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

STATE OF WASHINGTON
BY CA
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

KEVIN ABUAN, APPELLANT
TIMOTHY BLUEHORSE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chuschcoff

Nos. 07-1-04401-1
07-1-04327-8

Brief of Respondent

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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 August 20, 2007 the State charged Kevin Abuan in Count III with Drive By Shooting with a gang aggravator, and in Count IV with Unlawful Possession of a Firearm in the Second Degree.¹ CP (Abuan) 1-

2. A Second Amended Information was filed against Abuan on June 9, 2008, that added two additional counts of Assault in the Second Degree, Counts V and VI, each count being firearm enhanced and with a gang aggravator alleged. CP (Abuan) 59-61. Count V alleged Fransis [sic] Leoso as the victim of the assault. Count VI alleged Fomai Leoso as the victim of the assault. At the close of the State's case, Abuan moved for dismissal of Count IV (Unlawful Possession of a Firearm, 2nd Deg.), and the court granted the motion and dismissed the count. 14 RP 1762-1774.

The jury found Abuan guilty of Count III (drive-by shooting); Count V, (Assault 2nd Deg. on Fransis Leoso) and Count VI (Assault 2nd Deg. on Fomai Leoso). CP (Abuan) 121-123. Regarding the special verdicts, as to all three counts the jury found the gang aggravator did not

¹ A co-defendant, Raymond Howell, was originally charged with Abuan. However, Howell is not part of this appeal where he pleaded guilty.

apply. CP (Abuan) 116-120. However, the jury found that Abuan was armed with a firearm when he committed Counts V and VI. CP (Abuan) 116-120.

Timothy Bluehorse was charged on August 23, 2007, with two counts of Drive By Shooting, Counts I and II both with a gang aggravator. CP (Bluehorse) 1-2. A Second Amended Information was filed against Bluehorse on June 9, 2008, that added two counts of Assault in the Second Degree, Counts III and IV, each count being firearm enhanced and with a gang aggravator. CP (Bluehorse) 278-283. Count III alleged Fransis Leoso as the victim of the assault, while Count IV alleged Fomai Leoso as the victim of the assault. CP (Bluehorse) 278-283.

The jury found Bluehorse guilty of Count I (drive-by shooting), and not guilty of counts II (drive-by shooting), III (Assault 2nd deg. on Fransis Leoso), and IV (Assault 2nd deg. on Fomai Leoso). CP (Bluehorse) 29, 30, 32, 71. Regarding the special verdict on Count I, the jury found that Bluehorse committed Count I to advance his position in a gang. CP (Bluehorse) 72.

On September 12, 2008, the court imposed a standard sentence on Abuan, and imposed 36 months on Count III, and separate firearm enhancements on Counts V and VI of 36 months each for a total sentence of 108 months in custody. CP (Abuan) 162. The court also imposed 18-36 months of community custody, and specified that no more than 108

months to be served in custody, and no more than 120 months of total incarceration including community custody time. CP (Abuan) 163.

Bluehorse was sentenced at the same hearing as Abuan. 15 RP 1786.² Based on the jury's finding of the gang aggravator, the court imposed an exceptional sentence on Bluehorse, consisting of 108 months on Count I. CP (Bluehorse) 83; 15 RP 1820, ln. 13 to p. 1825, ln. 19. However, the court failed to fill out the exceptional sentence portion of the Judgment and Sentence, or to enter findings of fact and conclusions of law in support of the exceptional sentence. *See* CP (Bluehorse) 81. The court also imposed 18 to 36 months of community custody, but specified that the defendant is to serve no more than 108 months in custody, and no more than 120 months total. CP (Bluehorse) 84.

These appeals were timely filed.

2. Facts

Fomai Leoso and Francis Leoso are brothers who belong to the Outlaw Crip Killers (OLCK) street gang which is a predominantly Samoan gang of the "blood" gang affiliation. 8 RP 1005, ln. 1 to p. 1007, ln. 22; 10 RP 1257, ln. 21 to p. 1258, ln. 25. The OLCKs came into conflict over territory with two other "Crip" gangs, the Native Gangster

² There are two different volume 15 of the reports of proceedings. The volume 15 cited to herein refers the sentencing hearing that took place on Sept. 12, 2007, which volume should have been numbered as 18.

Crips, and especially the East Side Gangster Crips. 8 RP 1009, ln. 2 to p. 1011, ln. 20.

Some time before July 4, 2007, Fomai Leoso returned from a trip to California to see his garage door spray painted with red graffiti consisting of the letters EGC for Eastside Gangster Crip. 10 RP 1319, ln. 4-14; 10 RP 1340, ln. 9 to p. 1341, ln. 8.

On July 4, 2007, Fomai Leoso was having a barbeque in his front yard. 10 RP 1265, ln. 3-15. A number of family members were present, including a cousin named Ibbha. 10 RP 1265, ln. 16 to p. 1266, ln. 10. At about midnight, Fomai was outside in front of the barbeque grill when somebody (he didn't know who) said "Duck LOC." "Duck" meant to duck down. 10 RP 1267, ln. 23-24. And "LOC" is a phrase that Crip gang members call themselves. 10 RP 1268, ln. 4-7. Then somebody from his family group screamed "drive-by" as a warning 10 RP 1267, ln. 14-19.

Fomai just froze and then bullets started flying. 10 RP 1268, ln. 8-9. Everyone started dropping to the ground and crawling to the door, but Fomai continued to stand there frozen. 10 RP 1268, ln. 9-18. The bullets were coming from a dark blue Suburban vehicle that drove by and was shooting at them. 10 RP 1268, ln. 19 to p. 1269, ln. 3.

Fomai recognized the vehicle as he had seen it around, and knew it to be an NGC vehicle. 10 RP 1269, ln. 4-17; p. 1274, ln. 2-11. He couldn't see who was in the car shooting on this occasion. 10 RP 1269, ln.

4-17. However, he could see the hand holding the gun out the window coming out of the driver's side back seat. 10 RP 1269, ln. 18 to p. 1270, ln. 9. The hand had a plastic thing on it, as if the hand had been broken or injured. 10 RP 1269, ln. 18 to p. 1270, ln. 3.

Fomai's cousin, Ibbha was shot in the leg, so they put a belt on his leg, someone called the police, and then Ibbha went to the hospital. 10 RP 1271, ln. 8 to p. 1273, ln. 20.

A couple of days after the fourth of July, on about the seventh, the Leoso's and about fifteen of their family members went to a lake (possibly Tillicum Lake or American Lake or Lake Steilacoom) to go swimming. 8 RP 1044, ln. 11 to p.1046, ln. 13. It was just a family gathering, and not a gang gathering. 8 RP 1046, ln. 14-17. Leoso's cousin Ibbha was also present. 8 RP 1047, ln. 16-17. He is the same person who had been shot in the back of the leg on the fourth of July, and they believed Timothy Bluehorse was involved. 8 RP 1049, ln. 3-10.

Around noon, they observed Timothy Bluehorse with others, so the Leoso's and some of their family approached Timothy Bluehorse to confront him, at which point Ibbha hit Bluehorse. 8 RP 1049, ln. 11-13. They believed Bluehorse was involved in the July 4 shooting because when they confronted him at the lake, they observed him to have the same cast-like object on his hand that was observed in the shooting on July 4.

10 RP 1293, ln. 2-14. Some fists were thrown, but Bluehorse and his group ran before it turned into a significant fight. 8 RP 1049, ln. 14 to p. 1050, ln. 5.

On August 15, 2007, Francis Leoso was at his home playing a video game in the garage with his little brother after dark. 8 RP 1013, ln. 19 to p. 1016, ln. 15. All of a sudden they heard a car engine, then someone saying the phrase “N-G-C cuz,” which he could hear clearly and loud. 8 RP 1016, ln. 16-22. Then the shooting started, so Francis ducked down on the floor and cussed at his little brother to get on the ground, because he was just standing there screaming. 8 RP 1016, ln. 24 to p. 1017, ln. 1. The gunfire was hitting the house and Francis thought his sister was in the room [where the gunfire hit] and that she was shot that day. 8 RP 1017, ln. 4-11.

A bullet almost hit the ear of Francis, and he saw Timmy Bluehorse’s head sticking out of the window, and another person he knew as Lucas on the other side of the car. 8 RP 1020, ln. 1-25

Francis Leoso grabbed a gun he had nearby and went with his brother and got into a car to chase after the people in the car that shot at them, but was unable to find it. 10 RP 1288, ln. 11 to p. 1290, ln. 5. After about fifteen to twenty minutes of driving around, the Leoso’s were pulled over by police. 10 RP 1290, ln. 9-22. Officers found the gun, they investigated the Leoso’s for about an hour and a half, and arrested Francis, but released Fomai. 10 RP 1291, ln. 3 to p. 1292, ln. 16.

On August 15, just before the shooting occurred, Larry Davis was on a walk with his wife when he heard the gunshots, heard a car speed off and then heard more gunshots in the area of L and 36th street. 5 RP 442, ln. 12 to p. 443, ln. 4; p. 450, ln. 3-5. He saw two cars, one of which was red. 5 RP 450, ln. 6-9. It was then followed by a bigger car. 5 RP 451, ln. 24 to p. 452, ln. 16.

Detective Bair was assigned to investigate the case on the sixteenth of August. 6 RP 633, ln. 17-25. He went to Remann Hall and interviewed Francis Leoso who was being held there after his arrest. 6 RP 635, ln. 11-24. Leoso was able to identify Bluehorse from a photo montage as one of the persons in the vehicle. 8 RP 1040, ln. 14 to p. 1041, ln. 1. He also identified from a montage a second person known to him as Lucas, who had been on the rear passenger side of the vehicle during the shooting. 8 RP 1034, ln. 6-25.

On August 17, 2007, at about 1:00 a.m., Officer Frisbee of the Tacoma Police Department, together with officer Betts conducted a traffic stop of a red Chevy Beretta for an expired registration in the area of 30th and Portland Avenue. 5 RP 353, ln. 3-17; p. 362, ln. 10-19; p. 363, ln. 12-21; p. 364, ln. 25 to p. 365, ln. 4. The driver was Raymond Howell, and the passenger was Kevin Abuan. 5 RP 364, ln. 10-23. Howell didn't have a driver's license and didn't have identification on him, so he was

detained, determined to have a suspended license, and thus officer Frisbee arrested him. 5 RP 365, ln. 6-14.

The officers removed Abuan because they were going to search the car. Officer Betts told Abuan he was going to pat Abuan down for officer safety, and Abuan told him he had “weed,” meaning marijuana. 5 RP 365, ln. 15 to p. 366, ln. 231; p. 468, ln. 15 to p. 469, ln. 2. Abuan started to reach into his pockets, and for safety reasons Officer Betts told him to stop, put him in handcuffs, took the marijuana out and arrested Abuan for possession of marijuana. 5 RP 366, ln. 20 to p. 367, ln. 2; p. 469, ln. 3-6.

Officers searched the vehicle and found a 9mm handgun under the driver’s seat, and verified that Abuan had a prior felony conviction and could not lawfully possess it. 5 RP 370, ln. 8 to p. 372, ln. 15; 5 RP 470, ln. 25 to p. 472, ln. 7.

At the scene of the August 15 shooting, officers found 9mm casings. 5 RP 483, ln. 20-23. The officers looked more closely at the car, observed that one of the tail lights was out and showed signs of fresh damage. 5 RP 483, ln. 22 to p. 484, ln. 19

Abuan observe the officers looking at the vehicle and told them that he and a female cousin were driving around 32nd and Portland Avenue and someone dumped on them, i.e. fired two shots. 5 RP 375, ln. 23 to p. 376, ln. 14. This led the officers to realize that they probably had the vehicle that had been involved in the drive-by shooting on August 15. 5 RP 376, ln. 15-16. The officers asked Abuan about his gang affiliation

and he admitted to being an NGB, Native Gangster Blood. 5 RP 376, ln. 17-25. Abuan claimed Howell was a wannabe for a gang and also that they were heading to his sister's residence, which is a house associated with the Morton Blocc Crips. 5 RP 408, ln. 3-22. Additionally, the Native gangs have a sort of alliance where the Native gangs don't rival each other, and individuals will sometimes switch between being native Crips and native Bloods because some factions within the Native gang groups want to unite the whole thing and be the Native family, so their numbers aren't spread too thin and they can take on other gangs. 5 RP 409, ln. 3-18.

Detective Bair had interviewed Abuan in the jail twice regarding the crimes in this case. In the first interview, Abuan initially denied that he was involved with the drive-by shooting, but after being told that other persons had implicated him, he shook his head up and down indicating that he had been involved. 6 RP 646, ln. 18-21. At that point he began to discuss the case with Detective Bair. 6 RP 648, ln. 4-6. The defendant identified who was in the vehicle with him, and claimed that they went to the location of the crime only to flash gang signs, and then something different happened once they got there. 6 RP 648, ln. 4 to p. 650, ln. 24. However, one of the persons Abuan claimed was in the vehicle had a very solid alibi, and the officer was able to exclude that person as not having been present. 6 RP 652, ln. 17-25.

This led Detective Bair to conclude that some of the information Abuan provided in the first interview was not accurate. 6 RP 653, ln. 7-10. As a result, on August 20, three days after the first interview, Detective Bair interviewed the defendant a second time. 6 RP 653, ln. 11 to p. 655, ln. 2.

Detective Bair first told Abuan he had lied about one of the persons he claimed was in the vehicle, and Abuan agreed that he had lied. 6 RP 655, ln. 5-7. Abuan said that he had gotten together [apparently in custody] with Raymond Howell, the front passenger, and they had talked about Detective Bair's having discussed the case with Abuan. 6 RP 655, ln. 7-10. Abuan then claimed that he had been high on narcotics when he made the earlier statement and that he wasn't in the car, and claimed that a person named Jeremy was the one that actually fired, but that he [Abuan] hadn't been there. 6 RP 655, ln. 10-15.

Detective Bair then confronted the defendant with the claim that he had coordinated his story with Raymond Howell. 6 RP 655, ln. 16 to p. 656, ln. 8; p. 660, ln. 1-6. The defendant implied that he indeed had, and then didn't want to talk about it any more. 6 RP 660, ln. 7-12.

C. ARGUMENT.

1. THE UNITED STATES SUPREME COURT'S OPINION IN *ARIZONA V. GANT* DOES NOT REQUIRE SUPPRESSION OF THE EVIDENCE RELATED TO ABUAN.

The defendant brings this motion to reverse the trial court based on the recently filed opinion of the United States Supreme Court, *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 173 L.Ed.2d 485 (2009). See Br. App., p. 13. The defendant asserts that because his appeal was pending on direct review at the time *Gant* was decided, the change in the law established in *Gant* applies retroactively. Br. App. 13, ln. 2. The State agrees that *Gant* applies retroactively to all cases currently pending on direct review and not yet final. See, e.g., *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L.Ed.2d 649 (1987) (a new rule for the conduct of criminal prosecutions applies retroactively to all cases, state or federal, pending on direct review or not yet final); *Teague v. Lane*, 489 U.S. 288, 302-04, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989); *In re St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992).

The analysis, however, does not end with the retroactive application of *Gant*. The issue on appeal raised by the defendant's supplemental brief is how *Gant* affects the present case. The State's response consists of four issues. First, even though this case is currently pending on appeal, because it involves a challenge to suppress the

evidence, the issue is waived because the issue in *Gant* was not raised before the trial court. Even though *Gant* applies retroactively, it only affects those cases on appeal where error was preserved below, so that the issue in *Gant* would therefore properly be before this court now. However, here, the issue was waived.

Second, under the rules articulated in *Gant* itself, the search here may be proper even if the issues were preserved and *Gant* were to affect this case. This will be discussed in conjunction with the waiver argument.

Third, even if error was preserved so that *Gant* can be applied to this case, and even if under *Gant* the search here was unlawful, there is a separate question as to whether the exclusionary rule requires suppression of the evidence found during the search of the defendant's car. The "good faith" exception to the exclusionary rule applies. Because the officer conducted the search of the defendant's vehicle in good faith and under "authority of law" in effect at the time of the search, the evidence obtained during the vehicle search should not be suppressed.

Fourth, the defendant may not now, or subsequently claim that trial counsel was ineffective for failing to raise the *Gant* suppression issue before the lower court.

a. The Suppression Motion Was Waived
Where It Was Not Raised Below.

Before the trial court the defendant brought no motion to suppress evidence pursuant to CrR 3.6. More specifically, the defendant brought no

motion to suppress evidence claiming that the officers had no basis to search the vehicle where the defendants were secured in the back of patrol cars at the time the search took place. Now for the first time on appeal, the defendant challenges the evidence admitted at trial claiming it was unlawfully obtained in light of the United States Supreme Court's ruling in *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

The Court of Appeals (Division II) recently issued an opinion on the effect of *Gant* in which it held that suppression issues not raised at the trial court level are waived. *State v. Millan*, 151 Wn. App. 492, 212 P.3d 603 (2009). Under *Millan*, where the defendant brought no suppression motion below, the issue was waived and may not be raised for the first time on appeal. *Millan*, 151 Wn.2d at 502.

Millan would be controlling precedent except that subsequently a different panel of the Court of Appeals (Division II) issued its opinion in *State v. McCormick* in which it held that waiver was inconsistent with principles of retroactive application of case law, and therefore disagreed with the court in *Millan* that waiver applied to *Gant* cases. *State v. McCormick*, ___ Wn. App. ___, 216 P.3d 475, 476-477 (2009). Nonetheless, the court should follow *Millan* because the analysis of the waiver issue in *McCormick* suffers from several serious flaws.

First, the court in *McCormick* erroneously claimed that the reasoning in *Millan* was contrary to established law, relying on *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L.Ed.2d 649 (1987); *United States v. [Eugene] Johnson*, 457 U.S. 537, 566 n. 16, 102 S. Ct. 2579, 73 L.Ed.2d 202 (1982), and *State v. Counts*, 99 Wn.2d 54, 57-58, 659 P.2d 1087 (1983). See, *McCormick*, 216 P.3d at 476-77. Those cases all apply new precedent retroactively to cases not final on appeal. But in none of those cases did the State assert, or the court consider, the applicability of the waiver doctrine. Moreover, in none of those cases was the waiver doctrine applicable.

Indeed, in *[Eugene] Johnson*, waiver was inapplicable because the defendant preserved the suppression issue by raising it below. *[Eugene] Johnson*, 457 U.S. at 539-40. In *Griffith*, the doctrine of waiver was likewise inapplicable, but for different reasons. In *Griffith*, the underlying issue was not a suppression challenge, but was rather a *Batson* challenge to the fact that the prosecutor in that case had used four of his five allotted challenges to strike four of the five prospective black jurors. *Griffith*, 479 U.S. at 316-17. Moreover, in *Griffith*, the defense raised the (pre-) *Batson* challenge to the trial court, and continued to preserve the issue at every level thereafter so that it was raised before the court issued its

opinion *Batson*, which then applied retrospectively to *Griffith*. *Griffith*, 479 U.S. at 317-18.

Finally, *Counts* dealt with three unrelated cases; *Counts*, *Holmes*, and *Barilleaux*, which were consolidated for appeal. *Counts* 99 Wn.2d at 54, 57. In *Barilleaux*, the defendant had raised the suppression challenge below, so waiver was again inapplicable. *Counts*, 99 Wn.2d at 64. The opinion does not specify whether *Counts* or *Holmes* raised suppression issues below, but the reasonable inference is that they did. In *Counts*, the defendant's father had refused to admit police to his home without a warrant for an hour before they decided they didn't need a warrant and entered without one. *Counts*, 99 Wn.2d at 60. Those facts alone make it likely that the suppression issue was raised before the trial court. That inference is further supported by the fact that after trial, but before oral argument, the United States Supreme Court issued an opinion that the Court of Appeals held did not apply to *Counts* retroactively, but which the Court subsequently established it in fact did. *Counts*, 99 Wn.2d at 59-60. There is nothing to suggest the issue was raised for the first time on appeal.

In *Holmes*, the defendant appealed, claiming his statements made at the time of arrest should have been suppressed. *Counts*, 99 Wn.2d at 62. Again, the reasonable inference is that he pursued a challenge on

appeal that he had raised below. Additionally, waiver would have been irrelevant for *Holmes* where the court held that the admission of the statements was harmless error because they were not inculpatory. *Counts*, 99Wn.2d at 63.

The *McCormick* court's claim that *Griffith, Johnson* and *Counts* constitute contrary law to *Millan* is simply wrong. Indeed, to the extent that the issues in those cases were raised below, those opinions are, if anything, authority that support the analysis put forth in *Millan*, rather than *McCormick*. Accordingly, the *McCormick* court's reliance on those cases as contrary authority is inapposite.

Second, the court in *McCormick* claimed that applying waiver would thwart the doctrine of retroactivity under which a new rule for the conduct of criminal prosecution applies retroactively to all cases pending on direct review or not yet final. *McCormick*, 216 P.3d at 476. However, that claim is incorrect.

Regarding the federal law requirement of plain error for issues to be raised for the first time on appeal, in *United States v. [Joyce] Johnson*, the court held that "plain error review applies absent a preserved objection even when the error results from a change in the law that occurs while the case is pending. *United States v. Morelos*, 544 F.3d 916, 921 (8th Cir. 2008) (Citing *United States v. [Joyce] Johnson*, 520 U.S. 461, 467, 117 S.

Ct. 1544, 137 L.Ed.2d 718 (1997)). The 9th Circuit Court of Appeals has recognized that some narrow exceptions exist to the general rule in that issues raised for the first time on appeal will not be considered. One such exception is where the new issue arises while the appeal is pending because of a change in the law. *U.S. v. Flores-Payson*, 942 F.2d 556, 558 (9th Cir. 1991).

Nonetheless, a change in the law is not sufficient to justify a plain error review of suppression issues not raised below. Under Federal Rule of Criminal Procedure 12(b)(3), a suppression issue must be raised before the trial court. *United States v. Rose*, 538 F.3d 175, 177 (3rd Cir. 2008). Rule 12(b)(3) supercedes the “plain error” standard of Rule 52(b). This is because suppression issues not raised in the trial court “direct a waiver approach” to the analysis. *Rose*, 538 F.3d at 177-79, 182-83 (citing Fed.R.Crim.P. 12(e) (stating that failure to raise the issues prior to trial constitutes waiver)). *See also U.S. v. Chavez-Valencia*, 116 F.3d 127, 129-33 (5th Cir. 1997). Because the failure to raise a suppression issue constitutes waiver of that issue rather than forfeiture, suppression motions raised for the first time on appeal are not subject to a plain error review.

Similarly, in Washington 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, i.e. not an error that affects

the defendant's due process right to a fair trial. See *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990) (citing *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)). See also *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).

To the extent the court in *McCormick* treated defendants who had failed to raise the suppression issue the same as defendants who had raised the issue, it was the *McCormick* court that inverted the retroactivity standard and treated differently situated defendants the same.

Persons who have raised the issue below and persons who have failed to do so are not similarly situated. The doctrine of waiver does not undermine and is not at odds with the doctrine of retroactivity. Rather, the two doctrines deal with different matters and complement each other.

Finally, in *McCormick* the court also failed to recognize the fundamental role that the doctrine of waiver plays in the relation between the trial and appellate courts. The court in *McCormick* never considered the significance or purpose of the doctrine of waiver, instead effectively treating it as a meaningless superfluity in the law. However, waiver has a foundational role in any system where appellate courts review the trial court's actions.

Some opinions have given the impression that the requirement that appellate courts will only consider issues raised in the trial court arose out of solicitude for the trial court. Tegland, Karl, Washington Practice Series, vol. 2A, Rule Practice, Sixth Ed., p. 192. However, a more important factor is the consideration that opposing parties should have an opportunity at trial to respond to possible claims of error and to shape their cases to issues and theories at the trial level, rather than facing newly asserted errors, theories and issues for the first time on appeal. Tegland, Karl, Washington Practice Series, vol. 2A, Rule Practice, Sixth Ed., p. 192. The State as a party is also entitled to fair and equitable treatment by the court. Yet by dispensing with the doctrine of waiver, the court ends up deciding cases where the State has been given no notice of the issue and denied the ability to make a record, the lack of which is then used against the State on the appellate review.

In addition to fundamental fairness to both parties, the waiver doctrine also serves the interests of judicial economy by encouraging resolution of issues at the trial court level by ensuring the trial court has a reasonable opportunity to address issues of significance. The rule also promotes justice in the form of finality of decisions, rather than permitting justice to be delayed by the raising of a never ending stream of new issues on appeal.

As explained above, the waiver doctrine is well established under both Washington and Federal law. It primarily applies to suppression issues. By deeming waiver to be contrary to principles of retroactivity, the court in *McCormick* in fact created a heretofore unrecognized exception to the waiver doctrine. Moreover, that exception is one that makes no sense. Whereas if new authority doesn't issue until after a defendant's case is resolved, the defendant will have been precluded from raising a new issue on appeal. However, the defendant who carries or is delayed in his or her appeal, is rewarded by being allowed to raise a claim that was otherwise barred, simply because a court has subsequently effected a late change in legal standards. There is no authority to support the proposition that retroactive application of a change in legal standards constitutes an exception to the doctrine of waiver.

As argued above, the doctrines of waiver and retroactivity are not incompatible. Rather they are complementary. Insofar as the court in *McCormick* failed to recognize that and to give the doctrine of waiver its full due, the opinion was wrongly decided.

i. **Here The Defendant Waived The Suppression Issue.**

Here, as in *Baxter*, the evidence was admitted without any objection on the basis that the defendant now asserts. The defendant waived his claim that the evidence should be suppressed because the

officer lacked lawful authority to conduct a search of the vehicle incident to his arrest, and because that claim was waived, it may not now be raised for the first time on appeal. See *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990) (citing *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)); *State v. Valladares*, 31 Wn. App. 63, 639 P.2d 813 (1982).

The doctrine of waiver is particularly applicable here under the procedural facts of this case. First, the defendant cites to nothing in the record that indicates that any suppression motion was ever held. Moreover, after reviewing the record, the State cannot identify any additional documents to designate which indicate any such hearing ever took place. CP (Abuan) 7-8.

By not raising the issue before the trial court, the defendant deprived the State of the ability to put forth any relevant evidence and legal theories, including any alternative legal theories that would have supported the search of the vehicle. For instance, the State could have asserted an argument for inevitable discovery based upon an inventory of the vehicle pursuant to impound. As with suppression issues, inevitable discovery arguments must be raised before the trial court or are waived. See *State v. Rulan C.*, 97 Wn. App. 884, 889, 970 P.2d 821 (1999). Alternately, the evidence may have been admissible under other exceptions to the warrant requirement that may or may not have also involved inevitable discovery arguments.

Because the defendant did not raise a challenge to the officer's authority to search the vehicle incident to the arrest of the defendant, the State was not put on notice of the issue, and was deprived of the opportunity to develop the record regarding alternative bases supporting the lawfulness of the search or the admission of the evidence. For that reason, the facts necessary for a decision cannot be found in the record and review is unwarranted. *State v. Riley*, 121 Wn.2d 22, 31-32, 846 P.2d 1365 (1993).

- b. Even If The Court Were To, For Some Reason, Consider The Merits Of The Argument, The Evidence Should Not Be Suppressed Where The Officer Acted In Good Faith.

In the alternative, there is no basis to suppress the evidence found during the search of the defendant's vehicle because the officers were acting "under authority of law" and in reliance upon presumptively valid case law. In this circumstance, the "good faith" exception to the exclusionary rule applies under both the Fourth Amendment and Article 1, § 7, of the Washington constitution.

- i. **The Fourth Amendment Exclusionary Rule is Controlling.**

In his brief, the defendant relies on *Gant* to support his assertion that the warrantless search of his car was invalid. Br. App. 13. *Gant* was decided purely on Fourth Amendment grounds. *Gant*, 129 S. Ct. at 1716. Nor has the Washington Supreme Court reversed its longstanding position

that vehicle searches incident to a lawful arrest are valid under Article 1, § 7. Nor has the defendant made any argument under Article 1 § 7 other than merely citing to it. Br. App. 12. Absent any basis to address state constitutional issues, the defendant's motion for reconsideration should be reviewed solely under federal Fourth Amendment analysis.

ii. **The Fourth Amendment Good Faith Exception To The Exclusionary Rule Applies.**

Absent an exception to the warrant requirement, a warrantless search is impermissible under the Fourth Amendment to the U.S. Constitution. The exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect” by excluding evidence that is the fruit of an illegal, warrantless search. *United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct 613, 38 L.Ed.2d 561 (1974) (emphasis added). Evidence derived directly or indirectly from illegal police conduct is an ill-gotten gain, “fruit of the poisonous tree,” that should be excluded from evidence. *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963). Nevertheless, the United States Supreme Court has recognized that evidence obtained after an illegal search should not be excluded if it was not obtained by the exploitation of the initial illegality. *Wong Sun*, 371 U.S. at 488.

Consistent with these basic principles, the United States Supreme Court in *Michigan v. DeFillippo*, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L.Ed.2d 343 (1979), held that an arrest (and a subsequent search) under a statute that was valid at the time of the arrest remains valid even if the statute is later held to be unconstitutional.

In *DeFillippo*, the Court stated:

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

DeFillippo, 443 U.S. at 37-38.

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality -- with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement. *DeFillippo*, 443 U.S. at 37-38 (emphasis added). The Court further noted that:

[T]he purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which,

at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

DeFillippo, 443 U.S. at 38 (footnote 3, emphasis added).

The Court recognized a “narrow exception” when the law is “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” *DeFillippo*, 443 U.S. at 37-38. Accordingly, in *DeFillippo* the Supreme Court upheld the arrest, search, and subsequent conviction of the defendant even though the statute which justified the stop was subsequently deemed to be unconstitutional.

DeFillippo, 443 U.S. at 40.

The only difference between *DeFillippo* and the present case is that in *DeFillippo* the Court was addressing an arrest based on a presumptively valid statute that was later ruled unconstitutional, whereas here the situation involves a search upheld as constitutional by well-established and long-standing judicial pronouncements. This distinction does not justify a different result. Law enforcement officers should be entitled to rely on established case law – from both the federal and state courts – in determining what searches are deemed constitutional. Indeed, in the area of search and seizure, it is generally the courts that establish the “rules,” not the legislative bodies. Judicial decisions, particular those of the Supreme Court, as to the constitutionally permissible scope of searches

and seizures are clearly entitled to respect, deference, and reliance by officers in the field.

Prior to *Gant*, both the federal and state courts had unequivocally endorsed the constitutional validity of the vehicle searches incident to arrest. See, *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2001); *United States v. Caseres*, 533 F.3d 1064, 1071 (9th Cir. 2008); *United States v. Weaver*, 433 F.3d 1104, 1107 (9th Cir. 2006). Both cases interpret: *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L.Ed.2d 685 (1969); *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L.Ed.2d 768 (1981). This is made explicitly clear in *Gant* which recognized that the Court's prior opinions have "been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. . ." and that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception." *Gant*, 129 S. Ct. at 1718.

Likewise, the constitutionality of the search incident to arrest rule was repeatedly confirmed by the Washington Supreme Court over the past 23 years. See, e.g., *Vrieling*, 144 Wn.2d 489; *State v. Parker*, 139 Wn.2d 486, 489, 987 P.2d 73 (1999); *State v. Johnson*, 128 Wn.2d 431, 441, 909 P.2d 293 (1996); *State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989).

There can be little doubt that officers relied on these specific judicial pronouncements when conducting vehicle searches. Indeed, the

majority opinion in *Gant* emphasized that officers had reasonably relied on pre-*Gant* precedent, and were immune from civil liability for searches conducted in reasonable reliance on the Court's previous opinions. *Gant*, 129 S. Ct. at 1722, n.11.

Accordingly, this case does not fit within the narrow exception recognized in *DeFillippo* when the law is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." The pre-*Gant* cases may now be viewed as flawed, but the repeated judicial reliance on them for almost 30 years demonstrates that the search incident to arrest rule was neither grossly nor flagrantly unconstitutional.

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

At least one federal appellate court has expressly recognized the application of the "good faith" doctrine to *Gant* cases. See, *United States*

v. McCane, 573 F.3d 1037 (10th Cir. 2009). Prior to *Gonzalez* being issued, a federal district court had also applied the good faith doctrine to *Gant* cases. See, *United States v. Grote*, 629 F.Supp.2d 1201 (E.Dist. Wash. 2009). However, another Federal District Court has rejected the application of the good faith doctrine to *Gant* cases. *United States v. Buford*, 623 F. Supp.2d 923 (M.D. Tenn. 2009). It is worth noting that the court in *Buford* failed to consider the United States Supreme Court authority in *DeFillipo*, while the analysis in *Grote* is more rigorous.

In sum, the United States Supreme Court has recognized that the application of the exclusionary rule serves no purpose when officers relied in good faith on a presumptively valid statute. This same reasoning should apply to judicial opinions of long-standing duration. Pursuant to the *DeFillippo* “good faith” exception, the evidence obtained during the search in the present case should not be suppressed, and the defendant’s motion for reconsideration should be denied.

iii. **The Evidence Should Not Be Suppressed Under Article 1, § 7 Because The Search Was Conducted “Under Authority Of Law” And Pursuant To A Presumptively Valid Case Law.**

If the court were to address whether the evidence should be suppressed under an article 1, § 7 exclusionary rule analysis, there is nevertheless no basis to suppress the evidence. This is because the pre-

Gant search was conducted pursuant to authority of law and presumptively valid judicial opinions. See, *State v. Johnson*, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996) (holding that search of a vehicle incident to arrest of an occupant is one of the exceptions to the warrant requirement under Article I, section 7).

In a recent series of cases, the Washington Supreme Court has adopted the “good faith” exception to the exclusionary rule analysis set forth in *Michigan v. DeFillippo*, *supra*. For example, in *State v. Potter*, 156 Wn.2d 835, 132 P.3d 1089 (2006), the defendants maintained that they were unlawfully arrested for driving while their licenses were suspended because, subsequent to their arrests, the State Supreme Court held that the statutory procedures by which the Department of Licensing suspended licenses were unconstitutional. The defendants in *Potter* contended that under article I, section 7, evidence of controlled substances found in their vehicles during searches incident to their arrests had to be suppressed as a result of the illegal arrests.

In a unanimous decision, the Supreme Court applied the *DeFillippo* rule under article I, section 7, and held that an arrest under a statute valid at the time of the arrest remains valid even if the basis for the arrest is subsequently found unconstitutional. *Potter*, 156 Wn.2d at 843, 132 P.3d 1089. The Court stated:

In [*White*,] we held that a stop-and-identify statute was unconstitutionally vague and, applying the United States Supreme Court’s exception to the general rule from

DeFillippo, excluded evidence under that narrow exception for a law “so grossly and flagrantly unconstitutional” that any reasonable person would see its flaws.

Potter, 156 Wn.2d at 843 (quoting *State v. White*, 97 Wn.2d 92, 103, 640 P.2d 1061 (1982) (quoting *DeFillippo*, 443 U.S. at 38)). Under the facts presented in *Potter*, there were no prior cases holding that license suspension procedures in general were unconstitutional, and thus there was no basis to assume that the statutory provisions were grossly and flagrantly unconstitutional. Accordingly, applying *DeFillippo*, the Court affirmed the defendants’ convictions despite the fact that the statutory licensing procedures at issue had subsequently been held to be unconstitutional. *Potter*, 156 Wn.2d at 843.

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

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

Brockob, 159 Wn.2d at 341 n. 19 (quoting *White*, 97 Wn.2d at 103 (quoting *DeFillippo*, 443 U.S. at 38)). As in *Potter*, the Court held that

the narrow exception for grossly and flagrantly unconstitutional laws did not apply “because no law relating to driver's license suspensions had previously been struck down.” *Brockob*, 159 Wn.2d at 341, n. 19.

Potter and *Brockob* have had the effect of overruling *White* (unanimously, in *Potter*) insofar as *White* can be read to reject the *DeFillippo* good faith reliance on a presumptively valid statute. As discussed above, the only difference between these cases and the present case is that the present case involves presumptively valid case law, as opposed to a presumptively valid statute. This distinction has no bearing on the analysis: the judicial opinions of the State Supreme Court are at least as presumptively valid as legislative enactments.

Applying the analysis from *DeFillippo*, *Potter*, and *Brockob*, the good faith exception to the exclusionary rule applies. Moreover, as previously discussed, there were an overwhelming number of judicial opinions affirming the validity of vehicle searches incident to arrest. This case law was presumptively valid at the time the defendant was arrested. The narrow exception to *DeFillippo* does not apply; that is, there was no gross or flagrant unconstitutionality. Accordingly, the search incident to arrest of the defendant’s vehicle should be upheld because the search was conducted in good faith, under authority of law, and pursuant to presumptively valid case law.

iv. **The McCormick Court's Rejection
of the Good Faith Exception Was
Erroneous**

The court in *McCormick* concluded that *White* is controlling and that it holds that the good faith exception does not apply in Washington. For the reasons stated above, the State's position is that the *McCormick* court's interpretation of *White* is mistaken, and in any case *White* has been distinguished and superseded by *Potter* and *Brockob*. As noted above, the courts in *Potter* and *Brockob* expressly noted that *White* involved a flagrantly unconstitutional statute, and was thus consistent with *DeFillipo*.

The *McCormick* court's reliance on *United States v. Gonzalez* is also misplaced. *McCormick*, 216 P.3d at 478 (citing *United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009)). First, in *United States v. McCane*, the Tenth Circuit Court of Appeals has affirmed the applicability of the good faith doctrine to *Gant* challenges. *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009). While the court in *McCane* applied the good faith doctrine to *Gant* cases, it did not expressly consider good faith in relation to retroactivity.

Second, the court's opinion in *Gonzalez* was poorly reasoned for several reasons. It failed to recognize that the issue of the retroactive application of a change in the law is a completely separate issue from

whether the remedy of suppression is available. The fact that suppression may be unavailable as a remedy does not thwart retroactive application of the law. Rather, the effect of that application simply does not produce the outcome that the defendant hopes for.

It should also be noted that the application of the good faith doctrine would in no way cause similarly situated defendants to be treated differently. The good faith doctrine would apply equally to all defendants whose suppression challenges are based on the same intervening change in the law. To the extent that there might be some defendant whose search was unlawful, but for some reason did not involve good faith reliance by the officer, that defendant would not be similarly situated with the other defendants whose cases did involve good faith reliance.

Moreover, the policy reasons behind the good faith doctrine are more applicable where law enforcement has relied upon a court's interpretation of the law, rather than where law enforcement has relied upon legislation. In *Illinois v. Krull*, the court in applying good faith held that the exclusionary rule does not apply to evidence obtained by police who acted in objective reasonable reliance upon a state statute. *Illinois v. Krull*, 480 U.S. 340, 349-350, 107 S. Ct. 1160, 94 L.Ed.2d 364 (1987). In reaching that holding, the court noted that the exclusionary rule is aimed at deterring police misconduct and that legislators, like judicial officers, are

not the focus of the rule. *Krull*, 480 U.S. at 350. Because a change in case law is made by judicial officers, the reasoning of *Krull* is even more applicable to officer's reliance on the court's published opinions. *See, Krull*, 480 U.S. at 350. Indeed, as the court in *Krull* noted, in *State v. Leon*, it already endorsed the position that law enforcement may rely on the actions of judicial officers. *See, Krull*, 480 U.S. at 350 (citing *United States v. Leon*, 468 U.S. 897, 916, 104 S. Ct. 3405, 82 L.Ed.2d 677 (1984)). To the extent that the court in *Gonzalez* attempts to rely on *Krull*, that reliance is misplaced. *Gonzalez*, 578 F.3d at 1132.

Again, in the context of good faith, the court in *McCormick* has misconstrued the meaning of treating similarly situated defendants the same, by treating as the same defendants who are in fact not similarly situated. It then elevated that misinterpreted principle above all other legal doctrines (waiver and good faith) without fully or fairly considering either the scope or purpose of the respective doctrines. Just as the doctrines of waiver and retroactivity are complementary doctrines that neither thwart or undermine each other, similarly, the doctrines of good faith and retroactivity are also complementary doctrines that do not conflict. To the extent the courts in *Gonzalez* and *McCormick* held otherwise, it erred and should not now be followed.

c. The Defendant Cannot Later Claim Ineffective Assistance Of Counsel

The defendant has not yet alleged ineffective assistance of counsel as a result of the failure to raise a suppression challenge related to the lawfulness of the search of the vehicle incident to the Bliss's arrest. In anticipation that the defendant might assert such an argument, neither should the defendant now be permitted to raise such a challenge in the reply brief. An appellate court will generally refuse to consider a constitutional question which is raised only in a reply brief. *See State v. Alton*, 89 Wn.2d 737, 575 P.2d 737 (1978). 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).

Counsel, whether in recommending that his or her client enter a plea or that a suppression issue not be pursued, is not ineffective for failing to forecast changes or advances in the law. *See, e.g., In re the Personal Restraint Petition of Benn*, 134 Wn.2d 868, 939, 952 P.2d 116 (1998) (counsel could not be faulted for failing to anticipate a change in the law); *Sherrill v. Hargett*, 184 F.3d 1172, 1176 (10th Cir.), *cert. denied*, 528 U.S. 1009 (1999); *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th

Cir.), *cert. denied*, 519 U.S. 1119 (1993) ("The Sixth Amendment does not require counsel to forecast changes or advances in the law, or to press meritless arguments before a court."); *Johnson v. Armontrout*, 923 F.2d 107, 108 (8th Cir.), *cert. denied*, 502 U.S. 831 (1991) (same); *Elledge v. Dugger*, 823 F.2d 1439, 1443 (11th Cir. 1987) ("Reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop."). Thus, any argument by the defendant that his conviction must be vacated due to his counsel's failure to pursue a suppression motion under the rule announced in *Gant* must fail. This is because the propriety of counsel's conduct must be viewed at the time counsel was required to act. See *Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir.), *cert. denied*, 537 U.S. 1093 (2002) ("we have rejected ineffective assistance claims where a defendant 'faults his former counsel not for failing to find existing law, but for failing to predict future law' and have warned that clairvoyance is not a required attribute of effective representation.") (quoting *United States v. Gonzalez Lerma*, 71 F.3d 1537, 1542 (10th Cir. 1995)); *United States v. Chambers*, 918 F.2d 1455, 1461 (9th Cir. 1990) (counsel's conduct was not deficient when, at the time of trial, the instruction given to the jury was the standard instruction that had been approved by the appellate court).

The defendant fares no better by arguing that his conviction occurred after the Supreme Court granted review in *Gant* on February 25, 2008. *Arizona v. Gant*, ___ U.S. ___, 128 S. Ct. 1443, 170 L.Ed.2d 274

(2008). Counsel is not required to preserve an issue after a higher court has granted review of an intermediary appellate court's decision, but not yet passed upon the propriety of the lower court's reasoning. See *United States v. McNamara*, 74 F.3d 514, 516-17 (4th Cir. 1996) (counsel was not constitutionally deficient for following controlling law of circuit that willfulness was not an element of structuring financial transactions to avoid currency reporting requirements, even though the Supreme Court had granted certiorari on that issue at the time legal advice was given; "an attorney's failure to anticipate a new rule of law was not constitutionally deficient"); *Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995), cert. denied, 517 U.S. 1171 (1996) (trial counsel in capital case was not constitutionally ineffective for failing to preserve an issue at trial based merely on the Supreme Court's grant of certiorari in a case which raised the issue); *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991) (ruling that trial counsel was not ineffective by failing to raise *Batson* challenge two days before *Batson* was decided), cert. denied, 504 U.S. 920 (1992).

2. THERE STATE'S WITNESS DID NOT IMPORPERLY COMMENT ON ABUAN'S RIGHT TO REMAIN SILENT

Where a defendant raises a claimed constitutional error for the first time on appeal, the defendant has the burden of showing that the error was manifest. *State v. Gregory*, 158 Wn.2d 759, 837, 839, 147 P.3d 1201 (2006) (citing RAP 2.5(a)). In *State v. 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. [...]” *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

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).

The State may not use a defendant’s post arrest silence as evidence of guilt or seek to exploit that silence. *State v. Carnahan*, 130 Wn. App. 159, 167-68, 122 P.3d 187 (2005); *State v. Davis*, 38 Wn. App. 600, 686 P.2d 1143 (1984).

However, Washington courts distinguish between a comment on the right to remain silent, which is prohibited, and a mere reference to the

defendant's silence, which is not prohibited. *State v. Lewis*, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996); Tegland, Karl, Washington Practice, vol. 5B, Evidence Law and Practice, Fifth Edition § 801.46, n. 4, c. 2007. "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *Lewis*, 130 Wn.2d at 707. Where a reference to defendant's silence is not used as substantive evidence it is not a comment. *Lewis*, 130 Wn.2d at 706-07.

Similarly, in *State v. Pottorff* the court distinguished between direct and indirect comments on the right to remain silent. *State v. Pottorff*, 138 Wn. App. 343, 346-47, 156 P.3d 955 (2007) (citing *State v. Romero*, 113 Wn. App. 779, 790, 54 P.3d 1255 (2007)). "A direct comment occurs when a witness or State agent makes reference to the defendant's invocation of his or her right to remain silent. [...] ('I read him his Miranda warnings which he chose not to waive, would not talk to me')" *Pottorff*, 138 Wn. App. at 346-47. An indirect comment occurs when a witness or State agent references a comment or action by the defendant which could be inferred as an attempt to exercise the right to remain silent (officer did not testify the defendant refused to talk, but

rather that the defendant claimed he was innocent)” *Pottorff*, 138 Wn. App. at 347. Indirect comments are reviewed under the lower nonconstitutional harmless error standard. *Pottorff*, 138 Wn. App. at 347.

Here, Officer Bair had interviewed the defendant in the jail twice regarding the crimes in this case. In the first interview, Abuan initially denied that he was involved with the drive-by shooting, but after being told that other persons had implicated him, he shook his head up and down indicating that he had been involved. 6 RP 646, ln. 8-21. At that point, he began to discuss the case with Detective Bair. 6 RP 648, ln. 4-6. The defendant identified who was in the vehicle with him, and claimed that they went to the location of the crime only to flash gang signs, and then something different happened once they got there. 6 RP 648, ln. 4 to p. 650, ln. 24. One of the persons Abuan claimed was in the vehicle had a very solid alibi, and the officer was able to exclude that person as not present. 6 RP 652, ln. 17-25.

This led Detective Bair to conclude that some of the information Abuan provided in the first interview was not accurate. 6 RP 653, ln. 7-10. As a result, on August 20, three days after the first interview, Detective Bair interviewed the defendant a second time. 6 RP 653, ln. 11 to p. 655, ln. 2.

Detective Bair first confronted Abuan with the fact that he had lied about one of the persons he claimed was in the vehicle and Abuan agreed that he had lied. 6 RP 655, ln. 5-7. Abuan said that he had gotten together [apparently in custody] with Raymond Howell, the front passenger, and they had talked about Detective Bair's having discussed the case with Abuan. 6 RP 655, ln. 7-10. Abuan then claimed that he had been high on narcotics when he made the earlier statement, and that he wasn't in the car, and claimed that a person named Jeremy was the one that actually fired, but that he [Abuan] hadn't been there. 6 RP 655, ln. 10-15.

Detective Bair then told the defendant he had coordinated his story with Raymond Howell. 6 RP 655, ln. 16 to p. 656, ln. 8; p. 660, ln. 1-6.

At trial Detective Bair then testified as follows:

Q [Pros.]: Now, I believe, chronologically, after he told you that Jeremy is the one who fired, correct me – that is the point where you said he had already confessed. Now you had spoken with Raymond or Howell. You have conveniently gotten your story straight.

A [Det. Bair]: That's correct.

Q: Did he admit to that?

A: He didn't say that he had gotten his story straight. He didn't come out and tell me that, yeah, we've got our story straight. He implied that. And then he didn't want to talk about it anymore after that once I confronted him that I believe that's what took place.

The Detective's statement was not a comment on the defendant's right to remain silent. Rather, it was an explanation of the course of the interview in response to the prosecutor's question about the chronology of the statements, as well as the extent to which the defendant admitted coordinating his story with Howell.

Nor did the prosecutor refer to the defendant's silence in closing. See, 16 RP 53, ln. 1-22.

Here, while detective Bair may have referred to the defendant's silence, he only did so in the context of explaining the chronology of Abuan's statements. In doing so, he did not comment on Abuan's right to remain silent. Even if the court were to hold that Detective Bair's statement was error, any such error was nonetheless harmless. Accordingly, the defendant's challenge is without merit and should be denied.

3. THERE WAS SUFFICIENT EVIDENCE OF
ABUAN'S GUILT AS TO COUNT VI (ASSAULT
IN THE SECOND DEGREE)

The standard of review for sufficiency of the evidence is addressed in the preceding section and incorporated herein by reference.

The State was required to prove that Abuan or an accomplice assaulted Fomai Leoso with a deadly weapon on or about August 15, 2007. CP (Abuan) 150; *State v. Eastmond*, 129 Wn.2d 497, 499-500, 919

P.2d 577 (1996) (*overturned on other grounds, State v. Easterlin*, 159 Wn.2d 203, 208, n. 2, 149 P.3d 366 (2006)).

Here, the jury was instructed,

An assault is an act done with the intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied with the apparent present ability to inflict bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP (Abuan) 144.

The State must prove fear as a necessary element of assault by attempt to cause fear. *Eastmond*, 129 Wn.2d at 503-04. However, the State need not prove fear in fact as a necessary element of assault by attempt to cause injury. *Eastmond*, 129 Wn.2d at 504.

“Whether or not an assault occurs in a particular case depends more on the apprehension created in the mind of the person assaulted than in the undisclosed intention of the person assaulting. *State v. Murphy*, 7 Wn. App. 505, 511, 500 P.2d 1726 (1972). The assault charge is supported by the facts so long as there is a reasonable factual basis in the victim to support a fear of future harm. *State v. Ratliff*, 77 Wn. App. 522, 525, 892 P.2d 118 (1995).

Here, there was sufficient evidence for the jury to find Abuan guilty of assault in Count VI under either alternative means.

On August 15, 2007, Fomai Leoso was home talking on the phone when he heard at least six or seven gunshots. 10 RP 1287, ln. 7-22. When the shooting started, Fomai was inside and unable to see who was shooting or what was happening. 10 RP 1287, ln. 23 to p. 1288, ln. 5. He then ran outside and saw his brother outside walking back with his uncle. 10 RP 1288, ln. 8-12. After a couple of minutes, Fomai and his brother got into their car and attempted to follow the vehicle that shot at them, but were stopped by police. 10 RP 1288, ln. 12 to p. 1291, ln. 19. They told the officers that whoever was firing shot into the house and some bullets went into the wall on the outside of the house. RP 1317, ln. 1-17.

Here, where Abuan or an accomplice fired the gun at the residence of Fomai Leoso and hit the garage, the jury could find that the defendant or his accomplice assaulted Fomai Leoso. They could find that this was an act that was intended to inflict bodily injury on Fomai Leoso. In the alternative, the jury could find that it was an act to create fear of bodily injury in Fomai. Moreover, where the shots hit Fomai's residence, once he heard the first shot, the jury could reasonably infer that he feared future injury from the subsequent shots, even if he couldn't see who was shooting.

4. SUFFICIENT EVIDENCE SUPPORTED THE
JURY'S FINDING OF THE GANG
AGGRAVATOR AS TO BLUEHORSE

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In

considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[...]great deference [. . .] is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

Here, there was ample testimony that Bluehorse had flashed gang signs at the defendant on prior occasions. *See*, e.g. 8 RP 970, ln. 9-16. There was also evidence that Bluehorse was previously involved in the prior July 4 drive-by shooting of the Leoso’s residence. 10 RP 1293, ln. 2-14. Finally, there was evidence that Bluehorse was the shooter here in what was part of a pattern of gang motivated activity, and that Bluehorse

threw up gang signs after he completed the shooting. 8 RP 1016, ln. 16-24; p. 1020, ln. 1-25; p. 1027, ln. 10-16; p. 1028, ln. 15 to p. 1029, ln. 16.

5. BLUEHORSE'S EXCEPTIONAL SENTENCE OF 108 MONTHS WAS NOT CLEARLY EXCESSIVE.

A claim that a defendant's exceptional sentence was clearly excessive is reviewed for abuse of discretion. *State v. Alvarado*, 164 Wn.2d 556, 560-61, 192 p.3d 345 (2008) (citing *State v. Law*, 154 Wn.2d 85, 92, 110 P.3d 717 (2005) (citing RCW 9.94A.585)).

Here, the defendant has failed to show that the trial court abused its discretion. Indeed, the court's sentence was not unreasonable given that the jury found the gang aggravator and because the shots fired by Bluehorse or his accomplice hit Leoso's residence, penetrated the structure and could have injured third parties including children. 8 RP 1015, ln. 21 to p. 1017, ln. 12; 10 RP 1257, ln. 14-20; p 1287, ln. 7-22; p. 1317, ln. 1-17.

The court's sentence was a reasonable exercise of discretion to discourage this kind of conduct.

6. ABUAN'S SENTENCE IS NOT INDETERMINATE WHERE ABUAN RELIES ON *STATE V. LINERUD* AND THE SUPREME COURT OVERTURNED *LINERUD*.

The defendant cites *State v. Linerud* for the proposition that where a court imposes a sentence consisting of a period of incarceration and a

period of community custody, the total of which exceeds the statutory maximum, the court must specify how much time is to be served in incarceration and community custody respectively, or the sentence is indeterminate and legally invalid. *State v. Linerud*, 147 Wn. App. 944, 197 P.3d 1224 (2009). However, the court's opinion in *Linerud* was overturned by the Supreme Court in *In Re Personal Restraint of Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009). In *Brooks*, the court held that a sentence is not indeterminate if it includes both a defined range and a determinate maximum. *Brooks*, 166 Wn.2d at 674.

Brooks is controlling and directly on point with this case. Abuan's sentence here does not violate *Brooks*.

Here, the court imposed a sentence on Abuan consisting of 108 months of incarceration, plus 18 to 36 months of community custody time, for a total sentence of 126 to 144 months. The Statutory maximum for the defendant's crime is 120 months.

Here the court imposed a sentence of 108 months to be served in custody, and up to 18-36 months of community custody, and also specified that the defendant's sentence could not exceed the statutory maximum of 120 months. This complies with the requirements of *Brooks*. Accordingly, the defendant's challenge on this matter is without merit.

7. THE STATE'S CONCEDES THE TRIAL COURT ERRED WHERE IT FAILED TO ENTER WRITTEN FINDINGS AND CONCLUSIONS IN SUPPORT OF THE EXCEPTIONAL SENTENCES.

RCW 9.94A.535 requires that:

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.

The requirement of written findings and conclusions is mandatory.

State v. Hale, 146 Wn. App. 299, 306-07, 189 P.3d 829 (2008). However, that requirement may result in an absurd or strained result where the jury has already found the aggravating factor beyond a reasonable doubt.

Hale, 146 Wn. App. at 306, fn. 4. Moreover, where such a finding is implicit in the record, a remand may not be necessary. *State v. Poston*, 138 Wn. App. 898, 158 P.3d 1286 (2007), *review denied* 163 Wn.2d 1016, 180 P.3d 1291.

Here, the court did not enter written findings and conclusions in support of its imposition of an exceptional sentence. However, the jury found the gang aggravator beyond a reasonable doubt in a special verdict form, and such a finding is implicit in the record as the basis for the court's imposition of the exceptional sentence. 15 RP 1820, ln. 20 to p. 1825, ln. 19. Accordingly, the court's error was harmless and without prejudice to the defendant.

D. CONCLUSION.

The defendant is not entitled to relief under *Arizona v. Gant* because he waived the issue where he failed to raise it below, and because the officer acted in good faith on then existing precedent. The court's opinion in *State v. McCormick* was flawed and the court should instead follow *State v. Millan*.

The reference by a State's witness to Abuan's decision to stop talking to the officer was not a comment on the defendant's right to remain silent where it was not used as substantive evidence against the defendant. Sufficient evidence existed for the jury to find that Abuan or an accomplice assaulted Fomai Leoso where multiple shots were fired at his house while he was inside, and he was aware of those shots.

Sufficient evidence supported the jury's finding of the gang aggravator against Bluehorse. Bluehorse's exceptional sentence was reasonable where the jury found the gang aggravator.

Abuan's sentence was sufficiently determinate where it complied with the requirements of *In Re Personal Restraint of Brooks*, which overruled *State v. Linerud*, the case relied upon by the defendant. The trial court's failure to enter written findings in support of Bluehorse's

exceptional sentence was harmless error where the jury found the
aggravator, and it is clear from the record that was the court's basis for
imposing the exceptional sentence.

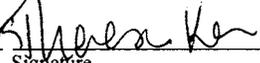
DATED: October 22, 2009.

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Pierce County
Prosecuting Attorney


STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

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.

10-22-09 
Date Signature

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