RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 11, 2017 4:23 PM
CLERK'S OFFICE

RECEIVED VIA PORTAL

NO. 93732-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC DANIEL CRUZ,

Appellant.

AMICUS CURIAE BRIEF OF WASHINGTON STATE PATROL AND WASHINGTON DEPARTMENT OF FISH AND WILDLIFE

ROBERT W. FERGUSON
Attorney General

Kelly Paradis, WSBA 47175
Assistant Attorney General

Peter B. Gonick, WSBA 25616
Deputy Solicitor General

PO Box 40100
Olympia, WA 98504-0100
(360) 753-6245
Peterg@atg.wa.gov
Kellyp@atg.wa.gov
Office ID 91087

TABLE OF CONTENTS

I. INTRODUCTION 1

II. IDENTITY AND INTEREST OF AMICUS CURIAE 2

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 4

A. A Law Enforcement Officer May Conduct a *Terry* Frisk or Protective Sweep Where He or She Has Lawfully Detained a Person, and that Person May Have Access to a Firearm 4

B. Even if Being Armed with a Firearm Is Not Sufficient to Justify an Officer's Protective Search, Additional Circumstances Here Justified the Search 10

C. The Protective Sweep of the Truck was Justified Because Mr. Cruz or His Associate Would Have Access to the Firearms During or Immediately After the Nonconsensual Encounter 11

D. Reaffirming the Principles in *Terry* Will Protect Law Enforcement Officers and Will Not Subject Those Possessing Firearms to Unwarranted Seizures 15

V. CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Davila v. United States,
713 F.3d 248 (5th Cir. 2013) 14

Gastelum v. Hegyi,
237 Ariz. 211, 348 P.3d 907 (Ariz. App. 2015) 6

Michigan v. Long,
463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)..... 13, 16

Northrup v. City of Toledo Police Dep't,
785 F.3d 1128 (6th Cir. 2015) 8

Pennsylvania v. Mimms,
434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977)..... 6, 10

State v. Chang,
147 Wn. App. 490, 195 P.3d 1008 (2008),
review denied, 166 Wn.2d 1002, 208 P.3d 1123 (2009) 12

State v. Collins,
121 Wn.2d 168, 847 P.2d 919 (1993)..... 5, 10

State v. Cruz,
195 Wn. App. 120, 380 P.3d 599 (2016).....3-5, 7, 10, 17

State v. Glenn,
140 Wn. App. 627, 166 P.3d 1235 (2007)..... 13

State v. Horrace,
144 Wn.2d 386, 28 P.3d 753 (2001)..... 5

State v. Larson,
88 Wn. App. 849, 946 P.2d 1212 (1997).....11-12

State v. Parker,
139 Wn.2d 486, 987 P.2d 73 (1993)..... 5

State v. Russell,
180 Wn.2d 860, 330 P.3d 151 (2014)..... 4

Terry v. Ohio,
392 U.S.1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....1, 3-9, 11, 15-18

United States v. Christian,
187 F.3d 663 (D.C. Cir. 1999)..... 14

United States v. Leo,
792 F.3d 742 (7th Cir. 2015) 7, 9

United States v. Nash,
876 F.2d 1359, 1361 (7th Cir. 1989) 13

United States v. Orman,
486 F.3d 1170 (9th Cir. 2007) 6

United States v. Paulino,
850 F.2d 93 (2d Cir. 1988) 13

United States v. Robinson,
846 F.3d 694 (4th Cir. 2017) 6-7, 17

United States v. Robinson,
814 F.3d 201 (4th Cir. 2016) 7

United States v. Rodriguez,
739 F.3d 481 (10th Cir. 2013) 6-7, 9

United States v. Ubiles,
224 F.3d 213 (2000)..... 8

Ybarra v. Illinois,
444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979)..... 6

Statutes

RCW 77.15.370(1)(c) 2

Other Authorities

Charles W. Johnson & Debra L. Stephens,
Survey of Washington Search and Seizure Law: 2013 Update,
36 Seattle U. L. Rev. 1581 (2013) 4, 12

National Law Enforcement Memorial Fund,
Facts & Figures: Causes of Law Enforcement Deaths,
available at: www.nleomf.org/facts/officer-fatalities-
data/causes.html 15

National Law Enforcement Memorial Fund,
Facts & Figures: Deaths, Assaults and Injuries,
available at: www.nleomf.org/facts/officer-fatalities-
data/daifacts.html 15

National Law Enforcement Memorial Fund,
Preliminary 2016 Law Enforcement Officer Fatalities Report,
available at: http://www.nleomf.org/assets/pdfs/
reports/Preliminary-2016-EOY-Officer-Fatalities-Report.pdf 15

Wayne R. LaFave & David C. Baum, *Search and Seizure: A Treatise on the Fourth Amendment*, §9.6(a) (5th ed. 2012 & Supp. 2016) 8

I. INTRODUCTION

Nearly fifty years ago, the United States Supreme Court held that a law enforcement officer who has lawfully detained a person may conduct a limited search for weapons if the officer has reason to believe the person may be armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). As the Court noted, an officer has an interest in determining whether a weapon could unexpectedly and fatally be used against him or her, and it would be "unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Id.* at 23. The rationale of the Court of Appeals opinion, which held that the fact that a lawfully detained suspect has access to a firearm is not sufficient to justify a *Terry* search, undermines this crucial foundation for *Terry* protective searches and exposes law enforcement officers to unnecessary risks.

Not only is the Court of Appeals rationale contradicted implicitly by the language and reasoning of *Terry* and subsequent opinions of the United States Supreme Court and this Court, but several courts across the country have explicitly rejected it, holding that a lawfully detained person's access to a firearm is sufficient to justify a *Terry* search even in the absence of additional, suspicious behavior. By contrast, the Court of Appeals and Mr. Cruz do not cite a single case prohibiting an officer who has lawfully detained a person and who has reason to believe the person may be armed from conducting a *Terry* search.

In addition, the United States Supreme Court and this Court's precedent establishes that for purposes of *Terry*, a detained person has

access to a weapon in a vehicle if the person will be returned to the vehicle during the encounter, even if the person does not have immediate access to the vehicle at the time of the search.

This Court should reverse.

II. 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 and outnumbered by suspects. During these investigations, an officer faces the deadly risk that a suspect may use a firearm against the officer. Amici have a substantial interest in the safety of officers, suspects, and the public, as well as clearly defined rules that respect both individual's constitutional rights and officer safety.

III. STATEMENT OF THE CASE

In a remote area of Okanagan County, a commissioned officer of the Washington Department of Fish and Wildlife arrested 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 Mr. Cruz with handcuffs before searching Mr. Cruz for weapons incident to arrest. CP 10.

During this search, the officer asked Mr. Cruz if he had weapons. CP 10. Mr. 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 Mr. Cruz in his patrol car. CP 10.

The officer went into Mr. Cruz's truck to secure the weapons, intending to issue Mr. 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 Mr. Cruz's handgun and two rifles in the truck. RP 12-13, 23-24, 26; CP 11. After securing the weapons, dispatch reported that Mr. 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 Mr. Cruz back to his truck after issuing the criminal citations. *Id*.

The State charged Mr. 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 firearms from the vehicle, but concluding that there was no evidence that the officer was in danger, the trial court found the officer's *Terry* search improper. CP 11; RP 45-46.

Division Three affirmed the evidence suppression, holding a *Terry* search was not necessarily justified even if a lawfully detained person had possible access to firearms. *State v. Cruz*, 195 Wn. App. 120, 124, 380 P.3d 599 (2016). Instead, the court held that a *Terry* search is only justified where a lawfully detained person had potential access to firearms *and* the circumstances otherwise justified a reasonable suspicion of dangerousness.

Id. Division Three reasoned that the "mere fact an individual possesses firearms does not make him dangerous." *Cruz*, 195 Wn. App. at 124.

IV. ARGUMENT

The rationale and language used by the United States Supreme Court and this Court and case law from other jurisdictions explicitly addressing the question all agree: reasonable suspicion that a lawfully detained person may be armed justifies a *Terry* search to protect law enforcement officers. Similarly, United States Supreme Court and this Court's precedent establish that an officer may conduct a *Terry* protective sweep of a vehicle even where the suspect does not have immediate access to the vehicle so long as the suspect will be returned to the vehicle during the nonconsensual encounter. Therefore, this Court should reverse the suppression of evidence seized during the officer's lawful search of Mr. Cruz's truck.

A. A Law Enforcement Officer May Conduct a *Terry* Frisk or Protective Sweep Where He or She Has Lawfully Detained a Person, and that Person May Have Access to a Firearm

Among the recognized exceptions to a warrantless search are protective frisks or sweeps commonly referred to as *Terry* searches. *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014) (citing *Terry*, 392 U.S. at 27). A law enforcement officer who has legitimately detained a person may conduct a *Terry* protective frisk or sweep when there is reasonable suspicion that the suspect he or she "is investigating at close range is armed and presently dangerous to the officer or to others." *Terry*, 392 U.S. at 24; *see also* Charles W. Johnson & Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2013 Update*, 36 Seattle U. L. Rev. 1581, 1690

(2013) (summarizing Washington law that a frisk is valid if (1) initial stop is legitimate; (2) reasonable safety concerns justifying a protective frisk for weapons; and (3) scope of the frisk is limited to protective purposes.) When officers have safety concerns during a nonconsensual encounter, "courts are reluctant to substitute their judgment for that of police officers in the field." *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993).

Although *Terry* allowed a protective search when an officer reasonably suspected that the detained person was "armed and dangerous," neither this Court nor the United States Supreme Court has held that the test is conjunctive, as Division Three emphasized. *See Cruz*, 195 Wn. App. at 123 (stating that "armed and dangerous" must not become a "disjunctive test."). In fact, this Court has at times referenced the *Terry* standard as being "armed or dangerous." *E.g.*, *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)).

Similarly, the United States Supreme Court has suggested that a reason to believe a suspect may be armed, standing alone, is sufficient to justify a *Terry* protective search. In the *Terry* opinion itself, the Court stated that "a reasonably prudent man would have been warranted in believing petitioner was armed *and thus* presented a threat to the officer's safety." *Terry*, 392 U.S. at 28 (emphasis added). In a subsequent case, the Court upheld a *Terry* frisk where a motorist was stopped for an expired license plate and ordered to exit the vehicle, whereupon the officers noticed a bulge under the driver's sports jacket. *Pennsylvania v. Mimms*, 434 U.S. 106, 107,

112, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977). The opinion contains no other facts suggesting dangerousness other than the possibility that the driver was armed. Nevertheless, the Court upheld the *Terry* frisk and seizure of the firearm that was discovered, reasoning that "[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." *Mimms*, 434 U.S. at 112 (emphasis added). *See also Ybarra v. Illinois*, 444 U.S. 85, 93, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979) (officer may conduct pat down to find weapons that "he reasonably believes or suspects are then in the possession of the person he has accosted.").

Although this Court and the United States Supreme Court have not explicitly addressed the question of whether an officer must have more information than that a person may be armed to justify a *Terry* search, numerous other courts have upheld *Terry* searches based solely on a suspicion that the suspect may be armed. *E.g.*, *United States v. Robinson*, 846 F.3d 694, 696 (4th Cir. 2017); *United States v. Rodriguez*, 739 F.3d 481, 491 (10th Cir. 2013); *United States v. Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007); *Gastelum v. Hegyi*, 237 Ariz. 211, 348 P.3d 907, 910 (Ariz. App. 2015). Several of these cases explicitly rejected the Court of Appeals approach, holding that an officer may conduct a *Terry* protective search based on a reason to believe that a lawfully detained person may be armed without any other showing of dangerousness or that the weapon is illegally possessed. *Robinson*, 846 F.3d at 696; *Rodriguez*, 739 F.3d at 491.

As the Tenth Circuit reasoned, firearms are always dangerous, thus the court concluded, "We will not deny an officer making a lawful investigatory stop the ability to protect himself from an armed suspect whose propensities are unknown." *Rodriguez*, 846 F.3d at 491. Applying similar reasoning to uphold a *Terry* search despite the suspect arguing that he was compliant, cooperative, and not displaying signs of nervousness, the Fourth Circuit held that a person lawfully stopped for a traffic infraction may be frisked if the officer has reason to suspect that an occupant is armed for the protection of the officer. *Robinson*, 846 F.3d at 696, 698. The Fourth Circuit further reasoned that "[t]he danger justifying a protective frisk arises from the combination of a forced police encounter and the presence of a weapon . . . ." *Id* at 696.

In stark contrast to the precedent showing that an officer may conduct a *Terry* protective search where there is reason to believe a lawfully detained person may be armed, the Court of Appeals cited no case holding to the contrary. *See generally Cruz*, 195 Wn. App. 120. Amici are aware of none.[1] The cases cited by Mr. Cruz for this proposition do not support his assertion. *See* Def.'s Resp. to Amicus Br. [at Petition for Review stage] at 3 (citing *United States. v. Leo*, 792 F.3d 742 (7th Cir. 2015); *Northrup v.*

[1] As noted by the State in its Petition for Review, in a decision vacated because rehearing en banc had been granted, a panel of the Fourth Circuit did rule that in states allowing broad possession of firearms, reasonable suspicion that a person is armed does not by itself justify a *Terry* protective search. Pet. Review at 20 (citing *United States v. Robinson*, 814 F.3d 201, 208 (4th Cir. 2016)). The Fourth Circuit has now issued its en banc opinion, rejecting the panel's approach and explicitly holding that an officer may conduct a *Terry* frisk based on a reasonable suspicion that a suspect is armed without any additional showing of dangerousness, even if the firearm might be possessed legally. *United States v. Robinson*, 846 F3d 694, 696 (4th Cir. 2017).

City of Toledo Police Dep't, 785 F.3d 1128 (6th Cir. 2015); *United States v. Ubiles*, 224 F.3d 213 (3rd Cir. 2000)).

None of the three cases cited by Mr. Cruz actually address the relevant question: whether a lawfully detained person who has access to a firearm may be subject to a *Terry* protective search. Two address the entirely different question of whether an officer may initiate a *Terry* stop to begin with based solely on a person's possession of a firearm. *See Northrup*, 785 F.3d at 1131; *Ubiles*, 224 F.3d at 217-18. Whereas a *Terry* stop must be based on an officer's reasonable and articulable suspicion that criminal activity is afoot, a *Terry* frisk is based on an officer's reasonable suspicion that a lawfully detained suspect is armed and presently dangerous. *Terry*, 392 U.S. at 22-24. Thus, the same facts supporting a *Terry* frisk once a lawful detention had occurred would not necessarily justify a *Terry* stop. *See* Wayne R. LaFave & David C. Baum, *Search and Seizure: A Treatise on the Fourth Amendment*, §9.6(a), at 1 (5th ed. 2012 & Supp. 2016). As explained in that treatise:

> For example, if a policeman sees a suspicious bulge which possibly could be a gun in the pocket of a pedestrian who is not engaged in any suspicious conduct, the officer may not approach him and conduct a frisk. And this is so even though the bulge would support a frisk had there been a prior lawful stop.

Id. (citations omitted). Therefore, *Northrup* and *Ubiles* do not support the Court of Appeals analysis nor Mr. Cruz's arguments.

The third case cited by Mr. Cruz likewise does not support his contention that a lawfully detained person's access to a firearm is insufficient to justify a *Terry* protective search. Again, the cited case did not address the relevant issue, instead addressing the scope of a permissible *Terry* frisk. *Leo*, 792 F.3d at 749. In *Leo*, officers lawfully conducted a *Terry* stop based on reports that Mr. Leo was engaged in an attempted burglary and had a firearm in his backpack. *Id.* at 744, 746. The officers handcuffed Mr. Leo, patted him down, and after finding no weapons opened the backpack and emptied its contents on the ground. *Id.* at 745. Mr. Leo did not claim the pat-down was unjustified, and further conceded that the officers properly could have patted down the backpack to determine if it contained a weapon. *Id.* at 749. The court ruled that the search was invalid because it had exceeded the scope of a *Terry* search, not because a *Terry* search was not justified by the reason to believe Mr. Leo was armed. *Id.* at 749-50.

Neither the Court of Appeals nor Mr. Cruz have cited authority that invalidates an officer's decision to conduct a *Terry* protective search where the officer had reason to suspect a lawfully detained person may have access to a firearm. This is likely because of the near-universal view that firearms are inherently dangerous. *E.g.*, *Rodriguez*, 739 F.3d at 491 (holding that a handgun is inherently dangerous). Amici respectfully request that the Court hold that an officer may conduct a *Terry* protective search if there is reason to believe a lawfully detained person may be armed or have ready access to firearms.

B. Even if Being Armed with a Firearm Is Not Sufficient to Justify an Officer's Protective Search, Additional Circumstances Here Justified the Search

Even if the Court agrees with the Court of Appeals that a detained person's access to a firearm is insufficient to reasonably justify an officer's safety concerns, it should reverse. As the Court of Appeals itself recognized, "once a firearm is present, not much more is needed to justify a frisk." *Cruz*, 195 Wn. App. at 125. But the Court of Appeals then erred by failing to consider several factors that reasonably caused officer safety concerns: a lone officer in a remote location with only "sketchy" communications with other officers, an associate of Mr. Cruz present at the scene, more than a mere articulable suspicion that Mr. Cruz had engaged in illegal activity, potential heightened tensions due to an arrest and handcuffing, and Mr. Cruz admitting to having multiple firearms in his vehicle. CP 9-10, 50; RP 8. With respect to the remoteness being a factor, this Court has previously noted in declaring as reasonable an officer's safety concerns that "an individual who has been stopped may be more willing to commit violence against a police officer at a time when few people are likely to be present to witness it." *State v. Collins*, 121 Wn.2d 168, 175, 847 P.2d 919 (1993). And although the Court of Appeals appears to have discounted the offense for which Mr. Cruz was arrested as minor and non-violent, many *Terry* cases arise from far more minor traffic infractions. *E.g.*, *Mimms*, 434 U.S. at 111 (upholding *Terry* frisk incident to issuance of traffic citation; stating "we have before expressly declined to accept the argument that traffic violations

necessarily involve less danger to officers than other types of confrontations.")

Here, Officer McCormick had ample basis to suspect that Mr. Cruz may be armed and that additional factors caused reasonable safety concerns; the *Terry* sweep was justified.

C. The Protective Sweep of the Truck was Justified Because Mr. Cruz or His Associate Would Have Access to the Firearms During or Immediately After the Nonconsensual Encounter

It is well established in Washington that a police officer may conduct a limited search of a car to secure his or her own safety if the officer reasonably believes that a suspect might be able to gain access to a weapon inside the car. This principle is consistently applied, even in cases where all occupants are outside of the car at the time of the search.

In *State v. Larson*, Division One upheld the search of the passenger compartment of a truck based on officer safety even though the defendant, the sole occupant, was outside of the truck while the officer conducted the search. *State v. Larson,* 88 Wn. App. 849, 856, 946 P.2d 1212 (1997). The officer had seen the defendant make furtive movements near the floorboard, which suggested he had placed a weapon under the passenger seat. *Id.* Reasoning that the defendant would ultimately have to return to the truck to retrieve documents to carry out the traffic stop and would then have access to any weapon he may have concealed, the Court concluded that the officer's concern for his safety was objectively reasonable. *Id.* at 857.

This Court expressly approved of *Larson*'s reasoning in *State v. Glossbrener*, 146 Wn.2d 670, 679, 49 P.3d 128 (2002). In doing so, it confirmed that an officer's ability to search the passenger compartment of a vehicle is not limited only to situations in which either the driver or passenger remain in the vehicle. *Id. See also* Johnson & Stephens, 36 Seattle U. L. Rev. at 1693 ("[T]he officer may still search the compartment if 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.").

Following this Court's approval of *Larson*, Washington courts have routinely held that police may conduct a limited protective search of a car when an officer reasonably believes that the car contains a weapon and the suspect will have an opportunity to return to the car. For example, in *State v. Chang*, Division One upheld a limited protective search of a car even though the defendant, the sole occupant, was handcuffed and standing outside of his car at the time of the search. *State v. Chang*, 147 Wn. App. 490, 494, 195 P.3d 1008 (2008), *review denied*, 166 Wn.2d 1002, 208 P.3d 1123 (2009). Because the police had received information that the defendant had a handgun and the defendant might later be released, the Court concluded that the officer's concern for his safety was reasonable. *Id.* at 497 ("Securing the scene required ensuring that the reported weapon would not be available to [the defendant] if police eventually released him to get back in his car.").

Similarly, in *State v. Glenn*, Division One concluded that officer safety concerns justified a limited search of a car even though the defendant was handcuffed and in a patrol car at the time of the search. *State v. Glenn*, 140 Wn. App. 627, 635-36, 166 P.3d 1235 (2007).The Court relied on the fact that there was a credible allegation that the defendant had pointed a gun from his car and that the officers had to return the defendant to his car if they did not find a weapon on his person. *Id.* at 636. It explained, "[h]ad the officers returned [the defendant] to his car with a weapon inside, they would not have been ensuring their own safety, or that of the surrounding community." *Id.*

These Washington decisions are in accordance with decisions around the country. Numerous courts have recognized the dangers that arise with the presence of weapons and have upheld limited protective searches of cars based on the fact that a suspect might gain access to a weapon. *See, e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1049, 1051, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (noting that "danger may arise from the possible presence of weapons in the area surrounding a suspect" and concluding that officers acted reasonably "in taking preventative measures to ensure that there were no weapons in Long's immediate grasp before permitting him to reenter his vehicle"); *United States v. Paulino*, 850 F.2d 93, 97-98 (2d Cir. 1988) (upholding protective search of car even though all occupants were outside of the car because occupant's furtive movement could signal the presence of a weapon); *United States v. Nash*, 876 F.2d 1359, 1361 (7th Cir. 1989) (upholding protective search of car even though the defendant was

outside based on the fact that the defendant made a furtive gesture, which could indicate that the defendant was hiding a gun "thus giving [the officer] cause to be concerned about his safety"); *United States v. Christian*, 187 F.3d 663, 669-71 (D.C. Cir. 1999) (upholding protective search of car based on the presence of a dagger in plain view and fact that suspect could break away from police control and retrieve the weapon or might be released and allowed to return to the car); *Davila v. United States*, 713 F.3d 248, 259 (5th Cir. 2013) (recognizing that "a protective sweep for weapons during a traffic stop is justified where the officers reasonably believe that someone within police custody might gain access to the weapons, either during the traffic stop or once they are returned to their vehicles").

Here, as in the cases discussed above, the limited protective sweep of Mr. Cruz's truck was justified because Mr. Cruz would have access to firearms upon being released at the scene. The officer did not merely suspect that Mr. Cruz had firearms in his truck, but Mr. Cruz had admitted it. The officer planned to release Mr. Cruz and allow him back into the truck after issuing a criminal citation. In addition, Mr. Cruz's associate was approximately 15-20 feet from the car and was not restrained in any way. Thus, it is possible that Mr. Cruz's associate could gain access to the unsecured firearms. In these circumstances, the officer's concern for his safety was objectively reasonable. The trial court erred when it concluded otherwise.

D. Reaffirming the Principles in *Terry* Will Protect Law Enforcement Officers and Will Not Subject Those Possessing Firearms to Unwarranted Seizures

Law enforcement officers put their lives on the line every day. They confront unknown individuals and make split-second decisions in tense and unpredictable situations. In the blink of an eye, routine police work can suddenly become a matter of life and death.

Statistics confirm the dangerous nature of this work. In the last decade, 1,512 law enforcement officers were killed in the line of duty. Nearly half a million officers were assaulted, and approximately 133,300 sustained injuries from the assault. National Law Enforcement Memorial Fund, *Facts & Figures: Deaths, Assaults and Injuries*, available at: www.nleomf.org/facts/officer-fatalities-data/daifacts.html.

These dangers increase with the presence of weapons, particularly firearms. Firearms-related incidents were the number one cause of law enforcement deaths in the past decade. National Law Enforcement Memorial Fund, *Facts & Figures: Causes of Law Enforcement Deaths*, available at: www.nleomf.org/facts/officer-fatalities-data/causes.html. Of the 1,512 officers killed in the last decade, 537 were shot. *Id.* And these numbers are on the rise. Last year more law enforcement officers were killed by gunfire than in each of the previous four years. *Id.* There was a 56 percent increase in shooting deaths between 2015 and 2016 alone. National Law Enforcement Memorial Fund, *Preliminary 2016 Law Enforcement Officer Fatalities Report*, available at: http://www.nleomf.org/assets/pdfs/reports/Preliminary-2016-EOY-Officer-Fatalities-Report.pdf. Moreover,

many of these deaths occurred during routine police work. In 2016, fourteen percent of officers killed by gunfire were shot while attempting to make an arrest. *Id.*

The United States Supreme Court has long recognized the inherent danger posed by the presence of a weapon. *See Long*, 463 U.S. at 1048 ("we have also expressly recognized that suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed."). By allowing officers to conduct a limited protective sweep of a car when an officer has a reasonable belief that the suspect may gain access to a weapon, the United States Supreme Court appropriately balanced the neutralization of danger to the officer and the sanctity of the individual. *See Long*, 463 U.S. at 1047; *Terry*, 392 U.S. at 26. This balance would be upended if this Court were to restrict law enforcement officers' ability to secure loaded firearms during non-consensual police encounters. Such a ruling would significantly hamper officers' ability to protect themselves and would expose them to unnecessary risks.

In addition, it would also have adverse consequences to arrestees. If officers are unable to protect themselves by securing firearms inside cars, they will be forced to take other precautions to ensure their safety. This will likely result in an increase in the number of arrestees taken into custody. When a person is arrested in Washington, the officer can either release the individual with a criminal citation or the officer can book the individual into jail. Releasing individuals by criminal citation has several benefits, such as being more cost efficient and keeping individuals from the jail system. This

process benefits non-violent offenders in particular. However, if officers are unable to take measures to protect themselves against the deadly threats posed by firearms, they will undoubtedly be discouraged from releasing individuals and allowing them to gain access to firearms. Instead, officers will have an incentive to err on the side of caution and resort to booking arrestees in jail, even for minor crimes.

For these reasons, this Court should confirm that an officer may conduct a limited protective sweep of a car if the officer has an objectively reasonable belief that the suspect is armed and might gain access to the weapon. Doing so will not expose any sportsman transporting firearms to law enforcement searches, as feared by the Court of Appeals. *See Cruz*, 195 Wn. App. at 125. As discussed above, this case involves only whether an officer who has already lawfully detained a person may neutralize the danger of an armed suspect, not whether an investigative stop may be initiated. To the extent that lawful possession of a firearm subjects a lawfully detained person to additional scrutiny, *Terry* has resolved this balance in favor of the officer, concluding that concerns for officer safety justifies this limited intrusion. *See Terry*, 392 U.S. at 26-27. The risks to an officer are not diminished simply because the firearm is lawfully possessed. *Robinson*, 846 F.3d at 701 ("The presumptive lawfulness of an individual's gun possession in a particular State 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.").

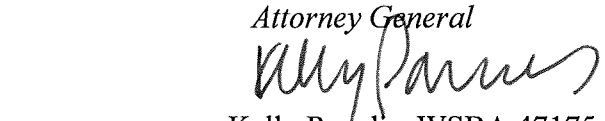
In short, as the United States Supreme Court recognized in *Terry*, it is "unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry*, 392 U.S. at 23. Restricting law enforcement officers in situations such as this would be unreasonable. This Court should reaffirm the principles of *Terry*, ensuring that officers can take necessary action in the face of their deadliest threat.

V. CONCLUSION

Amici respectfully request this Court to reaffirm the principles expressed in *Terry* so many years ago that balanced the constitutional rights of citizens to be free of unwarranted seizures and searches and the ability of law enforcement officers to protect themselves and avoid unnecessary risks. The Court should reverse the Court of Appeals and hold that under these circumstances, the *Terry* protective sweep was valid because the officer intended to release Mr. Cruz at the conclusion of the nonconsensual encounter, when he would have ready access to firearms that the officer had reason to believe were within Mr. Cruz's truck.

RESPECTFULLY SUBMITTED this 11th day of May 2017

ROBERT W. FERGUSON
Attorney General



Kelly Paradis, WSBA 47175
Assistant Attorney General

Peter B. Gonick, WSBA 25616
Deputy Solicitor General

PO Box 40100
Olympia, WA 98504-0100
(360) 753-6245
Peterg@atg.wa.gov
Kellyp@atg.wa.gov
Office ID 91087

Certificate of Service

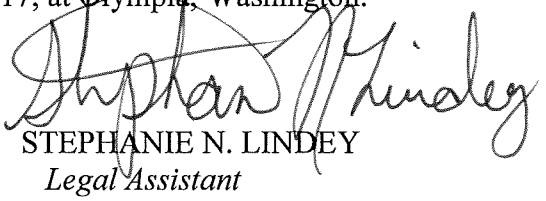
I certify, under penalty of perjury under the laws of the state of Washington, that I served, via regular United States Postal Service mail and electronic mail a true and correct copy of the foregoing document, upon the following:

Ronald Alan Hammett
Law Office of Ronald A. Hammett
PO Box 3940
Omak, WA 98841-3940
Ron@hammettlaw.com

Pamela B. Loginsky
Special Deputy Prosecuting Attorney
206 10th Avenue SE
Olympia, WA 98501
pamloginsky@waprosecutors.org

Karl F. Sloan
Branden E. Platter
Deputy Prosecuting Attorney
237 4th Avenue N.
PO Box 1130
Okanogan, WA 98840
ksloan@co.okanogan.wa.us
bplatter@co.okanogan.wa.us

DATED this 11th day of May 2017, at Olympia, Washington.



STEPHANIE N. LINDEY
Legal Assistant

SOLICITOR GENERAL OFFICE

May 11, 2017 - 4:23 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	93732-0
Appellate Court Case Title:	State of Washington v. Eric Daniel Cruz
Superior Court Case Number:	14-1-00437-9

The following documents have been uploaded:

- 937320_Briefs_20170511162152SC687590_8601.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Amicus_Final.pdf
- 937320_Motion_20170511162152SC687590_8820.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Motion for Leave to File.pdf

A copy of the uploaded files will be sent to:

- stephaniel1@atg.wa.gov
- sgoolyef@atg.wa.gov
- kellyp@atg.wa.gov

Comments:

Sender Name: Kristin Jensen - Email: kristinj@atg.wa.gov
Filing on Behalf of: Peter B. Gonick - Email: peterg@atg.wa.gov (Alternate Email: PeterG@atg.wa.gov)

Address:
PO Box 40100
1125 Washington St SE
Olympia, WA, 98504-0100
Phone: (360) 753-4111

Note: The Filing Id is 20170511162152SC687590