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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT RUDE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Commissioner Patrick Oishi (Plea)
The Honorable Judge Vicki Hogan (Sentencing)

No. 09-1-05358-0; 09-1-04544-7

Response Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

On October 9, 2009, the State charged defendant with five counts of unlawful possession of payment instruments and five counts of identity theft in the second degree under cause number 09-1-05358-0 in the

Superior Court of Pierce County. CP(09-1-05358-0) 1-5¹. The identity theft charges were based on an incident which occurred on August 6, 2007. *Id.* The State charged defendant with robbery in the second degree on December 1, 2009, under cause number 09-1-04544-7, also in the Superior Court. CP(09-1-04544-7) 1. The robbery charge was based on an incident which occurred on October 19, 2009. On January 28, 2010, the State filed an amended information charging defendant with robbery in the first degree. Supp. CP (09-1-05358-0) 2.

Nearly five months after the filing of the amended information, a plea agreement had been reached for both of defendant's cause numbers and a plea hearing was held on May 13, 2010. RP 1, 3-4. Defendant entered a written statement of defendant on plea of guilty separately under each cause number. CP(09-1-05358-0) 2-10, CP(09-1-04544-7) 6-14. Defendant stipulated to the determinations of probable cause in each case in order to find a factual basis for the pleas. RP 3-4.

The court questioned defendant about his written statements, and went through an oral colloquy with the defendant regarding his pleas. RP 5-20. After the colloquy, the court found that defendant entered each of his pleas knowingly, intelligently and voluntarily. RP 12-13, 20. The

¹ Because this is a consolidated appeal, there are two sets of clerk's papers as well as a supplemental designation, for clarity in citation, the State will refer to the clerk's papers for cause number 09-1-04544-7 as CP(09-1-04544-7), and 09-1-05358-0 as CP(09-1-05358-0), and the State's supplemental designation as Supp. CP.

court reviewed the declarations for determination of probable cause and determined that there was a factual basis for each of the pleas. RP 13, 20.

At sentencing on July 4, 2010, the State recommended that defendant receive the low end of the standard range for the robbery count, and the high end of the standard range for each count of identity theft in the second degree and unlawful possession of payment instruments. RP(sentencing) 5. The State also recommended that all of the sentences be run concurrently. *Id.* at 6. Defendant's counsel asked the court to consider an exceptional sentence downward, and gave defendant's version of the events leading to his possession of the checks, and the robbery. *Id.* 9-13. Defendant stipulated to his offender score of nine plus. CP(09-1-05358-0) 11-14, CP(09-1-04544-7) 15-18. The court sentenced defendant according to the State's recommendation. RP(sentencing) 20. Defendant was sentenced to fifty-seven months incarceration for each count of identity theft, and twenty-nine months for each count of unlawful possession of payment instruments as well as twelve months community custody on each charge for cause number 09-1-04544-7. CP(09-1-04544-7) 19-30. Defendant was also sentenced to 129 months of incarceration for the charge of robbery in the second degree, as well as 18 months of community custody for cause number 09-1-05358-0. CP(09-1-05358-0)

15-25. The court ordered the sentences for both cause numbers to be concurrent with each other. CP(09-1-05358-0) 15-25, CP(09-1-04544-7) 19-30.

On June 28, 2010, defendant filed a timely notice of appeal. CP(09-1-05358-0) 26-34, CP(09-1-04544-7) 31-38.

2. Facts

a. Cause number 09-1-05358-0.

The following facts are taken from the Declarations for Determinations of Probable Cause. CP(09-1-05358-0) 43-44.

On August 6, 2007, law enforcement officers stopped a vehicle for traffic violations in Puyallup, Washington. CP(09-1-04544-7) 43-44. Brooke Bernard was driving the vehicle at the time it was stopped. CP(09-1-04544-7) 43-44. Bernard told the officer that she did not have a valid driver's license, which the officer confirmed with dispatch. *Id.* The officer asked defendant to identify himself to determine if he had a valid driver's license so that defendant could take possession of the vehicle. *Id.* Defendant provided his name, and the officer checked with dispatch to confirm if defendant was legally authorized to drive the vehicle. *Id.* Dispatch informed the officer that defendant had an arrest warrant out of Fife, Washington. *Id.* The officer took defendant into custody at that time. *Id.* After being secured in the back of the patrol car, defendant asked the officer to retrieve his black backpack from the front passenger

seat of the vehicle in which he had been a passenger. *Id.* The officer retrieved the bag, and searched it incident to the arrest. *Id.* The bag contained defendant's wallet and driver's license, a few pairs of socks, a shirt, and a clear plastic bag containing fifteen checkbooks and two additional checks belonging to others, as well as a driver's license, none of which were issued to the defendant. *Id.*

b. Cause number 09-1-04544-7.

The following facts are taken from the Declarations for Determinations of Probable Cause. Supp. CP(091-04544-7) 1.

On October 19, 2009, defendant reached into a vehicle owned by James Evanger while it was parked at a gas station in Tacoma, Washington. Supp. CP(09-1-04544-7) 1. Defendant took Mr. Evanger's TomTom GPS device, and got back into his car to leave. *Id.* Mr. Evanger saw defendant take the GPS device, ran to defendant's car and tried to prevent him from leaving. *Id.* Mr. Evanger was thrown to the ground as defendant sped away. *Id.* Mr. Evanger suffered back pain after the incident. *Id.*

C. ARGUMENT.

1. DEFENDANT WAIVED THE PRIVILEGE OF BRINGING A MOTION TO SUPPRESS THE EVIDENCE AGAINST HIM, AND THERE IS AN INADEQUATE RECORD FOR REVIEW.

- a. Law of waiver

The outcome of this case is controlled by the Washington Supreme Court's recent decision in *State v. Robinson*, No. 83525-0(consolidated with No. 83613-2) (Sup. Ct. Wash. Apr. 14, 2011) [slip opinion attached]. *Robinson* upholds the long and well established rule under both the State and Federal constitutions that if an objection to evidence that was allegedly obtained illegally is not asserted timely, it is waived. *Robinson*, slip op. at 12. See also *State v. Gunkel*, 188 Wash. 528, 535-36, 63 P.2d 376 (1936); *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638 (1966); *State v. Duckett*, 73 Wn.2d 692, 694-95, 440 P.2d 485 (1968). The court held in *Robinson* that waiver does not apply in the "narrow class of cases" in which a new constitutional interpretation makes a right available which was not under previous binding precedent. Slip op. at 13-14. For cases in which no such new constitutional interpretation exists, the defendant has waived that argument and may not raise the issue for the first time on appeal, where he fails to assert a suppression issue at the trial court level.

State v. Mierz, 127 Wn.2d 460 468, 901 P.2d 286 (1995); *See also State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967), *cert. denied*, 389 U.S. 871 (1967). The issue is also waived where a defendant raises a suppression issue at the trial court, but fails to pursue the issue. *State v. Massey*, 60 Wn. App. 131, 803 P.2d 340 (1991).

At the trial court level, any suppression motion must be raised in a timely manner and the court has authority to reject suppression motions that were not made prior to the start of trial. *See* CrR 4.5(d). CrR 3.6 was adopted in 1975 and specifically governs motions to suppress evidence. Under CrR 3.6, the defendant has the burden of requesting a hearing on suppression issues. *State v. Gould*, 58 Wn. App. 175, 185, 791 P.2d 569 (1990).

CrR 3.6 motions to suppress evidence are heard prior to the time the case is called for trial. *See* Ferguson, 12 & 13 Washington Practice: Criminal Practice and Procedure, Chap. 23 (3d Ed) (citing CrR 4.5(d)); Tegland, 4A Washington Practice Rules Practice, CrR 3.6. Such a standard is implicit in the language of CrR 3.6, where the rule requires the moving party to set forth in a declaration the facts the party expects to be elicited in the event there is an evidentiary hearing. CrR 3.6(a). A pre-trial hearing is further implicated by the rule's language that, based upon the pleadings, the court is to determine whether an evidentiary hearing is required. CrR 3.6(b). All of this implicitly requires a pre-trial hearing. The requirement of a pre-trial hearing is also consistent with the legal

standards in Washington prior to the adoption of rule CrR 3.6. *State v. Simms*, 10 Wn. App. 75, 77, 516 P.2d 1088 (1973) (citing *State v. Baxter*, 68 Wn.2d 416, 422, 413 P.2d 638 (1966); *State v. Robbins*, 37 Wn.2d 431, 224 P.2d 345 (1950)). Moreover, nothing in CrR 3.6 permits or contemplates successive suppression motions.

The interpretation of CrR 3.6 as requiring pre-trial suppression motions is also consistent with CrR 4.5(d), which governs omnibus hearings.

(d) Motions. All motions and other requests prior to trial should be reserved for and presented at the omnibus hearing unless the court otherwise directs. Failure to raise or give notice at the hearing of any error or issue of which the party concerned has knowledge may constitute waiver of such error or issue. [...].

Waiver for failure to raise the issue before the trial court applies to suppression motions even where the claimed issue is a constitutional one, and there is a reasonable possibility the motion to suppress would have been successful if the issue had been raised. *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990), *overruled in part on other grounds*, *State v. McFarland*, 127 Wn.2d 322, 399 P.2d 1251 (1995); *See also Robinson*, slip op. at 14, *State v. Valladares*, 31 Wn. App. 63, 639 P.2d 813 (1982), *rev'd. in part on other grounds*, *State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1982). This is because the exclusion of improperly obtained evidence is a privilege that may be waived, and the fact that it was not

raised *is not* an error in the proceedings below. See *Tarica*, 59 Wn. App. at 372 (citing *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966))(Emphasis added.). In *State v. Baxter*, the court held that the defendant's motion to suppress evidence at the end of the State's case was too late where the defendant was well aware of the circumstances of his arrest at the time the allegedly unlawful evidence was entered. *Baxter*, 68 Wn.2d at 416.

RAP 2.5(a)(3) provides that the court may refuse to review any claim of error which was not raised at the trial court, however the party may raise for the first time a manifest error affecting a constitutional right.

In *State v. Valladares*, the court held that where a defendant raised, and then later withdrew a suppression issue, that it could not be raised for the first time on appeal under RAP 2.5(a)(3) because the rule's discussion of manifest constitutional error contemplates a trial error involving due process rights, as opposed to pre-trial rights. *Valladares*, 31 Wn. App. at 75-76. Moreover, the court in *Valladares* specifically clarified the scope of the exception under RAP 2.5(a)(3) because it was being misconstrued and had been "misread with increasing regularity." *Valladares*, 31 Wn. App. at 75. RAP 2.5(a)(3) is a limited exception to the general rule that issues may not be raised for the first time on appeal. *Valladares*, 31 Wn. App. at 75.

The court in *Valladares* went on to hold that where the defendant failed to pursue a challenge to evidence that might have been suppressible,

the admission of that evidence was not a clear violation of the defendant's due process rights, and was therefore not a manifest constitutional error that could be raised for the first time on appeal. *Valladares* 31 Wn. App. at 76 (citing *Baxter*, 68 Wn.2d at 413). *Valladares* appealed to the Washington Supreme Court, which agreed with and affirmed the Court of Appeal's analysis on this issue of waiver. See *Valladares*, 99 Wn.2d, at 671-72. The Supreme Court held that by, "withdrawing his motion to suppress the evidence, *Valladares* elected not to take advantage of the mechanism provided for him for excluding the evidence," and thus waived or abandoned his objections. *Valladares*, 99 Wn.2d at 672.

Only six years after the Court of Appeals in *Valladares* felt the need to clarify "manifest error," in *State v. Scott*, the Supreme Court again felt the need to clarify construction to be given to the "manifest error standard." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In *Scott*, the court held that the proper approach to claims of constitutional error asserted for the first time on appeal is that "[f]irst, the court should satisfy itself that the error is truly of constitutional magnitude - that is what is meant by "manifest"; and second, "[i]f the claim is constitutional then the court should examine the effect the error had on the defendant's trial according to the harmless error standard. [...]" *Scott*, 110 Wn.2d at 688.

The standard set forth in *Scott* has subsequently been elaborated into a four-part analysis.

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then and only then, the court undertakes a harmless error analysis.

State v. Bland, 128 Wn. App. 511, 515-16, 116 P.3d 428 (2005).

Moreover, under RAP 2.5(a)(3), while an appellant can raise a manifest error affecting a constitutional error for the first time on appeal, appellate review of the issue is not mandated if the facts necessary for a decision cannot be found in the record, because in such circumstances the error is not “manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993)). Additionally, it is worth noting that if a case is appealed a second time, an error of constitutional dimensions will not be considered if the error could have been asserted in the first appeal but was not, because at some point the appellate process must stop. See *State v. Suave*, 100 Wn.2d 84, 86-87 666 P.2d 894 (1983).

Notwithstanding all the controlling precedent on RAP 2.5(a)(3), in *State v. Littlefair* the court held otherwise, and ruled that a suppression issue could be raised for the first time on a second appeal because it was a matter of constitutional magnitude. See *State v. Littlefair*, 129 Wn. App.

330, 337-38, 119 P.3d 359 (2005), *review denied*, 149 Wn.2d 1020, 72 P.3d 761 (2003). The court in *Littlefair* seems to have gone astray because it focused on the constitutional right, but failed to consider the definition of “manifest error.” Compare *Littlefaire*, 129 Wn. App. at 338 to *Scott*, 110 Wn.2d at 687 (agreeing with and quoting *Valladares*, 31 Wn. App. at 76 “that the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below’”).

The waiver rule serves the interests of judicial economy by requiring the defendant to raise the challenge in a timely manner that permits the court to consider it without unnecessarily wasting resources. See *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 429 (1988).

In the case at hand, there is no new constitutional interpretation under which defendant has gained a right not available at the time of his trial. Therefore, under *Robinson* defendant must therefore establish a manifest constitutional error in order to raise the issue for the suppression of evidence for the first time on appeal. Slip opinion at 13-14.

From the record, defendant cannot establish the facts necessary to demonstrate a manifest constitutional error. Defendant did not move to suppress the evidence below and the issue was not preserved for appeal. Under the analysis in *Bland*, defendant must show that the alleged error suggests a constitutional issue. 128 Wn. App at 515-16. The suppression of evidence is a procedural question, not a constitutional one. *Tarica*, 59

Wn. App. at 372. However, if it is determined that a failure to suppress evidence obtained through an allegedly unconstitutional search suggests a constitutional issue, the next questions which must be addressed is whether the error was manifest in the record. *Bland*, 128 Wn. App. at 515-16.

Here, defendant fails to meet the burden of showing manifest error. The defendant bases his contention that the search was unconstitutional on a single sentence in the declaration of probable cause. This sentence alone does not provide sufficient facts for appellate review of the issue. The declaration of probable cause states, “The defendant was a passenger in the Bernard car. He was asked to identify himself in order to determine whether he had a valid driver’s license so that he could take possession of the car. He voluntarily provided his name, which returned a warrant out of Fife.” CP(09-1-04544-7) 43-44. Because there is insufficient information in the record from which this court could review the suppression issues the alleged error is not manifest and defendant may not raise it for the first time on appeal. *McFarland*, 127 Wn.2d at 333. Should this court determine that there is sufficient information in the record from which to determine that an error was manifest, the merits of that claim must be addressed. *Bland*, 128 Wn. App. at 515-16. Because neither defendant nor the State had the incentive or opportunity to develop the factual record before the trial court, the appropriate remedy is to

remand each case to the trial court for a suppression hearing. *Robinson*, slip opinion at 16.

2. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

"The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the [proceeding] was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 91 L.Ed.2d 305, 106 S. Ct. 2574, 2582 (1986). A defendant who raises a claim of ineffective assistance of counsel must demonstrate that: (1) his or her attorney's performance was deficient, and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, matters that go to trial strategy or tactics do not show deficient performance. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, defendant must show that a reasonable probability exists that the result of the trial would have been different, but for counsel's errors. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

The standard of review for effective assistance of counsel is whether the court can conclude, after examining the record as a whole,

that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988), *see also State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994). “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom. *Premo v. Moore*, 562 U.S. ____, 131 S. Ct. 733, 740, 178 L.Ed.2d. 649 (2011), *quoting Strickland*, 466 U.S. at 690, *see also Harrington v. Richter*, 562 U.S. ____, 131 S. Ct. 770, 778, 178 L.Ed.2d 624 (2011). Judicial scrutiny of an attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

In order to prevail on a claim of ineffective assistance of counsel for a failure to bring a motion, defendant must show that the motion would

likely have been granted. See *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Moreover, to raise a claim of ineffective assistance of counsel for the first time on appeal, the defendant is required to establish from the trial record: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995); *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993).

However, where an appellant claims ineffective assistance of counsel for trial counsel's failure to object to the admission of evidence, the burden on the appellant is even higher. To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: not objecting fell below prevailing professional norms; that the proposed objection would likely have been sustained; and that the result of the trial would have been different if the evidence had not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

Where defendant alleges ineffective assistance of counsel in a plea bargain he must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have

insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L.Ed.203 (1985). “An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial proceedings], and so the *Strickland* standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve.” *Premo* 131 S. Ct. 733, 740, quoting *Strickland* at 689-90 (alteration in original). Because plea bargains are ‘the result of complex negotiations suffused with uncertainty,’ defense counsel and defendant must make choices to balance opportunities and risks. *Premo*, 131 S. Ct. 733, 741. There are additional difficulties in evaluating defense counsel’s judgment where defendant challenges his representation in a plea agreement. “An attorney often has insights borne of past dealings with the same prosecutor or court, and the record at the pretrial stage is never as full as it is after a trial.” *Premo*, 131 S. Ct. 733, 741.

“The stakes for defendants are high, and many elect to limit risk by foregoing the right to assert their innocence. A defendant who accepts a plea bargain on counsel’s advice does not necessarily suffer prejudice when his counsel fails to seek suppression of evidence, even if it would be reversible error for the court to admit that evidence.” *Premo v. Moore*, 131 S. Ct. at 744.

Defendant claims that his counsel was ineffective for failing to bring a motion to suppress the evidence found in his backpack. Appellant's brief at 4. His argument is that defendant was unconstitutionally seized when he was asked for his identification as the passenger in a traffic stop. *Id.* Defendant contends that because the arrest, and subsequent search which produced the evidence, were a product of this seizure, the evidence was illegally obtained, and the court would have suppressed it. *Id.*

As discussed above, the evidence defendant argues counsel should have moved to suppress was gained during a lawful search following the defendant's arrest. As discussed above, defendant is not able to show from the record that the evidence could have been suppressed. However, even if this Court were to find that the evidence was gained pursuant to an unlawful seizure, defense counsel is not ineffective if he reasonably could have believed that a motion would not have been granted by the court. ***Kimmelman v. Morrison***, 477 U.S. 365, 382 note 7, 106 S. Ct. 2574, 91 L.Ed 305 (1986).

Defendant, in pushing for the suppression of the evidence, may have lost any opportunity of a plea bargain, thereby relegating himself to the risks of trial on both cases. Were the evidence not suppressed, this could have resulted in a situation significantly worse than that presented in the plea agreement. If defendant were convicted on all counts he would

have been sentenced according to the same standard ranges, but his sentences under the cause number for robbery would have been consecutive to those for the identity theft and unlawful possession of payment instruments cause number. This would have resulted in an additional 43 to 57 months of incarceration under the standard range. Supp. CP 3-6. Moreover, the prosecutor could have asked the court to consider an exceptional sentence upward because defendant's offender score would be in excess of nine points, where the range stops. RCW 9.94A.535(2)(c). This would mean that some of his crimes would go unpunished. *Id.* The maximum term under the sentencing guidelines for the charge of robbery in the second degree is life imprisonment, thus defendant was potentially in jeopardy of a life sentence if he were to have foregone the plea agreement. Supp. CP 3-6, 7-10. Additionally, defendant would not have been guaranteed the ability to request an exceptional sentence downward from the court, as he was allowed to do under the plea agreement. Defendant cannot show that but for his counsel's action he would not have pleaded guilty.

3. DEFENDANT ENTERED HIS GUILTY PLEA
KNOWINGLY, INTELLIGENTLY AND
VOLUNTARILY.

A defendant may plead guilty even when unwilling or unable to admit his participation in the criminal act. *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970), *State v. Newton*, 87 Wn.2d 363, 371, 552 p.2d 682 (1976). A guilty plea is valid where there is a factual basis for the plea, and the plea was “voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). Even if defendant does not admit guilt the court may accept a guilty plea, so long as the plea was a “voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Newton*, 87 Wn.2d at 372, quoting *Alford*, 400 U.S. at 31. The factual basis for the plea may be established “from any source the trial court finds reliable,” and is not limited to the admissions of the defendant. *Newton*, 87 Wn.2d at 370.

CrR 4.2(d) provides:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrR 4.2(d). The State bears the burden of proving the validity of a guilty plea, and the record from the plea hearing must establish that the plea was entered voluntarily and intelligently. *Wood v. Morris*, 87 Wn.2d 501, 507, 511, 554 P.2d 1032 (1976).

When a trial court is confronted with a defendant who wishes to plead guilty but does not admit to all elements of the crime, it should be “extremely careful that his duties under [CrR 4.2(d)] are fully discharged.” *Id.* at 370, quoting *United States v. Gaskins*, 158 U.S. App. D.C. 267, 485 F.2d 1046, 1049 (1973). However, a strong presumption that the plea is voluntary is created when defendant completes a written plea statement, and admits to reading, understanding and signing it. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998), citing *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982).

Likewise, when a defendant who has received the information and pleads guilty pursuant to a plea bargain, there is a presumption that the plea is knowing, intelligent and voluntary. *State v. Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993), *rev. denied* 123 Wn.2d 1009, 869 P.2d 1085 (1994). “A defendant’s signature on the plea form is strong evidence of the plea’s voluntariness.” *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). If the trial court then orally confirms the plea statement, the presumption that defendant understands this matter

becomes “well nigh and irrefutable.” *Branch*, 129 Wn.2d at 642 n.2; *State v. Stephan*, 35 Wn. App. 889, 894, 671 P.2d 780 (1983). After orally confirming the statements in his written plea form, that defendant “will not now be heard to deny these facts.” *In re Keene*, 95 Wn.2d 203, 207, 622 P.2d 360 (1980).

Rather than refuting the presumption that defendant entered his plea knowingly, voluntarily and intelligently, the record strongly supports it. The informations, which defendant acknowledges receiving, clearly show what crimes he was charged with, and the elements of each. CP(09-1-05358-0) 1, CP(09-1-04544-7) 1-5. The Statements, which defendant acknowledged reading, discussing with counsel, understanding and signing, list all counts, the elements for all counts, the consequences of a guilty plea on all counts, including the strike offense, and the prosecutor’s recommended sentences for all counts. RP 6-7, 13-14, CP(09-1-05358-0) 2-10, CP(09-1-04544-7) 6-14. During colloquy, the trial court read each count, and the rights which defendant was giving up by pleading guilty. RP 8-10, 16-17. The court also read the statements made by defendant in his written pleas, and defendant confirmed that he was adopting those statements as his own. RP 11, 19. Defendant confirmed orally that he understood the charges against him. RP 7-8, 15-16. He acknowledged having gone through each of the nine page Statements with counsel, and

that counsel was able to answer any questions he had. RP 6-7, 14.

Defendant confirmed during colloquy that his plea was voluntary. RP 12, 19-20.

The record supports the presumption that defendant entered his plea knowingly, intelligently and voluntarily. Defendant's guilty pleas should not be withdrawn.

4. IF DEFENDANT IS PERMITTED TO WITHDRAW HIS PLEA, HE MUST DO SO UNDER BOTH CAUSE NUMBERS.

If this Court rejects the State's argument and determines that defendant's plea was invalid, and remands the case in order for defendant to withdraw his plea, "the remedy is restricted to the withdrawal of his plea in its entirety." *State v. Bisson*, 156 Wn.2d 507, 519, 130 P.3d 820 (2006), *see also State v. Turley*, 149 Wn.2d 395, 398, 69 P.3d 338 (2003) ("[A] trial court must treat a plea agreement as indivisible when pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding."). The court in *Hudgens* uses the following language from *State v. Bisson*, "[b]ecause a plea agreement is a contract, interpretation of the plea's terms is a question of law, reviewed de novo." *Hudgens*, 156 Wn. App. at 416 (citing without quoting *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006)). For

that proposition, the court in *Bisson* relied upon *Tyrell v. Farmers Ins. Co. of Washington*, 140 Wn.2d 129, 133, 994 P.2d 833 (2000). However, in *Tryrell*, what the court said was, “*Roller* noted that where facts are not in dispute, “coverage depends solely on the language of the insurance policy”- and the interpretation of that language is a question of law reviewed *de novo*. *Tyrell*, 140 Wn.2d at 133 (emphasis added)(citing *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990)).

Thus, as used in *Bisson*, *Tyrell* and similar cases, “interpretation” refers to the determination of the legal effect of the contract and that is properly a question of law. However, this use of “interpretation” differs from other cases where “interpretation” is used to refer to the ascertainment of the meaning one or both parties ascribe to the contract or agreement. See *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990).

Under contract law, determinations of the parties’ intentions are questions of fact, while the legal consequences of such intentions are questions of law. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). This is why, in *Berg*, the court held that “...extrinsic evidence is admissible as to the entire circumstances under which the contract was made as an aid in ascertaining the parties intent.” The taking or admitting of evidence (as well as the weighing of such) is a question of fact. Thus, where there is a dispute as to the intent of the parties with regard to what they contracted or agreed to, a factual determination of what was agreed to

is the necessary pre-requisite to the ultimate determination of the legal consequences of any such agreement.

The modification of a bilateral contract requires a meeting of the minds, as well as separate consideration from the original contract.

Duncan v. Alaska U.S.A Federal Credit Union, Inc., 148 Wn. App. 52, 74, 199 P.3d 991 (2008). “Without a mutual change of obligations or rights, a subsequent agreement lacks consideration and cannot serve as modification of an existing contract.” *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 111 P.3d 1192 (2005).

...[W]here the terms of a plea agreement conflict with the law or the defendant was not informed of the sentencing consequences of the plea, the defendant must be given the initial choice of a remedy to specifically enforce the agreement or withdraw the plea. The prosecutor bears the burden of demonstrating that the defendant’s choice of remedy is unjust.

In Re Hudgens, 156 Wn. App. 411, at 417, 233 P.3d 566 (2010) (quoting *State v. Miller*, 110 Wn.2d 528, at 536, 756 P.2d 122 (1988)). Thus, once the defendant elects a remedy, the State then has the burden to show that compelling reasons exist not to allow that choice. *Hudgens*, 156 Wn. App. at 417 (citing *Bisson*, 156 Wn.2d at 518).

Defendant, in this case, entered into his plea agreement for both pending cases. All of the documentation in the record demonstrates that the intention was for both of these cases to be resolved under a single agreement. The stipulations on prior record for both cases

provide that defendant entered his plea in each case as “part of a package plea agreement.” The stipulations further recognize that:

The state has reduced the charges in this case as a result of a plea agreement with the defendant for both cases. That plea agreement was extended in the expectation that defendant would enter valid guilty pleas to the charges in each case and never seek to withdraw or set aside his plea in either case.

Supp CP(09-1-05358-0) 3-6, Supp CP(09-1-04544-7) 1-4. Defendant and his attorney signed both stipulations on prior record. Further, the judgment and sentence under each cause number repeatedly cross-references the cause number under the other as additional current offenses. Supp CP(09-1-04544-7) 19-30, CP(09-1-05358-0) 15-25. The prosecutor made his sentencing recommendation as a whole on both cases, stating “It was a package deal that we worked out with the defense.” RP(sentencing) 4. Neither the defendant nor the defendant’s attorney gave any indication that their understanding was any different. Defendant is not entitled to withdraw his plea under cause number 09-1-05358-0 alone. If this Court determines that defendant should be permitted to withdraw his guilty plea, he must withdraw his plea under both cause numbers.

11 APR 22 PM 2:55

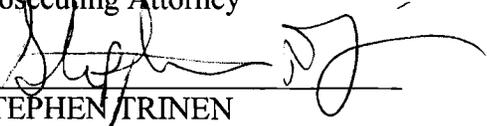
STATE OF WASHINGTON
BY _____
DEPUTY

D. CONCLUSION.

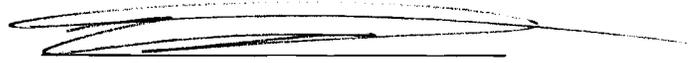
Because defendant received effective assistance of counsel, and knowingly, intelligently and voluntarily entered his guilty pleas, he should not now be permitted to withdraw those pleas.

DATED: April 22, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



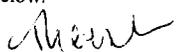
STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925



Margo Martin
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S.~~ ^{usmail} mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-22-11 
Date Signature

APPENDIX “A”

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 83525-0
)	(consolidated with
Respondent,)	No. 83613-2)
)	
v.)	
)	
MICHAEL WAYNE ROBINSON,)	
)	
Petitioner.)	
)	
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	En Banc
)	
Francisco Javier Millan,)	
)	
Petitioner.)	Filed April 14, 2011
)	

OWENS, J. -- The petitioners in these two consolidated cases seek to challenge, for the first time on appeal, the admissibility of evidence against them. In both cases, the trials were concluded prior to the United States Supreme Court's decision in *Arizona v. Gant*, 556 U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009),

a case that limited the circumstances in which police may conduct a warrantless search of an automobile incident to arrest. Though the trials were concluded, the cases were still pending on direct appeal at the time *Gant* was decided. In Francisco Millan's case, the Court of Appeals concluded that any error was waived by his failure to object to the admission of evidence at trial. *State v. Millan*, 151 Wn. App. 492, 499-500, 212 P.3d 603 (2009), *review granted*, 168 Wn.2d 1005, 226 P.3d 781 (2010). In Michael Robinson's case, the Court of Appeals considered and rejected his argument that the search was unconstitutional without considering the effect of *Gant*. We conclude that, in this circumstance, principles of issue preservation and waiver do not preclude criminal defendants from raising a constitutional objection for the first time on appeal. We therefore reverse the Court of Appeals in both cases.¹ However, because neither the petitioners nor the State had the opportunity or incentive to develop the record, we remand each case to the superior court for a suppression hearing in light of *Gant* and its progeny.

FACTS

A. Millan

Shortly before 1:00 am on April 1, 2007, police received a report of a disturbance in Tacoma. Officers Christopher Shipp and Timothy Caber responded,

¹ We do not, of course, reverse those portions of *State v. Robinson*, noted at 151 Wn. App. 1030 (2009), on which we did not grant review.

contacted the reporting parties, and located the vehicle that was the source of the disturbance. The officers pulled up behind the vehicle and activated the police car's lights.

Once the vehicle was stopped, Officers Shipp and Caber approached it; Officer Caber approached the driver, Millan, and Officer Shipp approached the passenger, Millan's wife. Officer Shipp reported that the passenger "appeared to be very upset, had been crying, and appeared fearful." Millan 2 Verbatim Tr. of Proceedings at 65. Officer Caber, meanwhile, asked Millan to step out of the vehicle and then placed him in wrist restraints. Because Millan repeatedly called out his wife's name and gave her what Officer Caber described as "pretty hard and intimidating looks," Officer Caber placed Millan in the backseat of the police car. *Id.* at 106.

While Millan was under arrest and located in the backseat of the police car, Officer Caber conducted a search of the vehicle incident to the arrest. On the floor of Millan's car, between the driver's seat and the driver's side backseat, Officer Caber located a handgun.

As a result of the stop and the search, Millan was charged with driving with a suspended license in the first degree and, because he had previously been convicted of a felony, unlawful possession of a firearm in the first degree. Millan pleaded guilty of driving with a suspended license but proceeded to a jury trial on the unlawful

possession of a firearm charge. At no time did Millan object to the admission of the firearm found in his vehicle; his motion in limine made no reference to the firearm nor did he object to its discussion at trial or its admission into evidence. Millan was subsequently convicted and, on December 7, 2007, sentenced to 42 months in prison.

Millan appealed his conviction to the Court of Appeals, arguing that the trial court should have granted his motion for a new trial based on jury misconduct. He submitted his brief on October 7, 2008. While his appeal was pending, the United States Supreme Court released its decision in *Gant* on April 21, 2009. On May 7, 2009, Millan filed a supplemental brief with the Court of Appeals arguing that the court must reverse his conviction because the vehicle search incident to arrest was unconstitutional under *Gant*. The Court of Appeals agreed that *Gant* applied to Millan's case, *Millan*, 151 Wn. App. at 496, but held that Millan waived any error by failing to object to the admission of the evidence at trial, *id.* at 499-500.

B. Robinson

On the afternoon of July 11, 2007, Trooper Tony Doughty was waiting at the intersection of Yelm Highway and Henderson Boulevard, having completed his shift at the Department of Labor and Industries building in Tumwater. As he waited, he heard vehicles that "sounded like they were moving at a very high rate [of speed]" and then, hearing the sound of screeching tires, looked up to see two cars proceeding east on

Yelm Highway, turning north onto Henderson Boulevard and breaking traction as they turned. *Robinson* 1 Verbatim Report of Proceedings at 29. A white Acura was followed by a blue Honda. Trooper Doughty activated his lights and siren and pursued the two vehicles. Though he lost sight of the vehicles for a brief time when they entered a curve in the road, he regained sight shortly thereafter and estimated they were traveling at around 80 mph as they traversed a “heavily traveled road” with crosswalks at 4:30 in the afternoon. *Id.* at 31.

The three cars, including Trooper Doughty’s, turned right onto North Street and Trooper Doughty observed the white Acura drive through a three-way stop. The blue Honda stopped and, as Trooper Doughty pulled up next to it, the driver yelled, ““They just stole my vehicle.”” *Id.* at 32-33. Trooper Doughty then continued to pursue the white Acura and stopped behind it on the access road to Washington Middle School. As Trooper Doughty arrived, he observed the driver of the Acura, Daniel Smith, getting out of the vehicle, so Doughty drew his weapon and ordered the driver to get on the ground, which Smith did. As Doughty approached Smith, the passenger of the Acura, Robinson, got out of the vehicle and approached Doughty. Trooper Doughty ordered Robinson to the ground, and Robinson complied. Trooper Doughty then placed handcuffs on Smith and returned to his car to retrieve a second set of handcuffs, which he placed on Robinson.

After Smith and Robinson were on the ground and restrained, the driver of the blue Honda arrived, repeating to Trooper Doughty that the Acura had been stolen from his yard.² Trooper Doughty had the driver return to his car until backup arrived. Doughty then took Smith and Robinson to sit in the shade because it was a hot day and informed Smith that he was in custody for reckless driving. Approaching the Acura, Trooper Doughty noticed that the ignition was “punched” and falling off the ignition console, which he recognized as being “very common” in stolen vehicles. *Id.* at 39-40. Trooper Doughty then conducted a vehicle search incident to the arrest of Smith for reckless driving. During this search, which continued once other officers arrived, the officers discovered a number of items, including a loaded handgun that had been burgled from a home the previous day. Upon discovering the handgun, Doughty informed Robinson that he was under arrest for possession of stolen property and read him his Miranda rights.

Following the search, Robinson allegedly told Detective Doug Clevenger that he assisted Smith during the previous day’s burglary. Robinson went on to identify some items stolen during the burglary, offer to help get a stolen safe back, state that he had handled the firearm, and state that Smith had a methamphetamine lab in the trunk of

² At some later point, Trooper Doughty learned that the driver of the blue Honda was mistaken and the Acura had not been stolen from him. Another officer subsequently learned that Smith had permission to use the vehicle.

the car.³ At trial, Robinson denied participating in the burglary or that he had ever acknowledged his participation.

Robinson was convicted of residential burglary, theft of a firearm, first degree unlawful possession of a firearm, first degree theft, and unlawful possession of methamphetamine while armed with a firearm. At no time prior to or during trial did Robinson object to the search of the car. Robinson appealed his conviction on a number of grounds. In his statement of additional grounds, Robinson, pro se, alleged for the first time that the search of the Acura was unconstitutional. This occurred prior to the United States Supreme Court's decision in *Gant*. The Court of Appeals, in an unpublished opinion, dismissed the unlawful possession of methamphetamine charge on the basis of insufficient evidence but affirmed the remaining convictions. *State v. Robinson*, noted at 151 Wn. App. 1030, 2009 WL 2233110, at *1. The Court of Appeals rejected the unlawful search claim by citing to *State v. White*, 129 Wn.2d 105, 112, 915 P.2d 1099 (1996), for the proposition that a warrantless search incident to arrest is valid. *Robinson*, 2009 WL 2233110, at *12. Robinson then filed a petition for review in this court on two issues, one of which was that the search of the vehicle was unconstitutional under *Gant*, and this court granted review of the *Gant* issue only. *State v. Robinson*, 168 Wn.2d 1001, 226 P.3d 780 (2010).

³ A subsequent search, pursuant to a warrant, disclosed that there was, in fact, a methamphetamine lab in the trunk.

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ISSUE

May a defendant challenge a search for the first time on appeal following a change in constitutional interpretation?

ANALYSIS

A. Standard of Review

Issues of constitutional interpretation and waiver are questions of law, which courts review de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

B. Gant, Its Progeny, and Their Legal Impact in Washington

In *Gant*, the United States Supreme Court announced a new rule governing the automobile search incident to arrest exception to the Fourth Amendment's warrant requirement. 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)). Though the Court was at pains to explain that its rule was consistent with its earlier decisions in *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), and *New York v. Belton*, 453

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U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981),⁴ *see Gant*, 129 S. Ct. at 1716-18, it also acknowledged that its earlier opinions had “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.” *Id.* at 1718.

Washington was one jurisdiction with such an understanding.

Prior to *Gant*, this court’s interpretation of the Fourth Amendment to the United States Constitution, as well as our interpretation of article I, section 7 of the Washington Constitution, permitted warrantless vehicle searches incident to a recent occupant’s arrest regardless of the status of the recent occupant. In *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), *overruled by State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009), eight justices agreed that such searches were permissible. *Id.* at 152 (lead opinion) (“During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence.”), 174 (Durham, J., concurring) (“A lawful arrest

⁴ We do not concede that *Gant* “did not announce a new rule of law.” Dissent at 2. In *Gant*, five justices agreed that the existing rule always permitted the search of an arrestee’s vehicle incident to the arrest. 129 S. Ct. at 1724 (Scalia, J., concurring); *id.* at 1726-27 (Alito, J., dissenting). Justice Scalia, however, stated that he found a “4-to-1-to-4 opinion” to be “unacceptable,” so he indulged the fiction that *Gant* was consistent with *Belton* and *Thornton*. *Id.* at 1725 (Scalia, J., concurring). We are not bound by that fiction in interpreting our procedural rules.

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provides Const. art. 1, § 7's required authority of law for a search of an automobile.”).

In many circumstances where this court had expressly permitted such searches under *Stroud*, *Gant* now prohibits such searches.

Shortly after *Gant* was decided, we had the opportunity to revisit the search incident to arrest exception to the warrant requirement under article I, section 7 of the Washington Constitution. In *State v. Patton*, we held that, under the Washington Constitution, the exception applies only where there is “a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.” 167 Wn.2d 379, 394-95, 219 P.2d 651 (2009); see *Valdez*, 167 Wn.2d at 777 (“A warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.”).

In sum, prior to *Gant* and *Patton*, we had interpreted the state and federal constitutions to permit warrantless automobile searches incident to arrest whether or not the arrestee had been secured. While the *Gant* majority may be correct that the question was an open one before the United States Supreme Court, that was not the case in Washington. *Gant* and *Patton* constituted a change in law in Washington.

C. *Gant* and *Patton* Apply Retroactively

A preliminary question in this case is whether Millan and Robinson may receive the retroactive benefit of the United States Supreme Court's holding in *Gant* and subsequent related state and federal court decisions. This court follows the rule set forth in *In re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992): "A 'new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.'" *Id.* at 326 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)).

It is not disputed, nor can there be any doubt, that both Millan and Robinson may therefore receive the retroactive benefit of the rules announced in *Gant* and *Patton*. The rules those cases set forth regarding searches of vehicles incident to arrest are undeniably new and relate to the conduct of criminal prosecutions. Both Millan's and Robinson's cases are still pending on direct review. Both petitioners are therefore entitled to the retroactive benefit of the rule.

D. Issue Preservation Does Not Bar Millan and Robinson from Challenging the Evidence for the First Time on Appeal

Even though Millan and Robinson are entitled to the substantive benefit of the rules announced in *Gant* and *Patton*, failure to comply with appropriate procedures may nonetheless preclude them from raising the issue. Issue preservation and retroactivity are distinct doctrines.

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The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a "manifest error affecting a constitutional right." *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) (internal quotation marks omitted) (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). This standard comes from RAP 2.5(a), which permits a court to refuse to consider claimed errors not raised in the trial court, subject to certain exceptions. *McFarland*, 127 Wn.2d at 332-33. The principle also predates RAP 2.5(a). See, e.g., *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967) ("Failure to challenge the admissibility of proffered evidence constitutes a waiver of any legal objection to its being considered as proper evidence by the trier of the facts."). *But cf. State v. Gunkel*, 188 Wash. 528, 536, 63 P.2d 376 (1936) (excusing failure to object to admissibility of evidence prior to trial where the defendant could not have known the items were unlawfully seized). While RAP 2.5(a) embodies the principle that errors not raised in the trial court may generally not be raised for the first time on appeal, RAP 1.2(a) mitigates the stringency of the rule, providing that the RAPs are to "be liberally interpreted to promote justice and facilitate the decision of cases on the merits."

The purpose underlying our insistence on issue preservation is to encourage "the efficient use of judicial resources." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d

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492 (1988). Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Id.*; see *McFarland*, 127 Wn.2d at 333 (noting that permitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources).

We recognize, however, that in a narrow class of cases, insistence on issue preservation would be counterproductive to the goal of judicial efficiency. Accordingly, we hold that principles of issue preservation do not apply where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation. A contrary rule would reward the criminal defendant bringing a meritless motion to suppress evidence that is clearly barred by binding precedent while punishing the criminal defendant who, in reliance on that binding precedent, declined to bring the meritless motion. The logical result would be the creation of a perverse incentive for criminal defendants to make "a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997).

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We further note that the rationale that failure to raise an issue in the trial court waives its consideration on appeal cannot withstand scrutiny in this context. Waiver of a constitutional right must be “knowing, intelligent, and voluntary.” *State v. Stegall*, 124 Wn.2d 719, 724, 881 P.2d 979 (1994). At the time of Millan’s and Robinson’s trials, the argument that the types of automobile searches at issue here were unconstitutional and that the evidence obtained was therefore suppressible was specifically foreclosed. *Stroud*, 106 Wn.2d at 152 (lead opinion), 174 (Durham, J., concurring). In other words, there was no right to waive at that time. Only by virtue of *Gant* and *Patton*, and their retroactivity to Millan’s and Robinson’s cases, is such a right available. Millan’s and Robinson’s failure to invoke the right prior to its existence was not knowing, intelligent, and voluntary. Thus, there could be no waiver of the right to challenge the search.

Turning to whether issue preservation applies in this case, we have already concluded that *Gant* and *Patton* effectively overruled the existing constitutional interpretation announced in *Stroud*, setting forth a new constitutional interpretation relating to the search incident to arrest exception to the warrant requirement. That new interpretation, as discussed, applies retroactively to Millan’s and Robinson’s cases. Moreover, the trials for both Millan and Robinson had concluded prior to the decisions in *Gant* and *Patton*. Therefore, issue preservation is simply not applicable.

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As a result, there is no requirement that Millan and Robinson demonstrate the existence of a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). We therefore reverse the Court of Appeals decision in *Millan*.

E. Suppression Hearings are Necessary

The records in the cases before us do not allow us to conclude that the searches were justified by the search incident to arrest exception to the warrant requirement. However, because neither the petitioners nor the State had the incentive or opportunity to develop the factual record before the trial court, the appropriate remedy is to remand each case to the trial court for a suppression hearing.

In Millan's case, Millan was in the back of the police car at the time the search took place. Officer safety therefore does not seem to justify the search incident to arrest. Moreover, it appears that the crime of arrest was driving with a suspended license. There is no indication that the search was for evidence of that crime which could be concealed or destroyed. The warrantless search that took place therefore does not appear to fit within the search incident to arrest exception to the warrant requirement.

In Robinson's case, the record reflects that, at the time of the search, both Robinson and Smith were in police custody, whether inside or outside the police vehicle. The arresting officer testified at trial that the crime of arrest was reckless driving. There is no reason to believe the vehicle would contain evidence of this offense. We cannot conclude that this warrantless search was justified by the search incident to arrest exception either. On this basis, we reverse the Court of Appeals

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holding that the search in Robinson's case was a valid search incident to arrest.

The inquiry does not end here, however. There may be additional facts justifying the search incident to arrest, which the State had no incentive to develop. Further, even if the search incident to arrest exception to the warrant requirement does not apply, other exceptions to the warrant requirement may. Again, because, at the time of trial, the evidence was admissible under then-existing interpretations of the state and federal constitutions, there was no incentive for the State to develop the record with respect to other exceptions to the warrant requirement.

We therefore remand these two cases to the superior court for suppression hearings. At these hearings, both the State and the petitioners will be permitted to further develop the record. If the trial court finds that the evidence was admissible, the conviction stands affirmed. If, on the other hand, the trial court finds the evidence was inadmissible, it must then determine whether the remaining evidence was sufficient to uphold the conviction. If so, the conviction is affirmed. If not, the conviction is reversed.

CONCLUSION

We hold that principles of issue preservation, as embodied in RAP 2.5(a), do not apply where (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing

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controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation. As these criteria are met in both Millan's and Robinson's cases, their raising the admissibility of evidence under *Gant* and *Patton* for the first time before the Court of Appeals and this court, respectively, are permissible. We remand both cases to the trial court for suppression hearings.

AUTHOR:

Justice Susan Owens

WE CONCUR:

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Justice Charles W. Johnson

Justice Gerry L. Alexander

Justice Debra L. Stephens

Justice Tom Chambers

Richard B. Sanders, Justice Pro
