

94054-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN DEAN VANHOLLEBEKE, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF ADAMS COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUE PRESENTED

1. Whether the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution allow law enforcement officers to obtain the consent to search a vehicle from the vehicle's bailor-owner even where a gratuitous bailee objects?
2. Whether this Court should adopt a rule under the Washington Constitution that deviates from federal jurisprudence where the defendant has never presented a *Gunwall* analysis for these specific circumstances?

II. STATEMENT OF THE CASE

On November 10, 2014, Sergeant Aaron Garza of the Othello Police Department was on patrol when he observed a vehicle stopped at an intersection, facing the wrong way on a one-way street. RP 8-10; CP 34. The sergeant pulled the truck over and the defendant, Justin Vanhollebeke, stepped out of the driver's side door. RP 10-12, 16. Garza ordered the defendant to remain in the truck; the defendant briefly complied. RP 12-13. As Garza approached the truck, Vanhollebeke again emerged. RP 14. Once more, Garza ordered Vanhollebeke to get back into the truck, but Vanhollebeke stated he had locked himself out. RP 14-15; CP 34. Dispatch advised that defendant's driver's license was suspended. RP 18; CP 35.

While Garza began to write Vanhollebeke a citation for driving while license suspended, another deputy performed a safety sweep of the locked truck. RP 21-22. The deputy saw in plain view, a glass pipe with a white crystal substance, and the truck's ignition had been "punched."

RP 22, 25-26; CP 35. Based on this information, Garza believed that Vanhollebeke may have committed a controlled substances crime or a vehicle theft offense. RP 28. The officers asked Vanhollebeke for consent to search the truck. RP 28. Vanhollebeke refused. RP 28. Dispatch advised that the truck was registered to Bill Casteel. RP 28-29; CP 35. When Garza was unable to reach the owner by telephone, one of the other deputies then drove to Casteel's home in nearby Hatton, Washington. RP 29-30, 107-108; CP 35.

Casteel told the deputy that Vanhollebeke had permission to use the truck.¹ However, Casteel was concerned about the possible presence of drug paraphernalia in the car and was "disgusted" that police had been required to stop his vehicle. RP 109-110. The deputy advised Casteel that the truck could be impounded and searched, but asked for his permission to search it at the scene. RP 110; CP 35. Casteel gave the deputy a key to the truck and agreed to the search. RP 32, 110. Because Casteel was ill, he declined the deputy's invitation to accompany him back to the truck. RP 110; CP 35.

The deputy returned to the truck and advised Garza that Casteel gave consent for the search without his presence. RP 32, 111. Garza used Casteel's key to unlock the truck. RP 33. The search of the passenger

¹ The trial court found that the defendant's interest in the truck was "permissive" and "pursuant to an oral agreement between himself and the registered owner." CP 35.

compartment of the truck yielded a loaded revolver under the driver's seat and the previously-observed glass pipe which tested positive for methamphetamine. RP 33, 36, 45. Dispatch advised that the defendant was a convicted felon. RP 77-78.

The State charged the defendant with first degree unlawful possession of a firearm. CP 3-4. Vanhollebeke moved to suppress the physical evidence, averring that his refusal of consent rendered the officers' search of the truck unconstitutional. CP 5-23. The trial court denied the defendant's motion and he was convicted. CP 36-37. The Court of Appeals determined that Vanhollebeke's legitimate privacy interest in the truck could be overridden by one with a superior interest, that is, the registered owner. *State v. Vanhollebeke*, 197 Wn. App. 66, 387 P.3d 1103 (2016).

III. ARGUMENT

A. THE FEDERAL AND STATE CONSTITUTIONS PERMIT A GRATUITOUS BAILOR OF A VEHICLE TO OVERRIDE A NONCONSENTING BAILEE'S OBJECTION TO A SEARCH.

1. The Fourth Amendment and article 1, section 7 both require the State to demonstrate that a third-party consentor to a search has common authority over the place to be searched.

A search conducted pursuant to voluntary consent remains one of the "few specifically established and well-delineated exceptions" to the fundamental rule that a search conducted without a warrant is "per se unreasonable." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507,

19 L.Ed.2d 576 (1967). Consent which is effective to validate a warrantless search may be given by a third-party under certain circumstances. *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969); *Schneekloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). “In such a case, the third party is permitting others to do no more than the third party may do on his own, i.e., inspect the premises or effects.” *People v. Blair*, 321 Ill. App. 3d 373, 380, 748 N.E.2d 318 (2001).

In *Matlock*, the United States Supreme Court addressed a case in which a co-tenant of a residence gave law enforcement consent to search the shared residence and bedroom which was jointly occupied by the defendant and her. 415 U.S. at 166. The question presented was whether the co-tenant’s relationship to the bedroom was sufficient to make her consent to the search valid against the defendant. *Id.* at 167. In answering that question in the affirmative, the Court stated that the “consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.” *Id.* at 170. The Court described common authority as:

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, *but rests rather on mutual use of the property by persons generally having*

joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 171 n.7 (emphasis added) (internal citations omitted).

This Court adopted the *Matlock* standard in *State v. Mathe*, 102 Wn.2d 537, 688 P.2d 859 (1984), for third-party consent issues under the Washington State Constitution.² The *Mathe* court reiterated that the proper inquiry under the common authority rule is (1) whether the consenting party was able to permit the search in question in his own right and (2) whether it is reasonable to find that the defendant assumed the risk that the consenting party might permit a search. *Id.* at 543-544.

This Court then revisited the issue in *State v. Cantrell*, 124 Wn.2d 183, 875 P.2d 1208 (1994), a case in which the passenger of a vehicle, whose parents owned the car, consented to a search; the Court held that the rule announced in *State v. Leach*, 113 Wn.2d 735, 782 P.2d 1035 (1989), which requires police to obtain the consent of *all present co-*

² Although we have not expressly adopted the *Matlock* test ... [w]e believe this rule best balances the interest of the police in conducting searches and our citizens' right to privacy in their homes. We will, therefore, adopt the common authority standard, described in *Matlock*, as the proper guide to determine test questions of consent issues under Const. art 1, § 7.

Mathe, 102 Wn.2d at 543.

occupants of a residence prior to conducting a warrantless search, does not apply to vehicle searches.

While there is a privacy interest in an automobile, the interest does not rise to the level of a person's expectation of privacy in a residence. There is less expectation of privacy in an automobile than in either a home or an office. Since a person enjoys a lesser expectation of privacy in a vehicle than in an office or a home, we decline to extend the rule enunciated in *State v. Leach*, 113 Wn.2d 735, 782 P.2d 1035 (1989) to vehicle searches. No adequate independent state grounds are advanced in this case to support extending the *Leach* rule to motor vehicles, and, for the reasons which follow, such a result is not mandated by federal law.

Cantrell, 124 Wn.2d at 190. Citing *Matlock*, *Schneckloth*, and a host of other federal cases, this Court determined that the Fourth Amendment does not require all occupants of a motor vehicle to independently consent to the search of the vehicle – the consent of one with common authority is sufficient to support a search. *Id.* at 192.

In *Georgia v. Randolph*, the United States Supreme Court announced a Fourth Amendment rule similar to *Leach* – a physically present inhabitant's stated refusal of a consent search is unreasonable and invalid as to him, even where another co-occupant consents. 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). *Randolph's* limited applicability was acknowledged by the High Court in *Fernandez v. California*, ___ U.S. ___, 134 S.Ct. 1126, 188 L.Ed.2d 25 (2014). The Court reasoned that

when a co-tenant is present and objects to a visitor's entry in a home, social expectations require the exclusion of the visitor.

Unless the people living together fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades, there is no social understanding of superior and inferior, a fact reflected in a standard formulation of domestic property law that, '[e]ach cotenant ... has the right to use and enjoy the entire property as if he or she were the sole owner limited only by the same right in the other cotenants.'

Randolph, 547 U.S. at 114 (internal citation omitted). With co-tenants, where a social hierarchy exists, however, the United States Supreme Court recognized that the hierarchy bears on the privacy expectations of the parties' involved. *Id.*

As discussed above, the Fourth Amendment and article 1, section 7 frameworks for third-party consent operate in unison, except in limited circumstances.³ The framework for third-party consent analysis adopted in *Mathe* remains the proper inquiry under the Washington State Constitution. The holding in *Vanhollebeke* does not deviate from this framework. The narrow rule announced in *Randolph*, and formerly in *Leach*, does not apply

³ In *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), the United States Supreme Court held that, even if a third-party lacked common authority to consent to the search of another's property, the Fourth Amendment is not violated if the police *reasonably believed* the consent was valid. However, in *State v. Morse*, this Court adopted a rule that the third-party must have *actual authority* to consent. This Court stated, "common authority under article 1, section 7 is grounded upon the theory that when a person, by his actions, shows that he has willingly relinquished some of his privacy, he may also have impliedly agreed to allow another person to waive his constitutional right to privacy." 156 Wn.2d 1, 8, 123 P.3d 832 (2005). Article 1, section 7 does not inquire into the reasonableness of a search as does the Fourth Amendment. *Id.* at 9-10.

to vehicle searches as already determined by this Court in *Cantrell* because of the differing societal expectations associated with physically present co-tenants of residences and co-users of motor vehicles.

2. A gratuitous bailor has actual and common authority over chattel in possession of a bailee, and can override a bailee's express refusal to consent to a search of the goods because the bailor has a superior property interest in those goods.

The Court of Appeals observed that Vanhollebeke agreed that Casteel had common authority over his vehicle. *Vanhollebeke*, 197 Wn. App. at 73. This determination alone, should end the inquiry, as a person with common authority over a place or thing generally can give third-party consent except as in *Randolph* and *Leach*, where an objecting *tenant is present at a residence* at the time of the desired search. As further discussed below, the rule in *Randolph* and *Leach* is inapplicable to bailed vehicles or other loaned goods because there is no societal expectation that a gratuitous bailee can exclude the owner of bailed goods from the property.

As above, the proper inquiry in third-party consent cases is whether the consenting party had common authority over the place to be searched, i.e., whether he or she had actual authority to permit the search in his or her own right and whether the defendant assumed the risk that he or she would permit the search. While the question of whether a defendant has a reasonable expectation of privacy does not turn *solely* on property law, an

understanding of property law is necessary to evaluate a party's (and the public's) legitimate expectations of privacy in real or personal property. Pertinent to this case is the law of bailments.

As a general rule, a bailment is a consensual transaction. *Collins v. Boeing Co.*, 4 Wn. App. 705, 710-11, 483 P.2d 1282 (1971). "The bailor intentionally delivers possession of his goods to the bailee and the latter accepts the same with a real or a presumed knowledge of the responsibility entailed thereby." *Collins*, 4 Wn. App. at 710. The bailor retains ownership of the property. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 432, 788 P.2d 1096 (1990). A bailment for the sole benefit of the bailee is terminable whenever the bailor chooses to do so. 8 C.J.S. Bailments § 120. On termination of the bailment, the bailor is entitled to immediately resume possession of the bailed property. 8 C.J.S. Bailments § 121. A bailment may also be terminated by agreement or conduct.⁴ 8 C.J.S. Bailments § 118.

With this understanding, the next question is whether Vanhollebeke had a legitimate societal expectation that he could exclude owner Casteel from the truck. Courts that have evaluated similar circumstances have determined that while a bailee of a vehicle has an expectation of privacy in a bailed vehicle against the rest of society, such that he or she may refuse to

⁴ A bailment may be terminated by any act of the bailee which is inconsistent or which tends to defeat the bailor's right to the property. 8 C.J.S. Bailments § 118.

give consent to a search by law enforcement, that expectation does not preclude a gratuitous bailor-owner of the vehicle, who has a superior interest in the vehicle, from *overriding* that refusal. *See* 4 W. LAFAVE, SEARCH AND SEIZURE § 8.6(b) (Consent by bailor) (5th ed. 2012) (“There are other, less formal bailment arrangements in which it is apparent the owner can more easily reclaim possession and thus give effective consent”).

For instance, in *Anderson v. U.S.*, 399 F.2d 753 (10th Cir. 1968), a pre-*Matlock* decision, the defendant, a suspect in a bank robbery, was driving a borrowed vehicle, and, upon being stopped by police, indicated he had no driver’s license, or other identification, and refused to tell officers his name. *Id.* at 754. The owner of the vehicle gave consent for law enforcement to search the car. *Id.* Numerous items associated with the robbery were located inside the vehicle pursuant to the search. *Id.*

The defendant moved to suppress the evidence, contending that the search was unreasonable. The Tenth Circuit recognized that the Fourth Amendment is a “personal right with property right overtones.” *Id.* at 755. The court explained that, historically, third-party consent cases often hinged on the “quality of the property right” involved. *Id.* at 756. Noting that a trespasser cannot give binding consent to search against a homeowner, but a homeowner could give binding consent against a trespasser:

The holder of a right in property may give binding consent to a search as against a fellow property right holder where the consenting party is in possession when consent is given, if the consenting party had a property right equal or superior to the property right held by the absent bound party.

Anderson, 399 F.2d at 756. Finding the vehicle owner's right to the vehicle was superior to the defendant's because the owner was in possession or *had the right to possession of the vehicle*, the court affirmed the defendant's conviction. *Id.* at 757. This holding is consistent with *Matlock*, in that, in the absence of a contrary agreement, the social expectations of a bailee does not include the ability to exclude a gratuitous bailor from the property. Thus, such bailees assume the risk a gratuitous bailor-owner will permit a search.

In *Hardy v. Commonwealth*, 17 Va. App. 677, 440 S.E.2d 434 (1994), an officer observed Hardy, who had a suspended license, driving a vehicle. The officer placed Hardy under arrest when he emerged from an apartment, but found no car keys on him. *Id.* at 679. The officer learned the vehicle was registered to the defendant's brother-in-law. *Id.* The defendant's girlfriend gave the keys to the police; the brother-in-law arrived on scene and, telling officers he had loaned the car to Hardy for a few days, consented to a search. *Id.* Hardy protested the search. *Id.*

Applying *Matlock*, and citing *Anderson*, the Virginia Court of Appeals held that because the property right of the owner is superior to the possessory right and expectation of privacy the possessor has in the

borrowed vehicle, the owner may consent over the bailee's objection if, at the time of consent, the owner was "either in possession or *entitled to possession*" of the vehicle. *Id.* (emphasis added). The court stated:

An owner who allows another person to use his automobile retains ownership and the right to reclaim possession of the vehicle at will. *While a bailee may have an expectation of privacy in the borrowed vehicle, that privacy interest is subordinate to the owner's right to his vehicle and right to reclaim possession of the vehicle at any time.*

Throughout the bailment, [the owner] was "entitled to possession" ... When [the owner] arrived on the scene and gave his consent to search his vehicle, he had the right to reclaim possession. *When there is a bailment-at-will, the bailee in possession of property has an absolute duty to return it to the owner upon demand.*

Hardy, 17 Va. App. at 681-682 (emphasis added); *see also Fogg v. Commonwealth*, 31 Va. App. 722, 525 S.E.2d 596 (2000) ("Even [if Fogg] had standing as a bailee to object to the officer's searching the vehicle ... the search was nevertheless valid because the ... bailor[']s immediate bailee] ... consented to the search").⁵

⁵ The common authority rule also applies in bailments created by the defendant. In cases in which the owner of a vehicle expressly objects to a search, but creates a bailment by giving the vehicle to another person, courts have held that the bailor-defendant assumes the risk that the bailee will allow a search of that vehicle. *See e.g., Sevilla-Caracamo v. State*, 335 Ga. App. 788, 783 S.E.2d 150 (2016) (in creating a bailment, the defendant assumed the risk that the bailee would allow a search); *Welch v. State*, 93 S.W.3d 50 (Tex. 2002) ("LaFave also addresses automobile bailments specifically and notes that '[w]here possession of the car was given on the understanding that the bailee would subject it to general use, ... then the bailee may give effective consent to a search of those portions of the car which he could be expected to make use of.'" (Citing 3 W. LAFAVE, SEARCH AND SEIZURE § 8.6(a) (3d ed.1996))).

In *U.S. v. Jensen*, 169 F.3d 1044 (7th Cir. 1999), the defendant was suspected of defrauding a Best Buy store in Illinois. The defendant told officers that he purchased an item at a Best Buy in Colorado during a trip from California to Illinois in a vehicle owned by his stepfather. *Id.* at 1045. Police contacted the stepfather in California to verify that the defendant had permission to drive the car. *Id.* The owner asked if law enforcement could secure the vehicle rather than impound it. *Id.* The officer indicated that should law enforcement secure the vehicle, it would be searched for their protection; the owner agreed. *Id.* Based on the owner's permission, law enforcement inventoried the items within and discovered incriminating evidence. *Id.* Confronted with this evidence, the defendant confessed. *Id.*

The defendant later claimed that he did not abandon his privacy interest in the vehicle and that his interest was superior to that of his stepfather. *Id.* at 1048. In addressing the warrantless search, the Seventh Circuit Court of Appeals indicated that, at a minimum, the defendant and his stepfather had common authority over the vehicle. *Id.* Explaining that the foundation of third-party consent is assumption of risk that another will authorize a search, the court stated that “*a person who shares a car with another person understands that the partner may invite strangers into it,*”⁶

⁶ This social understanding vastly differs from the social understanding discussed in *Leach* and *Randolph*. Contrary to the understanding associated with vehicles, a person who shares

and that the privacy right is not absolute but contingent in large measure on the decisions of the other.” *Id.* at 1049 (emphasis added). The court affirmed the defendant’s conviction.⁷ *Id.*

In *U.S. v. Lumpkins*, 687 F.3d 1011 (8th Cir. 2012), the Eighth Circuit Court of Appeals visited a similar issue. The defendant was stopped in a vehicle with tinted windows. *Id.* at 1012. The defendant locked the keys inside the car. *Id.* An officer looked through the windows as a precaution, and observed marijuana. *Id.* The vehicle was registered to a rental agency. *Id.* at 1013. The defendant was not an authorized driver. *Id.* The authorized driver did not have a spare key and refused consent to search. *Id.* Officers contacted the rental agency, and a manager informed them the vehicle was overdue for return and that the agency had demanded it for several days. *Id.* The manager arrived on scene, unlocked the vehicle, and consented to the search; drugs and a handgun were located within. *Id.*

Looking to the rental agreement, which allowed the agency to repossess the vehicle without notice if it was used in violation of the law or of the contract, the court determined the agent had the authority to consent

a *residence* with another person would not understand that visitor would be permitted entry over his or her objection if he was present.

⁷ This opinion also discussed “apparent authority to consent,” which is an inappropriate analysis under article 1, section 7 of the Washington Constitution. *See* n.3, *supra*. However, the court first determined that notwithstanding the stepfather’s distance from the vehicle, he had common authority to consent, and the defendant assumed the risk of a search.

to the search. *Id.* at 1013. The court held that there is no “commonly held understanding” in society that a driver of an overdue rental car, on notice that the rental agency is entitled to repossess the vehicle at any time, nevertheless may exercise authority over the vehicle contrary to the reposessor’s.”⁸ *Id.* at 1014. This holding is consistent with the law of bailments as discussed above.⁹ The Court of Appeals’ holding below is also consistent, in that Vanhollebeke used Casteel’s vehicle in a manner adverse to Casteel’s rights as the property owner – the operation of a vehicle with a suspended license (while carrying drugs or weapons) could result in the expense of a tow and impound of the vehicle, which would ultimately be the responsibility of the registered owner to pay. *See* RCW 46.55.113, 46.55.120; WAC 204-96-010 (conferring reasonable discretion on arresting officers to impound vehicles driven by suspended drivers even if the driver is not the registered owner and requiring towing, removal and storage fees to be paid prior to redemption from impound.)

⁸ *But see e.g., State v. Rose*, 75 Wn. App. 28, 876 P.2d 925 (1994) (landlord had no authority to consent to search of *unexpired leased property*); *People v. Smith*, 67 Cal. App. 3d, 136 Cal. Rptr. 638 (1977) (court determined search conducted with airplane owner’s permission was unconstitutional because the plane was *rented* to the defendant, in the defendant’s lawful possession and control before the search, and the possession and control was never terminated by the owner of the airplane, either before or after the search.)

⁹ *But see, e.g., RCW 62A.2A-525* (limiting a lessor’s right to repossess goods under a lease contract in the absence of judicial process to only those situations where repossession may be made without breach of the peace).

This notion of generally recognized superior and inferior privacy rights and the expectations of the holders of those rights is one that was not only relied on by the Court of Appeals, below, but has also been used by other courts, including this Court, to determine whether common authority to consent was present in a given circumstance. *See State v. Copeland*, 399 S.W.3d 159, 165 (Tex. Crim. App. 2013) (declining to apply *Randolph*'s "fine line" rule to vehicle searches, stating, "the general expectations [of privacy] may be different in the case of a recognized hierarchy," and noting, "fluid events that may occur during a traffic stop make a decision about who, other than the driver, might control a vehicle unlike the more stagnant inquiry of a tenant who answers the door at a residence"); *State v. Vidor*, 75 Wn.2d 607, 610, 452 P.2d 961 (1969) ("We can agree that the father's 'house' may also be that of the child, but if a man's house is still his castle in which his rights are superior to the state, those rights should also be superior to the rights of children who live in his house"); *see also State v. Thompson*, 151 Wn.2d 793, 92 P.3d 228 (2004) (adult son living in trailer on parents' property rent free, whose use of a boathouse was "clearly dependent upon the permission of the owners" did not have equal control over the premises and could not permit the search in his own right).

Here, Casteel was the undisputed owner of the vehicle driven by Vanhollebeke. A bailment relationship was established wherein Casteel allowed Vanhollebeke the *permissive* use of the vehicle for an unknown amount of time. Because the bailment relationship was gratuitous, Casteel was able to repossess the truck or terminate its use at will. He did so by expressing concern and surprise that the truck was used to carry illicit materials, and he expressly consented to the search both verbally, and by giving the vehicle's keys to law enforcement. The fact that Casteel was not present for the search is irrelevant because Vanhollebeke, as the bailee of the vehicle, assumed the risk that Casteel, who had an extra set of keys to the car and could repossess at any time, would authorize the entry and search of the vehicle. Under *Matlock*, *Mathe* and *Cantrell*, Casteel possessed actual common authority and a superior interest in his vehicle, and Vanhollebeke assumed the risk that Casteel would authorize its search. The limited holdings in *Randolph* and *Leach* simply do not apply to the search of a gratuitously bailed vehicle because a bailee in such circumstances has no legitimate privacy expectation that he or she may exclude the bailor from conducting a search or authorizing another to do so, and in accepting the bailed goods for his or her own benefit, the bailee assumes the risk that the bailor will permit the search.

3. The holding of this case is limited to cases in which a gratuitous bailor permits a search of the common area of a vehicle or other chattel.

The holding in *Vanhollebeke*, below, is narrow, and is confined to searches of only the open passenger compartment of vehicles. It would likely also extend to other gratuitous bailments or joint use of chattel. *See Frazier*, 394 U.S. 731 (petitioner who jointly used duffel bag with another assumes the risk that another may be permitted to look inside). However, it does not extend to consent searches of homes because the societal expectations attendant to bailments are not applicable to residences. *See Leach*, 113 Wn.2d 735. The rule also does not extend to closed containers within a vehicle that are not readily identifiable as belonging to the vehicle's owner. *See, e.g., State v. Rison*, 116 Wn. App. 955, 69 P.3d 362 (2003), *review denied*, 151 Wn.2d 1008 (2004) (tenant's consent to search the apartment did not authorize the police to search a closed eyeglass case belonging to a guest); *State v. Friedel*, 714 N.E.2d 1231 (Ind. Ct. App. 1999) (vehicle owner's consent to search did not include consent to search passenger's purse within); *State v. Williams*, 48 Or. App. 293, 616 P.2d 1178 (1980) (vehicle owner's consent to search a vehicle driven by another was not effective to validate warrantless search of cassette tape case which was located in the vehicle in the absence of any suggestion that the owner had common authority over the tape case). Rather, the holding

only applies to searches where the consenting party has actual common authority to consent, the search is made only of the areas of general access or accessible to only the bailor, and no contract or other agreement between the bailor and bailee, such as a rental agreement, abrogates the rights of the bailor to reclaim the property at any time or otherwise gives the bailee a finite, but superior interest in the property at the time of the search.

B. THIS COURT SHOULD DECLINE TO ADOPT A NEW RULE UNDER THE WASHINGTON CONSTITUTION IN THIRD-PARTY CONSENT CASES AS VANHOLLEBEKE HAS NEVER BRIEFED THE *GUNWALL* FACTORS.

The Court of Appeals expressly declined to consider whether article 1, section 7 of the Washington Constitution provides greater privacy to a bailee of a motor vehicle than the Fourth Amendment. *Vanhollebeke*, 197 Wn. App. at 75 n.4. This Court generally declines to engage in an analysis of independent state constitutional grounds where a *Gunwall* analysis is not briefed by the parties. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986); *Cantrell*, 124 Wn.2d at 190 n.19.

... “Whether the Washington Constitution provides a level of protection different from the federal constitution *in a given case* is determined by reference to the six nonexclusive *Gunwall* factors.” (Italics ours.) ... Where the *Gunwall* factors are not adequately briefed..., this court will not consider whether the state constitution provides greater protection than that provided by the federal constitution under the circumstances presented.

Cantrell, 124 Wn.2d at 190 n.19 (internal citations omitted).

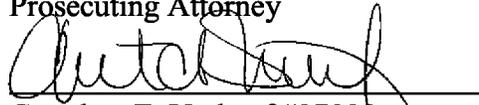
Vanhollebeke has never briefed nor argued a *Gunwall* analysis establishing why, under the circumstances presented, this Court should deviate from its holding in *Mathe* and *Cantrell* in which it adopted the Fourth Amendment analysis for third-party consent cases and declined to extend the *Leach* rule to vehicle searches. Rather, defendant has only baldly asserted that “Washington courts have long interpreted article 1, section 7 as establishing heightened privacy interests in vehicles than the Fourth Amendment.” See Appellant’s Br. at 14; Reply Br. at 2; Pet. for Rev. at 5. Due to the lack of any *Gunwall* briefing, this Court should decline to conduct an independent state constitutional analysis of this specific issue.

IV. CONCLUSION

The State respectfully requests this Court affirm the Court of Appeals and trial court. Societal expectations generally demand that a gratuitous bailor has a superior interest in bailed property, and a bailee-at-will using another’s property assumes the risk that the property owner may authorize that property to be searched.

Dated this 2 day of June, 2017.

RANDY J. FLYCKT
Prosecuting Attorney



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Special Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

In Re Personal Restraint Petition of:	NO. 94054-1
JUSTIN D. VANHOLLEBEKE,	COA 33427-9-III
Petitioner.	CERTIFICATE OF SERVICE

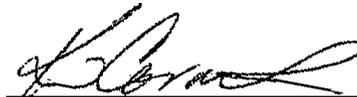
I certify under penalty of perjury under the laws of the State of Washington, that on June 2, 2017, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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(Date)

Spokane, WA
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SPOKANE COUNTY PROSECUTOR

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