

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jul 17, 2015, 8:17 am
BY RONALD R. CARPENTER
CLERK

NO. 91846-5

RECEIVED BY E-MAIL *bjh*

WASHINGTON STATE SUPREME COURT

HEIDI KROEBER a/k/a HEIDI LAZENBY

v.

GEICO INSURANCE COMPANY

Plaintiff Heidi Kroeber's Opening Brief on Certified Questions

LAW OFFICES OF RICHARD MCKINNEY

By: Richard McKinney, WSBA No. 4895
2701 California Avenue SW, #225
Seattle, WA 98116
206/933-1605; Fax: 206-937-5276



ORIGINAL
ORIGINAL

Table of Contents

TABLE OF AUTHORITIES	ii
1. Washington’s tests for causation of an accident in interpreting automobile insurance policies	1
2. Application of Washington tests.....	2
3. Summary of Washington Tests of Causation	6
4. Review of law from other States on whether an intentional shooting connected to a vehicle is covered under a UIM policy.....	7
5. Washington cases urged by GEICO	14
6. Review of out-of-state authorities which disfavor Kroeber’s position in this case.....	22
7. Ambiguity of phrase “arising out of”	25
8. Conclusion.....	27
9. Appendix – Drive-By America	

TABLE OF AUTHORITIES

CASES

<i>Abercrombie v. Georgia Farm Bureau Mut. Ins. Co.</i> , 216 Ga. App. 602, 454 S.E.2d 813 (1995).....	14
<i>Acceptance Ins. Co. v. Syufy Enterprises</i> , 69 Cal. App. 4 th 321, 81 Cal. Rptr. 2d 557 (1999).....	26
<i>Allstate Ins. Co. v. Bauer</i> , 96 Wn. App. 11, 977 P.2d 617 (1999)	16
<i>Am. Economy Ins. Co. v. Zurich Am. Ins. Co.</i> , 534 Fed. Appx. 645 (9 th Cir. 2013)	3
<i>American Family Mut. Ins. Co. v. Petersen</i> , 679 N.W.2d 571 (Iowa 2004).....	8
<i>Anderson v. Bennett</i> , 834 S.W.2d 320 (Tenn. Ct. App. 1992)	23
<i>Auto-Owners Ins. Co. v. Rucker</i> , 188 Mich. App. 125, 469 N.W.2d 1 (Mich. Ct. App. 1991)	24
<i>Barncastle v. American Nat’l Property Casualty Co.</i> , 129 N.M. 672, 11 P.3d 1234 (N.M. Ct. App. 2000).....	8, 17, 24
<i>Beckman v. Connolly</i> , 79 Wn. App. 265, 898 P.2d 357 (1995).....	1, 2, 7
<i>Benevides v. Arizona Prop. & Cas. Ins. Guar. Fund</i> , 184 Ariz. 610, 911 P.2d 616 (Ariz. Ct. App. 1995).....	25
<i>Butzberger v. Foster</i> , 151 Wn.2d 396, 89 P.3d 689 (2004)...	1, 4, 5, 18, 27
<i>Carrigan v. State Farm Mut. Auto Ins. Co.</i> , 326 Or. 97, 949 P.2d 705 (1997).....	9, 17
<i>Commerce Ins. v. Ultimate Livery Service</i> , 452 Mass. 639, 897 N.E.2d 50 (2008)	24

<i>Concord General Mut. Ins. Co. v. Doe</i> , 161 N.H. 73, 8 A.3d 154 (N.H. 2010).....	24
<i>Continental Western Ins. Co. v. Klug</i> , 415 N.W.2d 876 (Minn. 1987) ...	12
<i>Cung La v. State Farm Automobile Ins. Co.</i> , 830 P.2d 1007 (Colo. 1992).....	9, 17
<i>De Zafra v. Farmers Ins. Co.</i> , 270 Or. App. 77, 346 P.2d 652 (2015)	9
<i>Detweiler v. J.C. Penney Ins. Co.</i> , 110 Wn.2d 99, 751 P.2d 282 (1988).....	23
<i>Equilon Enterprises LLC v. Great American Alliance Ins. Co.</i> , 132 Wn. App. 430, 132 P.3d 758 (2006).....	26
<i>Farm & City Ins. v. Estate of Davis</i> , 2001 S.D. 71, 629 N.W.2d 586 (2001).....	23
<i>Farm Bureau Mut. Ins. Co. v. Evans</i> , 7 Kan. App. 2d 60, 637 P.2d 491 (1982).....	18
<i>Federated Mut. Implement & Hardware Ins. Co. v. Gupton</i> , 241 F. Supp. 509 (E. D. S.C. 1965), <i>aff'd</i> . 357 F.2d 155 (4 th Cir. 1966)	4, 5
<i>Fiscus Motor Freight v. Universal Ins.</i> , 53 Wn. App. 777, 770 P.2d 679 (1989).....	1
<i>Fortune Ins. Co. v. Ferreiro</i> , 458 So. 2d 834 (Fla. Dist. Ct. App. 1984).....	13, 14
<i>Foster v. Lafayette Ins. Co.</i> , 504 So. 2d 82 (La. App. 1987).....	12
<i>Ganiron v. Hawaii Ins. Guar. Assoc.</i> , 69 Hawaii 432, 744 P.2d 1210 (1987).....	12
<i>GEICO v. Titus</i> , 18 Wn. App. 208, 566 P.2d 990 (1977).....	26
<i>Gen. Acc. Ins. Co. of America v. Olivier</i> , 574 A.2d 1240 (R.I. 1990).....	11, 17

<i>Greene v. Young</i> , 113 Wn. App. 746, 54 P.3d 734 (2002).....	15, 18, 22
<i>Hamidian v. State Farm Fire & Cas. Co.</i> , 251 Kan. 254, 833 P.2d 1007 (1992).....	23
<i>Hartfield v. Liberty Mut. Ins. Co.</i> , 31 Va. Cir. 240, 1993 WL 946133, (Va. Cir. 1993) <i>reconsideration denied</i> 36 Va. Cir. 106, 1995 WL 1055795 (Va. Cir. 1995).....	10
<i>Hawkeye- Security Ins. Co. v. Gilbert</i> , 124 Idaho 953, 866 P.2d 966 (Idaho Ct. App. 1994).....	25
<i>Insurance Co. of North America v. Dorris</i> , 161 Ga. App. 46, 288 S.E.2d 856 (1982).....	14
<i>Le v. Farmers Texas County Mut. Ins. Co.</i> , 936 S.W.2d 317 (Texas App. 1996).....	23
<i>Lindstrom v. Hanover Ins. Co.</i> , 138 N.J. 242, 694 A.2d 1272 (1994).....	10, 18, 22
<i>Livsey v. Mercury Ins. Group</i> , 197 N.J. 522, 964 A.2d 312 (2009).....	22
<i>Lloyd v. First Farwest Life Ins. Co.</i> , 54 Wn. App. 299, 773 P.2d 426 (1989).....	16
<i>Maryland Cas. Co. v. Chicago & N.W. Transportation Co.</i> , 126 Ill. App.3d 150, 466 N.E.2d 1091 (1984).....	26
<i>McCauley v. Metropolitan Property and Cas. Ins. Co.</i> , 109 Wn. App. 628, 36 P.3d 1110 (2001).....	19
<i>McIntosh v. Scottsdale Ins. Co.</i> , 992 F.2d 251 (10 th Cir. 1993).....	26
<i>Mikula v. Miller Brewing Co.</i> , 281 Wis.2d 712, 701 N.W.2d 613 (Wis. Ct. App. 2005).....	27
<i>Mills v. Colonial Penn Ins.</i> , 47 Conn. Supp. 17, 768 A.2d 1 (Conn. Super. 2000).....	8

<i>Munn v. Mutual of Enumclaw</i> , 73 Wn. App. 321, 869 P.2d 99 (1994).....	2, 6, 27
<i>Mutual of Enumclaw v. Jerome</i> , 122 Wn.2d 157, 856 P.2d 1095 (1993).....	14, 15, 16, 17, 18, 19, 21
<i>Nationwide Gen. Ins. Co. v. Royal</i> , 700 A.2d 130 (Del. 1997).....	24
<i>Owens v. Ocean Accident & Guarantee Corp.</i> , 194 Ark. 817, 109 S.W.2d 928 (1937).....	5
<i>Peagler v. USAA Ins. Co.</i> , 368 S.C. 153, 628 S.E.2d 475 (2006)	20
<i>R.A. Stuchbery & Others Syndicate 1096 v. Redland Ins. Co.</i> , 154 Cal. App. 4 th 796, 66 Cal. Rptr. 3d 80 (2007)	11
<i>Rau v. Liberty Mut. Ins. Co.</i> , 21 Wn. App. 326, 585 P.2d 157 (1978).....	4, 5, 18, 19
<i>Red Ball Motor Freight v. Employers Mut. Liab. Ins. Co.</i> , 189 F.2d 374 (5 th Cir. 1951)	5
<i>Safeco Ins. Co. of America v. Dotts</i> , 38 Wn. App. 382, 685 P.2d 632 (1984).....	16
<i>Sears v. Grange Ins. Ass'n.</i> , 111 Wn.2d 636, 762 P.2d 1141 (1988).....	20
<i>Seaway Properties L.L.C. v. Firemen's Fund Ins. Co.</i> , 16 F. Supp.3d 1240 (W.D. Wash. 2014)	2, 3, 28
<i>Shaw v. State Farm Mut. Auto Ins. Co.</i> , 19 P.3d 588 (Alaska 2001)	8, 17
<i>Shouman v. Nationwide Ins. Co.</i> , 42 Ohio App. 3d 159, 537 N.E.2d 696 (Ohio Ct. App. 1988).....	12, 17
<i>Stamper v. Hyden, et al.</i> , 334 S.W.3d 120 (Ky. Ct. App. 2011).....	7, 18
<i>State Farm Fire & Cas. Co. v. Parella</i> , 134 Wn. App. 536, 141 P.2d 643 (2006)	16

<i>State Mut. Farm Auto Ins. Co. v. Bookert</i> , 337 S.C. 291, 523 S.E.2d 181 (1999).....	20
<i>State Farm Mut. Auto Ins. Co. v. Centennial Ins. Co.</i> , 14 Wn. App. 541, 543 P.2d 645 (1975).....	15, 21, 22
<i>State Farm Mut. Auto Ins. Co. v. Davis</i> , 937 F.2d 1415 (9 th Cir. 1991)	11, 18
<i>State Farm Mut. Auto Ins. Co. v. McMillan</i> , 925 P.2d 785 (Colo. 1996) (UIM coverage for drive-by shooters)	9
<i>State Farm Mut. Automobile Ins. Co. v. Moorner</i> , 330 S.C. 46, 496 S.E.2d 875 (S. C. Ct. App. 1998)	10, 20
<i>State Farm Mut. Auto Ins. Co. v. Langan</i> , 16 N.Y.3d 349, 922 N.Y.S.2d 233 (2011).....	17
<i>State Farm Mut. Auto Ins. Co. v. Whitehead</i> , 711 S.W.2d 198 (Mo. App. 1986)	12
<i>Taylor v. Phoenix Ins. Co.</i> , 622 So. 2d 506 (Fla. Dist. Ct. App. 1993).....	13, 14
<i>Transamerica v. United Pac. Ins.</i> , 92 Wn.2d 21, 593 P.2d 156 (1979).....	1, 19
<i>Unigard Mut. Ins. Co. v. Spokane School Dist. No. 81</i> , 20 Wn. App. 261, 579 P.2d 1015 (1978).....	16
<i>Wall v. Nationwide Mut. Ins. Co.</i> , 62 N.C. App. 127, 302 S.E.2d 302 (1983).....	23
<i>Wausau Underwriters Ins. Co. v. Howser</i> , 309 S.C. 269, 422 S.E.2d 106 (1992).....	10, 18
<i>Wendell v. State Farm Mut. Auto Ins. Co.</i> , 293 Mont. 140, 974 P.2d 623 (1999)	9, 18
<i>Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.</i> , 123 Wn.2d 891, 897, 874 P.2d 142 (1994)	26

STATUTES

R.C.W. 48.22.030 (12) 15, 17

EVIDENCE RULES

ER 201 28

LAW REVIEW ARTICLES

Charles E. Carpenter, *Workable Rules for Determining Proximate Cause-Part II*, 20 CAL. L. REV. 396 (1932) 6

The facts are well summarized in the Orders of the federal judge. Docket 38.

The Federal Court in the present case found that Atkinson, the drive-by shooter, was using his vehicle at the time of the shooting (Docket 38, p. 9, ll. 12-14 of opinion of 3/31/15). The Federal Court also found that the injuries of Plaintiff Kroeber, were caused by an “accident” within the definition of that term within the insurance policy (Docket 38, p. 9).

The sole issue for this Court is whether the drive-by shooting “arises out” of Atkinson’s use of his truck for purposes of uninsured motorist coverage (Docket 38, p. 9, ll. 8-22).

1. Washington’s tests for causation of an accident in interpreting automobile insurance policies

Numerous Washington cases state that the test for causation in an insurance policy is “but for” causation. *Butzberger v. Foster*, 151 Wn.2d 396, 405, 89 P.3d 689 (2004); *Beckman v. Connolly*, 79 Wn. App. 265, 274, 898 P.2d 357 (1995); *Transamerica v. United Pac. Ins.*, 92 Wn.2d 21, 26, 593 P.2d 156 (1979); *Fiscus Motor Freight v. Universal Ins.*, 53 Wn. App. 777, 770 P.2d 679 (1989) (Any cause is sufficient for vehicle use to cause accident. Rejects cases from other jurisdictions which require

“direct relationship” or “efficient and predominating cause” or “proximate cause.”)

The Federal Court in the present case found as a matter of law that Krocber’s injuries must “arise out” of Atkinson’s use of his truck. *Beckman, supra*, states that “arising out of” means “grew out of” or “flowed from.” It also says “the vehicle must have contributed in some way toward producing the injury; the vehicle must be more than the coincidental place in which the injury occurred.” “Arising out of” has a broader meaning than “caused by.” “Arising out” means “flowing from” or “having its origin in.” *Munn v. Mutual of Enumclaw*, 73 Wn. App. 321, 325, 869 P.2d 99 (1994).

2. Application of Washington tests

Seaway Properties LLC v. Firemen’s Fund Ins. Co., 16 F. Supp.3d 1240 (W.D. Wash. 2014), applying Washington law, interprets the phrase “arising out of.” In this case an injury victim fell in a common area enroute to the restaurant owned by lessee. Victim sued lessor who tendered the defense to lessee’s insurer which was contractually obligated to defend lessor for liability “aris[ing] out ... use of [lessee’s] premises.”

The lessee’s insurer argued that the lessee’s customer was not covered under its policy because he was not injured while using lessee’s premises. Judge Jones state that the insurer urged the majority rule in the

country, but that Washington law was to the contrary. Washington law requires coverage because the victim intended to use the restaurant. Thus use of the common area was causally connected to the victim's anticipated use of the restaurant. *Seaway* notes that Washington's expansive interpretation of "arising out" had already been established in a factually similar case in *Am. Economy Ins. Co. v. Zurich Am. Ins. Co.*, 534 Fed. Appx. 645 (9th Cir. 2013).

The analogy between *Seaway* and the present case is straightforward. There is evidence in the present case that Atkinson maneuvered his truck to get an advantageous shooting location and then employed his truck to rapidly escape the shooting scene. Docket 38, footnote 5.

Atkinson's shooting of Kroeber "arose out" of his driving because it was a step in the chain of driving events that are clearly covered under the policy. The chain was Atkinson driving in a circuitous route to draw closer to Kroeber's location, Atkinson slowing or stopping to fire toward Kroeber, and then accelerating quickly from the shooting scene in order to escape arrest. Declaration of Sadler (Docket 11-2, page stamped 039) and deposition of Torrance (Docket 11-4, page stamped 067).

The application of "arising out of" is similar in the present case to its application in *Seaway*.

There the restaurant patron's injuries in the common area arose out of intended imminent use of the restaurant. In the present case the shooting arose out of past driving to get to a good shooting location and future driving designed to permit escape from arrest. The shooting arose out of vehicle use.

Washington cases hold that actions arise out of vehicle use which is not at that moment ongoing. *Rau v. Liberty Mut. Ins. Co.*, 21 Wn. App. 326, 334-35, 585 P.2d 157 (1978) (cited for this proposition in footnote 4 of Judge Lasnik's opinion in Docket 38).

See also Butzberger, supra (individual temporarily leaving his own vehicle to help stranger in overturned vehicle was involved in activity arising out of use of both vehicles).

Both *Butzberger* and *Rau* cite *Federated Mut. Implement & Hardware Ins. Co. v. Gupton*, 241 F. Supp. 509 (E. D. S.C. 1965), *aff'd*, 357 F.2d 155 (4th Cir. 1966). *Gupton* finds UIM coverage when the insured tow truck driver was outside his tow truck but was struck by the vehicle which he was dispatched to help. *Gupton* holds that an accident arising out of vehicle use "extends beyond physical contact with the vehicle where control over it is easily or reasonably at hand and particularly when it is still being utilized."

Gupton cites other cases in which the use of the vehicle was not defined with reference to the movement of the vehicle, but was defined with reference to the intended deployment of the vehicle as a moving vehicle. See e.g. *Red Ball Motor Freight v. Employers Mut. Liab. Ins. Co.*, 189 F.2d 374 (5th Cir. 1951). In that case the driver of an insured truck negligently attached the gas valve, causing gasoline to escape later, resulting in an explosion when the car was no longer being driven. *Red Ball* holds that the explosion arose from the use of the vehicle.

Both *Rau* and *Butzberger* also cite *Owens v. Ocean Accident & Guarantee Corp.*, 194 Ark. 817, 109 S.W.2d 928 (1937). *Owens* holds that a patient on a stretcher was injured by conduct arising out of vehicle use when ambulance attendants dropped him from the stretcher while carrying him to the ambulance. A fortiori Kroeber was injured by vehicle use when Atkinson was still driving his truck, shot her from its cab and thereafter immediately used his truck to flee from the scene.

The present case involves a stronger showing of injury arising out of vehicle use than *Rau*, *Butzberger* or *Gupton*. In those cases the actual operation of the insured vehicles had stopped altogether and for more than a moment. In the present case Atkinson was still actively driving his vehicle and had only slowed his vehicle or stopped it very briefly. When shooting Kroeber, Atkinson was still using his vehicle according to Judge

Lasnik's finding. Docket 38, p. 9. The shooting arose directly out of the shooter's vehicle use in maneuvering to get a good shot at Kroeber, and his vehicle use continued in quickly escaping the scene immediately after the shooting.

SUMMARY ON WASHINGTON TESTS OF CAUSATION

Once again, conduct "arising out" of vehicle use is more broadly defined than even "but for" causation according to *Munn, supra*. Yet even "but for" causation is enough to establish a causal connection between Atkinson's vehicle use and the shooting of Kroeber ("accident" under the policy according to Judge Lasnik's ruling).

Charles E. Carpenter, *Workable Rules for Determining Proximate Cause-Part II*, 20 CAL. L. REV. 396 (1932) states, "If the effect would not have been produced had the defendant not acted, the defendant's act is a cause in fact of the effect." There is evidence supporting the position that the shooting would never have occurred had Atkinson not had the protective cover and the ready means of escape provided by his truck. See evidence that shooter, Atkinson, avoided acting on his anger and hostility toward Kroeber's boyfriend when Atkinson had no protective cover while inside the bar. Docket 11-2, pages stamped 37-38 and Docket 11-5, pages stamped 76, 77.

If the truck use is a but for cause (i.e. cause in fact) of the shooting, then even more clearly the shooting “arose out” of the truck use. As cited above the truck use need only have contributed in some way to the shooting. There is no need under the “arise out of” test to determine whether the shooting would have occurred without the truck use, as is required under the but for causation test. There is only a need to determine if the truck use actually contributed in some way to the shooting. *Beckman, supra.*

3. Review of law from other States on whether an intentional shooting connected to a vehicle is covered under a UIM policy

This section cites the cases supporting the application of UIM coverage in cases of shooting or beatings of victims by uninsured motorists. Cases in twenty American states have applied UIM coverage under facts that are virtually identical (drive-by shootings by uninsured motorists) or very similar (physical beatings by uninsured motorists) to the facts of the present case. The following is a listing and summary of those cases.

3.1 *Stamper v. Hyden, et al.*, 334 S.W.3d 120 (Ky. Ct. App. 2011) (UIM coverage when assailant rammed victim’s car with another vehicle, seizes control of victim’s car and apparently beat victim. Beating arose out of vehicle use in that mere causation is only connection

necessary to connect vehicle use to ramming.) (emphasis supplied in all cases in list of citations herein)

3.2. *American Family Mut. Ins. Co. v. Petersen*, 679 N.W.2d 571 (Iowa 2004) (Former boyfriend driving his vehicle while shooting Petersen with a stun gun. Court found that UIM coverage included intentional torts of uninsured motorist who was using vehicle during episode described.) Case holds that injuries arose out of vehicle use.)

3.3 *Shaw v. State Farm Mut. Auto Ins. Co.*, 19 P.3d 588 (Alaska 2001) (Assuming accuracy of fact that uninsured motorist left his car, walked to victim's car, steadied his gun on victim's car window and shot victim, then shooting arose out of shooter's vehicle use.)

3.4 *Barncastle v. American Nat'l Property Casualty Co.*, 129 N.M. 672, 11 P.3d 1234 (N.M. Ct. App. 2000) (There is UIM coverage when uninsured driver pulled next to passenger in insured car. Then passenger in uninsured car walked to insured car and shot passenger and shot passenger in insured car. Court found that driving of the car to the site of shooting constituted normal use of the car. Escape from scene by uninsured motorist constituted part of causal link between vehicle use and shooting.).

3.5 *Mills v. Colonial Penn Ins.*, 47 Conn. Supp. 17, 768 A.2d 1 (Conn. Super. 2000) (Ruling of UIM coverage because drive-by

shooting of insured by stranger arose out of stranger's use of his vehicle. The vehicle provided means of access to shooter, anonymity and means of escape.)

3.6 *Wendell v. State Farm Mut. Auto Ins. Co.*, 293 Mont. 140, 974 P.2d 623 (1999) (Uninsured motorist's vehicle pursued victim in victim's car, pulled victim from his car and beat him up outside car. There is UIM coverage because beating arose out of use of vehicle by uninsured motorist. Incident arose from use of assailant's vehicle used to chase victim.)

3.7 *Carrigan v. State Farm Mut. Auto Ins. Co.*, 326 Or. 97, 949 P.2d 705 (1997) (No fault medical benefits were available to victim of passenger of victim after passenger became carjacker who ordered victim out of his own car and then shot victim when victim was about 30 feet away from his car. The court found that as a matter of law injury to victim resulted from stealing of car which was a use of car under the policy.) Oregon has recently ruled that the holding in *Carrigan* will extend to UIM claims. *De Zafra v. Farmers Ins. Co.*, 270 Or. App. 77, 346 P.2d 652 (2015).

3.8 *State Farm Mut. Auto Ins. Co. v. McMillan*, 925 P.2d 785 (Colo. 1996) (UIM coverage for drive-by shooters). *See also* *Cung La v. State Farm Automobile Ins. Co.*, 830 P.2d 1007 (Colo. 1992) (UIM

coverage is also available when a shooter got out of his car and came to shoot victim in his car.) Both cases hold that the shootings arose out of vehicle use.

3.9 *Lindstrom v. Hanover Ins. Co.*, 138 N.J. 242, 694 A.2d 1272 (1994) (Drive-by shooting. Court permitted recovery of PIP benefits because automobile provided enhanced opportunity for shooting by providing anonymity to shooter and also provided a means of escape. Indirectly states that shooting arose out of vehicle use by contrasting facts of this case with other cases where injuries did not arise out of vehicle use.)

3.10 *Hartfield v. Liberty Mut. Ins. Co.*, 31 Va. Cir. 240, 1993 WL 946133, (Va. Cir. 1993) (Shooting arose out of driving as car was used to pull alongside victim and shoot him.) *reconsideration denied* 36 Va. Cir. 106, 1995 WL 1055795 (Va. Cir. 1995) (drive-by shooting is covered under UIM).

3.11 *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992) (Uninsured driver bumped victim's car three times. When victim tried to drive away, uninsured driver shot victim. The court allowed UIM coverage because of pursuit of victim in shooter's car which also provided means of quick and successful escape. Holds that injuries arose out of vehicle use.); *State Farm Mut. Automobile Ins. Co. v.*

Moorer, 330 S.C. 46, 496 S.E.2d 875 (S. C. Ct. App. 1998) (Intentional shooting by uninsured driver in another car arose out of his vehicle use).

3.12 *State Farm Mut. Auto Ins. Co. v. Davis*, 937 F.2d 1415 (9th Cir. 1991) (Applies then applicable California case law which determined that a motorist who shot someone in another car was liable within the context of a third party claim. The Ninth Circuit found that only minimal causation by the automobile was necessary, but sufficient causation existed in part because the automobile was being used by the shooter to escape and avoid apprehension.)

However, contrary to the national trend, California later began requiring that the use of the vehicle be a substantial factor in causing the injuries at issue. *R.A. Stuchbery & Others Syndicate 1096 v. Redland Ins. Co.*, 154 Cal. App. 4th 796, 66 Cal. Rptr. 3d 80 (2007). This test is far more demanding than the minimal causation test in Washington cases interpreting UIM coverage.

3.13 *Gen. Acc. Ins. Co. of America v. Olivier*, 574 A.2d 1240 (R.I. 1990) (After accident police officer was planning to place in his police car a witness to an accident between two other cars. Uninsured motorist who was in recent collision but was now on foot came near police car and shot witness. Uninsured motorist coverage applies because shooting arose out accident between vehicles.)

3.14 *Shouman v. Nationwide Ins. Co.*, 42 Ohio App. 3d 159, 537 N.E.2d 696 (Ohio Ct. App. 1988) (Issue of fact as to whether is UIM coverage for victims whose vehicle was chased by occupants of unidentified vehicle who shot victims from within uninsured car.)

3.15 *Continental Western Ins. Co. v. Klug*, 415 N.W.2d 876 (Minn. 1987) (Uninsured motorist's car pulled alongside car of victim and shot victim. Found as a matter of law that maneuvering uninsured car to facilitate shooting caused it to arise out of vehicle use, but left unresolved issue of whether incident was an "accident" within meaning of policy.)

3.16 *Foster v. Lafayette Ins. Co.*, 504 So. 2d 82 (La. App. 1987) (Intentional throwing of pumpkins by occupants of flatbed of forward vehicle on truck through windshield of following vehicle is basis for UIM coverage. Injuries caused by use of truck because driver utilized his truck to cooperate with pumpkin throwing scheme.)

3.17 *Ganiron v. Hawaii Ins. Guar. Assoc.*, 69 Hawaii 432, 744 P.2d 1210, 1212 (1987) (UIM coverage because shooting of driver, shot by another unidentified driver, arose out of driving uninsured vehicle.)

3.18 *State Farm Mut. Auto Ins. Co. v. Whitehead*, 711 S.W.2d 198 (Mo. App. 1986) (Plaintiff was shot by a passenger, hitchhiker, who was being transported to police station in same car that was transporting plaintiff. Holds that hitchhiker was using plaintiff's vehicle by riding in it.

Court held that auto use caused shooting, as hitchhiker was trying to stop being taken where he did not want to go. Dissent urged normal use doctrine.)

3.19 *Fortune Ins. Co. v. Ferreiro*, 458 So. 2d 834 (Fla. Dist. Ct. App. 1984) (Uninsured motorist coverage exists as a matter of law when uninsured motorist shoots from his vehicle into the plaintiff's vehicle injuring plaintiff. Injuries arose out of vehicle use.)

In its briefing to the Federal Court in this case GEICO cited *Taylor v. Phoenix*, 622 So. 2d 506 (Fla. Dist. Ct. App. 1993) and other Florida cases with holdings contrary to *Ferreiro*. However, these decisions cited by GEICO require more causation than simply that the injuries arose out of the vehicle use. *Taylor* adopts a three part test of causation which requires that the use be part of the "inherent" use of the automobile and further requires that the auto use have produced the injury, not that it merely contributed to the injury.

GEICO cannot cite one case which adopts the same tests as Washington and which does not find coverage for drive-by shooting. Those tests are that causation be "but for" causation or merely arising out of vehicle use, that vehicle use may include drive-by shooting, and that the results of intentional acts may be covered as an accident under the UIM policy. Judge Lasnik already has found that Kroeber's shooting was an

accident under the policy. He has further found that drive-by shooting is vehicle use under the policy notwithstanding the different requirement in such cases as *Taylor* that the use be consistent with the inherent nature of the automobile. Of the three Washington tests linked to this case only the causal relationship between the vehicle use and the injuries is still unresolved.

Ferreiro may or may not still be viable in Florida, but it illustrates the point that mere application of the simple test of whether a drive-by shooting injuries “arose out” of vehicle use leads clearly to the result that insurance coverage exists for that shooting.

3.20 *Insurance Co. of North America v. Dorris*, 161 Ga. App. 46, 288 S.E.2d 856 (1982) (After accident between uninsured motorist and driver of vehicle in which Plaintiff was riding, uninsured motorist chased vehicle carrying Plaintiff and then shot into vehicle transporting Plaintiff, causing it to leave road and injure Plaintiff. Shooting arose out of driving by uninsured motorist.) *Dorris* was reaffirmed in *Abercrombie v. Georgia Farm Bureau Mut. Ins. Co.*, 216 Ga. App. 602, 454 S.E.2d 813 (1995).

4. Washington cases urged by GEICO

4.1 In the present litigation GEICO has repeatedly relied on two Washington cases. The more recent is *Mutual of Enumclaw Ins. Co. v. Jerome*, 122 Wn.2d 157, 856 P.2d 1095 (1993) where a vehicle

passenger unsuccessfully threw fireworks from a car window. The fireworks remained inside the car, exploded, thereby accidentally igniting more fireworks within the car, ultimately injuring the driver. Initially *Jerome* holds that the passenger's unsuccessful throwing of fireworks from the car is not vehicle use. This is substantially different from the present case in which Judge Lasnik found vehicle use as a matter of law.

Jerome also holds that the driver's vehicle use was not as a matter of law the cause of the injuries. The driving did not in any way contribute to or derogate from the fireworks explosion. There are five other distinctions between *Jerome* and the present case.

1) *Jerome* quotes the test from *State Farm Mut. Auto Ins. Co. v. Centennial Ins. Co.*, 14 Wn. App. 541, 543 P.2d 645 (1975) that a vehicle "use" must be a natural and reasonable consequence of using a vehicle.

As stated, *infra*, *Centennial* announced a "normal motoring" test. However, the *Centennial* test for vehicle use, adopted in *Jerome*, conflicts with the test for vehicle use under R.C.W. 48.22.030 (12) and *Greene v. Young*, 113 Wn. App. 746, 54 P.3d 734 (2002). Both the R.C.W. and *Greene* now permit UIM recovery for intentional torts which by definition are not part of normal motoring.

2) *Jerome* at 161 is interpreting a policy barring coverage for intentional torts.

Safeco Ins. Co. of America v. Dotts, 38 Wn. App. 382, 685 P.2d 632 (1984) holds that a death caused by an intentional slap was not an accident even though the death was not intended. *See also Unigard Mut. Ins. Co. v. Spokane School Dist. No. 81*, 20 Wn. App. 261, 579 P.2d 1015 (1978) (intentional act with accidental consequences is not an accident). Analogously the deliberate throwing of firecrackers in *Jerome* is not an accident under the definition of accident in every insurance policy interpretation case except UIM cases. *See e.g. State Farm Fire & Cas. Co. v. Parella*, 134 Wn. App. 536, 141 P.2d 643 (2006) which holds that (at the time of the *Jerome* decision) the means and the end of an action must be unforeseen, involuntary, unexpected and unusual for the event to qualify as an accident under the insurance policy; *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 977 P.2d 617 (1999) (even acting in self-defense is intentional act); *Lloyd v. First Farwest Life Ins. Co.*, 54 Wn. App. 299, 773 P.2d 426 (1989).

Jerome is a third party liability case against the boy who threw firecrackers out of a car. The insurance policy in *Jerome* excluded coverage for intentional acts. Furthermore, the definition of “accident” applicable in *Jerome* excluded coverage for throwing firecrackers from

the window of a moving car because neither the means of the injury nor the resultant injury were unforeseeable results of the intentional action.

Therefore, *Jerome* is distinguishable from the present case because the test for an accident was very different in *Jerome* than in a contemporary UIM case which includes a statutory mandate for coverage for acts which are intentionally committed, but are accidental strictly from the viewpoint of the victim.

3) *Jerome* notes a national trend of excluding coverage for throwing firecrackers at the time of that decision.

In contrast, however, there is currently a national trend to find UIM coverage for innocent victims who are injured by intentional acts of an uninsured motorist. *See e.g. State Farm Mut. Auto Ins. Co. v. Langan*, 16 N.Y.3d 349, 922 N.Y.S.2d 233 (2011). This trend, reflected in R.C.W. 48.22.030 (12) is a significant distinction between *Jerome* and the present case.

4) *Jerome* is also inapplicable because Atkinson was more patently using his truck as an accessory to the wrongdoing than the passenger who threw firecrackers out of the vehicle window in *Jerome*.

Atkinson clearly used his truck to facilitate his escape and to increase the difficulty of apprehending him. The prospect of easier escape factored into out-of-state drive-by shooting cases which found use of an

uninsured vehicle while shooting. *See e.g. Lindstrom, Wausau, Davis, supra.* According to these authorities the required “use” of the vehicle may be immediately prospective rather than strictly retrospective. According to the following authorities, the use of the vehicle may be immediately retrospective: *Carrigan, Shouman, Olivier, Barncastle, Cung La, Shaw, Stamper, Wendell, and Greene, supra.* *See also* footnote 4 of Judge Lasnik’s opinion, Docket 38. Under both groups of cases the time of the “use” of the vehicle need not overlap with the time of the intentional tort connected with the vehicle use. Atkinson’s use of his vehicle was retrospective at the time of the shooting because he maneuvered his truck with the effect of drawing closer to Kroeber. There is evidence that Atkinson was not only behind the wheel of his truck while shooting Kroeber, but the truck was creeping forward at the time the gun discharged. *See* declaration of Sadler Docket 11-2 page stamped 40. Of course, Atkinson continued to use his vehicle immediately after the shooting.

Some courts have found movement of the vehicle at the time of the tort to be a pivotal factor in determining whether the vehicle was in use at the time of the wrongdoing. *Farm Bureau Mut. Ins. Co. v. Evans*, 7 Kan. App. 2d 60, 637 P.2d 491 (1982) (cited with approval in *Jerome, Evans* also requires normal use of car). However, *Rau* and *Butzberger, supra*,

both demonstrate that vehicle movement at the time of injury is not prerequisite to an injury which arises out of vehicle use. To the extent that *Jerome* relies on out-of-state cases which are contrary to Washington authority, *Jerome* should be disregarded.

Jerome contains a bit of a “parallel universe” analysis in positing that the tortfeasor there would have thrown firecrackers even if he had not been in a vehicle. Under such speculative reasoning one could cogently argue that both *Transamerica, supra*, and *McCauley v. Metropolitan Property and Cas. Ins. Co.*, 109 Wn. App. 628, 36 P.3d 1110 (2001) (both of which found vehicle “use”) should be “mere situs” cases because the careless gun handlers in those cases would just as likely have brushed their guns against gun-triggering objects in an immobile, non-vehicular setting. The application of the “mere situs” test is capable of becoming no more than a label justifying a predetermined result in a particular case. Far superior to the “mere situs” test is the extent of physical proximity test in *Rau*.

In the present case a mere situs test would have to be “cut and pasted” onto a vehicle driver who was actively moving his truck forward according to one witness and just briefly stopped in his driving activity according to another witness. Kroeber is aware of no Washington case finding that active driving by an uninsured motorist who causes an

accident, as defined by the UIM policy, requires a “mere situs” conclusion.

5) A “mere situs” analysis, if ever applicable to a moving vehicle that otherwise qualifies for UIM coverage, is far less applicable when analyzing “use” by a moving driver than when analyzing “use” by a passenger who has little ability to control and therefore to use the uninsured vehicle.

Indeed South Carolina has made this very distinction in *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 628 S.E.2d 475 (2006) which distinguishes between *State Farm Mut. Automobile Ins. Co. v. Moorer*, 330 S.C. 46, 496 S.E.2d 875 (S. C. Ct. App. 1998), which found auto insurance when a driver intentionally facilitated his passenger shooting someone from driver’s car and *State Farm Mut. Auto Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999) which found no vehicle use when a passenger shot someone from a moving vehicle. Of course, passengers may be using an automobile in limited circumstances. *Sears v. Grange Insurance Ass’n.*, 111 Wn.2d 636, 762 P.2d 1141 (1988). However, South Carolina is correct in finding that a passenger shooting from a vehicle, without collaboration with the driver is much less causally related to “vehicle use” than the present case. When Atkinson, the driver, shot from his truck, he made the decisions to drive in a circuitous route when leaving the parking

lot so as to be closer to Kroeber, to direct the vehicle to a darkened area when shooting, to use his truck to accelerate quickly away from the scene of the crime so as to enable his escape. The South Carolina case law provides yet another distinction between *Jerome*, involving a passenger throwing firecrackers from the car, and the present case involving the driver of a truck who made the decisions when to move forward or slow down or accelerate to avoid detection.

4.2 *Centennial, supra*, is the second Washington case which GEICO has strongly urged in its behalf in the present litigation. However, *Centennial* requires that the vehicle use must have involved a motoring risk and therefore disallows coverage for accidental gun discharge occurring when gun was unloaded while car was moving. *Centennial* also approved a Nebraska case which stated that guns are not normally unloaded within the automobile, and are ordinarily [already] unloaded when not available for immediate use. Finally *Centennial* stated that unloading a gun in a vehicle is illegal and unsafe.

The factors that were critical to both *Jerome* and *Centennial* are dated and passé. References to “normal driving” or lack of insurance for “intentional acts with accidental consequences” are no longer binding or even helpful in determining whether the vehicle use in this case caused Kroeber’s injuries.

Intentional wrongdoing by an uninsured motorist, causing an “accident” from the viewpoint of the victim, is now required coverage by statute. See *Greene, supra*. Yet such violent behavior as *Greene* describes or as the present case involves is “illegal” and “unsafe” and not “normal.” Because Atkinson’s conduct contravened all these adjectives, the case law at the time of *Centennial* would not have approved UIM coverage for Atkinson shooting Kroeber. However, *Centennial* is now forty years old, and has been eclipsed by modern jurisprudence.

5. Review of out-of-state authorities which disfavor Kroeber’s position in this case

In federal court GEICO cited cases that were unfavorable to Kroeber’s position. However, each such case had a different test for “use” or causation or accident than Washington.

Livsey v. Mercury Ins. Group, 197 N.J. 522, 964 A.2d 312 (2009) (holding that causation test for UIM coverage is a “substantial connection” and mere causation is the only requirement for PIP coverage). New Jersey’s highest court did not reverse *Lindstrom, supra*, which requires mere causation for PIP coverage for a drive-by shooting. However, in a New Jersey UIM case *Livsey* requires more than Washington’s but-for causation which is the test in a UIM case here.

Farm & City Ins. v. Estate of Davis, 2001 S.D. 71, 629 N.W.2d 586 (2001) (p. 20 of GEICO Response to Plaintiff's Motion for Summary Judgment in federal court) finds that shooting a firearm is independent of vehicle use. Such a holding directly contradicts Washington's *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 751 P.2d 282 (1988) which holds that after shooting a firearm to stop vehicle theft, when the bullet ricochets and strikes the shooter (also the vehicle owner) the vehicle use by the thief caused the bullet wounds. Moreover *Estate of Davis* also holds that shooting a firearm while driving is not covered under the policy because that is not a normal use of the vehicle. As stated above, "normal use" is not the test in Washington.

Le v. Farmers Texas County Mut. Ins. Co., 936 S.W.2d 317 (Texas App. 1996) (p.21 of GEICO federal court Response to summary judgment) holds that the vehicle "must not merely contribute . . . [to] produce the injury, but must itself produce the injury." This test goes far beyond Washington's but-for test. The cases of *Hamidian v. State Farm Fire & Cas. Co.*, 251 Kan. 254, 833 P.2d 1007 (1992) (at p. 260 of case cites at least three more jurisdictions which have requirement of "normal" auto use); *Anderson v. Bennett*, 834 S.W.2d 320 (Tenn. Ct. App. 1992) and *Wall v. Nationwide Mut. Ins. Co.*, 62 N.C. App. 127, 302 S.E.2d 302 (1983) are cases from three more jurisdictions which disallow UIM

coverage for drive-by shootings because the courts in those jurisdictions ruled such shootings not to be “normal.” *Cf. Barncastle*, *supra*, which finds that an uninsured motorist driving a car to site of shooting constituted normal conduct.

Altogether cases in at least seven jurisdictions referenced in this brief (including *Rucker*, *infra*) discussed herein have declined to extend UIM coverage to drive-by shootings because the conduct was not normal. Yet the discussion *supra* demonstrates that the “normal use” test is no longer part of the causation test for UIM cases in Washington.

Nationwide Gen. Ins. Co. v. Royal, 700 A.2d 130 (Del. 1997) (p. 20 GEICO Response in federal court) requires that the uninsured vehicle be an active accessory. *Royal* also approves the test in *Auto-Owners Ins. Co. v. Rucker*, 188 Mich. App. 125, 469 N.W.2d 1 (Mich. Ct. App. 1991) (p. 21 of GEICO Response in federal court). *Rucker* states that but-for causation is not enough, but “normal use” is required. These states have a different causation test than Washington which is no more than but-for causation.

Other states which reject but-for causation are *Concord General Mut. Ins. Co. v. Doe*, 161 N.H. 73, 8 A.3d 154 (N.H. 2010) which cites approvingly another case which rejects but-for causation. That case is *Commerce Ins. v. Ultimate Livery Service*, 452 Mass. 639, 897 N.E.2d

50, 62 (2008). These cases clearly apply a causation standard which is at variance with the Washington causation standard.

Similar to the “normal use” cases are the “inherent nature of the car” cases. These cases hold that there is no coverage because the car was not being put to its inherent use. *See e.g. Benevides v. Arizona Prop. & Cas. Ins. Guar. Fund*, 184 Ariz. 610, 911 P.2d 616 (Ariz. Ct. App. 1995); *Hawkeye- Security Ins. Co. v. Gilbert*, 124 Idaho 953, 866 P.2d 966 (Idaho Ct. App. 1994). There is a commonality among the cases which reject mere “but-for” causation and the cases requiring normal use of a vehicle, and cases requiring that causation be part of the inherent nature of a car. All of these doctrines require more than but-for causation. All of these cases which look for proof beyond cause in fact between the vehicle use and the accident (i.e. shooting) are cases which are not valid references in Washington. Our State has endorsed but-for causation or even a broader test of causation under the “arising out” language in the policy at issue.

6. Ambiguity of phrase “arising out of”

Kroeber believes that Washington case law mandates UIM coverage for her because of our but-for causation rule and because of the even less demanding standards for causation under Washington cases interpreting the phrase “arising out of.” *See Beckman and Munn, supra.*

At the very least the phrase “arising out of” is ambiguous. *Equilon Enterprises LLC v. Great American Alliance Ins. Co.*, 132 Wn. App. 430, 132 P.3d 758 (2006) states that “arising out of” has more than one meaning in the case law. To that extent the phrase is ambiguous.

A phrase is ambiguous if it is reasonably susceptible to at least two meanings, *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). If there are two reasonable interpretations to an insurance policy, then the interpretation most favorable to the insured should prevail. *GEICO v. Titus*, 18 Wn. App. 208, 566 P.2d 990 (1977).

There are in various jurisdictions numerous interpretations of “arising out of.” California interprets the phrase as requiring that the vehicle use be a substantial factor in interpreting the phrase in a UIM case. *Acceptance Ins. Co. v. Syufy Enterprises*, 69 Cal. App. 4th 321, 81 Cal. Rptr. 2d 557 (1999).

The Tenth Circuit has held that “arising out of” requires a greater showing of causation than “but-for” causation. *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993). Yet Illinois states that “arising out of” simply means “but-for” causation. *Maryland Cas. Co. v. Chicago & N.W. Transportation Co.*, 126 Ill. App.3d 150, 466 N.E.2d 1091 (1984).

Most leniently, Wisconsin holds that “arising out of” means only some causal connection as that phrase is broad, general and

comprehensive. *Mikula v. Miller Brewing Co.*, 281 Wis.2d 712, 701 N.W.2d 613 (Wis. Ct. App. 2005). This interpretation is most favorable to Kroeber, the insured. It happens that this interpretation comports with *Munn* and *Butzberger*, *supra*.

The phrase “arising out of” seems clear under Washington law. It means some loose causal connection. However, the ambiguity doctrine requires this Court to interpret the phrase in the same way, irrespective of Washington cases interpreting the phrase. Under the ambiguity doctrine Kroeber should also get the benefit of the interpretation which requires only a loose causal connection.

CONCLUSION

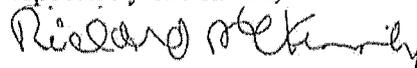
Once again, there is no known case in the U.S. which does not apply UIM coverage to a drive-by shooting if: 1. the jurisdiction applies a but-for test of causation of the shooting due to the vehicle use, 2. intentional acts, which are accidental to the victim, are covered under the UIM policy, and 3. vehicle use need not be defined as “normal” or “inherent.”

In the present case Judge Lasnik has already ruled that there was vehicle use at the time of the shooting, and he imposed no qualification or limitations on his finding of vehicle use. Judge Lasnik has also ruled that the shooting of Kroeber was an “accident” under the terms of the policy.

Therefore causation is the only issue. Washington has a lax causation standard, so lax that *Seaway, supra*, finds that our causation test is in the minority in the nation. Twenty other States have at some point found insurance coverage with facts identical or similar to the present case. Washington has never ruled on UIM coverage for a drive-by shooting victim. But our law is clear in requiring a minimal causal link to establish coverage. Our unbroken line of precedents requiring no more than but-for causation mandates that Washington join Oregon's 2015 decision to be part of the substantial plurality of jurisdictions which grant UIM coverage to those injured or killed by drive-by shooters. Because the most recent statistics show that Washington is fourth among States in absolute number of drive-by shootings (following three other states with much larger populations), the policy considerations cry out for providing relief to the plethora of victimized Washington residents. See attachment hereto which corroborates these statistics. ER 201.

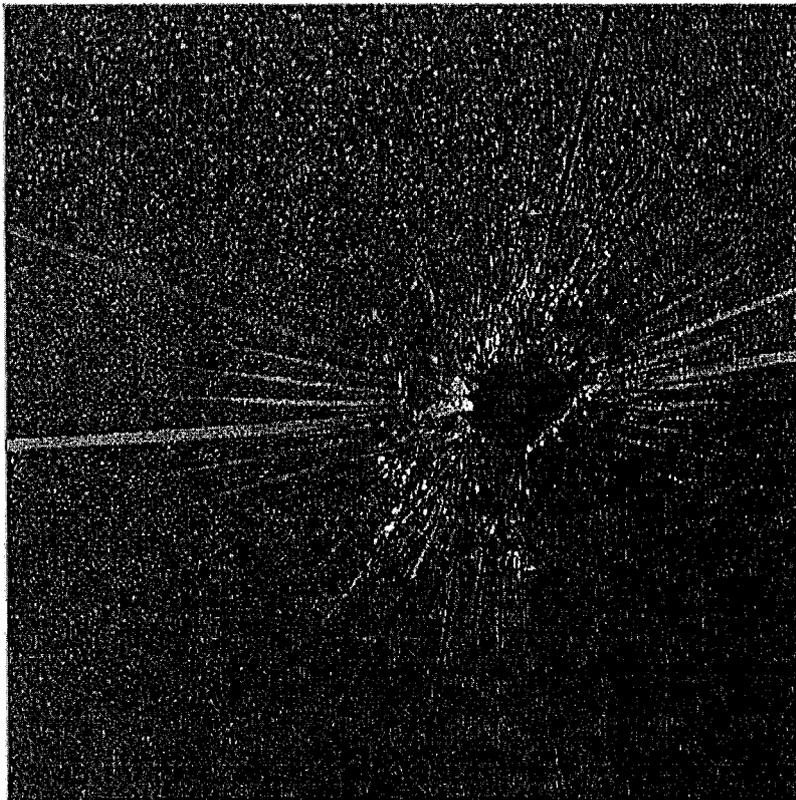
July 17, 2015

Respectfully submitted,



RICHARD MCKINNEY, WSBA NO. 4895
Attorney for Heidi Kroeber

Drive-By America



Second Edition

July 2010

The Violence Policy Center (VPC) is a national non-profit educational organization that conducts research and public education on violence in America and provides information and analysis to policymakers, journalists, advocates, and the general public. This study was funded with the support of The California Wellness Foundation. Past studies released by the VPC include:

- *Lessons Unlearned—The Gun Lobby and the Siren Song of Anti-Government Rhetoric* (April 2010)
- *Target: Law Enforcement—Assault Weapons in the News* (February 2010)
- *Black Homicide Victimization in the United States: An Analysis of 2007 Homicide Data* (January 2010)
- *When Men Murder Women—An Analysis of 2007 Homicide Data* (September 2009)
- *Law Enforcement and Private Citizens Killed by Concealed Handgun Permit Holders—An Analysis of News Reports, May 2007 to April 2009* (July 2009)
- *Indicted: Types of Firearms and Methods of Gun Trafficking from the United States to Mexico as Revealed in U.S. Court Documents* (April 2009)
- *Iron River: Gun Violence and Illegal Firearms Trafficking on the U.S.-Mexico Border* (March 2009)
- *Youth Gang Violence and Guns: Data Collection in California* (February 2009)
- *“Big Boomers”—Rifle Power Designed Into Handguns* (December 2008)
- *American Roulette: Murder-Suicide in the United States* (April 2008)
- *An Analysis of the Decline in Gun Dealers: 1994 to 2007* (August 2007)
- *Drive-By America* (July 2007)
- *A Shrinking Minority: The Continuing Decline of Gun Ownership in America* (April 2007)
- *Clear and Present Danger: National Security Experts Warn About the Danger of Unrestricted Sales of 50 Caliber Anti-Armor Sniper Rifles to Civilians* (July 2005)
- *The Threat Posed to Helicopters by 50 Caliber Anti-Armor Sniper Rifles* (August 2004)
- *United States of Assault Weapons: Gunmakers Evading the Federal Assault Weapons Ban* (July 2004)
- *Vest Buster: The .500 Smith & Wesson Magnum—The Gun Industry’s Latest Challenge to Law Enforcement Body Armor* (June 2004)
- *Bullet Hoses—Semiautomatic Assault Weapons: What Are They? What’s So Bad About Them?* (May 2003)
- *“Officer Down”—Assault Weapons and the War on Law Enforcement* (May 2003)
- *“Just Like Bird Hunting”—The Threat to Civil Aviation from 50 Caliber Sniper Rifles* (January 2003)
- *Sitting Ducks—The Threat to the Chemical and Refinery Industry from 50 Caliber Sniper Rifles* (August 2002)
- *License to Kill IV: More Guns, More Crime* (June 2002)
- *The U.S. Gun Industry and Others Unknown—Evidence Debunking the Gun Industry’s Claim that Osama bin Laden Got His 50 Caliber Sniper Rifles from the U.S. Afghan-Aid Program* (February 2002)
- *“A .22 for Christmas”—How the Gun Industry Designs and Markets Firearms for Children and Youth* (December 2001)
- *Unintended Consequences: Pro-Handgun Experts Prove That Handguns Are a Dangerous Choice For Self-Defense* (November 2001)
- *Voting from the Rooftops: How the Gun Industry Armed Osama bin Laden, Other Foreign and Domestic Terrorists, and Common Criminals with 50 Caliber Sniper Rifles* (October 2001)
- *Hispanics and Firearms Violence* (May 2001)
- *Where’d They Get Their Guns?—An Analysis of the Firearms Used in High-Profile Shootings, 1963 to 2001* (April 2001)
- *A Deadly Myth: Women, Handguns, and Self-Defense* (January 2001)
- *Handgun Licensing and Registration: What it Can and Cannot Do* (September 2000)
- *Pocket Rockets: The Gun Industry’s Sale of Increased Killing Power* (July 2000)
- *Guns For Felons: How the NRA Works to Rearm Criminals* (March 2000)
- *One Shot, One Kill: Civilian Sales of Military Sniper Rifles* (May 1999)
- *Cease Fire: A Comprehensive Strategy to Reduce Firearms Violence* (Revised, October 1997)

Violence Policy Center, 1730 Rhode Island Avenue, NW, Suite 1014, Washington, DC 20036
202-822-8200 phone, 202-822-8205 fax, www.vpc.org web

© July 2010, Violence Policy Center

Section One: Introduction

Drive-by shootings are commonly defined as an incident in which the shooter fires a firearm from a motor vehicle at another person, vehicle, building, or another stationary object.¹

This study is a follow-up to the July 2007 Violence Policy Center (VPC) report *Drive-By America*, which, using a limited sample of information, offered for the first time a nationwide overview of drive-by shootings.²

Three years after the publication of the original VPC study, there remains no national data on the prevalence of drive-by shootings, those who commit them, those who are killed and injured as a result of them, the firearms used, where they take place, or at what times they most often occur.

The goal of this new edition of *Drive-By America* is to continue the VPC's efforts to fill the information gap surrounding drive-by shootings while illustrating the need for improved data collection regarding this specific category of firearms violence.

¹ Dedel, Kelly, "Drive-By Shootings," *Problem-Oriented Guides for Police, Problem-Specific Guides Series, No. 47*, U.S. Department of Justice, Office of Community Oriented Policing Services, March 2007. The publication notes, "Many drive-by shootings involve multiple suspects and multiple victims. Using a vehicle allows the shooter to approach the intended target without being noticed and then to speed away before anyone reacts. The vehicle also offers some protection in the case of return fire. In some situations, drive-by shootings are gang-related; in others, they are the result of road rage or personal disputes between neighbors, acquaintances, or strangers and are not related to gang membership."

² National homicide data, including age, race, circumstance, weapon type, and relationship based on initial police reporting is compiled by the Federal Bureau of Investigation through the Supplementary Homicide Report (SHR) of the Uniform Crime Reports (UCR). National SHR data does not include drive-by shootings in its circumstances (although such information is tallied by the California Department of Justice for its statewide UCR report as detailed in Section Three of this report). The National Center for Health Statistics compiles data from death certificates on the "cause or mechanism" of the following injuries: unintentional, violence-related, homicide, legal intervention, suicide, undetermined intent. Neither of these data collection tools segregates drive-by shootings from their homicide totals. The Centers for Disease Control and Prevention's (CDC) National Violent Death Reporting System (NVDRS) compiles and combines data from medical examiners, coroners, police, crime labs, and death certificate registrars in 17 states and often includes such information. NVDRS data has been collected in Alaska, California, Colorado, Georgia, Kentucky, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Utah, Virginia, and Wisconsin. (For more information on the Centers for Disease Control and Prevention's National Violent Death Reporting System and states where the program is currently federally funded, please see <http://www.cdc.gov/ViolencePrevention/NVDRS/index.html>.) Unlike other federal violence surveillance systems, NVDRS does code for drive-by shooting where it can be ascertained from the data set (for example, whereas police reports would be more likely to report such information, death certificates would not).

From July 1, 2008, through December 31, 2008, the Violence Policy Center used the Google news search engine to collect every reported news article that contained the term "drive by."³ From these results, the VPC removed all results not related to a drive-by shooting incident (for example, extraneous results included news reports of football games detailing a "drive by" one team against another, etc.). Recognizing the limitations of the survey tools used, and taking into account prior studies looking at the number of drive-by shootings in specific jurisdictions, it is likely that the number of shootings is dramatically underreported.⁴ The number of reported instances may also be influenced by local media focus.

During the six-month period covered in this report, 733 drive-by shooting incidents were reported in the news media as identified by Google, claiming 154 lives and injuring 631 individuals.

³ According to the Google press office, Google News includes articles from more than 25,000 news sources in approximately 30 languages and more than 70 editions. Of these, more than 5,000 are English-language news sources.

⁴ Prior studies have primarily used police reports to tally the number of drive-by shootings in a given locality. Such reports would include not only incidents in which victims or potential victims were present, but property damage reported to law enforcement as the result of drive-by attacks. News coverage of drive-by shootings is far more likely when victims or potential victims are present, but far less likely when only property damage occurs from the incident. As a result, news reports would most likely dramatically underreport the total number of drive-by shootings.

Son: "She Was Covered in Blood," East Austin, TX, November 19, 2008

Nearly a dozen bullets penetrated a house injuring an elderly woman taking a shower. Ella Gonzales, 84, was inside the house when the shots were fired. One of the bullets hit her neck. The family did not know why the house or Ella Gonzales was targeted. "I could not believe, I didn't want to believe that something like that could happen to my mother....," said the woman's son. (*KVUE.com*)

Four Nabbed in Drive-By Slaying of 7-year-old Girl, Salt Lake City, UT, July 6, 2008

Seven-year-old Maria Del Carmen Menchaca was playing outside her home on the sidewalk around 6:30 PM when she became the unintended victim of a fatal shot fired from a black SUV. Police said the shooting was gang-related and may have stemmed from threats reported in the neighborhood earlier that day. Said one neighbor, "You don't want to let your kids play outside. Bullets don't have eyes." (*The Salt Lake Tribune*)

Bullet from Drive-By Shooting Injures 5-Month-Old Minneapolis Girl, Minneapolis, MN, August 7, 2008

A five-month-old girl, sitting in her grandmother's lap, was shot in the thigh by a stray bullet from a drive-by shooting between two cars near Powderhorn Park in Minneapolis around 8:00 PM. "This was a family enjoying the balmy evening in the park, and obviously their night was ruined," said police. (*Star Tribune*)

Pregnant Teen Killed in Drive-By Shooting, St. Louis, MO, September 19, 2008

Rosheena Frenchie, a pregnant 18-year-old, was killed, and her boyfriend was wounded, in a drive-by shooting as they walked down a sidewalk around 11:00 PM. Frenchie, who was four months pregnant, was shot in the chest and fatally wounded. Doctors were unsuccessful in saving the unborn child. Frenchie's boyfriend was wounded in the hand. The shooters were believed to have fired because of an earlier altercation with Frenchie's boyfriend. (*STLtoday.com*)

Teen Takes Stand in Hearing for Fatal Drive-By Shooting, Tulsa, OK, September 7, 2008

Five teenagers traveling in a red Chevrolet Caprice were fired on by a gunman in second car who mistakenly believed the teens were members of a rival gang. One 16-year-old passenger, Donovan Crutcher, died, and his brother was paralyzed from his injuries. Another victim lost an eye and the use of an arm. The shooter used an SKS assault rifle with a high-capacity ammunition magazine. (*Tulsa World*)

Drive-By Shooting Hits Elderly Man Outside Grocery Store, College Park, GA, October 17, 2008

A 74-year-old man was rushed to the hospital after being shot outside a grocery store in Fulton County. Authorities said that the victim was hit by gunfire coming from a green SUV outside the store. One witness said he heard five rapid-fire gunshots and saw the man lying on the ground, shot in the shoulder. (*Myfoxtlanta.com*)

Madison Drive-By Victim was Wounded Twice, Madison, IL, October 7, 2008

Twelve-year-old Delarrian Davis was struck twice by bullets and died while doing school work in his home. The alleged shooter, Marcus T. "Butterhead" Powell, was arrested and charged with first-degree murder. Police believe that Davis' stepfather was Powell's intended target. (*suburbanjournals.stltoday.com*)

Girl Shopping for Birthday Present Shot in Drive-By, Jacksonville, FL, August, 27, 2008

Fourteen-year-old Mary Hampton was on her way home from buying a birthday present with her friend, 17-year-old Jaquelle Erica Stinson, when the two girls were shot in a random drive-by shooting. They were treated and released for gunshot wounds to their legs. "I was getting a birthday present, I was about to go home," said Mary. (*firstcoastnews.com*)

Flint Woman Shot in Drive-By was Protecting her Children, Mother Says, Flint, MI, December 27, 2008

Shanicka Martin was shot once while trying to protect her two young children after a drive-by shooter fired 15 rounds from an assault rifle into her home. When the shooting started, Martin ran into the bedroom where her two daughters, ages one and two, were sleeping. Martin told her mother that she saw the bullet heading her way as she opened the bedroom door: "She said, 'Mama, I looked at the bullet and just wanted to get to my kids.'" (*The Flint Journal*)

18-Year-Old Killed in Minneapolis Alley Drive-By was Shot in Heart, Minneapolis, MN, October 11, 2008

High school student Jesse Mickelson was killed in the alley behind his home while retrieving a football for a group of kids playing at his cousin's birthday party. Mickelson's guardian, Heidi Crandell, ran through a group of terrified children to reach the teen, who was lying in the alley, shot in the chest. Crandell said that she suspected the gunshots were meant for the residents of a nearby house. (*The Star Tribune*)

Section Two: State-by-State Comparisons of Drive-By Shootings

During the study period, California led the nation in the number of reported drive-by shootings with 148 drive-by shootings, killing 40 and injuring 129. Following California were: Texas, 60 drive-by shootings, killing six and injuring 52; Florida, 48 drive-by shootings, killing 10 and injuring 42; Illinois, 38 drive-by shootings, killing 18 and injuring 53; and, Washington, 38 drive-by shootings, killing three and injuring 21. For a listing of the top 10 states ranked by the number of drive-by shootings, please see Chart One below.

During the study period, there were only four states where no drive-by shootings were reported: Maine, New Hampshire, South Dakota, and Wyoming. For a chart of all 50 states listed alphabetically with the number of drive-by shootings, and number of those killed and injured, please see the Appendix.

Chart One: Top 10 States Ranked by Number of Drive-By Shootings During Study Period

Rank	State	Number of Drive-Bys	Dead	Injured
1	California	148	40	129
2	Texas	60	6	52
3	Florida	48	10	42
4 (tie)	Illinois	38	18	53
4 (tie)	Washington	38	3	21
6	Oklahoma	25	5	21
7	North Carolina	24	2	16
8	Georgia	23	5	18
9	New York	22	4	27
10	Louisiana	20	4	15

Victims, Location, and Time of Day

During the study period, information was gathered on the number of victims who were under the age of 18, location of the drive-by shooting, and the time of day that the shooting occurred.

Age

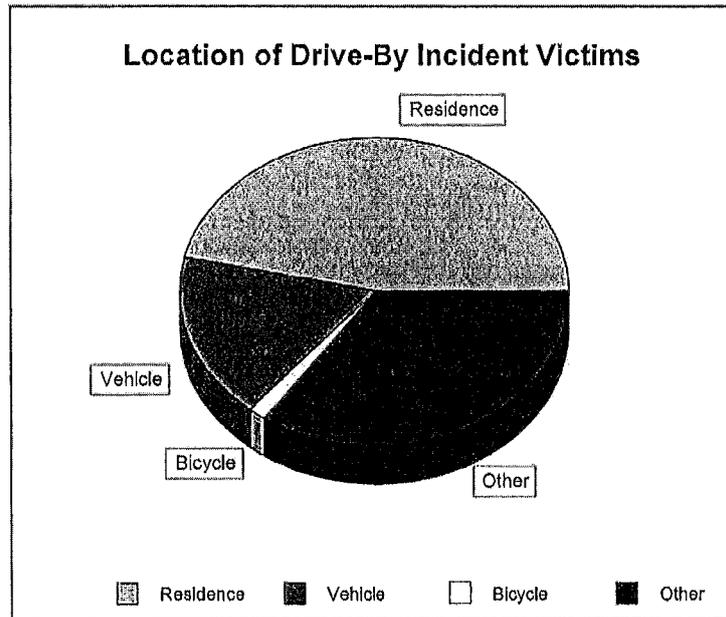
More than three quarters of those killed or injured were 18 years of age or older. Of the total of 785 victims dead or injured, 145 (18 percent) were identified as being under the age of 18.

Location

Nearly half of all drive-by shootings occurred at a residence. The location of the shooting victims could be identified in 676 of the 733 instances.

- In nearly half of the incidents (314 out of 676, or 46 percent), the victims were at a residence (either indoors or outdoors).
- Seventeen percent of the incidents (118 of 676) involved shooting at another vehicle.⁵
- In one percent of the incidents, (10 out of 676) the victim was on a bicycle.
- In more than a third (234 out of 676, or 35 percent) of the incidents, the victims were in other locations that included: street corner, parking lot, basketball court, bus stop, vacant lot, fast food restaurant, or other business.

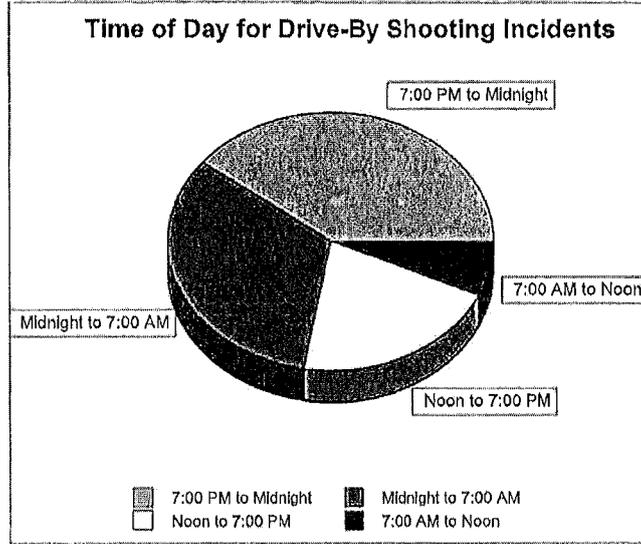
⁵ The study *Aggressive Driving: A Report by Louis Mizell, Inc. for the AAA Foundation for Traffic Safety*, (See *Aggressive Driving: Three Studies*, AAA Foundation for Traffic Safety, 1997, <http://www.aaafoundation.org/pdf/agdr3study.pdf>) reviewed 30 major newspapers, reports from 16 police departments, and insurance company claim reports for aggressive driving incidents for the period January 1990 to September 1, 1996, and found that of these 10,037 known aggressive driving incidents, firearms were the most popular weapon used by aggressive drivers. Guns were used in 37 percent of the cases. During the period reviewed "at least 322 incidents of domestic violence were played out on roads and Interstates throughout the country," leading the study to note, "Domestic violence plays a surprisingly large role in aggressive driving."



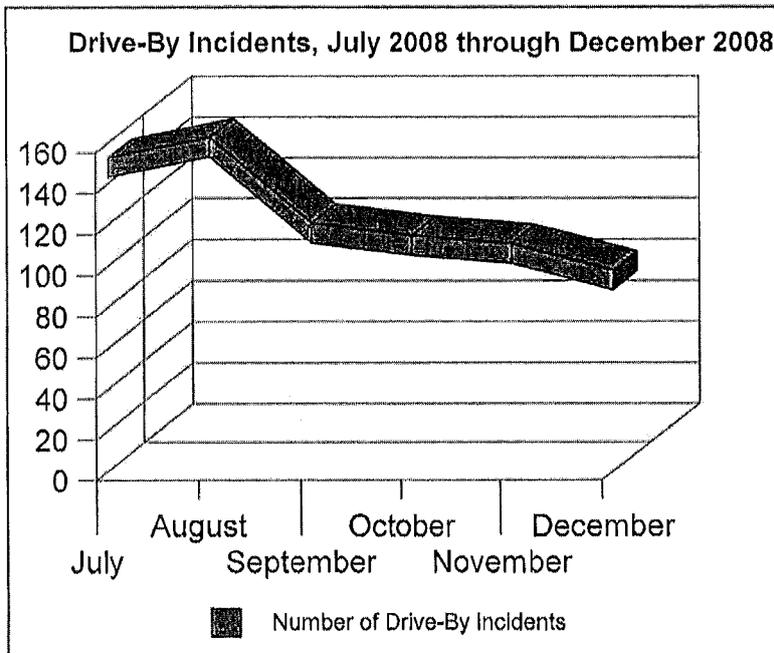
Time of Day

The most common time for drive-by shootings was between the hours of 7:00 PM and midnight. The time of day could be identified in 655 out of 733 instances.

- Forty percent (259 out of 655) were between the hours of 7:00 PM and midnight.
- Thirty-three percent (213 out of 655) were between midnight and 7:00 AM.
- Twenty-one percent (138 out of 655) were between noon and 7:00 PM.
- Seven percent (45 out of 655) were between the hours of 7:00 AM and noon.



Drive-by shootings peaked in the month of August and then declined as the months turned colder.



Possible Gang Involvement

News reports mentioned potential gang involvement (either through quotes of law enforcement officials, witnesses, victims, or non-cited reporting by the journalist) in 128 of the 733 drive-by shootings (17 percent).

Section Three: California Drive-By Shootings

During the study period, California led the nation in the number of reported drive-by shootings with 148 drive-by shootings, killing 40 and injuring 129. This section of the study offers more detailed information on drive-by shootings that occurred in the state during the study period.

Victims, Location, and Time of Day

During the study period, information was gathered on the number of victims who were under the age of 18, location of the drive-by shooting, and the time that the shooting occurred.

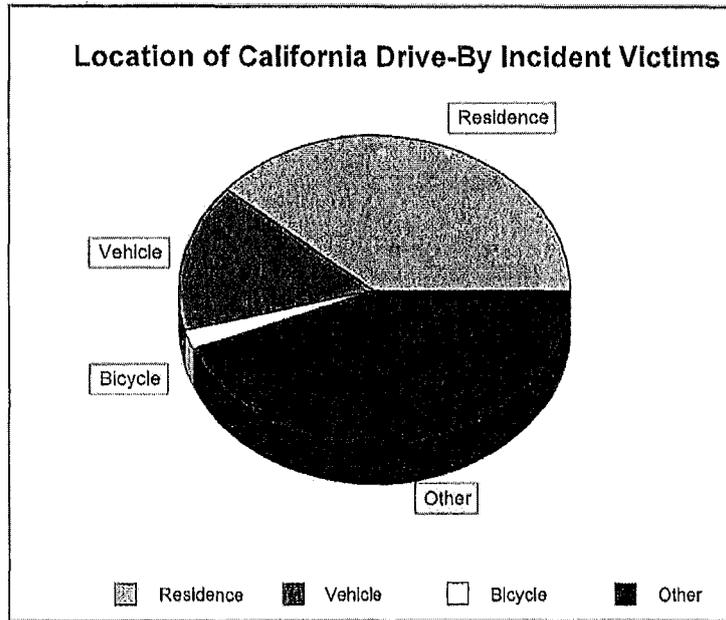
Age

More than four out of five of those killed or injured were 18 years of age or older. Of the total of 169 victims dead or injured, 28 (17 percent) were identified as being under the age of 18.

Location

More than one third of all drive-by shootings occurred at a residence. The location of the shooting victims could be identified in 142 of the 148 instances.

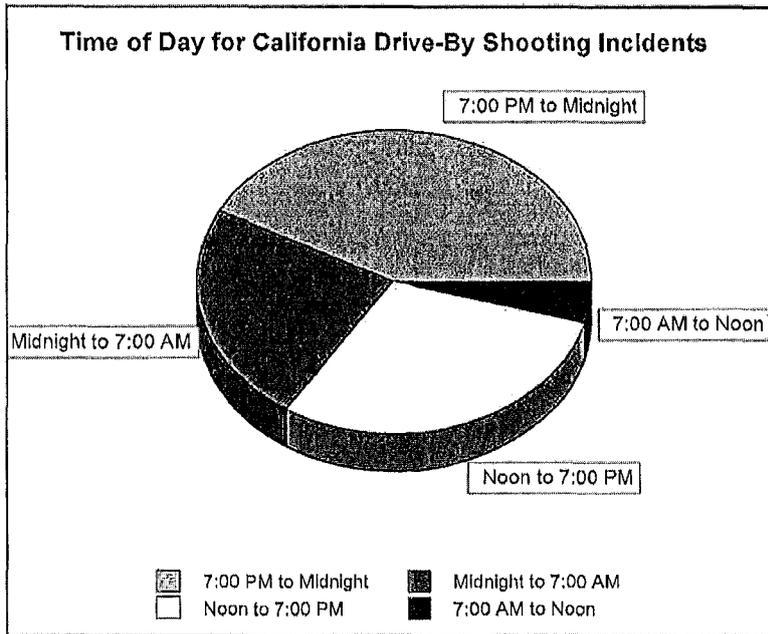
- In 39 percent of the incidents (55 out of 142) the victims were at a residence (either indoors or outdoors).
- Fifteen percent of the incidents (22 of 142) involved shooting at another vehicle.
- In two percent of the incidents (3 out of 142) the victim was on a bicycle.
- In 44 percent (62 out of 142) of the incidents the victims were in other locations that included: street corner, parking lot, vacant lot, fast food restaurant, or other business.



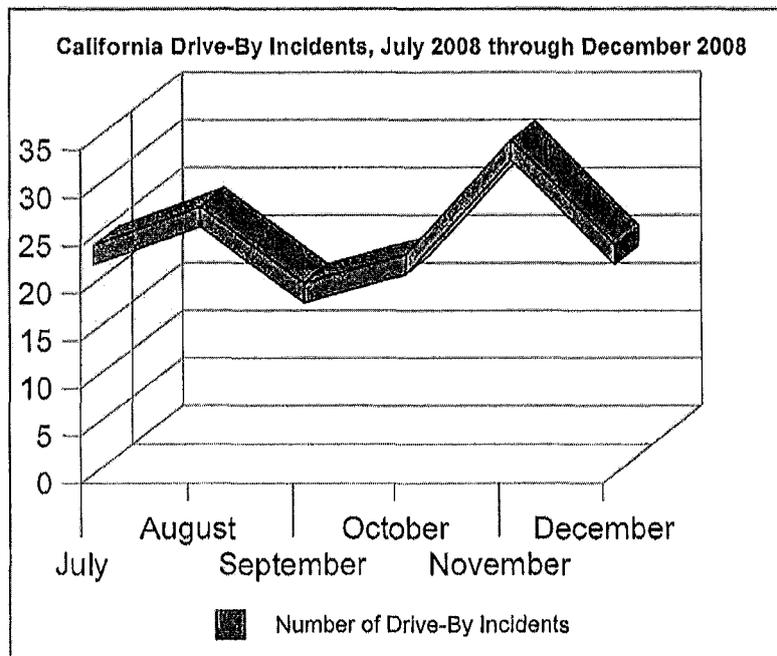
Time of Day

The most common time for drive-by shootings in California was between the hours of 7:00 PM and midnight. The time of day could be identified in 135 out of 148 instances.

- Forty-two percent (57 out of 135) were between the hours of 7:00 PM and midnight.
- Thirty percent (40 out of 135) were between noon and 7:00 PM.
- Twenty-four percent (32 out of 135) were between midnight and 7:00 AM.
- Four percent (six out of 135) were between the hours of 7:00 AM and noon.



Drive-by shootings peaked in the month of November.



Possible Gang Involvement

News reports mentioned potential gang involvement (either through quotes of law enforcement officials, witnesses, victims, or non-cited reporting by the journalist) in 47 of the 148 drive-by shootings (32 percent).

Conclusion

Little is known about the scope and prevalence of drive-by shootings. This analysis explores the relative frequency of such events on a state-by-state basis⁶ while identifying national trends regarding time, location, the age of those victimized, and suspected gang involvement. The overarching conclusion from this analysis is that additional research on the national level collecting and analyzing data on drive-by shootings is necessary to identify effective prevention strategies. Recommendations developed as the result of this analysis are—

- The feasibility of adding drive-by shooting as a category to the Uniform Crime Reports should be explored.
- Communities that experience a significant number of drive-by shootings should consider establishing their own data collection mechanism.
- Drive-by shootings are just one symptom of the increasing lethality of firearms available to the general public. State and federal policies should focus on limiting the caliber and capacity of firearms marketed to the general public.

⁶ Recognizing the limitations of the reporting process used for this analysis, and the relatively higher tallies of drive-by shootings reported in prior, local studies, we believe that the totals reported for this study are a dramatic underreporting of the frequency of such incidents.

Appendix: Drive-By Shooting Incidents by State

State	Number of Drive-Bys	Number killed	Number Injured
Alabama	8	1	8
Alaska	4	0	0
Arizona	18	1	17
Arkansas	4	0	3
California	148	40	129
Colorado	15	5	14
Connecticut	7	3	8
Delaware	7	0	4
DC	0	0	0
Florida	48	10	42
Georgia	23	5	18
Hawaii	2	0	2
Idaho	3	0	0
Illinois	38	18	53
Iowa	1	0	1
Indiana	12	3	7
Kansas	11	1	6
Kentucky	3	3	1
Louisiana	20	4	15
Maine	0	0	0
Maryland	6	7	9
Massachusetts	13	1	14
Michigan	18	4	18
Minnesota	7	3	5
Mississippi	10	2	6
Missouri	15	9	18

State	Number of Drive-Bys	Number killed	Number Injured
Montana	1	0	1
Nebraska	8	0	13
Nevada	5	1	4
New Hampshire	0	0	0
New Jersey	8	4	6
New Mexico	4	1	1
New York	22	4	27
North Carolina	24	2	16
North Dakota	2	0	0
Ohio	15	2	12
Oklahoma	25	5	21
Oregon	6	1	4
Pennsylvania	13	1	11
Rhode Island	1	0	1
South Carolina	17	0	10
South Dakota	0	0	0
Tennessee	10	2	8
Texas	60	6	52
Utah	10	1	9
Vermont	3	0	0
Virginia	16	0	14
Washington	38	3	21
West Virginia	1	0	0
Wisconsin	3	1	2
Wyoming	0	0	0
Total	733	154	631

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2015, one (1) copy of the **Plaintiff Heidi Kroeber's Opening Brief on Certified Questions** was mailed via Regular Mail to the following individual:

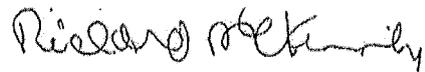
Alfred E. Donohue, WSBA #32774
Wilson Smith Cochran Dickerson
901 Fifth Avenue, Suite 1700
Seattle, WA 98164

I hereby certify that on July 17, 2015, one (1) copy of the **Plaintiff Heidi Kroeber's Opening Brief on Certified Questions** was emailed to the following:

EMAIL – supreme@courts.wa.gov
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

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

EXECUTED at Bremerton, Washington this 17th day of July, 2015.



RICHARD MCKINNEY, WSBA NO. 4895
Attorney for Heidi Kroeber

OFFICE RECEPTIONIST, CLERK

To: Richard McKinney
Subject: RE: Kroeber Brief No. 91846-5

Received 7-17-15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Richard McKinney [mailto:r_mckinney@qwestoffice.net]
Sent: Friday, July 17, 2015 7:15 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: FW: Kroeber Brief No. 91846-5

Clerk of Washington State Supreme Court:

Attached find my opening brief in case no. 91846-5.

Richard McKinney