NO. 46960-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THEODORE ROOSEVELT RHONE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy, Judge

No. 03-1-02581-1

BRIEF OF RESPONDENT

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

1. Is the trial court's apparently inadvertent failure to apply old direct appeal rulings on remand from the resolution of a more recently decided collateral attack immaterial to the result this Court should reach based on intervening developments in the law?

2. Has defendant failed to prove the gun he claims should have been suppressed through application of ***Arizona v. Gant***[1] is material to his persistent offender sentence since the gun was incidental to the underlying first degree robbery conviction?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged by Second Amended Information with unlawful possession of a controlled substance with the intent to deliver (Count I), first degree robbery (Count II), unlawful possession of a firearm in the first degree (Count III), and bail jumping (Count IV). CP 34-36. Firearm enhancements were added to Counts I-II. *Id.* The trial court denied defendant's CrR 3.6 motion to suppress the firearm and drugs recovered from a vehicle he rode in during the robbery. CP 40-44. Defendant was convicted as charged. CP 47-48. This Court upheld the

[1] 556 U.S. 332, 129 S.Ct. 1710 (2009).

decision under the search incident to arrest exception, and affirmed the convictions. No. 34063-1-II (2007 WL 831725, 1). The Washington State Supreme Court granted review only as to an issue raised pursuant to ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712 (1986), and also affirmed. 168 Wn.2d 645, 229 P.3d 752 (2010). In 2009, the United States Supreme Court limited the search incident to arrest exception. ***Gant,*** 556 U.S. at 351. Defendant's case became final June 15, 2010. CP 63-93.

This Court dismissed defendant's first personal restraint petition ("PRP") January 30, 2012, finding his first degree robbery conviction was supported by sufficient evidence. CP 610-11. (No. 42104-6-II). This Court dismissed defendant's second PRP July 31, 2012, as time-barred. CP 612-13 (No. 42812-1-II). This Court transferred defendant's third PRP to the Supreme Court July 9, 2013, as a successive petition barred from consideration in the Court of Appeals by RCW 10.73.140 that raised a potentially viable ***Gant*** issue. CP 94-96 (No. 44411-9-II). The Supreme Court granted the petition:

> [r]emanding the trial court's suppression order regarding the automobile search to be reconsidered in light of ... ***Gant*** ... and ***State v. Patton***, 167 Wn.2d 379, 219 P.3d 651... and such other further proceedings as are appropriate.

CP 97-98 (emphasis added).

The Honorable Edmund Murphy presided over the CrR 3.6 hearing on remand as the original trial judge, the Honorable Linda C.J. Lee, had ascended to this Court. RP(6/16/14) 10;CP 40-44. The State supplemented the evidentiary record with testimony from the arresting officer. RP (9/26/14) 25-28. Defendant's two attorneys[2] made arguments from Judge Lee's findings and conclusions without asserting the direct appeal rulings from 2007 as law of the case. *E.g.* RP(6/20/14) 5, 10; (9/26/14) 30-31, 33-35, 41-43. At one point, defense counsel actually conceded there was no search incident to arrest because the police lacked probable cause to arrest when the search was undertaken. RP(9/26/14) 31. The discussion focused on whether a warrant was required to examine the interior compartment of a vehicle during investigative detention. RP (9/16/14) 41-44.

Judge Murphy incorporated several of Judge Lee's findings and conclusions into his own by reference. RP (10/10/14) 46-50, 69-70. Consistent with defendant's earlier concession, Judge Murphy ruled the case did not involve a search incident to arrest since the deputy did not have probable cause to arrest when the safety sweep of the vehicle was conducted. RP(10/10/14) 50-55, 71-72; CP 540-45. Denial of defendant's suppression motion was reaffirmed because the ***Gant*** line of cases do not

[2] Defendant was initially represented by attorney Kent Underwood and was granted a requested substitution for attorney Desmond Kolke. *E.g.*, RP (6/20/14) 13-14, 20.

apply to pre-arrest safety sweeps for firearms. *Id.* Defendant never alerted Judge Murphy the decision deviated from the rulings issued in the direct appeal. *E.g.* RP (10/10/14) 47-50, 56; (11/7/14) 57-58, 60-66, 68-69; (11/24/14) 75-76, 78-79. "Law of the case" was only referenced in relation to evidence admitted at trial. RP (11/21/14) 63. Defendant timely appealed. CP 546.

2. Facts

Deputy David Shaffer received a report of a suspicious vehicle in the Jack in the Box drive-thru window. No. 34063-1-II (2007 WL 831725, 1-3). Dispatch relayed a red Camaro (DOL 677 HCS) with three occupants, drove through the drive-thru window, during which one of the occupants displayed a gun and demanded money for a debt. *Id.* Shaffer fortuitously recognized the vehicle to be associated with a drug house in a area he patrolled.[3] Shaffer found the Camaro at the house. *Id.*

Shaffer executed a felony stop with his weapon drawn out of concern for the reported firearm. Defendant was getting out of the car's passenger side when the stop was initiated. When Shaffer ordered him to show his hands, defendant slowly and deliberately looked at Shaffer, then leaned back into the car. These movements made Shaffer believe defendant had a weapon or was reaching for one. He was detained. *Id.*

[3] Shaffer apparently knew the house owner, and believed all the house's occupants used.

Assisting officers removed the other occupants, Phyllis Burg and Cortez Brown, from the car. While being removed, Burg told them they just came from the Jack in the Box. An officer patted down all three occupants. Defendant had a knife without a handle, someone else's checkbook, and a $20 bill. All three were handcuffed and placed in separate police cars. As Shaffer walked toward the Camaro, Burg, the vehicle's owner, told him there was a gun inside.[4] At some point during this process, Officer Darin Miller left to investigate the Jack in the Box events. *Id.*

Shaffer decided to secure the gun. He did not see anything in plain sight on his approach. He found the gun in a plastic bag wrapped inside a towel. Shaffer located crack cocaine inside a purple Crown Royal bag and small plastic tube. *Id.* Shaffer did not announce he was arresting the occupants until Officer Miller called him from the Jack in the Box. Miller relayed the Camaro had gone through the drive-thru window, contacted an employee, and demanded money from him. When the employee refused, one of the occupants displayed a gun and the employee threw $30 into the vehicle. Shaffer arrested all three occupants for armed robbery after receiving this information. *Id.*

Jack in the Box employee Isaac Miller testified he owed defendant money but claimed Brown, the Camaro's other male occupant, had already

[4] According to Burg's trial testimony, she started yelling about the gun as soon as defendant threw it into the back seat.

collected it. Miller noticed defendant was holding a gun in his lap and pointing it at him. Miller decided to give defendant the money and threw what he had into the car. *Id.*

Burg testified defendant asked Brown and her for a ride to Jack in the Box in her Camaro. Although she could not see defendant's lap, she heard him demanding $40, and saw money thrown into the car. She saw defendant with a plastic bag and she saw a gun in the bag when defendant threw it into the back seat after police surrounded the Camaro. *Id.*

Deputy Shaffer testified at length about the Crown Royal bag's contents. Inside the bag, he found five small baggies of crack cocaine, a handwritten note with "40's" written on it, and $30 in cash. *Id.* Detective Oliver Hickman testified as an expert on street level crack cocaine transactions. He noted a typical street sale involved selling amounts in $20 or $40 values. The crack cocaine rocks in this case were uniform in size, suggesting they had been measured by a drug dealer. And the note with "40's" indicated it was likely the drugs were packaged for sale in $40 increments. Hickman conceded a user could consume five packages in a week and a dealer would normally possess a cell phone, pager, scale, and crib notes. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT'S APPARENTLY INADVERTENT FAILURE TO APPLY OLD DIRECT APPEAL RULINGS ON REMAND FROM THE RESOLUTION OF A MORE RECENTLY FILED COLLATERAL ATTACK IS IMMATERIAL TO THE RESULT THIS COURT SHOULD REACH BASED ON INTERVENING DEVELOPMENTS IN THE LAW.

The United States Supreme Court explained the reasons for extending constitutional protection to officers conducting traffic stops:

> It would seem ... the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact ... evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

Maryland v. Wilson, 519 U.S. 408, 414, 117 S.Ct. 882 (1997). "To support its observations, the Court updated the grim statistics about traffic stops taken from the FBI's Uniform Crime Reports.... In 2011, Chief Judge Kozinski [of the Ninth Circuit] observed that "[i]n the last decade, more than half a million police were assaulted in the line of duty. More than 160,000 were injured, and 536 were killed—the vast majority while performing routine law enforcement tasks like conducting traffic stops and responding to domestic disturbance calls." ***Gonzalez v. City of Anaheim***, 747 F.3d 798, 803-04 (9th Cir., 2014) (citing ***Mattos v. Agarano***, 661 F.3d

433, 453 (9th Cir. 2011) (Kozinski, C.J., concurring in part and dissenting in part)).

"Writing in 2009 for a unanimous Court, Justice Ginsburg reaffirmed the Court's unyielding view that traffic stops are 'especially fraught with danger to police officers.'" ***Gonzalez***, 747 F.3d at 804 (quoting ***Arizona v. Johnson***, 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009)). "Yet again, she recognize[d]: 'The risk of harm to both the police and the occupants [of a stopped vehicle] is minimized, ... if the officers routinely exercise unquestioned command of the situation.'" .... In ***Brendlin v. California***, Justice Souter called the principle of unquestioned police command, a reflection of 'a societal expectation.'" *Id.* (quoting 551 U.S. 249, 258, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)).

a. Judge Murphy's conclusions of law No. 1-2, 8 and 11 appear to be inadvertent derogations from the law of the case.

"Law of the case" refers to three doctrines: (1) appellate court decisions bind the trial court on remand, (2) unobjected to jury instructions become the properly applicable law on appeal, and (3) a second appellate court will "generally not" revisit the holdings of the first appellate court in the same case. ***State v. Strauss***, 119 Wn.2d 401, 412, 832 P.2d 78 (1992); ***Lutheran Day Care v. Snohomish County***, 119 Wn.2d 91, 113, 829 P.2d 746 (1992); ***Folsom v. County of Spokane***, 111 Wn.2d 256-263-64, 759

P.2d 1196 (1988). Washington abides by the discretionary approach to the third doctrine:

> Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case, and where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of later review.

RAP 2.5(c)(2).

The 2007 Court of Appeals' decision affirmed Judge Lee's findings of fact. No. 34063-1-II (2007 WL 831725, 3-4). Unchallenged findings of fact are verities on appeal. ***State v. Bonds***, 174 Wn. App. 553, 563, 299 P.3d 633 (2013). Judge Murphy consequently did not derogate from the 2007 decision by reaffirming Judge Lee's findings.

The same cannot be said for the Judge Murphy's conclusions of law No. 1-2, 8 and 11, for the 2007 decision provides:

> [T]he trial court concluded ... Shaffer did not have probable cause to arrest Rhone and the other occupants until Officer Miller reported to him. Second, the trial court determined ... Rhone was not arrested until ... Shaffer said the words of arrest. We disagree with both conclusions and hold ... Shaffer had probable cause once Burg confirmed there was a gun in the car and ... the occupants had just come from the Jack in the Box. We also hold ... Shaffer arrested Rhone and the other occupants before the search.
>
> [A]lthough Shaffer testified he did not believe he had probable cause to arrest the suspects, the objective facts dictate ... he did. The police dispatch reported ... there was a suspicious vehicle in the drive-thru window at the Jack in the Box with two black men in the front and a white woman in the back seat. One of the occupants displayed a

> gun and asked about money. The dispatch also described the car and gave the license plate number of the car, and the Camaro matched the description and had the reported license plate number. At this point, ... Shaffer had a strong reasonable suspicion to stop the car on suspicion of armed robbery and second degree assault.
>
> When ... Shaffer found the car a short time after the dispatch, that reasonable suspicion was elevated to probable cause. Because of the matching license plate number, a reasonable officer would have known this was the car from the Jack in the Box. And Rhone's furtive movement back into the car further confirmed ... Shaffer had stopped the correct car. Moreover, when Shaffer removed the occupants of the car, Burg told him ... the car had come from the Jack in the Box. At some point before the search took place, Burg also told the officer ... there was a gun in the car. Thus, before the search took place, ...Shaffer had probable cause to believe ... the Camaro's occupants had been involved in at least a second degree assault or an attempted robbery.

Id. at 4-5. Likely due to the procedural posture of the case, being on remand from the Supreme Court on a PRP, Judge Murphy's conclusion of law No. 1 derogated from the law of the case by joining Judge Lee in concluding probable cause had yet to develop. Because an investigatory detention does not transform into custodial arrest due to the presence of probable cause, the State is not requesting RAP 2.5(c) review of the propriety of this aspect of the 2007 decision. *See* ***Hoffa v. United States***, 385 U.S. 293, 310, 87 S.Ct. 408 (1966)("Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable

cause...."); ***State v. Quezadas-Gomez***, 165 Wn. App. 593, 602-03, 267 P.3d 1036 (2011)("Probable cause for the greater intrusion of arrest encompasses legal justification for the lesser intrusion of mere stop.").

The 2007 decision also came to a different conclusion regarding defendant's custodial status when the gun was recovered:

> [t]he three occupants of the car were removed at gunpoint, frisked, handcuffed, and placed in separate police cars. One of the occupants apparently threw a weapon into the car and another admitted to police ... there was a gun in the car. An objective person seeing this amount of force and knowing that the police knew of an illegal gun in the car would believe that he or she was being detained indefinitely in these circumstances. Therefore, on the facts of this case, we hold ... Shaffer arrested the occupants even though he did not use the formal words....

Id. at 4-5 (emphasis added). Judge Murphy's Conclusions of Law No. 2, 8 and 11 derogated from the 2007 decision on the issue of whether a formal arrest occurred; however, the conclusion reached by Judge Lee and Judge Murphy is consistent with more recent cases that call the reasoning applied in 2007 into doubt. The State respectfully requests the Court reconsider that aspect of the 2007 decision under RAP 2.5(c)(2).

b. Reexamination of the record in light of recent developments in the law and long-standing precedent shows Judge Lee and Judge Murphy correctly concluded the challenged evidence was recovered during an investigatory detention, not formal arrest.

"The protective search exception to the warrant requirement applies when a valid ***Terry***[5] stop includes a vehicle search to ensure officer safety. ***State v. Chang,*** 147 Wn. App. 490, 495, 195 P.3d 1008 (2008) (citing ***State v. Kennedy***, 107 Wn.2d 1, 12, 726, P.2d 445 (1986)). Under the exception, "[i]f a police officer has a reasonable belief ... the suspect in a ***Terry*** stop might be able to obtain weapons from a vehicle, the officer may search the vehicle without a warrant to secure his own safety, limited to those areas in which a weapon may be placed or hidden." *Id.*

"In determining whether the search was reasonably based on officer safety concerns, a court should evaluate the entire circumstances surrounding the ***Terry*** stop." *Id.* (citing ***State v. Glossbrener***, 146 Wn.2d 670, 679, 49 P.3d 128 (2002)). "For example, if a suspect made a furtive movement appearing to be concealing a weapon or contraband in the passenger compartment, a protective search is generally allowed. *Id.* (citing ***Kennedy***, 107 Wn.2d at 12 (valid protective search when officer witnessed driver "lean forward" in a way that looked as if he was hiding something)).

The Ninth Circuit recently found an investigatory detention more intrusive than the one at issue in defendant's case to be an investigatory stop, not an arrest. ***United States v. Edwards***, 761 F.3d 977, 981-82 (9th Cir. 2014). Responding officers received a "shots fired" report that contained specific physical and geographical details about a man described as "[w]alking around shooting at passing vehicles." *Id.* at 980. Officers detained Edwards and another man potentially matching the description to facilitate a show-up identification. *Id.* Four officers had their weapons drawn as they approached Edwards. He was commanded to kneel on the pavement. He was handcuffed while on his knees, the officer stood him up and spread his legs. *Id.* A pistol fell from his pants. He was transported to the police station when dispatch advised the reporting party would not cooperate. *Id.*

Those intrusive tactics were not deemed sufficient to transform the officer's investigative detention into formal arrest consistent with the court's commitment to considering "*both* the inherent danger of the situation and the intrusiveness of the police action". *Id.* at 982 (emphasis added). Under this analysis, "pointing a weapon at a suspect, and handcuffing him, or ordering him to lie on the ground, or placing him in a police car will not automatically convert an investigatory stop into an arrest that requires probable cause." *Id.* (citing ***Washington v. Lambert***, 98 F.3d 1181, 1185 (9th Cir. 1996); ***United States v. Miles***, 247 F.3d 1009, 1012-13 (9th Cir. 2001)). Such intrusions are permitted during an

investigative detention "where the police have information ...the suspect is currently armed or the stop closely follows a violent crime." *Id.*

Washington applies the same test ***Edwards*** applied to intrusive investigative detentions, but divides the intrusion factor into temporal and physical subparts. *E.g.*, ***State v. Belieu***, 112 Wn.2d 587, 594, 773 P.2d 46 (1989)(investigation of burglary suspect justified ***Terry*** stop consisting of frisking, handcuffing, and separating vehicle occupants during 10 minute detention). The overruled Court of Appeals in ***Belieu***, like the Court in ***Rhone***, unduly focused on the amount of force used in making the stop. *See* 112 Wn.2d at 597. Appropriate focus on the circumstances warranting intrusive investigative detention procedures is equally apparent in ***State v. Wheeler***, 108 Wn.2d 230, 233-37, 737 P.2d 1005 (1987)(burglary suspect frisked, handcuffed, placed in patrol for 5-10 minutes, and transported to facilitate witness identification). As in ***Edwards***, the justification for the use of intrusive detention tactics, *i.e.* whether the officer had sufficient basis to fear for his safety to warrant the intrusiveness of the action taken, and not the intrusiveness from the perspective of the detainee, "frequently proves determinative." 761 F.3d at 981. Reaffirmation of this principal is visible in the ***Chang*** decision, which rejected the notion a vehicle sweep for weapons becomes excessive when the detainee is already handcuffed outside the vehicle without immediate access to its contents. 147 Wn. App. at 496-97.

It is plain the decision in defendant's direct appeal unduly focused on what it perceived to be the existence of probable cause to arrest and the intrusiveness of the stop from the perspective of the detainees without due, if any, regard for the safety concerns justifying those situationally appropriate investigative methods, *e.g.*:

> Deputy Shaffer had probable cause to believe ... the Camaro's occupants had been involved in at least a second degree assault or an attempted robbery ....
>
> [t]he three occupants of the car were removed at gunpoint, frisked, handcuffed, and placed in separate police cars. One of the occupants apparently threw a weapon into the car and another admitted to police ... there was a gun in the car. **An objective person seeing this amount of force and knowing that the police knew of an illegal gun in the car would believe that he or she was being detained indefinitely** in these circumstances. Therefore, on the facts of this case, we hold ... Shaffer arrested the occupants even though he did not use the formal words....

No. 34063-1-II (2007 WL 831725, 4-5). But the potential existence of probable cause from the hindsight assessment of dynamic and easily deadly circumstances from the protected confines of chambers has no bearing on whether the investigative detention transformed into a formal arrest, for the judiciary wisely does not "require[e] [police] to guess at their peril the precise moment at which they have probable cause to arrest". ***Hoffa***, 385 U.S. at 310; *see also* ***State v. O'Neill***, 148 Wn.2d 564, 574-75, 62 P.3d 489 (2003).

Rhone then found a formal arrest under circumstances that had not supported such a finding in earlier Supreme Court decisions, which have rightly guided later decisions antithetical to the outcome in ***Rhone***. Chief among ***Rhone's*** analytical failings is its lack of consideration for the "justification" component that "frequently proves determinative." *E.g.* ***Edwards***, 761 F.3d at 981-82; ***Belieu***, 112 Wn.2d at 594; ***Wheeler***, 108 Wn.2d at 233-37; ***Chang***, 147 Wn.App. at 496-97.

Most of those cases involved analogous indicia of the relevant detainee's guilt. Yet ***Rhone*** incorrectly factored the detainees' consciousness of guilt into its assessment of whether it would have been reasonable for them to perceive the possibility of release. This is another major analytical failing, for the correct test considers what an *innocent detainee*, not a guilty one, would perceive. *E.g.*, ***Edwards***, 761 F.3d at 981. Beginning the analysis from the perspective of the guilty detainee adds undue weight to the "detainee perception" component, for a guilty detainee aware of the contraband or incriminating evidence certain to be discovered would always perceive arrest an inevitable conclusion of any safety sweep however justified by the circumstances.

Given the well founded acceptance of the formally constitutional "search incident to arrest" exception when ***Rhone*** was decided, it would have been a waste of judicial resources for the State to seek reconsideration or review of what were immaterial academic distinctions in an unpublished decision that achieved the correct result by incorrect

means. The new materiality of the distinction warrants correcting the 2007 decision's analytical failings through careful application of the justification component to bring the outcome in line with similar cases.

2. DEFENDANT FAILED TO PROVE THE GUN HE CLAIMS SHOULD HAVE BEEN SUPPRESSED THROUGH APPLICATION OF ***GANT*** IS MATERIAL TO HIS PERSISTENT OFFENDER SENTENCE BECAUSE THE GUN WAS INCIDENTAL TO THE OVERWHELMING PROOF OF THE UNDERLYING ROBBERY.

Although the trial court's ruling at the suppression hearing is on direct review, defendant's convictions are not. They were transferred to the Supreme Court as part of successive personal restraint petition that only avoided RCW 10.73.090's time bar through RCW 10. 73.100(6)'s "significant change of the law" exception. CP 94-96. The impact of this Court's ruling on the suppression issue must be assessed according to the standard of review controlling collateral attacks. A petitioner raising constitutional error must show the error caused actual and substantial prejudice. ***In re Personal Restraint of Davis***, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004). Actual prejudice must be proved by a preponderance of the evidence. *Id.* at 672, n.21 (citing ***In Re Personal Restraint of Hews***, 99 Wn.2d at 89 (1983)). The Washington Supreme Court rejects the proposition constitutional errors incapable of being harmless on direct appeal will be presumed prejudicial in a collateral attack. *Id.* at 672, n.23

(citing ***In re Personal Restraint of St. Pierre***, 118 Wn.2d 321, 328, 823 P.2d 492 (1992)). "Relief by way of a collateral challenge ... is extraordinary ...." ***In re Personal Restraint of Coats***, 173 Wn.2d 123, 132, 267 P.3d 324 (2011).

Even if this Court permitted the previous resolution of the search issue to stand, and held ***Gant*** demands suppression of the gun and drugs recovered from the vehicle, defendant's life sentence should be unaffected due to his failure to prove his first degree robbery conviction is the product of actual prejudice. CP 53. That conviction is predicated on the jury's determination:

> (1) [D]efendant unlawfully took personal property belonging to another person or in the presence of another;
> (2) [D]defendant intended to commit theft of the property;
> (3) [T]he taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
> (4) That force or fear was used by the defendant to obtain or retain possession of the property;
> (5) That in the commission of these acts the **defendant displayed what appeared to be a firearm**;
> (6) That the acts occurred in the State of Washington.

CP 592 (Inst.16)(emphasis added); RCW 9A.56.200. Conviction for this offense was decided separately from the others and did not in any way depend on proof defendant used an actual firearm, let alone the one recovered, or the confiscated cocaine. CP 580 (Inst. 4); ***State v. Emery***, 174 Wn.2d 741, 754, 278 P.3d 653 (2012)(jurors are presumed to follow their instructions).

Defendant was first contacted by police as he emerged from the passenger side of a Camaro just involved in a robbery at the Jack in the Box where a firearm was displayed. No. 34063-1-II (2007 WL 831725, 1-2). A felony stop was executed. *Id.* Defendant "slowly and deliberately looked at Deputy Shaffer and leaned back into the car" as if he was hiding a firearm or reaching for one. *Id.* One of the occupants told police they just came from the Jack in the Box. *Id.* As Shaffer walked toward the Camaro, but before he searched it, its owner told him there was a gun inside. *Id.*

For the purpose of the analysis going forward it makes no difference whether one assumes the gun was suppressed at trial pursuant to ***Gant,*** or cleverly hidden never to be recovered by police. Eye witness testimony from the Jack in the Box employee established defendant pointed a gun at him while demanding money. *Id.* It was immaterial to the robbery conviction whether the object defendant had in his hand was a real gun or only appeared to be one. The first degree robbery was completed when the victim complied by throwing his money into the Camaro. *Id.* The Camaro's owner testified at trial "she heard [defendant] demanding $40, and saw the money thrown into the car. She saw [defendant] with a plastic bag and ... saw a gun in th[e] bag when [defendant] threw it into the back seat after the police surrounded the Camaro." *Id.*

The facts of the first degree robbery were proved through the independent testimony of the victim and one of the people with defendant

in the Camaro when the robbery was committed. It was legally irrelevant whether defendant displayed a real gun or fashioned some object into the shape of a gun, or successfully ditched the gun, or the gun-shaped object, prior to arrest. The undisputed facts of the first degree robbery are not dependent on the gun's recovery or production at trial. This is not a case where the gun tended to establish defendant's identity as the robber as both witnesses had a preexisting relationship with him prior to the robbery. *Id.* Because the gun was not fired, it was not tied to the crime scene through a tool-mark analysis of expelled casings or bullets. It was the witnesses' description of the gun, and not the gun's physical presence in the courtroom, which proved the charge.

Erroneous admission of weaponry used to commit similarly proved crimes has long been deemed harmless under the more conservative standard of constitutional error applied to cases on direct review. A helpful explanation of the logic at work in those cases can be found in ***State v. McCollum***:

> "Regardless of the admission of the pistol in evidence, the jurors could not, upon their oaths, under the instructions given them by the court, have done otherwise than find the appellant guilty of the offense charged. The pistol itself established nothing beyond what the other evidence in the case established, and I am unwilling to believe ... the jury was induced to find the appellant guilty of pointing the pistol merely because the pistol was displayed in court at the time of trial.
>
> While appellant does not so state the proposition, his claim of prejudice amounts, in effect, to simply this: If the jury

> had not seen the pistol in court, it might not have found him guilty even though the evidence warranted no other conclusion; or, further, had the pistol not been brought into court, he might have had the benefit of perjuring himself by denying ... he ever owned a pistol or ... hand one with him when he went to the home of the prosecuting witness. No such safeguard against conviction of a crime is provided or intended by the criminal law.

17 Wn.2d 85, 91-92, 136 P.2d 165 (1943)(J. Steinert concurring). An identical conclusion was reached in ***State v. Reid***, where erroneous admission of shotgun shells and a photograph of defendant's wife holding a shotgun was deemed harmless in a shotgun-murder case where the shooting was described by two eyewitnesses, and another witness described the defendant's previous possession of a similar gun. ***State v. Reid***, 38 Wn. App. 203, 213, 687 P.2d 861 (1984); *see also* ***State v. Ferguson***, 3 Wn. App. 898, 904, 479 P.2d 114 (1970)(harmless failure to exclude witness identifications cumulative of other evidence).

Other states employ a similarly rational approach. For example, in ***Fitts v. State***, Alaska's Court of Appeals determined failure to suppress the gun used in a robbery was harmless. As in defendant's case, the prosecution in ***Fitts*** presented very strong evidence ... [he] was one of the robbers. His identity was independently established through a wallet left in the taxicab whose driver "identified Fitts as the robber who held the gun." ***Fitts v. State***, 25 P.3d 1130, 1135 (2001). Just like defendant's illegitimate self-help defense, Fitts claimed he was attempting to recover money owed to him. *Id.*; CP 611; *see also* ***State v. Harrison***, 805 P.2d 769

(1991)(harmless to admit pistol in shooting case where it was "not the critical or sole factor tying [the defendant] to the shooting."); ***Pericola v. State***, 499 So.2d 864, 868 (1986)(failure to suppress gun harmless as it "w[as] not indispensable proof" where the victim positively identified defendant as the assailant and observed defendant's possession of the gun); ***Adkins v. Beto***, 462 F.2d 802, 804 (5th Cir. 1972)(any error in admitting knife in a stabbing murder harmless where a witness saw defendant cutting the victim with a knife).

It is plain under the more demanding actual prejudice standard properly applied to cases reviewed through a collateral attack, or even the less demanding harmless error standard applied to cases on direct appeal, failure to suppress the gun had no material impact on the first degree robbery conviction underlying defendant's life sentence. The same is true of defendant's conviction for jumping bail two months after the robbery was committed. CP 36, 48; No. 34063-1-II(2007 WL 831725, 2, n.3).

Defendant also lacked standing to challenge the search as to the robbery count. A defendant only has "automatic standing" to challenge the search of a vehicle in which he or she has no legitimate expectation of privacy for possessory offenses. ***State v. Foulkes***, 63 Wn. App. 643, 646-48, 821 P.2d 77 (1991)(citing ***Rakas v. Illinois***, 439 U.S. 128, 133, 99 S.Ct. 421 (1978)(passenger lacked standing to challenge search and seizure of rifle from vehicle). Burg owned the searched Camaro. Defendant's only connection to the car was Burg's willingness to give him

a ride to the Jack in the Box. Defendant was exiting the vehicle at the completion of that trip when the stop was initiated. Burg's act of alerting police to the presence of the gun in the car could be fairly interpreted as tacit consent to its recovery, which defendant could not countermand. Regardless, defendant had no reasonable expectation of privacy in Burg's car, leaving him without standing to challenge the gun's recovery from the vehicle as to the robbery count. Severance of counts would have enabled admission of the gun as to the robbery without addressing the search issue applicable to the charged possessory offenses. *E.g.* CrR 4.4(2)(b).

Defendant's conviction for unlawful possession of a firearm ("UPOF") is perhaps a closer call as it is a possessory offense to which the "automatic standing" rule applies and its capacity to fire a projectile must be proved, but not necessarily through the results of a post-seizure examination. RCW 9.41.010, .040; CP 593 (Inst.23). It does not appear defendant ever perfected the record as to the UPOF conviction, for he did not challenge it in his direct appeal. No. 34063-1-II(2007 WL 831725, 2, n.3); ***Olmsted v. Mulder***, 72 Wn. App. 169, 183, 863 P.2d 1355 (1993) (the burden is on the party seeking review of an alleged error to perfect the record), *review denied*, 123 Wn.2d 1025, 875 P.2d 635 (1994); ***State v. Blight***, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977) (a party's failure to provide the necessary record precludes review of the alleged error.). It can be discerned that he stipulated to the predicate offense at trial. CP 574. If the record contained testimony regarding the gun's pre-seizure operability,

then the gun's suppression would also be harmless given the witness testimony defendant possessed a gun during the robbery. The conviction should be affirmed due to defendant's failure to perfect the record on this point and because no actual prejudice has been shown. Reversal of the UPOF conviction should not be based on speculation. Its continued viability is nevertheless irrelevant to petitioner's life sentence.

Only the conviction for possession of a controlled substance with intent to deliver is clearly impacted by the search issue on appeal. If this Court held the search unlawful under ***Gant***, suppression of the drugs would necessarily deprive the conviction of nearly its entire evidentiary foundation. The proper result would be remand for dismissal of the drug conviction, and re-imposition of defendant's life sentence pursuant to the unaffected first degree robbery conviction. Sentence should also be re-imposed on the bail jumping and UPOF counts.

D. CONCLUSION.

This Court should reexamine the decision from defendant's direct appeal and bring it into line with prevailing precedent by concluding the challenged gun was recovered pursuant to an investigative safety sweep to which ***Gant*** does not apply and affirm defendant's convictions. In the alternative, failure to suppress the gun should be deemed harmless as to all

but the controlled substance offense. Defendant's persistent offender sentence predicated upon the first degree robbery count should remain unchanged.

RESPECTFULLY SUBMITTED: August 24, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

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WSB # 38725

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ 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.

8.24.15 Theresa Kahl
Date Signature

PIERCE COUNTY PROSECUTOR

August 24, 2015 - 3:36 PM

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