NO. 333124

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

PLAINTIFF/APPELLANT,

V.

ERIC DANIEL CRUZ

DEFENDANT/RESPONDENT

OPENING BRIEF OF APPELLANT

KARL F. SLOAN
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

Branden E. Platter
WSBA #46333
Deputy Prosecuting Attorney

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STATEMENT OF THE CASE

I. Statement of Facts.

Officer Troy McCormick is an officer with the Washington Department of Fish and Wildlife. [RP 6:6] He has been with the Department for approximately 15 years. [RP 6:20] On August 10, 2012 he was on duty patrolling the Similkameen River, west of Oroville, WA, just below the Enloe Dam. [RP 7:5] This area is patrolled approximately once a week while the salmon are running. [RP 7:12]

Officer McCormick was on patrol alone. [RP 8:5] This particular area is framed by high canyon walls. [RP 8:14] In Officer McCormick's experience, this area has extremely poor radio and cellular service. [RP 8:11-13] The cellular service is non-existent and radio signal is "sketchy." [RP 8:15-16] An officer has to move their vehicle around in order to get a radio signal to call out. [RP 8:17] This makes is difficult to call out for other officers if assistance is needed. [RP 8:19-21]

Officer McCormick observed Eric Cruz from an elevated cliff above the river and observed him for about half an hour. [RP 7:17-19] This was approximately 10:00 am. [RP 16:2] Officer McCormick has had prior casual contact with Mr. Cruz on a couple occasions over the prior two years, however Officer McCormick did not recognize Mr. Cruz on this particular day. [RP 16:4-21] Mr. Cruz was fishing with another

individual, Mr. Rose, believed to be a relative of Mr. Cruz. [RP 7:20-8:2] The officer observed Mr. Cruz "snag" a fish and pull it out of the river. [RP 9:2] "Snagging" is an illegal technique used to catch fish. [RP 9:5] Officer McCormick did not see either Mr. Cruz or Mr. Rose engage in any other illegal activity. [RP 18:7]

Officer McCormick returned to his vehicle and drove to the Enloe Dam parking area. [RP 9:16-19] He contacted Mr. Cruz who had returned to his vehicle by that time. [RP 9:19-20] At the time of this initial contact, Mr. Cruz was alone and Mr. Rose was not present. [RP 9:24]

When the officer approached, Mr. Cruz was attempting to quickly fill out his catch record card. [RP 10:3] Officer McCormick placed Mr. Cruz under arrest for the gross misdemeanor crime of unlawfully snagging salmon. [RP 10:14] Based on the circumstances and location, Mr. Cruz was handcuffed. [RP 10:7] At this point, Officer McCormick and Mr. Cruz were directly next to Mr. Cruz's vehicle. [RP 21:12]

Officer McCormick asked Mr. Cruz if he had any firearms and then searched his person incident to arrest. [RP 10:18-24] The officer asked about firearms for officer safety because if he had any firearms on his person when he was searching him, he wanted to know where they were before he manipulated the firearm. [RP 11:8-11] At that point,

Officer McCormick subjectively did not believe that Mr. Cruz's possession of a firearm would constitute a crime. [RP 11:13-16]

When asked if he had any firearms, Mr. Cruz replied that he had firearms inside the vehicle. [RP 11:20] Mr. Cruz was placed in Officer McCormick's vehicle to secure him because of "[the] location and not knowing where the other subject was...." [RP 12:2] At that time, Mr. Rose came up to the vehicle as Mr. Cruz was being secured in the officer's cruiser. [RP 12:7] Officer McCormick asked him to stay away from the vehicle as he was wanting to know what was going on with Mr. Cruz. [RP 12:10-13] Mr. Rose was approximately 15-20 feet from Mr. Cruz's vehicle. [RP 28:1] At this point, the firearms were still in Mr. Cruz's vehicle and the vehicle was not secured. [RP 25:16-20] Mr. Rose was not handcuffed and was not restrained in any way. [RP 26:8]

At that point, Officer McCormick, "in order to secure the scene and for officer safety," retrieved the firearms from Mr. Cruz's vehicle and secured them in his patrol vehicle. [RP 12:13-15] There were two rifles in the backseat of Mr. Cruz's vehicle and a pistol next to the driver's seat. [RP 12:21] When Officer McCormick retrieved the firearms from the vehicle, his intention was only to secure them during the contact with Mr. Cruz. [RP 13:4] His intention was to secure them for the length of the contact and then return them to the vehicle at the conclusion of the

contact. [RP 13:9-10] At that point, Officer McCormick intended on citing and releasing Mr. Cruz. [RP 23:14] This particular crime is not something that he would typically book a person into jail for. [RP 24:15-18] Mr. Cruz was being cooperative during the contact. [RP 24:16] However, Officer McCormick is always cautious when releasing people, especially when there are firearms. [RP 24:21] According to Officer McCormick, even if an officer feels a subject is dangerous, but they do not have a legal basis to seize the firearms, officers will issue the defendant a ticket, make sure the firearm is unloaded and place it back in the defendant's vehicle. [RP 27:10-16]

During the course of the contact, after securing the firearms in his patrol vehicle, Officer McCormick ran Mr. Cruz through the radio. [RP 13:20] It was difficult to get a response from Washington State Patrol due to the low signal, but when he did receive a response, he was informed that Mr. Cruz had a felony conviction and therefore could not possess firearms. [RP 13:20-24] At that point, Officer McCormick seized the firearms as evidence. [RP 14:2] Mr. Cruz was later charged with three counts of Unlawful Possession of a Firearm in the Second Degree. [CP 53-54]

In the trial court's ruling on the motion to suppress, the court focused heavily on whether Officer McCormick was in actual danger. The trial court stated

> [A]t no time have I heard Officer McCormick indicate that he was in danger. Being cautious...he's just aware of the situation. I think there's a burden upon the State to show that he is basically in a dangerous situation....[T]he Court's not finding that in this case Officer McCormick was in danger.

[RP 46:6-10; 48:6-8] The trial court then held that this case was a search incident to arrest and therefore fell under *Gant*:

> To search a vehicle, *Gant* was the initiating case at the Supreme Court level, but our State Court has held- there is [sic] cases throughout, including our own Division Three in [*Tamblyn*] case and others dealing with the search of vehicles and they talk about incident to arrest, but basically, again, there is no evidence that was going to be destroyed, so we basically turn is the issue officer safety [sic]? And although there's an abundance of caution here, the element risk when the Defendant has been removed basically comes within the purview of the *Gant* and its [progeny], including those cases that we find in Washington. Therefore, the Court opines that the removal of the guns and the seizure were a violation of Article 1, section 7 of our Washington State Constitution.

[RP 47:2-17]

The trial court issued Findings of Fact and Conclusions of Law. [CP 9-12] The trial court concluded that this case falls under *Arizona v. Gant*, 556 U.S. 332 (2004), and its progeny. [CP 11:13] According to the court, the State had not proven that Officer McCormick possessed a

reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted him in believing that the defendant was dangerous and might gain immediate control of the weapons inside the defendant's vehicle at the time of the search and seizure. [CP 11:14-16] The court also concluded that the State has a burden to show an actual dangerous situation. [CP 11:17]. Therefore, the court concluded that the State had not proven an exception to the search warrant requirement by clear and convincing evidence. [CP 11:19-20]

II. <u>Procedural History.</u>

Eric Daniel Cruz was initially cited by citation for Unlawful Possession of Drug Paraphernalia, Possession of Marijuana less than 40 grams, and Unlawful Recreational Fishing in the First and Second Degree. On November 1, 2012, the State dismissed that case from District Court without prejudice with the intent of refiling in Superior Court with the added charge of Unlawful Possession of Firearms in the Second Degree.

On December 15, 2015, the State filed an Information charging Mr. Cruz with three counts of Unlawful Possession of a Firearm in the Second Degree. [CP 53-55] On February 9, 2015, Mr. Cruz, by and through counsel, filed a Motion to Suppress Evidence. [CP 33-42] On

February 17, 2015, the State filed its response. [CP 22-32] Mr. Cruz, by and through counsel, filed a reply on February 25, 2015. [CP 17-21]

The hearing on the Motion to Suppress under CrR 3.6 was held on February 26, 2015. The trial court ruled in favor of Mr. Cruz and suppressed the seized firearms. [CP 7-8] A contested hearing on Findings of Fact and Conclusions of Law was held on March 26, 2015. The Findings of Fact and Conclusions of Law, Order Suppressing Evidence, and Order of Dismissal with Prejudice were filed on March 26, 2015. [CP 9-12; 7-8; 4]

ASSIGNMENTS OF ERROR

I. <u>Assignments of Error.</u>

1. The trial court erred in holding that this case is analyzed under *Arizona v. Gant*, 556 U.S. 332 (2004) and its progeny.
2. The trial court erred in holding that the State had not proven an exception to the warrant requirement by clear and convincing evidence.
3. The trial court erred in holding that the State has a burden to show an actual dangerous situation.
4. The trial court erred in holding that there was no danger to Officer McCormick sufficient to justify a search for officer safety.

II. Issues Pertaining to Assignment of Error.

1. Whether the trial court erred in concluding that this case falls under *Arizona v. Gant*, 556 U.S. 332 (2004) as a search incident to arrest rather than a protective search for officer safety under *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986), *State v. Larson*, 88 Wn.App. 849, 946 P.2d 1212 (1997), and *State v. Glossbrener*, 146 Wn.2d 670, 49 P.3d 128 (2002) or an exigent circumstances search under *State v. Smith*, 165 Wn.2d 511, 518 (2009).
2. Whether the trial court erred in concluding the State had not proven an exception to the warrant requirement given the evidence supporting an officer safety search and exigent circumstances search.
3. Whether the trial court erred in concluding that the State has a burden to show an actual dangerous situation existed in order to support an officer safety search.
4. Whether the trial court erred in concluding that there was no danger to Officer McCormick under the circumstances presented to Officer McCormick at the time of the search such to justify an officer safety search.

ARGUMENT

I. The search of Mr. Cruz's vehicle should be analyzed under *State v. Kennedy* and its progeny as an officer safety search rather than a search incident to arrest under *Arizona v. Gant.*

Appellant first assigns error to the trial court's determination that this case falls under *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710 (2004) as a search incident to arrest. Appellant contends this case should have been reviewed as an officer safety search, distinct from a search incident to arrest. The court reviews a trial court's conclusions of law in an order pertaining to suppression of evidence de novo. *State v. Smith*, 165 Wn.2d 511, 516, 199 P.3d 386 (2009).

State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986) is the foundation case for protective searches of vehicles based on officer safety. In *Kennedy*, the defendant and a passenger were pulled over after an informant had provided information that the defendant had just purchased marijuana. *Id.* at 3. Prior to pulling the vehicle over, the officer observed the defendant lean forward as if to put something under the seat. *Id.* at 4. The officer approached the vehicle and removed the defendant from the vehicle. *Id.* The officer looked into the vehicle to identify the passenger and he reached under the front seat where he found a bag of marijuana. *Id.*

According to the Court, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968) provides guidance for this type of stop and search. To begin with, it is well settled that an investigatory stop is reasonable when the officer has "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrants that intrusion." *Kennedy*, 107 Wn.2d at 5 citing *Terry*, 392 U.S. at 21. Furthermore, "the same concern that justifies the frisk under a Fourth Amendment analysis, possible danger to the officer, justifies it under article 1, section 7." *Id.* at 10.

The Court took the opportunity to distinguish this type of search from a search incident to arrest under *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986) overruled by *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009) (*Valdez* was Washington's adoption of the holding in *Gant*, 556 U.S. 332). While *Stroud* provided some guidance, the Court pointed out that the scope of the search in *Kennedy* must be determined under a different framework. *Kennedy*, 107 Wn.2d at 12. *Stroud* [and *Valdez*] involved an arrest, while a *Terry* stop is considerably different. *Id.* Thus, the Court expressly differentiated between a search incident to arrest under *Stroud* [and *Valdez*] and a protective search for officer safety taking place during a *Terry* stop. *Id.*

In its analysis under an officer safety search, the Court recognized that "[a]n officer conducting an investigative stop may be endangered not only by the suspect but by companions of the suspect as well." *Id.* at 11. This means the officer may search for weapons within the investigatee's immediate control. The Court also recognized that "such a limited search applies to any companion in the car because that person presents a similar danger to the approaching officer." *Id.* at 12.

With regard to *Kennedy*, the officer had seen a furtive gesture sufficient to give him an objective suspicion that the defendant was hiding something under the front seat and the officer had no way of knowing what that was. *Id.* at 11. The Court held the search valid because from the officer's perspective, there remained the initial gesture, the unknown object under the front seat, and the passenger inside the car who had easy access to the object. *Id.*

Building on the framework of *Kennedy*, the Division One Court of Appeals subsequently decided *State v. Larson*, 88 Wn.App. 849, 946 P.2d 1212 (1997) approved of by *State v. Glossbrener*, 146 Wn.2d 670, 49 P.3d 128 (2002). In *Larson*, the officer initiated a traffic stop of the defendant for speeding. *Id.* at 851. The officer observed the defendant leaning forward and making movements toward the floorboard of his truck. *Id.* The officer removed the defendant from the vehicle and placed himself

between the defendant and his vehicle. *Id.* The officer stuck his head into the cab of the truck through the open door to visually inspect the area around the driver's seat. *Id.* He saw heroin and drug paraphernalia in a pocket on the driver's seat. *Id.* The officer testified that if he had not found the drug-related items, he would have had Larson get back in the truck and would have proceeded with the usual activities involved in a traffic stop. *Id.*

Similar to *Kennedy*, the court recognized that this search was distinct from a search incident to arrest: "We first reject the State's attempt to justify the search as incident to arrest.... We address only the issue whether the search was justified by the concern for officer safety." *Id.* at 852.

Larson relied in part on *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469 (1983), a United States Supreme Court case that held under the Fourth Amendment, it is clear that a reasonable concern for officer safety, sufficient to justify the search of an automobile incident to a *Terry* stop, may arise even in circumstances where a lone driver is outside the automobile and has no immediate access to the car. *Id.* at 852.

Relying on *Michigan v. Long*, *Larson* therefore expanded *Kennedy,* holding that whether the passenger was in the car or not was not dispositive of whether the officer's search was reasonable. *Id.* at 856.

> In stopping a vehicle for a minor traffic infraction, a police officer is authorized and expected to 'detain that person for a reasonable period of time necessary to identify the person, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.' The certificate of license registration, by law, must be carried in the vehicle for which it is issued. Typically, this document is kept within the passenger compartment rather than on the driver's person. It was therefore reasonable for [the officer] to anticipate that as he continued to carry out the traffic stop, sooner or later he would have to permit Larson to return to the truck to retrieve documents. Because Larson would then have had access to any weapon he might have concealed inside before getting out, the protective search to discover such a weapon was not unreasonably intrusive.

Id. at 856. The court upheld the search based in large part on the fact that the defendant would be returned to the vehicle. *Id.*

The Washington Supreme Court then decided *Glossbrener*, 146 Wn.2d 670. In *Glossbrener*, an officer pulled over the defendant's vehicle for a non-functioning headlight. *Id.* at 673. Before coming to a stop, the officer noticed the defendant reach down toward the passenger side of the car for several seconds. *Id.* Upon approaching the vehicle, the officer noticed signs of intoxication. *Id.* The officer asked the defendant why he had reached toward the passenger side of the vehicle. *Id.* The defendant admitted that he had reached over to hide an alcohol container. *Id.* The officer had the defendant step out and perform field sobriety tests which showed that he was not impaired. *Id.* at 674. The officer then searched

the passenger side of the car, the area in which he had seen the defendant reaching prior to coming to a stop for "weapons and other evidence." *Id.* The officer found methamphetamine and the defendant was charged with possession of a controlled substance. *Id.*

The defendant argued that *Kennedy* only authorizes an officer to stop and frisk an occupant of a vehicle based on officer safety concerns, but does not permit the officer to search the interior of the vehicle. *Id.* at 677. The Court referenced the holding in *Kennedy* that "an officer [may] make a limited search of the passenger compartment to assure a suspect person in the car does not have access to a weapon." *Id.* at 678. The Court again referenced the distinction between a search incident to arrest and a search based on officer safety. *Id.* The Court further reiterated that "the area to be searched may be expanded to include those areas within the immediate control of any passenger because a passenger 'presents a similar danger to the approaching officer.'" *Id.* Further, the search of the passenger compartment of the vehicle is not dependent on the passenger remaining in the vehicle. *Id.*

The Court then referenced and approved of *Larson*, saying "the Court of Appeals has interpreted *Kennedy* to allow a search of the passenger compartment of a vehicle based on officer safety even though the driver was outside the vehicle and no passengers were inside the

vehicle. *Id.* "Because the officer was conducting a routine traffic stop, which required him to obtain the driver's vehicle registration, Larson would eventually have to gain access to his truck in order to obtain the registration... Thus the officer's concern for his safety was valid. *Id.*

In holding that *Larson* and *Kennedy* did not limit an officer's ability to search the passenger compartment of a vehicle based on officer safety concerns to only situations in which either the driver or passenger remain in the vehicle, the Court established a clear guide stating "a court should evaluate the entire circumstances of the traffic stop in determining whether the search was reasonably based on officer safety concerns." *Id.* at 679.

The Court recognized that *Kennedy* did not articulate a standard for courts to apply when determining whether an officer was justified in searching the passenger compartment of a vehicle for officer safety. *Id.* at 680. The Court analogized such an officer safety search to a *Terry* frisk, noting that such searches are justified when an officer can point to "specific and articulable facts which create an objectively reasonable belief that a suspect is armed and presently dangerous." *Id.* The Court then held that a protective search for weapons must be objectively reasonable, though based on the officer's subjective perception of events.

Id. This is the current standard for vehicle searches based on officer safety.

While the Court in *Glossbrener* did not find the officer's search of the passenger compartment to be reasonable based on the circumstances presented to the officer in that case, the Court differentiated the search from that in *Larson*. *Id.* at 684. In upholding the search in *Larson*, the Court specifically relied on the fact that Larson would have to return to his vehicle to obtain his registration in order to carry out the traffic stop, which in turn would give him access to any weapon he may have concealed inside the truck. *Id.*

Therefore, under the *Kennedy*, *Larson*, and *Glossbrener* line of cases, an officer may search a vehicle for weapons when there is an objectively reasonable possibility of danger based on the officer's subjective knowledge, taking into account such circumstances as whether there is a companion who has access to the vehicle and whether the defendant will be returned to the vehicle.

A. A protective search for officer safety is a distinct and separate type of search from a search incident to arrest.

Appellant assigns error to the trial court's ruling that this case falls under *Gant* as a search incident to arrest. As an initial matter, the case law is clear that a protective search for officer safety is distinct from a search

incident to arrest under *Gant.* While a search incident to arrest has an officer safety prong, an officer safety search is not only valid in the context of a search incident to arrest. This distinction was initially pointed out in *Kennedy* where the Court declined to analyze the case under *Stroud* and *Valdez* and instead analyzed it by analogizing it to *Terry. Kennedy*, 107 Wn.2d at 12.

This distinction was again pointed out in *Larson* when the court rejected the State's argument that the search fell under a search incident to arrest and reviewed the search only in the context of a search for officer safety. *Larson*, 88 Wn.App. at 852. Finally, this distinction was reiterated in *Glossbrener,* approving of *Larson. Glossbrener*, 146 Wn.2d at 678.

The trial court held that this case falls under *Gant* and its progeny as a search incident to arrest. [RP 47:2-15; CP 11:13] Appellant contends that this case falls under *Kennedy*, *Larson*, and *Glossbrener* as a search premised solely on officer safety.

Gant involved vehicle searches premised off of nothing more than a suspect's arrest while *Kennedy*, *Larson*, and *Glossbrener* involve situations where the suspect is not arrested, but there remains some level of potential danger to the officer. Either the suspect will be returned to the vehicle or there is a passenger present who maintains a level of access to the passenger compartment. The same rationale applied in *Kennedy*,

Larson, and *Glossbrener* applies in this case. The issue is not whether Mr. Cruz had been arrested, but whether Officer McCormick had a reasonable concern for his safety under the circumstances. The mere fact that he had actually been arrested does not automatically qualify this search as incident to arrest, especially when the search is based on factors other than the arrest.

Mr. Cruz admitted to the officer that he had firearms in his vehicle. According to Officer McCormick, his intention was to cite and release Mr. Cruz, therefore Mr. Cruz would have returned to the vehicle. Similarly, as in *Kennedy* and *Glossbrener*, there was another individual, Mr. Rose, present who presented the possibility of danger to Officer McCormick as he was unrestrained within 15 feet of Mr. Cruz's unsecured vehicle.

It is these factors that show this case should be analyzed under an officer safety standard, not a search incident to arrest. These are the exact factors present in *Kennedy* and *Larson*- the presence of another individual and the defendant's anticipated return to the vehicle. Furthermore, as the record clearly indicates, Officer McCormick specifically stated that he retrieved the firearms from the vehicle for officer safety, not in connection with the defendant's arrest. The trial court erred when it applied the incorrect body of law to this case.

B. The search of Mr. Cruz's vehicle was a valid officer safety search.

Appellant further assigns error to the trial court's determination that the retrieval of firearms from Mr. Cruz's vehicle was not a valid protective search for officer safety as an exception to the warrant requirement. Appellant contends it was a valid protective search for officer safety in light of the circumstances presented to Officer McCormick at the time of the search and seizure. Following *Kennedy*, *Larson*, and *Glossbrener*, an officer may search a vehicle for weapons when there is an objectively reasonable possibility of danger based on the officer's subjective knowledge, taking into account such circumstances as whether there is a companion who has access to the vehicle and whether the defendant will be returned to the vehicle.

In *State v. Chang*, 147 Wn.App. 490, 195 P.3d 1008 (Div. 1, 2008), the court held that an officer who had information there was a gun in the car, could search the car without a warrant to protect their safety, even though the defendant was handcuffed and standing outside the car. In *Chang*, officers responded to a report of a suspected forgery at a bank. *Id.* at 494. The suspect told the officers he had been dropped off at the bank by the defendant. *Id.* Officers found the defendant in the parking lot and detained him. *Id.* When asked if the defendant had any weapons on

him or in the vehicle, the forgery suspect told them the defendant had a handgun. *Id.* Officers had already removed the defendant from the vehicle and handcuffed him. *Id.* With the information about the gun, the officer looked inside the vehicle and saw a bulge under the floor mat. *Id.* He pulled back the mat and found a gun. *Id.* The police did not necessarily intend on arresting him at that time and the defendant was going to be permitted to return to the vehicle. *Id.*

The court upheld the search as a valid protective search stating, "Where a lone driver is outside the automobile and has no immediate access to the car, police may conduct a protective search if the suspect will have a later opportunity to return to his vehicle." *Id* at 496 citing *Larson*, 88 Wn.App. at 857. "Because the police had information that Chang had a gun in his car, their safety concern was reasonable and the trial court did not err in concluding that the warrantless search was valid." *Id.* at 497.

In both *Larson* and *Chang*, the pertinent fact was that the suspect would be returning to the vehicle. This is the exact situation that occurred with Mr. Cruz. Furthermore, this case has one extremely important fact that was not even present in *Kennedy* or *Larson*- actual knowledge of a firearm. Officer McCormick testified at the suppression hearing that Mr. Cruz had specifically told him there were firearms in the vehicle. Based on this, the officer had actual knowledge that firearms were in the vehicle.

Officer McCormick also testified that he intended on citing and releasing Mr. Cruz, as was his practice with this type of offense. Therefore, Mr. Cruz would be returning to the vehicle. Furthermore, the officer testified that there was another individual, Mr. Rose, unrestrained in close proximity to Mr. Cruz's unsecured vehicle. Officer McCormick was also in a position to have to try to focus his attention on both individuals at the same time. All of this information was within Officer McCormick's subjective knowledge at the time of the search.

Officer McCormick was in an area with little radio contact and was without the assistance of any other officers. While the trial court seemed to focus on the fact that Officer McCormick was able to make radio contact at one point, the ability to make radio contact does not provide the officer with much safety. If the closest assisting officer is thirty minutes away, radio contact does little to protect the officer.

The reality is that in rural areas where officers are scarce and the territory to cover is large, officers are often engaged in contacts alone and without the aid of immediate assistance. They must be permitted to ensure their own safety, especially when dealing with multiple individuals, and even more so when there are known firearms at the location. To hold otherwise would put little value on the safety of officers. Therefore, under

the circumstances presented to Officer McCormick at the time, his search was objectively reasonable.

II. The search of Mr. Cruz's vehicle also qualifies as an officer safety search under the exigent circumstances exception to the warrant requirement.

Appellant further contends that an officer safety search exists not only in the context similar to a *Terry* stop, but as an actual prong of "exigent circumstances." Therefore, the trial court erred further in finding that the State had not proven a warrant exception by clear and convincing evidence.

Exigent circumstances exist where it is impractical to obtain a warrant. *State v. Audley*, 77 Wn.App. 897, 905 (Div. 1 1995) citing *State v. Muir*, Wn.App. 149, 152 (1992). Such circumstances include hot pursuit, fleeing suspects, mobilily or destruction of evidence, and safety of the arresting officer or the public. *Audley*, 77 Wn.App. at 905 citing *State v. Counts*, 99 Wn.2d 54, 60 (1983); *State v. Carter*, 151 Wn.2d 118, 128 (2004); *State v. Patterson*, 112 Wn.2d 731, 751 (1989). The rationale behind the exigent circumstances exception "is to permit a warrantless search where the circumstances are such that obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." *Smith*, 165 Wn.2d at 517. These cases are characterized by the

need to act almost reflexively, on the officer's judgment, rather than on complex legal standards. *Patterson*, 112 Wn.2d at 751. "They are also often characterized by an absence of complete information and a need, accordingly, to assume and act on a worst case scenario." *Id.*

Whether exigent circumstances exist must be determined by the totality of the circumstances. *Carter,* 151 Wn.2d at 128. The court uses six factors to guide whether exigent circumstances justify a warrantless search: 1) the gravity or violent nature of the offense with which the suspect is to be charged; 2) whether the suspect is reasonably believed to be armed; 3) whether there is reasonably trustworthy information that the suspect is guilty; 4) there is strong reason to believe that the suspect is on the premises; 5) a likelihood that the suspect will escape if not swiftly apprehended; and 6) the entry is made peaceably. *State v. Cardenas*, 146 Wn.2d 400, 406 (2002).

In *State v. Smith*, 137 Wn.App. 262, 153 P.3d 199 (2007) the Division Three Court of Appeals upheld the search of a residence as a valid protective sweep. Officers went to the defendant's property to investigate a report of a semi-truck filled with anhydrous ammonia, a dangerous chemical. *Id.* When they arrived, they saw the vehicle and confirmed it had also been reported stolen. *Id.* The officers attempted to secure the home and surrounding outbuildings near the truck. *Id.* The

officer knocked and announced but nobody answered. *Id.* Two individuals were seen in an upstairs window. *Id.* A gun case could also be seen through one of the windows. *Id.* Eventually a man and a woman came out of the house. *Id.* at 267. The gun case that had been seen in the window earlier was gone. *Id.* Neither of the two individuals had a gun or the case. *Id.* Officers were uncertain if there were additional people inside the house. *Id.* Based on those facts, they did a protective sweep of the house to check for the gun and any other persons who may have been inside. *Id.* Upon entering the home, they noticed a strong chemical odor and later obtained a search warrant for evidence of methamphetamine manufacture. *Id.* While searching pursuant to the warrant, evidence of manufacture equipment was found. *Id.*

The defendant moved to suppress any evidence obtained during the protective sweep. The trial court had ruled that the warrantless search fell under the emergency exception. *Id.* at 267. The Division Three Court of Appeals upheld the warrantless search as valid under the protective sweep exception to the warrant requirement. *Id.* at 268. The court specifically pointed out that the officers did not know if other individuals were present in the home, their observation of the gun case in the window and the fact that the gun case was later missing from the window. *Id.* The officers

searched only those areas of the house that could have concealed a person. *Id.*

The Washington Supreme Court granted review of *Smith* and upheld the search under the "public and officer safety" prong of the "exigent circumstances" warrant exception. *Smith*, 165 Wn.2d at 519. The Court specifically noted that a gun case was seen in the window, then was later missing and neither of the two individuals who had come outside had the gun. *Id.* The Court also noted that the officers had a subjective fear that someone could still be in the home with the missing gun and could either shoot at the tank of chemicals or shoot at the officers. *Id.* Since the Court upheld the search under exigent circumstances, it did not reach the issue of protective sweep. *Id.*

Following *Smith*, it is clear that not only does officer safety pertain to searches during *Terry* stops, but officer safety is also a prong of "exigent circumstances." The very nature of exigent circumstances is that, under the circumstances presented to the officer in the field, it is impractical to require the officer to obtain a warrant. The officers must assume a worst case scenario and act accordingly, especially with regard to officer safety.

Officer McCormick was alone with no assisting officers. He knew for a fact there were firearms in the vehicle as Mr. Cruz had said so

himself. Officer McCormick's attention was on Mr. Cruz as that is who he was writing the citation to. However, Mr. Rose remained unrestrained a mere 15 feet from the unsecured vehicle. It is impractical and unreasonable to require Officer McCormick to obtain a warrant to seize the firearms to ensure his safety. He was in a location with no cellular service and "sketchy" radio contact. He simply could not have even easily obtained assistance from other officers let alone a warrant. Therefore, there were exigent circumstances allowing Officer McCormick to retrieve the firearms from the vehicle to secure them for the duration of the contact.

III. The State is not required to show an actual danger to the officer to justify a search for officer safety.

Appellant assigns error to the trial court's ruling that the State is required to show the officer is in actual danger. [RP 46:18] None of the case law requires the State to prove an actual dangerous situation. Rather the question is whether there is a reasonable basis that there is a possible danger to the officer. In *Kennedy*, the Court stated that it was the "possible danger to the officer" that justifies the intrusion, not actual danger itself. *Kennedy*, 107 Wn.2d at 10. Furthermore, this possible danger need not come from the defendant himself, but can come from companions and passengers as well. *Id.* at 11. This possible danger can

be present whether or not the passenger is even in the vehicle. *Larson*, Wn.App. at 856; *Glossbrener,* 146 Wn.2d at 678.

It is an important distinction that a search for officer safety is *similar* to that of a *Terry* stop, it is not a type of *Terry* stop. In *Glossbrener*, the Court analogized such searches to *Terry* stops and the standard that a *Terry* stop is reasonable when there are specific and articulable facts which create an objectively reasonable belief that a suspect is armed and presently dangerous." *Glossbrener,* 146 Wn.2d at 680. However, the Court then said that an officer safety search must be "objectively reasonable, though based on the officer's subjective perception of events." *Id.* The question then, is not whether there exists an actual danger to the officer, but rather, whether the officer had a reasonable basis to have concern for his safety based on the circumstances presented to him at the time.

The trial court therefore erred when it held that the State must prove that the officer is in actual danger before he may conduct a search for officer safety. The line between actual danger and possible danger is vague at best. To require actual danger would contradict the entire purpose of officer safety searches. If an officer is required to wait for a level of danger that a court would label as "actual," the purpose of officer

safety searches would be frustrated as the danger the officer is attempting to avoid would already be present.

Officer McCormick was presented with objectively reasonable possible danger during his contact with Mr. Cruz. Officer McCormick was alone with no immediate assistance from any officers if trouble should arise. He had no cellular service and "sketchy" radio contact. He was presented with two individuals. While one was handcuffed and in the vehicle, the other was unrestrained. Officer McCormick's attention would be on Mr. Cruz as he was the individual receiving the citation making it difficult for Officer McCormick to focus on Mr. Rose as well. Officer McCormick knew there were firearms in the vehicle and Mr. Rose was 15 to 20 feet from those unsecured firearms. This presents a clear possibility of danger to Officer McCormick sufficient to justify an exigent circumstance search based on officer safety.

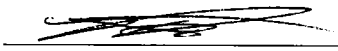
CONCLUSION

Appellant requests this Court find the trial court applied the incorrect body of law when it applied *Arizona v. Gant* and its progeny to this case and hold that this case should be analyzed under a search for officer safety under either the *Kennedy* line of cases or as an exigent circumstance. Appellant further requests this Court find that the State is not required to show actual danger, but rather the possibility of danger, in

order to justify a search for officer safety. Appellant requests this Court find that the State had proven the existence of a warrant requirement, specifically, officer safety. Finally, Appellant requests this Court remand this case to the trial court for continued proceedings consistent with those holdings.

Dated this 10th day of September, 2015

Respectfully Submitted:



Branden E. Platter, WSBA#46333
Deputy Prosecuting Attorney
Okanogan County, Washington

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 11th day of September, 2015, I provided service to the following, a true and correct copy of the Opening Brief of Appellant:

E-mail:
ron@hammettlaw.com

U.S. Mail:
Ronald Hammett
Hammett Law Office
PO Box 3940
Omak, WA 98841

Shauna Field, Legal Assistant

KARL F. SLOAN
Okanogan County Prosecuting Attorney
P. O. Box 1130 • 237 Fourth Avenue N.
Okanogan, WA 98840
(509) 422-7280 FAX: (509) 422-7290