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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RODGER SINCLAIR WRIGHT, Petitioner.

STATE OF WASHINGTON, Respondent,

v.

DANIEL SNAPP, Petitioner.

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SUPREME COURT
STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, that attempt to strike a balance between the effectiveness of police efforts to ensure public safety and the rights of citizens to be secure in their private affairs.

II. ISSUE PRESENTED

Whether the modified "relevant evidence" exception to the search warrant requirement which has been recognized for all but 5 years of Washington State's 122-year history should be eliminated?

III. STATEMENT OF FACTS

The facts of these two cases are discussed in detail in the briefs of the parties and will not be addressed here.

IV. ARGUMENT

Our forefathers created for Washington a vibrant and rich Constitution. Aware that later generations might stray from its letter and spirit, the drafters exhorted their descendants to return frequently to the fundamental principles that were embodied in the Constitution so as to ensure both the security of individual rights and the perpetuity of free government.

See Const. art. I, § 32.

Failure to heed this call resulted in this Court announcing a search incident to arrest doctrine that was ““all sail, no anchor””¹ and that imposed restrictions upon police which were inconsistent with precedent and which jeopardized public safety. See *State v. Ringer*, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983) (overruling essentially all of its prior decisions on vehicle searches incident to arrest). Three years later this Court realized it had strayed from the course set by Washington’s Constitutional Convention and changed direction. See *State v. Stroud*, 106 Wn.2d 144, 150, 720 P.2d 436 (1986), overruled by *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009) (overruling *State v. Ringer*). The new course, however, granted police license to conduct searches far in excess of those previously authorized and endangered personal rights.

The new course charted in *Stroud*, which permitted a search of a vehicle incident to the arrest of any occupant, was largely consistent with the general understanding of the United States Supreme Court’s decision in *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), and *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), but it departed from prior Washington case law. Over the next 23

¹*State v. Gunwall*, 106 Wn.2d 54, 60, 720 P.2d 808 (1986) (citing *The Role of a Bill of Rights in a Modern State Constitution*, 45 Wash. L. Rev. 453 (1970)).

years, this Court created special rules pursuant to Const. art. I, § 7 that sought to keep in the doctrine a balance between the needs of effective law enforcement and the personal rights of Washington's citizens.²

In 2009, the United States Supreme Court realized that the inferior court's understanding of *Chimel* and *Belton* allowed for "unreasonable" searches in excess of the justifications for the search incident to arrest exception. The Court, therefore, announced a new rule governing the automobile search incident to arrest exception to the Fourth Amendment's warrant requirement. In *Arizona v. Gant*, 556 U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the Court held that the exception applies in only two circumstances: (1) "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" and (2) "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Gant*, 129 S. Ct. at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring)).

The Supreme Court's decision in *Gant* was applicable to the states. See generally *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (the Fourteenth Amendment applies the Fourth Amendment to

²A summary of the Washington modifications to searches of vehicles incident to arrest appears in appendix A.

the states). In many circumstances where this Court had expressly permitted searches under *Stroud*, *Gant* prohibited such searches. See *State v. Robinson*, No. 83525-0 slip op. at ¶ 15, ___ Wn.2d ___, ___ P.3d ___, 2011 Wash. LEXIS 315 at 10 (Apr. 14, 2011). This Court took immediate action to conform Washington law to *Gant* by overruling *Stroud* in a case that was both argued and briefed prior to *Gant*. See *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). Language in *Valdez* further indicated that the “relevant evidence” prong of *Gant* would be narrowed in Washington to circumstances in which the arrestee might regain access to the automobile in order to destroy evidence. *Id.*, at 773.

Valdez and the other post-*Gant* decisions that this Court has reviewed did not present the opportunity for deciding the validity of the “relevant evidence” search incident to arrest exception under Const. art. I, § 7, as none of the cases dealt with current offenses.³ See *State v. Adams*, 169 Wn.2d 487, 488, 238 P.3d 459 (2010) (defendant was arrested on an “outstanding warrant”); *State v. Afana*, 169 Wn.2d 169, 174, 233 P.3d 879 (2010) (existing arrest warrant for the passenger); *Valdez*, 167 Wn.2d at 765 (driver arrested on “outstanding warrant”); *State v. Patton*, 167 Wn.2d 379, 383, 219

³This same criticism can be directed at *Ringer*, 100 Wn.2d at 688 (defendant arrest for an outstanding felony arrest warrant). *Stroud*, on the other hand, dealt with an arrest for a current offense. See *Stroud*, 106 Wn.2d at 145 (defendants arrested for the theft of a vending machine).

P.3d 651 (2009) (deputies serving arrest warrant on defendant). As a result some Court of Appeals decisions have characterized the discussion of the relevant evidence exception in *Valdez* as dicta. See, e.g., *State v. Louthan*, 158 Wn. App. 732, 752, 242 P.3d 954 (2010). This characterization is consistent with this Court's discussion of the relevant evidence exception in *Robinson* which considered whether there was a reason to believe evidence of the crime of arrest could be found in the vehicle after determining that the officer safety *Gant* exception did not apply. See *Robinson*, slip op. at ¶¶ 27-28.

The instant cases provide this Court with an opportunity to return Washington to the fundamental principles of article I, section 7. A return to the core protections of the constitution requires repudiating the aberrational *Ringer* rule (as has already been done by this Court) and the reinstating of the relevant evidence rule established by the decisions that held sway for the first 94 years our state's existence. These changes are true to the historical treatment of evidence of arrest searches in Washington but they do not run afoul of the federal constitution. In other words, the correct analysis in Washington results in a rule that falls between *Ringer* and *Stroud*. Acknowledging that the *Valdez* dicta went too far in rejecting the relevant evidence rule will serve the values of stare decisis better than would jury rigging a new justification to shore up *Ringer*'s overruling of decades of

settled article I, § 7 jurisprudence. *See generally Citizens United v. Federal Election Com'n*, ___ U.S. ___, 130 S. Ct. 876, 921, 175 L. Ed. 2d 753 (U.S. 2010).

After *Ringer* was decided, this Court adopted six nonexclusive factors⁴ to determine in any given case whether the state constitution provides different and broader protection than the federal constitution. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Four of the six factors require a review of the language and structure of the constitution from the viewpoint of the ratifying citizenry. The remaining two factors look to post-adoption events, but always with an eye to maintaining the rights as originally established against changed expectations. *See, e.g., State v. Sieyes*, 168 Wn.2d 276, 225 P.3d 995 (2010) (constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future generations think the scope too broad or too narrow); *State v. Eisfeldt*, 163 Wn.2d 628, 637, 185 P.3d 580 (2008) (article I, section 7 protections are not confined to the subjective privacy expectations of modern citizens); *State v. Jordan*, 160 Wn.2d 121, 137, 156 P.3d 893 (2007) (Madsen, J., dissenting) (“To decide if an interest is one that citizens of the State ‘have held,’ we look to the protection historically accorded the

⁴The factors are: (1) the textual language; (2) textual differences; (3) constitutional and common law history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or federal concern. *Gunwall*, 106 Wn.2d at 61-62.

interest.”).

“It is by now commonplace to observe Const. art. 1, § 7 provides protections for the citizens of Washington which are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment.” *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994). This observation rests, in large part, upon the clear variance in the wording of the two provisions. The size of the gulf created by the difference in the actual words depends upon the meaning the ordinary citizen would give to the phrase “private affairs” in 1889. *See generally State ex rel. State Capitol Commission v. Lister*, 91 Wash. 9, 14, 156 P. 858 (1916).

When Const. art. I, § 7 was adopted in 1889, the phrase “private affairs” was understood to mean a person’s papers and business affairs.⁵ In

⁵*See, e.g., ICC v. Brimson*, 154 U.S. 447, 478, 14 S. Ct. 1125, 38 L. Ed. 1047 (1894) (“the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man’s home, and the privacies of his life. As said by Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 250, “of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.”); *United States v. Boyd*, 46 U.S. 29, 50, 12 L. Ed. 36, 5 HOW 29 (1846) (“The public moneys in his hands constitute a fund, which it is his duty to keep, and which the law presumes is kept, distinct and separate from his own private affairs. It is only upon this view, that he can be allowed to purchase the public lands at all, consistently with the provisions of the act of Congress.”); *Hunter v. United States*, 30 U.S. 173, 187, 8 L. Ed. 86 (1831) (“It might be dangerous to give the same effect to a voluntary payment, by an agent of the government, as if made by an individual in his own right. The concerns of the government are so complicated and extensive, that no head of any branch of it can have the same personal knowledge of the details of business, which may be presumed in private affairs.”); *United States v. Duane*, 25 F. Cas. 920, 921 (1801) (“Jurors are not volunteers; they are called here by compulsion of law, and generally give their attendance to the great detriment of their private affairs.”).

other words, this language merely restated the protections afforded by the Fourth Amendment. This conclusion is supported by early Washington cases which resolved questions under Const. art. I, § 7 by relying upon decisions issued by states whose constitutional language bore a greater resemblance to the Fourth Amendment than to Const. art. I, § 7. *See, e.g., State v. Royce*, 38 Wash. 111, 80 P. 268 (1905) (citing cases from Illinois, Georgia, Missouri, Alabama, South Carolina, and New Hampshire).⁶ This tacit understanding was explicitly acknowledged by this Court in later years.⁷

⁶The relevant contemporary constitutional provisions of these sister states may be found in Appendix B.

⁷Some of this Court's recent opinions substitute the phrase "right to privacy" for Const. art. I, § 7's actual "private affairs" language. *See, e.g., State v. Schultz*, 170 Wn.2d 746, 758, ___ P.3d ___ (2011). This rephrasing is less awkward to modern ears than the original historical language. This rephrasing, however, creates a risk that Const. art. I, § 7 decisions will become unmoored from its historical underpinnings.

The phrase "right to privacy" has a popular and emotionally charged meaning that was unknown to the drafters of our Constitution. The delegates to the constitutional convention, however, lived in a world that did not recognize a "right to privacy" that could be vindicated in courts. The concept of a tort "right of privacy" was pioneered in a law review article published one year after the Washington Constitution was ratified. *See S. Warren and L. Brandeis, The Right of Privacy*, 4 Harv. L. Rev. 193 (1890).

The first discussion of a "right of privacy" in a Washington case was in *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 P. 594 (1911). In that case, a newspaper published an article describing the filing of criminal charges against a man. The article included a photograph of his daughter. The daughter sued, claiming that this publication violated her right of privacy. This Court held that there was no such right: "Not so much because a primary right may not exist, but because, in the absence of a statute, no fixed line between public and private character can be drawn." The opinion closed with a call for legislative action on this subject. As late as 1950, this Court continued to question the very existence of a right to privacy. *See, e.g., Lewis v. Physician's & Dentists Credit Bureau, Inc.*, 27 Wn.2d 267, 177 P.2d 896 (1947) (tracing the origin of the phrase "right of privacy" to the 1890 law review article and noting that "in a majority of the states even the existence of the right is still an open question."); *State ex rel. Hodde v. Superior Court*, 40 Wn.2d 502, 244 P.2d 668 (1952) (rejecting claims that the activities of the legislative investigative committees violated

See, e.g., State v. Smith, 88 Wn.2d 127, 133, 559 P.2d 970 (1977) ("It is apparent that the fourth amendment to the United States Constitution and article 1, section 7 of the Washington State Constitution are comparable and are to be given comparable constitutional interpretation and effect."); *State v. Miles*, 29 Wn.2d 921, 926, 190 P.2d 740 (1948) ("It will be observed that the fourth amendment to the constitution of the United States, and Art. 1, § 7, or our state constitution, although they vary slightly in language, are identical in purpose and substance.").

While the text of the Washington Constitution does not support a significant curtailing of the relevant evidence search incident to arrest exception announced in *Gant*, the structure of the Washington Constitution does support modest departures from Fourth Amendment rules. The simple fact that the Declaration of Rights is the *first* section of the State's Constitution supports the proposition that protection of individual rights against government intrusion was a significant concern of the drafters. *State v. Schelin*, 147 Wn.2d 562, 593-94, 54 P.3d 632 (2002) (Sanders, J., dissenting). "The state constitution limits powers of state government, while the federal constitution grants power to the federal government." *State v. Russell*, 125 Wn.2d 24, 61, 882 P.2d 747 (1994) (citing *Gunwall*, 106 Wn.2d

a "right of privacy"); *State v. James*, 36 Wn.2d 882, 221 P.2d 482 (1950) (same).

at 66).

Preexisting state law indicates that this Court has already reconciled the textual and linguistic differences between Const. art. I, § 7 and the Fourth Amendment in a manner that fully supports the relevant evidence search incident to arrest doctrine of *Gant*, while preventing overly intrusive invasions into our citizen's private affairs. This Court's early case law recognized a search incident to arrest exception to the warrant requirement. *See Olympia v. Culp*, 136 Wash. 374, 377-78, 240 P. 360 (1925). When the use of automobiles became widespread, this court included them within the scope of searches incident to arrest:

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 suit case, which he may be carrying. From this it seems to use 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. This is true because the person arrested has the immediate physical possession, not only of the grips or suit cases which he is carrying, but also of the automobile which he is driving and of which he has control.

State v. Hughlett, 124 Wash. 366, 370, 214 P. 841 (1923).

This Court fleshed out the parameters of the automobile search in subsequent cases. The rules required a case-by-case analysis, rather than the

bright-line rule later adopted in *Stroud*. The validity of any automobile search eventually depended upon the officer having probable cause to believe the suspect was currently or recently engaged in criminal conduct, the officer reasonably believing that the automobile contained evidence related to that criminal conduct, and the automobile being reasonably close to the place of arrest. See, e.g., *State v. Jackovick*, 56 Wn.2d 915, 916-17, 355 P.2d 976 (1960) (“the officers who made the arrest believed, and had every reason to believe, that the appellant had committed a felony and that he had fled the scene in the car found parked back of his shop”); *State v. Cyr*, 40 Wn.2d 840, 844-45, 246 P.2d 480 (1952) (“the automobile in question was in such reasonably close proximity to the place of arrest, and there existed such probable cause to believe that a search of the vehicle would reveal evidence pertinent to the charge, that such search and seizure was incident to the arrest and therefore authorized by law.”). If an officer could satisfy these three conditions, the search could proceed even after the arrestee was secured⁸ and unable to gain access to the vehicle in order to destroy evidence. See, e.g.,

⁸The offender would virtually always be secured at the time of the search, as a search conducted prior to arrest could not be justified as a search incident to arrest. See *State v. Deitz*, 136 Wash. 228, 230, 239 P. 386 (1925) (“The next contention is that the appellant had not in fact been placed under arrest before the search was made. The evidence, however, shows clearly that an arrest had been made and that the appellant was placed in the custody of one of the officers.”). This limitation is recognized in modern times. See *State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003).

Jackovick, 56 Wn.2d at 916 (vehicle parked behind the offender's shop was searched after the offender was arrested in his shop); *Cyr*, 40 Wn.2d at 841 (vehicle parked on street searched after defendant was arrested inside an adjacent restaurant).

Evidence related to other crimes was admissible, but only when discovered during an authorized search for evidence related to the crime of arrest or when securing the arrestee's possessions from loss. *Compare State v. Michaels*, 60 Wn.2d 638, 642-43, 374 P.2d 989 (1962) (evidence of gambling seized from the defendant's car when he was arrested for failing to signal a left turn was inadmissible as the officers did not "reasonably believe" that the automobile contained evidence of the crime of failing to signal a left turn), *with State v. Olsen*, 43 Wn.2d 726, 728, 263 P.2d 824 (1953) ("police officers were performing a routine duty in checking the articles [piled on the backseat] for safekeeping when the items were found which implicated the appellant" in a crime unrelated to the traffic offense for which he was arrested). If, however, evidence suggested that the arresting officer was exploiting either doctrine so as to conduct a general search of the vehicle, evidence found during the search was subject to suppression. *See, e.g., Michaels*, 60 Wn.2d 643-645 (an arrest cannot be used as a pretext for

searching an automobile)⁹; *State v. Houser*, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980) (“we recognize the possibility for abuse and have required that the State show that the search was conducted in good faith and not as a pretext for an investigatory search”); *State v. Gluck*, 83 Wn.2d 424, 428-29, 518 P.2d 703 (1974) (inventory searches must be conducted in good faith to be justified).

These pre-existing cases are in complete agreement with *Gant*'s relevant evidence prong. They are also narrower than *Stroud*'s “bright-line” rule which this Court steadfastly refused to abandon until the United States Supreme Court forced a return to the pre-*Ringer* rule. *See, e.g., State v. Vrieling*, 144 Wn.2d 489, 492, 28 P.3d 762 (2001) (rejecting an invitation to abandon *Stroud* in favor of *Ringer*).

Although *Stroud* authorized more frequent searches of vehicles incident to the arrest of an occupant then was historically justified, this Court adopted limitations to prevent such searches from becoming general exploratory searches. The Washington -specific requirements that a vehicle stop must be based upon sufficient facts to support the true crime of arrest, that an arrest must be supported by individualized probable cause, that only

⁹*Michaels*, which predated *Ringer* by two decades, disapproved of prior automobile search cases that did “not appear to have given full effect to the requirement that such a search, in order to be lawful, must be for items connected with the crime for which the person was arrested, or which might aid in his escape.” 60 Wn.2d at 643.

unlocked items within the passenger compartment that belong to the arrested person may be searched, and that reasonable efforts to secure the vehicle without an impound¹⁰ will continue to protect citizens from undue government intrusion. A return to the pre-*Ringer* relevant evidence exception will balance personal privacy with public safety needs in a manner consistent with the principles of our founding fathers.

The pre-*Ringer* relevant evidence exception was slightly more restrictive than the rule announced in *Gant*. *Gant* authorizes a search “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” *Gant*, 129 S. Ct. at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring)). “Reasonable to believe” is generally considered the equivalent of *Terry*’s¹¹ “reasonable belief” standard.¹² The pre-*Ringer* cases,

¹⁰See Appendix A.

¹¹*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889(1968).

¹²The phrase “reasonable to believe” is the equivalent of “reason to believe.” See *United States v. Gorman*, 314 F.3d 1105, 1111 n.4 (9th Cir. 2002) (listing examples of the use of the phrases “reason to believe”, “reasonable belief” and “reasonable grounds for believing” and noting their identical meaning). 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). That case held that an arrest warrant gives government agents limited authority to enter a suspect’s home to arrest him if they have “reason to believe” he is 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.”).

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., 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"); *States v. Diaz*, 491 F.3d 1074, 1077 (9th Cir. 2007) ("reasonable belief" in *Payton* is the same as probable cause); *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").

The vast majority of State courts have also held that the "reason to believe" language was meant to employ a standard less exacting than probable cause. *See, e.g. V.P.S. v. State*, 816 So. 2d 801, 802-803 (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, 840-841, 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, 191-192, 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, 404-406, 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. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).")

One can presume that the United States Supreme Court was aware that the phrase "reasonable to believe" is generally treated as comparable to *Terry* when the Court used the term in *Gant*. That the *Gant* Court intended that this meaning be applied to the phrase in the search incident to arrest context 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*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed.2d 572 (1982):

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.

however, imposed a probable cause standard on the relevant evidence exception. *See, e.g., State v. Knudsen*, 154 Wash. 87, 99, 280 P. 922 (1929) (“After careful consideration, we are of the opinion that what the officers saw on the evening of appellant's arrest supported a reasonable belief on the part of the officers that appellant was, in their presence, violating the law, and constituted probable cause for the search which was made of appellant's automobile.”).

The heightened “probable cause” standard was utilized by the Court of Appeals in the cases of *State v. Barnes*, 158 Wn. App. 602, 611-13, 243 P.3d 165 (2010), and *State v. Wright*, 155 Wn. App. 537, 551-53, 230 P.3d 1063, *review granted*, 169 Wn.2d 1026 (2010). Their reformulation of the traditional pre-*Ringer* relevant evidence exception as requiring a nexus between the person arrested and the vehicle searched and probable cause to believe evidence of the crime of arrest will be found within the vehicle should be adopted by this Court in the instant cases.

V. CONCLUSION

This Court should reaffirm Washington’s long standing modified relevant evidence exception to the warrant requirement.

Gant, 173 L. Ed. 2d at 498. Equating *Gant*'s “reasonable to believe” with “probable cause” would render the *Gant* exception meaningless or superfluous.

Respectfully submitted this 18th day of April, 2011.

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APPENDIX A

Automobile Exception to the Warrant Requirement Rejected

Const. art. I, § 7 bars warrantless searches of automobiles solely based upon probable cause to believe that the automobile contains contraband. *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983). *Contra United States v. Ross*, 456 U.S. 798, 823, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982) (the inherent mobility of automobiles allows officers to conduct a warrantless search when there is probable cause to believe that the automobile contains contraband); *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790 (1925) (same).

Individualized Probable Cause Required

The moderate smell of marijuana emanating from a vehicle, without more, will not provide probable cause to arrest any of the occupants of the vehicle. Const. art. I, § 7 requires individualized probable cause for each occupant of the vehicle, *State v. Grande*, 164 Wn.2d 135, 187 P.3d 248 (2008). *Contra Maryland v. Pringle*, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003) (the moderate smell of marijuana emanating from a vehicle, without more, establishes probable cause to arrest all occupants of the vehicle; the Fourth Amendment does not require individualized probable cause for each occupant of the vehicle).

Limitations Upon the Scope of an Automobile Incident to the Arrest of an Occupant

Need warrant to enter locked containers contained in a car or to enter the trunk when the vehicle is searched incident to the arrest of the driver or owner. *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). *Contra United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed.2d 572 (1982) (when a vehicle may be searched incident to arrest, an officer may open locked containers and may examine items in a trunk); *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed.2d 768 (1981) (same).

Need warrant to search unlocked containers contained in a vehicle that the officer "knows or should know" belong to a person other than the

arrestee. *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). *Contra Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999) (officer may search passenger's belongings that are found in the car).

Limitations Upon the Scope and Performance of Inventory Searches

A vehicle may not be impounded until an officer exhausts reasonable alternatives. *See State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984). *Contra Colorado v. Bertine*, 479 U.S. 367, 371-73, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987) (a driver need not be offered an opportunity to make other arrangements for the safekeeping of his property before a vehicle may be impounded.); *South Dakota v. Opperman*, 428 U.S. 364, 368-69, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976) (same).

Police may not enter a trunk of an impounded vehicle to inventory the contents. Nor may police open an unlocked, but closed container to inventory the contents. *State v. White*, 135 Wn.2d 761, 958 P.2d 982 (1998); *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980). *Contra Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987) (Police may inventory the contents of closed containers and car trunks when impounding a vehicle pursuant to a standardized procedure).

Pretext Stops Prohibited

An officer may not make an objectively reasonable stop in order to investigate an offense that the officer currently lacks sufficient evidence to justify a stop. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). *Contra Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 1774-76, 135 L. Ed. 2d 89 (1996) (stop is valid under the Fourth Amendment regardless of the officer's true reasons if the facts establish a violation of law).

APPENDIX B

Alabama

Article I, section 5, of the Alabama constitution provided as follows:

That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation.

State Tax. Com. v. Tennessee C., I. & R. Co., 206 Ala. 355, 89 So. 179, 182 (1921).

Georgia

Article 1, section 1, paragraph 16 of the Georgia Constitution provided that the

"right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated"

Underwood v. State, 13 Ga. App. 206, 78 S.E. 1103, 1104 (1913).

Illinois

Section 6 of article II of the Illinois constitution provided as follows:

"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 warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized."

People v. Grod, 385 Ill. 584, 593, 53 N.E.2d 591 (1944).

Missouri

Missouri Const. of 1875, Art. II, § 11 provided as follows:

That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation

New Hampshire

Part I, Article 19 of the New Hampshire Constitution provided as follows:

Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases, and with the formalities, prescribed by law.

South Carolina

SC Const. art. I, section 22 stated that :

"All persons have a right to be secure from unreasonable searches or seizures of their persons, houses, papers, or possessions."

State v. Atkinson, 40 S.C. 363, 18 S.E. 1021, 1024 (1894).