

62076-2

62076-2

NO. 62076-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DONALD JORDAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

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I. ISSUES PRESENTED

- (1) Was the investigatory stop at issue in this case proper?
 - (a) Was CrR 3.6 Finding of Fact 3(A) supported by substantial evidence?
 - (b) Did the trial court correctly find that the defendant was seized when he was told to exit the vehicle, not when he was told to show his hands while inside the vehicle?
 - (c) Was the investigatory stop supported by reasonable and articulable suspicion?

- (2) Does the defendant have automatic standing to challenge the search of the vehicle when the evidence found inside the vehicle did not concern a possessory crime?

- (3) What is the effect of the recent United States Supreme Court decision in Arizona v. Gant on cases involving a vehicle search incident to arrest 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 the officers acting in good faith reliance on established United States and Washington Supreme Court case law when conducting the vehicle search incident to arrest?
- (4) Was the search of the vehicle in this case proper under the Fourth Amendment as interpreted in Gant?
- (a) Was it reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle?
- (5) Is the Gant rule that a vehicle may be searched when it is reasonable to believe that evidence relevant to the crime of arrest may be found inside the vehicle valid under article I, § 7 of the Washington constitution?
- (a) In light of the state constitutional analysis conducted in State v. Stroud, is the holding in State v. Ringer an aberration?
 - (b) Does State v. Patterson call into question the “relevant to the crime of arrest” rule?
 - (c) Would a return to rule set forth in Ringer be bad policy?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

Donald Jordan was convicted by a jury of one count of possession of methamphetamine and one count of manufacturing methamphetamine. CP 78-79. He received a standard range sentence. CP 88-92. Jordan has filed a timely appeal. CP 80.

B. FACTUAL BACKGROUND

1. The CrR 3.6 hearing.¹

On December 9, 2004, around 12:30 a.m., King County Sheriff's Deputy Gabriel Morris was conducting a business check at the Barrel Tavern on First Avenue South in White Center, Seattle. 1RP 28-29. Deputy Morris was working on a problem-solving project at the Barrel Tavern because there had been numerous citizen complaints regarding narcotics activities at that location. 1RP 29-32, 65-71; 2RP 31-34.

As Deputy Morris stood in the parking lot of the Barrel Tavern, he saw a person walking from the bar to a Ford Explorer. The individual got into the Explorer on the driver's side and shut the door. Deputy Morris remained standing in the parking lot for about two minutes. The Explorer

¹ At trial, this was a combined CrR 3.6 and 3.5 hearing. Because Jordan has not pursued any claims concerning the admissibility of his statements, testimony relating to the CrR 3.5 issues is not emphasized in this factual summary.

The following individuals testified at the CrR 3.6 hearing: Deputy Morris, Deputy Hodges, Donald Jordan, and Lisa Flygare.

was never started up, and neither its interior nor exterior lights were turned on. The deputy walked forward to see what was happening in the Explorer. 1RP 33-35; 2RP 46.

Deputy Morris did not immediately turn on his flashlight or do anything to draw attention to himself. 1RP 36-37. As he stood outside the vehicle, the deputy had a clear view inside and saw Donald Jordan sitting in the driver's seat and Lisa Flygare sitting in the front passenger seat. Both occupants were turned inward toward the center console of the Explorer. They had their hands together and appeared to be shielding something from view while passing it back and forth.² 1RP 38.

It appeared to Deputy Morris that the individuals in the Explorer were conducting some type of narcotics transaction. 1RP 38. This was based on their hand-to-hand action, furtive movements, the deputy's experience conducting narcotics investigations, and the high number of complaints from citizens about narcotic activity in this area. 1RP 39.

Deputy Morris turned on his flashlight. 1RP 38. He knocked on the window and said, "What's going on in there?" 3RP 94; 2RP 61. At the CrR 3.6 hearing, Jordan claimed the deputy was yelling. 2RP 61. Lisa

² Testifying at the CrR 3.6 hearing, Jordan claimed that Lisa Flygare and he had gone to the Explorer to talk. 2RP 59. Jordan admitted that they were hunched over in the seats talking to each other, but denied being "bent over the console." 2RP 60-61.

Flygare, however, testified that Deputy Morris's tone was "abrupt, not really loud, just abrupt." 3RP 12-13.

When Morris turned on his flashlight, both Jordan and Flygare seemed surprised. 1RP 39. Both occupants dropped their hands away from the center console. Jordan put his hands between his legs and one of his hands was cupped as if he was holding something and trying to conceal it from view. 1RP 39-40. Flygare also put her hands in her lap, but Deputy Morris didn't believe she was trying to hide anything. 1RP 41.

Deputy Morris told the individuals in the Explorer to show him their hands. 1RP 40. Flygare showed her hands immediately; Jordan did not initially comply. The deputy repeated the request in a louder voice and, after hesitating, Jordan displayed his hands.³ 1RP 41; 2RP 9-11.

Deputy Morris was concerned that Jordan may have concealed something between his legs before bringing his hands into view. 1RP 42. He directed Jordan to exit the vehicle. As Jordan did so, the deputy saw him place both his hands in his jacket pockets. 1RP 44. The deputy told Jordan to remove his hands from his pockets, had him turn around, and then did a pat-down frisk. 1RP 44-45, 85.

³ Jordan admitted at the CrR 3.6 hearing that he put his hands between his legs and that it was after he did so that the deputy asked him to show his hands. 2RP 61-62.

Deputy Morris observed that Jordan had a bulge in one of his front jacket pockets significantly larger than the other pocket, as if there was a bulky object in it. 1RP 42-43. Deputy Morris felt the pocket and felt a key ring with an object that seemed to be a pocket knife attached to it.⁴ 1RP 47. As he removed this item from Jordan's pocket, a plastic baggie containing an off-white substance fell to the ground. 1RP 47; 2RP 3-5.

Deputy Morris asked Jordan what was in the bag and Jordan stated it was "crank" (slang for methamphetamine). 1RP 48. At this point, Jordan was placed under arrest, handcuffed, and subsequently read his constitutional rights. 1RP 48-51; 2RP 5.

With the assistance of Deputy Hodge, who had been serving as a back-up officer, the Ford Explorer was searched. This vehicle search was conducted incident to the arrest of Jordan. 2RP 5. A bag of syringes and a digital scale were found in the front center console. More syringes were found in the front passenger floorboard area. 11RP 70-72; 14RP 72. A meth pipe was recovered from the rear seat area of the vehicle. 1RP 53. When the deputies opened the rear hatchback of the Explorer, they saw large plastic containers holding supplies that appeared to be consistent with the manufacture of methamphetamine, including bottles of chemicals

⁴ The pocket knife removed from Jordan's jacket was a mini-Leatherman-type tool. It contained screwdrivers, a knife, and scissors. 1RP 35-37.

and other equipment.⁵ 1RP 53-55; 11RP 72; 14RP 74. The deputies secured the Explorer and requested narcotic detectives respond to recover the methamphetamine-related materials. 1RP 56-57.

2. The trial testimony.

The testimony of Deputy Morris and Deputy Hodge about the initial contact with Jordan, the discovery of the bag containing suspected methamphetamine in his pocket, and the preliminary search of the vehicle was consistent with their testimony at the CrR 3.6 hearing and will not be repeated. See 11RP 54-69; 14RP 70-72.

After Jordan was arrested and advised of his constitutional rights, Deputy Morris told him the Explorer was going to be searched. In response, Jordan said, "Everything in there is mine." 11RP 69-70, 84. Later, after the search of the vehicle, Jordan stated that he knew nothing about the materials in the vehicle and that the only thing that was his was the bag of methamphetamine in his pocket. 11RP 84-85, 144-45.

Narcotics detectives responded and processed the scene. 11RP 73, 139-47; 12RP 40-71. In their opinion, the items recovered from the cargo area of the Explorer were consistent with a methamphetamine lab. 11RP 146-63; 12RP 41. Based on the materials found in the vehicle, the lab

⁵ At the CrR 3.6 hearing, there was considerable testimony as to whether the vinyl cargo cover was open or closed and the legal significance of such a cover. That issue has not been pursued on appeal and is not discussed here.

appeared to be using the “REI” (red phosphorus, ephedrine, and iodine) method of cooking methamphetamine, although certain items were missing or had been used up in the manufacturing process. 11RP 160, 172-73; 12RP 122. Samples were taken of the chemicals found in the Explorer. 11RP 192-98; 12RP 103-14.

Inside the cargo area of the Explorer were two duffel bags, one containing women’s clothing and one containing men’s clothing. Inside these bags, were items bearing the name of Donald Jordan. 11RP 174, 177-78-95. Inside the men’s bag were notes on how to make methamphetamine. 11RP 178. Also inside the men’s bag was a container with coffee filters and residue inside that appeared to be the “binder” used in making methamphetamine. 11RP 180; 13RP 36.

Other letters were found in the back cargo area addressed to Jordan. 12RP 94, 100-01. Also in the cargo area was a denim jacket. Inside one of the pockets was a receipt for the purchase of items that were known to be used in manufacturing methamphetamine. 12RP 96-99.

A Washington State Patrol Crime Lab forensic scientist confirmed that the supplies in the Explorer could be used to manufacture methamphetamine and explained how the various items fit into the manufacturing process. 13RP 39-58. The crime lab tested the samples collected by the narcotics detectives and concluded that they were

consistent with chemicals used to manufacture methamphetamine; including solvents that contained methamphetamine. 13RP 67-79, 120.

The bag of cocaine that had been in Jordan's pocket was tested by the crime lab and found to contain methamphetamine. A second bag that had been found on the ground outside the driver's side door of the Explorer also contained methamphetamine. 11RP 73; 13RP 79-82.

Lisa Flygare testified at trial.⁶ She claimed that the Explorer was hers, that she had not let Jordan drive it in the days prior to her arrest, and that she had put Jordan's duffel bag with clothes in the Explorer when she went to meet him at the Barrel Tavern.⁷ 13RP 129-32. Flygare testified that she had been paid money by an acquaintance to dispose the containers and chemicals and had put them in the back of the Explorer the day before her arrest. 13RP 133-34. She admitted she had never told anyone this version of events before the trial commenced. 13RP 186-87. Flygare admitted the pipe in the car was a "meth pipe bong." 13RP 139. She claimed the scale in the car belonged to her brother. 13RP 139. Finally, Flygare admitted that immediately after her arrest, she told Deputy Hodge that the contents of the vehicle belonged to Jordan. 14RP 75-76.

⁶ Flygare and Jordan had originally been co-defendants. Prior to trial, Flygare pled guilty to one count of possession of methamphetamine. 1RP 16-24. There was no cooperation agreement and Flygare testified for the defense. 13RP 126.

⁷ The Explorer was registered to Lisa Flygare. 12RP 116. Handwritten on the registration was the name Don Jordan and his birth date. 13RP 161-62.

Jordan testified in his own defense. 14RP 90. Jordan admitted that he was in the Explorer when Deputy Morris approached and that his arm might have been on the center console, but denied being “hunched over.” 14RP 102. Jordan agreed that he told Deputy Morris that “everything in the Explorer was his.” At trial, he claimed this referred only to the baggie of methamphetamine in his pocket. 14RP 104. Jordan denied owning the meth pipe in the Explorer. 14RP 106. He claimed the receipt from the hardware store was for items needed to help rebuild a recreational vehicle. 14RP 106-07. Jordan said that the personal papers found in the Explorer with his name on them had been put in the vehicle by Flygare. 14RP 106. Jordan admitted that the bag of methamphetamine in his pocket and the bag on the ground belonged to him. 14RP 129, 151. Finally, Jordan admitted to have a general understanding, but not specific knowledge, of how to make methamphetamine. 14RP 147-48, 155-57.

III. ARGUMENT: THE INVESTIGATORY STOP

Jordan contends on appeal that there was no justification for Deputy Morris to ask Jordan to show his hands or to have him get out of the Explorer. These claims are without merit. The trial court properly found that Deputy Morris’s investigatory stop was justified by reasonable and articulable suspicion.

A. CrR 3.6 FINDING OF FACT 3(A) WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Jordan challenges the justification for the following portion of CrR 3.6 Finding of Fact 3(A):

Morris observed Jordan and Flygare huddled over the center console moving their hands furtively in a manner consistent with efforts to obscure their activities from view. Morris shined his flashlight into the car. Morris did not say anything at this point.

CP 37.⁸ There is no argument concerning this assignment of error.⁹

A trial court's findings of fact will not be disturbed if they are supported by substantial evidence; that is, evidence of sufficient quantity to persuade a fair-minded rational person of the truth of the declared premises. Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986). "Credibility determinations are for the trier of fact and cannot be reviewed upon appeal" because the trial court alone has had the opportunity to "view witness' demeanor and to judge his veracity." State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Deputy Morris testified that he stood outside the Explorer and saw Jordan and Flygare turned inward toward the center console of the

⁸ Presumably, it is only the first sentence of this finding to which Jordan objects.

⁹ Jordan assigns no error to any of the other findings of fact. An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

Explorer. They had their hands together and appeared to be shielding something from view while passing it back and forth. 1RP 38. The trial court found that Deputy Morris was credible but that Jordan and Flygare's testimony was only partially credible. CP 41. To the extent that the court rejected Jordan's and Flygare's claim that they were not engaged in furtive activity, this was a credibility determination and not reviewable on appeal.

Moreover, confirmation of Deputy Morris's account can be gleaned from several other facts, none of which are challenged on appeal. Jordan and Flygare admitted that they were together in the vehicle, leaning forward and talking to each other. 2RP 59-61; 3RP 13. Deputy Morris testified that when he shone his flashlight into the vehicle, he saw Jordan move his hands to his crotch area *and Jordan agreed that he did so*. 2RP 61-62. Jordan and Flygare's response after Deputy Morris announced his presence provides support for his belief that they were "moving their hands furtively in a manner consistent with efforts to obscure their activities from view."¹⁰

¹⁰ Although not discussed by the trial court in these terms, further support for the "furtive movement" finding can be found from the fact that a bag of methamphetamine was discovered on the ground outside the driver's door. 13RP 79-82. It is not unreasonable to conclude that Jordan was holding this bag when he put his hands in his "crotch area" and then managed to slough it outside the Explorer.

B. JORDAN WAS NOT SEIZED WHEN HE WAS TOLD TO SHOW HIS HANDS.

Jordan argues that he was seized when he was told by Deputy Morris to show his hands while he was still inside the Explorer. The trial court correctly rejected this argument and properly found that the seizure occurred when Jordan was ordered out of the vehicle. CP 39.

As a preliminary matter, Jordan's argument has little effect on the outcome of this case. The only consequence of concluding that the seizure occurred at the point Jordan claims is that, when evaluating whether the investigatory is supported by reasonable and articulable suspicion, the fact that Jordan did not initially comply when told to show his hands could not be considered. As the trial court's resolution of the disputed facts makes clear, everything else the court relied upon in finding that there was a reasonable and articulable basis for the stop occurred *before* Jordan was told to show his hands. The CrR 3.6 conclusions of law state:

[T]he defendant was seized pursuant to a lawful investigatory stop the point at which he was asked to step from the vehicle. This seizure was based on Deputy Morris' observations, including: 1) the officer's knowledge of drug activity in the area surrounding the Barrel Tavern, 2) the fact that the activity was taking place at 12:30 a.m. in the parking lot of a tavern, 3) the defendant entered the car and nothing happened within the approximately two minutes prior to the officer approaching the car, 4) the officer's observations of the occupants of the car, including the observation that the occupants were huddled over the center console and moving their hands in a furtive manner

consistent with efforts trying to conceal the activity from observers, 5) the occupants' reaction to the officer shining the light into the vehicle, including the defendant placing his hands between his legs *and his initial refusal to show his hands when requested to do so*, 6) the officer's belief that the occupants were engaged in drug-related activity, and 7) the officer's training and experience.

CP 39-40 (emphasis added). Only a portion of sub-heading 5 ("his initial refusal to show his hands when requested to do so") occurred *after* the deputy told Jordan to show his hands. As will be discussed later, even absent this fact, the investigatory stop was justified.

In any event, Deputy Morris's request that Jordan show his hands is not a seizure. "[N]ot every encounter between a police officer and a citizen is an intrusion requiring an objective justification." United States v. Mendenhall, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). A seizure occurs, under article I, § 7 when considering all the circumstances an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). This determination is made by objectively looking at the actions of the law enforcement officer. State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998).

Directing an individual to merely remove his hands from his pockets – or in this case to show his hands – does not constitute a seizure.

See, e.g., State v. Barnes, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999); State v. Nettles, 70 Wn. App. 706, 710 n.6, 855 P.2d 699 (1993); Duhart v. United States, 589 A.2d 895, 898 (D.C. 1991) (officer approached defendant on street, asked him to take his hand out of his pocket, and, when defendant reluctantly complied, officer grabbed his wrist; held: no seizure occurred until officer grabbed defendant's wrist; request that defendant remove hand from pocket constituted "merely a pre-seizure consensual encounter"); United States v. Barnes, 496 A.2d 1040, 1044-45 (D.C. 1985) (no seizure where officer asked defendant to remove hands from pockets and then asked him two questions, because this was no more intrusive than asking for identification).

As the court in Nettles made clear, there are strong policy reasons why a request that a person who has been contacted show the officer their hands not be deemed a seizure:

Moreover, in the interest of promoting public safety, the encounter between Nettles and Officer Wong should not be characterized as a seizure. As a part of their "community caretaking" function, police officers must be able to approach citizens and permissively inquire as to whether they will answer questions. In furtherance of this function, it is not unreasonable to permit a police officer in the course of an otherwise permissive encounter to ask an individual to make his hands visible, particularly under the circumstances of this case. Such a request, by itself, does not immobilize an individual who has voluntarily agreed to speak with a police officer, does not produce property which an officer's possession of would immobilize the

individual, and does not produce any incriminating evidence.

Nettles, 70 Wn. App. at 712 (emphasis added, footnote omitted).

In the present case, Jordan does not dispute that Deputy Morris was entitled to observe the Explorer in the parking lot, to observe the activity inside the Explorer, to shine his flashlight inside the vehicle, and to ask the occupants what they were doing. That the deputy then asked Jordan to show his hands does not convert this permissible contact into a seizure. The request did not immobilize Jordan or prevent him from seeking to leave if that is what he wished to do. The request did not produce property – such as a driver’s license – the possession of which by the deputy might have prevented Jordan from leaving. Nor did the request to display his hands compel Jordan to produce incriminating evidence.

The record does not support Jordan’s suggestion that asking Jordan to show his hands was an overbearing, coercive display of police authority. Flygare disputed Jordan’s claim that Deputy Morris was yelling when he asked to see Jordan’s hands. Flygare described Deputy Morris’s tone of voice as “abrupt, not really loud, just abrupt.” 3RP 12-13. The deputy only raised his voice when Jordan refused to show his hands.¹¹

¹¹ If the court were to find that the seizure occurred when the deputy raised his voice and asked for a second time that Jordan show his hands, there is no effect on the outcome of this case. The fact that Jordan delayed showing his hands would still be a factor the court could consider in determining whether the Terry stop was justified.

1RP 41; 2RP 9-11. Moreover, the deputy had not initiated a traffic stop, turned on his patrol vehicle's light bar, nor drawn his weapon; all factors that might support a finding that a seizure had occurred.

In sum, nothing in the record suggests Deputy Morris engaged in a coercive show of authority that amounted to a restraint on freedom of movement by asking Jordan to show his hands. Contrary to Jordan's claim, the seizure did not occur when Deputy Morris asked him to show his hands, but rather when the deputy – almost immediately thereafter – ordered Jordan to exit the vehicle.

C. LEGAL OVERVIEW: INVESTIGATIVE STOPS.

Warrantless seizures are *per se* unreasonable, in violation of the Fourth Amendment and article I, section 7 of the Washington State Constitution. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). There are, however, a few “jealously and carefully drawn” exceptions to the warrant requirement which provide for those cases where the societal costs of obtaining a warrant outweigh the reasons for prior recourse to a neutral magistrate. Williams, 102 Wn.2d at 736. These exceptions include investigative stops. State v. Rife, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997). The State carries the burden of showing that an investigative stop is justified. Williams, 102 Wn.2d at 736; see also State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

Washington courts use the rationale set forth in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), when examining the validity of investigative stops. State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986). A Terry stop of a person or vehicle is justified if the officer can “point to specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrants the intrusion.” Terry, 392 U.S. at 21; see also Kennedy, 107 Wn.2d at 6; State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982).

Thus, “[p]olice may conduct an investigatory stop if the officer has a reasonable and articulable suspicion that the individual is involved in criminal activity.” State v. Walker, 66 Wn. App. 622, 626, 834 P.2d 41 (1992). A reasonable suspicion is the “substantial possibility that criminal conduct has occurred or is about to occur.” State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). It includes “the ability to reasonably surmise from the information at hand that a crime was in progress or had occurred.” Id. “The reasonableness of the officer’s suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop.” State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991).

In evaluating the reasonableness of an investigative stop, “the circumstances must be more consistent with criminal than innocent

conduct, [but] ‘reasonableness is measured not by exactitudes, but by probabilities.’” State v. Mercer, 45 Wn. App. 769, 774, 727 P.2d 676 (1986) (quoting Samsel, 39 Wn. App. at 571). Courts may consider such factors as the officer’s training and experience, the location of the stop, and the conduct of the person detained. Samsel, 39 Wn. App. at 570-571 (“While an inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience. The officer is not required to ignore that experience.”); Mercer, 45 Wn. App. at 774. Other factors that may be considered when determining whether a stop was reasonable include: “the purpose of the stop, the amount of physical intrusion upon the suspect’s liberty, and the length of time the suspect is detained.” Samsel, 39 Wn. App. at 572, quoting Williams, 102 Wn.2d at 740.

D. THE INVESTIGATIVE STOP OF JORDAN WAS PROPER.

The stop in this case occurred when Jordan was asked to get out of the Ford Explorer. At this point, Deputy Morris had a reasonable and articulable suspicion that Jordan was engaged in illegal activity. On appeal, Jordan attempts a “divide and conquer” strategy, arguing that individual factors – such as the officer’s prior experience – do not justify the stop. But it is the totality of these circumstances that must be

considered. The trial court correctly concluded that there were sufficient articulable facts to reasonably justify the stop.

Deputy Morris had experience with narcotics transactions and knew that the Barrel Tavern was having an area where narcotic activity was occurring. His attention was drawn to the Explorer after Jordan got in it because the engine was not started and no lights were turned on after Jordan entered the vehicle.¹² When he approached and looked in the Explorer, the deputy saw Jordan and Flygare “moving their hands furtively in a manner consistent with efforts to obscure their activities from view.” In the deputy’s opinion, their actions were consistent with narcotics activity. When he shone his light in the vehicle and asked what was going on, the passengers reacted defensively and it appeared that Jordan was trying to conceal something in his hand in the area of his crotch.¹³ This response was consistent with the conclusion that Jordan and Flygare were engaged in narcotics activity.

¹² At this point, there is clearly no basis for an investigative stop, but the deputy was not required to ignore this background information in light of what he subsequently observed. As Deputy Morris appropriately stated during the CrR 3.6 hearing when asked what crime caused him to go and look at the car: “I don’t know what he did. I don’t need to – for someone to commit a crime to do my job. I make observations. That’s my job is to look at things and see if there’s criminal activity afoot or not.” 1RP 74.

¹³ This summary leaves out Jordan’s initial refusal to obey the deputy’s request that Jordan show his hands, another factor that supports the stop.

Deputy Morris was not acting on an “inchoate hunch” but on a series of observations which, when seen in the light of his experience and training, establish a well-founded suspicion, based on objective facts, that he was observing illegal narcotics activity. It was thus not unreasonable for the deputy to briefly detain Jordan to investigate further. The investigative stop was not improper. There is no basis to suppress any of the evidence obtained during the search of Jordan or the search of Flygare’s vehicle.

IV. ARGUMENT: AUTOMATIC STANDING

The trial court correctly determined that, because manufacture of methamphetamine is not a possessory crime, Jordan lacked standing to challenge the search of Flygare’s vehicle. The significance of this ruling is that, lacking standing to do so, Jordan may not pursue his argument (raised for the first time on appeal) that the search was improper pursuant to Arizona v. Gant.¹⁴

A. FACTUAL BACKGROUND: AUTOMATIC STANDING.

The trial court concluded that Jordan lacked standing to challenge the search of Flygare’s vehicle. The CrR 3.6 stated:

The defendant did not have a legitimate expectation of privacy in the contents of the vehicle. He was not the registered owner, he had not known the registered owner

¹⁴ ___ U.S. ___, 129 S. Ct. 1710 (2009).

long, he testified that he had never before driven the vehicle, and he had only been in the vehicle a few times prior to December 9, 2004. Further, according to *State v. Jones*, 146 Wash.2d 328 (2002), the defendant is not entitled to assert automatic standing with respect to the search of the vehicle. Thus, the defendant lacks standing to challenge the search of the vehicle.

CP 41 (CrR 3.6 Conclusion of Law 4(a)(viii)).

B. LEGAL OVERVIEW: AUTOMATIC STANDING.

Fourth Amendment rights are personal rights which may not be vicariously asserted. *State v. Foulkes*, 63 Wn. App. 643, 647, 821 P.2d 77 (1991) (citing *Rakas v. Illinois*, 439 U.S. 128, 133, 99 S. Ct. 421, 425, 58 L. Ed. 2d 387 (1978)). A defendant may challenge a search or seizure only if he or she has a personal Fourth Amendment privacy interest in the area searched or the property seized. *State v. Simpson*, 95 Wn.2d 170, 174-75, 622 P.2d 1199 (1980); *Rakas*, 439 U.S. at 140, 99 S. Ct. at 428. The defendant must personally claim a justifiable, reasonable, or legitimate expectation of privacy that has been invaded by governmental action. *Simpson*, 95 Wn.2d at 175, 622 P.2d 1199 (citing *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220 (1979)).

However, under certain limited circumstances, a defendant has “automatic standing” to challenge a search or seizure. Automatic standing applies if: (1) the offense charged involves possession as an “essential”

element of the offense; and (2) the defendant was in possession of the contraband at the time of the contested search or seizure. State v. Zakel, 119 Wn.2d 563, 568, 834 P.2d 1046 (1992) (citing Simpson, 95 Wn.2d at 181, 622 P.2d 1199).

The United States Supreme Court has abandoned the automatic standing doctrine. United States v. Salvucci, 448 U.S. 83, 85, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980) (“[W]e hold that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated. The automatic standing rule. . . is therefore overruled.”).

Automatic standing, however, is still recognized by Washington courts. State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002) (automatic standing “maintains a presence” in Washington); State v. Evans, 159 Wn.2d 402, 407, 150 P.3d 105 (2007).

C. JORDAN DOES NOT HAVE AUTOMATIC STANDING TO CONTEST THE SEARCH OF THE EXPLORER.

As Jordan acknowledges on appeal, possession is not an element of the crime of manufacturing methamphetamine. The elements of the crime manufacturing methamphetamine are that the defendant unlawfully and feloniously manufactured methamphetamine, a controlled substance. RCW 69.50.401(1), (2)(b); CP 10. Manufacturing methamphetamine has

no requirement that the state prove “possession” of any specific object or item. Pursuant to established Washington law, Jordan has not established the possession was an essential element of the crime and thus fails the first prong of the automatic standing test. See State v. Ague-Masters, 138 Wn. App. 86, 95-99, 156 P.3d 265 (2007) (defendant charged with unlawful manufacturing methamphetamine did not have standing to challenge search because not a possessory crime). Jordan’s arguments to the contrary fail for the following reasons.

First, in a single sentence and without any analysis, Jordan asserts that federal courts have interpreted “essential” to mean either “necessary” or “sufficient.” The sole case cited by Jordan for this proposition is United States v. Oates, 560 F.2d 45, 56 (2d Cir. 1977). Jordan, however, misapplies Oates. Most basically, the defendant in Oates was charged with *possession of heroin* with intent to distribute. Oates simply held that “proof of possession is an essential element of the count charging possession with intent to distribute.” Oates, 560 F.2d at 56. Oates does state that automatic standing exists when “proof of possession is either sufficient or necessary.” Significantly, however, the opinion prefaces the foregoing remark by asserting “the automatic standing rule applies when possession is an ‘essential’ element of the crime charged.” Oates, 560 F.2d at 56. Oates thus incorporates into the test for automatic standing the

usual requirement that the defendant be charged with a crime having possession as an essential element. Oates does not stand for the position that a crime that does not have a possessory element may be read to have such an element.

Second, Jordan asserts the Washington State Supreme Court in Simpson cited a Nebraska case, State v. Van Ackeren, 194 Neb. 650, 654, 235 N.W.2d 210 (1975), as an example of a case where possession was an essential element. This is not correct. In Van Ackeren, the defendant asserted that the search of a vehicle owned by a third party, and the luggage therein, was without probable cause. Id. at 652. The Nebraska Supreme Court held that “this issue “must be decided against the defendant on the basis of his lack of standing to challenge [the third party’s] arrest.”¹⁵ Id. at 653. The Court specifically held that the defendant *lacked standing* to challenge the search of the third party vehicle. Id. at 654. The Court determined that the defendant did have standing to challenge the search of his luggage based on the language of a specific Nebraska statute.¹⁶ Id. The Van Ackeren opinion does not

¹⁵ The Nebraska Court observed: “The general rule on standing is: ‘In order to have standing to raise fourth amendment rights the individual must show he has been injured by the search or seizure (invasion of property or privacy rights), not merely by use of the evidence.’” Id. at 653.

¹⁶ Neb. § 29-822, R.R.S.1943 (“Any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to suppress its use as evidence.”).

discuss what constitutes an “essential” element of a crime in any way and does not further Jordan’s argument in this case.

Third, Jordan asserts that because the State established that he had constructive possession of items used to manufacture methamphetamine, possession must be an “essential” element of the crime. This is fundamentally wrong. The issue of constructive possession *goes to the second prong of the automatic standing test* (i.e., that “the defendant was in possession of the contraband at the time of the contested search or seizure”), not the first prong (whether “possession is an essential element of the offense”).

This was made explicitly clear in Jones, the case in which the State Supreme Court reiterated that automatic standing test remains viable in Washington. In Jones, which involved the unlawful possession of a firearm, the Court properly found that the first prong of the automatic standing test had been satisfied. The Court then analyzed the second prong, stating: “As to the second requirement, possession may be actual or constructive to support a criminal charge.” This was followed by a detailed review of constructive possession. Jones, 146 Wn.2d at 332-33.

Jordan’s proposed analysis – that constructive possession has some bearing on whether possession is an essential element of the crime – would conflate the two-prong automatic standing test into a single test and

vastly expand the scope of the doctrine. Whenever the State sought to prove that a defendant had constructive possession over an evidentiary item, the defendant could assert that he had standing to challenge the search, even when no privacy interest on the part of the defendant was implicated. This would clearly be inconsistent with the two-part automatic standing test endorsed by the Supreme Court.

Fourth, relying on State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007), Jordan also argues that he should have automatic standing because he is charged with both possession of methamphetamine and manufacture of methamphetamine. Evans is not controlling because in that case *both* the methamphetamine and evidence used to convict the defendant of manufacturing methamphetamine were found in a locked container inside the vehicle that was searched with a warrant. Id. at 404 (“officers seized the briefcase [from the vehicle] and discovered materials in it that lead to Evans’s conviction on charges of manufacturing methamphetamine and possession of methamphetamine with an intent to deliver”).

By contrast, the methamphetamine that forms the basis of the possession charge against Jordan was found *outside* the vehicle during a valid search. The evidence used to prove the crime of manufacturing was found *inside* the Explorer. Also, the discovery of the methamphetamine occurred *before* the discovery of the manufacturing evidence; it was not

discovered as a fruit of the vehicle search. Jordan should not be allowed to bootstrap standing to challenge the search based on evidence obtained at an earlier time, in different location, pursuant to a valid search.¹⁷

Fifth, Jordan was not faced with the self-incrimination dilemma that provides the rationale underlying the automatic standing doctrine. It is not true that in order to challenge the search, Jordan had to admit possession of the items in the back of the Explorer. At the hearing below, Jordan's argument was that the scope of the search was improper on the grounds that either the back of the Explorer was locked or that the items in the cargo area were concealed by the "tonneau" covering the cargo area. In addition, Jordan was arguing that officers had not obtained permission from Flygare to search the vehicle.¹⁸ None of these arguments relied in any way on Jordan asserting ownership over the chemicals in the cargo area of the Explorer.¹⁹

But even if Jordan had admitted he owned the chemicals in the back of the Explorer, this was not the equivalent of admitting guilt. Jordan could argue that the chemicals were not sufficient to manufacture methamphetamine, or that there was an innocent reason for their purchase,

¹⁷ As Jordan concedes, the federal case he relies upon, United States v. Galante, 547 F.2d 733 (C.A.N.Y. 1976), did not resolve this issue.

¹⁸ Significantly, Jordan stated that he could not give the officers permission to search the vehicle because he did not own it.

¹⁹ At the CrR 3.6 hearing, Jordan never admitted to owning the items in the Explorer.

or that the testing of the evidence was flawed or incomplete. More basically, he could argue that simply owning these items did not prove that he had ever actually manufactured methamphetamine.

In short, Jordan's claim that he has standing to challenge the search of Flygare's vehicle for evidence related to a non-possessory crime ultimately proves too much. If Jordan's argument is accepted, it would confer standing to raise challenge a search on every criminal defendant against whom the State seeks to introduce a piece of evidence that was "necessary" to obtain a conviction. The items recovered from the back of the Explorer were simply evidence (just like a knife might be evidence in a murder or assault case). Unlike a pure possessory crime, the existence of such evidence, by itself is not sufficient to convict a defendant. Under these circumstances, application of the automatic standing doctrine is not appropriate.

Jordan neither claimed nor had a privacy interest in Flygare's Explorer. The evidence seized from the back of the Explorer did not relate to a possessory crime. Jordan thus lacked standing to challenge the search of the Explorer. Lacking standing to challenge the search, Jordan should be precluded from pursuing his claims under Arizona v. Gant.²⁰

²⁰ See, e.g., Galante, 547 F.2d at 738 n. 7.

V. ARGUMENT: ARIZONA v. GANT²¹

A. OVERVIEW

Jordan argues that his conviction must be reversed because the search of Flygare's vehicle incident to arrest is prohibited pursuant to the recent United States Supreme Court opinion in Arizona v. Gant, ___ U.S. ___, 129 S. Ct 1710 (2009). It is the State's position that even if Gant 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.

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 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

²¹ It is the State's position that Jordan lacks standing to raise this challenge to the search of the Explorer under Gant. Also, Jordan's argument pursuant to Arizona v. Gant has no bearing on his possession of methamphetamine conviction.

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.²²

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 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

²² As argued below, the search of the vehicle in this case was proper under the rule set forth in Gant that a vehicle search may be conducted when it is “reasonable to believe that evidence relevant to the crime of arrest” might be found inside the vehicle.

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. RELEVANT PROCEDURAL FACTS.

The underlying search at issue in this case occurred on December 9, 2004. Jordan was found guilty after a jury trial on July 3, 2008.

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.

On June 11, 2009, Jordan filed his opening brief in the Court of Appeals, arguing that the search of the car was improper under Gant.

C. SUMMARY OF ARIZONA V. GANT.

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. 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.

D. 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.²³ Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (a new rule for 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 basis. That is, it will be necessary in pending cases to determine whether – under the rules articulated in Gant – the search was nevertheless proper.

²³ 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).

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.

E. EVIDENCE OBTAINED IN RELIANCE ON PRESUMPTIVELY 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.²⁴ 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

²⁴ Gant was decided purely on Fourth Amendment grounds. Gant, 129 S. Ct at 1714. Absent any basis to address state constitutional issues, the Fourth Amendment analysis is controlling. Nevertheless, the State addresses the good faith exception under both the Fourth Amendment and article I, § 7.

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.

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.²⁵

²⁵ 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).

DeFillippo, 443 U.S. at 40; see also Illinois v. Krull, 480 U.S. 340, 349-50, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987) (upholding warrantless administrative searches performed in good-faith reliance on a statute later declared unconstitutional).

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.²⁶
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).

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.²⁷

²⁶ For a recent discussion of federal cases recognizing the “good faith” exception to the exclusionary rule, see Herring, 129 S. Ct. at 704.

²⁷ This was the result reached by a federal district court in a recent post-Gant case. See United States v. Grote, 2009 WL 2068023, 3 (E.D.Wash., 2009) (even if the search of vehicle was not a valid search incident to lawful arrest, the fruits of the search should not be excluded because the officer “conducted the search in objective good faith based on the law as it existed prior to Gant”).

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 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. 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 *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.

In addition, the 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 is discussed in detail below, none of these concerns are implicated under the facts of the present case.

White involved a flagrantly unconstitutional statute. It did not assess a statute or judicial opinion that was presumptively valid.²⁸ More

²⁸ For a critique of the White analysis, see State v. Kirwin, 203 P.3d 1044, 1051-54 (2009) (Madsen, J., concurring).

recently, however, the Court has explicitly held in two cases that an arrest or search conducted in reliance on a presumptively valid statute that was subsequently deemed unconstitutional does not require suppression of the evidence. See State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006); State v. Brockob, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006).

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.²⁹ The defendants in Potter 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:

In White, we held that a stop-and-identify statute was unconstitutionally vague and, applying the United States Supreme Court's exception to the general rule from DeFillippo, excluded evidence under that narrow exception

²⁹ The defendants in Potter were relying on City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004).

for a law “so grossly and flagrantly unconstitutional” that any reasonable person would see its flaws.

Potter, 156 Wn.2d at 843 (quoting White, 97 Wn.2d at 103 (quoting DeFillippo, 443 U.S. at 38)).

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 that:

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.

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 subjective 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 because the search was conducted pursuant to authority of law, and does not require suppression of the evidence obtained in the course of the arrest or search.

As discussed above, 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 should have no bearing on the analysis: the judicial opinions of the United States Supreme Court and the Washington Supreme Court should be viewed as least as presumptively valid as legislative enactments.

3. 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 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."³⁰ 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).

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

³⁰ 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.

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.³¹ 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 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. Evidence of criminal activity was validly obtained pursuant to a vehicle search incident

³¹ 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.

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 the evidence obtained in all pending cases with a possible Gant issue are not justified by the potential benefit in deterrence.³²

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 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.

³² 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.

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

That White is 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.³³ Commonwealth v. Dana, 43 Mass. 329 (2 met. 1841); 4 J. Wigmore, Evidence § 2183 (2nd 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

³³ The meaning and scope of a constitutional provision is determined by examining the law at the time of enactment. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003).

(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).³⁴ Nonetheless, the Washington

³⁴ “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. Biloche, 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.

F. CONCLUSION

The State respectfully requests that, for the reasons outlined above, this court uphold of the validity of the search of Flygare's vehicle incident to arrest because the officers were acting pursuant to presumptively valid case law at the time the search was conducted.

VI. ARGUMENT: FOURTH AMENDMENT CLAIM³⁵

A. THE SEARCH OF FLYGARE’S VEHICLE WAS PROPER UNDER THE FOURTH AMENDMENT.

Jordan argues that even under the new rules articulated by the U.S. Supreme Court in Gant, the search of Flygare’s vehicle was not justified under the Fourth Amendment. This is not correct. Gant specifically approved vehicle search when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. As Jordan concedes, “reasonable to believe” is the equivalent of the “Terry stop” standard. Because the deputies in this case had reasonable and articulable suspicion that there might be evidence relevant to the crime of arrest in the Explorer, they were justified in searching her car.

1. Analysis: “reasonable to believe” standard.

In Gant the U.S. Supreme Court articulated a new rule for vehicle searches, stating: “[W]e also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is *reasonable to believe evidence relevant to the crime of arrest might be*

³⁵ It is the State’s position that Jordan lacks standing to raise this challenge to the search of the Explorer. Moreover, as argued above, under federal case law, officers were relying in good faith reliance on the law in place at the time of the search and the exclusionary rule does not apply even under article I, § 7. Finally, Jordan’s Fourth Amendment argument has no bearing on his possession of methamphetamine conviction.

found in the vehicle.” Gant, 129 S. Ct at 1714 (emphasis added, internal quotations omitted).

In defining what is meant by “reasonable to believe,” Jordan suggests that it is the equivalent to the reasonable and articulable suspicion standard for an investigative stop set forth in Terry v. Ohio.³⁶ The State, with the exception of the caveat in the footnote below, agrees.³⁷ Because this is an issue of first impression, however, the State offers the following analysis of this question.

Gant does not explain what quantum of evidence will render it “reasonable to believe” that evidence relevant to the crime of arrest might be found in the vehicle. Guidance must, therefore, be sought from the use of this phrase in other contexts and from the entire Gant opinion.

The phrase “reasonable to believe” is the equivalent of “reason to believe.” The “reason to believe” standard first appeared in the United States Supreme Court’s opinion of Payton v. New York, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). Payton held that an arrest

³⁶ This standard has been set forth above and will not be repeated. Supra Section III.C.

³⁷ Jordan asserts that the reasonable articulable suspicion standard should be judged by the subjective belief of the officer conducting the arrest and search. This is not the standard set forth in Terry and its progeny. The proper test is whether the officer has a well-founded suspicion based on objective facts that the individual is connected to actual or potential criminal activity. State v. Sieler, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980). It is difficult to believe that the U.S. Supreme Court would allow the determination of whether an individual’s Fourth Amendment rights were violated to hinge solely on the subjective opinion of the officer conducting the search.

warrant gave government agents limited authority to enter a suspect's home to arrest him if they have "reason to believe" he was inside. Id., 445 U.S. at 603. The Supreme Court did not elaborate on the meaning of "reason to believe" in Payton and has not done so since then. See United States v. Magluta, 44 F.3d 1530, 1534 (11th Cir. 1995) ("The 'reason to believe' standard was not defined in Payton, and since Payton, neither the Supreme Court, nor the courts of appeals have provided much illumination.").

However, every Federal circuit court of the United States Court of Appeals that has addressed the issue, except the Ninth Circuit, has held that the "reason to believe" language was meant to employ a standard less exacting than probable cause. See, e.g., Valdez v. McPheters, 172 F.3d 1220, 1224-1225 (10th Cir. 1999) (adopting "reasonable belief" standard); United States v. Route, 104 F.3d 59, 62 (5th Cir.), cert. denied, 521 U.S. 1109 (1997) ("reason to believe" standard is distinct from "probable cause" and allows "the officer who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances"); United States v. Risse, 83 F.3d 212, 216 (8th Cir. 1996) ("the officers' assessment need not in fact be correct; rather, they need only 'reasonably believe' that the suspect resides at the dwelling to

be searched and is currently present at the dwelling”); United States v. Lauter, 57 F.3d 212, 215 (2d Cir. 1995) (probable cause is “too stringent a test”; proper inquiry is “whether there is a reasonable belief that the suspect resides at the place to be entered to execute an arrest warrant, and whether the officers have reason to believe that the suspect is present”); United States v. Edmonds, 52 F.3d 1236, 1247-48 (3d Cir.), vacated in part on other grounds, 1995 U.S. App. LEXIS 16108 (3d Cir. June 29, 1995), cert. denied, 519 U.S. 927 (1996) (although “the information available to the [police] clearly did not exclude the possibility that [the suspect] was not in the apartment, [they] had reasonable grounds for concluding that he was there”); United States v. Magluta, 44 F.3d 1530, 1535 (11th Cir.), cert. denied, 516 U.S. 869 (1995) (for police “to enter a residence to execute an arrest warrant for a resident of the premises, the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect’s dwelling, and that the suspect is within the residence at the time of entry”).

The vast majority of state courts have followed suit. See, e.g., V.P.S. v. State, 816 So. 2d 801, 802-03 (Fla. Dist. Ct. App. 2002); State v. Northover, 133 Idaho 655, 659, 991 P.2d 380 (Ct. App. 1999); State v. Beal, 26 Kan. App. 2d 837, 840, 994 P.2d 669 (2000); Commonwealth v.

Silva, 440 Mass. 772, 802 N.E.2d 535, 541-42 (2004); State v. Asbury, 328 S.C. 187, 191-92, 493 S.E.2d 349 (1997); Morgan v. State, 963 S.W.2d 201, 204 (Tex. Ct. App. 1998); State v. Blanco, 2000 WI App 119, 237 Wis. 2d 395, 404-06, 614 N.W.2d 512 (Ct. App. 2000)).

The standard adopted by these courts essentially equate “reasonable belief” with the Terry reasonable suspicion standard. See, e.g., Silva, 802 N.E.2d at 541 n.8 (“We reject the defendant’s argument that adopting a ‘reasonable belief’ standard would be too confusing for the police to apply. The police are already familiar with a similar standard of ‘reasonable suspicion’ based on ‘specific and articulable facts’ used in Terry-type investigatory stops.”).

Based upon the proceeding authorities, it is appropriate to presume that the United States Supreme Court was aware that the phrase “reasonable to believe” is comparable to the standard articulated in Terry when the Court used this phrase in Gant.

That the Gant Court intended that this meaning be applied to the phrase “reasonable to believe” is supported by the Court’s discussion of other established exceptions to the warrant requirement that are available post-Gant. One exception specifically identified is that contained in United States v. Ross:

If there is *probable cause to believe a vehicle contains evidence of criminal activity*, United States v. Ross, 456 U.S. 798, 820-821, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), *authorizes a search of any area of the vehicle in which the evidence might be found*. Unlike the searches permitted by JUSTICE SCALIA's opinion concurring in the judgment in Thornton, which we conclude today are reasonable for purposes of the Fourth Amendment, Ross allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader.

Gant, 173 L. Ed. 2d at 498 (emphasis added). Thus, the court recognized that if there was probable cause to believe a vehicle might contain evidence of criminal activity, a broader search was justified. Equating Gant's "reasonable to believe" with "probable cause" would render the Gant "relevant to the crime of arrest" rule meaningless and superfluous.

In sum, "reasonable to believe" as used by the U.S. Supreme Court in Gant means is the equivalent of the reasonable, articulable suspicion standard set forth in Terry.

2. The search of the Explorer was proper under the "reasonable to believe" test.

Jordan was arrested for possession of methamphetamine after he had been removed from the Explorer and a baggie containing powder he admitted was "crank" had fallen out of his pocket. 1RP 48-51. Jordan was placed under arrest, handcuffed, and read his constitutional rights. 1RP 48-51; 2RP 5. Deputy Morris told Jordan the Explorer was going to be searched. In response, Jordan said, "Everything in there is mine."

11RP 69-70, 84. Prior to being removed from the Explorer, Deputy Morris had seen Jordan leaning over the center console and engaged in furtive activity. 1RP 39. When the deputy shone the light in the vehicle, Jordan placed his hand in his crotch area and appeared to be concealing something. 1RP 39-40.

Based on the deputy's observation of Jordan's actions while inside the vehicle, the discovery of the bag of methamphetamine on Jordan's person, Jordan's pre-search admission that "everything" in the vehicle belonged to him, and the circumstances surrounding the stop (including the deputy's belief, based on his training and experience that, that Jordan was engaged in narcotics activity) it was reasonable to believe that there might be evidence of the crime of arrest (narcotics or narcotics related items) in the Explorer. This was confirmed when a bag of syringes and a digital scale were found in the front center console and syringes were found in the front passenger floorboard area. 11RP 70-72; 14RP 72. This in turn led to the discovery of the meth pipe in the rear seat area plastic containers holding supplies used to manufacture of methamphetamine in the open cargo area. 11RP 53-54, 72; 14RP 74.

In sum, the discovery of narcotics on Jordan plus prior indicia of other activity associated with narcotics use inside the car makes it reasonable to conclude that there might be evidence relevant to the

possession of methamphetamine use inside the Explorer. The search as thus appropriate under the new exception articulated in Gant and does not violate the Fourth Amendment.

VII. ARGUMENT: ARTICLE I, § 7 CLAIM³⁸

Jordan argues that the vehicle search in this case violated article I, § 7 of the Washington Constitution. Jordan asserts that this court should hold that under article I, § 7 the “exception set forth in Gant allowing a vehicle search when it is reasonable to believe that there is evidence relevant to the crime of arrest in the vehicle should be rejected.” Jordan asserts that State v. Stroud³⁹ is no longer good law and argues that this court should adopt the holding set forth in State v. Ringer⁴⁰ Jordan’s argument must be rejected because it has been long-settled in Washington that pursuant to article I, § 7, a vehicle search incident to arrest is allowed. This understanding is not changed by the U.S. Supreme Court’s opinion in Gant. Simply put, Ringer was an aberration in the case law and does not reflect the proper interpretation of article I, § 7.

³⁸ It is the State’s position that Jordan lacks standing to raise this challenge to the search of the Explorer. Moreover, as argued above, under Washington case law, officers were relying in good faith on the law in place at the time of the search and the exclusionary rule does not apply even under article I, § 7. Finally, Jordan’s argument pursuant to article I, § 7 has no bearing on his possession of methamphetamine conviction.

³⁹ 106 Wn.2d 144, 720 P.2d 436 (1986).

⁴⁰ 100 Wn.2d 686, 674 P.2d 1240 (1983).

A. **STROUD WAS BASED ON THE STATE, NOT THE FEDERAL, CONSTITUTION.**

In Stroud, an opinion decided in 1986, the Washington Supreme Court upheld vehicle searches incident to arrest of the driver under article I, § 7 of the Washington Constitution. Stroud, 106 Wn.2d at 146. The Court, recognizing the greater protection provided by the Washington Constitution, limited such searches to the open area of the passenger compartment and precluding searches of locked containers, a locked glove box, and the trunk. Id. at 152-53.

Jordan asserts that the United States Supreme Court in Gant “necessarily abrogated” the holding in Stroud. This is incorrect. The Washington Supreme Court made it explicitly clear that Stroud was decided under article I, § 7 of the Washington Constitution:

We wish to make clear that our subsequent determination in this case *is not based on prior federal case law*, and that *we decide this case solely on independent state grounds*. We believe that our state’s constitution, and recent case law interpreting it, mandate the decision we arrive at today. Furthermore, *the role we set regarding the automobile exception to the search warrant requirement is not based on federal precedent*, as we have independently weighed the privacy interests individuals have in items within their automobile and the dangers to the officers and law enforcement presented during an arrest of an individual inside an automobile. *Our divergence from the decisions of federal courts is based on this heightened protection of privacy required by our state constitution.*

Stroud, 106 Wn.2d 144 at 149 (emphasis added). There could not be a clearer statement that Stroud was based on the state, not federal constitution. In contrast, Gant was decided solely on Fourth Amendment grounds. Gant, 129 S. Ct at 1714.

Of course, pursuant to Mapp v. Ohio, individuals are entitled to the protection of the Federal constitution whether or not the State constitution provides similar protections. Mapp v. Ohio, 367 U.S. 643, 654-55, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). But this does not mean that the scope of vehicle searches under article I, § 7 has been narrowed beyond that set forth in Gant and beyond the analysis that has previously – and consistently – been approved by the Washington Supreme Court.

B. RINGER WAS AN ABERRATION AND DOES NOT CORRECTLY INTERPRET ARTICLE I, § 7.

In State v. Ringer, an opinion decided in 1983, the Washington Supreme Court held that warrantless searches of a vehicle were impermissible absent exigent circumstances. Ringer, 100 Wn.2d at 700-02. As will be discussed below, this holding was a significant departure from previous Washington case law. But what is most significant about Ringer is that two years later the Supreme Court in Stroud explicitly rejected its holding and its interpretation of article I, § 7. Here is the Stroud Court's review and rejection of the Ringer rule:

In Ringer, this court held that, absent actual exigent circumstances, a warrantless search of a suspect's vehicle was impermissible. . . .

This court held that the search violated article 1, section 7. The basis for this holding was that

[a] warrantless search in this situation is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested.

. . . This court then viewed the "totality of circumstances" surrounding the arrest, and decided that the burden was on the police officers to show that the exigencies of the particular situation required a warrantless search. . . . This was clearly to be done on a case by case basis. Because of the availability of a telephone search warrant, because of the lack of danger posed to the officers once the suspect was in the patrol car, and because the van was lawfully parked and immobile, the warrantless search was in this case disallowed.

We cannot agree with all of the reasoning used in Ringer, and agree that this part of the opinion must be overruled. The Ringer holding makes it virtually impossible for officers to decide whether or not a warrantless search would be permissible. Weighing the "totality of circumstances" is too much of a burden to put on police officers who must make a decision to search with little more than a moment's reflection.

Stroud, 106 Wn.2d at 150 (emphasis added, citations omitted).

Significantly, five of the justices (all those remaining on the bench) who had sided with the majority in Ringer, approved of its rejection in Stroud. This included Justice Dolliver, the author of the Ringer opinion, who concurred in the conclusion of Stroud. Clearly, upon mature

reflection, Supreme Court concluded that the Ringer opinion was a flawed and unworkable approach to vehicle searches incident to arrest.

Moreover, as Ringer itself recognized, there has been a long and extensive history in Washington of allowing vehicle searches pursuant to the lawful arrest of driver. See Ringer, 100 Wn.2d at 692-700; see also Ringer 100 Wn.2d 703-05 (Dimmick, J. dissenting); Stroud, 106 Wn.2d 155-59 (Durham, J, concurring). While it is not possible to repeat all of the cases discussed in Ringer, a few highlights are appropriate.

As early as 1923, the Washington Supreme Court authorized the warrantless search of an arrestee's automobile and his suitcase contained therein. State v. Hughlett, 124 Wash. 366, 214 P. 841 (1923).⁴¹ Two years later, in State v. Deitz, 136 Wash. 228, 239 P. 386 (1925), the Court upheld the search by police of the locked trunk of an arrestee's automobile. Similarly, in State v. Miller, 151 Wash. 114, 275 P. 75 (1929), the Court allowed the search of an arrestee's automobile incident

⁴¹ The Hughlett Court stated:

It has always been held that a peace officer, when he makes a lawful arrest, may lawfully, without a search warrant, search the person arrested and take from him any evidence tending to prove the crime with which he is charged. If a search may be made of the person or clothing of the person lawfully arrested, then it would follow that a search may also be properly made of his grip or suitcase which he may be carrying. From this it seems to us to follow logically that a similar search, under the same circumstances, *may be made of the automobile of which he has possession and control at the time of his arrest.*

124 Wash. at 370 (emphasis added).

to his arrest for bootlegging.⁴² In State v. Cyr, 40 Wn.2d 840, 246 P.2d 480 (1952), the Court approved the search of an arrestee's automobile even though he was not an occupant of the vehicle at the time the arrest occurred. See also State v. Jackovick, 56 Wn.2d 915, 916-17, 355 P.2d 976 (1960).

The scope of vehicle searches incident to arrest was subsequently somewhat limited by State v. Michaels, 60 Wn.2d 638, 374 P.2d 989 (1962), in which the Court emphasized that the search, in order to be lawful, must be for *items connected with the crime for which the person was arrested*. Id. at 642-47. Subsequently, the Court continued to require that a search incident to arrest be for evidence of the crime for which the defendant was arrested. See, e.g., State v. Johnson, 71 Wn.2d 239, 243, 427 P.2d 705 (1967).

The Court in Ringer concluded that this history of allowing vehicle searches was not consistent with its interpretation of article I, § 7 and stated that it was overruling some of the cases discussed above. Ringer, 100 Wn.2d at 700. However, in subsequently abrogating Ringer, Stroud explicitly rejected the conclusion that the vehicle searches incident to

⁴² In Miller, a defendant was arrested and police drove his automobile to the police station and searched two suitcases found in therein. The Court held that the validity of the search subsequent to arrest "depends upon whether the arresting officers, at the time of making the arrest, had reasonable ground to believe that the appellant was engaged in bootlegging." 151 Wash. at 115.

arrest were not allowed under article I, § 7. After a detailed discussion – which cannot be repeated here – the Court in Stroud stated: “State v. Ringer . . . was itself *the first case to restrict, based on state constitutional grounds, the automobile search incident to arrest doctrine* we had applied for nearly 60 years since State v. Hughlet. . .” Stroud 106 Wn.2d at 158 (emphasis added).

Thus, Ringer clearly represents an aberration in the interpretation of article I, § 7. The case law preceding Ringer allowed vehicle searches incident to arrest, although at times limiting such searches to evidence related to the crime of arrest. Subsequently, Ringer’s rejection of all vehicle searches absent exigent circumstances was itself rejected in Stroud. As discussed above, the analysis in Stroud has been repeatedly affirmed by the Washington Supreme Court over the last two-and-a-half decades.⁴³ Ringer was an aberration and does not represent a correct interpretation of article I, § 7.

C. STATE v. PATTERSON DOES NOT SUPPORT JORDAN’S ARGUMENT.

With virtually no analysis, Jordan also claims that State v. Patterson, 112 Wn.2d 731, 774 P.2d 10 (1989), justifies returning to the

⁴³ Supra Section II.E.3.

rule set forth in Ringer and rejection of the “evidence relevant to arrest” rule of Gant. This is not the case.

First, and most basically, Patterson explicitly affirmed the holding in Stroud. 112 Wn.2d at 734-35. Patterson neither cites to nor addresses Ringer. At best, Patterson simply affirms Stroud’s rejection of Ringer.

Second, Patterson did not concern searches incident to arrest. Rather, Patterson involved the search of a “parked, immobile, unoccupied and secure” vehicle outside the presence of the defendant (who was later arrested based on evidence found in the vehicle). 112 Wn.2d at 135. Patterson has nothing to do with the issues presented by Gant.

Finally, Jordan suggests that Patterson undermines the Gant “relevant to the crime of arrest” rule because (Jordan asserts) the Gant rule is based on the “automobile exception.” In fact, the Gant relevant to the crime of arrest rule is clearly based on Justice Scalia’s analysis in his dissent in Thornton v. United States, 541 U.S. 615, 629, 124 S. Ct. 2127, 2135-36 (2004). Scalia’s dissent in Thornton had nothing to do with the automobile exception. Here are key excerpts from Justice Scalia’s analysis:

If [vehicle searches incident to arrest] are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, *but simply because the car might contain evidence relevant to the crime for which he was arrested*. This more general sort of evidence-gathering

search is not without antecedent. For example, in United States v. Rabinowitz . . . we upheld a search of the suspect’s place of business after he was arrested there. We did not restrict the officers’ search authority to “the area into which [the] arrestee might reach in order to grab a weapon or evidentiary ite[m],” . . . and we did not justify the search as a means to prevent concealment or destruction of evidence. Rather, *we relied on a more general interest in gathering evidence relevant to the crime for which the suspect had been arrested.* . . . see also Harris v. United States . . . Marron v. United States . . . Agnello v. United States . . . Weeks v. United States . . .

Numerous earlier authorities support this approach, referring to the general interest in gathering evidence related to the crime of arrest with no mention of the more specific interest in preventing its concealment or destruction. *See* United States v. Wilson . . . Smith v. Jerome . . . Thornton v. State . . . Ex parte Hurn . . . Thatcher v. Weeks . . .

. . . .

There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.

Thornton, 541 U.S. at 629 (emphasis added, citations omitted, footnotes omitted). At no point was Justice Scalia relying on the “automobile exception” to justify the search of a vehicle for evidence relevant to the crime of arrest. Rather, he based his analysis on prior precedent that allowed searches for evidence when the perpetrator of a crime is lawfully arrested.

Significantly, in Thornton Justice Scalia would have upheld a search remarkably similar to that of Jordan's vehicle in the present case:

In this case, as in Belton, petitioner was lawfully arrested for a drug offense. It was reasonable for Officer Nichols to believe that further contraband or similar evidence relevant to the crime for which he had been arrested might be found in the vehicle from which he had just alighted and which was still within his vicinity at the time of arrest. I would affirm the decision below on that ground.

Thornton, 541 U.S. at 629 (footnote omitted).

Ultimately, the Washington Supreme Court's opinion in Patterson has nothing to do with, and does not call into question, the Gant "relevant to the crime of arrest" rule.

D. THE "RELEVANT TO THE CRIME OF ARREST" RULE IS NOT CONTRARY TO ARTICLE I, § 7.

Jordan argues that because article I, § 7 provides greater protection than the Fourth Amendment the "evidence relevant to the crime of arrest" rule set forth in Gant should be rejected. This argument is without merit. In Stroud, the Washington Supreme Court precisely determined the greater protection provided during vehicle searches incident to arrest. Under article I, § 7 of the Washington Constitution, individuals have a greater privacy interest in locked containers inside a vehicle (including a locked glove box and a locked trunk) than under the Fourth Amendment. Stroud, 106 Wn.2d at 152-53. Accordingly, in Washington, locked containers may not be opened during a vehicle search incident to arrest. Id.

This greater privacy protection provided by article I, § 7 remains unaffected by Gant. Assuming that pursuant to Gant officers may search an arrestee's vehicle because it is "reasonable to believe there is evidence relevant to the crime of arrest" inside, in Washington the officers may still not search locked containers, the locked glove box, or a locked trunk. This additional protection satisfies the requirements and judicial interpretation of article I, § 7.

Interpretations of article I, § 7 may allow greater protection from searches and seizures than that accorded by United States Supreme Court interpretations of the Fourth Amendment, but nothing *requires* Washington courts to reach such a result. State v. Chrisman, 100 Wn.2d 814, 817-18, 676 P.2d 419 (1984). This is particularly true when, as here, there is no basis in the historical precedent to support the newly proposed extension and limitation under the Washington constitution. Washington courts have consistently allowed vehicle searches incident to arrest. At best, pre-Ringer the Washington Supreme Court in allowing vehicle searches incident to arrest foreshadowed the holding in Gant by limiting such searches to *items connected with the crime for which the person was arrested*. See Michaels, 60 Wn.2d at 642-47; Johnson, 71 Wn.2d at 243.

This limitation is essentially identical to Gant's "relevant to the crime of arrest" rule.

In sum, there is no basis under Washington law to reject the "evidence relevant to the crime of arrest" rule as formulated in Gant, other than to recognize that – as has been the case since Stroud – locked containers may not be opened without a warrant during otherwise legal vehicle searches.

E. A RETURN TO RINGER WOULD BE BAD POLICY.

Jordan argues that the Gant "relevant to the crime of arrest" rule should be rejected and that the courts should return to the "totality of the circumstances" rule proposed in Ringer. This would represent a bad policy choice, one which has already been rejected by the Washington Supreme Court in Stroud.

In Ringer, the Court allowed vehicle searches only if "exigent circumstances" were present, as determined by a review of the "totality of the circumstances" on a case-be-case basis. Ringer, 100 Wn. 2d at 700-02. In Stroud, the Court recognized that this standard was ultimately unworkable and impractical: "The Ringer holding makes it virtually impossible for officers to decide whether or not a warrantless search would be permissible. Weighing the 'totality of circumstances' is too much of a burden to put on police officers who must make a decision to

search with little more than a moment's reflection.” Stroud, 106 Wn.2d at 150. Nothing has changed since Stroud was decided; the totality of the circumstances test remains impractical in the real world that of law enforcement.⁴⁴

Moreover – although there has not been a chance to develop this issue in the present case – the suggestion in Ringer that the availability of telephonic search warrants justifies adoption of a limited “exigent circumstances” rule for vehicle searches is questionable. Obtaining telephonic warrants is not as simple as picking up a telephone. In many situations, judges are unavailable to hear such requests. Required recording equipment may not be available. Today, judges often require that the “telephonic” warrants be reduced to writing and then faxed or e-mailed to them. If the vehicle can be secured, the judge may delay ruling on the warrant until a more convenient time. The end result of these practices is that obtaining a telephonic warrant is not just a question of

⁴⁴ As one of the dissenting justices in Ringer subsequently observed:

The defect in Ringer that prompted our reconsideration was its “totality of the circumstances” standard. While that case-by-case approach arguably permitted courts to decide warrantless search cases with great precision—weighing a range of factors and making fine distinctions—it required police officers, in effect, to predict how all the second-guessing would come out. If the officers, acting in good faith in a difficult situation, happened to judge their situation differently from the reviewing court, an otherwise proper, fruitful investigation would be ruined. If the police wished to avoid this risk, their only option was to adopt an overly-cautious approach to automobile searches. Either way, effective law enforcement suffered.

State v. Patterson, 112 Wn.2d 731, 740-41, 774 P.2d 10 (1989) (Dore, J., dissenting).

picking up a cell-phone and contacting a judge. Rather, it can be an involved and time-consuming process.⁴⁵

By itself, the inconvenience of delay may not justify an intrusion on an established constitutional right. But when the Washington Supreme Court has long recognized the reduced right to privacy in a vehicle – particularly in the context of a search incident to arrest – the impact on suspects and citizens should be considered. What is more intrusive, a brief search of a vehicle after the driver has been arrested, when it is reasonable to believe that there is evidence of the crime of arrest inside the vehicle, or a protracted delay at the side of the road while the warrant is obtained and the search then conducted?

The stark reality is that, when it is reasonable to believe that there is evidence relevant to the crime of arrest in the vehicle, a request for a search warrant will likely be approved. In this circumstance, obtaining a warrant has only delayed the implementation of the search to the detriment of all involved. A search pursuant to a warrant that turns up incriminating evidence is unlikely to be reversed. On the other hand, if an officer

⁴⁵ These delays are only likely to get worse if a warrant is required for every stop at 2:00 a.m. on a Friday night in which the officer concludes it is reasonable to believe there is evidence of the crime of arrest in the vehicle. Consider the case of a DUI arrest in which the officer sees a beer can on the console. Is a warrant required before the officer can check the beer can to see if it is opened? Is it reasonable to delay the release of the vehicle to a sober passenger before making this limited search?

conducts a search without a warrant, he or she runs the risk that the evidence will be suppressed if there is not a reasonable and articulable basis for the search. In the end, the broad rule of Ringer adds little constitutional protection to the accused. In addition, as Stroud emphasized, the “totality of the circumstances” test is unworkable and places undue burdens on law enforcement officers. The more limited “relevant to the crime of arrest” rule of Gant allows appropriate searches applying well-accepted “Terry stop” legal standard while preserving the remedy of suppression for those searches that are improper.

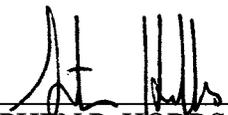
VIII. CONCLUSION

The State of Washington respectfully requests that Jordan’s convictions for one count of possession of methamphetamine and one count of manufacturing methamphetamine be affirmed.

DATED this 21st day of August, 2009.

Respectfully submitted,

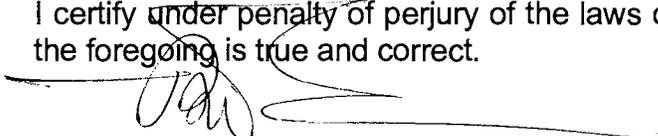
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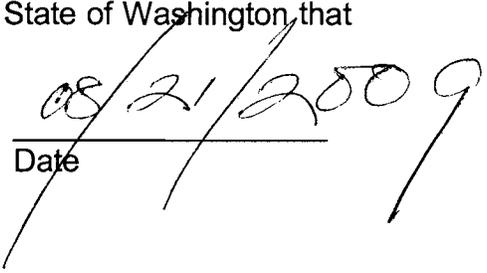
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to MINDY ATER, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE v. DONALD JORDAN, Cause No. 620760-2-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington



Date

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CLERK OF COURT