

64347-9

64347-9

NO. 64347-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Appellant,

v.

TREVOR DAVIS,

Respondent.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

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**BRIEF OF APPELLANT**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

STEPHEN P. HOBBS  
Senior Deputy Prosecuting Attorney  
Attorneys for Appellant

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred as matter of law when it concluded that the good faith exception to the exclusionary rule does not apply under either the Fourth Amendment or article I, § 7 of the Washington Constitution when officers relied in objectively reasonable good faith on long-standing and presumptively valid federal and state case law that allowed vehicle searches incident to the lawful arrest of the driver.

2. The trial court erred in suppressing the firearm found during the search of the defendant's vehicle conducted incident to his arrest and in suppressing the defendant's statement (as fruit of the poisonous tree) that he owned the firearm.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. What is the effect of the recent United States Supreme Court decision in Arizona v. Gant, and the Washington Supreme Court decision in State v. Patton and State v. Brockob, on cases involving a vehicle search conducted prior to Gant and that are currently pending in trial courts and on appeal?

(a) Does the "good faith" exception to the exclusionary rule under the Fourth Amendment require suppression of evidence obtained when officers conducted a search under authority of presumptively valid state and federal case law?

(b) Does article I, § 7 of the Washington constitution require suppression of evidence obtained when officers conducted a search under authority of presumptively valid state and federal case law?

(c) Were officers acting in good faith reliance on established United States and Washington Supreme Court case law when conducting the vehicle search incident to arrest?

### **III. OVERVIEW**

Prior to the United States Supreme Court decision in Arizona v. Gant, Davis was arrested on an outstanding warrant and his vehicle searched incident to that arrest. A firearm was found during the vehicle search. Davis was charged with Unlawful Possession of a Firearm in the First Degree.

After a CrR 3.6 hearing, the trial court found that the officers had “acted in good faith by relying on settled existing precedent.” But the court concluded that, as a matter of law, the good faith exception to the exclusionary rule does not apply to pre-Gant searches. After suppressing the firearm, the unlawful possession of a firearm charge was dismissed.

The trial court’s ruling is contrary to the recent decision of this Court in State v. Riley, 2010 WL 427118, 2-4 (2010), which concluded that law enforcement officers had an objectively reasonable basis to conduct vehicle searches incident to the lawful arrest of the driver prior to

Arizona v. Gant. Accordingly, the State respectfully requests that the trial court's ruling suppressing the firearm found during the pre-Gant vehicle search be reversed and the matter remanded for further proceedings.

#### **IV. STATEMENT OF THE CASE**

##### **A. PROCEDURAL BACKGROUND.**

The underlying search at issue in this case occurred on January 1, 2009. RP 60.

On April 27, 2009, Davis was charged by information with Unlawful Possession of a Firearm in the First Degree and a Violation of the Uniform Controlled Substances Act. CP 1-2, 7-8.

On April 21, 2009, the U.S. Supreme Court decided Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct 1710 (2009), which restricted the permissible scope of vehicle searches incident to arrest.

A pre-trial hearing pursuant to CrR 3.6 was held on September 16, 17, and 21, 2009. RP 1-182. At the conclusion of the hearing the trial court suppressed the evidence of the firearm found during the vehicle search. RP 164. Davis was found guilty of the Violation of the Uniform Controlled Substances Act count after a stipulated trial. CP 30-33.

The State has timely appealed the dismissal of the Unlawful Possession of a Firearm charge. CP \_\_\_ (Sub 61).

**B. FACTUAL BACKGROUND.**

**1. The CrR 3.6 hearing.<sup>1</sup>**

On January 21, 2009, at about 2 p.m., Seattle Police Detective (“SPD”) Zsolt Dornay was notified by telephone of a fugitive in West Seattle. (Finding 1). SPD Detective Scotty Bach spoke to Dornay and informed him that the defendant, Trevor Davis, had a felony warrant and was located at an apartment at 3022 S.W. Bradford Street in Seattle. (Finding 2). Bach provided a detailed physical description of Davis and informed Dornay that Davis was known to drive a white Chevy Blazer. (Finding 3).

A short time later, Dornay arrived near the apartment building mentioned by Bach and found a white 2003 four-door Chevy Blazer parked outside. Dornay gave the Blazer's license plate to Bach, who informed him over the police radio that the vehicle was registered to Davis's mother, Arlene Davis. (Finding 4). Dornay was aware that Davis was known to fight with the police. On Davis's felony warrant, there was

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<sup>1</sup> The CrR 3.6 hearing was held on September 16, 17, and 21, 2009. A copy of the court's written findings is attached as Exhibit A. CP \_\_ (Sub. 62). Because the State does not dispute any of the trial court's factual findings, this summary of the facts is identical to that set forth in the trial court's CrR 3.6 findings. Only the facts relevant to the CrR 3.6 hearing are emphasized in this discussion. Because the State is not pursuing the claim that the search should be upheld pursuant to the inevitable discovery doctrine, facts and testimony relevant to that issue are not discussed.

a warning stating: "Assaultive to Law Enforcement - Resistive - Escape Community Custody for Assault 3." (Finding 5).

At about 2:36 p.m., Dornay and SPD Detective David Redemann saw Davis and a female, Brittany Parfitt, get into the Blazer and drive away northbound on Avalon Street. Dornay notified SPD Officer Nicole Freutel, who was standing by on Avalon Street. (Finding 6). Freutel stopped the Blazer near the West Seattle Bridge onramp. (Finding 7). Davis was in the driver's seat, and Parfitt was in the passenger seat. After he was stopped, Davis was cooperative with police. (Finding 8). Davis was removed from the Blazer, handcuffed, and arrested for his felony warrant. The warrant later was verified. (Finding 9).

As the driver's door was open, Dornay saw a large black metal flashlight and a pair of black handcuffs in the driver's side door panel. Dornay and Det. Redemann could see in plain view through the open door and windows that the vehicle had an extensive amount of belongings in it. However, at this point, the officers did not see any evidence of firearms or illegal controlled substances. (Finding 10).

Freutel walked Davis back to her patrol car and searched him incident to arrest. (Finding 11). Freutel recovered from Davis's person an illegal fixed blade knife that was on a chain around Davis's neck, \$132 in

cash, a glass pipe believed to be used for smoking methamphetamine, and a small baggie containing suspected methamphetamine. (Finding 12).

The suspected narcotics found in the small baggie recovered from Davis's pocket later was tested by the Washington State Patrol Crime Laboratory. The substance was determined to be .55 grams of methamphetamine. (Finding 13).

Parfitt then was removed from the Blazer by the officers. After Parfitt was removed, the Blazer was searched incident to Davis's arrest. (Finding 14). Stuffed between the center console and the front passenger seat, Dornay found a "Glock 17" 9mm handgun that was loaded with hollow point rounds. The "Glock" later was identified as stolen. (Finding 15). On top of the handgun was a cloth bag that contained another bag filled with a small spoon, .6 grams of suspected marijuana, and 5.6 grams of crystal methamphetamine. (Finding 16).

Officers also recovered from the car Parfitt's purse, which contained marijuana, six grams of crystal methamphetamine, two suspected pipes for smoking methamphetamine, numerous baggies, suspected ecstasy pills, and a digital scale constructed to look like a compact disc container. (Finding 17).<sup>2</sup> The items found in the car were

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<sup>2</sup> After the officers found these items, Parfitt asked about getting something out of her purse, identifying the purse that the officers searched. As a result, Parfitt was arrested. (Finding 17).

inventoried and documented by the police in a "Case Report Face Sheet" and in evidence logs. The two-page Case Report Face Sheet (SPD #09-024247) is attached as Exhibit A. (Finding 18).

After searching the Blazer and finding the gun, Detective Dornay read Davis his Miranda rights as Davis sat in the back of Freutel's patrol car. Davis said that he understood his rights. (Finding 19). At the police precinct, Davis admitted to Dornay and Redemann that his fingerprints would be on the gun. Davis initially claimed that he had first noticed the gun only as he was being pulled over by the police, but then admitted that he tried to hide the gun as he was being pulled over. (Finding 20). Davis also admitted that he lied about not knowing about the gun and apologized for lying. Davis said that he had the gun to protect himself because a larger Samoan male "twice his size" wanted to hurt him. (Finding 21).

Davis's felony warrant later was verified and he was booked into King County Jail for his warrant. (Finding 22).

**2. The trial court's CrR 3.6 findings.**

The trial court made the following findings at the conclusion of the CrR 3.6 hearing concerning Arizona v. Gant and the State's claim that the search should be upheld because law enforcement officers were relying in good faith on pre-Gant case law:

3. In Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct 1710 (2009), the United States Supreme Court adopted two new rules concerning vehicle searches incident to arrest. The first is that police may search a vehicle incident to arrest only when the passenger is unsecured and within reaching distance of the vehicle's passenger compartment. The second is that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

4. Gant also recognized that vehicle searches might be proper for other reasons, including probable cause to believe that evidence of a crime was present in the vehicle, officer safety, and exigent circumstances. Gant did not address whether a good-faith exception to the exclusionary rule applies to vehicle searches when officers act in objectively reasonable reliance on settled case law.

6. This court has considered two federal court opinions addressing whether there should be a good-faith exception to the exclusionary rule for vehicle searches: The Ninth Circuit's opinion in U.S. v. Gonzalez, 2009 WL 2581738 (9<sup>th</sup> Cir., 2009) and the Tenth Circuit's opinion in U.S. v. McCane, 573 F.3d 1037 (10<sup>th</sup> Cir., 2009). This court finds the Ninth Circuit's reasoning in Gonzalez more persuasive.

7. Here, the officers' search of Davis's vehicle clearly was supported by existing judicial precedent, both on a state and federal level.

8. By searching Davis's car pursuant to a search incident to arrest, the officers acted in good faith by relying on settled existing judicial precedent. Thus, this court agrees that

applying the exclusionary rule to these facts does not support the principle of deterrence.

9. However, this court concludes, that under its interpretation of Gant, the good-faith exception to the exclusionary rule does not apply even when officers acted in objectively reasonable reliance on settled case law. This court concludes that the good faith exception does not apply to the officers' search of Davis's car. Thus, the officers' good faith is irrelevant.

10. There were no other valid reasons for the officers to search Davis's vehicle without a warrant. The officers had no safety concerns at the time of the search. And it was not reasonable to believe that evidence of the offense of the arrest (i.e. an outstanding warrant) might be found in the vehicle. Thus, under Gant, the search incident to arrest of Davis's vehicle was unlawful.

CP \_\_\_\_ (Sub. 62) (Conclusions of Law 3-10).

For the foregoing reasons, the trial court granted Davis's motion to suppress the items found in his vehicle and his motion to suppress his statements to the police regarding the handgun based on the "fruit of the poisonous tree" doctrine. Count one, unlawful possession of a firearm in the first degree, was accordingly dismissed.

## V. ARGUMENT: ARIZONA v. GANT

### A. OVERVIEW.

The State respectfully submits that the trial court erred in concluding that, as a matter of law, the good faith exception to the exclusionary rule does not apply to pre-Gant vehicle searches conducted incident to the lawful arrest of the driver. It is the State's position that

even if the United States Supreme Court opinion in Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), is applied retroactively, and even assuming that the search in this case was improper under Gant, the exclusionary rule should not be applied under either the Fourth Amendment or article I, § 7 of the Washington constitution because the search was conducted by an officer in reasonable reliance presumptively valid case law.<sup>3</sup>

As a preliminary matter, the State notes that if the vehicle search was improper under pre-Gant case law, it remains improper. In such a circumstance, there is no need to reach the question of the effect of Arizona v. Gant on the case. The search is invalid and the evidence must be suppressed.

Assuming the search is proper under pre-Gant case law, the question of the application of Gant to this case must be addressed. The State agrees that Gant applies retroactively to all non-final cases pending in trial courts and on appeal. Gant, however, does not require reversal of

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<sup>3</sup> Since the trial court's CrR rulings, the State Supreme Court has decided State v. Patton, \_\_\_ Wn.2d \_\_\_, 2009 WL 3384578 (Oct. 22, 2009), in which it adopted the holding of Gant under article I, § 7 of the Washington Constitution. The Court reiterated this conclusion in State v. Valdez, \_\_\_ Wn.2d \_\_\_, 2009 WL 4985242 (Dec. 24, 2009). Patton and Valdez do not change the analysis of this issue. It remains the State's position that the officers relied in good faith existing case law in conducting the vehicle search. Moreover, under both federal and state law, the good faith exception has been recognized. For convenience, references in this briefing to Gant should generally be considered as referencing Patton and Valdez as well.

every vehicle search conducted incident to arrest. Gant allows vehicle searches under a variety of circumstances and the facts must be examined on a case-by-case basis to determine whether the search remains valid even under a retroactive application of Gant.

Even if there is no basis to uphold the validity of the search under Gant, the State respectfully submits that evidence obtained during vehicle searches conducted in reliance on pre-Gant case law should not be suppressed. Searches conducted pursuant to presumptively valid case law remain valid despite the fact that the case law is subsequently deemed to be unconstitutional.

Because Gant was decided under the Fourth Amendment, and did not purport to address or overrule state constitutional law, the preliminary analysis should focus on the federal exclusionary rule. The federal exclusionary rule has long recognized reversal is not required when officers relied in good faith on a statute that is subsequently deemed unconstitutional.

The same result holds true, however, under article I, § 7 of the Washington Constitution. As the Washington Supreme Court has recently recognized, convictions obtained under a statute that is subsequently deemed unconstitutional remain valid. The same reasoning applies in this case. There is no basis to suppress the evidence when officers have relied

on long-standing and presumptively valid federal and state case law that allows vehicle searches incident to arrest.

**B. SUMMARY OF ARIZONA v. GANT.**

In Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the United States Supreme Court adopted two new rules concerning vehicle searches incident to arrest. The first is that police may search a vehicle incident to arrest only when the passenger is unsecured and within reaching distance of the vehicle's passenger compartment. Gant, 129 S. Ct. at 1714. The second is that a vehicle search incident to arrest is allowed when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. Id.

Gant also recognized that vehicle searches might be proper for other reasons, including probable cause to believe that evidence of a crime was present in the vehicle, officer safety, and exigent circumstances. Gant, 129 S. Ct. at 1721.

**C. APPLICATION OF GANT TO PENDING CASES.**

The State agrees that Gant must be applied to cases currently pending in trial courts and on direct appeal.<sup>4</sup> Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (a new rule for

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<sup>4</sup> Because Gant articulated a new constitutional rule that represents a clean break from the past, it will not apply to cases on collateral review. Teague v. Lane, 489 U.S. 288, 298, 311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past); Teague v. Lane, 489 U.S. 288, 302-04, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); In re St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992).

The analysis, however, does not end with the simple “retroactive” application of Gant. First, under the rules articulated in Gant, the search of a vehicle incident to arrest may still be proper because Gant permits vehicle searches under several alternative grounds. That is, it will be necessary in pending cases to determine whether – under the rules articulated in Gant – the search was nevertheless proper.

Second, there is a separate question as to whether the exclusionary rule requires suppression of the evidence found during a vehicle search conducted prior to the Gant decision. The State respectfully suggests that under the federal “good faith” exception to the exclusionary rule there is no basis to suppress the evidence obtained in good faith reliance on pre-Gant case law. Moreover, under article I, § 7 of the Washington constitution, when officers conducted a search of a vehicle under authority of presumptively valid case law in effect at the time of the search, the evidence obtained during the vehicle search should not be suppressed.

**D. EVIDENCE OBTAINED IN RELIANCE ON VALID  
PRE-GANT CASE LAW SHOULD NOT BE SUPPRESSED.**

**1. The Fourth Amendment good faith exception to the  
exclusionary rule.**

Absent an exception to the warrant requirement, a warrantless search is impermissible under the Fourth Amendment to the U.S. Constitution. The exclusionary rule is “a judicially created remedy *designed to safeguard Fourth Amendment rights generally through its deterrent effect*” by excluding evidence that is the fruit of an illegal, warrantless search. United States v. Calandra, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) (emphasis added). Evidence derived directly or indirectly from illegal police conduct is an ill-gotten gain, “fruit of the poisonous tree,” that should be excluded from evidence. Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Nevertheless, the United States Supreme Court has recognized that evidence obtained after an illegal search should not be excluded if it was not obtained by the exploitation of an initial illegality. Wong Sun, 371 U.S. at 488.

Consistent with these basic principles, the United States Supreme Court in Michigan v. DeFillippo, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979), held that an arrest (and subsequent search) under

a statute that was valid at the time of the arrest remains valid even if the statute is later held to be unconstitutional.

In DeFillippo, the Court stated:

At that time [of the underlying arrest], of course, there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. *A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.*

*Police are charged to enforce laws until and unless they are declared unconstitutional.* The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality – with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. *Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.*

DeFillippo, 443 U.S. at 37-38 (emphasis added). The Court further noted:

[T]he purpose of the exclusionary rule is to deter unlawful police action. *No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search.* To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

DeFillippo, 443 U.S. at 38 n.3 (emphasis added). The Court recognized a

“narrow exception” when the law is “so grossly and flagrantly

unconstitutional that any person of reasonable prudence would be bound to see its flaws.” DeFillippo, 443 U.S. at 37-38.<sup>5</sup>

Accordingly, in DeFillippo, the Supreme Court upheld the arrest, search, and subsequent conviction of the defendant even though the statute that justified the stop was subsequently deemed to be unconstitutional. DeFillippo, 443 U.S. at 40.

That the application of the good faith exception is not inconsistent with retroactivity doctrine of Griffith v. Kentucky can be seen from Illinois v. Krull, 480 U.S. 340, 349-50, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987). In Krull, the Supreme Court upheld warrantless administrative searches performed in good-faith reliance on a statute authorizing the search that was subsequently declared unconstitutional in a different case. Significantly, the United States Supreme Court applied the good faith exception in Krull just two months after the decision on Griffith. Clearly,

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<sup>5</sup> DeFillippo is entirely consistent with the U.S. Supreme Court’s traditional exclusionary rule analysis. As the Court noted in a recent opinion:

[E]xclusion “has always been our last resort, not our first impulse,” ... and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it “result[s] in appreciable deterrence.” ... We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.... Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future....

Herring v. United States, \_\_\_ U.S. \_\_\_, 129 S. Ct. 695, 700, 172 L. Ed. 2d 496 (2009) (citations omitted).

the good faith exception to the exclusionary rule may be applied even when a new holding is being applied retroactively.

The only difference between DeFillippo and the present case is the nature of the legal authority relied upon by the officer conducting the search. In DeFillippo, the arrest was based on a presumptively valid statute that was later ruled unconstitutional. In the present case, the search was conducted pursuant to a procedure upheld as constitutional by well-established and long-standing judicial pronouncements. This distinction does not justify a different result.

Law enforcement officers should be entitled to rely on established case law – from both the federal and state courts – in determining what searches are deemed constitutional. Indeed, in the area of search and seizure it is the courts that establish the “rules,” not the legislative bodies. Judicial decisions, particularly those of the Supreme Court, as to the constitutionally permissible scope of searches and seizures are clearly entitled to respect, deference, and reliance by officers in the field.

The good faith exception has been applied by the United States Supreme Court in many contexts involving the reliance by law enforcement officers on presumptively valid assertions by the judiciary. See e.g., United States v. Leon, 468 U.S. 897, 922, 104 S. Ct. 3405 (1984) (when police act under a warrant that is invalid for lack of probable cause,

the exclusionary rule does not apply if the police acted “in objectively reasonable reliance” on the subsequently invalidated search warrant); Massachusetts v. Sheppard, 468 U.S. 981, 991, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984) (exclusionary rule does not apply when a warrant was invalid because a judge forgot to make “clerical corrections”); Arizona v. Evans, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (applying good-faith rule to police who reasonably relied on mistaken information in a court’s database that an arrest warrant was outstanding).<sup>6</sup>

Given this history, there is no reason to conclude that law enforcement officers are not entitled to rely on the ultimate presumptively valid judicial assertion: opinions issued by the United States Supreme Court and the Washington State Supreme Court.<sup>7</sup>

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

Under article I, § 7, the exclusionary rule has been extended beyond the original Fourth Amendment context. See e.g., State v. Bond, 98 Wn.2d 1, 10-13, 653 P.2d 1024 (1982) (and cases cited therein) (“we view the purpose of the exclusionary rule from a slightly different

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<sup>6</sup> For a recent discussion of federal cases recognizing the “good faith” exception to the exclusionary rule, see Herring, 129 S. Ct. at 704.

<sup>7</sup> See the discussion in the “recent developments” section below for citations to case law that has reached this same conclusion.

perspective than does the United States Supreme Court”). However, even under the more stringent article I, § 7 analysis, when officers obtain evidence in reasonable reliance on presumptively valid statute, the exclusionary rule does not apply. The same result should apply when law enforcement officers rely on presumptively valid judicial authority.

In State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), the Washington Supreme Court addressed a situation involving an arrest premised upon a flagrantly unconstitutional “stop and identify” statute that negated the probable cause requirement of the Fourth Amendment. Id. at 106. The Court concluded that article I, § 7 provided greater protection than the Fourth Amendment, that the officer’s subjective good faith in relying on the statute was not relevant, and that the federal subjective “good faith” exception to the exclusionary rule was not applicable in Washington.<sup>8</sup> Id. at 110.

Nevertheless, the Court in White specifically stated that the remedy of exclusion should be applied only when the underlying right to privacy is “unreasonably violated.” White, 97 Wn.2d at 110-12. Three specific concerns justifying the application of the exclusionary rule were articulated: (1) to protect privacy interests of individuals from

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<sup>8</sup> For a critique of the White analysis, see State v. Kirwin, 203 P.3d 1044, 1051-54 (2009) (Madsen, J., concurring).

unreasonable governmental intrusions, (2) to deter the police from acting unlawfully in obtaining evidence, and (3) to preserve the dignity of the judiciary by refusing to consider evidence obtained by unlawful means. White, 97 Wn.2d. at 109-12; Bond, 98 Wn.2d at 12.

**3. Applying White, the good faith exception to the exclusionary rule applies.**

State v. 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 right to privacy under article I, § 7 is *unreasonably* violated.<sup>9</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

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<sup>9</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”).

stated: “Without an immediate application of the exclusionary rule whenever an individual’s right to privacy is *unreasonably* invaded, the 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 that specifically approved vehicle searches incident to arrest. Indeed, these opinions controlled the officer’s actions at the time of the search. As this Court 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. Leaving aside whether a subjective good faith test was ever the rule adopted by the federal courts under the Fourth Amendment, *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 clear from 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 only when privacy rights are unreasonably violated and with its rejection of a *subjective* good faith test.

In addition, the Supreme Court has emphasized that in applying the exclusionary rule under article I, § 7 it is also appropriate to consider the costs of doing so. See e.g., Bond, 98 Wn. App. at 14 (“we have little

hesitation in concluding that the costs [of excluding the evidence are] clearly outweighed by the limited benefits that would be obtained from excluding the confessions because of the illegal arrest.”). As the trial court concluded below – and as will be discussed in more detail later in this brief – there is no deterrent effect whatsoever in applying the exclusionary rule in this case.

**4. The good faith exception applies pursuant to State v. Potter and State v. Brockob.**

The State submits that it prevails under the reasoning set forth in State v. White. However, the analysis in White has since been superseded by the opinions 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). In Potter and Brockob, the Washington Supreme 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 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 that would deny any validity to the good faith exception to the exclusionary rule.

In State v. Potter, the defendants maintained that they were unlawfully arrested for driving while their licenses were suspended because, subsequent to their arrests, the State Supreme Court held that the statutory procedures by which the Department of Licensing suspended licenses were unconstitutional.<sup>10</sup> The defendants argued that under article I, § 7 evidence of controlled substances found during searches of their vehicles incident to arrest had to be suppressed because their arrests were illegal.

In a unanimous decision, the Court applied the DeFillippo rule under article I, § 7, and held that an arrest under a statute valid at the time of the arrest remains valid even if the basis for the arrest is subsequently found unconstitutional. Potter, 156 Wn.2d at 843. The Court stated:

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

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<sup>10</sup> The defendants in Potter were relying on City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004).

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).

Under the facts presented in Potter, because there were no prior cases holding that license suspension procedures in general were unconstitutional, there was no basis to assume that the statutory provisions were grossly and flagrantly unconstitutional. Accordingly, applying DeFillippo, the Court affirmed the convictions despite the fact that the statutory licensing procedures at issue had subsequently been held to be unconstitutional. Potter, 156 Wn.2d at 843.

Similarly, in State v. Brockob, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006), a defendant contended that his arrest for driving while his license was suspended and a search incident to that arrest were unlawful for the reasons claimed in Potter. The Court rejected the defendant's argument, stating:

White held that police officers may rely on the presumptive validity of statutes in determining whether there is probable cause to make an arrest unless the law is “so grossly and flagrantly unconstitutional” by virtue of a prior dispositive judicial holding that it may not serve as the basis for a valid arrest.”

Brockob, 159 Wn.2d at 341 n.19 (quoting White, 97 Wn.2d at 103) (quoting DeFillippo, 443 U.S. at 38). As in Potter, the Court held that the narrow exception did not apply “because no law relating to driver’s license suspensions had previously been struck down.” Brockob, 159 Wn.2d at 341 n.19.

Justice Madsen’s analysis of Potter and Brockob set forth in State v. Kirwin nicely summarizes the significance of these two cases:

. . . 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 . . .

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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), this court 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."

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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.

**5. Under the facts of this case, the officers were relying on presumptively valid pre-Gant case law and the evidence should not be suppressed.**

The vehicle search incident to arrest in this case was conducted before the United State Supreme Court decision in Arizona v. Gant, decided on April 21, 2009. Prior to that date, numerous federal and state judicial opinions law allowed vehicle searches incident to arrest of the driver or passenger. Accordingly, those searches should be upheld because they were conducted pursuant to presumptively valid case law.

There is no doubt that prior to Gant, federal and state courts had unequivocally endorsed the constitutional validity of vehicle searches incident to arrest. This is not a situation such as White where there was a clear prior suggestion that the rule being applied might be unconstitutional. It is not even the situation addressed in Potter and Brockob where the constitutionality of the statute had never been addressed before (and was thus “presumptively” valid). Instead, this is a situation in which the highest federal and state courts had specifically and repeatedly endorsed the procedures used by law enforcement.

Prior to Gant, federal case law clearly approved a bright-line test allowing the search of a vehicle incident to the lawful arrest of a passenger or occupant. See e.g., Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); New York v. Belton, 453 U.S. 454, 101 S. Ct.

2860, 69 L. Ed. 2d 768 (1981). This was made clear in Gant which recognized that the Court's prior opinions have "*been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search . . .*" and that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception."<sup>11</sup> Gant, 129 S. Ct. at 1718 (emphasis added).

Likewise, the constitutionality of the search incident to arrest rule had been repeatedly endorsed and affirmed by the Washington Supreme Court over the past twenty-three years. See e.g., State v. Stroud, 106 Wn.2d 144, 153, 720 P.2d 436 (1986); State v. Fladebo, 113 Wn.2d 388, 779 P.2d 707 (1989); State v. Parker, 139 Wn.2d 486, 489, 987 P.2d 73 (1999); State v. Johnson, 128 Wn.2d 431, 441, 909 P.2d 293 (1996); State v. Vrieling, 144 Wn.2d 489, 28 P.3d 762 (2001). That this was the rule in Washington is perhaps most clearly seen from the fact that the Supreme Court, in adopting the Gant analysis under article I, § 7, explicitly reversed these prior decisions. Patton, \_\_\_ Wn.2d at \*7 (" . . . we also recognize that we have heretofore upheld searches incident

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<sup>11</sup> That the majority in Gant spent considerable time arguing that the new rule was justified in spite of the doctrine of *stare decisis* is further evidence that the court was promulgating a new rule. Gant, 129 S. Ct. at 1722-24.

to arrest conducted after the arrestee has been secured and the attendant risk to officers in the field has passed. Today, we expressly disapprove of this expansive application of the narrow search incident to arrest exception.”).

Thus, this case does not fit within the narrow exception, recognized in DeFillippo and White, precluding officers from relying upon laws that are “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” The pre-Gant cases may now be viewed as flawed, but the repeated judicial reliance on them for almost 30 years demonstrates that the search incident to arrest rule was neither grossly nor flagrantly unconstitutional.

There can be little doubt that law enforcement officers can rely on these specific judicial pronouncements when conducting vehicle searches. To conclude otherwise would be equivalent of asserting that officers could never rely on judicial authority. In this regard, it is noteworthy that the majority in Gant emphasized that officers had reasonably relied on pre-Gant precedent and were thus immune from civil liability for searches conducted in accordance with the Court’s previous opinions. Gant, 129 S. Ct. at 1723 n.11.

Moreover, the most basic purpose of the exclusionary rule is not furthered in any way by suppression of the evidence in this case. As the

Court in DeFillippo noted, no conceivable deterrent effect would be served by suppressing evidence which, at the time it was found, was the product of a lawful search. Prior to April 21, 2009, officers understood that they could search a vehicle incident to the arrest of a recent occupant. After April 21, 2009, officers will know that they cannot conduct such searches and Gant will deter such conduct. But the retroactive application of the exclusionary rule has no deterrent value at all.

Nor is the preservation of judicial integrity, the other basis sometimes relied upon when applying the exclusionary rule, implicated in these circumstances.<sup>12</sup> In the context of the reliance by law enforcement officers on judicially created evidentiary rules, judicial integrity is not enhanced by failing to recognize that officers act in reliance on judicial authority. Rather, integrity is preserved by recognizing that law enforcement officers must rely on judicial opinions to guide their behavior and cannot be expected to do otherwise. Integrity is preserved by consistency; it is undermined if officers (and citizens) conclude that they can no longer rely in good faith on clearly articulated judicial

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<sup>12</sup> This rationale was first articulated by Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 483-85, 48 S. Ct. 564, 574-75, 72 L. Ed. 944 (1928). Justice Brandeis argued that when the government is permitted to use illegally obtained evidence in courts of law, the integrity of the judiciary itself is tarnished. See also Stone v. Powell, 428 U.S. 465, 485, 96 S. Ct. 3037, 3048, 49 L. Ed. 2d 1067 (1976), where judicial integrity is mentioned as a secondary rationale); White, 97 Wn.2d at 110.

pronouncements. Moreover, integrity is not sacrificed when the judiciary changes its mind on a constitutional principle, upon fresh examination of its reasoning, but minimizes the impact of its new ruling as to those who relied on its earlier pronouncements.

Finally, there is a clear cost in this and similarly-situated cases that is not outweighed by any deterrent effect in applying the rule.<sup>13</sup> Evidence of criminal activity was validly obtained pursuant to a vehicle search incident to arrest. There is no deterrent effect on law enforcement whatsoever by retroactively enforcing a rule the officers knew nothing about. The costs of excluding evidence obtained in all pending post-Gant cases are not justified by the potential benefit in deterrence.

In sum, the United States Supreme Court has recognized that the application of the exclusionary rule serves no purpose when officers relied in good faith on a presumptively valid statute. In Potter and Brockob, the

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<sup>13</sup> As the U.S. Supreme Court has noted, the benefits of the deterrent effect when applying the exclusionary rule should outweigh the costs:

In addition, the benefits of deterrence must outweigh the costs. . . “We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.” . . . “[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.” . . . The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that “offends basic concepts of the criminal justice system.” . . . “[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” . . .

Herring v. United States, \_\_\_ U.S. \_\_\_, 129 S. Ct. 695, 700-01, 172 L. Ed. 2d 496 (2009) (citations omitted); see also Bond, 98 Wn.2d at 14.

Washington Supreme Court has also recognized that the exclusionary rule does not apply when officers relied on a presumptively valid statute. This same reasoning should apply to judicial opinions of long-standing duration. The evidence obtained during the search in the present case should not be suppressed.

**6. The conclusion of State v. White is *dicta*.**

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

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 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). Gunkel 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 in the context of the exclusionary rule 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>14</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>15</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).

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<sup>14</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>15</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.

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, 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>16</sup>

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<sup>16</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 Supreme 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.

**7. The article I, § 7 exclusionary rule has traditionally been interpreted consistently with the federal rule.**

That White is simply an application of the federal exclusionary rule is entirely consistent with the fact that Washington courts have historically interpreted the exclusionary rule in a manner that is consistent with federal law. The Washington State Constitution, adopted in 1889, provides that, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, § 7. At common law, courts took no notice of whether evidence was properly seized; if relevant, it was admissible. Commonwealth v. Dana, 43 Mass. 329 (2 met. 1841); 4 J. Wigmore, Evidence § 2183 (2<sup>nd</sup> ed. 1923). This was the rule recognized in Washington as early as 1889. State v. Nordstrom, 7 Wash. 506, 35 P. 382 (1893); State v. Burns, 19 Wash. 52, 52 P. 316 (1898).

In 1886, the United States Supreme Court appeared to signal a different approach when it suppressed private papers seized pursuant to a court order, holding that seizure and use of the private papers as evidence was tantamount to compelling the defendant to testify against himself. Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). But the United States Supreme Court essentially repudiated Boyd in Adams v. New York, 192 U.S. 585, 598, 24 S. Ct. 372, 48 L. Ed. 575

(1905) (“...the English, and nearly all the American, cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent”).

Like most courts at that time, the Washington Court specifically rejected Boyd and held that relevant evidence was admissible, regardless of its source. State v. Royce, 38 Wash. 11, 80 P. 268 (1905) (evidence derived from improper search of burglary suspect need not be suppressed).

Nine years later, the United States Supreme Court reintroduced an exclusionary rule. Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). The next year, the Washington Supreme Court followed the U.S. Supreme Court’s lead and announced that an exclusionary rule would be recognized in Washington. State v. Gibbons, 118 Wash. 171, 184-85, 203 P. 390 (1922).

The ensuing decades of exclusionary rule jurisprudence can only be described as chaotic, as both state and federal courts struggled to find the proper balance between the need to protect constitutional rights and the interest in admitting relevant evidence. See e.g., State v. Young, 39 Wn.2d 910, 917, 239 P.2d 858 (1952).<sup>17</sup> Nonetheless, the Washington

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<sup>17</sup> “We do not wish to recede one iota from our [previous holding]. It is the duty of courts to protect citizens from unwarranted, arbitrary, illegal arrests by officers of the law. But we should not permit our zeal for protection of constitutional rights to blind us to our responsibility to other citizens who have the right to be protected from those who violate the law.” Young, 39 Wn.2d at 917.

Supreme Court has generally followed the application of the rule in federal courts. As the Washington Supreme Court said in State v. O'Bremski, 70 Wn.2d 425, 423 P.2d 530 (1967): “We have consistently adhered to the exclusionary rule expounded by the United States Supreme Court...” See also State v. Biloché, 66 Wn.2d 325, 327, 402 P.2d 491 (1965) (“The law is well established in this state, consistent with the decisions of the U.S. Supreme Court, that evidence unlawfully seized will be excluded...”) (emphasis added).

In sum, Washington’s exclusionary rule has followed the general contours, progression, and application of the federal exclusionary rule. The Washington Supreme Court’s recognition in Potter and Brockob that the decision in White was simply an application of the narrow exception to the DeFillippo good faith rule is both appropriate and justified.

**E. RECENT AND OUT-OF-JURISDICTION DEVELOPMENTS.**

This court, after conducting an in-depth analysis of this issue, has recently agreed with the State’s position that the good faith exception to the exclusionary rule applies both under the Fourth Amendment and article I, § 7. See State v. Riley, 2010 WL 427118, 2-4 (2010). In Riley, the court 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 approve of the well-reasoned analysis set forth in State v. Riley.

The Tenth Circuit Court of Appeals in United States v. McCane, 573 F.3d 1037 (10<sup>th</sup> Cir., July 28, 2009), has also upheld the good faith exception in response to a claim that Gant should be applied retroactively. Significantly, the Tenth Circuit, after conducting a detailed analysis of the interaction between the good faith exception and retroactivity, noted:

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).

The Ninth Circuit Court of Appeals has declined to apply the good faith exception. See State v. Gonzales, 578 F.3d 1130 (9<sup>th</sup> Cir., August 24, 2009). The State respectfully submits that the Ninth Circuit analysis was incorrect for precisely the reason set forth in McCane: it fails to ask what the remedy should be upon the retroactive application of Gant. As argued above, no purpose is served by excluding evidence that was obtained in objectively reasonable reliance on existing case law.

The Washington Court of Appeals, Division II, has rejected the good faith exception in State v. McCormick, \_\_\_ Wn. App. \_\_\_, 216 P.3d 475 (Div. II, Sept. 23, 2009). The State respectfully submits that Division II's conclusion is flawed. First, McCormick seems to rest exclusively on the holding in Gonzales, with no discussion of the differing view set forth in McCane. McCormick fails to recognize that simply stating that Gant applies retroactively does not end the analysis. The Court must still address the question of the appropriate remedy. McCormick is devoid of any discussion of the deterrent benefit of suppressing the evidence. Second, the State in McCormick erroneously conceded that White was controlling on the issue of whether the good faith exception applied.

McCormick contains absolutely no discussion of the on-point cases of Potter and Brockob which, as discussed above, have clearly limited the scope of the good faith exception under White.

**F. CONCLUSION.**

In People v. Banner, the Third Appellate District of California has upheld the good faith exception to the exclusionary rule in light of the new rules for vehicle searches adopted in Gant. \_\_\_ Cal.3<sup>rd</sup> \_\_\_, (C059288, December 17, 2009). In Banner the Court stated:

Although it may be that a ‘criminal is to go free because the constable has blundered’. . ., the *guilty should not go free when the constable did precisely what the United States Supreme Court told him he could do*, but the court later decides it is the one who blundered.

Id. at 2 (emphasis added, citation omitted). This holding sums up the State’s position in a nutshell.

The State respectfully requests that this court uphold the validity of the search of the vehicle incident to arrest of Davis because the officers were acting pursuant to presumptively valid pre-Gant case law at the time the vehicle search was conducted. Because there is no possible deterrent benefit to be obtained by suppressing the evidence, the exclusionary rule should not be applied in this context.

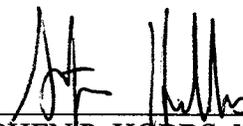
**VI. CONCLUSION**

The State of Washington respectfully requests that the trial court's CrR 3.6 ruling suppressing both the firearm and Davis's statement admitting ownership of the firearm be reversed and the matter remanded for further proceedings.

DATED this 2<sup>nd</sup> day of March, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
STEPHEN P. HOBBS, WSBA #18935  
Senior Deputy Prosecuting Attorney  
Attorneys for Appellant  
Office WSBA #91002

**CrR 3.5 and 3.6 Written Findings of Fact  
and Conclusions of Law**

**CP \_\_\_ (Sub 61)**

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	No. 09-C-01989-1 SEA
	)	
vs.	)	
	)	CrR 3.5 and 3.6 WRITTEN FINDINGS
TREVOR HAROLD DAVIS,	)	OF FACT AND CONCLUSIONS OF
	)	LAW
	)	
	)	
	)	
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On September 16 and 17, 2009, the Honorable Judge Michael Hayden held a CrR 3.5 hearing on the admissibility of the defendant's statements and a CrR 3.6 hearing on the admissibility of physical, oral, or identification evidence. The court informed the defendant that:

(1) he may, but need not, testify at the hearing on the circumstances surrounding the statements; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statements and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statements at trial. After being so advised, the defendant did not testify at the hearing.

After considering the evidence submitted by the parties and hearing argument and testimony, the Court enters the following findings of fact and conclusions of law:



STATE'S CrR 3.5 FINDINGS OF FACT  
AND CONCLUSIONS OF LAW-

Daniel Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104 (206) 296-9000  
FAX (206) 296-0955

1 **A. CrR 3.5 and CrR 3.6 FINDINGS OF FACT:**

2 1. On January 21, 2009, at about 2 p.m., Seattle Police Detective Zsolt Dornay was notified  
3 by telephone of a fugitive in West Seattle.

4 2. SPD Detective Scotty Bach spoke to Dornay and informed him that the defendant, Trevor  
5 Davis, had a felony warrant and was located at an apartment at 3022 S.W. Bradford Street in  
6 Seattle.

7 3. Bach provided a detailed physical description of Davis and informed Dornay that Davis  
8 was known to drive a white Chevy Blazer.

9 4. A short time later, Dornay arrived near the apartment building mentioned by Bach and  
10 found a white 2003 four-door Chevy Blazer parked outside. Dornay gave the Blazer's license  
11 plate to Bach, who informed him over the police radio that the vehicle was registered to Davis's  
12 mother, Arlene Davis.

13 5. Dornay also was aware that Davis was known to fight with the police. On Davis's felony  
14 warrant, there was a warning that read: "Assaultive to Law Enforcement - Resistive - Escape  
15 Community Custody for Assault 3."

16 6. At about 2:36 p.m., Dornay and SPD Detective David Redemann saw Davis and a  
17 female, Brittany Parfitt, get into the Blazer and drive away northbound on Avalon Street.  
18 Dornay notified SPD Officer Nicole Freutel, who was standing by on Avalon Street.

19 7. Freutel stopped the Blazer near the West Seattle Bridge onramp. When the Blazer  
20 stopped, it was parked in an illegal parking space that obstructed traffic.

21 8. Davis was in the driver's seat, and Parfitt was in the passenger seat. After he was  
22 stopped, Davis was cooperative with police.

23 9. Davis was removed from the Blazer, handcuffed, and arrested for his felony warrant.  
The warrant later was verified.

10. As the driver's door was open, Dornay saw a large black metal flashlight and a pair of  
black handcuffs in the driver's side door panel. Dornay and Det. Redemann could see in plain  
view through the open door and windows that the vehicle had an extensive amount of belongings  
in it. However, at this point, the officers did not see any evidence of firearms or illegal  
controlled substances.

11. Freutel walked Davis back to her patrol car and searched him incident to arrest.

12. Freutel recovered from Davis's person an illegal fixed blade knife that was on a chain  
around Davis's neck, \$132 in cash, a glass pipe believed to be used for smoking  
methamphetamine, and a small baggie containing suspected methamphetamine.

1 13. The suspected narcotics found in the small baggie recovered from Davis's pocket later  
2 was tested by the Washington State Patrol Crime Laboratory. The substance was determined to  
be .55 grams of methamphetamine.

3 14. Parfitt then was removed from the Blazer by the officers. After Parfitt was removed, the  
4 Blazer was searched incident to arrest.

5 15. Stuffed between the center console and the front passenger seat, Dornay found a "Glock  
6 17" 9mm handgun that was loaded with hollow point rounds. The "Glock" later was identified  
7 as stolen.

8 16. On top of the handgun was a cloth bag that contained another cloth bag filled with a  
9 small spoon, .6 grams of suspected marijuana, and 5.6 grams of crystal methamphetamine.

10 17. Officers also recovered from the car Parfitt's purse, which contained marijuana, six grams  
11 of crystal methamphetamine, two suspected pipes for smoking methamphetamine, numerous  
12 baggies, suspected ecstasy pills, and a digital scale constructed to look like a compact disc  
13 container. After the officers found these items, Parfitt asked about getting something out of her  
14 purse, identifying the purse that the officers searched. As a result, Parfitt was arrested.

15 18. The items found in the car were inventoried and documented by the police in a "Case  
16 Report Face Sheet" and in evidence logs. The two-page Case Report Face Sheet (SPD #09-  
17 024247) is attached as Exhibit A.

18 19. After searching the Blazer and finding the gun, Detective Dornay read Davis his Miranda  
19 rights as Davis sat in the back of Freutel's patrol car. Davis said that he understood his rights.

20 20. At the police precinct, Davis admitted to Dornay and Redemann that his fingerprints  
21 would be on the gun. Davis initially claimed that he had first noticed the gun only as he was  
22 being pulled over by the police, but then admitted that he tried to hide the gun as he was being  
23 pulled over.

24 21. Davis also admitted that he lied about not knowing about the gun and apologized for  
25 lying. Davis said that he had the gun to protect himself because a larger Samoan male "twice his  
26 size" wanted to hurt him.

27 22. Davis's felony warrant later was verified and he was booked into King County Jail for his  
28 warrant.

29 23. After Davis and Parfitt were arrested, there were no other passengers in Davis's vehicle  
30 who could have driven the vehicle away. In addition, the vehicle was parked in a public right-of-  
31 way on a busy road. Thus, after the vehicle was searched and its contents documented and  
32 collected, the officers had the vehicle impounded by a towing company (ABC towing) and the  
33 car was towed to the towing company's lot.

1 24. Detective Redemann testified that pursuant to proper SPD investigative procedures, even  
 2 had the Blazer not been searched incident to arrest, the Blazer would have been impounded and  
 3 the officers would have conducted an inventory search. Detective Redemann testified that before  
 4 the Blazer would have been released to anyone, the Blazer would have been subject to an  
 5 inventory search. Detective Redemann also testified that the purpose of the inventory search  
 6 would have been to properly document the belongings from the vehicle and to protect the police  
 7 from civil liability or accusations of wrongdoing. The court finds this testimony credible and  
 8 accepts this testimony as true for purposes of the pretrial hearing.

9 25. Detective Redemann also testified that because methamphetamine was found on Davis, the  
 10 officers would have conducted an inventory search to ensure that whoever picked up the Blazer  
 11 would not have unwittingly been driving a vehicle with contraband inside. The court also finds  
 12 this testimony credible and accepts this testimony as true.

13 26. Here, the officers never did do an inventory search of the vehicle. Instead, the officers  
 14 searched the vehicle incident to arrest and inventoried its contents in an evidence log and in a  
 15 Case Face Sheet (Exhibit A).

16 B. **CrR 3.5 CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE**  
 17 **DEFENDANT'S STATEMENTS:**

18 1. Davis's statements to the police were made after he was read his Miranda rights and after he  
 19 knowingly, voluntarily, and intelligently waived those rights.

20 2. The court finds that the totality of the circumstances demonstrates that Davis understood his  
 21 Miranda rights and knowingly, voluntarily, and intelligently waived them.

22 3. There is no evidence of coercion, compulsion, or any threats or promises made to the  
 23 defendant regarding these statements.

4 4. The defendant's statements to the detectives were voluntary.

5 5. Davis's statements are admissible in the State's case-in-chief under CrR 3.5. However, the  
 6 statements also must be admissible under CrR 3.6. Here, the court grants Davis's motion to  
 7 suppress his statements under CrR 3.6 (see below CrR 3.6 conclusions of law). Thus, the  
 8 statements are not admissible in the State's case-in-chief.

9 C. **CrR 3.6 CONCLUSIONS OF LAW.**

10 1. Based upon the police officers' training, experience, observations, and information they  
 11 had received, they had a reasonable, articulable suspicion to conduct a Terry stop of Davis's  
 12 vehicle. Factors that supported the Terry stop include (a) being aware that Davis had a felony  
 13 warrant and was at a specified address; (b) Davis walking out of the specified address; (c) Davis  
 14 matching the detailed physical description provided by officers; (d) officers knowing that Davis  
 15 was known to drive a white Chevy Blazer, and Davis indeed driving a white Chevy Blazer; and

1 (e) officers checking the Blazer's license plate and confirming that the Blazer was registered to  
2 Davis's mother, Arlene Davis.

3 2. Because the officers had reasonable, articulable suspicion to conduct a Terry stop of  
4 Davis, Davis's motion to suppress evidence on this basis is denied.

5 3. In Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct 1710 (2009), the United States Supreme  
6 Court adopted two new rules concerning vehicle searches incident to arrest. The first is that  
7 police may search a vehicle incident to arrest only when the passenger is unsecured and within  
8 reaching distance of the vehicle's passenger compartment. The second is that circumstances  
9 unique to the automobile context justify a search incident to arrest when it is reasonable to  
10 believe that evidence of the offense of arrest might be found in the vehicle.

11 4. Gant also recognized that vehicle searches might be proper for other reasons, including  
12 probable cause to believe that evidence of a crime was present in the vehicle, officer safety, and  
13 exigent circumstances. Gant did not address whether a good-faith exception to the exclusionary  
14 rule applies to vehicle searches when officers act in objectively reasonable reliance on settled  
15 case law.

16 6. This court has considered two federal court opinions addressing whether there should be  
17 a good-faith exception to the exclusionary rule for vehicle searches: The Ninth Circuit's opinion  
18 in U.S. v. Gonzalez, 2009 WL 2581738 (9<sup>th</sup> Cir., 2009) and the Tenth Circuit's opinion in U.S. v.  
19 McCane, 573 F.3d 1037 (10<sup>th</sup> Cir., 2009). This court finds the Ninth Circuit's reasoning in  
20 Gonzalez more persuasive.

21 7. Here, the officers' search of Davis's vehicle clearly was supported by existing judicial  
22 precedent, both on a state and federal level.

23 8. By searching Davis's car pursuant to a search incident to arrest, the officers acted in good  
faith by relying on settled existing judicial precedent. Thus, this court agrees that applying the  
exclusionary rule to these facts does not support the principle of deterrence.

9. However, this court concludes, that under its interpretation of Gant, the good-faith exception  
to the exclusionary rule does not apply even when officers acted in objectively reasonable  
reliance on settled case law. This court concludes that the good faith exception does not apply to  
the officers' search of Davis's car. Thus, the officers' good faith is irrelevant.

10. There were no other valid reasons for the officers to search Davis's vehicle without a  
warrant. The officers had no safety concerns at the time of the search. And it was not  
reasonable to believe that evidence of the offense of the arrest (i.e. an outstanding warrant) might  
be found in the vehicle. Thus, under Gant, the search incident to arrest of Davis's vehicle was  
unlawful.

11. After the unlawful search of the vehicle, Davis spoke to Detectives Dornay and Redemann  
and admitted that the gun found in the car was his. The court holds that Davis's admissions  
regarding the gun should be suppressed because they are the fruit of the unlawful search.

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12. The inevitable discovery doctrine allows the admission of unlawfully obtained evidence when the State proves by a preponderance of the evidence that (a) the same evidence would have been found using proper and predictable investigatory procedures; and (b) the police did not act unreasonably or in an attempt to accelerate discovery. This court finds by a preponderance of the evidence that the officers did not act unreasonably or in an attempt to accelerate discovery when searching Davis's Blazer incident to arrest.

13. The police may impound a vehicle as part of the police function of enforcing traffic regulations or under a community caretaking exception. But impoundment under these exceptions is not reasonable if a reasonable alternative to impoundment existed.

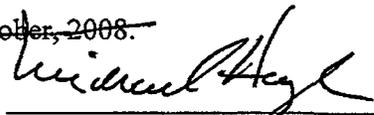
14. Had there not been a search of the Blazer incident to Davis's arrest, the officers would not have found controlled substances in Brittany Parfitt's purse and would not have subsequently arrested Parfitt. Had the officers not arrested Parfitt, she would have been available to drive away the Blazer. Had Parfitt been available to drive away the Blazer, the Blazer could not have been lawfully impounded because there would have been a reasonable alternative to impoundment.

15. This court finds that, had the officers been able to arrest Parfitt for some reason *other* than the controlled substances found in the car as a result of the search incident to arrest, the officers' impoundment and subsequent inventory search of the vehicle would have been valid. However, Parfitt's arrest stemmed directly from the impermissible search incident to arrest. Thus, any impoundment or inventory search would have been invalid.

16. Without the car being impounded, the officers would not have inevitably found the gun in the car. Thus, this court holds that the inevitable discovery doctrine does not allow admission of evidence of the gun because there would have been reasonable alternatives to impoundment had Brittany Parfitt not been arrested.

For the foregoing reasons, the defendant's motion to suppress evidence of the items found on Davis's person is denied. The defendant's motion to suppress the items found in Davis's vehicle is granted. The court also grants Davis's motion to suppress his statements to the police regarding the handgun based on the "fruit of the poisonous tree" doctrine. The court therefore dismisses count one - unlawful possession of a firearm in the first degree.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 6 day of ~~October, 2008.~~ <sup>November 2009</sup>  
  
JUDGE MICHAEL HAYDEN

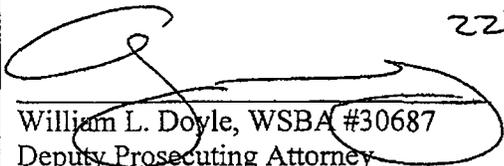
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Presented by:

4  22461 for

5  
6 William L. Doyle, WSBA #30687  
Deputy Prosecuting Attorney  
Attorneys for King County

7  
8 via e-mail dated 10-30-09  
Attorney for Defendant  
9 Nicholas Marchi, WSBA # \_\_\_\_\_

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STATE'S CrR 3.5 FINDINGS OF FACT  
AND CONCLUSIONS OF LAW-

Daniel Satterberg, Prosecuting Attorney 7  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104 (206) 296-9000  
FAX (206) 296-0955