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No. 93732-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

ERIC DANIEL CRUZ,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY

SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

A defensive weapons pat down or frisk can make a non-consensual police encounter safer for the police, the detainee and any bystanders. Allowing police to secure all weapons at the start of a non-consensual encounter can protect lives. This supplemental brief expands upon arguments contained in the State's Opening Brief of Appellant, Reply Brief of Appellant, and Petition for Review. The State's decision not to address certain issues in this supplemental brief should not be considered as a concession, but should be interpreted as the State's determination that the unaddressed issues are adequately discussed in its other briefs.

II. STATEMENT OF ISSUES

1. Whether the lawfulness of a detainee's possession of a firearm or other weapon is irrelevant to an officer's ability to perform a defensive *Terry*¹ frisk of the detainee or the detainee's vehicle?

2. Whether unsecured firearms in a vehicle that the driver or passengers will be allowed to return to at the conclusion of a lawful detention, presents a potential threat to an officer's safety sufficient to justify a *Terry* frisk of the vehicle?

III. ARGUMENT

A. A *TERRY* FRISK MAY LAWFULLY OCCUR IN CONJUNCTION WITH DETENTIONS OTHER THAN *TERRY* STOPS.

Terry v. Ohio created two separate exceptions to the Fourth Amendment. The seizure exception, commonly referred to as "*Terry* stops,"

¹*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

allows an officer to detain a suspect upon reasonable suspicion the suspect is about to, is in the process of, or has committed a crime.² The search exception, commonly referred to as “*Terry* frisks,” allows an officer to conduct a limited defensive or protective search for weapons upon articulable grounds that an individual is armed or dangerous.

The purpose of a *Terry* stop is to further the interests of crime prevention and detection, while a *Terry* frisk is justified by the concern for the safety of the officer and others in proximity. *See Terry*, 392 U.S. at 22-24. Whereas a *Terry* stop is justified by reasonable suspicion that criminal activity may be afoot, a frisk of a person for weapons requires reasonable suspicion that a suspect “is armed and presently dangerous to the officer or to others.” *Id.* at 24. A lawful frisk will not always flow from a justified *Terry* stop. When a frisk occurs during a lawful investigative detention, the stop and the frisk must be analyzed separately and the reasonableness of each must be independently determined. *Thomas v. Dillard*, 818 F.3d 864, 876 (9th Cir. 2016); *see also Terry*, 392 U.S. at 22-23.

Because a *Terry* frisk is justified by a concern for the safety of the officer and others in proximity, a lawful frisk may occur outside of a *Terry* investigative detention.³ *Seattle v. Hall*, 60 Wn. App. 645, 651, 806

²While Const. art. I, sec. 7 may provide greater protection than does the Fourth Amendment, the seizure exception is co-extensive under both constitutions on all but one point. *Terry* stops in Washington are limited to crimes and traffic infractions. *See State v. Day*, 161 Wn.2d 889, 168 P.3d 1265 (2007) (a *Terry* stop may not be made to investigate a parking violation); *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002) (a *Terry* stop may not be made to investigate a non-traffic infraction).

³While Const. art. I, sec. 7 may provide greater protection than does the Fourth Amendment, the search exception is co-extensive under both constitutions on all but one point. The Fourth Amendment permits frisks to be conducted during social contacts pursuant to consent. *See United States v. Drayton*, 536 U.S. 194, 197, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002) (“The Fourth Amendment permits police officers to approach bus passengers at random to ask questions and to request their consent to search”; evidence discovered during a suspicionless consensual pat down was lawfully collected); *Florida v. Bostick*, 501 U.S.

P.2d 1246 (1991). *Terry* frisks may be conducted of a passenger in a vehicle that has been seized due to the driver's violation of a traffic statute when an officer has reasonable grounds to believe the person may be armed or dangerous,⁴ of an arrestee's companion when an officer has particular facts that provide reasonable grounds to believe the person is armed,⁵ of a person who is present when a search warrant is executed if an officer has reasonable grounds to believe the person might be armed or dangerous,⁶ of a runaway child who is taken into protective custody prior to transporting the child,⁷ and of a mentally disordered person who is being detained for evaluation and treatment prior to transport.⁸ A *Terry* frisk may also be performed during a community caretaking contact when an individual, who voluntarily approaches an officer, behaves in a manner that causes the officer a legitimate concern for his or her safety,⁹ and prior to transporting someone in a patrol

419, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) (a police officer may conduct a pat down search in a consensual encounter even if there is no reasonable suspicion that the person subjected to the frisk is armed or dangerous if consent for the search is voluntarily given prior to the search). *Terry* frisks in Washington may not be conducted pursuant to consent during a social contact. *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009).

⁴*Arizona v. Johnson*, 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009); *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

⁵*State v. Flores*, 186 Wn.2d 506, 379 P.3d 104 (2016).

⁶*See, e.g., Michigan v. Summers*, 452 U.S. 692, 699, n. 9, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981) ("in *Ybarra v. Illinois*, 444 U.S. 85, we held that police executing a search warrant at a tavern could not invoke *Terry* to frisk a patron unless the officers had individualized suspicion that the patron might be armed or dangerous"); *State v. Broadnax*, 98 Wn.2d 289, 654 P.2d 96 (1982) (same).

⁷*See, e.g., State v. A.A.*, 187 Wn. App. 475, 349 P.3d 909 (2015).

⁸*See, e.g., State v. Mason*, 56 Wn. App. 93, 782 P.2d 572 (1989).

⁹*See, e.g., Hall*, 60 Wn. App. at 652-53.

car.¹⁰

In addition to a pat down for weapons, the *Terry* doctrine allows an officer to sweep the interior of a suspect's vehicle for weapons. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983); *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986); *State v. Larson*, 88 Wn. App. 849, 946 P.2d 1212 (1997). This exception to the Fourth Amendment is separate and distinct from the search incident to arrest doctrine. A *Terry* search of the vehicle is conducted not to discover evidence of a crime, but to allow an officer to safely fulfill the purpose of the detention. *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).

The *Terry* search exception to the warrant requirement announced in *Long* survived the United State's Supreme Court's opinion in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). In *Gant*, the Court listed *Long* as an established exception to the warrant requirement. *Gant*, 129 S. Ct. at 1721. *Long* 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." *Long*, 463 U.S. at 1050; *see also United States v. Goodwin-Bey*, 584 F.3d 1117, 1120 (8th Cir. 2009) ("In

¹⁰*See, e.g., State v. Wheeler*, 108 Wn.2d 230, 235-36, 737 P.2d 1005 (1987) (frisk prior to transporting, solely due to the danger a person in the back seat of a patrol car presents to the driver); *People v. Hannaford*, 421 N.W.2d 608, 610-11 (Mich. App. 1988) (an officer who provides transportation in his patrol car to the passengers of a vehicle whose driver is arrested for DUI is entitled to pat the passengers down for weapons prior to their entering the patrol car even though none of the passengers appeared armed or dangerous); *Commonwealth v. Rehmeier*, 502 A.2d 1332, 1336-39 (Pa. Super. 1985) (a police officer who, in a non-arrest situation, properly proposes to take a citizen home in his patrol car may subject that citizen to a pat down search for weapons despite the fact the officer has no reason to believe the citizen is armed).

reexamining the search incident to arrest exception to the warrant requirement, *Gant* left [the *Michigan v. Long*] exception untouched.”).

A *Terry* sweep of a vehicle for weapons is proper when an officer intends to allow a detained person or a detained person’s companions to return to the vehicle following the contact. *See, e.g., Gant*, 556 U.S. at 352 (Scalia, J., concurring) (“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.”);¹¹ *Long*, 463 U.S. at 1051-52 (a person continues to pose a risk to officers if he will be permitted to reenter the automobile while the officer remains at close range). This principle was clearly applicable in the instant case as Officer McCormick, when he conducted his protective search, reasonably believed that Cruz would be released at the scene and that Cruz and his companion would have access to the vehicle’s interior at the conclusion of the stop. RP 9-10; CP 11, FOF 10, 21. Officer McCormick removed the firearms from Cruz’s vehicle, not for investigative purposes, but for officer safety and to secure the scene. CP 11, FOF 22 and 23.

Officer McCormick’s protective search of Cruz’s vehicle, which was limited to securing the firearms, was entirely proper under *Long* and *Kennedy*. Reversing Division Three’s opinion to the contrary would be consistent with numerous opinions from across the country and with the

¹¹In Washington, an arrested individual may be released at the scene and allowed to return to the vehicle following the stop. *See generally State v. Pulfrey*, 154 Wn.2d 517, 111 P.3d 1162 (2005) (the decision to make an arrest is separate and distinct from the decision of whether to release the individual at the scene or to book the individual). In these “no book” situations, an officer may lawfully secure weapons contained in the vehicle prior to releasing the arrestee at the scene.

public safety concerns that underlie both *Long* and *Terry*. See, e.g., *Davila v. United States*, 713 F.3d 248, 259 (5th Cir. 2013) (sweep for weapons during a lawful investigatory stop is “justified where the officers reasonably believe that someone within police custody might gain access to weapons, either during the traffic stop or once they are returned to their vehicles”); *United States v Holmes*, 376 F.3d 270, 277-281 (4th Cir. 2004) (protective search of vehicle conducted while the vehicle’s occupants were handcuffed in the back of a locked police cruiser, with several armed officers between them and the vehicle, was proper under *Long* as it was reasonable to believe that upon release at the conclusion of the encounter, vehicle’s occupants would have access to the interior of the vehicle); *People v. Delacruz*, 384 P.3d 349, 354-55 (Colo. 2016) (a protective search of the vehicle was objectively reasonable despite the fact that both occupants had been removed from the vehicle and one occupant was handcuffed as “a suspect can still break away from police control and retrieve the weapon, or, if the suspect is not ultimately arrested, he may access weapons if permitted to return to his car”); *Commonwealth v. Demirtshyan*, 36 N.E.3d 32, 38 n. 11 (Mass. App. 2015) (a *Terry*-type “frisk” of the interior of an automobile may be justified by the concern that a driver or passenger returning to the vehicle may gain access to a weapon that may be used against the police; protective sweep proper where driver sat in the back seat of cruiser where driver may return to vehicle); *State v. Scheet*, 845 N.W.2d 885 (N.D. 2014) (officer safety sweep of vehicle for weapons justified as driver, who made furtive motions prior to being placed in the back of a squad car, would most likely be released with

citations for the minor traffic infractions); *State v. Chang*, 147 Wn. App. 490, 496, 195 P.3d 1008 (2008) (officer may still search the compartment when both occupants of the vehicle are outside the car and do not have access to the passenger compartment so long as the officer intends to return them to the car following the stop.).

B. THE “ARMED” AND “DANGEROUS” CRITERIA ENSURE THAT A FRISK OF A PERSON OR A VEHICLE IS NOT ARBITRARY OR HARASSING .

An officer need not be absolutely certain that the detained person the officer is investigating at close range is armed and dangerous; the issue is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his or her safety was in danger. *Terry*, 88 S. Ct. at 1883. The same standard applies to a *Terry* sweep of a vehicle. *See generally Kennedy*, 107 Wn.2d at 11-13. The “armed” and “dangerous” criteria are intended to ensure that a frisk is not undertaken simply as an act of harassment. *Terry*, 392 U.S. at 14-15. *Accord State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (a frisk is lawful when there is some basis from which the court can determine that the frisk was not arbitrary or harassing). This purpose is met when an officer has individualized suspicion that a suspect is potentially armed and thus potentially dangerous.

Division Three contends that a frisk may not be conducted unless an officer has reasonable suspicion that a suspect is both armed *and* dangerous. *See State v. Cruz*, 195 Wn. App. 120, 123, 380 P.3d 599 (2016) (“Neither the plain wording of *Terry* nor our case law permit reducing the standard to a disjunctive test.”), *review granted*, 187 Wn.2d 1031 (2017). Division Three’s

requirement of independent evidence supporting inferences that a suspect is both armed and dangerous, is contrary to this Court's "armed or dangerous" formulation. *See State v. Horrace*, 144 Wn.2d 386, 395, 28 P.3d 753 (2001) (describing the *Terry* standard as "the objective suspicions that the person searched may be armed or dangerous."); *State v. Parker*, 139 Wn.2d 486, 502, 987 P.2d 73 (1999) (frisk "must be supported by objective suspicions that the person searched may be armed or dangerous.").

Division Three's formulation is also inconsistent with the "armed is presumed to be dangerous" rule adopted by the United States Supreme Court and a significant number of other courts. *See, e.g., Ybarra v. Illinois*, 444 U.S. 85, 93, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979) (under *Terry* "a law enforcement officer, for his own protection and safety, may conduct a pat down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted"); *Pennsylvania v. Mimms*, 434 U.S. 106, 112, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (frisk justified where "[t]he bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer," and stating that "[i]n these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat down'"); *Terry*, 392 U.S. at 28 (in approving Officer McFadden's frisk, the Court noted that "a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety"); *United States v. Robinson*, 846 F.3d 649, 696, 700 (4th Cir. 2017) (en banc) ("an officer who makes a lawful traffic stop and who has reasonable suspicion that one of the automobile's

occupants is armed may frisk that individual for the officer's protection and the safety of everyone on the scene"; "The use of 'and thus' [by the Supreme Court in *Terry*] recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed."); *United States v. Rodriguez*, 739 F.3d 481, 491 (10th Cir. 2013) (concluding that "an officer making a lawful investigatory stop [must have] the ability to protect himself from an armed suspect whose propensities are unknown" and therefore rejecting the defendant's argument that the officer "had no reason to believe he was dangerous" even though the officer had seen a handgun tucked into the waistband of his pants); *United States v. Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007) (an officer's reasonable suspicion that a suspect is carrying a gun "is all that is required for a protective search under *Terry*"); *Gastelum v. Hegyi*, 237 Ariz. 211, 348 P.3d 907, 910 (Ariz. App. 2015) (when the encounter between the police officer and an individual is not based on consent, a *Terry* frisk may be conducted without specifically assessing the likelihood that the armed individual is presently dangerous).

Division Three's position that an officer must possess facts to support both an inference that the suspect is armed *and* that the suspect is dangerous would require an officer who encounters a suspect who engages in furtive movements to delay any frisk until the officer sees the glint of steel or the grip of a pistol. Waiting until such a point to take self-protective action is all too likely to expose an officer to death or injury. Pre-existing Washington case law does not require an officer to take such a gamble. *See, e.g., Horrace*, 144 Wn.2d at 396 (driver's pronounced movements in passenger's

direction, during which the driver could have concealed a weapon in or behind the passenger's jacket, was sufficient to support a frisk); *Kennedy*, 107 Wn.2d at 3-4, 11-13 (stop for suspicion of possession of marijuana and vehicle occupant leaned forward as if to put something under the seat; vehicle sweep was proper to allow the officer "to discover whether the suspect's furtive gesture hid a weapon under the front seat"); *Larson*, 88 Wn. App. at 857 (frisk of suspect and sweep of vehicle where driver, after being signaled to pull over for speeding, leaned forward and made movements toward the floorboard of the truck and where the driver, once outside of the vehicle, would be required to reenter the truck to obtain his vehicle registration at which time he would "have had access to any weapon he might have concealed inside before getting out"); *State v. Watkins*, 76 Wn. App. 726, 730-31, 887 P.2d 492 (1995) (an officer may properly conduct a search for weapons within the immediate control of the driver and passenger when one of the persons in a properly stopped car moves as if to hide a weapon); *State v. Wilkinson*, 56 Wn. App. 812, 815-19, 785 P.2d 1139 (1990) (frisk of passenger proper when the passenger was moving around considerably and it appeared as though the passenger was trying to hid something under the seat, as an officer is not required to wager his physical safety against the odds that the passenger is actually unarmed). Similarly, the United States Supreme Court does not require an officer to take such a gamble. *See Mimms*, 434 U.S. at 112, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (frisk justified where "[t]he bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the

officer”).

This Court should reaffirm that when an officer is engaged in a nonconsensual encounter, the officer’s decision to conduct a defensive search of the detained person for weapons is neither arbitrary or harassing when: (1) the officer reasonably believes that the person stopped is armed; *or* (2) the person’s conduct would lead a reasonable officer to believe that the person may be either hiding or drawing a weapon; *or* (3) the person’s clothing reveals a bulge that would lead a reasonable officer to believe the person is armed. This Court’s reaffirmation of this principle will still prohibit a frisk when an officer is subjected to the general risk associated with a forcible detention. The officer may only conduct a frisk when specific facts heightens the risk to a level where a reasonably prudent person would take steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.

C. THE RISKS INHERENT IN A NONCONSENSUAL ENCOUNTER WITH AN ARMED PERSON EXISTS EVEN WHEN THE WEAPON IS LEGALLY POSSESSED.

While both the United States¹² and the Washington Constitution¹³ protects an individual’s right to bear arms, a frisk may be conducted during a nonconsensual encounter even though the detainee may be lawfully possessing the firearm or other weapon. *See Long*, 436 U.S. at 1052 n. 16 (“[W]e have expressly rejected the view that the validity of a *Terry* search

¹²Second Amendment.

¹³Const. art. I, sec. 24.

[i.e., a frisk] depends on whether the weapon is possessed in accordance with state law”); *Adams*, 407 U.S. at 146 (a *Terry* frisk for weapons so that an officer's contact might be pursued without fear of violence “might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law.”).

Notwithstanding the Supreme Court’s statements, Division Three would modify the two elements required for a lawful *Terry* frisk¹⁴ in a manner that is respectful of the constitutional right to bear arms and that would not leave “anyone transporting firearms in a vehicle for sporting purposes vulnerable to a law enforcement search” *Cruz*, 195 Wn. App. at 124 and 125. Division Three’s position fails as a matter of logic to recognize that the risk inherent in a forced stop of a person who is armed exists even when the firearm is legally possessed. The presumptive lawfulness of an individual’s gun possession “does next to nothing to negate the reasonable concern an officer has for his own safety when forcing an encounter with an individual who is armed with a gun and whose propensities are unknown.” *Robinson*, 846 F.3d at 701.

Division Three’s illegality rule is contrary to the analysis of every other court that has considered the issue. Every court has rejected the rule that an officer may not conduct a frisk during a nonconsensual encounter unless the officer first determines that the person to be frisked is not lawfully

¹⁴The United States Supreme Court has imposed two requirements for conducting a frisk: first, that the officer conducted a lawful stop; and second, that during the valid but forced encounter, the officer reasonably suspected that the person is armed and thus dangerous. *Robinson*, 846 F.3d at 700. The same two elements satisfy Const. art. I, sec. 7. *See, e.g., State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). Under both the federal and the state constitution the frisk must be limited to its protective purposes. *Id.*

carrying the weapon. See *United States v. Robinson*, *supra* (it is inconsequential that the person to be frisked may have had a permit to carry the concealed firearm as the risk inherent in a forced stop is not negated when a firearm is lawfully carried); *United States v. King*, 990 F.2d 1552, 1561-62 (10th Cir. 1993) (a suspect's lawful possession of a pistol has no bearing on the reasonableness of the officer's actions under *Long*, as “a legally possessed weapon presents just as great a danger to her safety as an illegal one”); *People v. Colyar*, 996 N.E. 2d 575, 587 (Ill. 2013) (officers were not required to delay frisk until they determined whether the suspect lawfully possessed the bullet and noting that “the risk to a police officer posed by a potentially armed individual is not always eliminated simply because the weapon is possessed legally”); *State v. Gutierrez*, 94 P.3d 18, 22-23 (N.M. 2004) (“lawful possession of a gun has no bearing on the reasonableness of the officer's action to separate a suspect from a firearm within his possession”).

This Court should also refuse to adopt any rule that requires an officer to delay or forego taking reasonable steps to protect his safety and the safety of others until a determination is made that the detainee is not lawfully carrying any weapons.

D. AN OTHERWISE LAW ABIDING ARMED PERSON CANNOT BE DETAINED UNDER THE *TERRY* SEIZURE EXCEPTION TO THE FOURTH AMENDMENT ABSENT REASONABLE SUSPICION THAT THE PERSON UNLAWFULLY POSSESSES THE WEAPON.

Division Three expressed its concern that “[t]o allow a search in this case would mean anyone transporting firearms for sporting purposes would be vulnerable to a law enforcement search.” *Cruz*, 195 Wn. App. at 125.

Division Three's statement confuses the standard for a frisk with the standard for making stops. Any person who is transporting firearms is not subject to a search unless an officer first has grounds to conduct a lawful investigatory stop. A lawful investigatory stop may only be made upon reasonable suspicion that a crime or a traffic infraction has been, or is being committed. *State v. Duncan*, 146 Wn.2d 166, 173-174, 43 P.3d 513 (2002). A *Terry* investigative stop may not be made solely because an individual is known to be armed.

Washington permits its residents to openly carry firearms.¹⁵ The transporting of a firearm, by itself, will not give rise to grounds to make a *Terry* investigative stop. See *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) (“[W]here a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention.”). See also *Northrup v. City of Toledo Police Department*, 785 F.3d 1128 (6th Cir. 2015) (an individual, who was sporting a handgun in a visible holster in an open carry state, was improperly detained and disarmed by a police officer who responded to a citizen's 911 call reporting “that ‘a guy walking down the street’ with his dog was ‘carrying a gun out in the open’”); *St. John v. McColley*, 653 F. Supp. 2d 1155, 1161 (D.N.M. 2009) (finding no reasonable suspicion where the plaintiff arrived at a movie theater openly carrying a holstered handgun, an act which is legal in the State of New Mexico). An officer may only make a *Terry* investigative stop of an armed individual if the officer has reasonable grounds to believe that the

¹⁵ See generally RCW 9.41.050 and 9.41.060.

individual's possession of the firearm is unlawful or that the armed person has or is about to commit another crime or a traffic infraction.

An officer may only stop a vehicle that is transporting firearms, absent reasonable suspicion that the occupants have or are about to commit a non-firearm crime or traffic infraction, if the officer has reasonable suspicion the firearms are unlawfully possessed. The officer must have articulable facts that any rifle or shotgun is loaded,¹⁶ that the registered owner of the vehicle is disqualified from possessing a firearm due to a conviction or disqualifying domestic violence order,¹⁷ that all the occupants of the vehicle appear to be under the age of eighteen,¹⁸ or that the weapon was recently used in a crime.¹⁹ The officer may not make a stop of the vehicle just because the firearms *may* be transported in an illegal manner. *See, e.g., Black*, 707 at 540; *United States v. Ubiles*, 224 F.3d 213, 217-8 (3d Cir. 2000) (while there are ways to possess a gun illegally, an officer may not

¹⁶See RCW 77.15.460 (carrying a loaded rifle or shotgun in a motor vehicle is a misdemeanor).

¹⁷See RCW 9.41.040 (identifying circumstances that will render the possession of a firearm illegal in Washington). *Cf. State v. McKinney*, 148 Wn. 2d 20, 60 P.3d 46 (2002) (a vehicle may be stopped based upon DOL records which indicate that the driver's license of the registered owner of the vehicle is suspended); *State v. Bliss*, 153 Wn. App. 197, 203-04, 222 P.3d 107 (2009) (a vehicle may be stopped based upon the existence of an arrest warrant for the registered owner of the vehicle).

¹⁸RCW 9.41.040(1)(iv) (person under the age of eighteen); RCW 9.41.042(8) (person under the age of twenty-one transporting a loaded firearm in a vehicle); RCW 9.41.240 (possession of pistol by a person under the age of twenty-one in a vehicle is unlawful).

¹⁹*State v. Cardenas-Muratalla*, 179 Wn. App. 307, 319 P.3d 811 (2014) (anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person; where 911 caller did not indicate that he felt intimidated or alarmed when shown the gun, or that the person who was holding the gun discharged it or pointed the gun at anyone the *Terry* stop was unlawful; *Terry* stop would be lawful if officers have reasonable suspicion to believe the person is carrying a gun and that the gun was used to intimidate or alarm, was discharged, or was pointed at another individual).

presume that a specific individual's possession is unlawful).

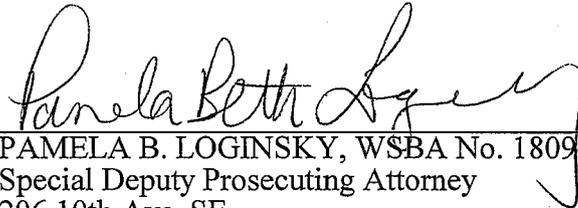
Sustaining Officer McCormick's protective search to remove the firearms from Cruz's vehicle will not subject law abiding armed individuals to unwarranted interference.

IV. CONCLUSION

The State respectfully requests that this Court hold that Officer McCormick's protective *Terry* search was lawful. The State respectfully requests that this matter be returned to the superior court for trial.

Respectfully submitted this 1st day of May, 2017.

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PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 1st day of May, 2017, pursuant to the agreement of the parties, I e-mailed a copy of the document to which this proof of service is attached to

Branden Platter at bplatter@co.okanogan.wa.us

Karl Sloan at ksloan@co.okanogan.wa.us

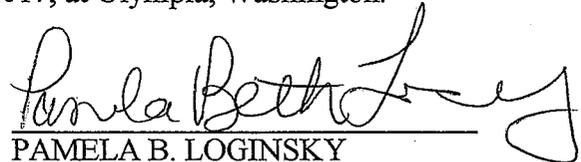
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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 1st day of May, 2017, at Olympia, Washington.


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WSBA NO. 18096