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**THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Petitioner,

v.

ERIC DANIEL CRUZ,

Respondent.

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**WASHINGTON STATE PATROL AND WASHINGTON  
DEPARTMENT OF FISH AND WILDLIFE'S AMICUS CURIAE  
BRIEF IN SUPPORT OF PETITION FOR REVIEW**

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Patrol and Washington Department of Fish and Wildlife (amici) are regularly involved in the detention and arrest of armed suspects. These criminal investigations are often in remote locations where officers are alone with suspects. During these investigations, an officer faces the deadly risk that a suspect may use a firearm against the officer. Amici seek guidance on how to honor state and federal constitutional protections while also securing dangerous firearms to neutralize this danger during a criminal investigation.

## II. STATEMENT OF THE CASE

In a remote area of Okanagan County, a commissioned officer of the Washington Department of Fish and Wildlife arrested Respondent Eric Daniel Cruz for the fishing crime of snagging, which is the illegal piercing of fish with weighted, unbaited hooks. RCW 77.15.370(1)(c); CP 50. The officer was by himself and secured Cruz with handcuffs before searching Cruz for weapons incident to arrest. CP 9.

During this search, the officer asked Cruz if he had weapons. CP 10. Cruz said that he had firearms in his truck. *Id.* Another man then approached the area. *Id.* The officer immediately directed this man to stay away from the truck, and the officer placed Cruz in his patrol car. *Id.*

The officer went into Cruz's truck to secure the weapons, intending to issue Cruz a criminal citation and then release him back to the truck and return the firearms unloaded. RP 12-13, 23-24, 26; CP 11. The officer obtained Cruz's handgun and two rifles in the truck. *Id.* After securing the weapons, dispatch reported that Cruz was a felon and was prohibited from possessing firearms. CP 11. With this new information, the officer retained the firearms as evidence. *Id.* He then released Cruz back to his truck after issuing the criminal citations. *Id.*

The State charged Cruz with unlawful possession of firearms, but dismissed the charges after the trial court suppressed the firearm evidence. CP 5-6, 11, 53. The trial court recognized that the officer was being cautious for officer safety in securing the firearm from the vehicle, but absent evidence that the officer was in danger, the trial court found the officer's *Terry* search improper. CP 11; RP 45-46; *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Division Three affirmed the evidence suppression, holding a *Terry* search can extend to a vehicle only "[i]f there is a reasonable suspicion that the suspect is dangerous *and* may gain access to a weapon in the vehicle." *State v. Cruz*, 195 Wn. App. 120, 124-25, 380 P.3d 599 (2016) (quoting *State v. Glossbrener*, 146 Wn.2d 670, 680-81, 49 P.3d 128 (2002)) (emphasis in original). Division Three reasoned that the "mere

fact an individual possesses firearms does not make him dangerous.” *Cruz*, 380 P.3d at 601-02.

The State has petitioned this Court to accept review of the published Division Three opinion.

### III. ARGUMENT

Because of the threat posed to officers while arresting armed suspects, amici support this Court’s review of the Division Three decision. RAP 13.4(b)(3)-(4). The case asks whether police may access a suspect’s vehicle to secure known firearms, before the suspect shows independent signs that he is dangerous.

Not being permitted to secure known firearms presents a great risk for officer safety -- a risk that *Terry* is meant to avert. There is interest in the safety of the public at large, of the suspect, and others where such uncertainty might lead to conflict. This restriction also discourages police from releasing arrestees back to vehicles that contain firearms, necessitating jail booking for minor crimes. This Court should grant review of this case to address these substantial issues, establishing a more appropriate constitutional balance between officer safety and privacy rights.

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**A. There is a substantial constitutional question whether a criminal suspect armed with a firearm must first show additional signs of dangerousness before a *Terry* search.**

The Court should grant review because it involves a significant constitutional question. RAP 13.4(3). The case is not a typical *Terry* analysis where an accessible weapon *might* reasonably exist based on the dangerousness of the suspect and surrounding circumstances. Instead, the question before the Court is whether a suspect who possesses a firearm must show additional, independent signs of dangerousness before police can disarm him. This question is relevant as many arrestees are released back to their vehicles with criminal citations, instead of being booked into jail.

Police are restricted in searching vehicles incident to arrest. *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). This case law is generally premised on the assumption that those arrested are transported to jail. *See id.* at 352 (Scalia, J., concurring). However, Justice Scalia carefully distinguished these *Gant* searches from officer-safety *Terry* searches. *Id.* (“[T]he 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.”) (distinguishing *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)).

*Terry* permits a protective search if a reasonably prudent person in the same circumstances has reason to believe that a suspect is armed and dangerous. *Terry*, 392 U.S. at 21-24. This Court often reuses this “armed and dangerous” language from *Terry*. *Glossbrener*, 146 Wn.2d at 680-81 (citing *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting *Terry*, 392 U.S. at 21-24)). But neither this Court nor the United States Supreme Court has held this *Terry* test to be a conjunctive test, as Division Three emphasizes. *Cruz*, 195 Wn. App at 123 (holding that “armed and dangerous” must not become “a disjunctive test”). Before the Court of Appeals opinion, there was no Washington authority holding that a suspect armed with a firearm must be independently dangerous before a *Terry* search. Indeed, this Court has at times before referenced this *Terry* test as being “armed or dangerous.” See *State v. Horrace*, 144 Wn.2d 386, 395, 28 P.3d 753 (2001) (citing *State v. Parker*, 139 Wn.2d 486, 502, 987 P.2d 73 (1993)).

*Terry* permits a limited search for weapons of people and vehicles after the officer reasonably concludes based on surrounding circumstances that a suspect is armed and dangerous. See *Pennsylvania v. Mims*, 434 U.S. 106, 111-12, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (holding that a firearm “bulge in the jacket permitted the officer to conclude that Mims was armed and *thus* posed a serious and present danger to the safety of the

officer”) (emphasis added)). Surrounding circumstances establish the actual danger posed to officers. There is no constitutional requirement that a criminal suspect armed with a firearm must first show independent signs of dangerousness before a *Terry* search. Firearms accessible to a criminal suspect are inherently dangerous to officer safety.

Current statistics reinforce this threat. Over the last decade, police were killed by firearms more than by any other means. National Law Enforcement Memorial, *Preliminary 2016 Law Enforcement Officer Fatalities Report*, available at: <http://www.nleomf.org/assets/pdfs/reports/Preliminary-2016-EOY-Officer-Fatalities-Report.pdf>. And the numbers are increasing. Since 2015, there has been a 56 percent increase in firearm-related officer deaths. *Id.* Of these 2016 firearm fatalities, 14 percent were killed by armed suspects during an attempted arrest. *Id.*

In the present case, Cruz had access to a handgun and rifles. To leave loaded firearms with Cruz upon his release would endanger the officer, regardless of how harmless Cruz otherwise appeared. There are many things unknown when police contact a criminal suspect. Indeed, after the arrest and search, dispatch only then notified the officer that Cruz was a convicted felon. CP 11. *Terry* searches are designed to balance “the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual.” *Terry*, 392 U.S. at 26.

An imbalance tips against officer safety when the officer is prohibited from neutralizing this inherent danger.

This Court should review this case and clarify that a suspect who clearly has access to a firearm is dangerous for purposes of *Terry*. Police need clear direction in the field to navigate safety concerns, so they can consistently ensure the preservation of our state and federal constitutional rights. By accepting review of this case, this Court can resolve this constitutional question and clarify this *Terry* balance.

**B. This case involves substantial public interests.**

Not only is the *Terry* balance discussed above a significant constitutional question, but it also involves an issue of substantial public interest. *See* RAP 13.4(b)(4). Officer safety is obviously of substantial public interest, but this case involves more than that. There is interest in the safety of the public at large, of the suspect, and others where uncertainty might lead to conflict.

The Division Three opinion also has the unintended consequence of jailing people unnecessarily. When a person is arrested, he or she can either be released with a criminal citation or booked into jail. Being released by criminal citation instead of booked into jail provides cost-savings and keeps people from the jail system. Non-violent offenders, in particular, benefit from the chance to be released at the time of arrest.

However, the Division Three opinion jeopardizes the ability of police to release a criminal suspect safely. Jail bookings might well increase if police otherwise face releasing an arrestee back to his or her firearms. In any event, the opinion below provides an incentive for officers concerned for their safety to arrest and jail rather than release suspects.

In the present case, the officer released Cruz with a criminal citation pursuant to policy, given the nature of the offense. CP 11. The officer was comfortable releasing Cruz, having secured the firearms Cruz would otherwise have access to upon release. By contrast, a reasonable officer might have concerns about releasing a suspect with ready access to loaded firearms, regardless of the suspect's cooperation during the arrest. But Division Three's published opinion prohibits officers from securing the firearms before release, because "despite access to firearms, there was no reasonable suspicion Mr. Cruz or his companion were dangerous." *Cruz*, 195 Wn. App. at 124-27. This *Terry* search prohibition inevitably will discourage criminal citation releases and require otherwise unnecessary jail bookings.

Division Three notes that the officer "could have asked Mr. Cruz for consent to retrieve and secure the firearms." *Cruz*, 195 Wn. App. at 126. The thought is that Cruz could have consented to the search or have been booked and his car impounded. Division Three noted

that had the officer “sought to impound Mr. Cruz’s car, our analysis might well be different.” *Id.* at n.5. While it is true that seeking consent to search is an alternative to a *Terry* search, this Court has discouraged requests for consent from detained suspects that appear coercive. *See State v. O’Neill*, 148 Wn.2d 564, 590-91, 62 P.3d 489 (2003) (holding that threats to arrest a detained suspect resulted in the improper granting of consent to search a vehicle). Given the unique facts surrounding every law enforcement encounter with suspects, police officers may not be able to readily determine whether a court would view a particular request for consent as unduly coercive. And in any event, the possibility that a suspect might consent to a search does not answer the question of whether a *Terry* search is constitutionally permissible.

Police should not have to rely on the consent of a criminal suspect before securing a firearm, and an arrestee should not have to choose between giving consent or being jailed. There is a substantial public interest in providing clarity to police in how to navigate the officer safety concerns of an armed suspect, while also encouraging the release of those who otherwise should not be booked into jail. Based on this important public issue, this Court should accept review.

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**IV. CONCLUSION**

Amici respectfully request that this Court grant the State's petition for review.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of January, 2017.

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NO. 93732-0

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DECLARATION  
OF SERVICE

I, Lucy Pippin, declare as follows:

On January 6, 2017, I sent, pursuant to the electronic service agreement, a true and correct copy of Motion for Leave to File Amicus Curiae Brief, Washington State Patrol and Washington Department of Fish and Wildlife's Amicus Curiae Brief in Support of Petition for Review, and Declaration of Service, addressed as follows:

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

DATED this 6th day of January, 2017, at Seattle, Washington.

  
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LUCY PIPPIN