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

REPLY BRIEF OF APPELLANT

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ARGUMENT

Respondent asks this Court to analyze this case strictly as a search incident to arrest and to disregard all other warrant exceptions. Citing *State v. Valdez*, 167 Wn.2d 761, 766 (2009); *Arizona v. Gant*, 566 U.S. 322 (2009); *State v. Snapp*, 174 Wn.2d 177 (2012); and *State v. Alfana*, 169 Wn.2d 169 (2010) Respondent argues that the United States and Washington Supreme Courts have held "under facts similar to this case" that once a suspect is arrested, they pose no risk of obtaining a weapon. [Respondent's Brief 8]. Respondent seems to ask this Court to stop its analysis there, focusing on the sole fact that the defendant had been arrested.

However, while the current case is similar to that line of cases in that Mr. Cruz had been arrested at one point, the similarity ends there. Respondent ignores the three primary factors that move this case away from *Gant* and its progeny and into the realm of *State v. Kennedy*, 107 Wn.2d 1 (1986), *State v. Larson*, 88 Wn.App. 849 (Div. 1, 1997), and *State v. Glossbrener*, 146 Wn.2d 670 (2002)-- 1) there was an unrestrained passenger in close proximity to the vehicle, 2) Officer McCormick intended on returning Mr. Cruz to his vehicle at the conclusion of the contact, and 3) Officer McCormick had actual knowledge that there were firearms in the vehicle.

In *Valdez*, cited by Respondent, the defendant was arrested for an outstanding warrant, therefore, there was no chance he would be returned to the vehicle. 167 Wn.2d at 766. The passenger was asked to step out of the vehicle and the officer searched the passenger compartment. *Id.* However, there were no facts presented in *Valdez* to suggest the defendant or passenger had made any furtive movements or had any weapons in the vehicle. *Id.* Therefore, there was no reason for the officer to search the vehicle, and with the incident having occurred prior to *Gant*, the officer's search was based solely on the defendant's arrest. The Court analyzed this case only under the search incident to arrest doctrine. *Id.* at 767-768.

In *Alfana*, also cited by Respondent, the defendant passenger was similarly arrested solely for an outstanding warrant and there was no chance she would be returned to the vehicle. 169 Wn.2d at 174. The driver was asked to step out of the vehicle and the officer searched the passenger compartment. *Id.* However, like in *Valdez*, the driver and defendant had made no furtive movements or anything to raise suspicion that there may be weapons in the vehicle. *Id.* The search was conducted exclusively incident to arrest as the incident occurred prior to the *Gant* decision. *Id.* The Court expressly only analyzed *Alfana* under a search incident to arrest and did not consider any other warrant exceptions. *Id.* at 177.

This Court should analyze this case under the line of cases that *most closely* resemble the facts of the current case, not a line of cases that share a single similarity and were exclusively analyzed under the search incident to arrest doctrine without consideration of any other warrant exceptions.

Respondent acknowledges that *Kennedy* allows a search of a vehicle for officer safety as an extension of *Terry v. Ohio*, 392 U.S. 1 (1968). [Respondent's Brief 13] However, Respondent asks this Court to stop its analysis there and disregard *Kennedy*'s extensions in *Larson* and *Glossbrener*. *Kennedy* provides the proper *foundation* case for this search, but the Court must follow the line of cases that build on *Kennedy* to fully analyze this case.

Larson expanded *Kennedy* to allow an officer to search the passenger compartment of a vehicle regardless of whether the passenger was in the vehicle or not. 88 Wn.App. at 856. The determining factor in *Larson* was also that the defendant would be returning to the vehicle. *Id.* Therefore, if not dispositive, a defendant's return to the vehicle is a highly probative consideration in analyzing these searches. *Glossbrener* then approved of *Larson*, thus setting the standard for these types of searches. 146 Wn.2d at 678. *Glossbrener* also approved of *Larson*'s holding based

on the fact that the defendant in *Larson* would be returning to the vehicle, thus presenting an officer safety issue. *Id.* at 684.

Respondent focuses solely on Mr. Cruz's arrest and glosses over the fact that there was a passenger roaming free in the proximity of the vehicle, that Mr. Cruz would be returning to the vehicle, and that Officer McCormick had actual knowledge of the firearms in the vehicle.

Respondent argues in one sentence that "the evidence was that [Mr. Rose] complied with the officer's request to stay away and was not involved in criminal activity." [Respondent's Brief 14]

Mr. Cruz informed Officer McCormick that he had firearms in the vehicle. [RP 11:20] This occurred *prior to* Mr. Rose coming to the area of the vehicle. [RP 11:20-12:7] While near the vehicle, Mr. Rose was unrestrained and approximately 15-20 feet from the vehicle which was unlocked. [RP 28:1, 25:16-20, 26:8]. This presents a significant risk to officer safety.

Respondent then argues that Officer McCormick did not have an objectively reasonable belief that he was in danger if he intended on releasing Mr. Cruz. [Respondent's Brief 16] However, Officer McCormick's intention to arrest or cite and release Mr. Cruz was not based on whether he felt there was any danger, but rather based on the charges Mr. Cruz was to be charged with at that point. Officer

McCormick testified that those particular crimes were not something he would typically book a person into jail for. [RP 24:15-18] This is no different than *Larson* where the officer had seen furtive movements from the defendant and because Larson was going to have to return to the vehicle, the officer was justified in searching it for his own safety. This case presents a situation where Officer McCormick did not base his safety concerns on a furtive movement or unfounded belief there may be weapons in the vehicle. Officer McCormick knew there were firearms in the vehicle as Mr. Cruz had told him that himself. [RP 11:20]

According to *Glossbrener*, "a court should evaluate the entire circumstances of the traffic stop in determining whether the search was reasonably based on officer safety concerns." 146 Wn.2d at 679. Officer McCormick was presented with a situation where he knew there were firearms in the vehicle [RP 11:20], there was an individual 15 feet from the unlocked vehicle [RP 28:1, 25:16-20], the officer was alone with no backup [RP 8:5], he was in an area with non-existent cell service and "sketchy" radio contact [RP 8:15-16], and Mr. Cruz was going to be returned to the vehicle [RP 23:14]. Officer McCormick's subjective purpose in securing the firearms was for his own safety [RP 12:13-15] and he intended on returning them at the conclusion of the contact [RP 13:9-

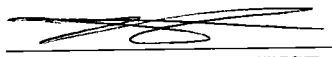
10]. Under these facts, Officer McCormick was lawfully justified to retrieve the firearms from Mr. Cruz's vehicle.

CONCLUSION

Appellant requests this Court find that the search of Mr. Cruz's vehicle was a lawful search for officer safety under *Kennedy*, *Larson*, and *Glossbrener*. Appellant requests this Court find that the State has proven the existence of a warrant requirement exception, specifically, officer safety. Finally, Appellant requests this Court remand this case to the trial court for continued proceedings consistent with those holdings.

Dated this 7th day of January, 2016

Respectfully Submitted:



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PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 7th day of January, 2016, I provided to the following via U.S. mail, a true and correct copy of the Reply Brief of the Appellant:

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