

No. 80091-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JESUS DAVID BUELNA VALDEZ, et al.,

Respondents.

BRIEF OF AMICUS CURIAE OF THE  
WASHINGTON DEFENDER ASSOCIATION

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## INTEREST OF AMICUS CURIAE

The Washington Defender Association ("WDA") is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense. WDA believes strongly in promoting the rights of indigent persons and upholding the protections guaranteed by Article 1, Section 7 of the Washington State Constitution, which protects the privacy rights of all citizens. WDA and its members have previously filed amicus briefs on issues relating to privacy interests and due process.

### ISSUES TO BE ADDRESSED BY AMICUS

- I. Whether the Search In This Case Was Unreasonable Under the Fourth Amendment of the U.S. Constitution and Article 1, Section 7 of the Washington State Constitution.
- II. Whether the Washington State Constitution Requires Suppression

## ARGUMENT

### I. The Search Was Unreasonable Under the U.S. and Washington State Constitutions

The Washington State Constitution has long been recognized as more protective of the privacy interests of state citizens than the federal constitution. Unlike the federal constitution, which focuses on whether the police acted reasonably under the circumstances, under Article 1, Section 7, the state constitution focuses on the expectations of the people being searched. State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). This difference in analysis has resulted in a more restricted view of the ability of the state to violate the privacy interests of its citizens and in the greater protections that the state constitution provides.

#### A. There Is No Lawful Authority For The Search Under State or Federal Law

This matter involves the search of the passenger compartment of a vehicle after the driver has been lawfully arrested for a warrant when there is no purpose to the search other than to hopefully find evidence of some other crime.

The U.S. Supreme Court has held that a vehicle may be searched incident to arrest "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or

it is reasonable to believe the vehicle contains evidence of the offense of arrest". Arizona v. Gant, 556 U.S. \_\_\_\_, 129 S.Ct. 1710, 1723, 173 L.Ed.2d 485 (2009). This rule replaces the exception to be free from warrantless searches that had been affirmed in New York v. Belton, which permitted the police to search the entire compartment of a vehicle incident the arrest of an occupant or recent occupant. New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." Gant, 129 S.Ct. at 1723 (quoting Mincey v. Arizona, 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)).

Prior to Gant, Washington allowed a search of the entire passenger compartment of a vehicle (except for locked containers) incident to the arrest of its driver immediately subsequent to the suspect's being arrested, handcuffed, and placed in the police vehicle. State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986). In relying heavily upon Belton, this Court agreed with the Supreme Court's decision to draw a clearer line to aid police enforcement.

Applying Gant and recognizing that the Washington's Constitution generally provides greater protection than the federal

constitution, we would ask this Court to hold that the seizures in this matter were unconstitutional. See, e.g., State v. Myrick, 102 Wn.2d 506, 688 P.2d 151 (1984) (“we have recognized that the unique language of Const. art. 1, § 7 provides greater protection to persons under the Washington Constitution than U.S. Const. amend. 4 provides to persons generally”).

B. The Exclusionary Rule of Article I, section 7 is Absolute and Does Not Permit a “Good Faith” Exception

Recognizing that the Washington Constitution affords greater protections than the U.S. Constitution, the Washington Supreme Court has rejected the “good faith” standard set out in Michigan v. DeFilippo, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). See State v. White, 97 Wn.2d 92, 109, 640 P.2d 1061 (1982) (“The result reached . . . in DeFilippo is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. . . . This approach permits the exclusionary remedy to be completely severed from the right to be free from unconstitutional governmental intrusions”). The purpose of Article 1, Section 7 is not only to curb governmental actions, but also to protect personal rights. Id.; see also Morse, 156 Wn.2d at 9-10 (Washington Courts have “long declined to

create 'good faith' exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement").

Instead, the court has held that the good faith exception is "unworkable and contrary to well established principles." White, Wn.2d at 106 n.6. In fact, the court specifically repudiated the "good faith" standard set out in DiFillipo in favor of an objective probable cause standard, noting that an objective standard that does not examine an officer's intent is the only workable test to determine whether the rights of the accused have been violated.<sup>1</sup>

This rule has not been altered by State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006), or State v. Brockob, 159 Wn.2d 311, 150 p.3d 59 (2006), both of which deal with the question of whether a probable cause determination is altered by a statute later found to be unconstitutional. These cases analyze the question of whether there was probable cause to conduct a search in the first place and not the scope of a Washington state citizen's privacy.

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<sup>1</sup> This Court should be wary of relying upon the argument that is made by the state and by WAPA that White is consistent with DiFillipo. Not only has the Washington Supreme Court clearly rejected this notion, but White repudiates DiFillipo within its holding.

rights. By concluding police had probable cause both Potter and Bockrob concluded no constitutional violation had occurred, and thus did not apply either the exclusionary rule nor any exceptions to that rule. WDA would agree that the analysis in these cases is unaffected by Gant. Conversely, the analysis of those cases has no affect on the analysis of this case. The Court's conclusion in this case should not change the rulings it has made in any of those matters.

II. Suppression is Required Under the Washington State Constitution

In White, this Court held that "we think the language of our state constitutional provisions constitutes a mandate that the right to privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy." 97 Wn.2d at 110. In Ladson, the court held that "our constitutionally mandated exclusionary rule saves article 1, section 7 from becoming a meaningless promise." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

These are not empty words. This Court has consistently held that the state constitution is not an empty document, but has the

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integrity necessary to uphold the right to be free from unreasonable governmental intrusion. "Without an immediate application of the exclusionary rule whenever an individual's right to privacy is unreasonably invaded, the protections of the Fourth Amendment and Article 1, Section 7 are seriously eroded". White, 97 Wn.2d at 111-12. Consistent with this holding, this Court has never applied a single exception to the exclusionary rule of Article I, section 7.

In this matter, there are no exceptions to the state exclusionary rule that would justify a conclusion other than that the evidence in this matter should be suppressed. The record does not indicate any justification to support a search of the defendant's vehicle. The defendant was properly placed in custody on a warrant and had been secured in the police vehicle prior to the search. There was no articulable suspicions that there was any other criminal activity that the police were aware of, nor did they appear to be concerned about the destruction of any evidence related to the execution of the warrant. As such there do not appear to be any constitutionally valid reasons for the search.

## CONCLUSION

WDA urges this Court to decline to consider the issues that have been raised by the state for the first time on appeal. If the Court is inclined to reconsider its 27-year-old conclusion in White, and consider for the first time recognizing an exception to the exclusionary rule, it should not do so in a case such as this where there is not a clear record establishing any such exception and where the issue are broached after the Court has heard argument in the matter. Rather, WDA believes the Court would be better served addressing issue with the benefit of complete briefing by the parties, and interested *amici*, and with the benefit of oral argument..

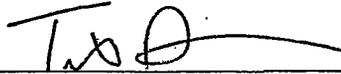
Should the Court decide to reach the issue of whether Gant should apply in this case, WDA asks the court to find that the search in this matter was unreasonable and that there is no exception to Article 1, Section 7 that would allow the state to intrude on the defendant's protected privacy interests, or to benefit from the fruits of such an intrusion.

For all the above reasons, WDA respectfully requests that the Court hold that Article 1, Section 7 prohibits the search of a

vehicle incident to arrest absent exigent circumstances and that the evidence seized in this case must be suppressed.

DATED this 5 day of July 2009.

Respectfully submitted,



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