

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2009 JUL -2 AM 11:18

82600-5

BY RONALD R. CARPENTER

CLERK *hh*

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

MARK J. AFANA,

Petitioner.

---

SUPPLEMENTAL BRIEF

---

STEVEN J. TUCKER  
Prosecuting Attorney  
Spokane County

Andrew J. Metts  
Deputy Prosecuting Attorney

Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

**INDEX**

I.	INTRODUCTION .....	1
II.	ISSUES PRESENTED .....	1
III.	STATEMENT OF THE CASE .....	1
IV.	ARGUMENT .....	3
	A.    SUMMARY OF <i>ARIZONA V. GANT</i> .....	9
	B.    APPLICATION OF <i>ARIZONA V. GANT</i> TO PENDING CASES .....	10
	C.    EVIDENCE OBTAINED IN RELIANCE ON PRESUMPTIVELY VALID PRE- <i>GANT</i> CASE LAW SHOULD NOT BE SUPPRESSED .....	11
	1.    The Fourth Amendment Good Faith Exception To The Exclusionary Rule.....	11
	2.    Under Article I § 7, A Search Conducted In Reliance On Presumptively Valid Case Law Should Not Be Suppressed.....	15
	3.    Under The Facts Of This Case, The Officers Were Relying On Presumptively Valid Pre- <i>Gant</i> Case Law And The Evidence Should Not Be Suppressed.....	20
	4.    The Art. I, § 7 Exclusionary Rule Has Traditionally Been Interpreted Consistently With The Federal Rule.....	24
F.	CONCLUSION .....	26

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

IN RE ST. PIERRE, 118 Wn.2d 321,  
823 P.2d 492 (1992).....10

STATE V. ACREY, 148 Wn.2d 738,  
64 P.3d 594 (2003).....3

STATE V. ARANGUREN, 42 Wn. App. 452,  
711 P.2d 1096 (1985).....5

STATE V. ARMENTA, 134 Wn.2d 1,  
948 P.2d 1280 (1997).....5

STATE V. BILOCHE, 66 Wn.2d 325,  
402 P.2d 491 (1965).....26

STATE V. BOND, 98 Wn.2d 1,  
653 P.2d 1024 (1982).....15, 16

STATE V. BROCKOB, 159 Wn.2d 311,  
150 P.3d 59 (2006)..... 17 - 20, 26

STATE V. BROWN, 154 Wn.2d 787,  
117 P.3d 336 (2005).....6

STATE V. BURNS, 19 Wash. 52,  
52 P. 316 (1898).....24

STATE V. FLADEBO, 113 Wn.2d 388,  
779 P.2d 707 (1989).....21

STATE V. GIBBONS, 118 Wash. 171,  
203 P. 390 (1922).....25

STATE V. JOHNSON, 128 Wn.2d 431,  
909 P.2d 293 (1996).....21

STATE V. MOTE, 129 Wn. App. 276,  
120 P.3d 596 (2005).....8

STATE V. NORDSTROM, 7 Wash. 506, 35 P. 382 (1893) .....	24
STATE V. O'BREMSKI, 70 Wn.2d 425, 423 P.2d 530 (1967) .....	26
STATE V. O'NEILL, 129 Wn.2d 347, 917 P.2d 108 (1996), <i>overruled in part by</i> <i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003) .....	5
STATE V. O'NEILL, 148 Wn.2d 564, 62 P.3d 489 (2003) .....	4, 5
STATE V. PARKER, 139 Wn.2d 486, 987 P.2d 73 (1999) .....	21
STATE V. POTTER, 156 Wn.2d 835, 132 P.3d 1089 (2006) .....	17 - 20, 26
STATE V. RANKIN, 151 Wn.2d 689, 92 P.3d 202 (2004) .....	8
STATE V. ROYCE, 38 Wash. 11, 80 P. 268 (1905) .....	25
STATE V. STROUD, 106 Wn.2d 144, 720 P.2d 436 (1986) .....	21
STATE V. VRIELING, 144 Wn.2d 489, 28 P.3d 762 (2001) .....	21
STATE V. WHITE, 97 Wn.2d 92, 640 P.2d 1061 (1982) .....	15 - 20, 24, 26
STATE V. YOUNG, 135 Wn. 2d 498, 957 P.2d 681 (1998) .....	4, 6
STATE V. YOUNG, 39 Wn.2d 910, 239 P.2d 858 (1952) .....	26

## SUPREME COURT CASES

ADAMS V. NEW YORK, 192 U.S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1905).....	25
ARIZONA V. EVANS, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) .....	14
ARIZONA V. GANT, -- U.S. --, 129 S. Ct. 1710 (2009) .....	9, 10, 21, 22, 23
BOYD V. UNITED STATES, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).....	25
CHIMEL V. CALIFORNIA, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969) .....	20
GRIFFITH V. KENTUCKY, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) .....	10
HERRING V. UNITED STATES, --, U.S. --, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009) .....	13
ILLINOIS V. KRULL, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987) .....	13
MASSACHUSETTS V. SHEPPARD, 468 U.S. 981, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984) .....	14
MICHIGAN V. DEFILLIPPO, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979) .....	12, 13, 17, 18, 26
NEW YORK V. BELTON, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) .....	21
TEAGUE V. LANE, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) .....	10
UNITED STATES V. CALANDRA, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) .....	11
UNITED STATES V. LEON, 468 U.S. 897, 104 S. Ct. 3405 (1984).....	14

WEEKS V. UNITED STATES, 232 U.S. 383,  
34 S. Ct. 341, 58 L. Ed. 652 (1914).....25

WONG SUN V. UNITED STATES, 371 U.S. 471,  
83 S. Ct 407, 9 L. Ed. 2d 441 (1963).....11, 12

**CONSTITUTIONAL PROVISIONS**

ARTICLE I, § 7..... 11, 15, 16, 17, 19, 24

FOURTH AMENDMENT.....11, 13

**OTHER AUTHORITIES**

4 J. WIGMORE, evidence § 2183 (2nd ed. 1923) .....24

COMMONWEALTH V. DANA, 43 Mass. 329 (2 met. 1841).....24

I.

INTRODUCTION

Respondent, State of Washington, respectfully submits this supplemental brief as requested by the Court in a ruling dated April 5, 2006.

II.

ISSUES PRESENTED

- (1) Did the Court of Appeals correctly reverse the trial court's suppression of the State's evidence?
- (2) What is the effect of the recent United State 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?

III.

STATEMENT OF THE CASE

The facts are, in the main, undisputed. On the date in question, June 13, 2007, at 3:39 AM, Spokane County Sheriff's Deputy Miller noticed a legally parked vehicle in a relatively rural area of Spokane County. CP 24, 18. The deputy shined his spotlight into the car and saw two people inside. CP 18. The deputy contacted the occupants and inquired what they

were doing. CP 18. The occupants stated that they were watching a movie. CP 18. The deputy also asked if they had any identification. CP 18. The defendant produced a driver's license and the passenger gave her name verbally.

The deputy wrote down the information and returned the defendant's license to him. CP 18. The deputy suggested to the couple that they might pick a better location to watch the movie. CP 18.

The deputy returned to his patrol car and checked the passenger's name, which came back as having an outstanding warrant. CP 18. The defendant had begun to pull away, so the deputy activated his emergency lights and stopped the car to effect an arrest of the female occupant. CP 18.

During a search of the auto incident to the arrest of the female, a black cloth bag was discovered with a baggie of methamphetamine and a separate baggie containing marijuana. Since the deputy had earlier seen this bag on the defendant's lap, the defendant was arrested for possession of controlled substances.

The defendant was charged with possession of a controlled substance – marijuana and possession of a controlled substance – methamphetamine. CP 1.

Prior to trial, the defendant brought a CrR 3.6 motion seeking to suppress the discovery of drugs in his car as a result of a search incident to

the arrest of the female occupant of the car. CP 14-16. The trial court granted the defendant's motion and suppressed the State's evidence. CP 26.

The State filed an appeal with Division III of the Court of Appeals. Division III reversed the trial court's suppression and remanded the case. CP 27-31.

#### IV.

#### ARGUMENT

The trial court suppressed the evidence based on the fact that the deputy asked the passenger what her name was. The trial court bases its ruling on irrelevant cases and incorrect interpretations of the law of the State of Washington. The facts of this case differ between the parties on only minor points. The real question in this case is whether an officer can approach a legally parked car, ask the occupants what is going on and ask the occupants their names without instituting a "seizure."

A trial court's conclusions of law will be reviewed *de novo*. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). The defendant couched his trial court arguments in terms of a violation of Art. I § 7 of the Washington State Constitution. CP 17.

In this case, the trial court concluded that the contact in this case was not a "social contact." CP 25. The trial court held that the social contact

ended when the deputy asked the occupants what their names might be. CP 25. The trial court concludes that this was part of an “investigation.” Certainly the deputy was curious why two persons were sitting in a car at 3:30 AM watching movies. To inquire is technically an investigation in the common sense of the word, but not in the search/seizure sense of the word. If this situation was turned into an “investigation” by the asking of names, then there can be no social contact whenever an officer asks for a name. All contacts between officers and citizens would be an “investigation” and seizure.

The defendant’s reasoning obviates the holdings in *State v. O’Neill*, 148 Wn.2d 564, 579, 62 P.3d 489 (2003) and *State v. Young*, 135 Wn. 2d 498, 957 P.2d 681 (1998) regarding social contacts by officers. The cases on seizure, passengers and pedestrians do stand for the proposition that asking of names can convert a contact into a seizure, but the trial court’s holding regarding the conversion of a social contact into an investigation was simply wrong. The trial court in this case failed to appreciate that there is no distinction between a “passenger” and a “pedestrian” when an officer approaches a vehicle that is legally parked in a public place. *O’Neill, supra* at 579.

Given that there is no functional difference between a pedestrian and a passenger in a parked automobile, the holding in *Armenta* is instructive:

“[W]e endorse the view expressed by the Court of Appeals in *Aranguren* to the effect that “police questioning relating to one's identity, or a request for identification by the police, without more, is unlikely to result in a Fourth Amendment seizure.” citing *State v. Aranguren*, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985); *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). The trial court dealt with *Armenta* by ignoring it.

What the trial court did in this case was to engage in some faulty conflation of seizure law involving investigations and overlay a faulty analysis of social police contacts on top of seizure law. The trial court concluded that the defendant was a “passenger in a vehicle” and not a pedestrian. CP 25. This conclusion is untenable in light of this Court's rulings in *O'Neill*. As stated previously, there is *no* distinction between a “passenger” and a pedestrian when the situation involves a legally parked, non-moving vehicle. *O'Neill, supra* at 579. See also *State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996), *overruled in part* by *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The holdings removing the distinction between the occupant of a parked car and a pedestrian are logical. The occupant of a parked vehicle could be seated on a park bench next to the car when police approach. Few would argue that a person sitting on a bench next to the car is a “passenger.” Yet, the options available to either the

occupant of a parked car or the person on a nearby bench are the same. They can refuse to answer the officer's questions and move away.

The trial court continued its faulty analysis of this case by holding that "This was not a "social contact" when the deputy asked for identification for *no apparent reason....*" CP 25. This holding makes no sense. None of the cases in this area of the law require the officer to have a reason for contacting the occupants of the car. If officers have to have a reason prior to contacting individuals, the social contact scenario will disappear. "Reasonless" contacts are at the heart of social contacts by police. The trial court erred by even considering the motivation of the deputy. The deputy's motivation is irrelevant to this case. The Court in *Young* held that, "...the police are permitted to engage persons in conversation and *ask for identification* even in the absence of an articulable suspicion of wrongdoing." *State v. Young*, 135 Wn.2d at 511.

The reasons for asking the names are fairly obvious, it is law enforcement's job to keep up on events in the city and they need to fill out reports when necessary. There is no principal preventing police officers from making a social contact with a pedestrian in a public place.

The trial court in this case held that *State v. Brown*, 154 Wn.2d 787, 117 P.3d 336 (2005) applies to this case. *Brown* is clearly distinguishable from the facts of this case. This is an indefensible decision in that *Brown*

involves the stop of a vehicle as opposed to an officer approaching a parked auto. The car in which *Brown* was riding was stopped at 10:48 P.M. The officer in *Brown* did not take the defendant's answers at face value, but instead asked to search of the defendant. *Brown, supra* at 791-92.

*Brown* simply does not apply to this case. The car in this case was not stopped by police. The defendant was in a legally parked, non-moving vehicle. The trial court in this case held that the deputy was asking the occupants' names for the purposes of an investigation. CP 25. This position is not supported by the facts. The deputy could not have been investigating a traffic violation; the car was not moving when sighted. There could be no suspicion of drug activity as there was nothing in the record indicating that the occupants were engaged in the use of drugs. In short, the deputy had no reason to be starting an "investigation" in the constitutional law sense of the word. The deputy merely approached the car to see why there were two occupants parked at the unusual morning hour. The defendant said they were watching movies and the presence of a portable movie player bore out that assertion. The deputy, apparently satisfied that there were no issues, asked the occupants their names, received that information and returned to his patrol car. At this point, the defendant was free to depart. In fact, he did start to drive away.

In *Mote*, the police officer pulled behind an occupied, legally parked car on a residential street. *State v. Mote*, 129 Wn. App. 276, 279, 120 P.3d 596 (2005). The officer walked up to the driver's side window and asked for identification from both occupants. *Id.* The officer ran a warrant check on the front passenger and found an active warrant. *Id.* The defendant was arrested and a baggie of methamphetamine was discovered on his person. *Id.* The defendant in *Mote* argued that *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004) applied to his case and the questions by the police officer rose to the level of a seizure. The *Mote* court rejected the *Rankin* holding for the same reasons that the State puts forward in this case: *Rankin* (as well as *Brown*) involve *stopping* cars rather than approaching a parked car. *Mote, supra* at 129 Wn. App. The *Mote* decision is on all fours for the analysis in this case.

Interestingly, the trial court must have thought that *Mote* was important or the trial court would not have taken the trouble to note in its Conclusions of Law that the court writing *Mote* was Division One of the Court of Appeals and therefore not binding on the trial court. CP 26. This is a rather peculiar statement in that the *Mote* case is directly on point and there is no case from this Division III so close to the facts of this case. To simply refuse to distinguish or follow *Mote* because it is from Division One is not defensible. The case is at least instructive, no matter which court wrote it.

The trial court's analysis of this case is not in harmony with existing caselaw of both the Court of Appeals and the Washington State Supreme Court. The trial court's holdings are questionable and in some places, flat out wrong. The Court of Appeals correctly reversed the trial court. This Court should affirm that holding.

A. 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 circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. *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.

B. APPLICATION OF *ARIZONA V. GANT* TO  
PENDING CASES.

The State agrees that *Gant* must be applied to cases currently pending in trial courts and on direct. *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, state or federal, 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.

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.

C. 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. The exclusionary rule is "a judicially created remedy designed to safeguard fourth amendment rights generally through its deterrent effect" by excluding evidence that is the fruit of an illegal, warrantless search. *United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) (emphasis added). Evidence derived directly or indirectly from illegal police conduct is an ill-gotten gain, "fruit of the poisonous tree," that should be excluded from evidence. *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct 407, 9 L. Ed. 2d 441 (1963). Nevertheless, the United States Supreme Court has recognized that evidence obtained after an illegal search should *not* be

excluded if it was *not* obtained by the exploitation of the 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*, 44 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.<sup>1</sup> *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

---

<sup>1</sup> *DeFilippo* is entirely consistent with the Supreme Court's exclusionary rule analysis. As the U.S. Supreme 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).

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 generally the courts that establish the "rules," not the legislative bodies. Judicial decisions, particularly those of the supreme court, as to the constitutionality of searches and seizures are clearly entitled to respect, deference, and reliance by officers in the field.

The good faith exception has been applied by the united states supreme court in many contexts involving the reliance by law enforcement officers on presumptively valid assertions by the judiciary. *See, e.g., United States v. Leon*, 468 U.S. 897, 922, 104 S. Ct. 3405 (1984) (when police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the subsequently invalidated search warrant); *Massachusetts v. Sheppard*, 468 U.S. 981, 991, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984) (exclusionary rule does not apply when a warrant was invalid because a judge forgot to make "clerical corrections"); *Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995)

(applying good-faith rule to police who reasonably relied on mistaken information in a court's database that an arrest warrant was outstanding). 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 Washington Supreme Court.

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), this 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.

This 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, this 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, this 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 will be discussed in detail below, none of these concerns are implicated under the unique facts of the present case.

*White* involved a flagrantly unconstitutional statute. It did not assess a statute or judicial opinion that was presumptively valid. More recently, however, this 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 Pp.3d 59 (2006).

In *State v. Potter*, 156 Wn.2d 835, 132 P.3d 1089 (2006), 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. 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, this 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. This 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 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*, this 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 at 341-42, 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*.

This 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 the 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: 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 States 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. Accordingly, those searched should be upheld because the search was 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). Indeed, *Gant* 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.*" *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. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2001); *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. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989).

Thus, this case does not fit within the narrow exception, recognized in *Defillippo* and *White*, that precludes officers from relying upon laws that are "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." the pre-*Gant* cases may now be viewed as flawed, but the repeated judicial reliance on them for almost 30

years demonstrates that the search incident to arrest rule was neither grossly nor flagrantly unconstitutional.

There can be little doubt that law enforcement officers can rely on these specific judicial pronouncements when conducting vehicle searches. To conclude otherwise would be equivalent of asserting that officers could never rely on judicial authority. In this regard, it is significant that the majority opinion in *Gant* emphasized that officers reasonably relied on pre-*Gant* precedent and were 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, officer 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. 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 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.

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. This court has 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.

4. The Art. 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 generally 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." const. Art. I, § 7. At common law, courts took no notice of whether evidence was properly seized; if relevant, it was admissible. *Commonwealth v. Dana*, 43 Mass. 329 (2 met. 1841); 4 J. Wigmore, evidence § 2183 (2nd ed. 1923). This was the rule recognized in Washington in 1889. *State v. Nordstrom*, 7 Wash. 506, 35 P. 382 (1893); *State v. Burns*, 19 Wash. 52, 52 P. 316 (1898).

In 1886, the United States Supreme Court appeared to signal a different approach when it suppressed private papers seized pursuant to a court order, holding that seizure and use of the private papers as evidence was tantamount to compelling the defendant to testify against himself. *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). But the United States Supreme Court essentially repudiated *Boyd* in *Adams v. New York*, 192 U.S. 585, 598, 24 S. Ct. 372, 48 L. Ed. 575 (1905) ("...the English, and nearly all the American, cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent").

Like most courts at that time, the Washington Supreme 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, this 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). Nonetheless, this court has generally followed the application of the rule in federal courts. As this court said in *State v. O'Bremski*, 70 Wn.2d 425, 423 P.2d 530 (1967), "[w]e 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...").

In sum, Washington's exclusionary rule has followed the general contours, progression, and application of the federal exclusionary rule. This court's recognition (in *Potter* and *Brockob*) that *White* was simply an application of the narrow exception to the *Defillippo* good faith rule is both appropriate and justified.

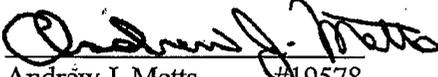
## V. CONCLUSION

The State respectfully requests that, for the reasons outlined above, this court uphold of the validity of the initial contact of the officer with the

passenger and driver and the search of the vehicle incident to arrest of the passenger because the officers were acting pursuant to presumptively valid case law at the time the search was conducted.

Respectfully Submitted this 2<sup>nd</sup> day of July, 2009.

STEVEN J. TUCKER  
Prosecuting Attorney

  
Andrew J. Metts, #19578  
Deputy Prosecuting Attorney  
Attorney for Respondent