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### **ASSIGNMENTS OF ERROR**

1. The police violated Mr. Bridges' right to privacy and his right to be free from unreasonable searches and seizures.
2. The trial court erred by admitting evidence and statements obtained in violation of Mr. Bridges' Fourth Amendment rights.
3. The trial court erred by admitting evidence and statements obtained in violation of Mr. Bridges' rights under Wash. Const. Article I, Section 7.
4. Trooper Hovinghoff's initial warrantless intrusion into Mr. Bridges' vehicle was unlawful because no exigency justified dispensing with the warrant requirement.
5. Trooper Hovinghoff's post-arrest vehicle search violated *Arizona v. Gant* because Mr. Bridges had already been arrested, handcuffed, and secured in the trooper's patrol car.
6. Mr. Bridges was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
7. If Mr. Bridges' *Gant* argument is not preserved for review, defense counsel was ineffective for failing to argue that the post-arrest vehicle search violated *Gant*.
8. The trial court erred by adopting Conclusion of Law No. 2.5, to the extent it implies that a basis existed for arrest prior to the seizure and testing of the plastic baggie seized by Trooper Hovinghoff.
9. The trial court erred by adopting Conclusion of Law No. 2.6, to the extent it implies that *Gant* is inapplicable to the post-arrest vehicle search.

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

1. A warrantless search is unconstitutional unless it falls within a recognized exception to the warrant requirement. In this case, the prosecutor failed to establish facts justifying Trooper Hovinghoff's initial warrantless intrusion into Mr. Bridges' car. Did the warrantless vehicle search violate Mr. Bridges' rights under the Fourth Amendment and Article I, Section 7?

2. An officer may not search a vehicle incident to the arrest of a suspect who has already been secured in a patrol car. Here, the Camaro was searched after Mr. Bridges had been arrested, handcuffed, and secured in Trooper Hovinghoff's patrol car. Did the warrantless vehicle search violate Mr. Bridges' rights under the Fourth Amendment and Wash. Const. Article I, Section 7?

3. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel moved to suppress evidence, but failed to argue that evidence obtained from the post-arrest search of Mr. Bridges' Camaro violated *Gant*. Was Mr. Bridges denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Brian Bridges bought a green Camaro for \$500. RP (2/10/10) 17; RP 4/19/10) 37, 86-87. As he was driving it the next day, he realized it needed work. He found coveralls and a coat in the back, put them on, and worked on the car. RP (4/19/10) 87-88, 92-93.

Mr. Bridges drove by the home of Mossyrock Police Officer Jeremy Stamper, who was in his circular driveway. As Mr. Bridges drove by, Stamper noticed that the Camaro's tabs had expired in 2006. Mr. Bridges was speeding; he slowed down when he saw the officer and pulled into the other end of the driveway. Stamper was getting into his car to leave; instead he pulled onto the road, turned in behind Mr. Bridges, and activated his overhead lights. RP (2/10/10) 5, 6, 14, 15.

Mr. Bridges didn't have any identification or the Camaro's registration, but Officer Stamper was familiar with him and ran his name. RP (2/10/10) 7, 17. His license came back as valid, and the car had not been reported stolen. RP (2/10/10) 7, 16. At this point, Trooper Hovinghoff arrived. RP (2/10/10) 7. He went to stand by the passenger door of the Camaro. RP (2/10/10) 7-8.

When Stamper returned to talk with Mr. Bridges, he saw a plastic bag on the floorboards. He asked Mr. Bridges what it was. RP (2/10/10)

8, 17. Mr. Bridges replied that it was empty and handed it out to Stamper. RP (2/10/10) 8.

Officer Stamper saw no VIN number for the vehicle. He found that suspicious, so he opened the driver's side door to look for an inspection sticker. RP (2/10/10) 8, 11. As he looked, he set the plastic bag down on the floorboard behind Mr. Bridges. RP (2/10/10) 17-18. He then walked around to the passenger side and opened that door to look for an inspection sticker. RP (2/10/10) 18. As Stamper did this, Trooper Hovinghoff went over to the driver's side. Hovinghoff opened the car door and picked up the plastic bag. RP (2/10/10) 9, 19, 24.

Trooper Hovinghoff field tested the contents of the bag, arrested Mr. Bridges, and secured him in his patrol car. RP (2/10/10) 9, 25; RP (4/19/10) 47. After arresting Mr. Bridges, Hovinghoff searched the Camaro and found a small bag of methamphetamine behind the passenger's seat. RP (4/19/10) 47. A jail search revealed a syringe and bag with methamphetamine in clothing worn by Mr. Bridges. RP (4/19/10) 50, 67. The state filed charged of Possession of a Controlled Substance (methamphetamine) and Use of Drug Paraphernalia. CP 1-2.

Mr. Bridges moved to suppress the plastic bags and their contents. He argued (among other things) that Trooper Hovinghoff lacked authority

to reach into the car after Stamper set the bag down behind the driver's seat. RP (2/10/10) 29-30.

The trial court denied the motion to suppress, and entered Findings of Fact and Conclusions of Law. CP 4, 4A-C. The Findings did not address the post-arrest search of Mr. Bridges' Camaro. CP 4, 4A-C.

A jury convicted Mr. Bridges of both charges. RP (2/10/10) 33, 5-14. Mr. Bridges timely appealed. CP 15-26.

### **ARGUMENT**

**I. THE WARRANTLESS VEHICLE SEARCH VIOLATED MR. BRIDGES' RIGHT TO PRIVACY UNDER ARTICLE I, SECTION 7 AND HIS FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES.**

**A. Standard of Review**

The validity of a warrantless search or seizure is reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008). A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.*

**B. The state and federal constitutions prohibit warrantless searches, absent an exception to the warrant requirement.**

The Fourth Amendment to the federal constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.<sup>1</sup> Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.<sup>2</sup>

Under both provisions, searches and seizures conducted without authority of a search warrant “are *per se* unreasonable...subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008). Without probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008).

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<sup>1</sup> The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

<sup>2</sup> It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

C. The prosecution failed to meet its heavy burden of establishing an exception justifying Trooper Hovinghoff's initial warrantless intrusion into the vehicle.

The existence of probable cause, standing alone, does not justify a warrantless search. Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant. *State v. Tibbles*, 169 Wash.2d 364, 370, 236 P.3d 885 (2010). Exigent circumstances may justify a warrantless search based on probable cause, but only when the exigency makes it impractical to obtain a warrant. *Id.* In this case, no exigent circumstances justified dispensing with the warrant requirement.<sup>3</sup>

1. Trooper Hovinghoff's initial warrantless intrusion into the car was not justified by any exception to the warrant requirement.

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<sup>3</sup> Under the Fourth Amendment, a vehicle's inherent mobility automatically provides exigent circumstances, allowing car searches under the so-called "automobile exception." See *U.S. v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). The "automobile exception" does not apply under Wash. Const. Article I, Section 7. *State v. Patton*, 167 Wash. 2d 379, 397 n. 4, 219 P.3d 651 (2009).

Assuming Trooper Hovinghoff had probable cause to believe the plastic baggie contained drug residue, no exigent circumstances justified his intrusion into the car to retrieve the baggie. *Tibbles, supra*. The exigent circumstances exception applies where delaying to obtain a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence. *Id, at 370*. A reviewing court “must look to the totality of the circumstances in determining whether exigent circumstances exist.” *Id*.

In *Tibbles*, an officer smelled marijuana after stopping a car for a broken taillight. The driver (and sole occupant) denied use, but the officer searched the car and found marijuana. The Supreme Court held that delaying to obtain a warrant would not compromise officer safety, facilitate escape, or permit destruction of evidence, and suppressed the evidence. *Id, at 370*.

Here, as in *Tibbles*, no exigent circumstances justified a warrantless intrusion into the car. Mr. Bridges voluntarily handed Officer Stamper the plastic baggie and told him it was empty. RP (2/10/10) 8. Stamper returned the baggie to the interior of the car. RP (2/10/10) 17, 24. Mr. Bridges was cooperative, and made no move to destroy or conceal the baggie. RP (2/10/10) 4-27. Under these circumstances, Trooper Hovinghoff’s intrusion into the vehicle’s interior was not justified. The

warrantless search violated Mr. Bridges' Fourth Amendment right to be free from unreasonable searches and his state constitutional right to privacy under Article I, Section 7. *Tibbles, supra*.

2. The evidence and statements derived from Trooper Hovinghoff's unlawful intrusion must be suppressed.

Evidence derived from an unconstitutional search or seizure must be suppressed as fruit of the poisonous tree. *U.S. v. Williams*, 615 F.3d 657, 668-669 (6th Cir. 2010) (citing *Wong Sun v. U.S.*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Exclusion is required unless the connection between illegal police conduct and the evidence is so attenuated as to dissipate the taint. *Id.*

The test is whether the evidence was discovered by exploitation of the illegality, or instead by means sufficiently distinguishable to be purged of the primary taint. *Id.* A reviewing court must consider temporal proximity (between the illegality and discovery of the evidence), the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.* (quoting *Brown v. Illinois*, 422 U.S. 590, 603-604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)). The prosecution bears the burden of proving that tainted evidence is admissible. *Taylor v. Alabama*, 457 U.S. 687, 690, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982).

Here, all the evidence admitted at trial (other than Mr. Bridges' initial statements to Officer Stamper) was obtained by exploiting Trooper Hovinghoff's illegal intrusion into the vehicle. RP (4/19/10) 34-76. The trooper's seizure of the baggie (and the field test of the residue) provided the basis for the arrest, which led to the discovery of additional contraband. Accordingly, all evidence obtained after the illegal seizure must be suppressed. This includes not only the physical evidence but also statements made by Mr. Bridges. His convictions must be reversed and the charges dismissed with prejudice. *Tibbles, supra*.

- D. The post-arrest vehicle search violated *Arizona v. Gant* because the search was conducted after Trooper Hovinghoff had already handcuffed Mr. Bridges and secured him in his patrol car.

One exception to the search warrant requirement is where the search is performed incident to arrest. *Gant*, at \_\_\_ (citing *Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914)). This exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Gant*, at \_\_\_; see also *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Accordingly, police are authorized "to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, at \_\_\_.

In this case, Mr. Bridges had been arrested, handcuffed, and secured in the officer's patrol car when Hovinghoff searched the Camaro. RP (2/10/10) 9, 25; RP (4/19/10) 47, 64. Accordingly, the search was not properly incident to Mr. Bridges' arrest. *Gant, supra*; see also *State v. Afana*, 169 Wash.2d 169, 233 P.3d 879 (2010); *State v. Valdez*, 167 Wash. 2d 761, 224 P.3d 751 (2009).

Because the jury returned general verdicts, it is impossible to tell whether they convicted based on the baggie found on the driver's side, the baggie found on the passenger's side, or the methamphetamine and paraphernalia found in Mr. Bridges' clothing. Verdict Forms A and B, Supp. CP. Mr. Bridges' convictions must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Id.*

**II. MR. BRIDGES WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

**A. Standard of Review**

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash. 2d 91, 109, 225 P.3d 956 (2010).

- B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An appellant claiming ineffective assistance must show that “counsel's performance fell below an objective standard of reasonableness and [that] counsel's poor work prejudiced him.” *A.N.J.*, at 109. To establish prejudice, the appellant must show “a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wash. 2d 856, 862, 215 P.3d 177 (2009).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wash. 2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

- C. If Mr. Bridges' *Gant* argument is not preserved for review, he was denied the effective assistance of counsel.

In *Reichenbach*, the Supreme Court reversed the defendant's conviction and dismissed his case because defense counsel failed to seek suppression of evidence. *Reichenbach, supra*. The Court examined the merits of the suppression issue, concluded that the evidence should have been suppressed, and held that defense counsel was ineffective for failing to seek suppression. *Id.*

Here, defense counsel failed to specifically argue that the evidence seized from the post-arrest search of Mr. Bridges' Camaro was inadmissible under *Gant, supra*. As in *Reichenbach*, defense counsel's performance fell below an objective standard of reasonableness. The

evidence should have been suppressed because Mr. Bridges's car was unlawfully searched without a warrant, as discussed above. There was no possible advantage in permitting the seized items to be admitted. Without the evidence, the prosecution would have been unable to proceed on the theory that Mr. Bridges possessed the baggie found behind the passenger seat. Because of this, there was no legitimate strategic or tactical reason justifying the failure to move to exclude the evidence. *Reichenbach, supra.*

Accordingly, Mr. Bridges's conviction must be reversed. *Id.* The evidence must be suppressed and the case dismissed with prejudice. *Id.*

**CONCLUSION**

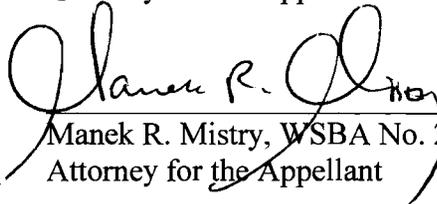
For the foregoing reasons, Mr. Bridges' convictions must be reversed. The evidence must be suppressed and the case dismissed with prejudice.

Respectfully submitted on October 15, 2010.

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All postage prepaid, on October 15, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 15, 2010.

  
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