No. 83525-0
(consolidated with 83613-2)

MADSEN, C.J. (dissenting)—I am not persuaded that the decisions in *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), and *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009), constitute a change in law and thus exempt petitioners Francisco Millan and Michael Robinson from ordinary issue preservation requirements. Accordingly, petitioners must show manifest constitutional error to challenge the searches of their respective vehicles for the first time on appeal. However, without a more developed record, petitioners cannot establish actual prejudice and thus cannot make the requisite showing of manifest constitutional error. Because I would hold that the issue preservation doctrine precludes us from reviewing petitioners' claims of error on direct review, I respectfully dissent.

"[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); *cf. State v. Markel*, 154 Wn.2d 262, 270, 111 P.3d 249 (2005) ("A 'new rule' is one that 'breaks new ground' or 'was not *dictated* by

precedent existing at the time the defendant's conviction became final'" (quoting *Teague*, 489 U.S. at 301)). The United States Supreme Court did not announce a new rule of law in *Gant*. To the contrary, the holding in *Gant*, namely that a vehicle search incident to arrest is lawful only when the arrestee is within reaching distance of the vehicle, simply reaffirmed a well-established—though often misapplied—principle; existing precedent at the time of petitioners' trial required no less. *Gant*, 129 S. Ct. at 1719; *see Markel*, 154 Wn.2d at 270. In other words, *Gant* neither broke new ground nor imposed a new obligation on the State. *See Teague*, 489 U.S. at 301.

In *Chimel v. California*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), the United States Supreme Court set forth what has been and remains the governing standard for a search incident to arrest under the Fourth Amendment. After identifying the twin rationales for the search incident to arrest exception to the warrant requirement—namely preventing an arrestee from gaining access to a weapon and preventing the destruction or concealment of evidence—the Court limited the scope of such a search to "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence." *Id.* at 763.

Despite widely held misconceptions, the Court did not depart from the "immediate control" standard when it decided *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). While that case has been cited for the notion that "articles inside

the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m],'" this faulty empirical assumption goes to the application of the "immediate control" standard, not the standard itself. *Id*. at 460 (alteration in original) (quoting *Chimel*, 395 U.S. at 763). Indeed, the Court expressly noted that its holding concerned only the application of *Chimel* to a specific set of facts and did not disturb the rule of law announced in *Chimel*. *Belton*, 453 U.S. at 460 n.3 ("Our holding today does no more than determine the meaning of *Chimel*'s principles in this particular and problematic context. It in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests.").

In *Gant*, 129 S. Ct. at 1717, the Court clarified its holding in *Belton*, noting that while the outcome in that case rested on an erroneous empirical assumption, *Chimel* remained good law.

> Under [a] broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." [*Belton*,] 453 U.S. [at 460 n.3]. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

Id. at 1719. The Court also held that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring in judgment)).[1]

Nor did *Gant* and its progeny effect a change of law in this state. In *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), we set forth the permissible scope of a search incident to arrest under our state constitution. Echoing *Chimel*, we held that under Washington Constitution article I, section 7, "when a lawful arrest is made, the arresting officer may search the person arrested and the area within his immediate control." *Ringer*, 100 Wn.2d at 699. We further held that "[a] warrantless search in this situation is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence for which he is arrested." *Id.* We also adopted a "totality of circumstances" analysis to determine whether the doctrine of exigent circumstances provides an exception to the warrant requirement. *Id*. at 701.

[1] While the *Gant* majority clearly stated that its holding did not constitute a change of law, a majority of this court would disregard this language in light of Justice Scalia's concurrence. Majority at 9 n.4. However, Justice Scalia did sign the lead opinion, and in so doing, he explicitly endorsed not only the majority rule but also the majority's narrow reading of *Belton*. *Gant*, 129 S. Ct. at 1725. Had Justice Scalia wished to endorse only the result of the lead opinion, he could have filed a concurring opinion without signing the lead opinion. Alternatively, had he wished to endorse only certain components of the majority's reasoning, he could have joined the majority except as to certain sections. He exercised neither of these options.

It is true, as the majority notes, that in *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), *overruled by State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009), this court allowed automobile searches incident to arrest without regard to the arrestee's actual proximity to the vehicle in question. However, just as the *Belton* Court did not abandon the "immediate control" standard set forth in *Chimel*, the *Stroud* court adhered to the parallel standard announced in *Ringer*.

The lead opinion[2] in *Stroud* began by recognizing that under *Ringer*, "'[a] warrantless search in this situation is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested.'" *Stroud*, 106 Wn.2d at 150 (alteration in original) (quoting *Ringer*, 100 Wn.2d at 699). Next, without rejecting the standard itself, the lead opinion went on to reject the fact-dependent totality of circumstances approach that the *Ringer* court had adopted to apply that standard, just as the *Belton* Court had eschewed a fact-intensive, case-by-case analysis in favor of a sweeping empirical assumption. *Id*. at 151 ("Weighing the 'totality of circumstances' is too much of a burden to put on police officers who must make a decision to search with little more than a moment's reflection . . . . We agree with the

[2] In *Stroud*, while the court was unanimous as to the result, only four justices signed the lead opinion, which excluded locked containers from the permissible scope of a search incident to arrest. The four justices who signed the concurring opinion would not have excluded locked containers and the ninth justice concurred in result only. 106 Wn.2d 144. However, this court later adopted the categorical rule appearing in the lead opinion of *Stroud*. *State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989) (reasoning that a purse is not a "locked container" and thus upholding search of purse found in passenger compartment of arrestee's vehicle).

Supreme Court's decision to draw a clearer line to aid police enforcement . . . ."). In place of a totality of circumstances analysis, the lead opinion adopted a bright line rule to determine whether a search incident to arrest fell within the scope authorized in *Ringer* and adequately protected the arrestee's privacy.

> During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

Id. at 152. In reasoning that this categorical rule comported with the underlying rationale for the search incident to arrest exception, the lead opinion signaled its continued adherence to *Ringer*. *Id*. ("[T]he danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized."); *see Ringer*, 100 Wn.2d at 699 (authorizing search incident to arrest only when necessary to remove weapons or prevent the destruction of evidence).

In *Patton*, 167 Wn.2d at 394-95, we reaffirmed the limited scope of the search incident to arrest exception for automobile searches, holding that such a search is unlawful "absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search." In so holding, however, we noted that we were not announcing a new rule but rather a new application of an existing rule.

> While we believe this holding is consistent with the core rationale of our cases, we also recognize that we have heretofore upheld searches incident

> to arrest conducted after the arrestee has been secured and the attendant risk to officers in the field has passed. Today, we expressly disapprove of this expansive *application* of the narrow search incident to arrest exception.

Id. at 395 (emphasis added).

In sum, just as the Court in *Belton* had labored under a sweeping, and ultimately erroneous, empirical assumption in applying the *Chimel* standard to a particular set of factual circumstances, the lead opinion in *Stroud* (and the cases that followed) relied on the flawed empirical assumption that a search of the passenger compartment that excluded locked containers would fall within the permissible scope set forth in *Ringer*. Because the underlying standard, namely the "immediate control" standard, has remained constant under state and federal law, neither *Gant* nor *Patton* constituted a change in law.

Accordingly, the majority errs in concluding that petitioners had no basis to challenge the searches at issue at the time of trial. To the contrary, because the "immediate control" standard predated *Gant* and *Patton*, petitioners had every opportunity to move for suppression under existing case law at the time of trial. In fact, relying on *Chimel* and *Stroud*, Robinson challenged the scope of the search incident to arrest in a statement of additional grounds *before* the United States Supreme Court handed down the *Gant* decision. Clearly, nothing prevented him from doing so at trial. *See* Statement of Additional Grounds at 35-36 (citing *Stroud*, 106 Wn.2d 152-53; *Chimel*, 395 U.S. 752). Indeed, Gant had only pre-*Gant* case law at his disposal, and he prevailed; so too did Patton.

Because these circumstances do not warrant an exception to the well-established doctrine of issue preservation, petitioners are left to contend with the ordinary restrictions on raising unpreserved issues on appeal. As the majority notes, when a party fails to raise an issue at trial, it generally waives the right to raise the issue on appeal, absent a showing of a "'manifest error affecting a constitutional right.'" *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) (internal quotation marks omitted) (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)); *see also* RAP 2.5(a) ("Errors Raised for First Time on Review").

To establish manifest constitutional error, a criminal defendant must identify a constitutional error and make a showing that the error negatively affected his or her rights at trial. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). "It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." *Id*. at 927 (citing *McFarland*, 127 Wn.2d at 333; *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). This principle reflects the pragmatic concern that "'permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.'" *McFarland*, 127 Wn.2d at 333 (quoting *State v. Lynn*, 67 Wn. App. 339, 344, 835 P.2d 251 (1992)).

As the majority recognizes, the record in each of these cases is insufficient to determine the legality of the warrantless searches at issue because neither defendant

challenged the vehicle search at trial. In particular, it is not only unclear whether a search incident to arrest was lawful under the factual circumstances of either case but also whether other exceptions to the warrant requirement may have applied. In the absence of suppression hearings, the State had no opportunity to defend the legality of these vehicle searches under any of these exceptions. We may not consider facts outside the record on direct review. *McFarland*, 127 Wn.2d at 335. Instead, the proper mechanism for raising claims of error that rest on facts outside the record is a personal restraint petition. *Id.* at 338; RAP 16.4(c)(3).

Thus, "[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *McFarland*, 127 Wn.2d at 333; *see also State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007) (finding no manifest constitutional error where record was insufficient to establish actual prejudice).

Having determined that issue preservation doctrine did not bar petitioners from challenging these warrantless searches for the first time on appeal, the majority proceeds to remand both cases to the superior court for suppression hearings. However, in the absence of a threshold showing of manifest constitutional error, it is inappropriate to remand these cases for further proceedings. *McFarland*, 127 Wn.2d at 338 (declining to review unpreserved error where record was insufficient to establish manifest constitutional error and declining to remand for further development of record on

ineffective assistance claim).

Because it erred in concluding that *Gant* and *Patton* marked a change in law, the majority has no valid basis for exempting petitioners from ordinary issue preservation requirements. Absent a showing of manifest constitutional error, we cannot review new claims that were fully available at the time of trial but raised for the first time on appeal nevertheless. On these records, neither petitioner can make such a showing. I would hold, however, that if petitioners wish to rely on facts outside the record to establish a constitutional claim, a personal restraint petition is the appropriate avenue for relief. Thus, I respectfully dissent.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice James M. Johnson