that required by the Fourth Amendment. *See, e.g., State v. Winterstein*, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 4350257 (2009).

A. This Court Has Never Recognized a “Good Faith” Exception to the Exclusionary Rule

Beginning roughly thirty years ago, the United States Supreme Court has adopted a number of exceptions to the exclusionary rule under the Fourth Amendment. *See, e.g., Michigan v. DeFillippo*, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979) (arrest under presumptively valid ordinance remains valid when ordinance is later found unconstitutional); *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (“good faith” reliance on defective search warrant); *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (hypothetical “inevitable discovery” of evidence if illegal conduct had not occurred).

This Court, when interpreting Article 1, Section 7, has resolutely refused to follow the United States Supreme Court’s moves to limit the exclusionary rule under the Fourth Amendment. First came *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982), squarely rejecting *DeFillippo’s* rule under Article 1, Section 7. *White* was one of this Court’s earliest cases “interpret[ing] Const. art. 1, 7 more expansively than the Fourth Amendment,” *id.* at 108, and emphasized that the exclusionary rule

mandated by Article 1, Section 7 goes well beyond that mandated by the Fourth Amendment.

The rejection of *Nix* and *Leon* has been slower, but inexorable. For decades, this Court declined to find an inevitable discovery exception under Article 1, Section 7, instead noting that it remained an open question. *See, e.g., State v. Coates*, 107 Wn.2d 882, 887, 735 P.2d 64 (1987); *State v. Smith*, 119 Wn.2d 675, 684 n. 5, 835 P.2d 1025 (1992); *State v. O'Neill*, 148 Wn.2d 564, 592 n. 11, 62 P.3d 489 (2003); *State v. Gaines*, 154 Wn.2d 711, 716 n. 5, 116 P.3d 993 (2005). Eventually, however, *Nix* and the inevitable discovery exception were explicitly rejected under Article 1, Section 7. *See Winterstein*, 2009 WL 4350257 (2009).

Similarly, the question of a good faith exception under Article 1, Section 7 putatively remains open. *See, e.g., 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 Wash.2d 1, 9-10, 123 P.3d 832 (2005). The tenor of the most recent discussions, however, leaves little doubt that a good faith exception is incompatible with Article 1, Section 7. *See State v. Eisfeldt*, 163 Wn.2d 628, 639 n. 10, 185 P.3d 580 (2008) (“The Fourth Amendment, unlike article I, section 7, allows good-faith exceptions to the warrant requirement.”).

Despite the weight of this history, the State nonetheless urges the adoption of a good faith exception under Article 1, Section 7. It uses a strained reading of two cases, *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), to claim that *White* was a narrow decision limited to its facts, rather than providing broad support for a robust exclusionary rule. Respondent's Supplemental Brief at 15-19. The State's view was decisively rejected in the recent *Winterstein* decision, which repeatedly cites *White* for the proposition that Article 1, Section 7 mandates a strong exclusionary rule, without limitation to any particular circumstances. *See Winterstein*, 2009 WL 4350257 at 6-8.

Amici respectfully request this Court to remove whatever doubt remains by explicitly rejecting any good faith exception in this case.

B. Article 1, Section 7 Mandates Exclusion of Evidence Obtained Through Violating Constitutional Privacy Rights

This Court's respect for the state exclusionary rule is well supported by the history and text Article 1, Section 7. The framers of the Washington Constitution deliberately rejected the limited language of the Fourth Amendment, and instead chose the broad language of Article 1, Section 7. *See* B. Rosenow, ed., *The Journal of the Washington State Constitutional Convention 1889* at 497 (1962). Article 1, Section 7 reads,

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Unlike the Fourth Amendment, there is no mention of reasonableness. “In short, while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article I, section 7 we focus on expectations of the people being searched.” *Morse*, 156 Wn.2d at 10; *see also White*, 97 Wn.2d at 110 (“the emphasis is on protecting personal rights rather than on curbing governmental actions”). Since the entire basis of the State’s requested good faith exception is whether the police acted reasonably (“in good faith”) under the circumstances, there is no place for such an exception under Article 1, Section 7.

The difference in federal and state constitutional privacy provisions leads naturally also to a difference in the exclusionary rule under each provision, as the purposes of exclusion are different. Article 1, Section 7 gives rise to three purposes for exclusion of unconstitutionally obtained evidence: “first, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means.” *State v. Bonds*, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982). In contrast, the federal exclusionary rule has

only one purpose, “the deterrence of police conduct that violates Fourth Amendment rights.” *Stone v. Powell*, 428 U.S. 465, 486, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976) (disclaiming the other two state purposes, remedying privacy violations and maintaining judicial integrity).

Significantly, *Bonds* established that the *primary* purpose of the state exclusionary rule is the vindication of individual privacy rights. This Court has consistently adhered to that ever since, most recently reaffirming that the federal emphasis on deterrence “is at odds with the plain language of article I, section 7, which we have emphasized guarantees privacy rights with no express limitations.” *Winterstein*, 2009 WL 4350257 at 8. Deterrence of future police misconduct is certainly a valuable goal of exclusion, but it is insufficient to remedy violations of privacy rights that have already occurred. Accordingly, even accepting the State’s argument that there was no police misconduct here to deter, exclusion of the evidence is nonetheless necessary to protect Afana’s privacy rights.

This Court has recognized “the mandatory nature of the exclusionary rule in cases where a person's privacy rights under Const. art. 1, § 7 have been violated.” *State v. Boland*, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990). It applies no matter what the cause of the violation of privacy was, whether due to officer misconduct, judicial error, or good faith

misinterpretation of the law; “violation of a constitutional immunity automatically implies exclusion of the evidence seized.” *Id.* It can be argued that the independent source doctrine is an exception to the mandatory exclusionary rule. *See, e.g., Gaines*, 154 Wn.2d at 711. This Court, however, has recently explained that there is no contradiction. Under the independent source doctrine, all that is admitted is the evidence legally gathered by the second source; “the tainted evidence, however, is suppressed.” *Winterstein*, 2009 WL 4350257 at 7. There is no similar justification for a good faith exception to the exclusionary rule, which would admit evidence that was, in fact, unconstitutionally seized.

C. The State’s Proposed Exception to the Exclusionary Rule Would Undercut the Principle of Retroactive Application

A decision construing constitutional privacy protections in criminal cases “is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.” *United States v. Johnson*, 457 U.S. 537, 562, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982). The United States Supreme Court has clarified that retroactivity must apply even when the new rule, as in *Gant*, is a “clear break” with the past. *Griffith v. Kentucky*, 479 U.S. 314, 326-28, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); *see also In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992).

The State purports to accept that the rule of *Gant* (and presumably *Patton* as well) must be applied to all currently pending cases, including the present one. Respondent's Supplemental Brief at 10. Creation of a good faith exception based on previous case law, however, would make a mockery of the rule of retroactivity. The State's argument is little different than that advanced by the Government in its opposition to retroactivity back in 1982, claiming "that new Fourth Amendment rules must be denied retroactive effect in all cases except those in which law enforcement officers failed to act in good-faith compliance with then-prevailing constitutional norms." *Johnson*, 457 U.S. at 559. The United States Supreme Court rightly dismissed the argument, recognizing that it

would reduce its own "retroactivity test" to an absurdity. Under this view, the only Fourth Amendment rulings worthy of retroactive application are those in which the arresting officers violated pre-existing guidelines clearly established by prior cases. But as we have seen above, cases involving simple application of clear, pre-existing Fourth Amendment guidelines raise no real questions of retroactivity at all. Literally read, the Government's theory would automatically eliminate all Fourth Amendment rulings from consideration for retroactive application.

Id. at 560.

The State's argument should fare no better today. The Ninth Circuit has already rejected it under the Fourth Amendment in a post-*Gant* case similar to the present one. *See United States v. Gonzalez*, 578 F.3d

1130 (9th Cir. 2009). Besides the logical inconsistency of the argument, the Ninth Circuit also recognized that it would result in disparate treatment of similarly situated defendants. The evidence in *Gant* itself was automatically suppressed once the search was deemed unconstitutional; there was no justification for treating *Gant* specially and refusing the same benefit to other defendants in the same situation. *Id.* at 1132-33. Since Article 1, Section 7 provides greater privacy protection than the Fourth Amendment, it cannot allow the exception requested by the State, undercutting both the exclusionary rule and the retroactivity rule.

CONCLUSION

For the foregoing reasons, the ACLU and WACDL respectfully request the Court to hold that Article 1, Section 7 mandates the exclusion of evidence obtained as a result of the unconstitutional search of Afana's vehicle.

Respectfully submitted this 11th day of December 2009.

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