IN THE SUPREME COURT OF THE STATE OF WASHINGTON

*Court of Appeals No. 39665-7-III*

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STATE OF WASHINGTON, Respondent,

v.

LENO SABALSA HOWARD, Petitioner.

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# PETITION FOR REVIEW

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Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
1360 N. Louisiana St. #A-789
Kennewick, WA 99336
Tel: (509) 572-2409
Email: Andrea@2arrows.net
Attorney for Petitioner

## TABLE OF CONTENTS

## AUTHORITIES CITED

### Cases

Federal:



Washington State:



### Constitutional Provisions



### Court Rules

## I. IDENTITY OF PETITIONER

Leno Howard requests that this court accept review of the decision designated in Part II of this petition.

## II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on January 28, 2025, concluding that the warrantless search of his car while he and all passengers were detained by police outside of and away from the car was justified by *Terry* considerations of officer safety. A copy of the Court of Appeals' published opinion is attached hereto.

## III. ISSUES PRESENTED FOR REVIEW

1. Whether, following *Arizona v. Gant*[1] and its restrictions on the use of officer safety considerations to justify warrantless searches of vehicles incident to arrest after the occupants had been removed from

[1] 556 U.S. 332, 129 S. Ct. 1710, 173 L.Ed.2d 485 (2009).

them, the same considerations can justify warrantless searches of vehicles after the occupants had been removed during a *Terry*[2] investigation.

2. Whether *Arizona v. Gant* implicitly overruled *State v. Kennedy*[3] and *State v. Glossbrenner*,[4] which permit searches of an automobile's interior after the vehicle's occupants have been detained and removed based on officer safety considerations.
3. Whether the search of Mr. Howard's vehicle was unreasonable under the Fourth Amendment and article I, section 7 of the Washington Constitution.

## IV. STATEMENT OF THE CASE

A Yakima County deputy sheriff was responding to a call of trespassers in Toppenish when he encountered a Pontiac Grand Am turning around in the driveway of the subject

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[2] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 186, 820 L.Ed.2d 889 (1968).
[3] 107 Wn.2d 1, 726 P.2d 445 (1986).
[4] 146 Wn.2d 670, 49 P.3d 128 (2002).

property. RP (Brittingham) 29-33. There were three people inside and Leno Howard was driving. RP (Brittingham) 35-36. The individuals were very cordial; Mr. Howard told the deputy he was there to pick up his friend and they were just leaving. RP (Brittingham) 36.

During the contact, dispatch informed the deputy of a report that shots had been fired and, upon inquiry, Mr. Howard said that there might be hunters nearby. RP (Brittingham) 37. However, dispatch then told the deputy that the caller on the phone was saying that the driver of the vehicle had fired shots at the caller. RP (Brittingham) 37.

The deputy immediately ordered everyone in the car to put their hands up. RP (Brittingham) 38. An initial visual scan of the car's interior revealed a large yellow-handled axe but no gun. RP (Brittingham) 38. When backup arrived, the deputies ordered the occupants out of the vehicle and frisked them, without incident. RP (Brittingham) 40-41.

The deputy then told Mr. Howard that he was going to "frisk the vehicle." RP (Brittingham) 43. While the occupants were detained about 10 feet away by another deputy, the deputy looked under the seats, in the glovebox, and ultimately lifted an article of clothing and a soda pop case that were sitting on the back seat to reveal a handgun underneath. RP (Brittingham) 43-44, 67, 71, 74-75.

While the deputies cuffed the male occupants of the car, the deputy who conducted the search then spoke with the caller who reported the shooting and took him back to the Grand Am to conduct a show up identification of the driver. RP (Brittingham) 45-46, 49. Subsequently, police seized the car to search it. RP (Brittingham) 55. They recovered the gun from the back seat, two additional loaded magazines, a live round in the center console, and a spent shell casing under the front passenger seat. RP (Brittingham) 88-89.

The State charged Mr. Howard with two counts of first degree assault, drive-by shooting, and unlawfully possessing a firearm in the first degree. CP 1-2. Mr. Howard moved to suppress the evidence obtained from the car, arguing it was tainted by the deputy's initial warrantless search. CP 41-42. After a hearing, the trial court denied the motion and entered findings of fact and conclusions of law supporting its decision. RP (Brittingham) 107-12; CP 216. The trial court found that Mr. Howard had not consented to the search, that the deputy lifted the soda and clothing in the back seat, and that the deputy would not have been able to see the gun otherwise; it then concluded that the deputy had valid safety concerns that justified a *Terry* search of the vehicle for officer safety purposes. CP 219, 221.

Following trial, a jury acquitted Mr. Howard of both counts of first-degree assault but convicted him of drive-by shooting and unlawfully possessing a firearm in the first degree. RP 559; CP 130-35. The trial court imposed a standard range

sentence of 95 months. CP 195, 197. Mr. Howard appealed, arguing that the trial court erred in denying his motion to suppress the evidence found as a result of the warrantless "frisk" of his car. CP 195; *Appellant's Brief*, at 2-3, 10-22.

In a published opinion, the Court of Appeals affirmed the trial court's denial of Mr. Howard's motion to suppress. *Opinion*, at 1-2, 4. Notwithstanding that the scope of intrusion permitted by *Terry* is less than that permitted by a search supported by probable cause, the Court of Appeals concluded that because a detention permits different safety considerations than an arrest – namely, that the detainee may be allowed to return to his car at some point – police may, solely on reasonable suspicion that a weapon may be present in a vehicle, search that vehicle even when the occupants have been removed from the vehicle and are held under police control. *Opinion*, at 5-7, 9.

Mr. Howard now seeks this Court's review of law enforcement's warrantless search of his vehicle for safety reasons when he and all other occupants were detained by police at a distance from the car.

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(3) because it involves a significant question of law under the Fourth Amendment and article 1, section 7 of the Washington Constitution. *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L.Ed.2d 485 (2009), marked a sea change in the Court's analysis of the reasonableness of unoccupied vehicles predicated on officer safety concerns. While *Gant* did not abrogate *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983) in all circumstances, whether *Long* permits vehicle searches in *these* circumstances – which are factually similar to those in *Gant* and implicate the same reasoning – is a significant constitutional question in light of

this Court's prior cases holding that officer safety justifies a search of the entire passenger compartment of an unoccupied automobile.

This Court adopted the reasoning of *Long* and applied it to article 1, section 7 in *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986) and *State v. Glossbrener*, 146 Wn.2d 670, 49 P.3d 128 (2002). In *Kennedy*, a police officer stopped a vehicle on suspicion that the driver had purchased marijuana. 107 Wn.2d at 3. As he signaled the driver to pull over, he saw the driver lean forward as if to put something under the front seat. The officer ordered him out of the car and reached under the front seat, finding a plastic bag containing marijuana. *Id.* at 3-4. The *Kennedy* Court observed that possible danger to the officer warrants a frisk under the Fourth Amendment and article I, section 7 of the Washington constitution. *Id.* at 10.

Acknowledging the search incident to arrest exception to the warrant requirement adopted in *State v. Stroud*, 106 Wn.2d

144, 720 P.2d 436 (1986), the *Kennedy* Court noted that the degree of intrusion permitted under a *Terry* stop would need to be less than that permitted by a formal arrest under article I, section 7. 107 Wn.2d at 11-12. Accordingly, it concluded that a search for weapons within the investigatee's immediate control, including any passengers in the car, is permitted to assure officer safety. *Id.* at 12. Once in and around the front seat of the car in a protective search for weapons, discovering contraband fell within the plain view exception to the warrant requirement. *Id.* at 13.

Notably, *Kennedy* involved distinctly different circumstances than those present here because it was the driver's own conduct that necessitated the search, and the search was independent of any investigatory motive on the part of law enforcement.

This Court revisited the "vehicle frisk" exception more than a decade later in *Glossbrenner*. There, police stopped a

driver for an inoperable headlight and saw him reach down toward the passenger side of the car before stopping. 146 Wn.2d at 673. The driver admitted he had reached over to hide a container of alcohol and got out of the car to perform field sobriety tests. *Id.* at 673-74. The investigating officer concluded the driver was not intoxicated but continued to detain the driver while a second officer arrived and searched the passenger side of the car, finding methamphetamine. *Id.* at 674.

First, the *Glossbrenner* Court noted that the Court of Appeals had held that circumstances may justify a limited vehicle search predicated on officer safety even if there is no driver or passenger in the car at the time. *Id.* at 678-79 (*discussing State v. Larson*, 88 Wn. App. 849, 946 P.2d 1212 (1997)). However, in that case, the driver was going to need to get back in the vehicle to access the registration documents. *Id.* at 679. The *Glossbrenner* Court agreed that the totality of the circumstances must be examined to determine "whether the search was reasonably based on officer safety concerns." *Id.*

But in *Glossbrenner*, the Court concluded the circumstances did not establish an objectively reasonable belief that the officer was in danger. *Id.* at 682.

Following the decisions in *Kennedy* and *Glossbrenner*, the courts of appeal upheld searches of automobiles based on officer safety considerations in several published decisions. *See, e.g., State v. Glenn*, 140 Wn. App. 627, 166 P.3d 1235 (2007); *State v. Chang*, 147 Wn. App. 490, 195 P.3d 1008 (2008). But in other cases, courts remained skeptical of vindicating warrantless car searches predicated on officer safety when there was no longer any danger of the defendant obtaining a weapon from the vehicle. *See, e.g., State v. Bradley*, 105 Wn. App. 30, 38, 18 P.3d 602 (2001).

In *Gant*, the U.S. Supreme Court make the commonsense observation that "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search," officer safety considerations do not apply and the

search incident to arrest doctrine cannot be invoked. 556 U.S. at 339. The Court of Appeals distinguishes this reasoning from the search of a vehicle under *Terry* because of "the possibility that an occupant will return to the vehicle." *Opinion*, at 9. While it is correct that a suspect who is temporarily detained for investigation will be allowed to return to the vehicle if law enforcement's suspicions are not substantiated, this rationale calls for *more* privacy protection, not less. The suspect cannot reach into a vehicle while being detained for investigation, so the car does not present a danger to police, and once the suspect is allowed to return to the vehicle, suspicion has been dispelled, undermining the justification for the search in the first instance.

Furthermore, the Court of Appeals' reasoning fails to reconcile the recognition of the *Kennedy* Court that the degree of intrusion permitted under a *Terry* stop would necessarily need to be less than that permitted by a formal arrest under article I, section 7. 107 Wn.2d at 11-12. As it stands now, had police arrested Mr. Howard, they would not have been

permitted to search his car without a warrant; because they initially didn't, they may. This reasoning is contradictory, creates incentives for law enforcement to game the investigation and arrest processes to justify warrantless intrusions based on less, rather than greater, suspicion, and rests upon the fiction that police who have detained an individual do not have the power and authority to determine when the investigation is concluded and the suspect can be either arrested, or allowed to resume their business because the initial suspicions have been dispelled.

For all of these reasons, the warrantless search of an unoccupied vehicle while the occupants are detained for investigation, predicated solely on considerations of officer safety, presents a significant question of constitutional law under the Fourth Amendment and article 1, section 7 of the Washington Constitution. Review should, therefore, be granted.

## VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(3) and this Court should enter a ruling that the warrantless "frisk" of Mr. Howard's vehicle after he and all of the vehicle occupants had been detained and removed from the vehicle violates Mr. Howard's rights under the Fourth Amendment and article 1, section 7 of the Washington Constitution.

*This document contains 2,131 words, excluding the parts of the document exempted from the word count by RAP 18.17.*

RESPECTFULLY SUBMITTED this 26 day of February, 2025.

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

## CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by e-mail through the Court of Appeals' electronic filing portal to the following:

Yakima County Prosecuting Attorney's Office
Deputy Prosecuting Attorney
Yakima County Prosecuting Attorney
appeals@co.yakima.wa.us
jill.reuter@co.yakima.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 26 day of February, 2025 in Kennewick, Washington.

Jeff Burkhart

Court of Appeals Opinion no. 39665-7-III (filed 1/28/2025)

# APPENDIX

**FILED**
**January 28, 2025**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

| | | |
|---|---|---|
| STATE OF WASHINGTON, | ) | No. 39665-7-III |
| | ) | |
| Respondent, | ) | |
| | ) | |
| v. | ) | PUBLISHED OPINION |
| | ) | |
| LENO SABALSA HOWARD, | ) | |
| | ) | |
| Appellant. | ) | |

LAWRENCE-BERREY, C.J. — Leno Howard appeals his convictions for drive-by shooting and unlawful possession of a firearm in the first degree. He argues the trial court erred in denying his motion to suppress evidence of the handgun found by a deputy during a warrantless search of his car.

Howard's argument hinges on the notion that *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), a decision discussing the search incident to arrest exception to the warrant requirement, implicitly overruled previous decisions that allow an officer, when conducting a *Terry v. Ohio*[1] investigation, to conduct a warrantless frisk of an unoccupied vehicle if reasonable for officer safety concerns.

[1] 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Because these two exceptions to the warrant requirement have different purposes, and because investigative stops present officer safety concerns that do not arise when an officer arrests a suspect, we conclude that *Gant* did not alter the rule permitting vehicle searches when reasonable for officer safety. We affirm the trial court's denial of Howard's motion to suppress.

## FACTS[2]

Sheriff's Deputy Mike Russell responded to a trespassing report at a farm. As he entered the farm's long dirt driveway, the deputy saw a Pontiac sedan turn around and head toward him from the house. As the vehicles reached each other, the deputy lowered his window and asked the Pontiac's driver if everything was all right. The driver, later identified as Leno Howard, responded that he had just picked up his two passengers, a man and a woman, and they were now leaving.

Around this time, Deputy Russell heard from dispatch that the 911 caller who had reported the trespass claimed to be at the house, and that shots had been fired. When the deputy asked Howard if he was aware of any shooting, Howard attributed the shots to nearby hunters. Dispatch then reported that the 911 caller could see the deputy speaking with the driver. The caller claimed that the driver had fired the shots.

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[2] These facts come from the trial court's CrR 3.6(b) findings, which Howard does not contest.

Deputy Russell immediately exited his vehicle and directed the Pontiac's three occupants to put their hands in the air. They complied. The deputy asked if there was a firearm in the car, and Howard said no. Deputy Russell looked inside the car and did not see any firearms, but did see a large axe. The occupants kept their hands raised, and the deputy waited with his hand on his holstered gun until a second deputy arrived.

Deputy Russell then explained to Howard and his passengers that someone had reported that they were involved in a shooting. Howard and the male passenger were directed, one at a time, to get out of the Pontiac to be frisked. The female passenger was directed to get out of the car, and all three individuals stood beside the second deputy, about 10 feet from the Pontiac. At the time, three of the four Pontiac doors were open, and none of the detainees were handcuffed.

Deputy Russell believed that a gun could be easily concealed in the car and, if produced during a confrontation, would present a mortal threat. He decided to check the Pontiac for a concealed gun. After about one minute, he found a handgun in the backseat, hidden under a shirt and case of soda pop. Deputy Russell did not touch or move the gun, and left it on the back seat. Around this time, a third deputy arrived. Howard and the other male detainee were handcuffed due to safety concerns. Deputy Russell then left the group and drove up the driveway to obtain information from the 911 caller. The investigation led to Howard's arrest.

The State charged Howard with two counts of assault, one count of drive-by shooting, and one count of unlawful possession of a firearm in the first degree. Before trial, Howard filed a CrR 3.6 motion to suppress evidence of the gun. After an evidentiary hearing, the trial court denied Howard's motion, and upheld the warrantless search of his Pontiac under the officer safety exception applicable to *Terry* investigations.

A jury acquitted Howard of both assault charges, but convicted him of the remaining charges. In addition to a standard range sentence and nominal restitution, the trial court imposed a $500 victim penalty assessment (VPA). Howard timely appeals.

## LAW AND ANALYSIS

### *TERRY* INVESTIGATIVE STOP EXCEPTION

Howard argues he is entitled to a new trial because the trial court erred in denying his motion to suppress the gun discovered during a warrantless search of his car. We disagree.

Under the Fourth Amendment to the United States Constitution, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Under article I, section 7 of the Washington Constitution, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The phrase "private affairs" includes automobiles and their contents. *State v. Kennedy*, 107 Wn.2d 1, 4-5, 726 P.2d 445 (1986). "It is well

established that article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections." *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014).

"The 'authority of law' required by article I, section 7 is a valid warrant unless the State shows that a search or seizure falls within one of the jealously guarded and carefully drawn exceptions to the warrant requirement." *Id.* at 868-69. "Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops." *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (footnote omitted). The State bears the burden of establishing one of these exceptions by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). "If no exception applies, the fruits of a warrantless search must be suppressed." *State v. Cruz*, 195 Wn. App. 120, 123, 380 P.3d 599 (2016), *review granted and dismissed*, 189 Wn.2d 588 (2017).

When an officer conducts an investigative stop of a vehicle, that officer may, under certain circumstances, frisk the driver of the vehicle to ensure officer safety. *Terry*, 392 U.S. at 30. "Less than probable cause is required because the stop is significantly less intrusive than an arrest." *Kennedy*, 107 Wn.2d at 6. In *Michigan v. Long*, 463 U.S.

1032, 1051-52, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), the United States Supreme Court extended *Terry* searches of a person to searches of the vehicle itself:

> During any investigative detention, the suspect is in the control of the officers in the sense that he may be briefly detained against his will. Just as a *Terry* suspect on the street may, despite being under the brief control of a police officer, reach into his clothing and retrieve a weapon, so might a *Terry* suspect in [the defendant]'s position break away from police control and retrieve a weapon from his automobile. In addition, if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside. Or, as here, the suspect may be permitted to reenter the vehicle before the *Terry* investigation is over, and again, may have access to weapons. In any event, we stress that a *Terry* investigation, such as the one that occurred here, involves a police investigation at close range, when the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected, and the officer must make a quick decision as to how to protect himself and others from possible danger.

(Internal quotation marks and citations omitted.) Because of these considerations, "A police officer may extend his 'frisk' for weapons into the passenger compartment of the vehicle if he has a 'reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle.'" *State v. Smith*, 115 Wn.2d 775, 785, 801 P.2d 975 (1990) (quoting *State v. Williams*, 102 Wn.2d 733, 738-39, 689 P.2d 1065 (1984)).

These same considerations may sometimes permit a frisk of a vehicle even if the driver and passengers have been temporarily removed from it:

> [Our precedent does] not limit an officer's ability to search the passenger compartment of a vehicle based on officer safety concerns only to situations in which either the driver or passenger remain in the vehicle. Instead, a court should evaluate the entire circumstances of the traffic stop in determining whether the search was reasonably based on officer safety concerns.

*State v. Glossbrener*, 146 Wn.2d 670, 679, 49 P.3d 128 (2002).

Here, once Howard and his passengers exited the Pontiac, the next step of Deputy Russell's investigation was to talk with the 911 caller, who was near the house at the end of the long driveway. The 911 caller had reported that the Pontiac's driver had shot at him, and, if this was true, the gun almost certainly remained in the car. Deputy Russell knew that once he drove down the driveway to speak with the caller, the second deputy would be left alone with a reported shooter and two trespassers likely in close proximity to a gun. Given this context, we conclude that Deputy Russell's warrantless car frisk was reasonably based on officer safety concerns.

Howard argues that *Gant* casts doubt on *Long* and authorities citing it, and that warrantless car searches no longer are permitted once a suspect and their passengers have been removed from the car. We disagree.

In *Gant*, the vehicle frisk occurred after the defendant was arrested, handcuffed, and locked in the back of a patrol car. 556 U.S. at 335. The court held that the search violated the Fourth Amendment and reaffirmed that "police may search incident to arrest

only the space within an arrestee's 'immediate control,' meaning 'the area from within which he might gain possession of a weapon or destructible evidence.'" *Id.* (quoting *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)). In reaffirming this rule, the court expressly confirmed it was not altering the rule in *Long*:

> Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons." *Id.*, at 1049, 103 S. Ct. 3469 (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

*Id.* at 346-47.

In his concurring opinion, Justice Scalia also emphasized that the court had not altered the rule in *Long*:

> It must be borne in mind that we are speaking here only of a rule automatically permitting a search when the driver or an occupant is arrested. Where no arrest is made, we have held that officers may search the car if they reasonably believe "the suspect is dangerous and . . . may gain immediate control of weapons." *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed. The rule of *Michigan v. Long* is not at issue here.

*Id.* at 352 (Scalia, J., concurring).

In short, *Gant* did not alter *Long*. An officer may still conduct a warrantless frisk of an unoccupied vehicle when there are reasonable officer safety concerns due to the possibility that an occupant will return to the vehicle.

VICTIM PENALTY ASSESSMENT

Howard argues the trial court erred by imposing the $500 VPA. The State agrees that remand is required for the trial court to strike the assessment due to an intervening change in law. We accept the State's concession and remand for this purpose.

Affirmed, but remanded to strike the $500 VPA.

Lawrence-Berrey, C.J.

WE CONCUR:

Fearing, J.

Staab, J.

# TWO ARROWS, PLLC

## February 26, 2025 - 2:02 PM

### Transmittal Information

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