

83525-0

No. 83613-2

Court of Appeals No. 37172-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO JAVIER MILLAN,

Petitioner.

SUPPLEMENTAL ARGUMENT IN SUPPORT OF
PETITION FOR REVIEW
(based upon subsequent caselaw)

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On review from the Court of Appeals, Division Two,
and the Superior Court of Pierce County

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A. IDENTITY OF PARTY

Francisco Javier Millan, petitioner, presents this supplemental argument asking this Court to review the decision of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Petitioner is seeking review of the three published decisions of the court of appeals, Division Two, in State v. Millan, 151 Wn. App. 492, 212 P.3d 603 (2009).

C. SUPPLEMENTAL ISSUE PRESENTED FOR REVIEW

The issues in this case involve the proper application of the U.S. Supreme Court's decision in Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), to cases where, as here, the defendant did not move to suppress the evidence below based upon controlling precedent at the time but raised the issue on appeal once Gant held that the search was unconstitutional.

In the published decisions of State v. McCormick, 152 Wn. App. 536, 216 P.3d 475 (2009), and State v. Harris, ___ Wn. App. ___, ___ P.3d ___ (2010 WL 45755) (January 7, 2010), decided after the Petition for Review was filed in this case, two panels of judges from Division Two

different from the panel which decided Mr. Millan's case specifically disagreed with the decision in this case. Other cases with different judges have cited the decision in this case with approval. Should review be granted under RAP 13.4(b)(2) because the published decision in this case is in direct conflict with the published decisions in McCormick and Harris?

Further, should review be granted under RAP 13.4(b)(4) to address the very significant public policy issue which exists now that there are competing, inconsistent published decisions on the same issue and guidance from this Court is required?

D. SUMMARY OF ARGUMENT

The three published decisions in this case have caused great confusion and conflict within the lower appellate courts, as evidenced by competing decisions, some citing this case with approval and some explicitly rejecting the reasoning of this case as unsound.

In McCormick, supra, a different panel of judges from the same division as decided this case specifically rejected it, finding that the reasoning used was contrary to established law and "justice demands that similarly situated defendants whose appeals are pending review deserve

like treatment following a change in the law.” 152 Wn. App. at 476-77. Similarly, in Harris, supra, the panel held that it would not follow this case because this case’s conclusion was “simply unfair, and a contradiction of the Supreme Court’s retroactivity rule.” __ Wn. App. at __ (slip. Op at 11).

In addition to the grounds set forth in Mr. Millan’s Petition for Review, this Court should also grant review under RAP 13.4(b)(2) in order to address the direct conflict between this case and the decisions in McCormick and Harris. Further, because the caselaw as it stands includes conflicting, published rulings on the same exact issue, review should be granted under RAP 13.4(b)(4) as a matter of public policy because the existing cases provide only confusion and a definitive ruling from this Court is required in order to give guidance to the lower courts on how to handle this important constitutional issue.

E. SUPPLEMENTAL ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW TO ADDRESS THE CONFUSING, CONFLICTING PUBLISHED DECISIONS WHICH HAVE NOW ISSUED, BOTH FOLLOWING AND REJECTING THE PUBLISHED DECISIONS IN THIS CASE

Under RAP 13.4(b)(2), one of the grounds upon which review is

granted by this Court is when there are conflicting decisions of the courts of appeals. In this case, since Mr. Millan's initial Petition was filed, several cases have issued, some of which conflict with the decision in this case and some of which follow it. In addition to the reasons set forth in Mr. Millan's Petition, this Court should also grant review under RAP 13.4(b)(2), based upon the developments in caselaw since the Petition was filed. Further, review should be granted as a matter of public policy under RAP 13.4(b)(4), because the ongoing conflict in published decisions has led to confusion and uncertainty for parties, judges and the public on what is the proper state of the law on the issue and the result is inconsistent rulings for defendants who are similarly situated.

First, review should be granted under RAP 13.4(b)(2), because there is now an ongoing conflict between a line of cases following the decision in this case and a line of cases specifically rejecting this case - all within the same division of the court of appeals.

The three separate decisions in this case were issued by Judges Quinn-Brintnall, Bridgewater and Hunt. See Millan, 151 Wn. App. at 492. In State v. McCormick, *supra*, issued after the decision in this case, Judges Houghton, Armstrong and Penoyar of Division Two specifically

rejected the ruling of this case as unsound, unfair and contrary to settled law. 152 Wn. App. at 476-77. First, the Court noted the controlling precedent on whether new constitutional rulings of the United States Supreme Court apply "retroactively," i.e., to cases where trial is complete but direct review still pending:

The Supreme Court has firmly established that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Likewise, in Johnson, the Court decried the "actual inequity that results" when similarly situated defendants receive different treatment after a change in the law. United States v. Johnson, 457 U.S. 537, 556 n. 16, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) (emphasis omitted); see State v. Counts, 99 Wash.2d 54, 57, 659 P.2d 1087 (1983) (applying Johnson and adopting retroactivity in "all cases still pending on direct appeal at the time of the new decision").

152 Wn. App. at 476. Next, the Court went on to criticize the decision in this case as contrary to that established, controlling law and fundamental tenets of fairness:

In Millan, we held that because Millan did not move to suppress at trial, he waived his Gant issue on appeal under RAP 2.5(a). But the reasoning in Millan is contrary to established law. McCormick does not prevail on appeal because she moved to suppress at trial, but because justice demands that similarly situated defendants whose appeals are pending direct review deserve like treatment following a change in the law. We agree with the basic fairness represented by the Supreme Court's holding in Griffith and

Johnson and follow our Supreme Court's recognition of these holdings in Counts. We therefore reject Millan's reasoning and hold that under both RAP 2.5(a) and controlling precedent, McCormick has preserved the matter for appeal because the Supreme Court's opinion in Gant applies retroactively to all similarly situated defendants in Washington.

152 Wn. App. at 476-77 (citations omitted).

McCormick, however, did not end the story by causing a wholesale departure from the holding in this case. In other cases, judges including those who initially decided this case, have cited the decision in this case with approval. See, State v. Snapp, ___ Wn. App. ___, 219 P.3d 971 (November 9, 2009) (Judges Bridgewater, Hunt and Quinn-Brintnall) (citing Millan with approval but addressing the issue because a challenge was raised below); State v. Bliss, ___ Wn. App. ___, ___ P.3d ___ (November 17, 2009) (2009 WL 3823332) (Judges Hunt, Quinn-Brintnall and Houghton) (noting that Millan had held that the issue had to be “preserved” below but that it had been done in that case).

These cases make it clear there is an ongoing, public dispute within Division Two of the court of appeals about whether to follow the mandates of Griffith and apply Gant to cases pending review or whether it should find a “waiver” for defendants who failed to somehow anticipate Gant's significant change in the law. And indeed, although it has not yet

addressed the question, Division Three has cited McCormick with approval and appears ready to follow that case, rather than this one. See State v. Brandenburg, ___ Wn. App. ___, ___ P.3d ___ (Dec. 29, 2009) (2009 WL 5099678) (slip Op. at 1).

More recently, in State v. Harris, *supra*, a published decision issued January 7, 2010, Judges Armstrong and Penoyar followed McCormick and rejected the holding in this case. After first noting the holdings of Griffith and its progeny, the Court noted that the rulings of those cases were “clear” and “compelling.” ___ Wn. App. at ___ (slip Op. at 4-5). It then noted that Harris was, of course, unaware of the change in the law which would occur when Gant was decided well after his conviction, comparing the situation to the one in which defendants who had not challenged imposition of their exceptional sentences based upon improper fact-finding by a trial court were nevertheless allowed to do so on appeal following a supreme court decision mandating jury fact-finding for such cases. Harris, ___ Wn. App. at ___ (slip Op. at 7-8).

At that point, the Harris majority recognized the holding in this case but found it to be legally unsound and based upon unpersuasive authority, because none of the federal cases upon which Millan applied

“involved a change in the applicable constitutional right between the time of trial and appeal.” Harris, ___ Wn. App. at ___ (slip Op. at 10). The majority then chose to follow McCormick, concluding “[i]t is simply unfair, and a contradiction of the Supreme Court’s retroactivity rule, to hold that an appellant cannot challenge a search made unlawful by intervening case law.” Harris, ___ Wn. App. at ___ (slip Op. at 11).

Not surprisingly, in Harris, Judge Quinn-Brintnall, one of the authors of the decision in this case, dissented, indicating that she felt “constrained” to hold that Gant applied to the case but that she would follow Millan and hold that the issue was “waived” by Harris’ failure to raise it below. Harris, ___ Wn. App. at ___ (Quinn-Brintnall, J., dissenting).

Thus, since the three published decisions issued in this case, there has been a conflict between judges in the same division over whether it was proper or in error. The result is that there are now two lines of cases - some of which follow this case and would find “waiver” based upon a defendant’s failure to anticipate the ruling in Gant and raise the issue at trial, and some of which reject the holding in this case as unsound, unfair and improper given the settled law of Griffith and its state and federal

progeny. Review should be granted under RAP 13.4(b)(2) to address this very significant, very serious and confusing situation and clarify which of the two lines of cases will control. Review should also be granted under RAP 13.4(b)(4) because the existence of the two divergent and completely contradictory holdings on the issue has not only created confusion, it has created disparity in how a defendant is treated, with some receiving relief which others in the same situation are being denied. The important public policies of fairness within the system and respect for judicial rulings are thus at stake, and this Court should grant review in order to settle the law.

F. CONCLUSION

For the reasons stated in Mr. Millan's original Petition for Review and the reasons stated herein, this Court should accept review of the decision of Division Two of the court of appeals in this case

DATED this 19th day of January, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Supplemental Petition for Review to opposing counsel and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows:

- To: Steven Trinen, Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave S., Tacoma, WA. 98402
- To: Francisco Millan, .DOC 839093, Monroe Corr. Center, PO Box 777, Monroe, WA. 98272-0777.

DATED this 19th day of January, 2010.


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