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No. 93732-0

COA NO. 33312-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

vs.

ERIC DANIEL CRUZ,

Respondent.

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

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STATE'S PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

The State of Washington, by and through its attorney, Pamela B. Loginsky, Special Deputy Prosecuting Attorney for Okanogan County, asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

## II. RELIEF REQUESTED

The State seeks review of Division Three's decision in *State of Washington v. Eric Daniel Cruz*, COA No. 33312-4-III. This published opinion affirmed the superior court's decision suppressing firearms removed from the defendant's vehicle pursuant to *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986). The published opinion was issued on July 19, 2016. A copy of the opinion appears in appendix A. The State's timely filed motion for reconsideration was denied on September 22, 2016. A copy of the order denying reconsideration appears in appendix B. An extension of time to file this petition was granted by this Court on October 19, 2016. A copy of the ruling granting the extension of time appears in appendix C.

## III. ISSUES PRESENTED FOR REVIEW

1. Whether an armed, lawfully detained individual, presents a potential threat to an officer's safety sufficient to justify a *Terry*<sup>1</sup> frisk?
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?

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

3. Whether reasonable suspicions standard under *Terry* remains an objective one that is based upon the totality of the circumstances rather than a subjective test that looks to the officer's level of fear?

4. Whether the test for a *Terry* frisk of a lawfully detained person is the same for an armed "recreational sportsman" as for any other armed person?

#### IV. STATEMENT OF THE CASE

On August 10, 2012, Fish and Wildlife Officer Troy McCormick was patrolling the Simikameen River in Okanogan County. RP 7. This relatively isolated area of the County is characterized by high canyon walls which impact radio traffic, making it difficult for a lone officer, such as Officer McCormick, to obtain record checks and/or to secure backup. CP 9, FOF 1 and 5; RP 7-8, 13.

Officer McCormick hiked to the top of a cliff overlooking the Similkameen River. From this vantage point, he observed Eric Cruz, use an illegal fishing lure to "snag" a fish in violation of the law.<sup>2</sup> RP 8-9. Officer McCormick also noted that Cruz was accompanied by another fisherman. RP 7. Officer McCormick raced to his truck and drove to the area where Cruz could be contacted. RP 9; CP 10, FOF 4.

When Officer McCormick arrived at the parking lot it was empty except for Cruz's vehicle. RP 9, 15-16. Cruz was in the open door of his pickup truck, scrambling to record his catch.<sup>3</sup> CP 10, FOF 6. Officer

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<sup>2</sup>RCW 77.15.370(1)(c). A violation of this statute is a gross misdemeanor that may impact the defendant's ability to obtain a fishing license. See RCW 77.15.370(2) and (3).

<sup>3</sup>Cruz's failure to complete the catch record at the water's edge was a separate infraction. See RCW 77.15.160(1)(c).

McCormick contacted Cruz and asked to see Cruz's fish. Cruz opened the cooler in the bed of his pickup, allowing Officer McCormick to examine the fish's condition. RP 18-19; CP 10, FOF 7. His examination confirmed his suspicion that Cruz had unlawfully snagged the fish. RP 20; CP 10, FOF 8.

Officer McCormick informed Cruz that he was under arrest for snagging. RP 10; CP 10, FOF 8. Officer McCormick placed Cruz in handcuffs and searched Cruz incident to arrest. RP 10, 20-21. Immediately prior to the search incident to arrest, Officer McCormick inquired whether Cruz was armed. Cruz stated that he was not, but that he had some guns in the truck. RP 10-11; CP 10, FOF 12. Upon completing the search incident to arrest, Officer McCormick secured Cruz in the back of his patrol car. RP 12, 21; CP 10, FOF 16.

Officer McCormick returned to the pick up truck to secure the firearms due to the potential threat they posed to his safety. RP 12. Officer McCormick took this step because the location of Cruz's companion was not known to him and because he anticipated releasing Cruz at the scene. RP 9-10; CP 11, FOF 21. While the weapons were still in Cruz's vehicle, Cruz's companion approached the vehicle. RP 12, 24-25. Officer McCormick ordered the companion to stop, and the companion halted approximately 15 to 20 feet from the vehicle. RP 12, 25, 26, and 28; CP 10, FOF 9.

Officer McCormick removed two rifles from the back seat of Cruz's vehicle and a handgun that was adjacent to the driver's seat. RP 12. Officer McCormick removed the weapons solely to protect his safety and not for investigative purposes. CP 11, FOF 22 and 23. Officer McCormick secured

the weapons in his patrol car, intending to unload them prior to returning the weapons at the conclusion of the encounter. RP 12-13, 23-24, 26; CP 11, FOF 19.

Officer McCormick then resumed his investigation of the crime of snagging, reading Cruz his *Miranda*<sup>4</sup> warnings and asking Cruz questions. RP 14-15, 22. While engaged in this investigation, Officer McCormick received word over his radio that Cruz had a prior felony conviction and was ineligible to possess firearms. CP 11, FOF 19. Officer McCormick informed Cruz that the firearms would be placed into evidence and that a report would be forwarded to the prosecutor. RP 13-14.

With the firearms secured, Officer McCormick believed that Cruz posed no danger to anyone. RP 23-24. Officer McCormick, therefore, released Cruz at the scene with a citation for the fishing violation. RP 24-25; CP 11, FOF 20.

The State charged Cruz with three counts of unlawful possession of a firearm in the second degree on December 15, 2014. CP 53. Cruz filed a motion to suppress the firearms, arguing that the warrantless seizure of the firearms violated *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). CP 42. The State argued that the warrantless seizure of the firearms was lawful under *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). CP 24.

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<sup>4</sup>*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1965).

The trial court granted Cruz's motion to suppress, ruling the sweep of the vehicle to secure the weapons was improper because "[t]here is a burden on the State to show a dangerous situation." CP 11 at COL 2A. The State filed a timely notice of appeal. CP 1. Division Three affirmed the trial court, holding that *Terry* does not allow an officer to secure weapons being transported by cooperative "sportsmen". *State v. Cruz*, 195 Wn. App. 120, 125, \_\_\_ P.3d \_\_\_ (2016). The State files this timely petition for review.

#### V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4 discusses the considerations governing this Court's acceptance of review. Here, review is appropriate under RAP 13.4(b)(4) because Division Three's decision increases the risk of injuries and fatalities during lawful, non-consensual, police encounters. Review is also appropriate under RAP 13.4(b)(1) and (2) because the opinion conflicts with many decisions of this Court and of the Court of Appeals. Finally, review should be granted under RAP 13.4(b)(3) because Division Three's standardless "sportsmen" exception to *Terry* presents a significant question of law under the Fourth Amendment and Const. art. I, § 7.

##### A. **A Lawfully Detained Armed Person is Presumed to Present a Sufficient Risk to the Officer's Safety to Support a Frisk to Secure the Weapons Until the Investigation is Completed.**

Pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), police officers may make limited searches for the purposes of protecting the officers' safety during an investigative detention. A lawful frisk does not always flow from a justified stop. Rather, each element of the stop and the frisk must be analyzed separately; the reasonableness of each

must be independently determined. *Terry*, 392 U.S. at 22-23; *Thomas v. Dillard*, 818 F.3d 864, 876 (9th Cir. 2016).

“The purpose of *Terry* frisks is to protect officer and bystander safety.” *State v. Russell*, 180 Wn.2d 860, 869, 330 P.3d 151 (2014). A limited warrantless *Terry* pat-down search is conducted not to discover evidence of a crime, but to allow an officer to safely pursue a *Terry* investigation. *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).

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, supra*;<sup>5</sup> *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986); *State v. Larson*, 88 Wn. App. 849, 946 P.2d 1212 (1997). A *Terry* sweep of a vehicle for weapons is proper when an officer intends to allow the detained person and/or the detained person’s companions to return to the vehicle following the contact. *See 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.”). *Accord State v. Chang*, 147 Wn. App. 490, 496, 195 P.3d 1008 (2008) (officer may still search the

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<sup>5</sup>The *Terry* sweep exception to the warrant requirement that was recognized in *Michigan v. Long*, survived the United State’s Supreme Court’s opinion in *Arizona v. Grant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). *See Gant*, 129 S. Ct. at 1721 (listing *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), which 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,” as an established exceptions to the warrant requirement that authorizes an officer to enter a vehicle); *United States v. Goodwin-Bey*, 584 F.3d 1117, 1120 (8th Cir. 2009) (“In reexamining the search incident to arrest exception to the warrant requirement, *Gant* left [the *Michigan v. Long*] exception untouched.”), *cert. denied*, 559 U.S. 961 (2010).

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.).

An officer need not be absolutely certain that the detained person the officer is investigating at close range is armed or 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; *State v. Harvey*, 41 Wn. App. 870, 874-75, 707 P.2d 146 (1985). The same standard applies to a *Terry* sweep of a vehicle. *See generally Kennedy*, 107 Wn.2d at 11-13. Appellate review of an officer's frisk decision is circumspect as

courts are reluctant to substitute their judgment for that of police officers in the field. "A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing."

*State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (alterations in original) (emphasis and internal quotation marks omitted) (quoting *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989)).

During non-consensual contacts, such as traffic stops, this Court has stated that a frisk is proper upon objective suspicions that the suspect or other occupants of the vehicle could be "armed or dangerous." *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.").

Applying this test, Washington cases have upheld frisks or sweeps where the officer has reasonable suspicion that the detainee is armed. *See, e.g., State v. Flores*, No. 91986-1, slip op. at 22, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (Sep. 15, 2016) (officer lawfully seized gun from an arrestee's companion who, while walking backwards towards an officer with his arms up, volunteered that he had a gun); *Russell*, 180 Wn.2d at 868-69 (frisk of suspect, who was stopped for violating several minor traffic laws, was justified by the fact that the officer found a small derringer-style gun in the suspect's possession one week earlier); *Collins*, 121 Wn.2d at 176-77 (reliable informant's tip that an individual carries a gun can support a protective frisk following a lawful traffic stop); *State v. Holbrook*, 33 Wn. App. 692, 657 P.2d 797, *review denied*, 99 Wn.2d 1023 (1983) (frisk of driver, who was stopped for a broken taillight and an expired license plate, and sweep of vehicle for weapons was proper where tip sheet indicated that the driver possesses multiple guns and carries a loaded automatic under the left side of his dashboard); *State v. Olsson*, 78 Wn. App. 202, 895 P.2d 867 (1995) (frisk of driver, who was stopped for excessively loud noise, was justified by the suspect's statement that he had a knife). These Washington cases equate the reasonable suspicion that the detainee is armed with reasonable suspicion that the person may be potentially dangerous.

The "armed is potentially dangerous" standard applied by both this Court and the Court of Appeals is consistent with decisions from the United States Supreme Court, the Ninth Circuit, and our sister states. *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 patdown 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. 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*”), *cert. denied*, 552 U.S. 1313 (2008); *Gastelum v. Hegyi*, 237 Ariz. 211, 348 P.3d 907, 910 (Ariz. App.), *review denied*, 2015 Ariz. Lexis 358 (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).

The “armed is potentially dangerous” standard is consistent with the Supreme Court’s recognition that a person armed with a weapon could unexpectedly and fatally use that weapon against an officer. *Terry*, 392 U.S. at 23. The Ninth Circuit has also observed, “The possibility of a surprise attack at close quarters with even a small knife presents danger sufficient to

justify an officer in taking reasonable protective measures . . . .” *United States v. Mattarolo*, 209 F.3d 1153, 1158 (9th Cir. 2000).

The “armed is potentially dangerous” standard is consistent with courts’ recognition that “a police officer is not required to ‘await the glint of steel’ before he or she can act to preserve his or her own safety because once the glint of steel appears, it is ‘often...too late’ to take safety precautions.” J. Michael McGuinness, *Law Enforcement Use of Force: Safe and Effective Policing Requires Retention of the Reasonable Belief Standard*, 39 *Champion* 26, 31 (2015) (internal citations omitted). Scientific studies support the conclusion that an officer may not safely wait to take defense actions until a detainee demonstrates an intent to assault the officer. *See, e.g.*, Raymond P. Rheingans, *Violator Movement Times vs. Officer Response Times in Armed Encounters*, PPCT Res. Rev. June 998, at 2 (describing reaction-time experiments that show that an “officer who is unaware of a subject’s weapon could be behind by .79 seconds or more if the subject suddenly drew his weapon”); Seth D. DuCharme, *The Search for Reasonableness in Use-of-Force Cases: Understanding the Effects of Stress on Perception and Performance*, 70 *Fordham L. Rev.* 2515, 2547-48 (2002) (an individual standing thirty feet away can reach an officer in less than two seconds).

Here, Officer McCormick had actual notice that firearms were in Cruz’s vehicle prior to his securing them. The firearms were secured at a time when Cruz and/or Cruz’s companion could gain access to the firearms when they returned to the vehicle at the end of the investigation. Numerous other jurisdictions have approved of *Terry* sweeps of the passenger

compartment under similar circumstances. *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”); *Commonwealth v. Demirtshyan*, 87 Mass. App. Ct. 737, 36 N.E.3d 32, 38 n. 11 (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), *appeal denied*, 473 Mass. 1102 (2015); *State v. Scheet*, 2014 ND 91, 845 N.W.2d 885 (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).

**B. Division Three’s Determination that the Securing of the Firearms Violated *Terry* is Based Upon an Erroneous Subjective Test.**

The reasonable suspicions standard for a lawful frisk is an objective one. *Long*, 463 U.S. at 1046 n.11 (“The propriety of a *Terry* stop and frisk is to be judged according to whether the officer acted as a ‘reasonably prudent man’ in deciding that the intrusion was justified.”); *Terry*, 392 U.S. 1, 27 (“The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be

warranted in the belief that his safety or that of others was in danger.”).<sup>6</sup> The objective standard means that a frisk can be valid when a officer does not actually feel threatened by the person frisked or when the record is silent regarding the officer’s actual belief. *See, e.g., State v. Kyles*, 269 Wis. 2d 1, 675 N.W.2d 449 (2004) (surveying state and federal court cases).

The Fifth Circuit’s decision in *United States v. Tharpe*, 536 F.2d 1098 (5th Cir. 1976), *reversed on other grounds by United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987), explains the reason for this rule as follows:

We know of no legal requirement that a policeman must feel “scared” by the threat of danger. Evidence that the officer was aware of sufficient specific facts as would suggest he was in danger satisfies the constitutional requirement. *Terry* cannot be read to condemn a pat-down search because it was made by an inarticulate policeman whose inartful courtroom testimony is embellished with assertions of bravado, so long as it is clear that he was aware of specific facts which would warrant a reasonable person to believe he was in danger. Under the familiar standard of the reasonable prudent man, no purpose related to the protective function of the *Terry* rule would be served by insisting on the retrospective incantation “I was scared.”

Some foolhardy policemen will never admit fear. Conversely, reliance on such a litany is necessarily prone to self-serving rationalization by an officer after the fact. It would be all too easy for any officer to belatedly recite that he was scared in situations where he neither had any reason to be scared, nor was indeed scared. The Supreme Court in *Terry* noted that the potential for abuse in relying upon a subjective rule cannot be squared with the protection guaranteed the individual by the fourth amendment.

*Tharpe*, 536 F.2d at 1101.

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<sup>6</sup>The United States Supreme Court favors objective standard tests out of a belief that “[e]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.” *Horton v. California*, 496 U.S. 128, 138, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990).

The standard of objective reasonableness relies upon the totality of circumstances. A host of factors can contribute to a basis for believing a suspect may be armed and possibly dangerous. These factors taken together may create reasonable suspicion when each factor, taken alone, would be insufficient. A reviewing court, therefore, should not find reasonable suspicion that the suspect was armed or dangerous was lacking “based merely on a ‘piecemeal refutation of each individual’ fact and inference.” *United States v. George*, 732 F.3d 296, 299-300 (4th Cir. 2013) (quoting *United States v. Branch*, 537 F.3d 328, 339 (4th Cir. 2008) (quoting *United States v. Whitehead*, 849 F.2d 849, 858 (4th Cir. 1988))).

In the instant case, the trial court ruled that the *Terry* sweep of the vehicle to secure the weapons was improper because

The State has not proved by clear and convincing evidence that Officer McCormick possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted him in believing that the defendant was dangerous and might gain immediate control of weapons inside defendant’s vehicle at the time of the search and seizure.

CP 11 at COL 2. The standard applied by the trial court is inconsistent with both *Terry* and *Collins*.

Division Three disapproved of the *Terry* sweep of the vehicle because “Officer McCormick agreed he ‘didn’t feel that [Mr. Cruz] was a danger.’”<sup>7</sup> Division Three’s statement takes Officer McCormick’s testimony out of context. The relevant exchange dealt with whether Officer McCormick believed that Cruz posed a danger to him at the conclusion of the encounter,

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<sup>7</sup>*Cruz*, 195 Wn. App. at 124, quoting RP 27.

after Officer McCormick had secured the weapons from Cruz's vehicle in the patrol car, not at the time he took custody of the two rifles and one handgun. *See* RP 23-24.<sup>8</sup> Finally, Division Three's factual determination is contrary to the unchallenged finding of the trial court that Officer McCormick removed the firearms from Cruz's vehicle to allay concerns for his safety.<sup>9</sup>

Division Three compounded its misreading of the record, by considering subsequent events, that were unknown to Officer McCormick at the time he secured the weapons. Officer McCormick did not know that his ability to reach dispatch would be unimpeded prior to securing the weapons. Officer McCormick did not know that Cruz's companion would be cooperative, until after he began to secure the weapons. In other words, Division Three engaged in the type of second-guessing and hindsight that is improper when reviewing an officer's decision regarding the need to take protective action. *See, e.g., Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (citing *Terry* for the proposition that courts must not judge officers with "the 20/20 vision of hindsight"); *Womack v. United States*, 673 A.2d 603, 611 (D.C. 1996) (stating that with respect to an officer's decision to frisk, "second-guessing of split-second decisions made by the officers on the scene is fraught with peril, and every effort must be made to 'eliminate the distorting effects of hindsight.'" (internal citations omitted)).

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<sup>8</sup>The relevant testimony is reproduced in appendix D.

<sup>9</sup>CP 11, FOF 23. This unchallenged finding is a verity on appeal. *State v. Fedorov*, 183 Wn.2d 669, 674, 355 P.3d 1088 (2015). This unchallenged finding is amply supported by the suppression hearing record. *See* RP 11-13, 26.

The totality of the circumstances known to Officer McCormick at the time he secured the weapons, would lead any reasonable person to believe that the weapons in Eric Daniel Cruz's vehicle should be secured for the remainder of the contact in order to protect the officer's safety. The objective facts were that: (1) Officer McCormick was on patrol alone, RP 8, CP 9 at FOF 1; (2) Officer McCormick was patrolling in a relatively isolated area—"the Similikameen River west of Oroville just below Enloe Dam," RP 7; (3) no other fishermen or other individuals were present at the time of the contact in the Enloe Dam parking area, RP 9, 15-16; (4) the high canyon walls in the area make it difficult for an officer to call for assistance, RP 8, CP 10 at FOF 5; (5) the high canyon walls make it difficult to obtain a record check on suspects, RP 13; (6) when Mr. Cruz was initially contacted at his vehicle for the crime of "snagging" a fish, the whereabouts of Mr. Cruz's companion was unknown, RP 9-10, CP 10 at FOF 6; (7) Mr. Cruz stated that firearms were in his unsecured vehicle, which was directly adjacent, with the door open, to Mr. Cruz at the time of arrest, RP 21, CP 10 at FOF 6 and 12; (8) Mr. Cruz's unrestrained companion approached Mr. Cruz's unsecured vehicle and was 15-20 feet from the vehicle while the two rifles and a pistol were still inside, RP 12, 25, 26, and 28, CP 10 at 9; (9) Officer McCormick seized the two rifles from the back seat and the handgun that was adjacent to the driver's seat with the intent of unloading them and returning the weapons to Mr. Cruz and his companion following the issuance of a citation, RP 12-13, 23-24; and (10) Officer McCormick released Mr. Cruz at the scene with a citation, CP 11 at FOF 11.

Multiple Washington cases support frisks and/or weapon sweeps under these circumstances. *See, e.g., State v. Smith*, 115 Wn.2d 775, 778-79, 784-85, 801 P.2d 975 (1990) (sweep of vehicles for weapons during an investigation into violation of park rules, was proper when there were three occupants in the car and a possibility that a fourth person was in the vicinity and the first person contacted had a concealed weapons permit and stated there was a weapon under the front seat of the car); *Horrace*, 144 Wn.2d at 398-99 (noting that an individual is may be more likely to commit violence against a police officer when few people are likely to be present to witness it); *State v. Larson, supra* (furtive motion by lone occupant in vehicle and lone occupant likely to return to vehicle for registration).

Division Three's opinion is also inconsistent with this Court's holding in *State v. Glossbrener*, 146 Wn.2d 670, 679-85, 49 P.3d 128 (2002), that a protective sweep of the vehicle is proper when conducted immediately upon observing or learning the facts that reasonably give rise to an objective concern for safety. Here, immediately upon learning that there were firearms in the unsecured vehicle Officer McCormick (1) suspended his investigation to deal with the weapons, RP 12, 20-21, (2) secured Mr. Cruz in the back seat of the patrol vehicle, RP 12, 21, (3) immediately returned to Mr. Cruz's vehicle, RP 21, and (4) ordered Mr. Cruz's companion to stay away until the weapons were secured, RP 25-26. Officer McCormick's actions, following immediately upon the heels of learning about the weapons, render the securing of the weapons objectively reasonable.

**C. An Otherwise Lawful Frisk is Not Barred When the Detained Person is a “Recreational Sportsman.”**

Division Three’s opinion restricts an officer’s ability to frisk an armed, lawfully detained, “recreational sportsman.” The new “recreational sportsman” rule restricts an officer’s ability to secure weapons during a lawful non-consensual encounter to those instances in which (1) the detainee or his/her companions defy an officer’s commands, (2) the detainee or his/her companions make a “furtive movement,” (3) the detainee or his/her companions take a step towards attacking the officer, or (4) there is other evidence that the detainee or his/her companions are “dangerous.” *See Cruz*, 195 Wn. App. at 124-25.

Division Three adopted its new “recreational sportsman” rule, without benefit of written briefing or oral argument from the parties. Adopting a new constitutional rule under such circumstances violates this Court’s injunction to avoid naked castings into the constitutional sea and to not announce constitutional rules that lack an adequate anchor. *See generally State v. Gunwall*, 106 Wn.2d 54, 58-63, 720 P.2d 808 (1986). Division Three’s adoption of the “recreational sportsman” rule in the absence of briefing from the parties directly conflicts with this Court’s refusal to consider the impact of the constitutional right to bear arms on an officer’s ability to conduct a frisk due to inadequate briefing. *See Collins*, 121 Wn.2d at 178-79.

Division Three’s new “recreational sportsman” rule is inconsistent with *Terry* and *Long*. Division Three’s opinion, moreover, provides no definition of who is a “recreational sportsman.” Does the new rule apply to anyone who is detained by a Fish and Wildlife officer? Does the new rule

apply to anyone who is detained upon reasonable suspicion that he has violated a law related to fishing or hunting? Does the new rule apply to anyone who possesses a current fishing or hunting license? Is the rule limited to people in rural areas and/or those near known fishing and hunting areas? Does the new rule apply to anyone whose possession of a weapon may be lawful or otherwise “innocent”?

Division Three’s opinion, beyond a passing statement that “[t]he right to bear arms is constitutionally protected,”<sup>10</sup> identifies no legal basis for prohibiting an officer from securing the weapons of a “recreational sportsman” during a lawful non-consensual contact. Whether Washington should be the first jurisdiction in the nation<sup>11</sup> to adopt a “recreational sportsman” exception to *Terry* and *Long* involves a significant question of law under the federal and Washington constitutions and involves an issue of substantial public interest that should be determined by this Court. *See* RAP 13.4(b)(3) and (4).

Review is particularly appropriate as the new “recreational sportsman” exception to *Terry* and *Long* is contrary to Supreme Court precedent and to well reasoned decisions from other courts. *See Long*, 436 U.S. at 1052 n. 16 (*Terry* frisk of vehicle was proper even though the suspect

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<sup>10</sup>*Cruz*, 195 Wn. App. at 124.

<sup>11</sup>A Lexis search using the query “sportsm\*n and (terry w/3 ohio) or frisk” yielded 25 reported federal and state opinions, including *State v. Cruz*, *supra*. Although one concurring Judge noted that “people may possess shotgun shells and may transport and use them, most often perhaps in the role of sportsmen matching skills against nature’s feathered or other small creatures,” *United States v. Colbert*, 474 F.2d 174, 178 (5th Cir. 1973) (Brown, Chief Judge, concurring), only *Cruz* held that a lawfully detained “sportsman” is not subject to a frisk under the same standards that apply to every other lawfully detained person.

may have lawfully possessed the hunting knife); *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."); *Orman*, 486 F.3d at 1176 (a frisk is not rendered improper where the person the officer is dealing with may be lawfully carrying any weapons); *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"<sup>12</sup>); *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*, 136 N.M. 18, 94 P.3d 18, 22-23 (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")

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<sup>12</sup>A significant number of homicides have been committed by individuals who possess concealed weapons permits. See generally Violence Policy Center: Concealed Carry Killers, available at <http://concealedcarrykillers.org/> (last visited July 26, 2016). Seventeen law enforcement officers were killed by concealed permit holders between May 2007 and the present. See Violence Policy Center, Law Enforcement Officers Killed By Concealed Carry Killers, available at: <http://concealedcarrykillers.org/law-enforcement-officers-killed-by-concealed-carry-killers/> (last visited July 26, 2016).

Perpetrators were lawfully in possession of firearms in slightly more than 14 percent of crimes committed with firearms in one American city. See Anthony Fabio, Jessica Duell, et al., *Gaps continue in firearm surveillance: Evidence from a large U.S. City Bureau of Police*, 10 *Social Medicine* 13, 17 (July 2016). A copy of this study may be found in appendix E.

Only one court has ruled that in states “which broadly allow public possession of firearms, reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that the person is dangerous for Terry purposes.” *United States v. Robinson*, 814 F.3d 201, 208 (4th Cir. 2016), *rehearing en banc granted* April 25, 2016. This split decision, however, was vacated by the United States Court of Appeals for the Fourth Circuit on April 25, 2016, when the court ordered rehearing en banc.<sup>13</sup> See 2016 U.S. App. Lexis 13678 (Apr. 25, 2016); 4th Cir. R 35(c) (“Granting of rehearing en banc vacates the previous panel judgment and opinion.”).

## VI. CONCLUSION

The State respectfully requests that this Court grant the State’s petition for review and ultimately reverse Division Three’s affirmance of the trial court’s suppression ruling.

Respectfully submitted this 2nd day of November, 2016.

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<sup>13</sup>The en banc argument in *United States v. Robinson*, No. 14-4902 (4th Cir.), was held on September 22, 2016. See United States Court of Appeals for the Fourth Circuit, En Banc Cases, <http://www.ca4.uscourts.gov/opinions/en-banc-cases> (last visited Oct. 26, 2016).

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 4th day of August, 2016, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

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

On the 4th day of August, 2016, 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](mailto:bplatter@co.okanogan.wa.us)

Karl Sloan at [ksloan@co.okanogan.wa.us](mailto:ksloan@co.okanogan.wa.us)

Ronald Hammett at [ron@hammettlaw.com](mailto:ron@hammettlaw.com)

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

Signed this 4th day of August, 2016, at Olympia, Washington.

  
PAMELA B. LOGINSKY  
WSBA NO. 18096

Appendix A

*State v. Cruz*, No. 33312-4-III (July 19, 2016)

**FILED**  
**July 19, 2016**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 33312-4-III
	)	
Appellant,	)	
	)	PUBLISHED OPINION
v.	)	
	)	
ERIC DANIEL CRUZ,	)	
	)	
Respondent.	)	

PENNELL, J. — Law enforcement need not obtain a warrant prior to conducting a protective vehicle search, so long as there is reasonable suspicion a suspect is dangerous and may gain immediate control of weapons. We are confronted with whether a suspect's potential access to firearms alone satisfies these prerequisites. Under the circumstances presented here, involving a recreational sportsman cited for a fishing violation, we hold it does not. We thus affirm the superior court's order of suppression.

## FACTS

Late one August morning in 2012, Washington Department of Fish and Wildlife officer Troy McCormick was alone on patrol near the Similkameen River. From his vantage point on a cliff above the river, Officer McCormick was able to watch the activities of fishermen below. According to Officer McCormick, there was no cellular service and only a "sketchy" radio signal at a parking lot where most of the fishermen would leave their vehicles or down on the river itself. Report of Proceedings (RP) at 8.

Eric Cruz and a male companion were fishing on the river that morning and caught Officer McCormick's eye. After about a half hour, Officer McCormick saw Mr. Cruz illegally snag<sup>1</sup> a Chinook salmon and pull it from the river. The offense was a gross misdemeanor. Officer McCormick got into his car and drove down to the parking area to make contact with Mr. Cruz.

Officer McCormick found Mr. Cruz by himself, standing near the open door of his truck. He was filling out his catch record card. After a brief interaction, Officer McCormick arrested Mr. Cruz for illegal snagging and placed him in handcuffs. Mr. Cruz was cooperative. Officer McCormick performed a search incident to arrest of Mr.

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<sup>1</sup> Snagging is a method of fishing that involves catching a fish by use of a hook, but without the hook being baited and the fish taking the bait with their mouth.

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*State v. Cruz*

Cruz's person. While doing so, he asked Mr. Cruz if he had any firearms on him. Mr. Cruz volunteered that he had firearms in his truck. There was no discussion of what type of firearms were in the truck or whether they were loaded.

Officer McCormick placed Mr. Cruz in his patrol vehicle. As he did so, Mr. Cruz's companion appeared, curious about what was happening. Mr. Cruz's companion was told to stay away from the truck, to which he complied. At no point did Officer McCormick observe Mr. Cruz's companion do anything illegal or engage in any suspicious or obstructive conduct.

With Mr. Cruz secure in the police vehicle and his companion 15-20 feet away, Officer McCormick entered Mr. Cruz's truck and removed three firearms. According to Officer McCormick, he wanted to secure the firearms for the duration of his contact with Mr. Cruz, as he intended to release Mr. Cruz with only a citation. After placing the firearms in his patrol vehicle, Officer McCormick ran Mr. Cruz's name through dispatch. Officer McCormick learned Mr. Cruz had a prior felony conviction and was ineligible to possess firearms. Officer McCormick then retained the firearms as evidence.

The State charged Mr. Cruz with three counts of unlawful possession of a firearm in the second degree. The superior court granted Mr. Cruz's motion to suppress evidence of the firearms and dismissed the charges against Mr. Cruz without prejudice. The State

appeals.

### ANALYSIS

Warrantless searches are presumptively unreasonable outside of a few “‘jealously and carefully drawn’ exceptions.” *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 2 L. Ed. 2d 1514 (1979)). The State bears the burden of establishing the applicability of an exception by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). If no exception applies, the fruits of a warrantless search must be suppressed.

As the parties agree, Officer McCormick’s seizure of the firearms cannot be justified under the search incident to arrest exception. But this does not end the matter. The search may still be justified if another exception applies. The State suggests the search can be justified as either an officer safety/*Terry*<sup>2</sup> search or an exigent circumstances search. We address each in turn.

#### *Terry Search*

A *Terry* frisk extends to a car “‘if there is a reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle.’” *State v. Glossbrener*, 146 Wn.2d 670, 680-81, 49 P.3d 128 (2002) (emphasis added) (quoting *State v. Terrazas*, 71

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

No. 33312-4-III  
*State v. Cruz*

Wn. App. 873, 879, 863 P.2d 75 (1993)). Both components must be present. If either the suspect cannot access a weapon or there is no suspicion of dangerousness, a warrantless vehicle search violates *Terry*.

Officer McCormick's search fails under *Terry* because, despite possible access to firearms, there was no reasonable suspicion Mr. Cruz or his companion were dangerous. The right to bear arms is constitutionally protected. Standing alone, the mere fact an individual possesses firearms does not make him dangerous or justify intrusion into his private space. Context matters. Unless the circumstances suggest a suspect may use firearms to harm himself or others, a vehicle *Terry* frisk is not warranted based simply on the presence of firearms.

There was no indication here of dangerousness. At the time of the search, Mr. Cruz and his companion had just spent the morning fishing. The fact that there were firearms present in this recreational setting was neither surprising nor alarming. Mr. Cruz's law violation did not create any specific safety concerns. He was not under investigation for a crime of violence or other felonious conduct. He was in the process of being cited for a misdemeanor fishing violation. Nothing about these general circumstances suggested a risk to officer or public safety.

The individual circumstances of Mr. Cruz and his companion were likewise

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benign. Neither man had engaged in any suspicious conduct or made any concerning or furtive movements. Both fully complied with Officer McCormick's instructions. When asked by the State how he felt at the time of the search, Officer McCormick agreed he "didn't feel that [Mr. Cruz] was a danger." RP at 27. These circumstances support the superior court's finding the search was improper.

The authorities cited by the State are inapposite. Both *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986), and *State v. Larson*, 88 Wn. App. 849, 946 P.2d 1212 (1997), involved vehicle occupants who had made suspicious, furtive movements. Such movements typically provide strong justification for a protective search. *Glossbrener*, 146 Wn.2d at 681-83. *State v. Chang*, 147 Wn. App. 490, 195 P.3d 1008 (2008), involved an individual known to possess a concealed handgun while parked in the lot of a bank as his companion committed a crime inside. This was not an innocuous circumstance. In the context of an ongoing felony investigation, the presence of firearms justifies protective action under *Terry*.

As recognized in the authorities cited by the State, once a firearm is present, not much more is needed to justify a frisk. Had Mr. Cruz or his companion been noncompliant, had they appeared evasive or antagonistic, or had the presence of firearms seemed unusual given the circumstances or time of day, the balance likely would have

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*State v. Cruz*

tipped to favor a protective search. *See State v. Carter*, 151 Wn.2d 118, 123-24, 129, 85 P.3d 887 (2004). But under the facts found by the superior court, Mr. Cruz and his companion were completely cooperative. They posed no more threat than the average sportsmen. To allow a search in this case would mean anyone transporting firearms in a vehicle for sporting purposes would be vulnerable to a law enforcement search. That level of intrusion is incompatible with our constitutional principles.

#### *Exigent Circumstances*

The State also attempts to justify Officer McCormick's search under the exigent circumstances exception to the warrant requirement. This exception applies where "obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting *State v. Audley*, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)). Exigent circumstances involve a true emergency. *State v. Hinshaw*, 149 Wn. App. 747, 753, 205 P.3d 178 (2009) (such as "an immediate major crisis" requiring swift action to prevent harm) (quoting *Dorman v. United States*, 140 U.S. App. D.C. 313, 319, 435 F.2d 385 (1970)). Danger to an arresting officer is a potentially exigent circumstance. *State v. Tibbles*, 169 Wn.2d 364, 370, 236 P.3d 885 (2010).

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*State v. Cruz*

The State fails to establish exigent circumstances for the same reasons it cannot establish dangerousness under *Terry*. Exigent circumstances are ones presenting a true potential for an emergency or destruction of evidence. *Tibbles*, 169 Wn.2d at 369-70. No such circumstances were present here. The hypothetical concern that Mr. Cruz or his companion *could* have posed a threat *if* they were dangerous applies to every individual contacted by law enforcement. We agree with the superior court that such generalized concerns are insufficient to permit intruding on an individual's constitutionally protected private space. *Tibbles*, 169 Wn.2d at 372; *State v. Swetz*, 160 Wn. App. 122, 136, 247 P.3d 802 (2011).<sup>3</sup>

#### CONCLUSION

Once Officer McCormick learned about the presence of firearms, it was appropriate for him to proceed with caution. But this did not justify a warrantless search. Other less intrusive options were available. Officer McCormick could have asked Mr. Cruz for consent to retrieve and secure the firearms. Alternatively, he may have been able to access Mr. Cruz's keys and lock the vehicle during the citation process. Had Officer McCormick believed Mr. Cruz's companion was too close to the truck, he could

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<sup>3</sup> Had Officer McCormick sought to impound Mr. Cruz's car, our analysis might well be different. *State v. Duncan*, 185 Wn.2d 430, 441, \_\_\_ P.3d \_\_\_ (2016).

No. 33312-4-III  
*State v. Cruz*

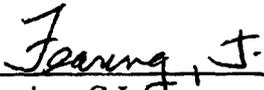
have instructed him to stand further away and keep his hands visible. If, during any of these interactions, Officer McCormick developed a suspicion that Mr. Cruz and his companion were being evasive or non-compliant, then he would have had grounds to go further and conduct a protective search.

Our country's freedoms undoubtedly make police work more difficult. Over the years, courts have accommodated law enforcement's safety and investigative needs by crafting several exceptions to the constitution's warrant requirement. However, none of these exceptions extends to generalized safety concerns applicable to interactions with large sectors of the public. Because Officer McCormick's safety concerns were too general, the order of suppression must be affirmed.

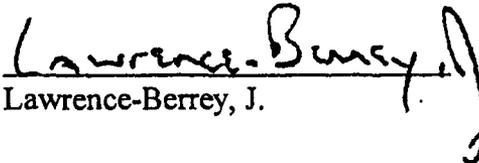
  
\_\_\_\_\_

Pennell, J.

WE CONCUR:

  
\_\_\_\_\_

Fearing, C.J.

  
\_\_\_\_\_

Lawrence-Berrey, J.

APPENDIX B

*State v. Cruz*, No. 33312-4-III,  
Order Granting Motion for Leave to File Amicus Curiae  
Brief, Denying Motion for Reconsideration and  
Amending Opinion (Sep. 22, 2016)

**FILED**  
**SEPTEMBER 22, 2016**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 33312-4-III
Appellant,	)	
	)	ORDER GRANTING
v.	)	MOTION FOR LEAVE TO FILE
	)	AMICUS CURIAE BRIEF,
ERIC DANIEL CRUZ,	)	DENYING MOTION FOR
	)	RECONSIDERATION AND
Respondent.	)	AMENDING OPINION
	)	

THE COURT has considered appellant's motion for reconsideration of our July 19, 2016 opinion, the respondent's answer thereto, the Washington State Patrol and Washington Department of Fish and Wildlife's motion for leave to file an amicus curiae brief in support of the appellant's motion for reconsideration, and the amicus curiae brief filed by the Washington State Patrol and Washington Department of Fish and Wildlife on August 9, 2016.

IT IS ORDERED that the motion for leave to file amicus curiae brief in support of the appellant's motion for reconsideration is granted.

IT IS FURTHER ORDERED that the appellant's motion for reconsideration of this court's July 19, 2016 opinion is denied.

IT IS FURTHER ORDERED that the court's July 19, 2016 opinion is amended as follows:

In the first paragraph on page five, the following is added after the sentence “Both components must be present.”:

Neither the plain wording of *Terry* nor our case law permit reducing the standard to a disjunctive test.<sup>3</sup>

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<sup>3</sup> See *State v. Russell*, 180 Wn.2d 860, 868, 330 P.3d 151 (2014) (“stop was justified because [the officer] could point to specific and articulable facts that supported a belief that [defendant] could be armed *and* dangerous”) (emphasis added); *State v. Collins*, 121 Wn.2d 168, 847 P.2d 919 (1993) (protective frisk of driver was lawful as the officer had a reasonable suspicion the driver was armed and dangerous where there was a reliable informant tip the driver had a gun, the stop occurred early in the morning, and the officer previously arrested the driver for a felony); *State v. Horrace*, 144 Wn.2d 386, 28 P.3d 753 (2001) (frisk of vehicle passenger supported by specific and articulable facts giving rise to an objectively reasonable belief that passenger could be armed and dangerous where trooper saw driver lean in passenger’s direction, passenger was in close proximity to driver’s movements, passenger was wearing a bulky jacket in which driver could have concealed a weapon, and the stop occurred in a relatively isolated spot in the middle of night); *Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986) (where driver made suspicious furtive movements and passenger remained in the car, officer’s *Terry* search of car justified); *Larson*, 88 Wn. App. 849 (driver’s furtive movements combined with the officer’s knowledge he would have to let driver back into his car justified *Terry* frisk of car).

In the first paragraph on page six, the following footnote is added after the citation “RP at 27.”:

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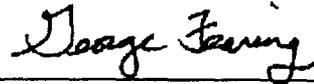
<sup>4</sup> Although Officer McCormick’s subjective impressions are not dispositive, they are relevant to the court’s objective assessment of how a reasonable officer would assess the situation. See *Ornelas v. United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996) (in making determinations of reasonable suspicion and probable cause, “due weight” should be given to inferences drawn by “local law enforcement officers”).

No. 33312-4-III  
*State v. Cruz*

With the addition of the two above-referenced footnotes, the footnote on page eight will be renumbered from "3" to "5."

PANEL: Judges Fearing, Lawrence-Berrey and Pennell

FOR THE COURT:



---

GEORGE FEARING  
Chief Judge

APPENDIX C

*State v. Cruz*, No. 93732-0  
Notation Order Granting Extension of Time to File  
Petition for Review (Oct. 19, 2016)

SUSAN L. CARLSON  
SUPREME COURT CLERK

ERIN L. LENNON  
DEPUTY CLERK/  
CHIEF STAFF ATTORNEY

**THE SUPREME COURT**  
STATE OF WASHINGTON



TEMPLE OF JUSTICE  
P.O. BOX 40929  
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[www.courts.wa.gov](http://www.courts.wa.gov)

October 19, 2016

**LETTER SENT BY E-MAIL ONLY**

Karl F. Sloan  
Branden Eugene Platter  
Okanogan County Prosecuting Attorney  
P. O. Box 1130  
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Ronald Alan Hammett  
Law Office of Ronald A. Hammett  
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Omak, WA 98841-3940

Pamela Beth Loginsky  
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Olympia, WA 98501-1399

Re: Supreme Court No. 93732-0 – State of Washington v. Eric Daniel Cruz  
Court of Appeals No. 33312-4-III

Counsel:

The following notation ruling was entered on October 19, 2016, by the Supreme Court Deputy Clerk in the above referenced case:

**MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW**

**“The motion for extension of time is granted. The Petition for Review should be served and filed by November 7, 2016.”**

Sincerely,

A handwritten signature in black ink, appearing to read "Erin L. Lennon".

Erin L. Lennon  
Supreme Court Deputy Clerk

ELL:fw

C-1



APPENDIX D

*State v. Cruz*, Okanogan Superior Court No. 14-1-00437-9, excerpt of 3.5 Motion Hearing

From Cross Examination of Troy McCormick

Q: Okay.

So, then you decided to, to let him go, is that right?

A: Yes. I was going to cite and release him.

Q: And, well, I guess you assumed he wasn't a danger to anyone *at that point*?

A: He was —

[Objection and ruling on objection]

A: Ask your question again, please?

Q: Okay. You, you released him, right?

A: I did.

Q: And you — *At that point* you didn't feel he was a danger to anyone, did you?

A: Well, I was, I was going to release him.

Q: Uh-huh (affirmative).

A: It was a — something that we typically would cite and release for, and because he was cooperative I saw no reason to book him into jail.

Q: So you didn't feel he was a danger to you or anyone else *at that point*, did you?

A: I'm always cautious when releasing people, especially with their firearms, so even if I —

Q: But that was your intent to release him —

A: — that was my intent.

Q: — and give him the firearms?

A: That was my intent—

Q: Yeah.

A: - was to return the firearms and release him.

RP 23-25 (emphasis added).

From Re-Direct of Troy McCormick

Q: Okay.

Now you said that you, you intended at that point to release the weapons to him and, and basically cite him and release him, and that was before you had gotten the information about his felony conviction?

A: Correct.

Q: Okay. Now, you had, you had - You testified that you had secured them for your safety. If you did not feel that there was a legal basis to hold the firearms but felt that the Defendant was dangerous, what would you have done with them?

A: The . . . I guess I, I need -

Q: I, I can try to re (sic) --

A: - I need that asked again.

Q: I can try to rephrase that. So you said that *at that point* you didn't feel that he was a danger, okay?

A: Yeah.

Q: Now, assuming you did think that the Defendant or somebody in that situation was a danger but you didn't feel that you had a legal basis to, to seize or keep the weapons, what would you have done with the firearms?

A: Yeah, that's actually pretty commons is when we return firearms that we don't have a legal basis to hold, I will issue the ticket, place the firearms in their vehicle, usually unload the - you know, or put the magazine in a separate place under the floorboard or something and tell them, you know, not to touch them 'til I'm gone.

RP 26-27 (emphasis added).

## APPENDIX E

Anthony Fabio, Jessica Duell, et al.,  
*Gaps continue in firearm surveillance: Evidence from a  
large U.S. City Bureau of Police,*  
10 Social Medicine 13 (July 2016)

# Gaps continue in firearm surveillance: Evidence from a large U.S. City Bureau of Police

*Anthony Fabio PhD, MPH; Jessica Duell MPH; Kathleen Creppage MPH; Kerry O'Donnell; Ron Laporte PhD.*

## Abstract

While the broad relationship between violence, poor health outcomes, and firearms is well-established, there is limited research in the public health field on the source of guns collected by police departments, many of which are used for violent crime that results in injury or death. This data could be valuable for purposes of improving surveillance around violent crime and health outcomes as well as for evaluating prevention strategies and future programs that aim to reduce gun violence.

The objectives of this study are to describe how guns come into police possession, identify the primary source of these guns, determine how guns leave possession of lawful owners, and determine disposition of guns and perpetrators. In order to meet the objectives, we analyzed data on 762 cases in which a gun was recovered by the Pittsburgh Bureau of Police Firearm Tracking Unit (FTU). Descriptive analyses were conducted.

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From the Department of Epidemiology, Graduate School of Public Health, University of Pittsburgh: Anthony Fabio PhD, MPH; Jessica Duell MPH; Kerry O'Donnell; Ron Laporte PhD.

From the Falk Foundation, Pittsburgh, PA: Kathleen Creppage MPH

**Submitted:** 12/7/2015

**Revised:** 1/15/2016

**Accepted:** 1/15/2016

**Conflict of interest:** None declared

**Peer-reviewed:** Yes

Most cases involve a single perpetrator. Traffic stop and street patrol accounted for 31% of method of recovery. Most perpetrators (79%) were carrying a gun that did not belong to them. More than 30% of the guns recovered were reported stolen by owners when the FTU contacted them. For 44% of the guns, whether the gun was stolen was either unknown or not able to be determined. In most cases, individual

## What is already known on this subject?

- Homicide by firearms ranks among the leading causes of death of young people in the United States.
- Given the significant and timely public health issue of violence, determining the sources of the firearms used in these crimes is a priority.
- No system exists to track acquisition, type, or motivation for firearms.

## What this study adds?

- It highlights the continuing difficulty in obtaining data around firearms and the relatively large amount of missing data on this topic.
- It is important to understand all parts of the pathway from firearm source to violent crime outcome, especially major channels for diverting firearms from the legal to illegal market since diversion and theft are key sources of firearms for youth and juveniles.
- Given that 79% of perpetrators are connected to firearms for which they are not the legal owner, it is highly likely that a significant amount of theft or trafficking is the source of perpetrators' firearms.
- Future studies should be conducted to assess the pathway by which firearms travel from legal ownership to illegal ownership.

owners did not know how they lost possession of their firearm (62%).

Currently there is no way to track firearms from a legal purchase into hands that do not have legal ownership, even through official police data. A large number of guns recovered are taken from persons who are not the lawful owner of the gun. In the majority of cases, the guns were privately owned, as opposed to being traced back to a dealer. How the guns left the possession of their lawful owners is unknown, and collecting this data proves to be challenging. Future studies should be conducted to assess the pathway in which guns travel from legal to illegal ownership.

### Introduction

Violence has been established as a significant public health issue. Though no one is immune to violence, the burden of gun violence weighs heavy among younger individuals. From a public health perspective, it contributes to a tremendous amount of mortality and years of potential life lost among youth and young adults,<sup>1</sup> particularly when there is a firearm involved.<sup>2</sup> Homicide by firearms continues to rank among the leading causes of death of young people in the United States. Of the 12,765 homicides in 2012, 8,855 were due to a firearm,<sup>3</sup> meaning more than two-thirds of homicides involve a firearm.

Firearms are also involved in self-inflicted acts of violence (suicides). According to the Centers for Disease Control and Prevention (CDC), of the 38,264 suicides in 2010, 19,392 (51%) involved a firearm.<sup>4</sup>

Few studies have assessed detailed information about acquisition or type of firearms recovered by police, or the motivation for the police recovering the firearm. This data is challenging to collect and often incomplete, leaving large gaps where information is missing. Those that have attempted to trace and identify recovered firearms use different measures and methods for assessing acquisition, and not all involve the perspective of law enforcement. Several important studies that evaluated firearm acquisition used sales or licensure volume as a measure to link with violent crime and the resulting outcomes.<sup>5,6</sup> Though it is clear that the prevalence of guns and retail sales are associated with a greater prevalence of crime and gun-related mortality, this does not describe in detail the source of firearms for all violent crime (particularly among youth). It is important to understand the major channels for

diverting firearms from the legal to illegal market since diversion and theft are key sources of firearms for youth and juveniles.<sup>7</sup> In a sense, this is an important link in the chain connecting firearms and violent health outcomes.

Attempts to characterize the illegal acquisition of firearms in the U.S. have been fraught with difficulty. The total number of firearms stolen annually is hard to determine beyond a rough estimate. Ludwig and Cook and the Bureau of Alcohol, Tobacco and Firearms (ATF) put the number at more than 500,000 firearms per year based on studies done in the 1990's<sup>8,9</sup>; in 2012, a poll of firearm owners commissioned by Mayors Against Illegal Firearms put the number around 600,000 just from private residences.<sup>10</sup> It also can be difficult to determine if firearms recovered by the police are stolen, and whether or not they are weapons used to commit violent crimes. Studies in the 1990's put the percentage of recovered firearms as having been stolen at anywhere from 6-32%, and surveys of incarcerated persons suggested that 9-32% of them had acquired their most recent handgun via theft.<sup>11</sup> An attempt by Wintemute et al. to characterize the life cycle of firearms stopped short of determining the percent or number of firearms stolen, instead reporting only if the purchaser and possessor were different people.<sup>12</sup> An older descriptive study of guns recovered from an urban buyback program suggested that some of the recovered firearms were not used in the most violent crimes that result in death. However, individuals who turn in firearms to buyback programs can be motivated by incentives and may only return legally purchased guns. Additionally, there was no information about the individuals who participated.<sup>13</sup> Given the increased public and media attention to firearm violence, there is room for more timely and improved firearm surveillance using alternative methods.

The overall aim of this study was to determine and classify the sources of firearms recovered by the Pittsburgh Bureau of Police. Specifically, we aimed to 1) Identify the primary source of these firearms, 2) Determine how firearms leave possession of lawful owners, 3) Describe demographic characteristics of owners and perpetrators, and 4) Determine disposition of firearms and perpetrators. We analyzed data on 762 cases in which a gun was recovered by the Firearms Tracking Unit. Data collection was performed by two data collectors in the FTU offices from February to September 2012.

## Materials and Methods

The study team initially met with members and leaders of the Firearms Tracking Unit (FTU) of the Pittsburgh Police in December 2011 to discuss their processes and priorities for collecting, storing, aggregating, and dispersing their data. The FTU has several members dedicated to investigating and collecting data on all firearms retained by the Pittsburgh Police. Data are compiled and stored in paper files, and certain fields are entered into an electronic database. The study team developed a form to manually collect data from the paper files.

This data collection form was developed with input from the FTU and study team members. The form was divided into three sections: Weapon, Owner, and Perpetrator. A single case could have more than one weapon, owner, or perpetrator. Each case was uniquely identified by CCR number, a unique 8-digit number assigned to each call or incident to which the police respond. Due to privacy and legal concerns, certain data could not be recorded on the form for use by non-police, such as names, birth dates, or addresses associated with the owners or perpetrators and data obtained from the state police (e.g., the number and nature of "hits" from the National Crime Information Center (NCIC), a computerized index of crime and criminals, including records of stolen firearms, available to all law enforcement agencies). For cases with multiple firearms, the firearms were numbered sequentially by the data collector and the make/model and serial number were recorded to differentiate between firearms. Owners were associated with individual firearms. Adult perpetrators who were arrested and referred for court action were identified by OTN, a unique number assigned by the court. The OTNs enabled the data collectors to follow up on actions taken against the perpetrators, including final charges and verdicts. Perpetrators who were not charged with a crime and juvenile perpetrators were identified only by demographic information and sequential numbering within cases.

It should be noted that handgun sales in Pennsylvania, initially by a dealer or subsequently between persons, must be documented and conducted through a federal firearms licensed (FFL) dealer while shotgun and rifle sales are documented only the first time they are sold by a dealer.

Therefore, when the FTU traces a handgun, the documented owner should be the last legal owner, but when a rifle or shotgun is traced, the identified "owner" may be the original owner, not the current owner. The data collectors recorded information for the last known owner identified by police.

Data collection was performed by two data collectors in the FTU offices from February to September 2012. Because cases could have multiple firearms and/or perpetrators, the master dataset was broken down into two subsets for statistical analysis. One subset had a single record for each firearm and was used to examine firearm-specific variables, such as recovery method, final disposition, stolen/not stolen status, and owner characteristics. The other subset had one record per perpetrator (or, if no perpetrator was identified or involved, per case) and was used to explore perpetrator-specific variables, such as type, demographics, and court outcomes. Descriptive statistics were run on each data subset using SPSS 19.

## Results

We collected data on 762 cases for 2008. (Note, percentages may not add up to 100 percent due to missing values.) It is assumed that this included all cases for that year.

### *Firearms*

During the study period a total of 893 firearms were recovered by the Pittsburgh Police.

Fifty-seven firearms (6.4%) were found in the National Integrated Ballistic Information Network (NIBIN) as having been used in prior incidents. For a large proportion of the firearms ( $n = 396$ , 44.3%), the police could not determine if the firearm had been stolen. After recovery and when police made contact with owners, more than 30 percent of the firearms were said to have been stolen ( $n = 292$ , 32.7%), yet only 169 of those (57.9%) had been officially reported stolen prior to recovery by police (Table 1). Of the 292 stolen firearms, the police could not always determine if the owner of the stolen firearm knew the thief. Forty-nine (16.8%) said they did and 33 (11.3%) said they did not. Police determined that in 88 cases the owner reported the theft to an insurance company, and in 74 cases they did not.

**Table 1.**  
**Status and source of stolen firearms recovered by the Police Firearm Tracking Unit (n-893)**

	Yes	No	Unknown/ Cannot Determine	N/A	Missing
Was the Firearm Claimed to have been Stolen?	32.7% (n=292)	21.9% (n=196)	44.3% (n=396)	0.0% (n=0)	1.0% (n=9)
For Firearms Claimed to have been Stolen (n=292)					
Was the firearm reported stolen to police before recovery?	57.9% (n=169)	40.8% (n=119)	1.0% (n=3)	0.0% (n=0)	0.3% (n=1)
Was the insurance company notified before recovery?	4.8% (n=14)	25.3% (n=74)	66.8% (n=195)	2.1% (n=6)	1.0% (n=3)
Did the owner say (s)he knew the likely thief?	16.8% (n=49)	11.3% (n=33)	70.2% (n=205)	0.7% (n=2)	1.0% (n=3)
Was the place locked when the firearm was taken?	9.2% (n=27)	11.6% (n=34)	76.0% (n=222)	2.1% (n=6)	1.0% (n=3)
For Firearms Reported Stolen to Police Before Recovery (n=169)					
Was a copy of the police report in the FTU file?	39.6% (n=67)	56.8% (n=96)	0.6% (n=1)	0.6% (n=1)	2.4% (n=4)

For most firearms (n = 551, 61.7%) the place where the owner lost possession of the firearm was unknown. Of those for which the place was known (n=157), owners reported losing possession of their firearms from the home in 86 instances (54.7%), while 27 firearms (17.2%) were reportedly lost from a vehicle, and 44 firearms (28.0%) from some other place. Almost half of the reported stolen firearms originated in the county of Allegheny. Of the 292 firearms reportedly stolen, 59 (20.2%) came from within the city of Pittsburgh, 46 (15.8%) were taken from a locality within Allegheny County but outside the Pittsburgh city limits, 41 (14.0%) were taken from another county in Pennsylvania, and 1 (0.3%) was from a different state. For the remainder (145, 49.7%), the locality from which the firearm originated was unknown or missing.

**Owners**

The police were able to identify most of the last known owners of recovered firearms (n = 691, 77.4%). Owners were mostly Caucasian (n = 432, 61.7%) though a significant number were Black (n = 245, 35.0%). Most identified owners were male (n = 569, 81.3%), with females making up only a minority of owners (n = 120, 17.1%). Importantly, the gender proportion varied based on if the firearm was reported stolen. For firearms not stolen, male ownership was 82.1%, female ownership was

13.3%, and 4.1% were unidentified owners. For firearms reported stolen prior to recovery, 79.9% were male, 16.6% female, and 3.6% were unidentified. For firearms reported stolen after recovery, 63% were male, 19.3% were female, and 17.6% were unidentified (Figure 1).

**Table 2.**  
**Demographics of firearm owners vs. perpetrators**

	Owners (n=700)	Perpetrators (n=607)
<b>Gender</b>		
Male	81.3% (n=569)	91.8% (n=557)
Female	17.1% (n=120)	5.4% (n=33)
Missing	1.6% (n=11)	2.8% (n=17)
<b>Race</b>		
White	61.7% (n=432)	13.7% (n=83)
Black	35.0% (n=245)	83.5% (n=507)
Other	1.1% (n=8)	0.7% (n=4)
Missing	2.1% (n=15)	2.1% (n=13)
<b>Age</b>		
% <18yrs	Unavailable	15.0% (n=91)
% 18-21yrs	Unavailable	22.9% (n=139)
% >21yrs	Unavailable	60.1% (n=365)
Missing	n/a	2.0% (n=12)

E-4

### *Perpetrators*

Of the 762 cases, 553 (73 percent) involved a total of 607 perpetrators. Most (n = 478, 78.7%) were carrying or linked to a firearm that did not belong to them. Eighty-six (14.2%) were owners that committed an offense while legally carrying their firearm, 10 (1.6%) were owners illegally carrying their firearm but committing no other offense, and 12 (2.0%) were owners that committed an offense while illegally carrying their firearm (Figure 2). Perpetrators were overwhelmingly male (n = 557, 91.8%) and Black (n = 507, 83.5%). Most were adults with 60.1% above age 21 (n = 365), 22.9% were between ages 18 and 21 (n = 139), and 15.0% were juveniles (n = 91). Table 2 offers a comparison of the demographics of owners versus perpetrators.

### **Discussion**

#### *Firearms Tracing*

The Pittsburgh Police Bureau has engaged in comprehensive firearms tracing since 2000, meaning that all firearms recovered are submitted for tracing, thus reducing the selection bias that might occur if the police chose which firearms to trace. While the data are still influenced by police investigative tactics, and not all traced firearms are associated with a crime, the sample of firearms recovered in 2008 ought to correlate well with the actual population of crime firearms in Pittsburgh. When comprehensive tracing began in the 1990's in a few select cities, firearms had a 50-50 shot of being successfully traced. In 1999, Cook and Braga reported only a 54% success rate nationally. This was hindered by firearms too old to be traced, serial number inaccuracies or obliterations, errors on the trace form, problems with the FFL records, and other issues.<sup>8</sup> In Pittsburgh, 59.2% of firearms recovered in 2000 could be traced to the original purchaser.<sup>14</sup> In this 2008 study, 77.4% of original owners were identified. Only demographic data for owners were released for this study, so while it was determined that firearm owners were overwhelmingly white and male, data on place of residence or purchase, or age of owner were not available.

### *Stolen Firearms*

The primary purpose of this study was to explore the characteristics of stolen firearms. Determining whether or not a firearm is stolen can be quite difficult. Part of the problem rests on the underreporting of theft by owners. As discussed previously, more than a half million firearms may be stolen annually, but in 2012 the NCIC received only 190,342 reports of lost or stolen firearms.<sup>15</sup>

Additionally, illegally diverted firearms may be reported by the owner as stolen to conceal firearms trafficking.<sup>16</sup> The determination of whether or not firearms recovered in Pittsburgh were stolen firearms depended on local police reports (in Pittsburgh or other localities) submitted by owners prior to recovery and, if the firearm was not previously reported stolen, to successful identification and communication with the last owner. Of the 893 firearms recovered by the Pittsburgh Police, 169 (18.9%) were reported stolen prior to recovery, and 123 (13.7%) were reported stolen after recovery (i.e., when the police traced the firearm, made contact with the owner, and were told that the firearm had been stolen but not previously reported). Twenty-two percent of firearms were not stolen – for instance, they may have been recovered directly from the owners or their kin (either during a crime investigation or voluntarily turned in), the owner may have lent or sold the firearm legally or illegally, or the owner may have misplaced the firearm. For 396 firearms (44.3%), the police were unable to determine if the firearm had been stolen.

This was primarily because 22.6% of owners could not be identified, and of those who were identified, 43.6% did not respond to attempts to contact them. For the firearms for which no owner could be contacted, stolen status could be assigned based solely on prior police reports or determination that the possessor of the firearm at time of recovery was definitely not the lawful owner (e.g., via confession). This is also why the police could not determine where the owner lost possession for the majority of firearms (61.7%). However, when this determination could be made, most of the firearms (72.0%) were reportedly lost from the home or from a vehicle, likely through theft or burglary, although some of these firearms may have been illegally given or sold to another person then reported missing from one of these locations. This contrasts

with the number of ATF investigations involving firearms stolen from a residence or vehicle. Over a four year period spanning from January 1, 1999, to December 31, 2002, the ATF conducted 2,608 firearm trafficking investigations, of which 337 (13.0%) involved firearms taken from a home or vehicle, representing only 6.6% of firearms investigated in that time period due to the relatively low number of firearms per investigation for this type of trafficking (mean 23.0 versus 48.6 for all other types of trafficking).<sup>10</sup>

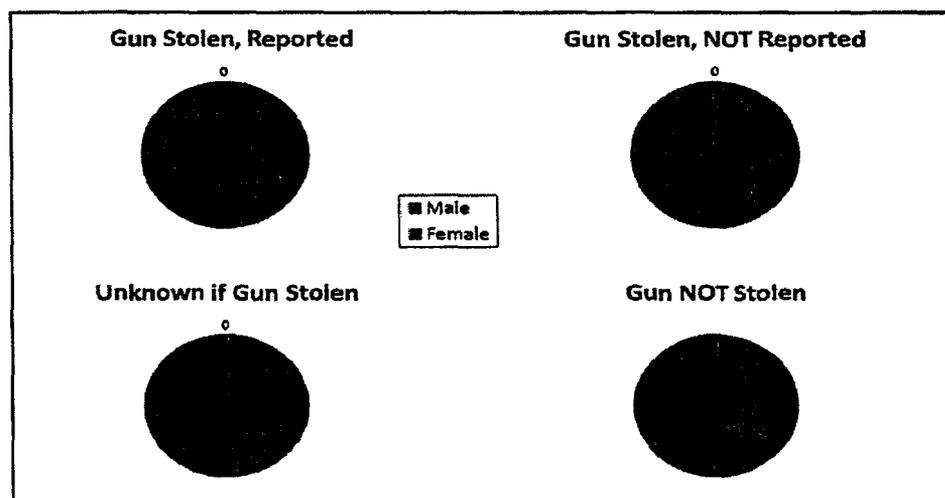
### Trafficking

Firearms that are recovered by suspicious means from a non-owner without having been previously reported stolen may be indications of trafficking. Owners who have illegally transferred their firearm may be more likely to resist contact attempts or claim the firearm was stolen after the police contact them. Of particular concern are straw purchasers – those who buy a firearm for someone who otherwise could not legally obtain one. Bradford, Gundlach, and Wilkie concluded that most trafficked firearms are initially sold by a retail FFL dealer, and one important pathway via which firearms are trafficked are straw purchases.<sup>17</sup> There are certainly FFL dealers willing to sell firearms to a buyer they know is making the purchase for another person. A 2010 survey of dealers in California found that 20% would agree over the phone to sell to someone who stated that the firearm was intended for someone else.<sup>18</sup> Another telephone survey conducted in 2003

found that more than 50% of dealers in large cities throughout the U.S. would willingly participate in a straw purchase.<sup>19</sup> In a study of ATF investigations from January 1999 to December 2002, Braga et al. found that 41.3% of investigations involved straw purchasing.<sup>18</sup> In an earlier study of ATF cases involving youth under age 25, Braga and Kennedy found that 50.9% of investigations involved straw purchasing.<sup>8</sup>

Trace reports and police investigations are rarely able to tell if a firearm has been trafficked, especially if the owner claims the firearm was stolen; however, evidence of straw purchasing may be available. Wintemute et al. examined the relationship between purchaser and possessor for firearms recovered from persons under 25 years of age and traced in California in 1999, finding that the majority of the firearms for which a purchaser was identified had been purchased by someone over 24 years old – clearly a different person than the possessor at time of recovery.<sup>12</sup> In a study of firearms recovered by the Milwaukee police, only 9% were confiscated from the original purchaser.<sup>20</sup> An examination of firearms sold and subsequently recovered in Baltimore found that firearms were more likely to be recovered if they were originally bought by someone who was young, black, and female.<sup>21</sup> A study of FFLs in California found that the number of traces leading to an FFL dealer for firearms involved in violent and firearm related crimes was related to the gender of the purchaser; as the number of traces increased, so did the percent of

Figure 1: Comparison of gender composition by firearm status.



female purchasers. The authors explained that this phenomenon may be due to girlfriends and spouses making straw purchasing for their male partners.<sup>22</sup> Similarly, a study of hand firearms purchased from FFLs in California in 1996 found that the odds of a firearm being traced was significantly elevated if the purchaser was young and female.<sup>23</sup>

*Detailed Firearm Surveillance*

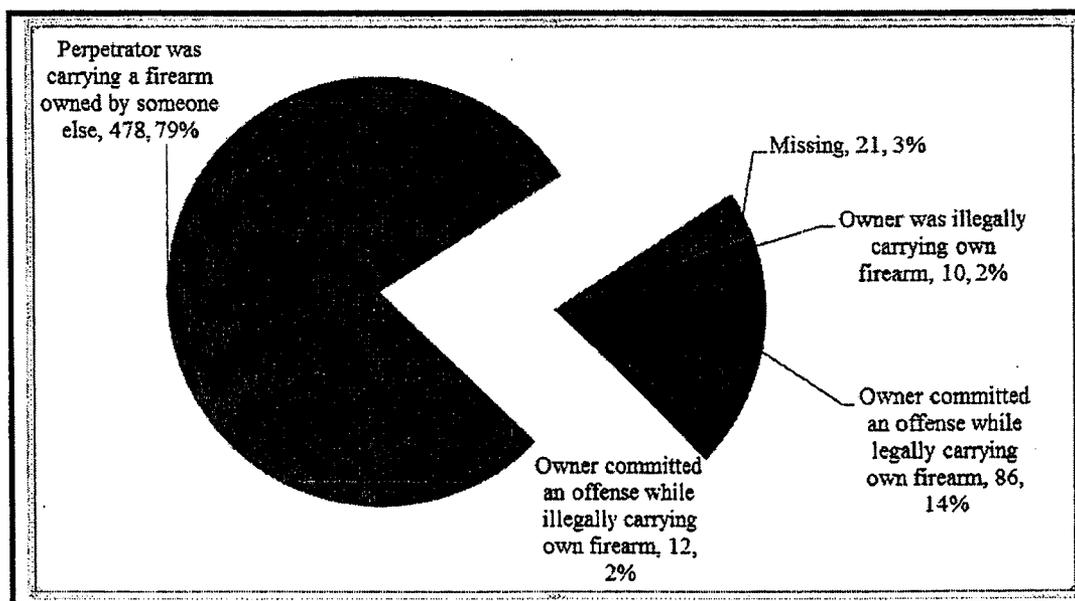
To examine the Pittsburgh data for similar evidence, the gender proportion was compared across four categories of firearms: not stolen, stolen and reported prior to recovery, stolen but not reported prior to recovery, and firearms for which stolen status could not be determined. The hypothesis was that the percent female would be higher for firearm stolen but not reported prior to recovery and firearm with undermined stolen status, since these categories would be more susceptible to trafficking. The results, which support the hypothesis, are summarized in Figure 1. Additional evidence that many of the firearms were stolen or straw purchased comes from comparison of the owners versus perpetrators, most of whom were not

the owners of the firearms with which they were associated. Both groups were mostly males, but the proportion of male to female was higher for perpetrators than for owners. Additionally, most owners were white while most perpetrators were black. However, these comparisons are confounded by the fact that black males are more likely to be arrested than any other racial group in Pittsburgh.<sup>24</sup>

*Origin.*

For another trafficking indicator – where the firearms originated – it was difficult to obtain and interpret the available data. Dealer information was not available, nor was owner residence or place of purchase. The only information came from firearms determined to be stolen, and the data were missing for half of the stolen firearms. For the 147 firearms with data on the police locality in which they were stolen, 40.1% came from within Pittsburgh, 71.4% came from with Allegheny County where Pittsburgh resides, and only one (0.7%) came from outside of Pennsylvania. Caution should be taken in generalizing these conclusions to stolen firearms with unknown localities or firearms with undermined stolen status. It may be that firearms

**Figure 2.**  
**Ownership of firearm by perpetrator, Pittsburgh, 2008.**



from out of the state were less likely to be successfully traced to owners, or that it was more difficult for the police to contact owners from other states to obtain this information. Generally, the literature suggests wide geographic variability in the number of recovered firearms originating from out of state.<sup>25</sup> Analysis of ATF investigations from July 1996 to December 1999 found that 73.8% of investigations involved intrastate trafficking, 46.6% involved interstate trafficking, and 6.2% involved international trafficking.<sup>7</sup> Interstate flow of firearms seems heavily influenced by state policies, with movement primarily from "weak law" states to "strong law" states.<sup>8,11</sup>

### Conclusion

Given the major public health issue of firearm injuries and death, it is important to understand the "pathway" from firearm source to violent crime outcomes. The Pittsburgh Police engages in comprehensive firearms tracing, but the data available to the police and to the public about recovered firearms are often limited. In most cases the original owner and one or more perpetrators are identified, but it is still difficult to determine definitively if many of the recovered firearms have been stolen or trafficked. Given that 79% of perpetrators are connected to firearms for which they are not the legal owner, it is highly likely that a significant amount of theft or trafficking is the source of perpetrators' firearms. This analysis provides some evidence of straw purchasing and little evidence of interstate trafficking. Both raise the issue of increasing public knowledge regarding safe storage of firearms and injury prevention as a method of reducing access to firearms where feasible.

Many firearm injuries occur among young people, accounting for significant morbidity, mortality, and potential years of life lost. These data suggest that many perpetrators of firearm violence, especially homicides, acquire their firearms through theft or trafficking. This study offers a timely opportunity to encourage ongoing, systematic collaboration between public health and law enforcement with the purpose of describing, understanding and reducing violent crime (particularly violent death) as well as reducing the difficulty in data collection for firearms. Future studies should be conducted to assess the pathway in which firearms travel from legal ownership to illegal ownership, as well as to investigate ways of

incorporating or linking this type of data into currently existing public health surveillance around violence.

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## OFFICE RECEPTIONIST, CLERK

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**To:** Pam Loginsky  
**Cc:** Michael Young; Shelley Williams; Branden Platter; Karl Sloan; Ronald Hammett  
**Subject:** RE: State v. Eric Daniel Cruz, COA No. 33312-4-III and S. Ct. No. 93732-0

Received 11-7-2016

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**From:** Pam Loginsky [mailto:Pamloginsky@waprosecutors.org]

**Sent:** Monday, November 07, 2016 11:06 AM

**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>

**Cc:** Michael Young <michaely@atg.wa.gov>; Shelley Williams <ShelleyW1@atg.wa.gov>; Branden Platter <bplatter@co.okanogan.wa.us>; Karl Sloan <ksloan@co.okanogan.wa.us>; Ronald Hammett <ron@hammettllaw.com>

**Subject:** Fwd: State v. Eric Daniel Cruz, COA No. 33312-4-III and S. Ct. No. 93732-0

Dear Clerk:

As indicated, I mailed the attached petition for review to Division Three on November 2, 2016. I sent the petition to Division Three as RAP 13.4(a) indicates the petition is to filed with the Court of Appeals.

I am serving this Court with a copy, as I am uncertain whether this Court's granting of my motion for an extension of time to file the petition for review also modified RAP 13.4(a).

Please let me know if you should experience any difficulties in opening either of the attached documents.

Sincerely,

Pam Loginsky  
Special Deputy Prosecuting Attorney

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>>> Pam Loginsky 11/2/2016 12:04 PM >>>  
Dear Counsel:

Attached is the State's petition for review and the transmittal letter that accompanied the document to Division Three.

A hard copy of both documents will only be mailed today to Mr. Cruz's counsel, as all other counsel have agreed to accept service by e-mail.

Please let me know if you should experience any difficulties in opening either document.

Sincerely,

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Special Deputy Prosecuting Attorney

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