

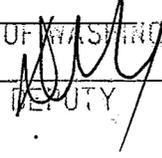
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DIVISION II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY   
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

FRANCISO MILLAN, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Judge Thomas P. Larkin

No. 07-1-01782-0

**Brief of Respondent to Supplemental Brief of Appellant**

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

1. Whether the defendant waived any argument challenging the lawfulness of the search where the issue was not raised below and no objection was made to the admission of the evidence?
2. Whether the evidence should have been admitted under the good faith exception even if the court were to hold the search was unlawful?
3. Whether the defendant is also subsequently precluded from also claiming ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

On April 2, 2007 Francisco Millan was charged in Count I with unlawful possession of a firearm, and in count II with driving with a suspended license based on an incident that occurred on April 1, 2007. CP 1-2. An attorney for the Department of Assigned Counsel filed a notice of appearance on April 5, 2007. CP 4. Eleven days later, on April 16, 2007 a new attorney filed a notice of appearance on the case. CP 5.

An omnibus order was entered on July 11, 2007. CP 107. On that order, regarding suppression of physical evidence or identification, the box was checked that the defendant's motion to suppress would be filed by a deadline to be filled in, however, no deadlines were filled in either for

the defense or the prosecution. CP 107. The order also listed inadvertent possession as a defense. CP 107. No suppression motion was ever filed or heard.

The case was assigned for trial. 1RP p. 4. Prior to the start of trial the defendant pleaded guilty to Count II, driving on a suspended license. 1 RP, p. 10, ln. 8-10; p. 11, ln. 1-6; p. 30 to p. 32. He then proceeded to trial on count I, unlawful possession of firearm, and the jury convicted the defendant. CP 24. The defendant was sentenced on December 7, 2007. CP 63-74.

This appeal was filed timely on January 2, 2008.

The briefing was completed on February 10, 2009 and on April 16, 2009 the matter was scheduled for non-oral argument calendar. On May 11, 2009 the defendant filed a motion for a supplemental brief, along with the brief. The court granted the motion for the supplemental brief and directed the State to respond by June 5. The State now files this response.

## 2. Facts

Tacoma Police Officers Shipp and Caber were dispatched to a report of a possible domestic violence incident. CP 3. The calling party reported that a man had pulled a female into his vehicle. CP 3. The caller followed the vehicle until the police could effect a stop. CP 3. Witnesses advised the officers that they had seen the driver [Millan] pull the female [Millan's wife] into the car by her hair and punch her in the face at least

five times. Millan's driver's license was suspended. CP 3. *See also* 2 RP 64, ln. 18 to p. 66, ln. 3; p. 68, ln. 10-16. A search of the vehicle revealed a .380 semi-auto handgun that was in with the reach of Millan, located in the back seat driver's side floor board. CP 3. It was balanced upside down in its spine. 2RP 91, ln. 18 to p. 92, ln. 2; p. 99, ln. 19 to p. 100, ln. 11.

C. ARGUMENT.

1. THE DEFENDANT HAS WAIVED ANY CHALLENGE TO THE SEARCH OF THE VEHICLE PURSUANT TO *ARIZONA V. GANT*.

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, \_\_\_ L. Ed. 2d \_\_\_ (April 21, 2009). *See* Supp. Br. App., p. 3. The defendant asserts, in a footnote, 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. *See* Supp. Br. App., p. 5, n. 1. 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).

concession

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. However, 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 it was not raised before the trial court. Even though *Gant* applies retroactively, it only affects those cases where error was preserved below so that the issue in *Gant* is properly before this court. 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. Waiver Under The Law Of Washington

It is long and well established under both the State and Federal constitutions that if an objection to evidence that was allegedly obtained illegally is not asserted timely, it is waived. *See State v. Gunkel*, 188 Wash. 528, 535-36, 63 P.2d 376 (1936); *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638 (1966); *State v. Duckett*, 73 Wn.2d 692, 694-95, 440 P.2d 485 (1968). Where a defendant fails to assert a suppression issue at the trial court level, the defendant has waived that argument and may not raise the issue for the first time on appeal. *State v. Mierz*, 127 Wn.2d 460 468, 901 P.2d 286 (1995); *See also State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967), *cert. denied*, 389 U.S. 871 (1967). The issue is also waived where a defendant raises a suppression issue at the trial court, but fails to pursue the issue. *State v. Massey*, 60 Wn. App. 131, 803 P.2d 340 (1991). Additionally, 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). However, in *State v. Kitchen*, the court did consider a constitutional issue raised for the first time in a reply brief where that issue related to the basic constitutional right to a unanimous jury verdict. *State v. Kitchen*, 46 Wn. App. 232, 730 P.2d 103 (1986), *affirmed* 110 Wn.2d 403, 756 P.2d 18 (1982). Accordingly, the error in *Kitchen* was presumably a manifest constitutional error.

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

CrR 3.6 motions to suppress evidence are heard prior to the time the case is called for trial. *See* Ferguson, 12 & 13 Washington Practice: Criminal Practice and Procedure, Chap. 23 (3d Ed) (citing CrR 4.5(d)); Tegland, 4A Washington Practice Rules Practice, CrR 3.6. Such a standard is implicit in the language of CrR 3.6 where the rule requires the moving party to set forth in a declaration the facts the party expects to be elicited in the event there is an evidentiary hearing. CrR 3.6(a). A pre-trial hearing is further implicated by the rule's language that based upon the pleadings the court is to determine whether an evidentiary hearing is required. CrR 3.6(b). All of this implicitly requires a pre-trial hearing. The requirement of a pre-trial hearing is also consistent with the legal standards in Washington prior to the adoption of rule CrR 3.6. *State v. Simms*, 10 Wn. App. 75, 77, 516 P.2d 1088 (1973) (citing *State v. Baxter*, 68 Wn.2d 416, 422, 413 P.2d 638 (1966)); *State v. Robbins*, 37 Wn.2d

431, 224 P.2d 345 (1950)). Moreover, nothing in CrR 3.6 permits or contemplates successive suppression motions.

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

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

Waiver for failure to raise the issue before the trial court applies to suppression motions even where the claimed issue is a constitutional one and there is a reasonable possibility the motion to suppress would have been successful if the issue had been raised. *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990); *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). This is because the exclusion of improperly obtained evidence is a privilege that may be waived, and the fact that it was not raised is *not* an error in the proceedings below. *See Tarica*, 59 Wn. App. at 372 (citing *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)). In *State v. Baxter*, the court held that the defendant's motion to suppress evidence at the end of the State's case was too late where the defendant was well aware of the circumstances of his

arrest at the time the allegedly unlawful evidence was entered. *Baxter*, 68 Wn.2d at 416.

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

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

The court in *Valladares* went on to hold that where the defendant failed to pursue a challenge to evidence that might have been suppressible, the admission of that evidence was not a clear violation of the defendant's due process rights and was therefore not a manifest constitutional error that could be raised for the first time on appeal. *Valladares* 31 Wn. App. at 76 (citing *Baxter*, 68 Wn.2d at 413). Valladares appealed to the Washington Supreme Court, which agreed with and affirmed the Court of

Appeal's analysis on this issue of waiver. See *Valladares*, 99 Wn.2d, at 671-72. The Supreme Court held that by, "withdrawing his motion to suppress the evidence, *Valladares* elected not to take advantage of the mechanism provided for him for excluding the evidence," and thus waived or abandoned his objections. *Valladares*, 99 Wn.2d at 672.

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

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

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the

court must address the merits of the constitutional issue. Finally, if the determines that an error of constitutional import was committed, then and only then, the court undertakes a harmless error analysis.

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

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

Notwithstanding all the controlling precedent on RAP 2.5(a)(3), in *State v. Littlefair* the court held otherwise and ruled that a suppression issue could be raised for the first time on a second appeal because it was a matter of constitutional magnitude. See *State v. Littlefair*, 129 Wn. App. 330, 337-38, 119 P.3d 359 (2005), review denied, 149 Wn.2d 1020, 72 P.3d 761 (2003). The court in *Littlefair* seems to have gone astray because it focused on the constitutional right, but failed to consider the definition of “manifest error.” Compare *Littlefaire*, 129 Wn. App. at 338.

to *Scott*, 110 Wn.2d at 687 (agreeing with and quoting *Valladares*, 31 Wn. App. at 76 “that the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below’”).

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

b. Forfeiture And Waiver Under Federal Law.

Washington courts often look to federal standards for guidance on the issue of waiver. *See Scott*, 110 Wn.2d at 687 (citing 3A C. Wright, Federal Practice and Procedure § 856, at 339-41 (2d ed. 1982); Fed.R. Crim.P. 52(b)). This is because RAP 2.5(a)(3) has its genesis in federal law. *Scott*, 110 Wn.2d at 687, n. 4 (citing Comment (a), RAP 2.5(a)(3), 86 Wn.2d 1152 (1976)). Thus, similar to Washington, under federal law where a ground for suppression is not made timely at the trial court the issue is waived. *See United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002) (citing Federal Rule of Criminal Procedure 12(b)(3) and holding that ground for suppression not included in pre-trial motion to suppress was waived); *United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 2000) (failure to bring a timely motion to suppress constitutes a waiver of the issue); *United States v. Restrepo-Rua*, 815 F.2d 1327, 1329

(9th Cir. 1987) (per curiam) (failure to raise a particular ground in support of a motion to suppress constitutes waiver). Under the federal standard, the court may in its discretion grant relief from waiver for “cause shown,” but that requires the defendant to make a particular showing in its brief, something that has not been done here. *See Restrepo-Rua*, 815 F.2d at 1329 (citing *United States v. Gonzales*, 749 F.2d 1329, 1336 (9th Cir. 1984)).

Federal Rule of Criminal Procedure 52(b) is analogous to RAP 2.5(a)(3). *Scott*, 110 Wn.2d at 687, n. 4. However, RAP 2.5(a)(3) is significantly narrower because RAP 2.5(a)(3) covers only constitutional errors, while Fed.R.Crim. P. 52(b) covers “plain errors.” *Scott*, 110 Wn.2d at 687, n. 4. Rule 52(b) provides: “PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Rule 52(b) at its adoption was intended as a “restatement of existing law.” *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (quoting Advisory Committee’s Notes on Fed. Rule Crim. Proc. 52, 18 U.S.C. App., p. 833). The rule has only been changed once since its adoption in 2002 and those changes are intended to be stylistic only. *See* Advisory Committee’s Notes to the 2002 Amendments.

The appellate courts’ authority under Rule 52(b) is limited. There must be “error” that is “plain” and it must “affect substantial rights.” *Olano*, 507 U.S. at 732. While the rule leaves the decision to correct the

forfeited error to the sound discretion of the court of appeals, the court should not exercise that discretion unless the error “‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *Olano*, 507 U.S. at 732 (quoting *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 1046, 84 L. Ed. 2d 1 (1985) (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936))).

Federal law makes a careful distinction between error that has been “waived” and error that has been “forfeited.” Forfeiture is the failure to make the timely assertion of a right. *Olano*, 507 U.S. at 733. While under federal law, waiver is the “intentional relinquishment or abandonment of a known right.” *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938)). “Deviation from a legal rule is ‘error’ unless the rule has been waived.” *Olano*, 507 U.S. at 732-33. As opposed to waiver, mere forfeiture does not extinguish an “error” under Rule 52(b). If a legal rule was violated in district court proceedings and the defendant did not waive the rule, than an “error” has occurred under Rule 52(b) despite the absence of a timely objection. *Olano*, 507 U.S. at 733-34.

“The second limitation on for appellate authority under Rule 52(b), is that the error be “plain.” Plain means “clear” or “obvious.” *Olano*, 507 U.S. at 734. The third requirement is that that plain error “affects substantial rights.” In most cases, this means that the error must have been prejudicial such that it affected the outcome of the district court

proceedings. *Olano*, 507 U.S. at 734. The court then conducts a harmless error analysis, with the defendant having the burden to show prejudice.

*Olano*, 507 U.S. 735.

It is also worth noting that Rule 52(b) is permissive, not mandatory so that the court of appeals has authority to order a correction but is not required to do so. *Olano*, 507 U.S. at 735. The discretion conferred by Rule 52(b) should be employed where a miscarriage of justice would otherwise result. *Olano*, 507 U.S. at 736. This means that “the Court of Appeals should correct a plain forfeited error affecting substantial rights if the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936)). A plain error affecting substantial rights does not without more satisfy this standard, lest the discretion granted by Rule 51(b) be nullified. *Olano*, 507 U.S. at 737.

The court in *Olano* stated that at a minimum, in order to be plain, an error must be clear under current law. *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 586, 169 L. Ed. 2d 445 (1997) (citing *Olano*, 520 U.S. at 743). But the court in *Olano* declined to consider the situation where the error was unclear at the time of appeal, but became clear on appeal because the applicable law was clarified in the interim. *Olano*, 507 U.S. at 734. That issue was considered by the court in *Johnson*, wherein 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 *Johnson*, 520 U.S. at 467. The 9th circuit court of appeals has recognized that some narrow exceptions exist to the general rule is 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 raise for the first time on appeal are not subject to a plain error review.

c. 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. *See* CP 109; 3RP 209, ln. 6-13. The defendant therefore 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. 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 that any suppression motion was ever held. Moreover, after reviewing the record, the State cannot identify any additional documents to designate that indicate any such hearing ever took place.

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 alternative theories, that would have supported the search of the vehicle. For instance, the State could have asserted an argument for inevitable discovery. Here, the gun was observed in open view, providing probable cause to arrest for unlawful possession of a

firearm and thus search the vehicle incident to the crime of arrest. 2RP 91, ln. 5-17; p. 99, ln. 19 to p. 101, ln. 17.<sup>1</sup> See *Gant*, 129 S. Ct. at 1719.

The State may have also been able to argue that the search was lawful under the emergency exception where the officers were responding to a report of a domestic violence incident. See, e.g. *State v. Jacobs*, 101 Wn. App. 80, 2 P.3d 974 (2000); *State v. Raines*, 55 Wn. App. 459, 778 P.2d 538 (1989); CP 3. Given that circumstance and the fact that the victim was upset, the officers may have also been warranted in conducting a safety check of the vehicle where the victim was unrestrained, and had access to the vehicle. 3 RP 65 ln. 1-3. See *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986). However, 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.

The court also should note that the testimony at trial did not completely reflect the facts surrounding the arrest of the defendant. In order to minimize any prejudice to the defendant arising from his other crimes, the parties agreed to exclude from the trial the evidence of the

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<sup>1</sup> While the officer stated that he saw the gun through the window, which would be “open view,” the defense attorney erroneously described the observation in terms of the related but different legal doctrine of “plain view.”

domestic violence incident; the fact that the defendant was driving on a suspended license; as well as the specific predicate offense for the unlawful possession of a firearm. See 1RP 12, ln. 13 to p. 17, ln. 22. See also 2 RP 60, ln. 19-22; 2RP 62, ln. 11-23; 2RP 64, ln. 18 to p. 65, ln. 21. Apparently the defendant was being separately prosecuted for the domestic violence assault in Tacoma Municipal Court. 1RP 16, ln. 11-15.

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. *Riley*, 121 Wn.2d at 31-32.

2. 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 under article 1, § 7 of the Washington Constitution.

a. The Fourth Amendment Exclusionary Rule Is Controlling.

In his supplemental brief, the defendant relies exclusively on *Gant* to support his assertion that the warrantless search of his car was invalid. See Supplemental Brief, p. 3-5. *Gant*, was decided purely on Fourth Amendment grounds. *Gant*, 129 S. Ct. at 1716. The defendant makes no argument that the outcome of this case is controlled by article 1, section 7 of the Washington Constitution. Nor has the Washington Supreme Court reversed its longstanding position that vehicle searches incident to a lawful arrest are valid under article 1, section 7. Absent any basis to address state constitutional issues, the defendant's motion for reconsideration should be reviewed solely under federal Fourth Amendment analysis.

b. 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.

*Conk 12*

*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. See *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2001).

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 courts had unequivocally endorsed the constitutional validity of the vehicle searches incident to arrest. *See e.g., 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 reasonable relied on pre-*Gant* precedent and were immune from civil liability for searched 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.

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.

c. 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.

As discussed above, it is not appropriate to review this case under an article 1, § 7 analysis because the defendant has only sought relief based on *Gant*, a Fourth Amendment case. However, even 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.

3. 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 his 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. *McFarland*, 127 Wn.2d at 333-34; *Riley*, 121 Wn.2d 22.

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*

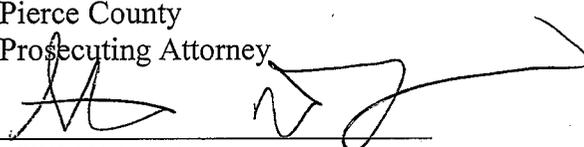
*States v. McNamara*, 74 F.3d 514, 516-17 (4th Cir. 1996) (counsel was not constitutionally deficient for following controlling law of circuit that willfulness was not an element of structuring financial transactions to avoid currency reporting requirements even though Supreme Court had granted certiorari on that issue at 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).

D. CONCLUSION.

The defendant waived any challenge to officer's lawful authority to search the vehicle incident to his arrest where the issue was not raised below and the evidence was admitted without any objection at trial.

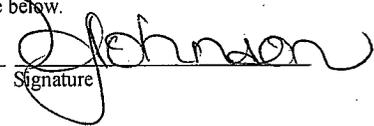
DATED: June 3, 2009

GERALD A. HORNE  
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.

6/3/09   
Date Signature