

63123-3

63123-3

NO. 63123-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TINA BOTTROFF,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN LUM

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 23 PM 1:03

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHEN P. HOBBS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

I.	<u>ISSUES PRESENTED</u>	1
II.	<u>STATEMENT OF THE CASE</u>	2
	A. PROCEDURAL BACKGROUND.....	2
	B. FACTUAL BACKGROUND.....	2
	1. CrR 3.6 hearing.....	2
	2. Trial testimony.....	7
III.	<u>ARGUMENT: ARIZONA V. GANT</u>	10
	A. OVERVIEW	10
	B. RELEVANT PROCEDURAL FACTS	12
	C. SUMMARY OF <u>ARIZONA V. GANT</u>	13
	D. APPLICATION OF <u>GANT</u> TO PENDING CASES.....	13
	E. EVIDENCE OBTAINED IN RELIANCE ON VALID PRE- <u>GANT</u> CASE LAW SHOULD NOT BE SUPPRESSED.....	15
	1. The Fourth Amendment good faith exception to the exclusionary rule	15
	2. Under article I, § 7, a search conducted in reliance on presumptively valid case law should not be suppressed	19
	3. Under the facts of this case, the officers were relying on presumptively valid pre- <u>Gant</u> case law and the evidence should not be suppressed	25

4. The article I, § 7 exclusionary rule has traditionally been interpreted consistently with the federal rule30

F. RECENT AND OUT-OF-JURISDICTION DEVELOPMENTS.....33

G. CONCLUSION.....35

IV. ARGUMENT: MISSING FINDINGS.....36

V. CONCLUSION.....37

TABLE OF AUTHORITIES

Table of Cases

Federal:

<u>Adams v. New York</u> , 192 U.S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1905)	31
<u>Arizona v. Evans</u> , 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995)	19
<u>Arizona v. Gant</u> , ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)	<i>passim</i>
<u>Boyd v. United States</u> , 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886)	31
<u>Chimel v. California</u> , 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)	26
<u>Griffith v. Kentucky</u> , 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)	14, 17, 33
<u>Herring v. United States</u> , ___ U.S. ___, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009)	17, 19, 29
<u>Illinois v. Krull</u> , 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987)	17, 25, 34
<u>Massachusetts v. Sheppard</u> , 468 U.S. 981, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984)	19
<u>Michigan v. DeFillippo</u> , 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979)	15-18, 22-24, 27, 28, 33
<u>New York v. Belton</u> , 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981)	26
<u>Olmstead v. United States</u> , 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928)	28

<u>State v. Gonzales</u> , 578 F.3d 1130 (9 th Cir., August 24, 2009).....	34
<u>State v. McCane</u> , 573 F.3d 1037 (10 th Cir., July 28, 2009).....	33, 34, 35
<u>Stone v. Powell</u> , 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976).....	28
<u>Teague v. Lane</u> , 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).....	13, 14
<u>United States v. Calandra</u> , 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974).....	15
<u>United States v. Leon</u> , 468 U.S. 897, 104 S. Ct. 3405 (1984).....	18, 33
<u>Weeks v. United States</u> , 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).....	32
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).....	15
 Washington State:	
<u>City of Redmond v. Moore</u> , 151 Wn.2d 664, 91 P.3d 875 (2004).....	22
<u>In re St. Pierre</u> , 118 Wn.2d 321, 823 P.2d 492 (1992).....	14
<u>State v. Biloche</u> , 66 Wn.2d 325, 402 P.2d 491 (1965).....	32
<u>State v. Bond</u> , 98 Wn.2d 1, 653 P.2d 1024 (1982).....	19, 21, 29
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	21, 23-25, 30, 33, 35

<u>State v. Burns</u> , 19 Wash. 52, 52 P. 316 (1898).....	31
<u>State v. Fladebo</u> , 113 Wn.2d 388, 779 P.2d 707 (1989).....	26, 27
<u>State v. Gibbons</u> , 118 Wash. 171, 203 P. 390 (1922).....	32
<u>State v. Head</u> , 136 Wn.2d 619, 964 P.2d 1187 (1998).....	37
<u>State v. Johnson</u> , 128 Wn.2d 431, 909 P.2d 293 (1996).....	27
<u>State v. Kirwin</u> , 203 P.3d 1044 (2009)	21
<u>State v. McCormick</u> , ___ Wn. App. ___, 216 P.3d 475 (Div. II, Sept. 23, 2009).....	34, 35
<u>State v. Nordstrom</u> , 7 Wash. 506, 35 P. 382 (1893).....	31
<u>State v. O’Bremski</u> , 70 Wn.2d 425, 423 P.2d 530 (1967).....	32
<u>State v. Parker</u> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	27
<u>State v. Patton</u> , ___ Wn.2d ___, 2009 WL 3384578 (Oct. 22, 2009).....	1, 10, 27
<u>State v. Potter</u> , 156 Wn.2d 835, 132 P.3d 1089 (2006).....	21-25, 30, 33, 35
<u>State v. Riley</u> , 69 Wn. App. 349, 848 P.2d 1288 (1993).....	36
<u>State v. Royce</u> , 38 Wash. 11, 80 P. 268 (1905).....	31
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003).....	31

<u>State v. Stroud</u> , 106 Wn.2d 144, 720 P.2d 436 (1986).....	26
<u>State v. Valdez</u> , ___ Wn.2d ___, 2009 WL 4985242 (Dec. 24, 2009)	10
<u>State v. Vrieling</u> , 144 Wn.2d 489, 28 P.3d 762 (2001).....	27
<u>State v. White</u> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	20-25, 27, 28, 30, 33, 35
<u>State v. Young</u> , 39 Wn.2d 910, 239 P.2d 858 (1952).....	32

Other Jurisdictions:

<u>Commonwealth v. Dana</u> , 43 Mass. 329 (2 met. 1841).....	31
<u>People v. Banner</u> , ___ Cal.3 rd ___, (C059288, December 17, 2009).....	35

Constitutional Provisions

Federal:

U.S. Const. amend. IV	<i>passim</i>
-----------------------------	---------------

Washington State:

Const. art. I, § 7.....	<i>passim</i>
-------------------------	---------------

Statutes

Washington State:

RCW 69.50	2
-----------------	---

Rules and Regulations

Washington State:

CrR 3.6..... 2, 7, 36, 37

Other Authorities

4 J. Wigmore, Evidence § 2183
(2nd ed. 1923) 31

I. ISSUES PRESENTED

1. What is the effect of the recent United States Supreme Court decision in Arizona v. Gant on cases involving a vehicle search incident to arrest that are currently pending in trial courts and on appeal?
 - a. Does the “good faith” exception to the exclusionary rule under the Fourth Amendment require suppression of evidence obtained when officers conducted a search under authority of presumptively valid state and federal case law?
 - b. Does article I, § 7 of the Washington constitution require suppression of evidence obtained when officers conducted a search under authority of presumptively valid state and federal case law?
 - c. Were the officers acting in good faith reliance on established United States and Washington Supreme Court case law when conducting the vehicle search incident to arrest?

2. Is the Gant rule that a vehicle may be searched when it is reasonable to believe that evidence relevant to the crime of arrest may be found inside the vehicle valid under article I, § 7 of the Washington constitution?
 - a. Was this rule adopted by the Washington Supreme Court in State v. Patton?

3. Was the vehicle search proper under pre-Gant case law?
 - a. Was there a close physical and temporal proximity between the arrest and the vehicle search?
4. Should this matter be remanded for entry of CrR 3.6 findings?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

Tina Bottroff was charged with one count of violating the Uniform Controlled Substances Act, RCW 69.50, possession with intent to deliver methamphetamine. CP 1-30. A jury found Bottroff guilty as charged. CP 49. Bottroff received a sentence under the Drug Offender Sentencing Alternative of six months residential based treatment followed by twelve months of community custody. CP 53-69. Bottroff has filed a timely appeal. CP xx. The State has moved to consolidate Bottroff's appeal with that of her co-defendant, Christopher Gregory.

B. FACTUAL BACKGROUND.

1. CrR 3.6 hearing.¹

On May 29, 2008, Bellevue Police Department ("BPD") officers stopped a Honda Accord for a traffic infraction. Matthew Logstrom was the driver and Tina Bottroff was the passenger. 1RP 50-51, 75. During

¹ The State adopts the following method of referring to the report of proceedings: 1RP (Sept. 15, 2008), 2RP (Sept. 16, 2008), 3RP (Sept. 17, 2008), 4RP (Sept 18, 2008), and 5RP (Sept. 19, 2008).

this stop Logstrom was arrested and a search incident to arrest found suspected methamphetamine and other items possibly associated with selling drugs. 1RP 8, 30-32. Logstrom gave a statement to police in which he admitted he was a methamphetamine dealer. 1RP 320-33. After Logstrom's arrest, BPD Ofc. Halsted drove passenger Tina Bottroff to the Newport Hills Townhomes and saw her enter Unit 44.² Bottroff told Ofc. Halsted that she lived with "Chris" and "Laura" in Unit 44. 1RP 86-87.

Logstrom was subsequently interviewed by BPD Detective Christiansen. 1RP 8-9. During the interview, Det. Christiansen learned that Bottroff was living with Christopher Gregory and Laura Vetter at the Newport Hills Townhomes, Unit 44.³ 1RP 9, 12, 34. The detective knew and confirmed that Gregory had an outstanding Department of Corrections felony escape warrant. 1RP 9-12, 34-37, 67-68, Pre-Trial Ex. 1.

Previously, in November of 2007, a confidential informant had told Det. Christiansen that Christopher Gregory was actively involved with stolen cars and was trying to get into the "methamphetamine business." 1RP 48-49, Ex. 4, p. 3. The detective asked the informant to

² See also 4RP 130 (trial testimony).

³ Detective Christiansen looked up Laura Vetter's name in a police database and learned that Gregory had been a passenger in a vehicle driven by Vetter that was involved in a traffic accident. This confirmed for the detective that there was a connection between Vetter and Gregory. 1RP 12-13, 38.

determine where Gregory was living, but the informant was unable to do so. 1RP 49.

On June 13, 2008, Detective Christiansen set up a surveillance operation hoping to locate Gregory at the Newport Hills Townhomes. 1RP 12, 51. Three officers were involved in the surveillance and they rotated watching the apartment in unmarked cars from a parking lot across the street.⁴ 1RP 13. From this position the parking lot and the walkway to Unit 44 could be seen. 1RP 14, 51-52, 55.

The surveillance began at approximately 9:00 a.m. 1RP 15, 51. Shortly afterward, Bottroff drove up to the apartment complex in a red two-door Honda Accord. Det. Christiansen saw Bottroff make several trips from the apartment to the car. Bottroff then remained in the apartment. 1RP 15-16.

In the afternoon, Det. Christiansen switched locations with Ofc. Halsted. 1RP 16. The detective moved down the street to the intersection of 60th and 119th and Ofc. Halsted assumed the “eye” position.⁵ 1RP 16. At approximately 2:30, Ofc. Halsted informed Det. Christiansen by radio that Gregory had left the apartment and was getting into the car. 1RP 16.

⁴ Testimony at trial made it clear that this surveillance position was on the other side of the road from Unit 44. 4RP 12-14.

⁵ See also 4RP 16-18 (trial testimony: the purpose of this secondary surveillance position was so that the primary “eye” did not have to immediately follow the suspect vehicle).

There was no attempt to arrest Gregory from the point at which he left the apartment to when he got into the Honda. 1RP 54-55. Det. Christiansen saw the Honda as it drove out of the parking lot onto 60th. 1RP 16-17.

Det. Christiansen testified that, for safety reasons, law enforcement does not like to make an arrest in front of someone's residence. 1RP 16. Detective Christiansen followed the vehicle for a very short distance, down 60th and onto 119th. 1RP 18, 58-59. Moments later the Honda pulled onto 119th, turned into a service station, and pulled up to a pump.⁶ 1RP 18, 39, 59. Det. Christiansen stopped behind the Honda and Ofc. Halsted blocked the car from the front. 1RP 18-19. Det. Christiansen activated the flashing lights in his car. 1RP 19, 40-41.

Det. Christiansen immediately got out of his car. At the same time Gregory was getting out of the Honda on the passenger side. 1RP 19, 41, 59. Tina Bottroff was the driver. The detective recognized Gregory from prior contacts. 1RP 20. Det. Christiansen said, "Please stop." Gregory did so. 1RP 20-21, 41, 61. Gregory had shut the door to the Honda. 1RP 61-62.

⁶ See Ex. 2 (map drawn by Det. Christiansen for pre-trial hearing). As the drawing shows, the Honda drove only a very short distance before being stopped. At trial, during cross-examination by Gregory's attorney, it was established that the Honda travelled approximately 900 feet from the apartment to the service station before it was stopped. 4RP 80-81.

Gregory was arrested on the warrant, handcuffed, and placed in Ofc. Halsted's car. 1RP 21-23. During a search of Gregory's person incident to his arrest a cell phone was found in his pocket. 1RP 23, 44.

Det. Christiansen asked Bottroff to get out of the car. He told her that he was going to conduct a search of the area in the car where Gregory had been sitting. 1RP 21. This search was limited to the areas in the vehicle that Gregory would have been able to reach from the passenger seat. This included areas accessible to the front passenger on the driver's side of the car. 1RP 21-23, 63-65. Prior to the search, the detective did not see drugs or weapons inside the car in plain view. 1RP 62.

In the driver's side door pocket, Det. Christiansen found a paper bag containing several small plastic baggies, one of which contained a substance he recognized as methamphetamine. 1RP 23-24, 43. In the vehicle's center console, Det. Christiansen discovered a small digital scale and items bearing Bottroff's name. 1RP 24, 43.

Det. Christiansen advised Ofc. Halsted to arrest Bottroff for possession of methamphetamine. 1RP 24-25, 43. Bottroff was searched and two baggies of methamphetamine were found in her right front

pocket.⁷ 1RP 25-26. In the bag Bottroff had been seen carrying to the car, officers recovered approximately 50 unused small baggies with the same logo as the ones recovered from her pocket.⁸ 1RP 25.

On June 13, 2008, the same day on which Gregory was arrested, the police obtained a search warrant and searched Unit 44. 1RP 26-29, 45-46. Although a search of the apartment on that day found drugs and drug paraphernalia, Det. Christiansen did not believe that these items could be conclusively linked to Gregory. 1RP 46.

2. Trial testimony.

At trial, Detective Christiansen testified consistently with the testimony he gave during the CrR 3.6 hearing. 4RP 7-47.

Gregory's cell phone, taken from him after his arrest, was admitted into evidence. 4RP 28. The cell phone had a photograph of Gregory on it. 4RP 73. When the cell phone is activated, the initials "CEG" appear on the screen." 4RP 74.

There were multiple text messages on the cell phone on the date June 13, 2008, the day Gregory was arrested. 4RP 56-57. These included the following text messages between Gregory and an individual calling

⁷ The methamphetamine weighed eight grams and tested positive for the presence of methamphetamine. Based on Detective Christiansen's training and experience he estimated that the eight grams of drugs could be split into forty "hits" of methamphetamine, a common amount of distribution.

⁸ See also 4RP 84-85 (trial testimony).

himself “Vic” (Detective Christiansen’s explanation to the jury of some terms is added in parenthesis):

Incoming message from “Vic,” 6-13-08, 11:54 a.m.:
“Anything good on yo side.”

Response by Gregory: “Not at this time, but that is subject to change really soon.”

Incoming message from Vic: “All depends on the price. If the price is rite then we be all the way nice.”

Incoming message from Vic: “QTR.” (Detective: this is a reference to a quarter ounce of narcotics.)

Response by Gregory: “350 for that ticket.” (Detective: reference to paying \$350 for a quarter ounce of methamphetamine, a reasonable price for a pre-street, wholesale deal.)

Incoming message from Vic: “If it’s the stuff Tina has then I’m coo uce cuz I talked to her and she said there’s quite a bit of blowoff.” (Detective: “Uce” is Gregory’s nickname; “blowoff” is cutting agent added to drug.)

Incoming message from Vic: “Naw I’m gitin this shit from someone else.” (Detective: Vic will buy better quality drug from another person.)

Incoming message from Vic, 1:04 p.m.: “No break no luv tryna com up uce. Or is that what you are getting charged?” (Detective: Vic wants a price break.)

Response by Gregory: “Well, actually I would only make 25 on that.” (Detective: Gregory is claiming he will only make \$25 on the deal.)

Incoming message from Vic: “Uce I know you well enough that if it isn’t good you wouldn’t fuck with it. So what can happen with three Cnotes.” (Detective: “3notes” means \$300.)

Response by Gregory: “6.5.” (Detective: \$300 will buy 6.5 grams of methamphetamine.)

Response by Gregory: “Yeah nothing good about fluffy stuff and I do not subscribe to it.” (Detective: Gregory is claiming he is not selling drugs that have been cut down.)

Incoming message from Vic: “So how can we do this.”

Response by Gregory: “I’m waiting to get it then I’ll text you.”

Incoming message from Vic: “Okay uce.”

4RP 66-72. Detective Christiansen tried to reverse the phone number but it was not possible to locate “Vic.” 4RP 90-91.

At approximately 1:50 p.m., about ten minutes after the last message, an individual in a white Ford van arrived at the Newport Hills Townhomes apartments, entered Unit 44, and stayed until approximately 2:50 p.m. 4RP 114-15.

Approximately 15 minutes later, Ofc. Halsted, across the street, saw Bottroff walk out to the Honda and get inside. 4RP 135. Gregory then walked out of the apartment and to the car. Gregory returned briefly to the apartment and then went back to the Honda and got inside the car. 4RP 135-36. Bottroff drove away and was subsequently stopped by Det. Christiansen and Ofc. Halsted, as described above. 4RP 115.

Documents in the name of Christopher Gregory were located during the search of Unit 44. 4RP 75, 120-21. Electronic scales, glass pipes, and suspected methamphetamine were also found in the apartment. 4RP 118-19, 141-47. No drugs were found in the apartment.

The methamphetamine recovered from the Honda, from Bottroff's pockets, and in Unit 44 was admitted into evidence. 4RP 31-32, 134, 145-46. The parties stipulated to the admission of the lab report which confirmed that these substances all contained methamphetamine. 4RP 156-58.

III. ARGUMENT: ARIZONA v. GANT

A. OVERVIEW.

Bottroff argues that her conviction must be reversed because the search of the vehicle incident to arrest is prohibited pursuant to the recent United States Supreme Court opinion in Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).⁹ It is the State's position that even if Gant is applied retroactively, and even assuming that the search in this case was improper under Gant (and recent post-Gant Washington Supreme Court cases), the exclusionary rule should not be applied under either the Fourth Amendment or article I, § 7 of the Washington

⁹ Since the filing of Bottroff's opening brief, the State Supreme Court decided State v. Patton, ___ Wn.2d ___, 2009 WL 3384578 (Oct. 22, 2009), in which it adopted the holding of Gant under article I, § 7 of the Washington Constitution. The Court reiterated this conclusion in State v. Valdez, ___ Wn.2d ___, 2009 WL 4985242 (Dec. 24, 2009). Patton and Valdez do not change the analysis of this issue. It remains the State's position that the officers relied in good faith existing case law in conducting the vehicle search. Moreover, under both federal and state law, the good faith exception has been recognized. For convenience, references in this briefing to Gant should generally be considered as referencing Patton and Valdez as well.

constitution because the search was conducted by officers in reasonable reliance presumptively valid case law.

As a preliminary matter, the State notes that if the vehicle search was improper under pre-Gant case law, it remains improper. In such a circumstance, there is no need to reach the question of the effect of Gant on the case. The search is invalid and the evidence must be suppressed.

Assuming the search is proper under pre-Gant case law, the question of the application of Gant to this case must be addressed. The State agrees that Gant applies retroactively to all non-final cases pending in trial courts and on appeal. Gant, however, does not require reversal of every vehicle search conducted incident to arrest. Gant allows vehicle searches under a variety of circumstances and the facts must be examined on a case-by-case basis to determine whether the search remains valid even under a retroactive application of Gant.

Even if there is no basis to uphold the validity of the search under Gant, the State respectfully submits that evidence obtained during vehicle searches conducted in reliance on pre-Gant case law should not be suppressed. Searches conducted pursuant to presumptively valid case law remain valid despite the fact that the case law is subsequently deemed to be unconstitutional.

Because Gant was decided under the Fourth Amendment, and did not purport to address or overrule state constitutional law, the preliminary analysis should focus on the federal exclusionary rule. The federal exclusionary rule has long recognized reversal is not required when officers relied in good faith on a statute that is subsequently deemed unconstitutional.

The same result holds true, however, under article I, § 7 of the Washington Constitution. As the Washington Supreme Court has recently recognized, convictions obtained under a statute that is subsequently deemed unconstitutional remain valid. The same reasoning applies in this case. There is no basis to suppress the evidence when officers have relied on long-standing and presumptively valid federal and state case law that allows vehicle searches incident to arrest.

B. RELEVANT PROCEDURAL FACTS.

The underlying search at issue in this case occurred on June 13, 2008. 1RP 12. Bottroff was found guilty on September 19, 2008.

On April 21, 2009, the U.S. Supreme Court decided Arizona v. Gant, which restricted the permissible scope of vehicle searches incident to arrest.

On November 30, 2009, Bottroff filed her opening brief in the Court of Appeals, arguing that the search of the car was improper under Gant.

C. SUMMARY OF ARIZONA v. GANT.

In Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the United States Supreme Court adopted two new rules concerning vehicle searches incident to arrest. The first is that police may search a vehicle incident to arrest only when the passenger is unsecured and within reaching distance of the vehicle's passenger compartment. Gant, 129 S. Ct. at 1714. The second is that a vehicle search incident to arrest is allowed when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. Id.

Gant also recognized that vehicle searches might be proper for other reasons, including probable cause to believe that evidence of a crime was present in the vehicle, officer safety, and exigent circumstances. Gant, 129 S. Ct. at 1721.

D. APPLICATION OF GANT TO PENDING CASES.

The State agrees that Gant must be applied to cases currently pending in trial courts and on direct appeal.¹⁰ Griffith v. Kentucky,

¹⁰ Because Gant articulated a new constitutional rule that represents a clean break from the past, it will not apply to cases on collateral review. Teague v. Lane, 489 U.S. 288, 298, 311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past); Teague v. Lane, 489 U.S. 288, 302-04, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); In re St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992).

The analysis, however, does not end with the simple “retroactive” application of Gant. First, under the rules articulated in Gant, the search of a vehicle incident to arrest may still be proper because Gant permits vehicle searches under several alternative grounds. 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.

**E. EVIDENCE OBTAINED IN RELIANCE ON 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 an initial illegality. Wong Sun, 371 U.S. at 488.

Consistent with these basic principles, the United States Supreme Court in Michigan v. DeFillippo, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979), held that an arrest (and subsequent search) under

a statute that was valid at the time of the arrest remains valid even if the statute is later held to be unconstitutional.

In DeFillippo, the Court stated:

At that time [of the underlying arrest], of course, there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. *A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.*

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality – with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. *Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.*

DeFillippo, 443 U.S. at 37-38 (emphasis added). The Court further noted:

[T]he purpose of the exclusionary rule is to deter unlawful police action. *No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search.* To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

DeFillippo, 443 U.S. at 38 n.3 (emphasis added). The Court recognized a

“narrow exception” when the law is “so grossly and flagrantly

unconstitutional that any person of reasonable prudence would be bound to see its flaws.” DeFillippo, 443 U.S. at 37-38.¹¹

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. DeFillippo, 443 U.S. at 40.

That the application of the good faith exception is not inconsistent with retroactivity doctrine of Griffith v. Kentucky can be seen from Illinois v. Krull, 480 U.S. 340, 349-50, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987). In Krull, the Supreme Court upheld warrantless administrative searches performed in good-faith reliance on a statute authorizing the search that was subsequently declared unconstitutional in a different case. Significantly, the United States Supreme Court applied the good faith exception in Krull just two months after the decision on Griffith. Clearly,

¹¹ DeFillippo is entirely consistent with the U.S. Supreme Court’s traditional exclusionary rule analysis. As the Court noted in a recent opinion:

[E]xclusion “has always been our last resort, not our first impulse,” ... and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it “result[s] in appreciable deterrence.” ... We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.... Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future....

Herring v. United States, ___ U.S. ___, 129 S. Ct. 695, 700, 172 L. Ed. 2d 496 (2009) (citations omitted).

the good faith exception to the exclusionary rule may be applied even when a new holding is being applied retroactively.

The only difference between DeFillippo and the present case is the nature of the legal authority relied upon by the officer conducting the search. In DeFillippo, the arrest was based on a presumptively valid statute that was later ruled unconstitutional. In the present case, the search was conducted pursuant to a procedure upheld as constitutional by well-established and long-standing judicial pronouncements. This distinction does not justify a different result.

Law enforcement officers should be entitled to rely on established case law – from both the federal and state courts – in determining what searches are deemed constitutional. Indeed, in the area of search and seizure it is the courts that establish the “rules,” not the legislative bodies. Judicial decisions, particularly those of the Supreme Court, as to the constitutionally permissible scope of searches and seizures are clearly entitled to respect, deference, and reliance by officers in the field.

The good faith exception has been applied by the United States Supreme Court in many contexts involving the reliance by law enforcement officers on presumptively valid assertions by the judiciary. 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).¹²

Given this history, there is no reason to conclude that law enforcement officers are not entitled to rely on the ultimate presumptively valid judicial assertion: opinions issued by the United States Supreme Court and the Washington State Supreme Court.¹³

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

¹² For a recent discussion of federal cases recognizing the “good faith” exception to the exclusionary rule, see Herring, 129 S. Ct. at 704.

¹³ See the discussion in the “recent developments” section below for citations to case law that has reached this same conclusion.

perspective than does the United States Supreme Court”). However, even under the more stringent article I, § 7 analysis, when officers obtain evidence in reasonable reliance on presumptively valid statute, the exclusionary rule does not apply. The same result should apply when law enforcement officers rely on presumptively valid judicial authority.

In State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), the Washington Supreme Court addressed a situation involving an arrest premised upon a flagrantly unconstitutional “stop and identify” statute that negated the probable cause requirement of the Fourth Amendment. Id. at 106. The Court concluded that article I, § 7 provided greater protection than the Fourth Amendment, that the officer’s subjective good faith in relying on the statute was not relevant, and that the federal subjective “good faith” exception to the exclusionary rule was not applicable in Washington. Id. at 110.

Nevertheless, the Court in White specifically stated that the remedy of exclusion should be applied only when the underlying right to privacy is “unreasonably violated.” White, 97 Wn.2d at 110-12. Three specific concerns justifying the application of the exclusionary rule were articulated: (1) to protect privacy interests of individuals from unreasonable governmental intrusions, (2) to deter the police from acting unlawfully in obtaining evidence, and (3) to preserve the dignity of the

judiciary by refusing to consider evidence obtained by unlawful means.

White, 97 Wn.2d. at 109-12; Bond, 98 Wn.2d at 12.

In addition, the Court has emphasized that in applying the exclusionary rule under article I, § 7 it is also appropriate to consider the costs of doing so. See e.g., Bond, 98 Wn. App. at 14 (“we have little hesitation in concluding that the costs [of excluding the evidence are] clearly outweighed by the limited benefits that would be obtained from excluding the confessions because of the illegal arrest.”). As is discussed in detail below, none of these concerns are implicated under the facts of the present case.

White involved a flagrantly unconstitutional statute. It did not assess a statute or judicial opinion that was presumptively valid.¹⁴ More recently, however, the Court has explicitly held in two cases that an arrest or search conducted in reliance on a presumptively valid statute that was subsequently deemed unconstitutional does not require suppression of the evidence. See State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006); State v. Brockob, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006).

In State v. Potter, the defendants maintained that they were unlawfully arrested for driving while their licenses were suspended

¹⁴ For a critique of the White analysis, see State v. Kirwin, 203 P.3d 1044, 1051-54 (2009) (Madsen, J., concurring).

because, subsequent to their arrests, the State Supreme Court held that the statutory procedures by which the Department of Licensing suspended licenses were unconstitutional.¹⁵ The defendants in Potter argued that under article I, § 7 evidence of controlled substances found during searches of their vehicles incident to arrest had to be suppressed because their arrests were illegal.

In a unanimous decision, the Court applied the DeFillippo rule under article I, § 7, and held that an arrest under a statute valid at the time of the arrest remains valid even if the basis for the arrest is subsequently found unconstitutional. Potter, 156 Wn.2d at 843. The Court stated:

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

¹⁵ The defendants in Potter were relying on City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004).

DeFillippo, the Court affirmed the convictions despite the fact that the statutory licensing procedures at issue had subsequently been held to be unconstitutional. Potter, 156 Wn.2d at 843.

Similarly, in State v. Brockob, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006), a defendant contended that his arrest for driving while his license was suspended and a search incident to that arrest were unlawful for the reasons claimed in Potter. The Court rejected the defendant's argument, stating that:

White held that police officers may rely on the presumptive validity of statutes in determining whether there is probable cause to make an arrest unless the law is “so grossly and flagrantly unconstitutional’ by virtue of a prior dispositive judicial holding that it may not serve as the basis for a valid arrest.”

Brockob, 159 Wn.2d at 341 n.19 (quoting White, 97 Wn.2d at 103) (quoting DeFillippo, 443 U.S. at 38). As in Potter, the Court held that the narrow exception did not apply “because no law relating to driver’s license suspensions had previously been struck down.” Brockob, 159 Wn.2d at 341 n.19.

Potter and Brockob recognize that White was addressing a unique situation: what should be the remedy when an arrest or search is conducted pursuant to a flagrantly unconstitutional statute. Such arrests and searches are presumptively unreasonable, regardless of the officer’s

subjective good faith reliance on a statute. White did not address reliance on a presumptively valid statute. As Potter and Brockob make clear, however, reliance on the presumptively valid statute is reasonable, does not implicate article I, § 7 because the search was conducted pursuant to authority of law, and does not require suppression of the evidence obtained in the course of the arrest or search.

As discussed above, the only difference between Potter and Brockob and the present case is that the present scenario involves presumptively valid case law, as opposed to a presumptively valid statute. This distinction should have no bearing on the analysis: the judicial opinions of the United States Supreme Court and the Washington Supreme Court should be viewed as least as presumptively valid as legislative enactments.

There is another reason that the holding in White lacks force today. The Court in White rejected the application of the good faith exception based on the mistaken belief that the doctrine was premised on the “subjective” belief of the law enforcement officer. White, 97 Wn.2d at 106 n.6 (DeFillippo “required a showing only that [the officer] enforced a presumptively valid statute in the good faith belief it was valid. The incorporation of a subjective good faith test is unworkable. . .”). Leaving aside whether DeFillippo ever actually endorsed a “subjective” good faith

standard, the rule in the federal system is clear: the good faith reliance must be objectively reasonable. See e.g., Krull, 480 U.S. at 346-57 (concluding that officer’s reliance on statute was “objectively reasonable”). The State is not suggesting that this Court should apply the exception simply because the officers subjectively believed they could search the car, but because that belief was – given the unequivocal federal and state case law – objectively reasonable.

3. Under the facts of this case, the officers were relying on presumptively valid pre-Gant case law and the evidence should not be suppressed.

The vehicle search incident to arrest in this case was conducted before the United State Supreme Court decision in Arizona v. Gant, decided on April 21, 2009. Prior to that date, numerous federal and state judicial opinions law allowed vehicle searches incident to arrest of the driver or passenger. Accordingly, those searches should be upheld because they were conducted pursuant to presumptively valid case law.

There is no doubt that prior to Gant, federal and state courts had unequivocally endorsed the constitutional validity of vehicle searches incident to arrest. This is not a situation such as White where there was a clear prior suggestion that the rule being applied might be unconstitutional. It is not even the situation addressed in Potter and Brockob where the constitutionality of the statute had never been

addressed before (and was thus “presumptively” valid). Instead, this is a situation in which the highest federal and state courts had specifically and repeatedly endorsed the procedures used by law enforcement.

Prior to Gant, federal case law clearly approved a bright-line test allowing the search of a vehicle incident to the lawful arrest of a passenger or occupant. See e.g., Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). This was made clear in Gant which recognized that the Court’s prior opinions have “*been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search . . .*” and that “lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception.”¹⁶ Gant, 129 S. Ct. at 1718 (emphasis added).

Likewise, the constitutionality of the search incident to arrest rule had been repeatedly endorsed and affirmed by the Washington Supreme Court over the past twenty-three years. See e.g., State v. Stroud, 106 Wn.2d 144, 153, 720 P.2d 436 (1986); State v. Fladebo, 113 Wn.2d

¹⁶ That the majority in Gant spent considerable time arguing that the new rule was justified in spite of the doctrine of *stare decisis* is further evidence that the court was promulgating a new rule. Gant, 129 S. Ct. at 1722-24.

388, 779 P.2d 707 (1989); State v. Parker, 139 Wn.2d 486, 489, 987 P.2d 73 (1999); State v. Johnson, 128 Wn.2d 431, 441, 909 P.2d 293 (1996); State v. Vrieling, 144 Wn.2d 489, 28 P.3d 762 (2001). That this was the rule in Washington is perhaps most clearly seen from the fact that the Supreme Court, in adopting the Gant analysis under article I, § 7, explicitly reversed these prior decisions. Patton, ___ Wn.2d at *7 (“... we also recognize that we have heretofore upheld searches incident to arrest conducted after the arrestee has been secured and the attendant risk to officers in the field has passed. Today, we expressly disapprove of this expansive application of the narrow search incident to arrest exception.”).

Thus, this case does not fit within the narrow exception, recognized in DeFillippo and White, precluding officers from relying upon laws that are “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” The pre-Gant cases may now be viewed as flawed, but the repeated judicial reliance on them for almost 30 years demonstrates that the search incident to arrest rule was neither grossly nor flagrantly unconstitutional.

There can be little doubt that law enforcement officers can rely on these specific judicial pronouncements when conducting vehicle searches. To conclude otherwise would be equivalent of asserting that officers could

never rely on judicial authority. In this regard, it is noteworthy that the majority in Gant emphasized that officers had reasonably relied on pre-Gant precedent and were thus immune from civil liability for searches conducted in accordance with the Court's previous opinions. Gant, 129 S. Ct. at 1723 n.11.

Moreover, the most basic purpose of the exclusionary rule is not furthered in any way by suppression of the evidence in this case. As the Court in DeFillippo noted, no conceivable deterrent effect would be served by suppressing evidence which, at the time it was found, was the product of a lawful search. Prior to April 21, 2009, officers understood that they could search a vehicle incident to the arrest of a recent occupant. After April 21, 2009, officers will know that they cannot conduct such searches and Gant will deter such conduct. But the retroactive application of the exclusionary rule has no deterrent value at all.

Nor is the preservation of judicial integrity, the other basis sometimes relied upon when applying the exclusionary rule, implicated in these circumstances.¹⁷ In the context of the reliance by law enforcement

¹⁷ This rationale was first articulated by Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 483-85, 48 S. Ct. 564, 574-75, 72 L. Ed. 944 (1928). Justice Brandeis argued that when the government is permitted to use illegally obtained evidence in courts of law, the integrity of the judiciary itself is tarnished. See also Stone v. Powell, 428 U.S. 465, 485, 96 S. Ct. 3037, 3048, 49 L. Ed. 2d 1067 (1976), where judicial integrity is mentioned as a secondary rationale); White, 97 Wn.2d at 110.

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.¹⁸ Evidence of criminal activity was validly obtained pursuant to a vehicle search

¹⁸ As the U.S. Supreme Court has noted, the benefits of the deterrent effect when applying the exclusionary rule should outweigh the costs:

In addition, the benefits of deterrence must outweigh the costs. . . . “We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.” . . . “[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.” . . . The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that “offends basic concepts of the criminal justice system.” . . . “[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” . . .

Herring v. United States, ___ U.S. ___, 129 S. Ct. 695, 700-01, 172 L. Ed. 2d 496 (2009) (citations omitted); see also Bond, 98 Wn.2d at 14.

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 evidence obtained in all pending post-Gant cases 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. In Potter and Brockob, the Washington Supreme Court has also recognized that the exclusionary rule does not apply when officers relied on a presumptively valid statute. This same reasoning should apply to judicial opinions of long-standing duration. The evidence obtained during the search in the present case should not be suppressed.

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

That White is an application of the federal exclusionary rule is entirely consistent with the fact that Washington courts have historically interpreted the exclusionary rule in a manner that is consistent with federal law. The Washington State Constitution, adopted in 1889, provides that, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, § 7. At common law, courts took no notice of whether evidence was properly seized; if relevant,

it was admissible.¹⁹ Commonwealth v. Dana, 43 Mass. 329 (2 met. 1841); 4 J. Wigmore, Evidence § 2183 (2nd ed. 1923). This was the rule recognized in Washington as early as 1889. State v. Nordstrom, 7 Wash. 506, 35 P. 382 (1893); State v. Burns, 19 Wash. 52, 52 P. 316 (1898).

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

Like most courts at that time, the Washington Court specifically rejected Boyd and held that relevant evidence was admissible, regardless of its source. State v. Royce, 38 Wash. 11, 80 P. 268 (1905) (evidence derived from improper search of burglary suspect need not be suppressed).

¹⁹ The meaning and scope of a constitutional provision is determined by examining the law at the time of enactment. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003).

Nine years later, the United States Supreme Court reintroduced an exclusionary rule. Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). The next year, the Washington Supreme Court followed the U.S. Supreme Court's lead and announced that an exclusionary rule would be recognized in Washington. State v. Gibbons, 118 Wash. 171, 184-85, 203 P. 390 (1922).

The ensuing decades of exclusionary rule jurisprudence can only be described as chaotic, as both state and federal courts struggled to find the proper balance between the need to protect constitutional rights and the interest in admitting relevant evidence. See e.g., State v. Young, 39 Wn.2d 910, 917, 239 P.2d 858 (1952).²⁰ Nonetheless, the Washington Supreme Court has generally followed the application of the rule in federal courts. As the Washington Supreme Court said in State v. O'Bremski, 70 Wn.2d 425, 423 P.2d 530 (1967): "We have consistently adhered to the exclusionary rule expounded by the United States Supreme Court..." See also State v. Biloche, 66 Wn.2d 325, 327, 402 P.2d 491 (1965) ("The law is well established in this state, consistent with the

²⁰ "We do not wish to recede one iota from our [previous holding]. It is the duty of courts to protect citizens from unwarranted, arbitrary, illegal arrests by officers of the law. But we should not permit our zeal for protection of constitutional rights to blind us to our responsibility to other citizens who have the right to be protected from those who violate the law." Young, 39 Wn.2d at 917.

decisions of the U.S. Supreme Court, that evidence unlawfully seized will be excluded...” (emphasis added).

In sum, Washington’s exclusionary rule has followed the general contours, progression, and application of the federal exclusionary rule. The Washington Supreme Court’s recognition in Potter and Brockob that the decision in White was simply an application of the narrow exception to the DeFillippo good faith rule is both appropriate and justified.

F. RECENT AND OUT-OF-JURISDICTION DEVELOPMENTS.

The argument in favor of the good faith exception outlined above was originally presented by the State of Washington in an amicus brief filed with the Washington Supreme Court shortly after the Gant decision was issued. Subsequently, the Tenth Circuit Court of Appeals in State v. McCane, 573 F.3d 1037 (10th Cir., July 28, 2009), upheld the good faith exception in response to a claim that Gant should be applied retroactively. Significantly, the Tenth Circuit, after conducting a detailed analysis of the interaction between the good faith exception and retroactivity, noted:

McCane argues the retroactivity rule announced in Griffith v. Kentucky, 479 U.S. 314, 322-23, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), requires application of the Supreme Court’s holding in Gant to this case. *The issue before us, however, is not whether the Court’s ruling in Gant applies to this case, it is instead a question of the proper remedy upon application of Gant to this case.* In Leon, the Supreme Court considered the tension between the retroactive application of Fourth Amendment decisions to

pending cases and the good-faith exception to the exclusionary rule, stating that retroactivity in this context “has been assessed largely in terms of the contribution retroactivity might make to the deterrence of police misconduct.” 468 U.S. at 897, 912-13, 104 S. Ct. 3405. *The lack of deterrence likely to result from excluding evidence from searches done in good-faith reliance upon settled circuit precedent indicates the good-faith exception should apply in this context. See Krull*, 480 U.S. at 360, 107 S.Ct. 1160 (declining to apply a court decision declaring a statute unconstitutional to a case pending at the time the decision was rendered and instead applying the good-faith exception to the exclusionary rule because the officer reasonably relied upon the statute in conducting the search).

McCane, 573 F.3d at 1045 n.5 (emphasis added).

The Ninth Circuit Court of Appeals has declined to apply the good faith exception. See State v. Gonzales, 578 F.3d 1130 (9th Cir., August 24, 2009). The State respectfully submits that the Ninth Circuit analysis was incorrect for precisely the reason set forth in McCane: it fails to ask what the remedy should be upon the retroactive application of Gant. As argued above, no purpose is served by excluding evidence that was obtained in objectively reasonable reliance on existing case law.

The Washington Court of Appeals, Division II, has recently rejected the good faith exception in State v. McCormick, ___ Wn. App. ___, 216 P.3d 475 (Div. II, Sept. 23, 2009). The State respectfully submits that Division II’s conclusion is flawed. First, McCormick seems to rest exclusively on the holding in Gonzales, with no discussion of the

differing view set forth in McCane. McCormick fails to recognize that simply stating that Gant applies retroactively does not end the analysis. The Court must still address the question of the appropriate remedy. McCormick is devoid of any discussion of the deterrent benefit of suppressing the evidence. Second, the State in McCormick erroneously conceded that White was controlling on the issue of whether the good faith exception applied. McCormick contains absolutely no discussion of the on-point cases of Potter and Brockob which, as discussed above, have clearly limited the scope of the good faith exception under White.

Finally, in People v. Banner, the Third Appellate District of California has upheld the good faith exception. ____ Cal.3rd ____, (C059288, December 17, 2009). In Banner the Court stated:

“Although it may be that a ‘criminal is to go free because the constable has blundered’. . . , the *guilty should not go free when the constable did precisely what the United States Supreme Court told him he could do*, but the court later decides it is the one who blundered.”

Id. at 2 (emphasis added, citation omitted). This sums up the State’s position in a nutshell.

G. CONCLUSION.

The State respectfully requests that this court uphold the validity of the search of the vehicle incident to arrest of Bottroff because the officers were acting pursuant to presumptively valid pre-Gant case law at the time

the vehicle search was conducted. Because there is no possible deterrent benefit to be obtained by suppressing the evidence, the exclusionary rule should not be applied in this context.

IV. ARGUMENT: MISSING FINDINGS

Bottroff argues that the trial court erred by not entering written findings and conclusions in connection with the CrR 3.6 hearing. Remand is not required in this case. While written findings of fact and conclusions of law are required pursuant to CrR 3.6, such error is harmless where the trial court's oral findings are sufficient to permit appellate review. State v. Riley, 69 Wn. App. 349, 352, 848 P.2d 1288 (1993). The findings of fact and conclusions of law are sufficient for appellate review in the present case because Bottroff's claim on appeal has nothing to do with whether the search was valid under pre-Gant law. Rather, Bottroff is simply arguing that the search is no longer valid after Gant. In response, the State contends that the exclusionary rule does not apply when officers were relying in good faith on existing law when they conducted the search. In this regard, it is perhaps relevant to note that co-defendant Christopher Gregory – who raises an identical issue – agreed that the court's oral

findings were sufficient to review the same claim that Bottroff now raises.²¹ See Gregory Opening Brief, p. 9, note 5.

If the court disagrees then, as Bottroff recognizes, the correct remedy is for remand for entry of the missing CrR 3.6 findings. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). Reversal is not an appropriate remedy because the missing findings cannot prejudice Bottroff who has raised no issue directly relating to the specifics of the findings themselves.

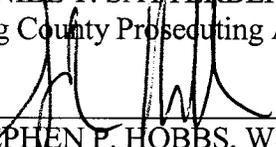
V. CONCLUSION

For the reasons stated above, the State of Washington respectfully requests that Tina Bottroff's conviction for possession with intent to deliver methamphetamine be affirmed.

DATED this 25th day of January, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
STEPHEN P. HOBBS, WSBA #18935
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

²¹ In fact, Gregory's claim was far more fact-specific than that raised by Bottroff. Gregory also argued that the search was improper because he was physically distant from the vehicle when he was placed under arrest; that is, that the search was invalid under pre-Gant law. See Gregory Opening Brief, p. 33-37.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Vanessa Lee, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent Appeals, in STATE v. TINA BOTROFF, Cause No. 63123-3-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

1/25/10
Date

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 25 PM 1:03