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No. 96035-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner,

v.

MARC McKEE, Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

PAMELA B. LOGINSKY
Staff Attorney
Washington Association of
Prosecuting Attorneys
206 10th Ave. SE
Olympia, WA 98501
(360) 753-2175

TABLE OF CONTENTS

INTRODUCTION..... 1

II. INTEREST OF AMICUS CURIAE..... 2

III. ISSUES PRESENTED 2

IV. STATEMENT OF FACTS 2

V. ARGUMENT..... 8

 A. The Quality or Quantity of a Respondent’s Briefing Does
 Not Relieve a Court From Rigorously Applying the Law
 10

 B. Neither an Express Nor a Tacit Concession of Law
 Relieves the Court of Its Independent Responsibility to
 Identify and Apply the Proper Governing Principles 13

VI. CONCLUSION 15

TABLE OF AUTHORITIES

TABLE OF CASES

Adams v. Dep't of Labor and Indus., 128 Wn.2d 224,
905 P.2d 1220 (1995) 12, 13

Alverado v. Wash. Public Power Supply Sys.,
111 Wn.2d 424, 759 P.2d 427 (1988)..... 9

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d
801, 828 P.2d 549 (1992) 10

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct.
817, 82 L. Ed. 1188 (1938)..... 9

Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d
1081 (1961)..... 9

Maynard Inv. Co. v. McCann, 77 Wn.2d 616,
465 P.2d 657 (1970) 9

State v. Barry, 183 Wn.2d 297, 352 P.3d 161 (2015) 10

State v. Drum, 168 Wn.2d 23, 225 P.3d 237 (2010)..... 13

State v. Duncan, 185 Wn.2d 430, 374 P.3d 83 (2016) 9

State v. Jackson, 82 Wn. App. 594, 918 P.2d 945 (1996),
review denied, 131 Wn.2d 1006 (1997) 7

State v. Knighten, 109 Wn.2d 896, 748 P.2d 1118 (1988) 1, 13

State v. Longshore, 141 Wn.2d 414, 5 P.3d 1256 (2000) 7

State v. McKee, 3 Wn. App. 2d 11, 413 P.3d 1049,
review granted, 191 Wn.2d 1012 (2018) 6

State v. Wilburn, 51 Wn. App. 827, 755 P.2d 842 (1988),
overruled by Adams v. Department of Labor & Indus., 128
Wn.2d 224, 905 P.2d 1220 (1995) 11, 12

<i>Swift & Co. v. Hocking Valley Ry. Co.</i> , 243 U.S. 281, 37 S. Ct. 287, 61 L. Ed. 722 (1917)	1
<i>United States v. Vega-Ortiz</i> , 425 F.3d 20 (1st Cir. 2005)	14

CONSTITUTIONS

Fourth Amendment	4, 10, 14
------------------------	-----------

RULES AND REGULATIONS

RAP 10.3(a)(6)	10
RAP 2.5(a)	10

OTHER AUTHORITIES

Daniel J. Meador, Thomas E. Baker & Joan E. Steinman, <i>Appellate Courts: Structures, Functions, Processes, and Personnel</i> (2d ed. 2006)	8
Kathleen Waits, <i>Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction</i> , 1983 U. Ill. L. Rev. 917 (1983)	8
Steven Shavell, <i>The Appeals Process as a Means of Error Correction</i> , 24 J. Legal Stud. 379 (1995)	8

I. INTRODUCTION

An appellate court's reliance on an explicit erroneous concession as to the applicable law incorporates the erroneous statement of the law into a judicial opinion. This then becomes precedent to be used in future cases. To avoid corrupting the law, the United States Supreme Court long ago held that it would refuse to be controlled by a stipulation entered into by the parties:

If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative, since the court cannot be controlled by agreement of counsel on a subsidiary question of law.

Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281, 289, 37 S. Ct. 287, 61 L. Ed. 722 (1917). This Court adheres to the same rule. *See, e.g., State v. Knighten*, 109 Wn.2d 896, 901-02, 748 P.2d 1118 (1988).

In the instant case, Marc McKee argues that the State's failure to respond to one of the three requested remedies in his Brief of Appellant constituted a concession as to the appropriateness of remand for dismissal. McKee's position appears to be that a "concession by silence which is erroneous" should be treated differently than affirmative concessions of the law. McKee's thesis is contrary to this Court's precedent and can lead to injustices in both the instant case and future cases.

II. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, that could result in an injustice in the instant case and in future cases.

III. ISSUES PRESENTED

1. Whether the quality or quantity of a respondent's briefs alters or lessens the judicial function of correctly identifying and applying the law to the facts.
2. Whether a concession as to the law, whether explicit or tacit, alters or lessens the judicial function of correctly identifying and applying the law to the facts.

IV. STATEMENT OF FACTS

Marc McKee was convicted of a number of different crimes in a jury trial. Prior to trial, McKee sought to suppress evidence obtained via a search warrant. In neither his initial motion, his reply memorandum, nor his oral argument did McKee indicate that the charges should be dismissed due to the

allegedly illegal seizure of evidence. See CP 191-230 and 2RP 2-25.¹ McKee's suppression motion was denied, CP 233, and the evidence collected pursuant to the search warrant was introduced at trial.

McKee filed a timely notice of appeal from his convictions. In his Brief of Appellant, McKee assigned error to the denial of his motion to suppress evidence, Brief of Appellant, at 1. In his statement of the case, McKee identifies three video clips and one still photo of his engaging in sex with 16-year-old A.Z. that were recovered from his phone as fruits of the challenged search warrant. McKee characterized these four items as the basis for counts 1 through 4. See Brief of Appellant at 5-6.

McKee's statement of the case, however, also identified untainted evidence that supports the possession of depictions of minors engaged in sexually explicit conduct charged in counts 1 through 4. McKee disclosed that the 16-year-old victim A.Z. was present when "using his cell phone camera, McKee created three short video clips and some still shots memorializing" A.Z. and McKee having sex. Brief of Appellant at 3 (citing 5RP 17, 29-43). McKee conceded that prior to the police obtaining possession

¹During his oral presentation, McKee made two statements regarding remedy. At page 11, McKee stated "So, we're asking the Court to find this warrant overbroad, void for vagueness, and suppress any and all evidence perceived pursuant to the issuance of this warrant, and also any evidence that may have resulted from the fruits of the poisonous tree." At page 25, McKee concluding his suppression motion presentation by asking and answering a question: "Should the defense motion to suppress be granted? Yes."

of his cell phone, A.Z.'s brother Robert Gora, obtained McKee's cell phone from him. *Id.* at 4 (citing 6RP 90-95, 133-142; 7RP 35-41, 58, 67-69, 116-121). McKee acknowledged that Gora found the clips of McKee and A.Z. having sex on the phone before the phone was turned over to the police. *Id.* at 4 (citing 7RP 41-45).

McKee's argument section in support of his challenge to the search warrant contains the following conclusion:

Therefore, all fruits from the search of McKee's phone—which formed the basis for the charges in counts 1 through 4—should have been suppressed. McKee's convictions on these counts should be reversed and dismissed.

Brief of Appellant, at 16.

McKee's brief contained no legal citations in support of his request for dismissal of charges due to a Fourth Amendment violation. McKee's brief contained no argument explaining why the untainted evidence of McKee's possession of videos and a still photo of A.Z. was insufficient to allow for a retrial. McKee's conclusion also fails to seek dismissal and contains a request for a different remedy. *See* Brief of Appellant at 24 ("McKee's convictions on counts 1 through 4 should be vacated based on the faulty warrant.").

The State's Brief of Respondent directly responded to McKee's particularity and other attacks upon the search warrant. *See* Brief of Respondent at 3-14. The State's brief acknowledged the proper remedy for a

Fourth Amendment violation— suppression of evidence – while claiming that no violation had occurred. *See* Brief of Respondent, at 18 (“Because the search warrant was not overly broad, the trial court did not err in the denial of the suppression motion and the convictions should be affirmed.”).

McKee’s Reply Brief of Appellant did not contain a renewal of his request for dismissal of the charges. The Reply Brief of Appellant merely asked the Court to “vacate McKee’s convictions on counts 1 through 4 based on the faulty warrant.” Reply Brief of Appellant at 9.

Oral argument was held in McKee’s appeal in Division One on September 14, 2017. Each side was provided with 10-minutes within which to make their case. *See* Court of Appeals Division I Oral Argument Calendar for Thursday, September 14, 2017.² According to McKee, he did not present any argument in support of dismissal until asked a question by Judge Schindler during the last two minutes of his argument. *See* Supplemental Brief of Respondent at 6-7.³ The State, which was not asked whether dismissal was the appropriate remedy if the warrant were to be

²The Oral Argument Calendar is available at http://www.courts.wa.gov/appellate_trial_courts/appellatedockets/index.cfm?fa=appellate_dockets.showDocket&folder=A01&year=2017&file=20170914 (last visited Jan. 24, 2019).

³The URL that appears at page 6 of McKee’s Supplemental Brief of Respondent opens a page that contains this message: “You have encountered an Error. There was either a problem on the website, or you have requested a page that does not exist or is no longer available on our web site.” *See* <https://www.courts.wa.gov/index.cfm?fa=home.pageNotFound&reqPage=https://www.courts.wa.gov/appellate> (last accessed Jan. 24, 2019).

invalidated, devoted its 10 minutes of argument to defending the warrant. *Id.*

The Court of Appeals ruled the motion to suppress was erroneously denied by the trial court as the warrant was invalid. *See State v. McKee*, 3 Wn. App. 2d 11, 413 P.3d 1049, *review granted*, 191 Wn.2d 1012 (2018). The court “reverse[d] and remand[ed] to dismiss the four convictions of possession of depictions of a minor engaging in sexually explicit conduct.” *McKee*, 3 Wn. App. 2d at 30. The court did not provide any legal or factual analysis in support of the remand to dismiss charges.

The State filed a timely Motion to Reconsider. The Motion to Reconsider identified the proper remedy for a Fourth Amendment violation and identified evidence that was not a fruit of the invalid warrant that would be available on retrial. The Motion to Reconsider also identified the paucity of McKee’s argument in support of dismissal.

McKee’s Answer to Motion for Reconsideration argued that the State’s failure to respond in its briefing or during oral argument to his one line request for dismissal of charges that appeared on page 16 of the Brief of Appellant, meant that the remedy should stand. *See Answer to Motion for Reconsideration* at 3 (reconsideration should be denied as nothing was overlooked or misapprehended by the court). For the first time, McKee presented legal citations and argument in support of dismissal as a remedy. The argument relied solely upon evidence admitted at trial, rather than all

untainted evidence that the State could muster for a retrial. The analysis, moreover, viewed the untainted evidence in the light most favorable to the defense. *Id.* at 3-5.⁴

After the Court of Appeals denied the motion for reconsideration without comment, the State filed a timely petition for review limited to the proper remedy when evidence is collected pursuant to an improper search warrant. McKee did not oppose review.

In this Court, McKee has not renewed his argument that insufficient untainted evidence remains to allow a retrial. *See* Supplemental Brief of Respondent. Instead, McKee contends that the State “conceded” that dismissal was the proper remedy by not addressing his request for dismissal in the Brief of Respondent. *See* Supplemental Brief of Respondent at 10-11. McKee claims that the State’s failure to do so and its failure to address a question that Judge Schindler posed to him during oral argument, constitutes a “concession” that McKee’s request for dismissal of charges prevents the

⁴McKee’s argument in support of dismissal contained in his Answer to Motion for Reconsideration is supported almost exclusively by citations to his cross-examination. The correct perspective when determining whether a matter should be aborted prior to trial or verdict is to view the evidence in the light most favorable to the prosecution. *See, e.g., State v. Longshore*, 141 Wn.2d 414, 419, 5 P.3d 1256 (2000) (a directed verdict may only be granted in a criminal case if, after viewing the material evidence in the light most favorable to the prosecution, the court determines that there is no substantial evidence or reasonable inference to sustain a verdict for the State); *State v. Jackson*, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996), *review denied*, 131 Wn.2d 1006 (1997) (a pre-trial motion to dismiss for insufficiency of the evidence requires the court to take the evidence and the reasonable inferences therefrom in the light most favorable to the State).

State from challenging the dismissal remedy. *Id.* Because adopting McKee's position that an appellate court may grant relief to a petitioner based solely upon the quality or quantity of the respondent's briefing is contrary to the public's interest and this Court's precedent, WAPA submits this timely amicus curiae brief.

V. ARGUMENT

Appellate courts serve many functions, including declaring the law, correcting error, harmonizing the law among trial courts, preventing error by inducing trial judges to make fewer errors or risk reversal, and lending legitimacy to the legal process. *See generally* Daniel J. Meador, Thomas E. Baker & Joan E. Steinman, *Appellate Courts: Structures, Functions, Processes, and Personnel* 4-9 (2d ed. 2006); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. Legal Stud. 379, 425-26 (1995). Opinions issued by an appellate court serve to guide the public and lawyers in deciding future courses of conduct and guiding trial courts in deciding cases. Opinions fulfill these purposes best when the court provides an honest rationale for its decision. *See, e.g.*, Kathleen Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U. Ill. L. Rev. 917, 934 (1983).

In performing its functions and in crafting its opinions, appellate courts are not bound by erroneous concessions of law or by the quality of the briefing. Instead courts have a duty to announce its own view of the relevant principles. As stated by this Court in *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 465 P.2d 657 (1970),

Courts are created to ascertain the facts in a controversy and to determine the rights of the parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent. A case brought before this court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it.

77 Wn.2d at 623.

Random examples of cases in which courts followed the *Maynard* rule include *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), where no lawyer of record had urged the court to adopt the rule it did; *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), where counsel specifically disclaimed any intention to ask for reconsideration of *Wolf v. Colorado*, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (see opinion of Harlan, J., 367 U.S. at 674, n. 6); *Alverado v. Wash. Public Power Supply Sys.*, 111 Wn.2d 424, 429-30, 759 P.2d 427 (1988), where neither party raised the issue of federal preemption; and *State v. Duncan*, 185 Wn.2d 430, 440-41, 374 P.3d 83 (2016), where no party urged the court to adopt the rule it did.

A. The Quality or Quantity of a Respondent's Briefing Does Not Relieve a Court From Rigorously Applying the Law.

McKee contends that the State's failure to address his one sentence request for dismissal of charges in its Brief of Respondent bars the State from tendering argument in opposition in a motion to reconsider. *See* Supplemental Brief of Respondent at 8, 10-11. McKee's position is undermined by his failure to request dismissal of charges in the trial court, to provide any legal citations in support of his request for dismissal, and to provide any argument in support of dismissal. *See generally State v. Barry*, 183 Wn.2d 297, 312-13, 352 P.3d 161 (2015) (a defendant's argument that is not supported with specific citations and support will not be considered on appeal); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (matters argued in a brief of appellant that are not supported by any reference to the record or by citation of authority will not be considered by an appellate court); RAP 2.5(a) (an issue not raised in the trial court will generally not be reviewed by an appellate court); RAP 10.3(a)(6) (argument in the brief of appellant must be supported by citations to legal authority and reference to relevant parts of the record).

Assuming that McKee's brief adequately raised the issue of dismissal as a remedy for the identified Fourth Amendment violation, the standard of review and the appellate court's duty is not changed by the State's failure to

respond to McKee's passing reference.

In *State v. Wilburn*, 51 Wn. App. 827, 755 P.2d 842 (1988), *overruled* by *Adams v. Department of Labor & Indus.*, 128 Wn.2d 224, 229, 905 P.2d 1220 (1995), the defendant claimed three errors merited the reversal of his rape conviction. The State failed to file a responsive brief and was thus barred from oral argument. Two members of the court determined that when a respondent's brief is not filed, appellate review is limited to examining the appellant's brief to determine if its assignments of error present a prima facie showing of error. *Wilburn*, 51 Wn. App. at 829-30. Applying this extremely low standard of review, the majority reversed the conviction and ordered a new trial on the grounds that one of the three asserted errors, the denial of a mistrial motion due to a witness's failure to excise the word "again" when repeating a defendant's statement to the jury was "prima facie reversible error." *Wilburn*, 51 Wn. App. at 832-33.

Retired Chief Justice Alexander, then Judge Alexander, dissented from the majority opinion on the grounds that the use of the word "again" was "harmless error when one looks at the entire trial record." *Wilburn*, 51 Wn. App. at 835 (Alexander, J., dissenting). Of greater import was Chief Justice Alexander's statement of the court's duty:

Our duty as an appellate court should be the same, whether or not the respondent submits a brief or makes oral argument. We must examine the assignments of error, and determine as best

we can the merits of the case. While I share the majority's concern about the prosecutor's failure to file a brief, the rule favored by the majority could easily result in an injustice simply because the prosecutor erred.

Wilburn, 51 Wn. App. at 834 (Alexander, J., dissenting).

Too late to spare Wilburn's victim the trauma of a second trial, this Court considered whether a respondent's failure to file a brief lessened an appellate court's responsibilities. In *Adams v. Dep't of Labor and Indus.*, 128 Wn.2d 224, 905 P.2d 1220 (1995), a disabled worker did not file a respondent's brief in an appeal filed by the Department of Labor and Industries challenging an order awarding the worker a permanent partial disability award. This Court reviewed the rule announced by the *Wilburn* majority. Acknowledging that it "was perhaps understandable that the court was displeased with a county prosecutor's failure to file a brief," *Adams*, 128 Wn.2d at 229, the Court rejected the majority's prima facie error standard of review stating that

We find [Judge Alexander's] dissent more persuasive. A respondent who elects not to file a brief allows his or her opponent to put unanswered arguments before the court, and the court is entitled to make its decision based on the argument and record before it. The court, however, should not confine itself to whether the appellant has presented a prima facie case when the record and their own knowledge of the law permit a fuller review. Under the RAPs, there is no longer a basis for differing standards of review. Even more importantly, the prima facie case rule has the potential for producing an unjust result. The quantity or quality of briefing should not affect the standard of review used by the court.

Adams, 128 Wn.2d at 229.

No principled reason exists to lessen or alter an appellate court's duty when a respondent files a brief, but the brief does not contain a response to an issue, claim, or remedy request contained in an appellant's brief. When, as here, the court of appeals does not explain why the dismissal remedy mentioned in passing in the appellant's brief was ordered, a respondent properly assists the court in its responsibility to correctly identify and apply the law by bringing the relevant precedent to the court's attention in a motion for reconsideration. Relying on a respondent's failure to answer an appellant's argument as a basis for a decision can, as here, result in an erroneous remedy appearing in a published opinion that will become precedent to be used in future cases. Surely the public is poorly served by transferring the responsibility to announce the law from judges to litigants.

B. Neither an Express Nor a Tacit Concession of Law Relieves the Court of Its Independent Responsibility to Identify and Apply the Proper Governing Principles.

It is the province of an appellate court to decide issues of law. *State v. Drum*, 168 Wn.2d 23, 33, 225 P.3d 237 (2010). An appellate court's duty is the same whether parties make concessions of law. Erroneous concessions of law, even those tendered by prosecutors, do not bind courts. *See, e.g., Knighten*, 109 Wn.2d at 901-02 (State's concession that no probable cause to arrest rejected by the Court as an erroneous concession of the law).

Regardless of why a lawyer misapprehends the law, an appellate court must announce its own view of what it regards as the relevant principles. To do otherwise is to incorporate the erroneous statement of the law into a judicial opinion which then becomes precedent to be used in future cases. *See, e.g., United States v. Vega-Ortiz*, 425 F.3d 20, 22 (1st Cir. 2005) (citation and internal quotation marks omitted) (“While concessions are often useful to a court, they do not, at least as to questions of law that are likely to affect a number of cases in the circuit beyond the one in which the concession is made, relieve this Court of the duty to make its own resolution of such issues.”).

Whether suppression or dismissal is the proper remedy for violations of the Fourth Amendment and whether sufficient untainted evidence remains to support a retrial are both questions of law. McKee contends that the State conceded both of these that dismissal was a proper remedy and that insufficient untainted evidence existed to support a retrial due to its failure to address the single-sentence request for dismissal that appeared in his Brief of Appellant. *See* Supplemental Brief of Respondent at 10-12 (collecting cases). McKee, however, does not explain why an erroneous “silent concession,” which occurs due to a lack of argument, is binding upon an appellate court when an erroneous explicit concession is not.

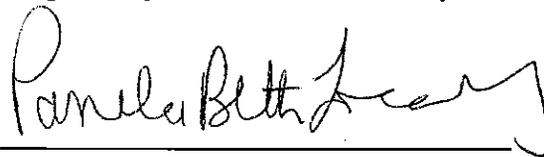
Whether an erroneous concession of law is the result of shoddy research, rapidly evolving legal principles, or an overlooked argument, an

appellate court must not issue opinions based upon the misapprehensions of lawyers. Instead, the court must seek out and apply the correct legal principles and law. Allowing a party to repudiate an erroneous concession of law, whether tacit or explicit, in a motion for reconsideration allows for the proper development of the law, preventing injustice in both the instant and future cases.

VI. CONCLUSION

WAPA respectfully requests that this Court identify and apply the correct legal standards to the question of what remedy is McKee entitled to for the Fourth Amendment violation. WAPA is certain that the matter must be remanded to the trial court for a new trial. The trial court, rather than an appellate court, is in the best position to determine whether the State possesses sufficient untainted evidence to allow the case to proceed.

Respectfully submitted this 25th day of January, 2019.



Pamela B. Loginsky, WSBA No. 18096
Staff Attorney
206 10th Ave. SE
Olympia, WA 98501
Tel: 360-753-2175
Fax: 360-753-3943
E-mail: pamloginsky@waprosecutors.org

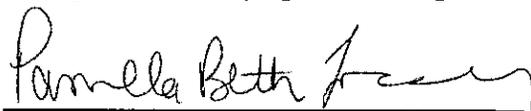
PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 25th day of January, 2019, pursuant to the agreement of the parties, an electronic copy the document to which this proof of service is attached was served upon the following individuals via the CM/ECF System:

David Koch at kochd@nwattorney.net
John Sloane at Sloanej@nwattorney.net
Erik Pedersen at erikp@co.skagit.wa.us
skagit_appeals@co.skagit.wa.us

Signed under the penalty of perjury under the laws of the state of Washington this 25th day of January, 2019, at Olympia, Washington.



PAMELA B. LOGINSKY
WSBA No. 18096
Special Deputy Prosecuting Attorney

WASHINGTON ASSOC OF PROSECUTING ATTY

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