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## ARGUMENT

### **I. THE EVIDENCE WAS OBTAINED IN VIOLATION OF MR. CARDWELL'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.**

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). To meet this standard, “[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).<sup>1</sup>

RAP 2.5(a)(3) applies to the erroneous admission of evidence seized in violation of the Fourth Amendment and Wash. Const. Article I, Section 7. Such errors may be raised for the first time on appeal even

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<sup>1</sup> The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

absent a motion in the trial court. *Kirwin, supra; Contreras, supra; see also State v. Holmes*, 135 Wn. App. 588, 592, 145 P.3d 1241 (2006). This is consistent with the well-established principles governing application of RAP 2.5(a)(3).

For example, in *Kirwin*, the defendant was arrested for littering in violation of a city ordinance. The arresting officer discovered methamphetamine in the defendant's car. On appeal, the defendant argued for the first time that the officer's search violated the Fourth Amendment and Article I, Section 7. The Supreme Court acknowledged that the defendant had not raised the issue below, and analyzed it pursuant to RAP 2.5(a)(3):

Although not raised at trial, *Kirwin* may submit for review a “manifest error affecting a constitutional right.” ...*Kirwin* must “identify a constitutional error and show how, in the context of the trial, the alleged error actually affected [his] rights.” ... It is proper to “preview” the merits of the constitutional argument to determine whether it is likely to succeed....As a threshold matter, we address whether *Kirwin* has met his burden to prove a constitutional error occurred.

*Kirwin*, 823-824 (footnote and citations omitted).

The Court then discussed the merits of the defendant's claim and concluded that the arrest and search were lawful.

Similarly, in *Contreras*, the defendant was arrested for obstructing and searched incident to arrest. For the first time on appeal, he alleged that the officers lacked a reasonable articulable suspicion of criminal

activity when they seized him, and lacked probable cause when they arrested him. The state argued that the defendant could not raise the issue for the first time on appeal, but Division II disagreed:

We conclude that when an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal... [H]ere the record is sufficiently developed for us to determine whether a motion to suppress clearly would have been granted or denied; thus we can review the suppression issue, even in the absence of a motion and trial court ruling thereon. Accordingly, we look to the facts of Contreras' seizure and arrest to determine whether a motion to suppress would properly have been granted or denied. *Contreras*, at 312-313, 314 (footnote omitted).

In *Holmes*, the defendant was arrested for driving with an expired and mismarked trip permit, and drugs were found after a search incident to arrest. Division II permitted *Holmes* to raise a suppression issue for the first time on appeal:

Where a party asserts a Fourth Amendment argument for the first time on appeal, we will review the newly raised argument only if the record contains the facts necessary for its adjudication... Here, the record contains the facts necessary for us to address the merits of Holmes's challenge. *Holmes*, at 592 (citation omitted).

The cases cited by Respondent depart from this standard and conflict with the Supreme Court's decision in *Kirwin*, *supra*. Brief of Respondent, citing *State v. Millan*, \_\_\_ Wn.App. \_\_\_, 212 P.3d 603 (2009) and *In re Nichols*, \_\_\_ Wn.App. \_\_\_, 211 P.3d 462 (2009).

In *Millan*, one judge (joined by another, concurring) held that the defendant's failure to seek suppression in the trial court "constitutes a waiver of any error associated with the admission of the evidence at trial." *Millan*, at \_\_\_\_\_. The third member of the judicial panel wrote separately to emphasize that the defendant could not raise the suppression issue for the first time on appeal "because he failed to move to suppress the evidence below on grounds that the search was illegal *and* the record is insufficient for us to determine whether the search was illegal." *Millan*, at \_\_\_\_\_ (emphasis in original). *Nichols* applies the same reasoning to a PRP. *Nichols*, at 466.

Neither *Millan* nor *Nichols* addresses the Supreme Court's ruling in *Kirwin*. Nor do these cases distinguish *Contreras* and *Holmes*.

The Supreme Court does not view failure to seek suppression in trial court as a waiver that precludes review under RAP 2.5(a)(3).<sup>2</sup> *Kirwin*, *supra*. As the Court made clear in *Kirwin*, suppression issues are to be analyzed in the same manner as other constitutional issues raised under RAP 2.5(a)(3).

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<sup>2</sup> The only case in which the Supreme Court has analyzed a suppression issue with reference to RAP 2.5(a)(3) and found a waiver is *Valladares*, in which the defendant filed a motion to suppress but affirmatively withdrew the motion and thus "waived or abandoned his Fourth Amendment objections." *State v. Valladares*, 99 Wn.2d 663, 672, 664 P.2d 508 (1983). *Cf. State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995) (court found a waiver, but did not reference RAP 2.5(a)(3)).

In this case, Mr. Cardwell's Fourth Amendment rights were infringed by a search conducted in violation of *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009). Evidence from that search was admitted against him at trial. RP (12/10/08) 30-40. This is a manifest error affecting his constitutional rights, and may be reviewed for the first time on appeal. RAP 2.5(a)(3).

Respondent does not argue that the issue does not qualify for consideration under RAP 2.5(a)(3). Nor does Respondent suggest that the record is incomplete, or that additional information is needed to resolve the claim. Finally, Respondent does not pretend that the error is harmless. Brief of Respondent, pp. 2-5.

The evidence was unlawfully seized. Mr. Cardwell's marijuana conviction must be reversed, the evidence suppressed, and the charge dismissed with prejudice. *Gant, supra*.

**II. MR. CARDWELL'S BAIL JUMPING CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS BEYOND A REASONABLE DOUBT.**

Respondent's argues that "[t]he State is not required to prove that [Mr. Cardwell] actually received notice" of his court date to sustain a bail jumping conviction. This is incorrect; the prosecution must prove actual knowledge. *See, e.g., State v. Liden*, 118 Wn. App. 734, 740, 77 P.3d 668

(2003); *State v. Ball*, 97 Wn.App. 534, 536, 987 P.2d 632 (1999).

Accordingly, Mr. Cardwell rests on the arguments set forth in his Opening Brief.

**III. THE PROSECUTOR'S MISCONDUCT IN CLOSING VIOLATED MR. CARDWELL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.**

Mr. Cardwell rests on the arguments set forth in his Opening Brief.

**IV. THE COURT'S INSTRUCTIONS VIOLATED MR. CARDWELL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ALLOWING CONVICTION WITHOUT PROOF OF EACH ESSENTIAL ELEMENT OF BAIL JUMPING.**

Mr. Cardwell rests on the arguments set forth in his Opening Brief.

**V. IF MR. CARDWELL'S ISSUES ON APPEAL ARE NOT PRESERVED FOR REVIEW, HE WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Mr. Cardwell rests on the arguments set forth in his Opening Brief.

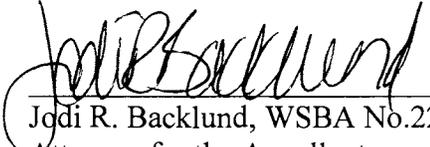
**CONCLUSION**

Mr. Cardwell's convictions must be reversed and the charges dismissed. In the alternative, the case should be remanded to the trial court for a new trial.

Respectfully submitted on September 8, 2009.

**BACKLUND AND MISTRY**

  
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