No. 16-___

IN THE

Supreme Court of the United States

SHAQUILLE M. ROBINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Terry v. Ohio*, 392 U.S. 1 (1968), officers who lack probable cause or a warrant may search a person they have lawfully stopped only if they have specific and articulable reason to believe that person is "armed and presently dangerous." *Id.* at 30. This case presents the following question:

In a state that permits residents legally to carry firearms while in public, whether, or under what circumstances, an officer's belief that a person is armed allows the officer to infer for purposes of a *Terry* search that the person is "presently dangerous."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shaquille M. Robinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit sitting en banc (Pet. App. 1a) is reported at 846 F.3d 694 (4th Cir. 2017). The panel opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 49a) is reported at 814 F. 3d 201 (4th Cir. 2016). The opinion of the District Court (Pet. App. 89a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 23, 2017. Pet. App. 1a. On April 18, 2017, the Chief Justice extended the time to file this petition for a writ of certiorari to and including June 22, 2017. *See* No. 16A969. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, in relevant part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated."

STATEMENT OF THE CASE

The Fourth Amendment protects "the right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court established a narrow exception to the general Fourth Amendment prohibition on conducting a search without either a warrant or probable cause. *Terry* allows officers to stop an individual without probable cause when they have reasonable suspicion that the individual has committed or is about to commit a crime. *Id.* at 22-23. As is relevant here, *Terry* also permits officers, after a lawful stop, to conduct a limited search when officers have a "specific and articulable" reason to believe that the person they have stopped is "armed and presently dangerous to the officer or to others." *Id.* at 21, 30.

In this case, the Fourth Circuit held that the test for conducting a search in conjunction with a lawful *Terry* stop requires only that the officer "reasonably suspect that the person is armed." Pet. App. 13a. This holding deepens a split among federal and state courts over whether, in states that allow residents to carry firearms, officers may conduct a *Terry* search of anyone they believe to be armed, without a particularized basis for believing the person poses a present danger to the officers' safety.

A. Factual background

Ranson, West Virginia, is a small town of approximately 4500 people. On an afternoon in March 2014, the Ranson Police Department received an anonymous telephone call. The caller stated that he had seen "a black male" with a firearm in the parking

lot of one of the town's two 7-Eleven stores. Pet. App. 4a. The caller reported that the man was a passenger in a car being driven by a white woman that had just left the parking lot. *Id.*

The information provided by the caller "was, in fact, not reporting a crime or any criminal activity," Pet. App. 128a, because it was legal in West Virginia to openly carry a firearm without a license and to carry a concealed firearm with a license, which was issued to any applicant who met certain statutory criteria. W. Va. Code § 61-7-4 (2014) (amended 2016); W. Va. Const. art. III, § 22. (Since 2016, West Virginia has allowed concealed carry without a license for people age twenty-one or older. W. Va. Code § 61-7-7(c)).

Nevertheless, Ranson Police Officer Kendall Hudson was dispatched in a patrol vehicle, and within a few minutes spotted a car that matched the tipster's description. Pet. App. 5a. Hudson noticed that the driver was not wearing a seatbelt and decided to use that as a basis to stop the car. *Id.* 101a. When he turned on his patrol lights, the car immediately pulled over. C.A. App. 75. Holding his service revolver at his side, Hudson approached the driver's side of the car and asked the driver for her license, registration, and insurance information. *Id.* 66.

While Hudson was still engaged with the driver, Ranson Police Captain Robbie Roberts arrived at the scene, opened the passenger-side car door, and asked petitioner to step out. As petitioner stepped out of the vehicle—Hudson testified that petitioner was cooperative throughout the encounter, Pet. App. 121a—Roberts asked whether petitioner was carrying a weapon. C.A. App. 88. Without waiting for an answer, Roberts "just started" to search petitioner,

finding a gun "protruding" from petitioner's pants pocket. *Id.* 90. Hudson promptly handcuffed petitioner and seated him on the sidewalk. *Id.* 90-91. "Following the frisk and after [petitioner] was handcuffed, Captain Roberts recognized [him] as Mr. Robinson and connected him to being a convicted felon." Pet. App. 103a. Petitioner was then formally arrested. *Id.* 6a. Officer Hudson ultimately released the driver without a citation, warning her "[j]ust make sure you wear your seat belt" in the future. C.A. App. 70.

B. Procedural history

1. The United States indicted petitioner for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Pet. App. 6a.

Petitioner moved to suppress the firearm found during the search. He argued that the search violated the Fourth Amendment because the officer lacked an articulable basis to believe that petitioner was dangerous.

The magistrate judge who conducted the suppression hearing recommended granting petitioner's motion. Pet. App. 131a. He found that the initial traffic stop was valid because "Officer Hudson had probable cause to believe a seat belt violation occurred." *Id.* 107a.[1] Nonetheless, the *Terry* search

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[1] *See* W. Va. Code § 17C-15-49(a) ("A person may not operate a passenger vehicle on a public street or highway of this state unless the person . . . and any person in the front seat of the passenger vehicle is restrained by a safety belt meeting applicable federal motor vehicle safety standards."). The law provides that "[a]ny person who violates the provisions of this section shall be fined $25. No court costs or other fees may be assessed for a violation of this section." *Id.* § 17C-15-49(c).

was unreasonable. The anonymous tip that petitioner had put a gun in his pocket was "insufficient to support reasonable suspicion of criminal activity," *id.* 126a, because under West Virginia law, "residents may conceal a loaded firearm with the issuance of a license," *id.* 127a. The tip "provided no information indicating that the person observed in the parking lot was engaging in an illegal activity, making threats, brandishing the weapon or conducting himself in any manner that others would perceive as dangerous." *Id.* 128a. Furthermore, "the officers testified to no objective and particularized facts demonstrating that [petitioner] was dangerous at the time of the traffic stop." *Id.* The magistrate judge rejected the Government's argument that a "weird look" petitioner had given Roberts in response to his question whether petitioner was armed could "transform his silence into dangerousness." *Id.* 129a. Nor could the fact that the stop occurred in a high-crime neighborhood "justify the officer's suspicion that [petitioner] was dangerous." *Id.* 130a.[2]

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[2] The Government claimed in its pre-hearing brief that the officers were entitled to search petitioner because the stop took place in a "high crime area" and not "a nice neighborhood." C.A. App. 100-01. The government witnesses evinced some confusion on this point: After initially suggesting that the 7-Eleven where the anonymous caller claimed to have seen petitioner was a "particular" high crime area within Ranson, one officer testified that "all" of Jefferson County was considered "a high crime area." *Id.* 38.

This contention, unsupported with "any statistics, reports, [or] crime data," C.A. App. 40a, is inaccurate. Jefferson County is one of the safest counties in West Virginia. *See* Dan Keating & Denise Liu, *Here's What Crime Rates by County Actually Look*

Although it accepted the magistrate judge's statement of the facts, the district court rejected the magistrate's recommendation, and it denied the motion to suppress. Pet. App. 98a. The court did not directly address the question whether the police had reasonable suspicion that petitioner was engaged in criminal activity; instead, it focused its discussion on whether the tip that petitioner was carrying a gun was reliable. *See id.* 93a-96a. The court pointed to "[t]he fact that the officers found and stopped the vehicle in the same high-crime area as the 7-Eleven" and that petitioner did not immediately answer Captain Roberts' question whether he was armed. *Id.* 96a. These circumstances provided a basis "to believe that the officer's safety or that of others was in danger" regardless of the "possibility" that petitioner "could have lawfully possessed the firearm." *Id.*

Petitioner entered a conditional guilty plea, reserving his right to appeal denial of the motion to suppress. Pet. App. 7a. He was sentenced to thirty-seven months in prison and three years of supervised release.

2. A panel of the Fourth Circuit reversed. The majority held that "in states like West Virginia, 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

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Like, Wash. Post (Nov. 16, 2016), https://tinyurl.com/ybcbhbbm (using crime data from 2014). And the crime rate in Ranson itself is "55.36% lower than the national average." *See* City of Ranson, West Virginia, Fiscal Year 2016-17 Budget at 31, http://www.cityofransonwv.net/Archive/ViewFile/Item/100 (last visited June 19, 2017).

person is dangerous for *Terry* purposes." Pet. App. 61a. Given "that the only 'crime' of which the police reasonably suspected Robinson was a seatbelt violation," *id.* 66a n.5, there was no basis for inferring danger to the police from the report that he had a gun. Nor could the totality of the circumstances, including the look petitioner gave Captain Roberts and petitioner's presence in a high-crime area, justify the search. *Id.* 66a.

Judge Niemeyer dissented, arguing that "the danger posed by an individual's possession of a firearm" categorically authorizes police to search that person. Pet. App. 72a.

3. The Fourth Circuit granted the Government's petition for rehearing en banc, and a sharply divided court affirmed the district court.

Judge Niemeyer's opinion for the en banc majority announced a rule of per se Fourth Amendment reasonableness: Whenever an "officer reasonably suspects that the person he has stopped is armed, the officer is 'warranted in the belief that his safety . . . [is] in danger,' thus justifying a *Terry* [search]." Pet. App. 11a (quoting *Terry*, 392 U.S. at 27) (alterations in original). In support of that rule, the majority seized on language from *Terry* and *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), where this Court had described the individuals being searched as "armed *and thus*" dangerous. Pet. App. 13a (emphasis added by the Fourth Circuit) (quoting the same phrase from both *Terry*, 392 U.S. at 28, and *Mimms*, 434 U.S. at 112). According to the en banc majority, "[t]he use of 'and thus' recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed." Pet. App. 13a. In light of that conclusion,

"[t]he presumptive lawfulness of an individual's gun possession in a particular State does next to nothing" to limit an officer's authority to search. *Id.* 14a.

Finally, although it was "not necessary to the conclusion in this case," Pet. App. 16a, the en banc majority thought that petitioner's demeanor—namely, that he had given Captain Roberts a "weird," or "'oh, crap'" look, *id.* 6a, 16a—and prior presence in a parking lot known for drug activity reinforced the reasonable suspicion, "created simply" by the belief that petitioner was armed, *id.* 13a, that petitioner was also dangerous.

Judge Wynn concurred in the judgment. He "disagree[d] with the majority opinion's contention that 'armed and dangerous' is a unitary concept," Pet. App. 19a, pointing out that many items individuals regularly have with them, ranging from forks to wine bottles, can be used as weapons, *id.* 20a (citing cases that so held). The *Terry* exception would swallow up the rule if police could search all individuals believed to be carrying these items without particularized reason to believe the individuals were dangerous. Accordingly, Judge Wynn proposed instead that officers have categorical authority to search without other factors showing a suspect's dangerousness "*only* when law enforcement officers reasonably suspect that a detainee has a *firearm* or other inherently dangerous weapon." *Id.* 22a (emphasis in original).

In a dissenting opinion written by Judge Harris, four judges rejected the majority's "bright-line rule." Pet. App. 28a. Judge Harris reiterated that in states like West Virginia where public possession of firearms is presumptively legal, there is no reason for assuming that a person carrying a gun during a stop "is anything

but a law-abiding citizen who poses no threat to the authorities." *Id.* By automatically equating "armed" with "dangerous," she explained, the majority's rule would subject lawfully armed citizens to an array of "special burdens." *Id.* 37a. Citizens whom police believe carry a firearm could be subjected to searches any time they are lawfully stopped, no matter how minor the infraction. *Id.* 37a.

The dissent saw nothing in "the rest of the circumstances surrounding this otherwise unremarkable traffic stop"—namely, the neighborhood where it occurred or petitioner's demeanor—that could "add appreciably to the reasonable suspicion calculus" regarding whether petitioner was dangerous to the officers. Pet. App. 48a. Thus, the dissenters would have suppressed the gun found during the search.

The dissent also warned that the majority's categorical rule regarding *Terry* searches "gives rise to 'the potential for intentional or unintentional discrimination based on neighborhood, class, race, or ethnicity.'" Pet. App. 38a (quoting *United States v. Williams*, 731 F.3d 678, 694 (7th Cir. 2013) (Hamilton, J., concurring in part and concurring in the judgment)). By leaving to "unbridled police discretion the decision as to *which* legally armed citizens will be targeted" for searches, *id.* 29a (emphasis in original), the majority's rule implicated "concerns about the abuse of police discretion that are fundamental to the Fourth Amendment." *Id.* 38a. Like Judge Wynn, *see id.* 25a, the dissenters recognized that the majority's categorical rule might result in "the price for exercising the right to bear arms [being] the forfeiture of certain Fourth Amendment protections." *Id.* 29a.

But they took the position that "unless and until the Supreme Court takes us there," they could not endorse that rule. *Id.*

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's en banc decision illustrates fault lines that have played out in decisions across the country. Federal courts of appeals and state courts of last resort are divided over whether, or under what circumstances, officers in states that allow people to carry guns in public are permitted to conduct a *Terry* search whenever they have reason to believe the person they have stopped is armed.

The answer to this question affects millions of Americans. Governments also need to know what the Fourth Amendment requires in order to implement their policy objectives regarding the carrying of firearms.

Furthermore, the Fourth Circuit's decision is wrong. In deciding that officers can search any individual they believe to be carrying a firearm, the Fourth Circuit misread this Court's decisions in *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny. Those decisions require police to have "specific and articulable" facts suggesting an individual's dangerousness before they can inflict an "invasion of [his] personal security." *Id.* at 21, 23. In the growing number of jurisdictions like West Virginia that freely permit the carrying of firearms, an individual's possession of a gun is not itself a sufficient basis for concluding he is dangerous. Furthermore, the few additional facts to which the Fourth Circuit pointed after announcing its categorical rule cannot justify the search in this case.

I. Federal and state courts are sharply divided over the question presented.

1. Four courts—including the Fourth Circuit here—have concluded that a reasonable belief that a weapon is present is enough by itself to make a person "presently dangerous" and thus subject to search under *Terry v. Ohio*, 392 U.S. 1, 24 (1968).

The Ninth Circuit has held that "an officer's reasonable suspicion" that an individual possesses a gun "is all that is required for a protective search under *Terry*." *United States v. Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007), *cert. denied*, 552 U.S. 1313 (2008). Like the en banc court here, the Ninth Circuit posited that officers may search "regardless of whether carrying a concealed weapon violates any applicable state law." *Id.*

The Tenth Circuit has similarly held that an officer's knowledge that an individual is carrying a handgun is "enough to justify" a search, without regard whether state law permits concealed carry. *United States v. Rodriguez,* 739 F.3d 481, 491 (10th Cir. 2013).

Finally, the Supreme Court of Illinois has held that an officer's "reasonable suspicion that a gun [is] present" justifies a *Terry* search because any individual with a gun is "potentially dangerous." *People v. Colyar*, 996 N.E.2d 575, 587 (Ill. 2013); the danger is the same regardless of whether possession of the weapon is legal, *id.*[3]

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[3] The Eleventh Circuit has adopted a similar position. In Florida, it is unclear whether carrying a concealed weapon can

2. Two federal courts of appeals and three state supreme courts have reached the contrary conclusion. These courts have rejected the proposition that an officer's belief that an individual is armed categorically justifies a *Terry* search in jurisdictions that allow people to carry guns in public.

In *Northrup v. City of Toledo Police Department*, 785 F.3d 1128 (6th Cir. 2015), Judge Sutton's opinion for the court explained that in a state that permits public carrying of firearms, a person's being armed does not make that person "armed *and dangerous*." *Id.* at 1132 (emphasis supplied by the Sixth Circuit) (quoting *Sibron v. New York*, 392 U.S. 40, 64 (1968)). In such a jurisdiction, a police officer who encounters an individual must "ascertain[]" some particularized "evidence of criminality or dangerousness" before he may "disarm a law-abiding citizen." *Northrup*, 785 F.3d at 1133.

Similarly, the Seventh Circuit has concluded that the *Terry* exception to the probable-cause requirement allows searches only if officers "have an articulable suspicion that the person is *both* armed *and* a danger

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justify a *Terry* stop and search, given Florida's law permitting concealed weapons if the carrier has a permit. *Compare State v. Burgos*, 994 So.2d 1212, 1213-14 (Fla. Dist. Ct. App. 2008) (finding that police nonetheless have reasonable suspicion of criminal activity based on the presence of a weapon alone), *with Regalado v. State,* 25 So.3d 600, 601 (Fla. Dist. Ct. App. 2009) (finding that merely knowing an individual has a gun provides no basis for a stop or search). In light of this uncertainty, the Eleventh Circuit has held that a reliable tip that an individual is carrying a gun is enough to permit "a *Terry* stop and search." *United States v. Montague*, 437 F. App'x 833, 835-36 (11th Cir. 2011), *cert. denied*, 565 U.S. 1272 (2012).

to the safety of officers or others." *United States v. Leo*, 792 F.3d 742, 748 (7th Cir. 2015) (emphasis added). The court explained that given "the right to carry a gun in public," courts must resist the suggestion that the possible presence of a weapon inevitably poses a threat justifying a search. *Id.* at 752; *see also United States v. Williams*, 731 F.3d 678, 686–87 (7th Cir. 2013) (holding that an officer's decision to conduct a *Terry* search was not justified by a 911 call reporting weapons in a high-crime area and an individual's avoidance of eye contact with the police).

The highest courts of Arizona, Idaho, and New Mexico agree. In *State v. Serna*, 331 P.3d 405 (Ariz. 2014), the Arizona Supreme Court declared that in a state that "freely permits citizens to carry weapons," "the mere presence of a gun cannot provide reasonable and articulable suspicion that the gun carrier is presently dangerous," *id.* at 410. A contrary rule, the court warned, "would potentially subject countless law-abiding persons to patdowns solely for exercising their right to carry a firearm." *Id.*

Similarly, in *State v. Bishop*, 203 P.3d 1203 (Idaho 2009), the Idaho Supreme Court held that, given Idaho's law authorizing people to carry concealed firearms, "weapon possession, in and of itself, does not necessarily mean that a person poses a risk of danger" sufficient to justify a search. *Id.* at 1218; *see also id.* at 1219 n.13. And given the prevalence of legal firearms among the state's population, "[i]f an officer's bare assertion that a suspect 'could possibly' be carrying a weapon was enough to establish that a person posed a risk of danger, officers could frisk any person with whom they come into contact"—a patently unconstitutional result. *Id.*; *see also State v. Henage*,

152 P.3d 16, 22 (Idaho 2007) ("A person can be armed without posing a risk of danger.")

Finally, the New Mexico Supreme Court has held that "[t]o justify a frisk for weapons, an officer must have a sufficient degree of articulable suspicion that the person being frisked is both armed *and* presently dangerous. Any indication in previous cases that an officer need only suspect that a party is either armed *or* dangerous is expressly disavowed." *State v. Vandenberg*, 81 P.3d 19, 25 (N.M. 2003) (emphases in original).

3. The conflict among the lower courts is particularly striking because federal and state courts reviewing searches in the same jurisdiction disagree on whether evidence is admissible. Consider an individual subjected to a search in Arizona or Idaho based solely on an officer's belief that the individual is armed. If the search turns up evidence, the individual's motion to suppress the evidence will succeed if he is prosecuted in state court. *See Serna*, *supra* (Arizona); *Bishop*, *supra* (Idaho). But the same evidence will be admissible if local police turn the case over to the federal government to prosecute. *See Orman*, *supra* (Ninth Circuit). Indeed, the Arizona Supreme Court expressly declared its "disagree[ment] with the Ninth Circuit's determination that mere knowledge or suspicion that a person is carrying a firearm satisfies the second prong of *Terry*." *Serna*, 331 P.3d at 410. The same conflict exists in the Tenth Circuit with respect to cases from New Mexico. *Compare Vandenberg*, *supra* (forbidding such searches), *with Rodriguez*, *supra* (permitting them). Conversely, in Illinois, the state courts will admit evidence that the Seventh Circuit would suppress.

Compare Colyar, *supra*, *with Leo*, *supra*. The conflict thus incentivizes the sort of prosecutorial forum shopping that this Court long ago condemned. *Cf. Elkins v. United States*, 364 U.S. 206, 221-22 (1960).

II. The question presented is important.

1. According to the National Rifle Association's Institute for Legislative Action, twelve states currently allow individuals to carry concealed firearms for lawful purposes without a permit. NRA-ILA, *Gun Right to Carry Laws*, https://www.nraila.org/gun-laws (last visited June 16, 2017). Twenty-nine additional states allow residents to carry concealed firearms in public with permits that the government must issue as a matter of right whenever specified prerequisites are met. *Id.*; *see also* Br. of Amici Curiae Western States Sheriffs' Association *et al.* in Support of Petitioners at 8-9, *Peruta v. California*, No. 16-894 (U.S. Feb. 16, 2017) (collecting state laws).

As of 2015, almost 13 million Americans had permits to carry concealed handguns. Christopher Ingraham, *After San Bernardino, Everyone Wants To Be a 'Good Guy With a Gun'*, Wash. Post (Dec. 10, 2015), http://tinyurl.com/l6n9d8f. That number has been rising rapidly—almost tripling from 4.6 million in 2007. *Id.* (And of course the total number of persons who legally can carry firearms in public is much higher considering the number of states that require no permit in the first place.)

Depending on whether carrying a firearm is, by itself, sufficient to justify a *Terry* search, each of those individuals may be opening himself or herself up to a physical search by the police any time he or she engages in any of the myriad aspects of daily life that,

because they may support a police officer's belief that an individual has violated some ordinance or another, justify a police stop.

As this Court has recognized, searches of a person's body can be "humiliating." *Terry v. Ohio*, 392 U.S. 1, 25 (1968). The millions of Americans who have the right under state law to carry a concealed weapon need to know whether exercising that right means they risk having officers "feel with sensitive fingers every portion of [their] bod[ies]" including their "arms and armpits, waistline and back, [and] the groin," *id.* at 17 n.13 (internal quotation marks omitted), the next time a car in which they are a passenger is pulled over.

Indeed, as the Idaho Supreme Court pointed out, the question presented is important not just to individuals who themselves are lawfully carrying firearms, but to anyone who resides in a jurisdiction where firearms are commonly and lawfully carried because the categorical rule creates a basis for an officer to search them as well. *State v. Bishop*, 203 P.3d 1203, 1219 n.13 (Idaho 2009).

2. State and local law enforcement also have a strong interest in having this question settled. "[A]s public possession and display of firearms become lawful under more circumstances," *United States v. Williams*, 731 F.3d 678, 691 (7th Cir. 2013) (Hamilton, J., concurring in part and concurring in the judgment), police officers must know when they can search persons whom they believe to have firearms.

3. The question presented is important as well to state legislatures and city councils enacting firearm legislation. If police officers may constitutionally search any lawfully stopped person they believe to be

armed, some jurisdictions may choose to respond to the potential invasion of privacy by imposing restrictions on police searches that go beyond those imposed by the Fourth Amendment itself.

Conversely, if this Court rejects the categorical rule that police can search individuals based solely on the belief that the individuals are armed, some jurisdictions may decide to enact duty-to-inform laws that require gun-carrying residents to inform police officers they are armed. *See* Ariz. Rev. Stat. Ann. § 13-3112(A), (C). Other jurisdictions might require residents to disarm when stopped by police.

States that have already enacted duty-to-inform laws have a particular interest in knowing the answer to the question presented. If mere possession of a gun justifies a search, then a resident's compliance with the duty-to-inform law will automatically subject him to a search at the officer's discretion. Under those circumstances, jurisdictions that have enacted such laws may decide to revise them to avoid the unintended consequence of subjecting lawful gun owners to frequent searches.

And states that are considering liberalizing laws on carrying firearms would benefit from knowing the impact those laws would have on individuals' Fourth Amendment rights and on officers' concomitant ability to search individuals with guns.

III. This case presents an ideal vehicle for resolving the conflict.

1. This case is free from some of the complicating factors that might hinder this Court's reaching the question presented in other cases where it arises. As an initial matter, the question presented arrives

before this Court on direct review after having been briefed by both parties and squarely addressed by each court below.

Moreover, in many cases involving evidence found during *Terry* searches, both the legality of the initial stop *and* the legality of the search are contested, complicating the inquiry. Here, by contrast, petitioner acknowledges that the police "had the right to stop the vehicle in which he was a passenger after observing a traffic violation." Pet. App. 7a. Nor does petitioner ask this Court to disturb the conclusion below that the officers had reason to believe he was armed. *See id.* 8a. There is thus no barrier to this Court addressing the question whether, "simply because" the officers had reason to believe petitioner was "armed," *id.* 13a, "the officers could reasonably have suspected that he was dangerous" and thus could search him, *id.* 8a.

2. This case offers a typical example of the context in which the question presented arises. Cases on both sides of the split arise from tips about an individual carrying a gun. *See* Pet. App. 4a; *United States v. Orman*, 486 F.3d 1170, 1171-72 (9th Cir. 2007); *United States v. Williams*, 731 F.3d 678, 680 (7th Cir. 2013). In addition, cases on both sides of the split have involved traffic stops. *See* Pet. App. 5a; *State v. Henage*, 152 P.3d 16, 18 (Idaho 2007); *State v. Vandenberg*, 81 P.3d 19, 22 (N.M. 2003).

Moreover, in cases on both sides of the split, courts have considered the question presented while confronted with arguments by the government pointing to minor circumstances beyond gun possession. In *United States v. Rodriguez*, 739 F.3d 481 (10th Cir. 2013), for example, the Government pointed to the following: a 911 call reporting

employees of a convenience store showing handguns to each other and "the fact that the convenience store was in a high-crime area." Appellee's Answer Br. at 6, *United States v. Rodriguez*, 739 F.3d 481 (10th Cir. 2013) (No. 12-2203). In *Williams*, the Seventh Circuit held that neither "alone [n]or together" could the following facts justify the search: that there was a 911 call reporting weapons, that the defendant avoided eye contact with the officers, and "that this all occurred in a high crime area." 731 F.3d at 686-87. Similarly, in *Henage*, the Idaho Supreme Court held that the defendant's possession of a knife and his "continued nervous behavior" could not justify the search. 152 P.3d at 23.

It makes sense to address the question presented in the context of such additional circumstances because the government rarely defends a *Terry* search based solely on officers' beliefs about the subject's possession of a gun. To the contrary, prosecutors will virtually always point to an extra, relatively minor fact or two. Therefore, issuing a decision in a case such as this—where belief that the person was armed was the driving force behind the search but the government also offered a couple of other supposedly relevant surrounding circumstances—will allow this Court to offer the genuinely meaningful guidance necessary in the real world of litigation.

3. Finally, the legality of the *Terry* search here is outcome determinative. If the officers lacked a sufficient basis to believe that petitioner posed a present danger to them, then the search violated the Fourth Amendment and the district court should have granted petitioner's motion to suppress. At that point, the charges against him—based solely on his

possessing the gun found during the search—would almost certainly have to be dismissed.

IV. The Fourth Circuit's decision is incorrect.

The Fourth Circuit's holding permits police to search any individual they lawfully stop if they have reason to believe the individual is armed, regardless of the basis for the stop and regardless of whether they have any particularized reason to believe the individual poses a present danger. Contrary to the Fourth Circuit's holding, the Fourth Amendment does not permit police officers in jurisdictions that freely permit public carrying of firearms to search persons solely because they reasonably suspect that those persons are carrying a firearm. Nor can they do so because those persons happen to be in a "high-crime" neighborhood (or give the officer a funny look).

1. The Fourth Circuit's categorical rule misreads this Court's precedents. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court held that when an officer lacks probable cause to arrest a person he has legally stopped, the officer may nonetheless conduct a limited search of that person only if the officer has reason to believe the person is "armed and presently dangerous to the officer or to others." *Id.* at 24; *see id.* at 30. The Court required lower courts to "focus[] the inquiry squarely on the dangers and demands of the particular situation," *id.* at 18 n.15, and directed that "each case of this sort" be "decided on its own facts," *id.* at 30. The Fourth Circuit's categorical rule ignores that admonition.

To reach its conclusion, the Fourth Circuit relied on short phrases in two of this Court's cases for the proposition that every person who carries a gun—that

is, who is "armed"—is automatically "dangerous" enough to forfeit the Fourth Amendment right not to be searched absent a warrant or probable cause. It posited that in both *Terry* and *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), this Court "deliberately linked 'armed' and 'dangerous,' recognizing that . . . the person stopped 'was armed and thus' dangerous." Pet. App. 13a (citations omitted).

The Fourth Circuit has ripped those words out of context, ignoring the features of both cases that rendered the defendants' possession of firearms a present danger. In *Terry*, the officer had a reasonable basis for suspecting that Terry was an armed robber—a serious criminal offense—caught in the act of initiating a heist. *Terry*, 392 U.S. at 28. Moreover, at the time, it was illegal in Ohio for anyone other than a law enforcement officer to carry a concealed weapon. *Id.* at 4 n.1. Thus, anyone carrying a firearm was doing so illicitly. It is therefore no surprise that "on the facts and circumstances" that obtained at the time Terry was searched, it was entirely reasonable for the officer to believe that, if Terry was armed, he likely "presented a threat to officer safety while [the officer] was investigating his suspicious behavior." *Id.* at 28.

The search at issue in *Mimms*—a case decided without full briefing or oral argument—similarly occurred in a jurisdiction that had strict laws against carrying firearms. *See* Pet. App. 34a n.2 (citing 1943 Pa. Laws 487; 1972 Pa. Laws 1577).[4] The Court's focus

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[4] Pennsylvania did not enact a liberalized "shall-issue" concealed-carry permit regime until 1989, and did not extend that

was on the question whether police officers can order drivers stopped for traffic offenses to get out of their vehicles. *See Mimms*, 434 U.S. at 107-11.

The inference that supported the searches in *Terry* and *Mimms*—that anyone who is armed is inevitably breaking the law, and doing so in a way that poses a present danger to officer safety—does not apply to West Virginia in 2014.

People who carry guns in West Virginia are not presumptive lawbreakers. A majority of the state's residents—54.2%—own a firearm. Bindu Kalesan et al., *Gun Ownership and Social Gun Culture*, 22 Injury Prevention 216, 218 fig. 3 (2016). At the time of the search in this case, West Virginia permitted its residents to carry firearms openly without a license and issued concealed carry permits to any applicant who met the statutory criteria and paid a $75 fee, W. Va. Code § 61–7–4(f). Over 90,000 individuals had obtained these permits. U.S. Gov't Accountability Office, Gun Control: States' Laws and Requirements for Concealed Carry Permits Vary Across the Nation 76 (2012), http://tinyurl.com/cc6uwu9 (last visited June 19, 2017). Today, West Virginia law no longer requires a permit for any type of carry. *See supra* at 3. Under these circumstances, as the dissenters below explained, there is simply no reason to believe that someone carrying a gun is "anything but a law-abiding

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regime to Philadelphia—where the search at issue in *Mimms* took place—until 1995. *See* John R. Lott, Jr., & David B. Mustard, *Crime, Deterrence, and Right-To-Carry Concealed Handguns*, 26 J. Legal Stud. 1, 12 (1997).

citizen who poses no threat to the authorities." Pet. App. 59a.[5]

2. The Fourth Circuit's rule authorizes searches that cannot be justified as a matter of common sense. A parent approached by an officer after he sees her parked briefly near her own driveway to deal with her children's misbehavior, *see* W. Va. Code § 17C-13-3(a)(2), or a grandfather crossing the street without using the crosswalk, *see* W. Va. Code § 17C-10-3, can be searched so long as officers believe they have handguns. In no way does an officer's reasonable suspicion of such minor infractions create an expectation of danger; yet the Fourth Circuit's rule automatically justifies this "serious intrusion upon the sanctity of [a] person." *Terry*, 392 U.S. at 17.

Such a broad authorization is unnecessary to protect officer safety. Instead, the basis for the initial stop must play some role. When the reason for an underlying stop is "an articulable suspicion of a crime of violence," officers' right to search is "immediate and automatic." *Terry*, 392 U.S. at 33 (Harlan, J., concurring). But absent other facts indicating present dangerousness, it is not necessary to search all armed persons who are stopped in a state like West Virginia. In this case, for example, the police acknowledged that the report that prompted them to pursue petitioner

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[5] West Virginia is not alone in placing this trust in an armed public. Police officers themselves generally believe that an armed citizenry benefits public safety. In a recent survey, an overwhelming majority police professionals supported concealed carry and most thought that "legally armed citizens" are "important" to "reducing crime rates overall." *See* PoliceOne, Gun Policy & Law Enforcement Survey at 10-11 (2013), https://tinyurl.com/ d3zodtj (last visited June 19, 2017).

provided no evidence of "a crime or any criminal activity." Pet. App. 128a. Indeed, absent the fortuity that petitioner and the driver of the car in which he was traveling were not wearing their seatbelts, it is unclear that the police could have stopped petitioner at all.

The implications of the Fourth Circuit's rule go beyond infringing the privacy of individuals who actually carry a gun. Anyone whom the police merely *believe* to be carrying a firearm in public faces a *Terry* search whenever an officer has a basis for stopping him—and state criminal and vehicle codes provide a huge range of bases for a police stop. Even forgoing the right to carry a weapon thus does not protect an individual against being searched. Instead, a "large bulge in any man's pocket" will be sufficient to authorize a search, allowing "police to stop and frisk virtually every man they encounter." *See Ransome v. State*, 373 Md. 99, 108 (Md. 2003). And in states where many people carry guns, police can treat everyone they stop as sufficiently dangerous to search.

This is not merely a hypothetical concern. Officer Hudson testified that he believed if he found an individual with a gun, he should "treat them as [if] they could be a criminal." C.A. App. 72. He thought it was "best" to search "anybody that you're interviewing and question[ing] that may have a weapon." *Id.* at 68.

In addition, the Fourth Circuit's rule effectively re-creates the same "firearm exception" to *Terry* that the Court rejected in *Florida v. J.L.*, 529 U.S. 266, 272 (2000). In *J.L.*, this Court held that a "tip[] about guns," without more, could not justify a stop and search. *Id.* at 273. But under the Fourth Circuit's rule, all the officer would have had to do was wait until J.L.

showed signs of "loiter[ing]" in an unusual manner—a crime in Florida, Fla. Stat. Ann. § 856.021. He could then have stopped J.L. and conducted an "intrusive, embarrassing police search of the targeted person." *J.L.*, 529 U.S. at 272.

Finally, the implications of the Fourth Circuit rule are especially perverse in jurisdictions that have enacted "duty to inform" laws. A number of states require individuals carrying concealed weapons to inform the police of that fact during any police encounter. *See* G. Halek, *Do You Have A Duty To Inform When Carrying Concealed?*, Concealed Nation (July 26, 2015), https://tinyurl.com/ojqvbsm (last visited June 19, 2017); *see also, e.g.*, S.C. Code Ann. § 23-31-215(K) (providing that when an individual who possesses a concealed carry permit is "carrying a concealable weapon," he "must inform a law enforcement officer of the fact that he is a permit holder" when an officer "(1) identifies himself as a law enforcement officer; and (2) requests identification or a driver's license" from the individual). Under the Fourth Circuit's rule, the moment that gun-carrying individuals obey the law in these states—for example, when an officer stops them for a traffic offense—they have shown themselves to be "dangerous" and they can be subjected to a *Terry* search at an officer's discretion.

3. The Fourth Circuit's decision in this case cannot be saved by considering either the neighborhood near which petitioner's stop took place or the "look" Captain Roberts testified to seeing on petitioner's face.

"An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the

person is committing a crime." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). As this Court explained in *Ybarra v. Illinois*, 444 U.S. 85 (1979), the "'narrow scope' of the *Terry* exception" requires "reasonable belief or suspicion directed *at the person to be frisked*" and not simply information about the "premises" on which a search occurs. *Id.* at 94 (emphasis added).

Nor does the belief that an individual in a high-crime area is armed support a conclusion that the individual is presently dangerous to the police. *See United States v. Williams*, 731 F.3d 678, 687 (7th Cir. 2013). To hold otherwise would diminish the Fourth Amendment rights of all residents of all neighborhoods with higher-than-average crime rates—that is to say, roughly half of the residents in the country. *See also supra* at 5 n.2 (pointing out that the small community where petitioner was stopped is generally safer than average).

Indeed, the Fourth Circuit's reasoning gets things exactly backwards. As the plurality opinion in *McDonald v. Chicago*, 561 U.S. 742 (2010), explained, "the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials." *Id.* at 790. Thus, high-crime areas are precisely where we should expect to see law-abiding citizens carrying arms for self-defense.

Even less can an "'oh, crap' look[]," Pet. App. 16a, justify searching someone the police think may be armed in a state that allows carrying concealed firearms in public. Other courts of appeals have recognized that nervous gestures or facial expressions during an encounter with police have "very little import to a reasonable suspicion determination."

Williams, 731 F.3d at 687; *see also, e.g.*, *United States v. McKoy*, 428 F.3d 38, 40 (1st Cir. 2005) (holding that the combination of a traffic stop in a high-crime area and "nervous" look was insufficient to justify a *Terry* search because approving such searches "comes too close to allowing an automatic frisk of anyone who commits a traffic violation in a high-crime area").

Petitioner's case illustrates why facial expressions have little probative value. The car in which petitioner was a passenger was pulled over based on a seatbelt violation. Nevertheless, the officer who made the stop did not initially inform the driver or petitioner of why he had stopped them. While petitioner was attempting to comply with that officer's request to get out of the car, a second officer appeared, opened the passenger side door, and asked petitioner whether he was carrying a weapon. C.A. App. 78, 88-90. Under these perplexing circumstances, petitioner's "weird look," Pet. App. 6a, provides no support for the proposition that he was dangerous.[6]

4. Finally, and perhaps most troublingly, the Fourth Circuit's decision "giv[es] police officers unbridled discretion" to decide *which* legally armed citizens to search. *Arizona v. Gant*, 556 U.S. 332, 345 (2009). It is a staple of modern policing that police officers can stop individuals for minor infractions in order to investigate matters for which they lack even

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[6] Still less does Captain Roberts' interpretation of petitioner's facial expression provide any support for a conclusion that petitioner posed a present danger to the officers. Roberts interpreted petitioner's look as saying: "I don't want to lie to you, but I'm not going to tell you anything," Pet. App. 6a, and not that petitioner intended to attack the officers.

reasonable suspicion, let alone probable cause. *Whren v. United States*, 517 U.S. 806, 810, 819 (1996). The Fourth Circuit's rule goes far further: it permits police to layer pretextual *searches* atop these pretextual stops, despite this Court's insistence that *Terry* searches cannot be conducted for "whatever evidence of criminal activity [an officer] might find," *Terry*, 392 U.S. at 30.

It is no defense of the Fourth Circuit rule that police will not pursue distracted mothers or jaywalking grandparents, *see supra* at 23. A rule that abrogates the Fourth Amendment rights only of "black male[s]" who may be exercising their state-law rights to carry firearms, by treating (only) them as inherently "dangerous," would not be an improvement. As the dissenters below highlighted, the Fourth Circuit's rule poses grave risks of discriminatory policing. Pet. App. 38a. The blanket authority to search that the Fourth Circuit's rule provides threatens to exacerbate the problem that Justice Sotomayor pointed out in *Utah v. Strieff*, 136 S. Ct. 2056 (2016): "that people of color are disproportionate victims" of special police scrutiny. *Id.* at 2070 (dissenting opinion).

This case illustrates that point: Officer Hudson admitted that he stopped Robinson not because he suspected a seatbelt violation, but because he received a call that there was a "black male with a gun" near a 7-Eleven. C.A. App. 63; *see also* Pet. App. 17a. Without any evidence that the man had violated any law, the Ranson Police Department dispatched two officers to stop petitioner and search him. It is far from obvious that the police would have reacted similarly to an anonymous report of an armed "white male." Indeed,

the officers seemed tellingly incurious about the white female driver in this case. The "kind of standardless and unconstrained discretion" enabled by the Fourth Circuit's rule is an "evil" this Court has long condemned. *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 22, 2017

APPENDIX

APPENDIX A

ON REHEARING EN BANC
PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-4902

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHAQUILLE MONTEL ROBINSON,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. Gina M. Groh, Chief District Judge. (3:14-cr-00028-GMG-RWT-1)

Argued: September 22, 2016
Decided: January 23, 2017

Before GREGORY, Chief Judge, WILKINSON, NIEMEYER, MOTZ, TRAXLER, KING, SHEDD, DUNCAN, AGEE, KEENAN, WYNN, DIAZ, FLOYD, THACKER, and HARRIS, Circuit Judges, and DAVIS, Senior Circuit Judge.

Affirmed by published opinion. Judge Niemeyer wrote the majority opinion, in which Judge Wilkinson, Judge Traxler, Judge King, Judge Shedd,

Judge Duncan, Judge Agee, Judge Keenan, Judge Diaz, Judge Floyd, and Judge Thacker joined. Judge Wynn wrote a separate opinion concurring in the judgment. Judge Harris wrote a dissenting opinion, in which Chief Judge Gregory, Judge Motz, and Senior Judge Davis joined.

ARGUED: Nicholas Joseph Compton, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Martinsburg, West Virginia, for Appellant. Thomas Ernest Booth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Kristen M. Leddy, Research and Writing Specialist, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Martinsburg, West Virginia, for Appellant. William J. Ihlenfeld, II, United States Attorney, Jarod J. Douglas, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

NIEMEYER, Circuit Judge:

This appeal presents the question of whether a law enforcement officer is justified in frisking a person whom the officer has lawfully stopped and whom the officer reasonably believes to be armed, regardless of whether the person may legally be entitled to carry the firearm. Stated otherwise, the question is whether the risk of danger to a law enforcement officer created by the forced stop of a person who is armed is eliminated by the fact that state law authorizes persons to obtain a permit to carry a concealed firearm.

After receiving a tip that a man in a parking lot well known for drug-trafficking activity had just loaded a firearm and then concealed it in his pocket before getting into a car as a passenger, Ranson, West Virginia police stopped the car after observing that its occupants were not wearing seatbelts. Reasonably believing that the car's passenger, Shaquille Robinson, was armed, the police frisked him and uncovered the firearm, leading to his arrest for the possession of a firearm by a felon.

During his prosecution, Robinson filed a motion to suppress the evidence recovered as a result of the frisk, contending that the frisk violated his Fourth Amendment rights. The officers, he argued, had no articulable facts demonstrating that he was dangerous since, as far as the officers knew, the State could have issued him a permit to carry a concealed firearm. After the district court denied the motion to suppress, Robinson pleaded guilty to the illegal possession of a firearm, reserving the right to appeal the denial of his motion to suppress.

On appeal, Robinson contends again that the information that police received from the tip described seemingly innocent conduct and that his conduct at the time of the traffic stop also provided no basis for officers to reach the conclusion that he was dangerous. He argues, "Under the logic of the district court, in any state where carrying a firearm is a perfectly legal activity, every citizen could be dangerous, and subject to a *Terry* frisk and pat down."

We reject Robinson's argument and affirm, concluding that an officer who makes a lawful traffic

stop and who has a reasonable suspicion that one of the automobile's occupants is armed may frisk that individual for the officer's protection and the safety of everyone on the scene. *See Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977) (per curiam). The Fourth Amendment does not "require . . . police officers [to] take unnecessary risks in the performance of their duties." *Terry v. Ohio*, 392 U.S. 1, 23 (1968). And it is inconsequential that the person thought to be armed was a passenger. *See Maryland v. Wilson*, 519 U.S. 408, 414 (1997). It is also inconsequential that the passenger may have had a permit to carry the concealed firearm. The danger justifying a protective frisk arises from the combination of a forced police encounter and the presence of a weapon, not from any illegality of the weapon's possession. *See Adams v. Williams*, 407 U.S. 143, 146 (1972); *Michigan v. Long*, 463 U.S. 1032, 1052 n.16 (1983).

I

The material facts in this case are not disputed. At about 3:55 p.m. on March 24, 2014, an unidentified man called the Ranson, West Virginia Police Department and told Officer Crystal Tharp that he had just "witnessed a black male in a bluish greenish Toyota Camry load a firearm [and] conceal it in his pocket" while in the parking lot of the 7-Eleven on North Mildred Street. The caller advised Officer Tharp that the Camry was being driven by a white woman and had "just left" the parking lot, traveling south on North Mildred Street.

The 7-Eleven on North Mildred Street is adjacent to the Apple Tree Garden Apartments, and the area constitutes the highest crime area in Ranson. One officer who testified said that in his short one and a

half years as a state trooper, he had experience with at least 20 incidents of drug trafficking in the 7-Eleven parking lot. Another officer testified that "when [she] was doing drug work[,] . . . [she] dropped an informant off to buy drugs" at the 7-Eleven parking lot and observed "three other people waiting for drugs in that parking lot." She added that she had personally received "numerous complaints" of people running between the parking lot and the apartment complex, making drug transactions. Another officer testified that "[a]nytime you hear Apple Tree or 7-Eleven, your radar goes up a notch." Accordingly, when the Ranson Police Department received the tip about someone loading a gun in the 7-Eleven parking lot, its officers' "radar [went] up a notch," and the officers went "on heightened alert."

While still on the telephone with the caller, Officer Tharp relayed the information to Officer Kendall Hudson and Captain Robbie Roberts. Hudson immediately left the station to respond to the call, and Roberts left soon thereafter to provide backup.

When Officer Hudson turned onto North Mildred Street a short time later, he observed a blue-green Toyota Camry being driven by a white woman with a black male passenger. Noticing that they were not wearing seatbelts, Hudson effected a traffic stop approximately seven blocks, or three-quarters of a mile, south of the 7-Eleven. He estimated that the traffic stop took place two to three minutes after the call had been received at the station.

After calling in the stop, Officer Hudson approached the driver's side of the vehicle with his

weapon drawn but carried below his waist and asked the driver for her license, registration, and proof of insurance. He also asked the male passenger, the defendant Robinson, for his identification but quickly realized that doing so was "probably not a good idea" because "[t]his guy might have a gun[,] [and] I'm asking him to get into his pocket to get his I.D." Instead, Officer Hudson asked Robinson to step out of the vehicle.

At this point, Captain Roberts arrived and opened the front passenger door. As Robinson was exiting the vehicle, Captain Roberts asked him if he had any weapons on him. Instead of responding verbally, Robinson "gave [Roberts] a weird look" or, more specifically, an "'oh, crap' look[]." Roberts took the look to mean, "I don't want to lie to you, but I'm not going to tell you anything [either]." At this point, Captain Roberts directed Robinson to put his hands on top of the car and performed a frisk for weapons, recovering a loaded gun from the front pocket of Robinson's pants. After conducting the frisk, Roberts recognized Robinson, recalled that he had previously been convicted of a felony, and arrested him.

After Robinson was charged with the illegal possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1), he filed a motion to suppress the evidence of the firearm and ammunition seized during the frisk, arguing that the frisk violated his Fourth Amendment rights.

The district court denied the motion, concluding that the officers possessed reasonable suspicion to believe that Robinson was armed and dangerous. Relying on *Navarette v. California*, 134 S. Ct. 1683

(2014), the court concluded that the anonymous caller's eyewitness knowledge and the contemporaneous nature of the report indicated that the tip was sufficiently reliable to contribute to the officers' reasonable suspicion. The court explained that the "anonymous tip that [Robinson] [had] recently loaded a firearm and concealed it on his person in a public parking lot in a high-crime area," as well as Robinson's "weird look and failure to verbally respond to the inquiry whether he was armed," gave rise to a reasonable suspicion that Robinson was armed and dangerous.

Robinson thereafter pleaded guilty to the firearm possession charge, reserving his right to appeal the district court's denial of his suppression motion, and the district court sentenced him to 37 months' imprisonment. Robinson appealed the denial of his motion to suppress, and a panel of this court reversed the district court's decision denying Robinson's motion to suppress and vacated his conviction and sentence. *United States v. Robinson*, 814 F.3d 201, 213 (4th Cir. 2016). By order dated April 25, 2016, we granted the government's petition for rehearing *en banc*, which vacated the panel's judgment and opinion. *See* 4th Cir. Local R. 35(c).

II

Robinson's appeal is defined as much by what he concedes as by what he challenges. Robinson rightfully acknowledges that the Ranson police had the right to stop the vehicle in which he was a passenger after observing a traffic violation, *see Whren v. United States*, 517 U.S. 806, 819 (1996), and also that they had the authority to direct him to exit the vehicle during the valid traffic stop, *see*

Wilson, 519 U.S. at 415. He also correctly concedes that the anonymous tip received by the Ranson Police Department was sufficiently reliable to justify the officers' reliance on it. *See Navarette*, 134 S. Ct. at 1688-89 (concluding that an anonymous 911 call "bore adequate indicia of reliability for the officer to credit the caller's account" in large part because, like here, the caller "claimed eyewitness knowledge of the alleged [conduct]" and the call was a "contemporaneous report" that was "made under the stress of excitement caused by a startling event"). Finally, and most importantly, Robinson does not contest the district court's conclusion that the police had reasonable suspicion to believe that he was armed.

Robinson's argument focuses on whether the officers could reasonably have suspected that he was dangerous. He argues that while the officers may well have had good reason to suspect that he was carrying a loaded concealed firearm, they lacked objective facts indicating *that he was also dangerous*, so as to justify a frisk for weapons, since an officer must reasonably suspect that the person being frisked is both armed *and* dangerous. *See Terry*, 392 U.S. at 27. Robinson notes that at the time of the frisk, West Virginia residents could lawfully carry a concealed firearm if they had received a license from the State. *See* W. Va. Code § 61-7-3 to -4 (2014). And, because the police did not know whether or not he possessed such a license, the tip that a suspect matching his description was carrying a loaded firearm concealed in his pocket was, he argues, a report of *innocent behavior* that was not sufficient to indicate that he posed a danger to others. Moreover,

he argues, his behavior during the stop did not create suspicion – "he was compliant, cooperative, [and] not displaying signs of nervousness." In these circumstances, he concludes, the officer's frisk was not justified by any reasonable suspicion that he was *dangerous*.

Robinson's argument presumes that the legal possession of a firearm cannot pose a danger to police officers during a forced stop, and it collapses the requirements for making a stop with the requirements for conducting a frisk. It thus fails at several levels when considered under the Supreme Court's "stop-and-frisk" jurisprudence. First, Robinson confuses the standard for making stops – which requires a reasonable suspicion *that a crime or other infraction has been or is being committed* – with the standard for conducting a frisk – which requires both a lawful investigatory stop and a reasonable suspicion t*hat the person stopped is armed and dangerous*. *See Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009). Second, he fails to recognize that traffic stops alone are inherently dangerous for police officers. Third, he also fails to recognize that traffic stops of persons who are armed, whether legally or illegally, pose yet a greater safety risk to police officers. And fourth, he argues illogically that when a person forcefully stopped may be *legally* permitted to possess a firearm, any risk of danger to police officers posed by the firearm is eliminated.

We begin by noting that the Supreme Court has repeatedly recognized that whenever police officers use their authority to effect a stop, they subject themselves to a risk of harm. This holds true whether the temporary detention is a traditional, "on-the-

street" *Terry* stop to investigate an officer's reasonable suspicion "that the person apprehended is committing or has committed a criminal offense," *Johnson*, 555 U.S. at 326, or a stop of a motor vehicle and all of its occupants to enforce a jurisdiction's traffic laws, *id.* at 327. The Supreme Court has explained that "the risk of a violent encounter in a traffic-stop setting 'stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop.'" *Id.* at 331 (quoting Wilson, 519 U.S. at 414); *see also Mimms*, 434 U.S. at 110 (rejecting "the argument that traffic violations necessarily involve less danger to officers than other types of confrontations"). Indeed, the Court has concluded that traffic stops are "especially fraught with danger to police officers." *Long*, 463 U.S. at 1047. And the Court has also observed that when the stop involves one or more passengers, that fact "increases the possible sources of harm to the officer," *Wilson*, 519 U.S. at 413, as "the motivation of a passenger to employ violence . . . is every bit as great as that of the driver," *id.* at 414.

In *Wilson*, the Court observed that "[i]n 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops," 519 U.S. at 413, prompting the Court to conclude that the public interest in police officer safety during traffic stops is "both legitimate and weighty," *id.* at 412 (quoting *Mimms*, 434 U.S. at 110). And more recent statistics, unfortunately, remain as grim. Of the 51 law enforcement officers feloniously killed in the line of duty in 2014, 9 officers (or 18%) were fatally injured during traffic pursuits or stops. *FBI, Officers*

Feloniously Killed, in Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted, 2014.

To be clear, the general risk that is inherent during a traffic stop does not, without more, justify a frisk of the automobile's occupants. But the risk inherent in all traffic stops is heightened exponentially when the person who has been stopped – a person whose propensities are unknown – is "armed with a weapon that could unexpectedly and fatally be used against" the officer in a matter of seconds. *Terry*, 392 U.S. at 23. As such, when the officer reasonably suspects that the person he has stopped is armed, the officer is "warranted in the belief that his safety . . . [is] in danger," *id.* at 27, thus justifying a *Terry* frisk.

In *Terry*, Officer McFadden "seized" Terry on the street and subjected him to a "search" without probable cause to believe that he had committed or was committing a crime or that he was armed. 392 U.S. at 19. The Court was thus confronted with two distinct constitutional issues: *first*, whether a person could be stopped (seized) on suspicion of criminal conduct that fell short of probable cause; and *second*, whether the officer could conduct a protective frisk or "pat down" for weapons (search) during the stop. The Court readily concluded that Terry's seizure was "reasonable" under the Fourth Amendment because the officer reasonably believed that criminal conduct was afoot. *Id.* at 22-23. The Court then turned its attention to the legality of the frisk, stating, "We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with

whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Id.* at 23. The concern – i.e., the danger – was thus found *in the presence of a weapon during a forced police encounter*. Indeed, the Court said as much, noting in approving Officer McFadden's frisk of Terry that "a reasonably prudent man would have been warranted in believing petitioner was armed *and thus presented a threat to the officer's safety*." *Id.* at 28 (emphasis added). In this manner, the Court adopted the now well-known standard that an officer can frisk a validly stopped person if the officer reasonably believes that the person is "armed and dangerous." *Id.* at 27; *see also id.* at 32 (Harlan, J., concurring) (explaining that because a "frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop").

The Supreme Court applied *Terry* to circumstances analogous to those before us in *Mimms*, where an officer, after making a routine traffic stop, "noticed a large bulge" under the defendant's jacket and therefore conducted a frisk. 434 U.S. at 107. Holding that the frisk was clearly justified, the *Mimms* Court explained 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*," adding that "[i]n these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat down.'" *Id.* at 112 (emphasis added). The only evidence of Mimms' dangerousness was the bulge indicating that he was armed. *See id.* It was thus

Mimms' status of being armed during a forced police encounter (the traffic stop) that posed the danger justifying the frisk, and we have previously relied on Mimms for that precise principle. *See United States v. Baker,* 78 F.3d 135, 137 (4th Cir. 1996) (citing *Mimms*, 434 U.S. at 112) ("Based on the inordinate risk of danger to law enforcement officers during traffic stops, observing a bulge that could be made by a weapon in a suspect's clothing reasonably warrants a belief that the suspect is potentially dangerous, even if the suspect was stopped only for a minor violation").

In short, established Supreme Court law imposes two requirements for conducting a frisk, but no more than two: *first*, that the officer have conducted a lawful stop, which includes both a traditional *Terry* stop as well as a traffic stop; and *second*, that during the valid but forced encounter, the officer reasonably suspect that the person is *armed and therefore dangerous*. In both *Terry* and *Mimms*, the Court deliberately linked "armed" and "dangerous," recognizing that the frisks in those cases were lawful because the stops were valid and the officer reasonably believed that the person stopped "was armed *and thus*" dangerous. *Terry*, 392 U.S. at 28 (emphasis added); *Mimms*, 434 U.S. at 112 (emphasis added). The use of "and thus" recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed.

In this case, both requirements – a lawful stop and a reasonable suspicion that Robinson was armed – were satisfied, thus justifying Captain Roberts' frisk under the Fourth Amendment as a matter of law.

Robinson argues that *Mimms* is distinguishable because the frisk there took place in a jurisdiction that made it a crime to carry a concealed deadly weapon. West Virginia, on the other hand, generally permits its citizens to carry firearms. From this distinction, Robinson argues that when the person forcibly stopped may be *legally* permitted to possess a firearm, the risk of danger posed by the firearm is eliminated. This argument, however, fails under the Supreme Court's express recognition that the legality of the frisk does not depend on the illegality of the firearm's possession. Indeed, the Court has twice explained that "[t]he purpose of this limited search [*i.e.*, the frisk] is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, *whether or not carrying a concealed weapon violated any applicable state law*." *Williams*, 407 U.S. at 146 (emphasis added); *see also Long*, 463 U.S. at 1052 n.16 ("[W]e have expressly rejected the view that the validity of a *Terry* search [*i.e.*, a frisk] depends on whether the weapon is possessed in accordance with state law"). Robinson's position directly conflicts with these observations.

Notwithstanding the Supreme Court's statements, Robinson's position also fails as a matter of logic to recognize that the risk inherent in a forced stop of a person who is armed exists even when the firearm is legally possessed. The presumptive lawfulness of an individual's gun possession 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. *See United States v. Rodriguez*, 739 F.3d 481, 491 (10th Cir. 2013) (concluding that "an officer making a lawful investigatory stop [must have] the ability to protect himself from an armed suspect whose propensities are unknown" and therefore rejecting the defendant's argument that the officer "had no reason to believe he was dangerous" even though the officer had seen a handgun tucked into the waistband of his pants).

Accordingly, we conclude that given Robinson's concession that he was lawfully stopped and that the police officers had reasonable suspicion to believe that he was armed, the officers were, as a matter of law, justified in frisking him and, in doing so, did not violate Robinson's Fourth Amendment rights.

III

While the lawful traffic stop of Robinson and the reasonable suspicion that he was armed justified the frisk in this case, the officers had knowledge of additional facts that increased the level of their suspicion that Robinson was dangerous.

First, the reliable tip in this case was not just that an individual matching Robinson's description possessed a firearm. Rather, the caller reported that he had observed an individual "load a firearm [and] conceal it in his pocket" while in the parking lot of the 7-Eleven on North Mildred Street, a location that the officers knew to be a popular spot for drug-trafficking activity. Four officers testified about the high level of drug-trafficking and other criminal activity in that particular parking lot, prompting one to explain, "[a]nytime you hear . . . 7-Eleven, your

radar goes up a notch." Knowing that the 7-Eleven parking lot was frequently used as a site for drug trafficking, a reasonable officer could legitimately suspect that an individual who was seen both loading and concealing a firearm in that very parking lot may well have been doing so in connection with drug-trafficking activity, making his possession of a firearm even more dangerous. *See United States v. Lomax*, 293 F.3d 701, 705 (4th Cir. 2002) (recognizing the "numerous ways in which a firearm might further or advance drug trafficking").

Second, when Captain Roberts asked Robinson, as he was getting out of the car, whether he was carrying any firearms, Robinson failed to respond verbally and instead gave the officer an "'oh, crap' look[]," which Roberts took to mean, "I don't want to lie to you, but I'm not going to tell you anything [either]." Surely, Robinson's evasive response further heightened Captain Roberts' legitimate concern as to the dangerousness of the situation.

While not necessary to the conclusion in this case, these facts can only confirm Captain Roberts' reasonable suspicion that Robinson was dangerous and therefore should be frisked for the protection of the officer and all others present. Indeed, in light of all of the circumstances known to Captain Roberts, he would unquestionably have been criticized for not conducting a frisk if, after having failed to do so, something untoward had happened.

* * *

The judgment of the district court is accordingly

AFFIRMED.

WYNN, Circuit Judge, concurring in the judgment:

Defendant Shaquille Robinson concedes that law enforcement officers reasonably suspected that he was carrying a firearm.[1] Defendant further concedes that the law enforcement officers lawfully stopped him for an unrelated, albeit pretextual, reason. I agree with the majority that these facts alone allowed the officers to perform a protective frisk of Defendant during the stop.

In reaching this conclusion, the majority frames this case as a run-of-the-mill search-and-seizure case involving a traffic stop in which we must assess whether law enforcement officers had reasonable suspicion to frisk Defendant based on the facts known to the officers at the time they conducted the frisk. To that end, the majority focuses on the dangers law enforcement officers face in conducting lawful stops, particularly traffic stops, and the officers' reasonable suspicion that Defendant had a "weapon."

But this case is not about traffic stops or "weapons" – it is about *firearms* and the danger they pose to law enforcement officers. In particular, this case arises from the Defendant's presumptively lawful activity of carrying a firearm, which became the basis for making a pretextual, albeit lawful, stop

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[1] The majority states that the law enforcement officers received a "tip" that Defendant was carrying a loaded firearm. *Ante* at 4.

Carrying a loaded firearm in West Virginia is presumptively lawful activity. Thus, information that an individual is engaging in presumptively lawful activity should not constitute a "tip" for purposes of this analysis.

for not wearing a seatbelt. From these remarkable facts, the majority opinion reduces the issue in this case to whether the officers justifiably frisked Defendant, after a lawful stop, because they had a "tip" that Defendant carried a "weapon."

By focusing on the officers' justification – rather than Defendant's presumptively lawful decision to carry a firearm – the majority elides discussion of the two key issues in this case: (1) whether individuals who carry firearms – lawfully or unlawfully – pose a categorical risk of danger to others and police officers, in particular, and (2) whether individuals who choose to carry firearms forego certain constitutional protections afforded to individuals who elect not to carry firearms. As explained in more detail below, the majority opinion's attempt to duck these questions is futile because its conclusion necessarily answers "yes" to both questions.

I.

First, the majority opinion altogether avoids addressing the first issue – whether individuals who carry firearms (lawfully or unlawfully) pose a categorical risk of danger to others – by reinterpreting the Supreme Court's long-established test for determining whether law enforcement officers lawfully performed a protective frisk. Under that test, the question is whether the officers had "reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 327 (1997). Instead of according "dangerous" an independent meaning, the majority contends that "armed and dangerous" is a unitary concept – if law enforcement officers reasonably

suspect a detainee is "armed," they necessarily reasonably suspect he is "dangerous." *Ante* at 16 ("[T]he risk of the danger is created simply because the person, who was forcibly stopped, is armed."). I disagree with the majority opinion's contention that "armed and dangerous" is a unitary concept.

To be sure, from the outset, stripping "dangerous" of independent meaning violates the long-standing principle that elements separated by a conjunctive should be interpreted as distinct requirements. *See*, *e.g.*, *Crooks v. Harrelson*, 282 U.S. 55, 58 (1932); *Am. Paper Inst. v. U.S. E.P.A.*, 660 F.2d 954, 961 (4th Cir. 1981). That is why other Circuits have held that law enforcement officers must reasonably suspect a detainee is "both armed and a danger to the safety of officers or others" before conducting a frisk. *United States v. Leo*, 792 F.3d 742, 748 (7th Cir. 2015) (emphasis added); *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1132 (6th Cir. 2015) ("Clearly established law required [the officer] to point to evidence that [the subject] may have been armed *and dangerous*. Yet all he ever saw was that [the subject] was armed – and legally so." (emphasis in original) (citation and internal quotation marks omitted)).

The view of the other Circuits on according "dangerous" an independent meaning makes sense because the majority opinion's unitary meaning interpretation would allow law enforcement officers to frisk a wide swath of lawfully stopped individuals engaging in harmless activity. Indeed, by definition, an individual is "armed" if he is "[e]quipped with a weapon." *Armed*, Black's Law Dictionary (9th ed. 2009).

To illustrate the absurdity of the majority opinion's unitary meaning interpretation, consider, for example, that courts have found a bottle to be a "weapon." *See United States v. Daulton*, 488 F.2d 524, 525 (5th Cir. 1973) ("Courts have held that a wine bottle can be a dangerous weapon."). Under the majority's unitary meaning interpretation, officers informed that an individual was leaving a convenience store "armed" with a bottle of wine could, after a lawful stop, frisk that individual because, in the majority's words, "the risk of the danger is created simply because the person, who was forcibly stopped, is armed." *Ante* at 16.

As Justice Brennan noted, numerous everyday objects turn into "weapons" when put to appropriate use:

> A "weapon" could include a brick, a baseball bat, a hammer, a broken bottle, a fishing knife, barbed wire, a knitting needle, a sharpened pencil, a riding crop, a jagged can, rope, a screw driver, an ice pick, a tire iron, garden shears, a pitch fork, a shovel, a length of chain, a penknife, a fork, metal pipe, a stick, etc. The foregoing only illustrate the variety of lawful objects which are often innocently possessed without wrongful intent.

Wright v. New Jersey, 469 U.S. 1146, 1149 n.3 (1985) (Brennan, J., dissenting from dismissal for want of substantial federal question). Under the majority opinion's unitary meaning interpretation, reasonable suspicion that an individual possessed any of these items would give rise to reasonable suspicion to frisk the individual, after a lawful stop, even absent any

evidence the individual intended to use the object as a weapon. The Fourth Amendment does not contemplate giving law enforcement officers such wide-ranging authority to engage in warrantless frisks of detainees. *See*, *e.g.*, *City of Los Angeles v.* Patel, 135 S. Ct. 2443, 2455 (2015) (holding that courts must not interpret the Fourth Amendment in a way that allows the "narrow exception[s]" to the warrant requirement "to swallow the rule"); *United States v. Wilson*, 953 F.2d 116, 126 (4th Cir. 1991) (refusing to allow "limited *Terry* exception to swallow the rule").

The majority nonetheless contends that the Supreme Court "deliberately linked 'armed' and 'dangerous'" in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), by approving frisks because the officers "reasonably believed that the person stopped 'was armed *and thus*' dangerous." *Ante* at 16 (quoting *Terry*, 392 U.S. at 28; *Mimms*, 434 U.S. at 112). But when the Supreme Court has elaborated on the test for a lawful frisk, it has highlighted the independent role of "dangerousness," holding that *Terry* authorizes a "frisk" of an automobile when law enforcement officers reasonably suspect "that the suspect is dangerous and the suspect may gain immediate control of weapons." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

How then do we reconcile the language in *Terry* and *Mimms*, upon which the majority relies, with *Long* and the plain language of the test, which requires that officers reasonably suspect an individual is *both* armed and dangerous? The answer plainly lies in the type of "weapon" at issue.

In *Long*, the officers reasonably suspected that the defendant had a knife. 463 U.S. at 1050. By contrast, in *Terry* and *Mimms*, the officers reasonably suspected the detainees had firearms. *Terry*, 392 U.S. at 6-7; *Mimms*, 434 U.S. at 106. Accordingly, *Terry* and *Mimms* collapse the "armed and dangerous" test into a single inquiry *only* when law enforcement officers reasonably suspect that a detainee has a *firearm* or other inherently dangerous weapon. Such a reading ensures that the "armed" and "dangerous" prongs retain distinct meaning and places meaningful restrictions on law enforcement officers' ability to frisk lawfully stopped individuals.

But the majority opinion also contends that we should collapse the "armed and dangerous" test into a single inquiry – regardless of the type of "weapon" with which the detainee is "armed" – because the combination of a "forcible stop" and an armed detainee poses a "risk of danger." *Ante* at 16 ("[T]he risk of danger is created simply because the person, who was forcibly stopped, is armed."). Yet committing a minor traffic violation – a seatbelt violation here – provides no basis to believe an individual poses any special danger warranting departure from the rule that law enforcement officers may not, as a general matter, frisk lawfully detained individuals. Likewise, as explained above, given the numerous objects that can constitute "weapons," being "armed" does not, by itself, establish that an individual poses a danger. Rather, what the majority opinion skillfully avoids is that the "risk of danger" to the officers arose from the officers' reasonable suspicion Defendant was carrying a *firearm*.

Confronting the inescapable reality that lawfully-stopped individuals armed with firearms are categorically dangerous reflects the heightened danger posed by firearms. To that end, the Supreme Court has held that "a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous." *McLaughlin v. United States*, 476 U.S. 16, 17 (1986). This Court also has recognized "the substantial risk of danger and the inherently violent nature of firearms," *Pelissero v. Thompson,* 170 F.3d 442, 447 (4th Cir. 1999) (quotation omitted), as have other Circuits, *e.g.*, *United States v. Copening*, 506 F.3d 1241, 1248 (10th Cir. 2007) (characterizing a "loaded gun [as] by any measure an inherently dangerous weapon"); *Love v. Tippy*, 133 F.3d 1066, 1069 (8th Cir. 1998) (recognizing "the inherently violent nature of firearms, and the danger firearms pose to all members of society"); *United States v. Allah*, 130 F.3d 33, 40 (2d Cir. 1997) ("[F]irearms are inherently dangerous devices.").

Indeed, the Supreme Court's decision in District of *Columbia v. Heller* – which first recognized the individual right to carry firearms – is premised on the dangerousness of carrying firearms. In particular, *Heller* held that the Second Amendment affords individuals the right to keep and use handguns for the "*defense*" and "*protection* of one's home and family" – for example, to ward off "attacker[s]" or threaten "burglar[s]." 554 U.S. 570, 628-29 (2008) (emphasis added). If a lawfully possessed firearm did not pose a danger to attackers, burglars, or other

threatening individuals, there would be no need for individuals to own and carry firearms for protection.

And the widespread judicial recognition of the inherent dangerousness of firearms accords with the evidence. The Department of Justice reported that in 2011, the most recent year for which comprehensive statistics are available, a total of 478,400 fatal and nonfatal violent crimes were committed with a firearm. Michael Planty & Jennifer L. Truman, U.S. Dep't of Justice, Bureau of Justice Stats., *Special Report: Firearm Violence, 1993-2011*, at 1 (May 2013). Likewise, firearms are a leading cause of injury-related death in the United States and have been for many years. Jonathan E. Selkowitz, Comment, *Guns, Public Nuisance, and the PLCAA: A Public Health-Inspired Legal Analysis of the Predicate Exception*, 83 Temp. L. Rev. 793, 801-02 (2011); *see also* Centers for Disease Control & Prevention, Nat'l Ctr. for Health Stats., Underlying Cause of Death 1999-2014 on CDC WONDER Online Database, http://wonder.cdc.gov/ucd-icd10.html (queried on Nov. 18, 2016) (reporting that there were 497,632 intentional firearms deaths between 1999 and 2014). Accordingly, as a matter of law and fact, firearms – and therefore individuals who choose to carry firearms – are inherently dangerous.

In sum, individuals who carry firearms – lawfully or unlawfully – pose a risk of danger to themselves, law enforcement officers, and the public at large. Accordingly, law enforcement officers may frisk lawfully stopped individuals whom the officers reasonably suspect are carrying a firearm because a detainee's possession of a firearm poses a categorical "danger" to the officers.

II.

Having determined that individuals who are armed with a firearm are categorically "dangerous," we confront the second issue – whether individuals who choose to carry firearms sacrifice certain constitutional protections afforded to individuals who elect not to carry firearms. We must confront this issue because treating individuals armed with firearms – lawfully or unlawfully – as categorically dangerous places special burdens on such individuals. Today we recognize one such burden: individuals who carry firearms elect to subject themselves to being frisked when lawfully stopped by law enforcement officers.

I see no basis – nor does the majority opinion provide any – for limiting our conclusion that individuals who choose to carry firearms are categorically dangerous to the *Terry* frisk inquiry. Accordingly, the majority decision today necessarily leads to the conclusion that individuals who elect to carry firearms forego other constitutional rights, like the Fourth Amendment right to have law enforcement officers "knock-and-announce" before forcibly entering homes. *See Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) ("In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be *dangerous* or futile." (emphasis added)). Likewise, it is difficult to escape the conclusion that individuals who choose to carry firearms necessarily face greater restriction on their concurrent exercise of other constitutional rights, like those protected by the First Amendment. *See Schenck v. United States*, 249 U.S.

47, 52 (1919) (Holmes, J.) ("The question in every [freedom of speech] case is whether the words used *are used in such circumstances* and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent." (emphasis added)).

The Supreme Court has long recognized that "[t]he promotion of safety of persons and property is unquestionably at the core of the State's police power," *Kelley v. Johnson*, 425 U.S. 238, 247 (1976), and "the structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006). Thus, like most rights, the right protected by the Second Amendment – which Defendant's conduct may or may not implicate[2] – "is not unlimited" and therefore

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[2] Although we have expressly declined to resolve whether the right recognized in *Heller* extends beyond the home, *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011), other courts are divided on the question, *compare Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012) (recognizing that the "right to keep and bear arms for personal self-defense . . . implies a right to carry a loaded gun outside the home"); *Palmer v. Dist. of Columbia,* 59 F. Supp. 3d 173, 181-82 (D.D.C. 2014) (holding that Second Amendment right recognized in *Heller* extends beyond home), with *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016) ("[T]he Second Amendment does not protect the right of a member of the general public to carry *concealed* firearms in public." (emphasis added)); *Young v. Hawaii*, 911 F. Supp. 2d, 972, 990 (D. Haw. 2012) ("[L]imitations on carrying weapons in public do[] not implicate activity protected by the Second Amendment."); *Williams v. State*, 10 A.3d 1167, 1178 (Md. 2011) (holding that regulations on carrying firearms

does not amount to "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. In particular, today's majority opinion necessarily recognizes that the limitations on the right to carry firearms derive not only from the language of the Second Amendment – as *Heller* recognized – but also from other provisions in the Constitution, which protect law enforcement officers and the public at large from individuals who elect to engage in dangerous activities, like the carrying of firearms.

III.

In sum, because the carrying of a firearm poses a categorical danger to others – in this case, law enforcement officers – the law enforcement officers frisked Defendant, after lawfully detaining him, based on information that he carried a firearm. Accordingly, I concur in the majority opinion's decision to affirm Defendant's convictions.

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outside the home are "outside of the scope of the Second Amendment, as articulated in *Heller* and *McDonald*").

PAMELA HARRIS, Circuit Judge, with whom GREGORY, Chief Judge, DIANA GRIBBON MOTZ, Circuit Judge, and DAVIS, Senior Circuit Judge, join, dissenting:

In many jurisdictions and for many years, police officers could assume that anyone carrying a concealed firearm was up to no good. Because public possession of guns was prohibited or tightly regulated, concealed firearms were hallmarks of criminal activity, deadly weapons carried by law-breakers to facilitate their crimes. So it followed, without much need for elaboration, that if a suspect legally stopped by the police was carrying a gun, then he was not only "armed" but also "dangerous," justifying a protective frisk under *Terry v. Ohio*, 392 U.S. 1 (1968).

But that is no longer the case, at least in states like West Virginia. Today in West Virginia, citizens are legally entitled to arm themselves in public, and there is no reason to think that a person carrying or concealing a weapon during a traffic stop – conduct fully sanctioned by state law – is anything but a law-abiding citizen who poses no threat to the authorities. And as behavior once the province of law-breakers becomes commonplace and a matter of legal right, we no longer may take for granted the same correlation between "armed" and "dangerous."

The majority disagrees, adopting a bright-line rule that any citizen availing him or herself of the legal right to carry arms in public is per se "dangerous" under the *Terry* formulation and therefore subject to frisk and disarmament, at police discretion, if stopped for a traffic violation or some

other minor infraction. It may be, as the concurring opinion suggests, that this is where we will end up – that the price for exercising the right to bear arms will be the forfeiture of certain Fourth Amendment protections. Conc. Op. at 30-31. But unless and until the Supreme Court takes us there, I cannot endorse a rule that puts us on a collision course with rights to gun possession rooted in the Second Amendment and conferred by state legislatures. Nor would I adopt a rule that leaves to unbridled police discretion the decision as to *which* legally armed citizens will be targeted for frisks, opening the door to the very abuses the Fourth Amendment is designed to prevent. I must respectfully dissent.

I.

"[A]s public possession and display of firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt." *United States v. Williams*, 731 F.3d 678, 691 (7th Cir. 2013) (Hamilton, J., concurring). Within the last decade, federal constitutional law has recognized new Second Amendment protections for individual possession of firearms, *see McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), and state law has followed, providing expanded rights to carry guns in public, *see Williams*, 731 F.3d at 691. That states have elected to trust their citizens to carry guns safely cannot, of course, change federal Fourth Amendment law. But it does change the facts on the ground to which Fourth Amendment standards apply. And once it no longer is the case that the public carry of guns is illegal or even unusual, courts must take into account that changed

circumstance in applying the familiar *Terry* standard.

We have recognized as much already when it comes to the "stop" portion of a *Terry* "stop and frisk," justified on reasonable suspicion of criminal activity. *See Terry*, 392 U.S. at 30; *Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009). In jurisdictions in which the public carry of firearms is prohibited or closely regulated, a concealed gun is indicative of criminal activity and may give rise to "reasonable suspicion" sufficient to justify an investigative stop. But when a state elects to legalize the public carry of firearms, we have held, the Fourth Amendment equation changes, and public possession of a gun is no longer "suspicious" in a way that would authorize a *Terry* stop. *United States v. Black*, 707 F.3d 531, 539-40 (4th Cir. 2013). "Permitting such a justification" for a *Terry* stop, we explained, "would eviscerate Fourth Amendment protections for lawfully armed individuals in those states." *Id.* at 540.

We are not alone in this insight. In *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1131-33 (6th Cir. 2015), for instance, the Sixth Circuit held that where state law permits the open carry of firearms, the police are not authorized by *Terry* to conduct a stop – or an attendant frisk – of a person brandishing a gun in public. Where the state legislature "has decided its citizens may be entrusted with firearms on public streets," the court reasoned, the police have "no authority to disregard this decision" by subjecting law-abiding citizens to Terry stops and frisks. *Id.* at 1133; *see also*, *e.g.*, *United States v. Leo,* 792 F.3d 742, 749-50, 751-52 (7th Cir. 2015) (rejecting "frisk" and search of backpack on

suspicion that it contains gun in light of "important developments in Second Amendment law together with Wisconsin's [concealed-carry] gun laws"); *United States v. Ubiles*, 224 F.3d 213, 218 (3d Cir. 2000) (invalidating *Terry* stop based on suspicion of gun possession in open-carry jurisdiction).

In my view, the same reasoning compels the conclusion that in a state like West Virginia, which broadly allows public possession of firearms, reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that the person also is dangerous, so as to justify a *Terry* frisk. Guns, of course, are in some sense intrinsically dangerous. But the question under *Terry* is whether a person carrying a gun is a danger to the police or others. *Terry*, 392 U.S. at 24. And where the state legislature has decided that its citizens may be entrusted to safely carry firearms on public streets and during traffic stops, and law-abiding citizens have availed themselves of these rights, I do not see how we can presume that every one of those citizens necessarily poses a danger to the police. *See Northrup*, 785 F.3d at 1133 (absent reasonable suspicion that an armed man is dangerous, officers must "trust . . . their State's approach to gun licensure and gun possession").

To be clear: As Officer Tharp testified at the suppression hearing, none of the conduct reported in the anonymous tip she received – that an African-American man had loaded a gun in the parking lot of a 7-Eleven and then concealed it in his pocket before leaving in a car – was illegal under West Virginia law. Nor was there any testimony from the officers that the reported conduct was unusual, or "out of

place" where it occurred. *Cf. United States v. Arvizu*, 534 U.S. 266, 276 (2002) (conduct that appears innocuous in one setting but is unusual in another may give rise to reasonable suspicion).[1] In terms of Robinson's behavior, the officers knew nothing except that Robinson was engaging in what we must treat as a presumptively lawful exercise of his right to carry a concealed weapon. *See Black*, 707 F.3d at 540 (police may not proceed on assumption that gun displayed in open-carry jurisdiction may be illegally possessed by convicted felon); *see also Northrup*, 785 F.3d at 1132 (same). If that by itself is enough to make a person "dangerous" for *Terry* purposes, then the legal right to carry arms in public is perfectly self-defeating: The moment a person exercises that right – and has the misfortune to be stopped for a traffic violation or other minor infraction – he opens himself up to being frisked and *disarmed*, at least temporarily, by law enforcement officers.

The majority insists that this result, putting at cross-purposes Fourth Amendment and gun possession rights, is compelled by the Supreme Court's holdings in *Terry v. Ohio*, 392 U.S. at 27, and *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977) (per curiam). According to the majority, those cases establish that if the police have reasonable suspicion

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[1] We have held that in jurisdictions generally allowing public gun possession, police testimony that few law-abiding citizens take advantage of that right is not enough to establish reasonable suspicion for a *Terry* stop when a gun is publicly displayed. *See Black*, 707 F.3d at 540. But even assuming that such testimony might bear on the separate "dangerousness" inquiry under *Terry*, none was offered at this suppression hearing.

that a suspect is "armed," then they necessarily have reasonable suspicion that he is "dangerous," as well, justifying a frisk under *Terry*'s "armed and dangerous" standard. In other words, when the Supreme Court says "armed and dangerous," what it really means is "armed and *therefore* dangerous," Maj. Op. at 13-16 – or, put more simply, "armed."

But the Supreme Court for decades has adhered to its conjunctive "armed *and* dangerous" formulation, giving no indication that "dangerous" may be read out of the equation as an expendable redundancy. *See Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (approving *Terry* "frisk" of automobile on reasonable suspicion "that the suspect is dangerous *and* the suspect may gain immediate control of weapons") (emphasis added). Indeed, until its latest filing before our en banc court, the government itself understood "armed" and "dangerous" as separate and independent conditions of a lawful *Terry* frisk. *See* Gov't Br. at 16-17. And other courts applying *Terry* in precisely this context – against a backdrop of state laws that routinely permit the public possession of firearms – have taken the same position, holding that a *Terry* frisk requires reasonable suspicion that a person is "both armed and a danger to the safety of officers or others." *Leo*, 792 F.3d at 748; *see Northrup*, 785 F.3d at 1132 ("Clearly established law required [the officer] to point to evidence that [the suspect] may have been armed *and dangerous*. Yet all he ever saw was that [the suspect] was armed – and legally so.") (emphasis in original) (citation omitted).

It is true, as the majority argues, that the Court in *Terry* and *Mimms* was prepared to infer danger

from the presence of a concealed firearm. *Terry*, 392 U.S. at 28; *Mimms*, 434 U.S. at 112. But that simply brings us back to our starting point: that in jurisdictions where public possession or concealed carry of guns is illegal, as in *Terry*, *see Northrup*, 785 F.3d at 1131, or tightly regulated, as in *Mimms*,[2] there is precious little space between "armed" and "dangerous" – not only because someone carrying a gun probably is breaking the law already, but also because he likely is inclined to commit other crimes with the assistance of the gun. Nobody – including Robinson – doubts that as in *Mimms* and *Terry*, a presumptively illegal concealed gun gives rise to a reasonable suspicion of dangerousness, allowing the police to conduct a protective frisk. But those cases simply do not speak to the very different circumstances presented when public gun possession is presumptively legal, *see Black*, 707 F.3d at 540, and there no longer is reason to believe that a person carrying a gun during a traffic stop is anything but a perfectly law-abiding citizen.

Nor, contrary to the majority's analysis, Maj. Op. at 16-17, does *Adams v. Williams*, 407 U.S. 143 (1972), resolve this issue. Adams does make clear, as the majority emphasizes, that even a lawfully possessed firearm *can* pose a threat to officer safety. 407 U.S. at 146. But that point is of limited use here, because nobody is disputing it. Robinson's argument is not, as the majority would have it, Maj. Op. at 16,

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[2] At the time of the events in *Mimms*, local law appears to have strictly limited the public possession of firearms, allowing it only in certain narrow circumstances. *See* 1943 Pa. Laws 487; 1972 Pa. Laws 1577.

that any risk of danger posed by a firearm necessarily is "eliminated" if the firearm is legally possessed. Where, as in *Adams*, an armed man suspected of drug offenses is sitting alone in a parked car at 2:15 a.m. and unwilling to cooperate with the police, everyone agrees that the circumstances give rise to a reasonable suspicion of "dangerousness" regardless of the legal status of the gun. *See* 407 U.S. at 147-48. But the question in this case is different: not whether a presumptively lawful gun may give rise to a reasonable suspicion of dangerousness under certain circumstances, but whether it necessarily and automatically does so in every circumstance. On that question, *Adams* has nothing to say.[3]

The problems with treating "armed and dangerous" as a "unitary" concept, *see* Conc. Op. at 23, go beyond the mismatch with precedent. As the concurring opinion cogently explains, the logic of *Terry* frisk doctrine is premised on an independent role for dangerousness: Whether a person in possession of, say, a screwdriver is deemed "armed" under *Terry* depends entirely on whether there is separate reason to believe he or she also is

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[3] Nor does *Michigan v. Long*, 463 U.S. 1032 (1983), on which the majority also relies. In a footnote, *Long* cites *Adams* for the proposition that a person in legal possession of a weapon – in *Long*, a knife – may pose a risk of danger to the police. *Id.* at 1052 n.16. But the Court's approval of the frisk in *Long* rested not only on the presence of a weapon, but also on an independent finding that under all the circumstances of the case – featuring a suspect who drove at excessive speed, swerved into a ditch, refused initially to cooperate, and appeared to be intoxicated – the officers were "clearly justified" in their "reasonable belief that Long posed a danger" to their safety. *Id.* at 1050.

"dangerous" and thus might use that screwdriver as a weapon. *See* Conc. Op. at 24-25; *United States v. Matchett*, 802 F.3d 1185, 1193 (11th Cir. 2015) (upholding *Terry* frisk of burglary suspect because burglars frequently are "armed" with tools like screwdrivers).

And though it purports to rely on a common-sense equation of guns with danger, the majority's approach can embrace that connection only very selectively: An armed citizen in an open-carry jurisdiction necessarily poses a "danger" to the police that justifies a protective frisk if and only if he appears to have committed some offense, however trivial – like the seatbelt violation here – leading to a valid stop. *See* Maj. Op. at 15-16. If, on the other hand, the police in this case had initiated a consensual encounter with Robinson in the 7-Eleven parking lot, then the gun Robinson was suspected of carrying would *not* have been grounds for a frisk, as the government conceded at oral argument. Likewise, had Robinson exited the car in which he was a passenger before the police could conduct their pretextual traffic stop, then again he would no longer be "dangerous" for purposes of allowing a *Terry* frisk, notwithstanding the concealed gun in his pocket. To be sure, as the majority explains, Maj. Op. at 15, *Terry* doctrine requires that a frisk be attendant to a lawful stop. But if "armed" may be conflated with "dangerous" under *Terry*, then it is hard to see why an officer's right to protect him or herself would be made to turn on whether a dangerous person carrying a gun has remembered to fasten his seatbelt.

Most important, by equating "armed" with "dangerous" even in states where the carrying of guns is widely permitted, the majority's rule has the effect of depriving countless law-abiding citizens of what otherwise would be their Fourth Amendment and other constitutional rights. As the concurring opinion explains, the upshot of the majority's approach is that citizens who avail themselves of their legal right to carry firearms will be subject to a wide range of "special burdens," the full extent of which we only can begin to discern. Conc. Op. at 30. Certainly, such citizens may be frisked and temporarily disarmed when stopped, even for the most minor of infractions; if they necessarily are "dangerous," then the police should be free to dispense with Fourth Amendment "knock-and-announce" protections before entering their homes; and when armed and "therefore dangerous" citizens seek to assemble in public, their First Amendment rights may be restricted based on the risk they are conclusively presumed to pose to public safety. *See id.* at 30-31. To the concurring opinion's list, I would add one more: If a police officer reasonably believes that a suspect poses a "threat of serious physical harm," he may use deadly force to protect himself, *see*, *e.g.*, *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013) (internal quotation marks omitted), and while we have held in the past that the presence of a gun alone does not constitute a "threat," *id.*, or establish that a suspect is "dangerous" to an officer, *Pena v. Porter*, 316 F. App'x 303, 311 (4th Cir. 2009) (unpublished), today's decision insisting on a conclusive link between "armed" and "dangerous" undoubtedly will have implications for police use of force, as well. Those consequences – and others that surely will

follow – are profound, both practically and constitutionally, and I would not be so quick to invite them without some direction from the Supreme Court.

But my biggest concern is that these "special burdens" – most relevantly, the *Terry* frisks at issue here – will not be distributed evenly across the population. Allowing police officers making stops to frisk anyone thought to be armed, in a state where the carrying of guns is widely permitted, "creates a serious and recurring threat to the privacy of countless individuals," *Arizona v. Gant*, 556 U.S. 332, 345 (2009) (police may not search a car "whenever an individual is caught committing a traffic offense"). And, critically, it "gives police officers unbridled discretion" to decide *which* of those legally armed citizens will be targeted for frisks, implicating concerns about the abuse of police discretion that are fundamental to the Fourth Amendment. *See id.*; *Black*, 707 F.3d at 541. As Judge Hamilton warned in Williams, once a state legalizes the public possession of firearms, unchecked police discretion to single out anyone carrying a gun gives rise to "the potential for intentional or unintentional discrimination based on neighborhood, class, race, or ethnicity." 731 F.3d at 694; *see also Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) ("it is no secret that people of color are disproportionate victims" of special police scrutiny).

The government assures that we need not worry about these possible disproportionate effects because a *Terry* frisk may be conducted only after a stop on reasonable suspicion of "criminal activity" – an "objective standard" that "prevents police stops on

hunches alone." Pet'n for Reh'g En Banc at 13. But that simply is not so, and to understand why not, we need look no further than the facts of this very case. Robinson was not stopped for "criminal activity," at least as that term generally is understood. As a legal matter, he was stopped because Officer Hudson observed a seatbelt violation – the kind of minor and routine traffic infraction that does next to nothing to narrow the class of legally armed citizens who may be subjected to a frisk at police discretion. And in reality, as Officer Hudson candidly testified at the suppression hearing, Robinson was stopped so that the police could investigate the tip they had received about a black male carrying a concealed firearm. Though Robinson's gun possession was presumptively lawful in light of West Virginia's generous public-carry laws, *see Black*, 707 F.3d at 540, that is, Robinson was stopped *precisely* because the police had a hunch that his possession in fact might be unlawful.

It is true, as the government argues, that under *Whren v. United States*, 517 U.S. 806 (1996), the Fourth Amendment permits this kind of pretextual traffic stop, undertaken in order to explore some unsupported hunch. But that is exactly the problem: In light of *Whren*, the requirement that a valid stop precede a *Terry* frisk imposes no meaningful limit at all on police discretion. If the police in a public-carry jurisdiction want to target a particular armed citizen for an exploratory frisk, then they need do no more than wait and watch for a moving violation, as in this case – or a parking violation, *see United States v. Johnson*, 823 F.3d 408, 412 (7th Cir. 2016) (Hamilton, J., dissenting) (describing pretextual stop

for "parking while black") *reh'g en banc granted, opinion vacated* (Aug. 8, 2016); or, for the pedestrians among us, a jaywalking infraction, as the government helpfully explained at oral argument – and then make a pretextual stop.

And we should be clear about the degree to which that pretextual stop may be leveraged into a wide-ranging and intrusive investigation. *Cf. Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting) ("Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more.") First, of course, is the frisk itself, euphemistically described as a "pat-down" but recognized, since *Terry*, as a "serious intrusion upon the sanctity of the person" that may extend to a thorough touching of sensitive and private areas of the body. *Id.* at 2070; *Terry*, 392 U.S. at 17 & n. 14. And under *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983), reasonable suspicion that the subject of a vehicular stop is armed and dangerous may authorize not only a frisk of the suspect's person but also a "frisk" of the passenger compartment of the car. So with possession of a firearm in a public-carry state now enough to generate a reasonable suspicion of dangerousness, pretextual stops will allow police officers to target law-abiding gun owners not only for intrusive frisks but also limited car searches, at police discretion and on the basis of nothing more than a minor infraction. That is effectively the same result that the Supreme Court found unacceptable in *Gant*, 556 U.S. at 345 (forbidding car searches incident to arrest for minor traffic violations), and it should be no more acceptable here, where a right of constitutional

dimension – the right to bear arms – is in the balance.

I recognize the serious concerns for officer safety that underlie the *Terry* frisk doctrine and the majority's opinion. Those concerns, as the majority points out, Maj. Op. at 12-13, may be especially pronounced during traffic stops, *see*, *e.g.*, *Mimms*, 434 U.S. at 110-11 – though, of course, the majority's rule is not limited to the context of traffic stops. And I do not doubt that recent legal developments regarding gun possession have made the work of the police more dangerous as well as more difficult. *See Williams*, 731 F.3d at 694.

In my view, states have every right to address these pressing safety concerns with generally applicable and even-handed laws imposing modest burdens on *all* citizens who choose to arm themselves in public. For instance, many states – though not West Virginia – seek to reconcile police safety and a right to public carry through "duty to inform" laws, requiring any individual carrying a weapon to so inform the police whenever he or she is stopped,[4] or in response to police queries.[5] And if a person fails to disclose a suspected weapon to the police as required by state law, then that failure itself may give rise to a reasonable suspicion of dangerousness, justifying a protective frisk.

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[4] *See*, *e.g.*, Alaska Stat. § 11.61.220; La. Stat. § 40:1379.3; Neb. Rev. Stat. § 69-2440; N.C. Gen. Stat. § 14-415.11; Okla. Stat. tit. 21, § 1290.8.

[5] *See*, *e.g.*, Ariz. Rev. Stat. § 13-3112; Ark. Code § 5-73-315; 430 Ill. Comp. Stat. 66/10; S.C. Code § 23-31-215.

West Virginia, however, has taken a different approach, permitting concealed carry without the need for disclosure or temporary disarmament during traffic stops. For the reasons described above, I do not believe we may deem inherently "dangerous" any West Virginia citizen stopped for a routine traffic violation, on the sole ground that he is thought to have availed himself fully of those state-law rights to gun possession. Nor, in my view, does the Fourth Amendment allow for a regime in which the safety risks of a policy like West Virginia's are mitigated by selective and discretionary police spot-checks and frisks of certain legally armed citizens, by way of pretextual stops or otherwise. *Cf. Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (invalidating discretionary spot-checks of drivers for licenses and registrations in furtherance of roadway safety). Absent some "specific, articulable suspicion of danger" in a particular case, *see United States v. Sakyi*, 160 F.3d 164, 168-69 (4th Cir. 1998), West Virginia's citizens, including its police officers, must trust their state's considered judgment that the benefits of its approach to public gun possession outweigh the risks. *See Northrup*, 785 F.3d at 1133.

II.

The majority's rule is bright-line and broad: Any citizen carrying a gun in a public-carry jurisdiction is "armed" and also per se "dangerous" under *Terry*, regardless of surrounding circumstances. Maj. Op. at 18. The majority goes on, however, to consider the particular facts surrounding Robinson's stop, and concludes that they confirm a reasonable suspicion of dangerousness. *Id.* at 18-19. Though this portion of the majority's opinion appears to be dicta

unnecessary to its holding, I respectfully note my disagreement.

To be clear, I have no quarrel with the majority's premise: that under certain circumstances, even a lawfully possessed firearm can give rise to a reasonable suspicion of dangerousness. *See Adams*, 407 U.S. at 146. And so it is incumbent on me to consider whether the frisk in this case was justified in light not only of reasonable suspicion that Robinson was armed – insufficient by itself – but also of the surrounding circumstances. But like the magistrate judge who conducted Robinson's suppression hearing, I do not believe that either of the factors cited by the government and the majority – Robinson's presence in a high-crime neighborhood, or his "evasive response" when asked if he had a gun – is probative of dangerousness in the context of this case. Taking all of the circumstances together, I see no "particularized and objective basis" for believing that Robinson was dangerous as well as armed. *See United States v. George*, 732 F.3d 296, 299 (4th Cir. 2013) (internal quotation marks omitted).

The suppression hearing in this case was conducted by a magistrate judge, who heard testimony from all of the officers involved in the events leading up to Robinson's frisk. In recommending suppression, the magistrate judge evaluated the full circumstances surrounding Robinson's frisk, including both the "high-crime" status of the apartment complex next to the 7-Eleven at which Robinson was seen loading his weapon and Robinson's conduct during the traffic stop. According to the magistrate judge, the testimony at the hearing indicated that Robinson was fully cooperative with

the police, who perceived no "furtive gestures" or movements suggesting an intent to reach for a weapon. J.A. 131. And based on all of the evidence before him, the magistrate judge concluded that the government had failed to "articulate any specific fact, other than [Robinson's] possession of a firearm in a high crime neighborhood, a legal activity in the state of West Virginia, which would justify the officer's suspicion that [Robinson] was dangerous." *Id.* at 138.

The district court, of course, rejected the magistrate judge's report and recommendation and denied the suppression motion. But because the district court did not conduct a second hearing, this case must be decided on the record created before the magistrate judge. And on that record, I see no reason for second-guessing the magistrate judge's determination that the government's witnesses "testified to no objective and particularized facts demonstrating that [Robinson] was dangerous at the time of the traffic stop." *Id.* at 137.

It is true, as the magistrate judge carefully reviewed, that police officers provided testimony that an apartment complex adjacent to the 7-Eleven at issue is considered a high crime area, and that crime from that complex often "spilled over" into the 7-Eleven parking lot where Robinson was seen, "as evidenced by shoplifting, thefts and drug trafficking activities." *Id.* at 130. And it is clear, as the magistrate judge recognized, that presence in a high-crime area may contribute to a finding of reasonable suspicion. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

But as our cases have indicated, the relative significance of a high-crime area, like other reasonable suspicion factors, is context-specific. In some cases, for instance, we have sustained a *Terry* frisk because it occurred in a high-crime area late at night. *See*, *e.g.*, *George*, 732 F.3d at 300. In *Black*, however, we rejected a position substantially the same as the government's here: that even if public gun possession alone does not justify a *Terry* stop where the law permits the open carry of firearms, gun possession in a high-crime area would be sufficiently "suspicious" to do so. 707 F.3d at 542.

Black should govern here. Whether or not a high-crime environment might make other ambiguous conduct – for instance, fleeing from a police officer, *see Wardlow*, 528 U.S. at 124 – more likely to be criminal or dangerous, it sheds no light on the likelihood that an individual's presumptively legal gun possession poses a danger to the police. That is because where public gun possession is permitted, high-crime areas are exactly the setting in which we should most expect to see law-abiding citizens carrying guns; there is more, not less, reason to arm oneself lawfully for self-defense in a high-crime area. *Cf. McDonald*, 561 U.S. at 790 ("[T]he Second Amendment right protects the rights of minorities and other residents of high-crime areas."). Presence in a high-crime area, in other words, is as likely an explanation for innocent and non-dangerous gun possession as it is an indication that gun possession is illegal or dangerous, and it does nothing to help the police tell the difference.

As discussed above, in states allowing the public possession of weapons, authorizing a *Terry* pat-down

whenever there is reasonable suspicion that a person is armed, and in connection with a stop for any minor violation, would give the police unchecked discretion in deciding which armed citizens to frisk. Allowing such automatic frisks only in high-crime areas would do nothing to address that concern. Instead, it would guarantee that the costs of such intrusions are borne disproportionately by the racial minorities and less affluent individuals who today are most likely to live and work in neighborhoods classified as high-crime. *See Black*, 707 F.3d at 542. Given the lack of probative value associated with a high-crime area when it comes to gun possession, there is no justification for adopting such a rule. "The new constitutional and statutory rights for individuals to bear arms at home and in public apply to all," and "[t]he courts have an obligation to protect those rights" in neighborhoods labeled "bad" as well as "good." *Williams*, 731 F.3d at 694 (Hamilton, J., concurring).

Apart from the high-crime neighborhood, the majority, like the government, puts primary reliance on Robinson's "evasive response" when asked by Captain Roberts whether he was carrying a firearm. Maj. Op. at 19. But according to the officers' testimony, Robinson was cooperative throughout his encounter with the police, and never made any inconsistent statements indicating nervousness. And the magistrate judge found – without dispute by the district court – that Captain Roberts's inquiry to Robinson came virtually simultaneously with the frisk itself: Roberts "asked [Robinson] if he had any firearms on his person as [Robinson] was exiting the vehicle," and upon perceiving a "weird look," ordered

Robinson to place his hands on top of the car and conducted the frisk. J.A. 118. Even construing this evidence in the light most favorable to the government, there was a very limited time window during which Robinson could have responded before the frisk made the question moot, and his failure to interject an answer immediately did not provide an objective indication that he was about to abandon his cooperative posture and become dangerous.[6]

That is particularly so given that West Virginia does not require that people carrying firearms inform the police of their guns during traffic or other stops, even if asked. *See supra* at 50. Where a state has decided that gun owners have a right to carry concealed weapons without so informing the police, gun owners should not be subjected to frisks because they stand on their rights. *Cf. Northrup*, 785 F.3d at 1132 ("impropriety" of officer's demand to see permit for gun being brandished in public is "particularly acute" where state has not only legalized open carry of firearms but also "does not require gun owners to produce or even carry their licenses for inquiring officers"). Under a different legal regime, different inferences could be drawn from a failure to answer an officer's question about a gun. *See supra* at 50-11.

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[6] The majority appears also to credit the "weirdness" of Robinson's look, as understood by Captain Roberts, as indicative of evasiveness or perhaps dangerousness itself. Maj. Op. at 19. On this point, I must agree with the magistrate judge: Captain Roberts's perception that through his look Robinson actually was saying, "[O]h, crap," "I don't want to lie to you, but I'm not going to tell you anything," J.A. 89, is sufficiently subjective that it cannot constitute an objective or articulable factor supporting reasonable suspicion of anything.

But I do not think we may presume dangerousness from a failure to waive – quickly enough – a state-conferred right to conceal a weapon during a police encounter.

Again, I recognize that expanded rights to openly carry or conceal guns in public will engender genuine safety concerns on the part of police officers, as well as other citizens, who more often will find themselves confronting individuals who may be armed. But where a sovereign state has made the judgment that its citizens safely may arm themselves in public, I do not believe we may presume that public gun possession gives rise to a reasonable suspicion of dangerousness, no matter what the neighborhood. And because the rest of the circumstances surrounding this otherwise unremarkable traffic stop do not add appreciably to the reasonable suspicion calculus, I must conclude that the police were without authority to frisk Robinson under *Terry*'s "armed and dangerous" standard. Accordingly, I dissent.

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-4902

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHAQUILLE MONTEL ROBINSON,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. Gina M. Groh, Chief District Judge. (3:14-cr-00028-GMG-RWT-1)

Argued: October 29, 2015
Decided: February 23, 2016

Before NIEMEYER and HARRIS, Circuit Judges, and DAVIS, Senior Circuit Judge.

Reversed and vacated by published opinion. Judge Harris wrote the opinion, in which Senior Judge Davis joined. Judge Niemeyer wrote a dissenting opinion.

ARGUED: Nicholas Joseph Compton, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Martinsburg, West Virginia, for Appellant. Jarod James Douglas, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee. **ON BRIEF:** Kristen M. Leddy, Research and Writing Specialist, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Martinsburg, West Virginia, for Appellant. William J. Ihlenfeld, II, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

PAMELA HARRIS, Circuit Judge:

On an afternoon in 2014, the Ranson, West Virginia police department received an anonymous tip that a black man had loaded a gun in a 7-Eleven parking lot and then concealed it in his pocket before leaving in a car. A few minutes later, the police stopped a car matching the description they had been given, citing a traffic violation. Shaquille Montel Robinson, a black man, was a passenger in the car. After Robinson exited the vehicle at police request, an officer frisked Robinson and discovered a firearm in the pocket of Robinson's pants.

Under *Terry v. Ohio*, 392 U.S. 1 (1968), the police may conduct a limited pat-down for weapons when there is reasonable suspicion that a suspect is both armed and dangerous. "Armed" is not a problem in this case: Assuming the credibility of the anonymous tip, which we may for purposes of this appeal, the police had reason to believe that Robinson was armed when they stopped him. But "dangerous" is more difficult, and what makes it difficult is that West

Virginia law authorizes citizens to arm themselves with concealed guns. Because the carrying of a concealed firearm is not itself illegal in West Virginia, and because the circumstances did not otherwise provide an objective basis for inferring danger, we must conclude that the officer who frisked Robinson lacked reasonable suspicion that Robinson was not only armed but also dangerous. Accordingly, we reverse the district court decision denying Robinson's motion to suppress the evidence uncovered by this unlawful search.

I.

A.

At 3:55 p.m. on March 24, 2014, the Ranson police department forwarded an anonymous call to Officer Crystal Tharp. At a hearing conducted by the magistrate judge, Tharp testified that the caller "advised that he had witnessed a black male in a bluish greenish Toyota Camry load a firearm, conceal it in his pocket, and there was a white female driver." J.A. 43. The caller indicated that the car had just left the location, which he identified as the parking lot of a 7-Eleven on North Mildred Street. Immediately adjacent to that 7-Eleven is the Apple Tree Gardens apartment complex, regarded by the officers in this case as the highest-crime area in Ranson.

The caller advised that the Camry had headed south on North Mildred Street. Two officers, Captain Robbie Roberts and Officer Kendall Hudson, separately left the station to find the car. Officer Hudson spotted a car matching the description traveling on North Mildred Street, and noticed that the two occupants were not wearing seatbelts, a

traffic violation under West Virginia law. Relying on the seatbelt violation, he pulled over the car, approximately two to three minutes after the anonymous call had been received and roughly three-quarters of a mile from the 7-Eleven.

Officer Hudson approached the driver's side of the car with his weapon drawn and asked the female driver for her license and registration. She complied. At the hearing before the magistrate judge, Hudson testified that he also initially asked Robinson for his identification, but then realized that asking him to reach into his pocket was "probably not a good idea" because "[t]his guy might have a gun." J.A. 66. Instead, Hudson asked Robinson to step out of the car.

At this point, Captain Roberts had arrived at the scene as backup. Roberts testified that he approached Robinson and opened the passenger-side door. As Robinson was exiting the car, Roberts asked Robinson if he had any weapons. In response, Roberts testified, Robinson gave a "weird look." J.A. 88. Roberts ordered Robinson to put his hands on top of the car and began to frisk him for weapons, discovering a firearm in Robinson's pants pocket.

Captain Roberts whispered "gun" to Officer Hudson, and Hudson handcuffed Robinson and ordered him to sit on the sidewalk. According to the officers' testimony, Robinson was cooperative throughout his encounter with the police, and made no furtive gestures or movements suggesting that he intended to reach for a weapon. After frisking him, however, Roberts recognized Robinson from prior

criminal proceedings and confirmed that Robinson was a convicted felon.

B.

A grand jury in the Northern District of West Virginia indicted Robinson on one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Robinson moved to suppress the evidence against him — the gun recovered during the traffic stop of March 24 — on the ground that the frisk was unlawful. The district court referred the motion to a magistrate judge for a report and recommendation.

The magistrate judge conducted a hearing, taking testimony from all of the officers involved in the events of March 24: Officer Tharp, Officer Hudson, and Captain Roberts. A fourth officer, Trooper D.R. Walker, testified as to the high level of criminal activity at the Apple Tree Garden apartment complex next to the 7-Eleven at which Robinson had been seen loading his weapon. Following the hearing, the magistrate judge issued a report that recommended granting Robinson's motion to suppress.

The magistrate judge agreed with the government that the initial stop of the car was justified by the observed seatbelt violation. But the frisk, the magistrate judge concluded, was not supported by a "reasonable belief that [Robinson] [was] armed and presently dangerous," as required to justify a pat-down for weapons under *Terry*. J.A. 124 (quoting *Ybarra v. Illinois*, 444 U.S. 85, 86 (1979)). The problem, the magistrate judge explained, was that in light of West Virginia law allowing for both open and concealed carrying of loaded guns, "the

content of the tip provided to the police, while reporting the individual was *armed*, does not contain any information demonstrating that the individual was engaging in any objective or particularized *dangerous* behavior." J.A. 136 (emphasis added) (internal quotation marks omitted).

The magistrate judge also considered the facts surrounding the officers' encounter with Robinson, including the "high-crime" status of the apartment complex next to the 7-Eleven. Based on the officers' testimony, the magistrate judge concluded that both the car's driver and Robinson were cooperative throughout, and that Robinson had made no "furtive gestures, movements or inconsistent statements" suggesting nervousness or an intent to reach for a weapon. J.A. 131. Apart from what one officer perceived as a "weird look" — which the magistrate judge deemed a "subjective impression" insufficient to justify a frisk, J.A. 137 — the magistrate judge concluded that the government had failed to "articulate any specific fact, other than [Robinson's] possession of a firearm in a high crime neighborhood, a legal activity in the state of West Virginia, which would justify the officer's suspicion that [Robinson] was dangerous." J.A. 138.

After the government submitted objections, the district court rejected the magistrate judge's report and recommendation in relevant part and denied the suppression motion. Because it did not conduct a second hearing, the district court relied on the record created before the magistrate judge. And in the district court's view, a reasonable suspicion that Robinson was armed in a high-crime area, when combined with Robinson's failure to answer when

asked by an officer if he was armed, translated to a reasonable suspicion that Robinson was dangerous.

Robinson conditionally pleaded guilty to being a felon in possession of a firearm, preserving his right to appeal the denial of his suppression motion, and was sentenced to 37 months of incarceration. This timely appeal followed.

II.

In reviewing the denial of a motion to suppress, we examine the district court's factual findings for clear error and its legal conclusions de novo. *United States v. Elston*, 479 F.3d 314, 317 (4th Cir. 2007). We view the evidence in the light most favorable to the government, as the prevailing party before the district court. *United States v. Black*, 707 F.3d 531, 534 (4th Cir. 2013).

A.

This case is governed by the familiar two-part standard of *Terry v. Ohio*, which considered the lawfulness of "stop and frisk" procedures under the Fourth Amendment. 392 U.S. 1. Under *Terry*, an officer may conduct a brief investigatory "stop" — including a traffic stop, *see Arizona v. Johnson*, 555 U.S. 323, 330-32 (2009) — based on reasonable suspicion of criminal activity, without the need for a warrant or probable cause. *Terry*, 392 U.S. at 30; *see*, *e.g.*, *United States v. Holmes*, 376 F.3d 270, 275 (4th Cir. 2004). But a valid stop does not automatically entitle an officer to conduct a "frisk," or protective pat-down of outer clothing for weapons. *See United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998) (officer "must have justification for a frisk or a 'pat-

down' beyond the mere justification for [a] traffic stop"). Rather, because a frisk is a "serious intrusion upon the sanctity of the person," *Terry*, 392 U.S. at 17, it is subject to a separate standard: The police may frisk a person who has been legally stopped only if the officer has a reasonable and articulable suspicion that the person is "armed and presently dangerous to the officer or to others." *Id.* at 24; *Holmes*, 376 F.3d at 275.

In deciding whether a frisk is justified, we "examine the 'totality of the circumstances' to determine if the officer had a 'particularized and objective basis' for believing that the detained suspect might be armed and dangerous." *United States v. George*, 732 F.3d 296, 299 (4th Cir. 2013) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). As the district court noted, multiple factors may together create reasonable suspicion that a suspect is armed and dangerous even if none of them would be sufficient taken alone. *Id.* at 300. The standard is objective, so a frisking officer's subjective impressions are not relevant to our analysis. *Id.* at 299; *United States v. Hernandez-Mendez*, 626 F.3d 203, 212 (4th Cir. 2010).

Here, Robinson does not contest the validity of the initial traffic stop by Officer Hudson. Nor could he. As the magistrate judge explained, under *Whren v. United States*, 517 U.S. 806 (1996), approving "pretextual" stops under the Fourth Amendment, evidence of a seatbelt violation justified the stop regardless of whether the officer actually was motivated by the anonymous tip. Accordingly, the only question we must decide is whether the subsequent frisk was lawful — that is, whether the

officers had reasonable suspicion that Robinson was "armed and dangerous." And our inquiry is narrower still because Robinson does not dispute reasonable suspicion that he was "armed," choosing not to contest the reliability of the anonymous tip to the police.[1] All that remains for us to decide is whether there was reasonable suspicion that Robinson was "dangerous."[2] For the reasons set out below, we conclude that there was not.

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[1] Though Robinson addressed the issue in his brief, at oral argument he expressly declined to rely on any challenge to the reliability of the anonymous tip. Accordingly, for purposes of this appeal, we will assume without deciding that the tip was reliable.

[2] Our dissenting colleague suggests that we may dispense with this inquiry entirely, because when the Supreme Court says "armed and dangerous" what it really means is "armed and *thus* dangerous" — or, put more simply, "armed." *See post* at 9-14. But the government does not dispute that "armed" and "dangerous" are separate and independent conditions of a lawful *Terry* frisk. *See* Gov't Br. at 16-17 (given reasonable suspicion that Robinson was armed, "the dispositive issue becomes whether a reasonable prudent . . . officer would be warranted in the belief that his safety . . . was in danger"). We think that is a wise concession. The Supreme Court for decades has adhered to its conjunctive "armed *and* dangerous" formulation, giving no indication that "dangerous" may be read out of the equation as an expendable redundancy. Indeed, where the Court has elaborated, it has highlighted the independent role of "dangerousness," holding in *Michigan v. Long*, 463 U.S. 1032 (1983), that *Terry* authorizes a "frisk" of an automobile when a police officer possesses reasonable suspicion "that the suspect is dangerous and the suspect may gain immediate control of weapons," *id.* at 1049. Like other courts applying *Terry* in jurisdictions that routinely permit the public possession of firearms, we take the Supreme Court at its word: A *Terry* frisk requires reasonable suspicion that a person is "both armed and a danger to the safety of officers or others." *United States v. Leo*,

B.

All parties agree that the anonymous tip to the police, giving rise to a reasonable suspicion that Robinson was carrying a loaded and concealed firearm, is critical to the government's case on dangerousness. Accordingly, we start with the tip, and consider first whether reasonable suspicion that Robinson was armed, in and of itself, generated reasonable suspicion of dangerousness sufficient to justify a *Terry* frisk.

In a different time or jurisdiction, it might well have. If carrying a concealed firearm were prohibited by local law, then a suspect concealing a gun in his pocket by definition would be presently engaged in criminal activity involving a deadly weapon. And where local law tightly regulates the concealed carry of firearms, permitting it only in rare cases, then a concealed gun may remain a strong indication of criminal activity. In those circumstances, there is precious little space between "armed" and "dangerous," and a police officer may be justified in conducting a *Terry* frisk on reasonable suspicion that a suspect is concealing a gun. Indeed, *Terry* itself, approving a protective frisk where an officer had reason to believe a robbery suspect was armed with a concealed handgun, *see* 392 U.S. at 24, was decided

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792 F.3d 742, 748 (7th Cir. 2015); *see Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1132 (6th Cir. 2015) ("Clearly established law required [the officer] to point to evidence that [the subject] may have been armed *and dangerous*. Yet all he ever saw was that [the subject] was armed — and legally so.") (emphasis in original) (internal citation and quotation marks omitted).

at a time when handgun possession was illegal. *See Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1131 (6th Cir. 2015) (Sutton, J.).[3]

But times have changed, and we decide this case against a different legal background. As Officer Tharp testified, none of the conduct reported in the anonymous tip she received — that a man had loaded a gun in the parking lot of a 7-Eleven and then concealed it in his pocket before leaving in a car — is currently illegal under West Virginia law. On the contrary, in West Virginia it is legal to carry a gun in public, *see* W. Va. Code § 61-7-3; *United States v. Perkins*, 363 F.3d 317, 327 (4th Cir. 2004), and it is legal to carry a concealed firearm with a permit, *see* W. Va. Code §§ 61-7-3, 61-7-4. And permits are relatively easy to obtain; West Virginia is a "shall issue" state, in which the sheriff must issue a license to any applicant who submits a complete and accurate application, pays the $75 fee, and certifies that he or she meets certain basic requirements, such as age and training. *Id.* § 61-7-4. Today in West Virginia, in other words, there is no reason to think that public gun possession is unusual, or that a person carrying or concealing a weapon during a traffic stop is anything but a law-abiding citizen who poses no danger to the authorities.

"[A]s public possession and display of firearms become lawful under more circumstances, Fourth

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[3] Similarly, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), a per curiam opinion on which the dissent relies, arose from an arrest at a time when local law appears to have strictly limited the public possession of firearms, allowing it only in narrow circumstances. *See* 1943 Pa. Laws 487; 1972 Pa. Laws 1577.

Amendment jurisprudence and police practices must adapt." *United States v. Williams*, 731 F.3d 678, 691 (7th Cir. 2013) (Hamilton, J., concurring). Within the last decade, federal constitutional law has recognized new Second Amendment protections for individual possession of firearms, *see McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008), and state law has followed, providing expanded rights to carry guns in public, *see Williams*, 731 F.3d at 691. And as conduct once the province of law-breakers becomes increasingly commonplace, courts must reevaluate what counts as suspicious or dangerous behavior under *Terry* when it comes to public possession of guns. *See Northrup*, 785 F.3d at 1132-33.

We have recognized as much already, holding in *United States v. Black* that when a state authorizes the open display of firearms, public possession of a gun is no longer suspicious in a way that would authorize a *Terry* stop. 707 F.3d at 539-40. "Permitting such a justification," we explained, "would eviscerate Fourth Amendment protections for lawfully armed individuals in those states." *Id.* at 540. Several of our sister circuits have reached similar conclusions. In *Northrup*, for instance, the Sixth Circuit held that where state law permits the open carry of firearms, the police are not authorized by *Terry* to conduct a stop or frisk of a person brandishing a gun in public. 785 F.3d at 1131-33. Likewise, in *United States v. Ubiles*, 224 F.3d 213, 218 (3d Cir. 2000), the Third Circuit invalidated a *Terry* stop based on the suspicion of gun possession at a street festival because local law permitted public possession of firearms: "For all the officers knew,

even assuming the reliability of the tip that [the defendant] possessed a gun, [the defendant] was another celebrant lawfully exercising his right under Virgin Islands law to possess a gun in public." *Id.* at 218. And in *United States v. Leo*, 792 F.3d 742 (7th Cir. 2015), the Seventh Circuit quoted approvingly from Judge Hamilton's concurrence in *Williams*, *id.* at 752, and held that in a "concealed-carry" state, the police could neither *Terry* "frisk" nor search a backpack in a preschool parking lot on the suspicion that it contained a gun, *id.* at 749-50, 751-52 (rejecting search of backpack in light of "important developments in Second Amendment law together with Wisconsin's [concealed-carry] gun laws").

Applying the same reasoning, we conclude that in states like West Virginia, 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. Where the state legislature has decided that its citizens may be entrusted to carry firearms on public streets, we may not make the contrary assumption that those firearms inherently pose a danger justifying their seizure by law enforcement officers without consent. *Cf. Northrup*, 785 F.3d at 1133 (police have "no authority to disregard" the decision of the legislature to allow public possession of guns by using such possession to justify *Terry* stops and frisks). Nor will we adopt a rule that "would effectively eliminate Fourth Amendment protections for lawfully armed persons," id. at 1132 (citation and quotation marks omitted), authorizing a personally intrusive frisk whenever a citizen stopped by the police is exercising the

constitutional right to bear arms. *See id.*; *Black*, 707 F.3d at 540.

Allowing police officers making stops to frisk anyone who is thought to be armed, in a state where the carrying of guns is widely permitted, would "create[] a serious and recurring threat to the privacy of countless individuals," *Arizona v. Gant*, 556 U.S. 332, 345 (2009) (holding that police may not search a car "whenever an individual is caught committing a traffic offense"). It also would "giv[e] police officers unbridled discretion" to decide *which* of those legally armed citizens to target for frisks, implicating concerns about abuse of police discretion that are central to the Fourth Amendment. *See id.*; *Black*, 707 F.3d at 541. As Judge Hamilton warned in *Williams*, once a state legalizes the public possession of firearms, unchecked police discretion to single out anyone carrying a gun gives rise to "the potential for intentional or unintentional discrimination based on neighborhood, class, race, or ethnicity." 731 F.3d at 694.

Those concerns are especially pressing in the context of traffic stops like the one in this case. Under *Whren*, on which the government relies here, the police may conduct a pretextual stop for a routine traffic violation — like Robinson's seatbelt violation — when their real motive is to investigate some other unsupported hunch. 517 U.S. at 813. And under *Michigan v. Long*, 463 U.S. 1032 (1983), reasonable suspicion that the subject of such a traffic stop is armed and dangerous may authorize not only a frisk of the suspect's person but also a "frisk" of the passenger compartment of the car. *Id.* at 1049-50. So if public possession of a firearm in an open- or

concealed-carry state were enough to generate a reasonable suspicion of dangerousness, then pretextual traffic stops would allow police officers to target perfectly law-abiding gun owners for frisks and also limited car searches, at police discretion and on the basis of nothing more than a traffic violation. That is effectively the same result that the Supreme Court found unacceptable in *Gant*, 556 U.S. at 345 (forbidding car searches incident to arrest for minor traffic violations), and it is no more acceptable here.

We recognize that in this case, Robinson's possession of a gun was not in fact legal because Robinson was a convicted felon. But a frisk must be justified on the basis of "what the officers knew *before* they conducted their search," *see Florida v. J.L.*, 529 U.S. 266, 271 (2000) (emphasis added), and at the time of the frisk, Captain Roberts had no reason to suspect Robinson of a prior felony conviction. Nor, we have made clear, does the mere chance that a gun may be possessed in violation of some legal restriction satisfy *Terry*: Where it is lawful to possess a gun, unlawful possession "is not the default status." *Black*, 707 F.3d at 540; *accord Northrup*, 785 F.3d at 1132 (quoting *Black*, 707 F.3d at 540); *Ubiles*, 224 F.3d at 217-18.

We also recognize, of course, the serious concerns for officer safety that underlie the *Terry* frisk doctrine and may be especially pronounced during traffic stops. *See*, *e.g.*, *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977) (per curiam) (police may order driver out of vehicle during traffic stop to protect officer safety). And we do not doubt that recent legal developments regarding gun possession have made the work of the police more dangerous as

well as more difficult. *See Williams*, 731 F.3d at 694. Several states — though not West Virginia — have responded to this concern with "duty to inform" laws, which require individuals carrying concealed weapons to disclose that fact to the police if they are stopped. *See*, *e.g.*, Alaska Stat. § 11.61.220; La. Stat. § 40:1379.3; Neb. Rev. Stat. § 69-2440; N.C. Gen. Stat. § 14-415.11; Okla. Stat. tit. 21, § 1290.8.[4] And where the police have reasonable suspicion that a person is armed, that person's failure to so inform the police, as required by law, may well give rise to a reasonable suspicion of dangerousness.

But as we have explained, under Supreme Court precedent, a more "generalized risk to officer safety" during traffic stops is not enough to justify the intrusion worked by a frisk. *Sakyi*, 160 F.3d at 168-69. The Supreme Court has struck a different balance, authorizing a protective frisk only on a "specific, articulable suspicion of danger" in a particular case. *Id.* at 168. And for the reasons given above, once state law routinely permits the public possession of weapons, the fact that an individual is armed, in and of itself, is not an objective indication of danger. Absent some other basis for suspecting danger — a question to which we turn next — police officers must put their trust in West Virginia's considered judgment that its citizens may safely carry concealed weapons in public and during traffic stops. *See Northrup*, 785 F.3d at 1133 (responding to

[4] Other states — though again, it seems, not West Virginia — require those carrying or concealing firearms to disclose that fact to the police in response to a police question, but not otherwise. *See*, *e.g.*, Ariz. Rev. Stat. § 13-3112; Ark. Code § 5-73-315; 430 Ill. Comp. Stat. 66/10; S.C. Code § 23-31-215.

government argument that prohibiting stop and frisk of individual carrying a gun would leave officer with no recourse but to "hope that [the suspect] was not about to start shooting": "[This] *hope* . . . remains another word for the *trust* that Ohioans have placed in their State's approach to gun licensure and gun possession.").

C.

Because West Virginia authorizes the public carrying of weapons, reasonable suspicion that Robinson was armed did not by itself justify a *Terry* frisk. But even a lawfully possessed firearm can pose a threat to officer safety, and so we also must consider whether a frisk was authorized in light not only of reasonable suspicion that Robinson was armed but also of the surrounding circumstances. *See Adams v. Williams*, 407 U.S. 143, 146 (1972) (*Terry* frisk may be conducted on reasonable suspicion that a suspect is "armed and presently dangerous," regardless of whether "carrying a concealed weapon violate[s] any applicable state law").[5] The government

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[5] We have no quarrel with the dissent's observation that a gun may be dangerous to a police officer whether or not it is legally possessed. *See post* at 15. Where, for instance, there is not only reasonable suspicion that a person is armed but also reasonable suspicion that he is engaged in a drug offense or some other serious crime, or there are other objective indicia of danger, then a *Terry* frisk may be justified whatever the legal status of the gun in question, consistent with *Adams*. *See* 407 U.S. at 147-48 (armed subject of frisk suspected of drug offenses, sitting alone in car at 2:15 a.m., and unwilling to cooperate with police). So in the many cases in which the police stop individuals they believe to be armed on reasonable suspicion of an actual crime, there may well be enough to show reasonable suspicion that the suspect is dangerous as well as armed. What makes

relies on two additional factors: Robinson's failure to answer when asked by Captain Roberts if he had a gun, and Robinson's presence in a high-crime area. We conclude that in the context of this case, neither is probative of dangerousness, and that the totality of the circumstances, taken together, *see George*, 732 F.3d at 300 (reasonable suspicion depends on totality of the circumstances, taken together), did not authorize the frisk of Robinson.[6]

The government first argues — and the district court agreed — that Robinson's non-answer when asked by Captain Roberts if he was carrying a gun contributed to reasonable suspicion that Robinson was dangerous. Taking the full context into account, as we must, and in light of both the rapidity with which events unfolded and the fact that Robinson was under no legal obligation to inform the police of his weapon, we think that the government's

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this case different, however, is that the only "crime" of which the police reasonably suspected Robinson was a seatbelt violation; the government has never argued that there was reasonable suspicion of any other crime, nor that danger to the police may be inferred from a person's failure to wear a seatbelt.

[6] The government contends that our totality-of-the-circumstances analysis must take account of the *actual* reason for the stop — investigation of a tip regarding gun possession — and not the *pretextual* reason on which the government relies to justify the stop — a seatbelt violation. For the proposition that it can have it both ways under *Whren*, the government can cite only an unpublished decision from our circuit that does not address the issue directly. Without deciding the question here, we may assume that the government is correct for purposes of this appeal, and we will consider the anonymous tip along with the other circumstances surrounding the traffic stop.

contention gives too much significance to Robinson's failure to tell the officers that he was armed.

According to the officers' testimony before the magistrate judge, Robinson was cooperative throughout his encounter with the police, and he never made any gesture that they construed as reaching for a weapon. And the magistrate judge found — without dispute by the district court — that Captain Roberts's inquiry to Robinson came virtually simultaneously with the frisk itself: Roberts "asked [Robinson] if he had any firearms on his person as [Robinson] was exiting the vehicle," and upon perceiving a "weird look," ordered Robinson to place his hands on top of the car and conducted the frisk. J.A. 118. Even construing this evidence in the light most favorable to the government, there was a very limited time window during which Robinson could have responded before the frisk made the question moot, and his failure to interject an answer quickly enough did not provide an objective indication that he was about to abandon his cooperative posture and become dangerous.[7]

That is particularly so given that West Virginia does not appear to require that people carrying firearms inform the police of their guns during traffic

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[7] We note that the government does not emphasize the "weird look" in its argument. Nor do we understand the district court to have given significant weight to the "weird look" in its analysis. In our view, Captain Roberts's perception that through his look Robinson was saying, "[O]h, crap," "I don't want to lie to you, but I'm not going to tell you anything," J.A. 89, was sufficiently subjective that it cannot constitute an objective or articulable factor supporting reasonable suspicion of dangerousness.

or other stops. Where a state has decided that gun owners have the right to carry concealed weapons without so informing the police, it would be inconsistent with that legislative judgment to subject gun owners to frisks because they stand on their rights. *Cf. Northrup*, 785 F.3d at 1132 ("impropriety" of officer's demand to see permit for gun being brandished in public is "particularly acute" where state has not only legalized open carry of a firearm but also "does not require gun owners to produce or even carry their licenses for inquiring officers"). Again, we recognize that under a different legal regime, different reasonable inferences could be drawn from a failure to answer an officer's question about a gun. *See supra* at 17-18. But in light of West Virginia law, and under all of the circumstances of this case, Robinson's failure to respond immediately to Captain Roberts's question does not add appreciably to the reasonable suspicion calculus.

The government also relies on the fact that the relevant conduct in this case — the loading of a gun in a 7-Eleven parking lot and the stop of the car approximately three-quarters of a mile away — happened in or near a "high-crime area." And the Supreme Court indeed has held that presence in a high-crime area may contribute to a finding of reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Under the circumstances here, however, we conclude that this factor does not lend support to an inference that Robinson was a danger to the police.

As our cases have indicated, the relative significance of a high-crime area, like other reasonable suspicion factors, is context-specific. In

some cases, for instance, we have sustained a *Terry* frisk in part because it occurred in a high-crime area late at night. *See*, *e.g.*, *George*, 732 F.3d at 300. In *Black*, however, we rejected a position substantially the same as the government's here: that even if public gun possession alone does not justify a *Terry* stop where the law permits the open carrying of firearms, gun possession in a high-crime area at night would be sufficient. 707 F.3d at 542.[8]

We think that *Black* applies here. Whether or not a high-crime environment might make other ambiguous conduct — for instance, fleeing from a police officer, *see Wardlow*, 528 U.S. at 124 — more likely to be criminal or dangerous, we conclude that it sheds no light on the likelihood that an individual's gun possession poses a danger to the police. Where public gun possession is legal, high-crime areas are precisely the setting in which we should most expect to see law-abiding citizens who present no threat to officers carrying guns; there is more, not less, reason to arm oneself lawfully for self-defense in a high-crime area. *Cf. McDonald*, 561 U.S. at 790 ("[T]he Second Amendment right protects the rights of minorities and other residents of high-crime areas."). Presence in a high-crime area, in other words, is as likely an explanation for innocent and non-dangerous gun possession as it is an indication that gun

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[8] We note that most of our cases assessing the relevance of a high-crime area involve nighttime police encounters, whereas the events at issue here transpired during the afternoon. Given our holding, we need not consider the effect of a daylight setting on any inferences that otherwise might be drawn from a high-crime location.

possession is illegal or dangerous, and it does nothing to help police tell the difference.

As discussed above, in states allowing the public possession of weapons, authorizing a *Terry* pat-down in connection with a traffic stop whenever there is reasonable suspicion that a person is armed would give the police unchecked discretion in deciding which armed citizens to frisk. Allowing such automatic frisks only in high-crime areas would do nothing to address that concern; instead, it would guarantee that the costs of such intrusions would be borne disproportionately by the racial minorities and less affluent individuals who today are most likely to live and work in neighborhoods classified as high-crime. *See Black*, 707 F.3d at 542. Given the lack of probative value associated with a high-crime area when it comes to gun possession, there is no justification for adopting such a rule. "The new constitutional and statutory rights for individuals to bear arms at home and in public apply to all," and "[t]he courts have an obligation to protect those rights" in neighborhoods labeled "bad" as well as "good." *Williams*, 731 F.3d at 694.

Again, we recognize that expanded rights to openly carry or conceal guns in public may give rise to genuine safety concerns on the part of police officers, as well as other citizens, who more often will find themselves confronting individuals who may be armed. But where a sovereign state has made the judgment that its citizens may safely arm themselves in public, we cannot presume that public gun possession gives rise to a reasonable suspicion of dangerousness, no matter what the neighborhood. And because the rest of the circumstances

surrounding this otherwise unremarkable traffic stop do not add appreciably to the reasonable suspicion calculus, we must conclude that *Terry* did not authorize the police to conduct a frisk of Robinson. Accordingly, we reverse the decision of the district court denying Robinson's motion to suppress and vacate Robinson's conviction and sentence.

III.

For the foregoing reasons the judgment of the district court is

REVERSED AND VACATED.

NIEMEYER, Circuit Judge, dissenting:

The majority acknowledges that when Captain Robbie Roberts confronted Shaquille Robinson following a lawful traffic stop, Roberts had reasonable suspicion to believe that Robinson was armed with a loaded gun concealed in his pocket. Nonetheless, it concludes that Captain Roberts could not have reasonably believed that he was in danger because, for all Roberts knew, Robinson could have been carrying a concealed weapon pursuant to a license issued by West Virginia. The majority reasons that Roberts was required to presume that Robinson was "a law-abiding citizen who pose[d] no danger to the authorities." *Ante* at 13. Therefore, it holds, the frisk, which Roberts conducted for his safety and the safety of a fellow officer, violated the Fourth Amendment.

This remarkable holding establishes a new approach that will make traffic stops substantially more dangerous to police officers and that is based, I respectfully submit, on several basic flaws of law and logic. *First*, the majority's approach modifies the Supreme Court's existing criteria for frisks by requiring indicia of dangerousness distinct from and in addition to the danger posed by an individual's possession of a firearm during the course of a forced police encounter. The majority fails to accept the Supreme Court's explanation that a reasonable officer need have only a suspicion that the individual who has been lawfully stopped is armed and *thus* dangerous. *See Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977) (per curiam); *Terry v. Ohio*, 392 U.S. 1, 28 (1968).

Second, the fact that Robinson could have been licensed to carry a concealed weapon does not minimize the danger that prompted the Supreme Court in *Terry* to authorize protective frisks under the Fourth Amendment. The Supreme Court has explained that the dangerousness justifying the frisk arises from the combination of the police forcing an encounter with a person and that person's possession of a gun, whether the possession of a gun was legal or not. *See Adams v. Williams*, 407 U.S. 143, 146 (1972). The frisk authorized by *Terry* is justified by dangerousness, not by criminal conduct.

Third, in hypothesizing innocence to various isolated aspects of Robinson's conduct – for instance, that he could have possessed the gun legally and that its possession in a high crime area is consistent with "innocent and non-dangerous gun possession," *ante* at 24 – the majority overlooks the Supreme Court's guidance that "reasonable suspicion need not rule out the possibility of innocent conduct." *Navarette v. California*, 134 S. Ct. 1683, 1691 (2014) (internal quotation marks and citation omitted). It also overlooks the totality of the real world circumstances that leaves no doubt that Captain Roberts had a reasonable suspicion that Robinson was armed and dangerous. Not only did Roberts have good reason to believe that Robinson possessed a loaded gun in his pocket, he also had information indicating that Robinson had both loaded and concealed the gun while in a well-known drug market. And Captain Roberts' suspicion was only heightened when, prior to the frisk, he asked Robinson whether he had a gun and Robinson responded with an "'oh, crap' look[]," taken by Roberts as indicating that Robinson did not

want to deny possession of a gun and thus lie, but also did not want to confess to possessing one.

With the majority's new approach to what justifies a frisk during a lawful stop, police officers will be confused and their efforts in protecting themselves impaired. Traffic stops, which the Supreme Court has noted are already "especially fraught with danger," *Michigan v. Long*, 463 U.S. 1032, 1047 (1983), will become yet more dangerous as a result. The majority, I am afraid, has forgotten *Terry*'s fundamental principle that the Fourth Amendment does not "require . . . police officers [to] take unnecessary risks in the performance of their duties." 392 U.S. at 23.

I respectfully dissent.

I

The facts are not disputed. At about 3:55 p.m. on March 24, 2014, an unidentified man called the Ranson, West Virginia Police Department and told Officer Crystal Tharp that he had just "witnessed a black male in a bluish greenish Toyota Camry load a firearm [and] conceal it in his pocket" while in the parking lot of the 7-Eleven on North Mildred Street. He advised Officer Tharp that the Camry was being driven by a white woman and had "just left" the parking lot, traveling south on North Mildred Street.

The 7-Eleven on North Mildred Street is adjacent to the Apple Tree Garden Apartments, and the area constitutes the highest crime area in Ranson, which itself is a high crime city. One officer who testified said that in his short one and a half years as a state trooper, he experienced at least 20 incidents of drug

trafficking in the 7-Eleven parking lot. Another officer testified that "when [she] was doing drug work[,] . . . [she] dropped an informant off to buy drugs" at the 7-Eleven parking lot and observed "three other people waiting for drugs in that parking lot." She added that she had personally received "numerous complaints" of people running between the parking lot and the apartment complex, making drug transactions. Another officer testified that "[a]nytime you hear Apple Tree or 7-Eleven, your radar goes up a notch." Accordingly, when the Ranson Police Department received the tip about someone loading a gun in the 7-Eleven parking lot, its officers' "radar [went] up a notch," and the officers went "on heightened alert."

While still on the telephone with the caller, Officer Tharp relayed the information to Officer Kendall Hudson and Captain Roberts. Hudson immediately left the station to respond to the call, and Roberts left soon thereafter to provide backup.

When Officer Hudson turned onto North Mildred Street a short time later, he observed a blue-green Toyota Camry being driven by a white female with a black male passenger. Noticing that they were not wearing seatbelts, Hudson effected a traffic stop at a location approximately seven blocks, or three-quarters of a mile, south of the 7-Eleven. He estimated that the traffic stop took place two to three minutes after the call had been received at the station.

After calling in the stop, Officer Hudson approached the driver's side of the vehicle and asked the driver for her license, registration, and proof of

insurance. He also asked the male passenger, the defendant Robinson, for his identification before realizing that that was "probably not a good idea" because "[t]his guy might have a gun[,] [and] I'm asking him to get into his pocket to get his I.D." Instead, Officer Hudson asked Robinson to step out of the vehicle.

At this point, Captain Roberts arrived and opened the front passenger door. As Robinson was exiting the vehicle, Captain Roberts asked him if he had any weapons on him. Instead of responding verbally, Robinson "gave [Roberts] a weird look" or, more specifically, an "'oh, crap' look[]." Roberts took the look to mean, "I don't want to lie to you, but I'm not going to tell you anything [either]." At this point, Captain Roberts directed Robinson to put his hands on top of the car and performed a frisk for weapons, recovering a loaded gun from the front pocket of Robinson's pants. After conducting the frisk, Captain Roberts recognized Robinson and recalled that he had previously been convicted of a felony.

After Robinson was charged with the illegal possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1), he filed a motion to suppress the evidence of the firearm and ammunition seized during the frisk, arguing that the frisk violated his Fourth Amendment rights.

The district court denied the motion, concluding that the officers possessed reasonable suspicion to believe that Robinson was armed and dangerous. Relying on *Navarette*, 134 S. Ct. at 1688-89, the court concluded that the anonymous caller's eyewitness knowledge and the contemporaneous nature of the

report indicated that the tip was sufficiently reliable to contribute to the officers' reasonable suspicion. The court explained that the "anonymous tip that [Robinson] [had] recently loaded a firearm and concealed it on his person in a public parking lot in a high-crime area," when combined with Robinson's "weird look and failure to verbally respond to the inquiry whether he was armed," gave rise to a reasonable suspicion that Robinson was armed and dangerous.

Robinson thereafter pleaded guilty to the gun possession charge, reserving his right to appeal the district court's denial of his suppression motion, and the district court sentenced him to 37 months' imprisonment. Robinson filed this appeal, challenging Captain Roberts' frisk under the Fourth Amendment.

II

Robinson's appeal is defined as much by what he concedes as by what he challenges. Robinson rightfully acknowledges that the Ranson police had the right to stop the vehicle in which he was a passenger after observing a traffic infraction, *see Whren v. United States*, 517 U.S. 806, 819 (1996), and also that they had the authority to direct him to exit the vehicle during the valid traffic stop, *see Maryland v. Wilson*, 519 U.S. 408, 415 (1997). He also correctly concedes that the anonymous tip received by the Ranson Police Department was sufficiently reliable to justify the officers' reliance on it. *See Navarette*, 134 S. Ct. at 1688-89 (concluding that an anonymous 911 call "bore adequate indicia of reliability for the officer to credit the caller's account"

in large part because, like here, the caller "claimed eyewitness knowledge of the alleged [conduct]" and the call was a "contemporaneous report" that was "made under the stress of excitement caused by a startling event"). Finally, and most importantly, he does not contest the district court's conclusion that the police had reasonable suspicion to believe that he was armed, surely recognizing that he perfectly matched the caller's specific description of the individual whom the caller claimed to have just seen with a gun.

Robinson's argument is that while the officers may well have had good reason to suspect that he was carrying a loaded concealed weapon, they lacked objective facts *indicating that he was also dangerous*, so as to justify a frisk for weapons, since an officer must reasonably suspect that the person being frisked is both armed *and* dangerous. Robinson notes, in this regard, that West Virginia residents may lawfully carry a concealed firearm if they have received a license from the State. *See* W. Va. Code § 61-7-4. Because the police did not know whether or not Robinson possessed such a license, he contends that the tip that a suspect matching his description was carrying a loaded firearm concealed in his pocket was a report of innocent behavior that was not sufficient to indicate that he posed a danger to others.

The majority accepts this argument and, in doing so, adopts its several flaws, both as a matter of law and as a matter of logic. Thus, it establishes a new principle in tension with basic Supreme Court jurisprudence, holding that, "in states like West Virginia, which broadly allow public possession of

firearms, reasonable suspicion that a person [lawfully stopped] is armed does not by itself give rise to reasonable suspicion that the person is dangerous for *Terry* purposes." *Ante* at 14-15. Under the majority's new standard, a frisk during a traffic stop must be justified by more than suspicion that the person who has been stopped is armed.

The majority achieves this position by dissecting the armed-and-dangerous requirement into two distinct requirements, holding that dangerousness must exist separately and to a greater extent than the danger created by the person's possession of a gun during a lawful but forced police encounter. Respectfully, this fundamentally twists the Supreme Court's armed-and-dangerous standard and, in any event, defies common sense.

In *Terry*, where the Court first authorized a stop and frisk under the Fourth Amendment without probable cause, the Court was confronted with two distinct issues: *first*, whether a person could be stopped on suspicion of criminal conduct that fell short of probable cause; and *second*, whether the officer could conduct a protective frisk or "pat down" during the stop. As the Court posed the second issue, "We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing *is not armed with a weapon* that could unexpectedly and fatally be used against him." *Terry*, 392 U.S. at 23 (emphasis added). Accordingly, the frisk that the Court ultimately authorized had to be "limited to that which is necessary for the discovery of weapons which might

be used to harm the officer." *Id.* at 26. In approving the frisk before it, the Court observed that "Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered weapons." *Id.* at 30. The concern – the danger – was thus the presence of a weapon during a forced police encounter. The Court said this *explicitly* in approving Officer McFadden's frisk, noting that "a reasonably prudent man would have been warranted in believing petitioner was armed *and thus* presented a threat to the officer's safety." *Id.* at 28 (emphasis added). In this fashion, the Court approved the well-known standard that during a *Terry* stop, an officer can frisk a suspect if the officer reasonably believes that the suspect is armed and thus dangerous, or, in short, "armed and dangerous."

The Court again relied on this exact understanding in *Mimms*, where an officer, after making a routine traffic stop, "noticed a large bulge" under the defendant's jacket and therefore conducted a frisk. 434 U.S. at 107. Holding that the frisk was clearly justified, the *Mimms* Court explained 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*," adding that "[i]n these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat down.'" *Id.* at 112 (emphasis added). The only evidence of *Mimms*' dangerousness on which the Court relied was the bulge indicating that *Mimms* was armed. It was thus *Mimms*' status of being armed during a forced police encounter (the

traffic stop) that posed the danger justifying the frisk.

The armed-and-dangerous appellation is thus a unitary concept, and no further evidence of dangerousness is required to justify a frisk once a police officer reasonably suspects that an individual who has been lawfully stopped is armed. This approach rests on the well-recognized background level of risk attendant whenever police use their authority to effect a stop. This holds true whether the temporary detention is a traditional *Terry* stop to investigate an officer's reasonable suspicion "that the person apprehended is committing or has committed a criminal offense," *Arizona v. Johnson*, 555 U.S. 323, 326 (2009), or a stop to enforce a jurisdiction's traffic laws, *see id.* at 331 ("[T]he risk of a violent encounter in a traffic-stop setting 'stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop'" (quoting *Wilson*, 519 U.S. at 414)); *see also Mimms*, 434 U.S. at 110 (emphasizing that the Court had previously "expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations"). To be sure, this general risk does not, by itself, justify a frisk, but it is a component background risk such that when an officer suspects that the person he has stopped – a person whose propensities are unknown – is "armed with a weapon," *Terry*, 392 U.S. at 23, the officer is "warranted in the belief that his safety . . . [is] in danger," *id.* at 27. A *Terry* frisk is then lawful, with or without any additional signs indicating that the individual may be dangerous. *See United States*

v. Rodriguez, 739 F.3d 481, 491 (10th Cir. 2013) (concluding that "an officer making a lawful investigatory stop [must have] the ability to protect himself from an armed suspect whose propensities are unknown" and therefore rejecting the defendant's argument that the officer "had no reason to believe he was dangerous: even though the officer had seen a handgun tucked into the waistband of his pants).

The cases relied on by the majority miss the mark. They do not concern what justifies a frisk *after a lawful stop is made*. Their holdings instead relate to whether possession of a gun gives rise to a reasonable suspicion of *criminal activity*, therefore justifying a *Terry* stop in the first instance. *See United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) ("[W]here a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify *an investigatory detention*" (emphasis added)); *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1133 (6th Cir. 2015) ("[T]he Ohio legislature has decided its citizens may be entrusted with firearms on public streets. The Toledo Police Department has no authority to disregard this decision . . . *by detaining* every 'gunman' who lawfully possesses a firearm" (emphasis added) (citation omitted)); *United States v. Williams*, 731 F.3d 678, 692-93 (7th Cir. 2013) (Hamilton, J., concurring) ("A *Terry* stop does not require probable cause for an arrest, of course, but it still requires reasonable suspicion of genuinely criminal conduct. Based on the new Wisconsin law, that is hard to find on this record"); *United States v. Ubiles*, 224 F.3d 213, 214 (3d Cir. 2000) ("[T]he stop and subsequent search were unjustified because the precondition for

a '*Terry*' stop was not present in this case"). These cases thus have little bearing on the present case, where both Robinson and the majority acknowledge that the police had the right to detain Robinson and the only issue is whether Captain Roberts acted reasonably to protect his safety and the safety of his fellow officer during that encounter. The majority has thus conflated the nature of suspicion for making a stop in the first instance with the nature of suspicion for conducting a frisk during a lawful stop. The first requires a suspicion of criminal conduct, while the latter requires suspicion of weapons possession. It is clear that if the officer has a reasonable suspicion that the person he has stopped is armed, the officer may conduct a frisk.

In sum, established law imposes two requirements for conducting a frisk: first, that the officer have conducted a lawful investigatory stop, which includes both traditional *Terry* stops as well as traffic stops; and second, that during the valid but forced encounter, the officer reasonably suspect that the person is armed and therefore dangerous. Both were satisfied in this case, thus justifying Captain Roberts' frisk under the Fourth Amendment as a matter of law.

Also, as a matter of logic, the majority's position – that because Robinson *could* have been licensed under West Virginia law to carry a concealed weapon, Captain Roberts could not have reasonably believed that he was dangerous – is flawed. It does not follow that because an individual has a license to carry a concealed weapon, he does not pose a threat to officers' safety during a lawful but forced police encounter. Indeed, when a person is stopped on the

highway for a traffic infraction, that person poses a heightened risk of danger simply by possessing a firearm during the encounter, *whether the weapon is possessed legally or not*. As the Supreme Court has explained, "The purpose of this limited search [*i.e.*, the frisk] is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, *whether or not carrying a concealed weapon violated any applicable state law*." *Adams*, 407 U.S. at 146 (emphasis added). The majority's position directly conflicts with this, concluding that . . . when gun possession is legal, "there is no reason to think that a person carrying or concealing a weapon during a traffic stop is anything but a law-abiding citizen who poses no danger to the authorities." *Ante* at 12-13.

Contrary to the majority's thesis, nothing about the assumed recent liberalization of gun laws changes the proper analysis. The majority's analysis rests on the premise that, without some other basis for suspecting danger, an officer can reasonably suspect that an armed individual who has been detained during a traffic stop only presents a threat to the officer's safety if the stop takes place in a jurisdiction where gun possession is generally illegal. *See ante* at 18 ("[O]nce state law routinely permits the public possession of weapons, the fact that an individual is armed, in and of itself, is not an objective indication of danger"). But the presumptive lawfulness of an individual's gun possession in a particular state does nothing to negate the reasonable concern an officer would almost invariably feel for his own safety when forcing an encounter

with an unknown individual who is armed with a gun and whose propensities are unknown. *See Rodriguez*, 739 F.3d at 491.

The final flaw in the majority's approach is attributable to its focus on isolated, innocent possibilities of Robinson's conduct – that he could be an innocent citizen carrying a gun as authorized by a lawfully issued license; that he was coincidentally in a high-drug zone; and that he had no legal duty to tell Captain Roberts of any license to carry a gun – and its failure to consider the totality of the actual circumstances presented. To be sure, the observations that the majority makes about the possibilities of innocent conduct in isolated circumstances may be valid, but in the context of the real world circumstances, considered as a whole, they are neither likely nor relevant. As an initial matter, the majority's analysis completely overlooks the Supreme Court's recognition that "reasonable suspicion *need not* rule out the possibility of innocent conduct." *Navarette*, 134 S. Ct. at 1691 (emphasis added) (internal quotation marks and citation omitted). Rather, the inquiry must, as the Supreme Court has repeatedly instructed, be based on common sense, *see Navarette*, 134 S. Ct. at 1690; *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000); *Ornelas v. United States*, 517 U.S. 690, 695 (1996), and must be focused on what a reasonable officer would believe *in light of the totality of the circumstances*. The majority's innocent possibilities analysis, by contrast, fails to give due weight to two key facts known to Captain Roberts and the "commonsense judgments and inferences" that Roberts could draw from those facts when taken together. *Wardlow*, 528 U.S. at 125.

First, the reliable tip in this case was not just that an individual matching Robinson's description possessed a gun. Rather, the caller reported that he had observed an individual "load a firearm [and] conceal it in his pocket" while in the parking lot of the 7-Eleven on North Mildred Street, *a location that the officers knew to be a popular spot for drug-trafficking activity*. Indeed, at the evidentiary hearing, a state trooper who had been on the force only a year and a half estimated that he had experience with at least 20 incidents of drug trafficking in that particular parking lot. Another officer testified that "when [she] was doing drug work[,] . . . [she] dropped an informant off to buy drugs there" and observed "three other people waiting for drugs in that parking lot." A third officer explained, "[a]nytime you hear . . . 7-Eleven, your radar goes up a notch." Knowing that the 7-Eleven parking lot was frequently used as a site for drug trafficking, a reasonable officer could legitimately suspect that an individual who was seen both loading and concealing a gun in that very parking lot may well have been doing so in connection with drug-trafficking activity. *See United States v. Lomax*, 293 F.3d 701, 705 (4th Cir. 2002) (recognizing the "numerous ways in which a firearm might further or advance drug trafficking"). Thus, that an individual matching Robinson's description was reported to have recently loaded and concealed a firearm while in a parking lot so well known for its connection to drug activity greatly reinforces the reasonableness of Captain Roberts' suspicion that Robinson was both armed and dangerous.

Second, when Captain Roberts asked Robinson, as he was getting out of the car, whether he was carrying any firearms, Robinson gave the officer an "'oh, crap' look[]," which Roberts took to mean, "I don't want to lie to you, but I'm not going to tell you anything [either]." Surely, this was not the reaction of a person who legally possessed a concealed weapon for a benign purpose. In other words, Robinson's response to Captain Roberts' question not only confirmed Roberts' suspicion that Robinson had a concealed weapon, it also made it eminently reasonable for Captain Roberts to suspect that Robinson's possession of a concealed weapon was illegal and dangerous. *See* W. Va. Code § 61-7-3 (making it a crime to carry a concealed deadly weapon without a license or other lawful authorization). That West Virginia does not impose a legal duty on those licensed to carry concealed weapons to report their gun possession when stopped by police does not obviate Captain Roberts' suspicion, based on common sense, that Robinson's silence was telling.

At bottom, the fact that Captain Roberts reasonably suspected that Robinson, who had been detained pursuant to a valid traffic stop, was armed and thus dangerous fully supports the legality of the frisk. But even beyond that, a proper consideration of the totality of the circumstances presented here – the information provided by the reliable tip, the lawlessness prevalent at the relevant location, and Robinson's incriminating reaction during the traffic stop – establishes, beyond doubt, that Captain Roberts' belief that Robinson was armed and dangerous was reasonable and that a protective frisk

of Robinson's person during a valid stop was therefore warranted. "In these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat down.'" *Mimms*, 434 U.S. at 112.

With an analysis that finesses the context that supported the officers' suspicions, the majority reaches a highly abstract result because "times have changed," ante at 12, and officers must allow that everyone can possess a gun during a traffic stop absent other indicators of dangerousness. But, in light of all the circumstances known to Captain Roberts, I submit that Roberts would unquestionably have been criticized for not having taken reasonable precautions if, after failing to conduct a frisk, something untoward had happened.

I would affirm the district court's denial of Robinson's motion to suppress, which was undoubtedly correct.

APPENDIX C

UNITED STATES DISTRICT COURT
N.D. WEST VIRGINIA,
MARTINSBURG.

UNITED STATES of America,

Plaintiff,

v.

Shaquille Montel ROBINSON,

Defendant.

No. 3:14–CR–28.
Signed Aug. 14, 2014.

Attorneys and Law Firms

Jarod J. Douglas, U.S. Attorney's Office, Wheeling, WV, for Plaintiff.

ORDER REJECTING IN PART REPORT AND RECOMMENDATION

DINA M. GROH, District Judge.

On this day, the above-styled matter came before the Court for consideration of the report and recommendation ("R & R") of United States Magistrate Judge Robert W. Trumble. On July 11, 2014, the Defendant filed a motion to suppress [Doc. 21]. The Court referred this motion to Magistrate Judge Trumble for submission of an R & R concerning that motion. Magistrate Judge Trumble filed his R & R [Doc.30] on August 8, 2014. He recommends that this Court grant the motion to suppress. For the following reasons, the Court rejects in part the R & R.

I. Background

At 3:55 p.m. on March 24, 2014, an unidentified man called the Ranson Police Department. The secretary transferred the call to Officer Crystal Tharp. The caller told Tharp he witnessed a black male in a bluish greenish Toyota Camry, driven by a female, load a firearm and conceal it in his pocket. The caller stated the car had just left the Ranson 7-Eleven parking lot and he was leaving as well. Officer Tharp knew the 7-Eleven was located on North Mildred Street next to the Apple Tree Garden apartments. At the suppression hearing, officers testified that this 7-Eleven was known for drug dealing, firearm violence, and other criminal activity. Officer Tharp relayed the tip to Officer Hudson and Officer Roberts.

Two to three minutes after the call, Officer Hudson conducted a traffic stop of a vehicle matching the caller's description on North Mildred Street for a seatbelt violation he observed. The stop occurred approximately seven blocks south of the 7-Eleven. Officer Roberts subsequently arrived on the scene. He approached the vehicle, opened the passenger side door, and asked the Defendant whether he had any weapons on him. The Defendant gave Officer Roberts no answer but reacted to the question with what Officer Roberts described as a weird look. Officer Roberts then conducted a pat down for officer safety. He felt the handle of a firearm at the Defendant's waist during the frisk. The officers then handcuffed the Defendant and seized the weapon. At that time, Officer Roberts recognized the Defendant who is a convicted felon.

Based on this incident, the Defendant was indicted in this case upon one count of felon in possession of a firearm and ammunition. The Defendant moved to suppress evidence of the firearm and ammunition obtained during the frisk, arguing that the frisk violated his Fourth Amendment rights. After a suppression hearing, Magistrate Judge Trumble issued a report recommending that the Court grant the Defendant's motion. The United States timely objected to the R & R. The United States argues that the frisk did not violate the Fourth Amendment because there was reasonable suspicion that the Defendant was armed and dangerous. The Defendant disagrees in his response.

II. Standard of Review

The Court may designate a magistrate judge "to conduct hearings, including evidentiary hearings, and to submit . . . proposed findings of fact and recommendations for the disposition" of a motion to suppress. 28 U.S.C. § 636(b)(1)(A)-(B). A party may file written objections to the R & R within fourteen days after being served with a copy. *Id.* § 636(b)(1). A district judge must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.* This review requires "a *de novo* determination, not a *de novo* hearing." *United States v. Raddatz*, 447 U.S. 667, 674 (1980). The Court, however, is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge to which no objections are addressed. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). Failure to file timely objections constitutes a waiver of *de novo* review. *See Snyder v. Ridenour*, 889 F.2d

1363, 1366 (4th Cir. 1989); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984). Accordingly, this Court will review those portions of the R & R to which the United States objects *de novo* and the remainder of the R & R for clear error.

III. Discussion

The United States argues that the frisk was lawful because the anonymous tip and the fact that the events occurred in a high-crime area, taken together, gave rise to reasonable suspicion that the Defendant was armed and dangerous.

The Defendant raises several arguments in response. First, he contends that the anonymous tip does not support reasonable suspicion because it did not allege criminal activity as a person can legally carry a concealed firearm in West Virginia with a permit. Second, he points out that Officer Hudson and Officer Roberts testified that they would have acted as they did solely based on a tip reporting gun possession. Finally, the Defendant argues that none of the factors that generated reasonable suspicion in *United States v. George*, 732 F.3d 296 (4th Cir. 2013), *cert. denied,* 134 S.Ct. 1530 (2014), are present here.

Because neither party disputes that the seat belt violation provided probable cause to stop the vehicle, *see Whren v. United States*, 517 U.S. 806, 810 (1996), the dispositive issue here is whether the frisk violated the Defendant's Fourth Amendment rights. However, the Court finds the seatbelt violation observed by Officer Hudson did provide probable cause to stop the vehicle.

A frisk of a passenger during a valid traffic stop is lawful if the police "harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). "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." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). This standard is objective; courts do not consider "the officer's subjective state of mind." *George*, 732 F.3d at 299-300.

To determine whether reasonable suspicion exists, courts consider "the 'totality of the circumstances' to determine if the officer had a 'particularized and objective basis' for believing that the detained suspect might be armed and dangerous." *Id.* at 299 (citations omitted). "A host of factors can contribute to a basis for reasonable suspicion, including the context of the stop, the crime rate in the area, and the nervous or evasive behavior of the suspect." *Id.* (citing *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)). Multiple factors may together "create a reasonable suspicion even where each factor, taken alone, would be insufficient ." *Id.* at 300 (citing *United States v. Branch*, 537 F.3d 328, 339 (4th Cir. 2008)).

An anonymous tip is another factor that can create reasonable suspicion. *See Navarette v. California*, 134 S.Ct. 1683, 1688 (2014). To do so, the tip must "demonstrate sufficient indicia of reliability to provide reasonable suspicion." *Id.* (citation and quotation marks omitted).

The Supreme Court most recently examined an anonymous tip's reliability in *Navarette. See id.* at 1688-1690. In that case, a 911 caller reported that a "Silver Ford 150 pickup" license plate 8D94925 traveling southbound on Highway 1 at mile marker eighty-eight had run the caller off the road "and was last seen approximately five [minutes] ago." *Id.* at 1688-87. The dispatcher broadcasted this information at 3:47 p.m. *Id.* at 1687. At 4:00 p.m., an officer passed the pickup near mile marker sixty-nine. *Id.* The officer pulled the pickup over at approximately 4:05 p.m. *Id.* Officers discovered thirty pounds of marijuana during the stop and arrested the defendants. *Id.* The Court held that the 911 call had sufficient indicia of reliability to provide reasonable suspicion that the pickup had run the caller off the road, thereby justifying the investigatory stop. *Id.* at 1692.

In reaching this conclusion, the Court emphasized three qualities of the tip. First, "the caller claimed eyewitness knowledge of the alleged dangerous driving." *Id.* at 1689. Second, the caller made the report contemporaneous with the pickup running her off the road, an indication it was "especially trustworthy" under sound principles of evidence law. *Id.* Third, the caller's use of 911 indicated her veracity as 911 provides "some safeguards against making false reports with immunity" (*e.g.*, the ability to trace calls). *Id.*

The Court also took great care to distinguish *Navarette* from its decision in *Florida v. J.L.*, 529 U.S. 266 (2000) that an anonymous tip was not reliable. *J.L.* involved an anonymous caller who reported to police *that* a young black male standing

at a particular bus stop was wearing a plaid shirt and carrying a gun. 529 U.S. at 268. The Court found that the *Navarette* tip differed from the *J.L.* tip in two key respects. The *J.L.* tip, the Court explained, "provided no basis for concluding that the tipster had actually seen the gun." Navarette, 134 S.Ct. at 1689. There also was no indication that the *J.L.* tip was made contemporaneously with criminal activity or under the stress of excitement caused by a startling event. *Id.*

Against this background, there are sufficient indicia that the anonymous tip in this case is reliable. *See id.* at 1688. Two circumstances support this conclusion. First, the caller had eyewitness knowledge of the alleged loading and possession of the firearm by the Defendant. *See id.* at 1689. He told Officer Tharp that he actually saw the Defendant, who was in a bluish greenish Toyota Camry, load the firearm and conceal it. Thus, like *Navarette,* the fact that the caller witnessed the event indicates that the tip is reliable. *See id.; see also* United States v. Edwards, ___ F.3d ___, 2014 WL 3747130, at *6 (9th Cir. 2014) (finding an anonymous tip reliable based, in part, on a determination that the caller actually witnessed the shooting he reported). Second, the caller made the report shortly after observing the Defendant load and conceal the firearm. *See Navarette*, 134 S.Ct. at 1689. His statement that the car in which the Defendant was a passenger had "just" left the 7-Eleven indicates that he made the report immediately after watching this event. The close temporal relationship between the caller witnessing the Defendant's actions and his report lends further credibility to the tip just as it did in

Navarette. See id.; see also Fed. R. Evid. 803(1). Taking together the caller's eyewitness knowledge and the contemporaneous nature of the report, the tip was sufficiently reliable. The fact that the caller did not use the 911 emergency system does not alter this conclusion because this tip is still much more than a "bare-boned" tip about guns like the J.L. tip. *See* 529 U.S. at 273. Indeed, this tip has the two characteristics that the Supreme Court specifically stated were absent in *J.L.* Accordingly, the anonymous tip supports the reasonable suspicion analysis because it contained sufficient indicia of reliability.

Viewing the totality of the circumstances, there are objective and particularized facts giving rise to reasonable suspicion that the Defendant was armed and dangerous. The officer observed the seatbelt violation in the vehicle matching the caller's detailed description of it only three minutes after receiving the reliable tip and just a few blocks from the 7-Eleven. The fact that the officers found and stopped the vehicle in the same high-crime area as the 7-Eleven mere minutes removed from the tip, and that the Defendant did not answer and looked weird when asked if he was armed, would lead a reasonably prudent officer to believe that the officer's safety or that of others was in danger.

The possibility that the Defendant could have lawfully possessed the firearm does not negate that the totality of the circumstances give rise to reasonable suspicion. The Supreme Court has "consistently recognized that reasonable suspicion 'need not rule out the possibility of innocent conduct.'

" *Navarette*, 134 S.Ct. at 1691 (quoting *United States v. Arvizu*, 534 U.S. 266, 277 (2002)).

The Defendant's contention that Officer Roberts needed reasonable suspicion of criminal activity is misplaced because this case involves a traffic stop, not an investigatory stop.

The Fourth Circuit decision in *George* does not call for a different outcome. In *George,* the court upheld the frisk of a passenger in a validly stopped car because the officer had reasonable suspicion he was armed and dangerous. 732 F.3d at 299, 302. The officer in *George* had no information indicating the passenger had a firearm or other weapon before making the stop. *See id.* 299-302. The Fourth Circuit reached this conclusion by analyzing the circumstances of the stop itself. *See id.* at 300-01. In contrast, reasonable suspicion in this case derives not only from the stop itself (i.e., the Defendant's weird look and failure to verbally respond to the inquiry whether he was armed), but also additional factors from the anonymous tip that the Defendant recently loaded a firearm and concealed it on his person in a public parking lot in a high-crime area. Therefore, this case is distinguishable from *George*.

In conclusion, following the valid traffic stop for an observable seatbelt violation, Officer Roberts lawfully frisked the Defendant for weapons to protect himself and others because reasonable suspicion that the Defendant was armed and dangerous existed based upon the Defendant's reaction at the scene and the reliable tip, either of which would justify the pat down search. The Court therefore sustains the

United States' objection and denies the motion to suppress.

IV. Conclusion

Upon careful review of the record, the Court **SUSTAINS** the United States' objection to Magistrate Judge Trumble's report and recommendation and **DENIES** the Defendant's Motion to Suppress.

Accordingly, it is the opinion of this Court that Magistrate Judge Trumble's report and recommendation should be, and is, hereby **ORDERED REJECTED IN PART.** The Court adopts only the following sections of the R & R because the parties have not objected to them and the Court finds no clear error therein: Section II (procedural history), Section III (statement of the facts), and Section V. A (lawfulness of the traffic stop).

It is so **ORDERED.**

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

APPENDIX D

UNITED STATES DISTRICT COURT
N.D. WEST VIRGINIA,
MARTINSBURG.

UNITED STATES of America,

Plaintiff,

v.

Shaquille Montel ROBINSON,

Defendant.

Criminal Action No. 3:14–CR–28.
Signed Aug. 8, 2014.

Attorneys and Law Firms

Jarod J. Douglas, U.S. Attorney's Office, Wheeling, WV, for Plaintiff.

REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION TO SUPPRESS [21] BE GRANTED

ROBERT W. TRUMBLE, United States Magistrate Judge.

I. INTRODUCTION

This matter comes before the Court on Defendant Shaquille Montel Robinson's Motion to Suppress [21], filed on July 11, 2014. On July 22, 2014, the United States of America (hereinafter, "the Government") filed its Opposition to Defendant's Motion to Suppress [25]. On July 28, 2014, Defendant filed his Reply to the United States' Response in Opposition to Motion to Suppress [26]. On July 31, 2014, the Court held an evidentiary hearing and argument on Defendant's Motion to Suppress. Defendant appeared

in person and by counsel, Nicholas J. Compton, Assistant Federal Public Defender. The Government appeared by Jarod J. Douglas, Assistant United States Attorney. At the hearing, the Government presented the testimony of Trooper D.R. Walker with the West Virginia State Police and three officers from the Ranson Police Department: Officer Crystal Tharpe, Officer Kendall Hudson and Captain Robbie Roberts. No additional testimony or other evidence was presented.

II. PROCEDURAL HISTORY

Defendant was indicted by a Grand Jury sitting in the Northern District of West Virginia on May 29, 2014. (ECF No. 1). Defendant is charged with being a felon in possession of a firearm and ammunition, in violation of Title 18, United States Code, Section 922(g)(1) and 924(a)(2). (*Id.*).

III. STATEMENT OF THE FACTS

On March 24, 2014, a call from an unknown male came into the Ranson Police Department at approximately 3:55 p.m. (Tr. 16). After hearing the tip, the Ranson Police Department secretary decided to transfer the call to Officer Chrystal Tharp. (*Id.*). Officer Tharp was advised by the caller that he had witnessed "a black male in a bluish greenish Toyota Camry load a firearm, conceal it in his pocket and there was a white female driver." (*Id.*). The caller stated that the car was in the parking lot of a 7-Eleven, which Officer Tharp understood to be the 7-Eleven on North Mildred Street located next to the Apple Tree Garden apartments. (*Id.*). The 7-Eleven is located approximately fifty (50) yards from the Apple Tree Garden apartments, which is accessible by

walking over a grassy area. (Tr. 6, 28). The officers classified the City of Ranson, and particularly the Apple Tree Garden apartments, as a high crime area. (Tr. 4-7, 19-21, 43-44, 54, 56-58).

The caller stated the car left the parking lot and headed south on North Mildred Street. (Tr. 17). Officer Tharp relayed this information to Officer Kendall Hudson and Captain Robbie Roberts, who were present in the room during the call. (*Id.*). Officer Hudson left the station before Officer Tharp completed the phone call so he "could get out on the road and look for the vehicle and the person she was explaining." (Tr. 35). Captain Roberts then left to provide back up for Officer Hudson. (R. 58-59). The caller never identified himself or provided contact information. (R. 24-25).

After leaving the police station, Officer Hudson made a left onto North Mildred Street. (Tr. 37). Officer Hudson noticed the vehicle that the matched the description along with the two occupants behind him. (*Id.*). After seeing the car, he turned into Jay's Automotive to let the car go by him. (*Id.*). As the car passed by him, he noticed the two occupants were not wearing their seatbelts. (*Id.*). Officer Hudson immediately pulled behind the vehicle, turned on his lights and the vehicle pulled over across from the Southern States parking lot, approximately seven blocks, or three-quarters of a mile, south of the 7-Eleven. (Tr. 38, 48). Upon pulling the car over, Officer Hudson dispatched the traffic stop and provided the location of the vehicle. (Tr. 38). Captain Roberts had already left the police station when Officer Hudson called in the traffic stop so he proceeded to the location. (Tr. 59). Officer Hudson

stated that the stop occurred approximately two to three minutes after the anonymous call came into the police station. (Tr. 39).

Officer Hudson approached the vehicle from the driver's side with his weapon drawn, which he carried "down" and "low," below his waist. (Tr. 39). Officer Hudson asked the female driver for her license, registration and insurance. (*Id.*). Officer Hudson also asked the passenger for his identification but then realized "this guy might have a gun. I'm asking him to get into his pocket to get his I.D. That's probably not a good idea." (*Id.*). Officer Hudson then asked the passenger to exit the vehicle. (R. 41). At this point Captain Roberts had arrived on scene. (Tr. 41, 60).

Captain Roberts approached the rear of the vehicle and asked Officer Hudson if he had checked the passengers and he said "no." (Tr. 41, 60). Captain Roberts then approached the passenger side of the vehicle and opened the passenger side door. (Tr. 61). Captain Roberts asked Defendant if he had any firearms on his person as Defendant was exiting the vehicle. (*Id.*). Defendant then gave a "weird look" or an "oh crap look," which the officer took to mean "I don't want to lie to you, but I'm not going to tell you anything."[1] (Tr. 62). At this time, Captain Roberts

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[1] The exact timing of this series of events is unclear based on Captain Roberts's testimony. First, Captain Roberts testified that he opened the door and asked Defendant if he had any weapons on him and he gave the weird look, then he asked him to step out of the car. (Tr. 61). Then he testified that "when I opened [the car door], he was stepping out." (*Id.*). When asked to clarify when he asked Defendant if he has a firearm, Captain Roberts stated "I think I asked him before he even got out of the

had Defendant put his hands on top of the car and he began to pat him. (*Id.*). Captain Roberts felt the handle of a firearm at Defendant's waist at his front pants pocket. (Tr. 63).

Captain Roberts told Officer Hudson "gun," indicating that he had found the gun on Defendant. (Tr. 42). Officer Hudson then placed handcuffs on Defendant and sat him on the sidewalk. (Tr. 42, 64). Officers asked the female driver, who was acting "hysterical" and crying, to get out of the vehicle and questioned her regarding "why someone would call with this information." (Tr. 42). The female driver received a verbal warning for the seatbelt violation and was allowed to leave the scene. (Tr. 43).

Following the frisk and after Defendant was handcuffed, Captain Roberts recognized Defendant as Mr. Robinson and connected him to being a convicted felon. (Tr. 64-65).

IV. CONTENTION OF THE PARTIES

Defendant argues that the police lacked an adequate basis to perform a traffic stop, based on the information provided by the anonymous caller, which failed to allege criminal activity. Defendant states that West Virginia allows individuals to openly carry firearms and issues concealed carry permits, and therefore, carrying a loaded firearm does not create reasonable suspicion of a crime. Moreover, Defendant

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car. I think as he was getting out of the car, I asked him if he had any weapons on him ." (*Id.*). When the Government's counsel clarified "[a]s he is getting out, you asked him if he had any weapons on him" and Captain Roberts said "Yes." (Tr. 62).

asserts that there was no indication that the caller knew Defendant was a felon or a person who could not possess a weapon. Second, Defendant argues that the officers lacked an adequate basis to conduct a search of his person because Defendant gave officers no indication that he was armed or dangerous. Defendant further argues that after stopping the vehicle, the officers acted so quickly in asking Defendant to step out of the vehicle and in performing the frisk, that the officers had no time to assess Defendant's conduct, had not checked his criminal history and had no time to develop reasonable suspicion for suspecting Defendant to be armed and dangerous. In addition, Defendant argues that the anonymous tip lacked sufficient indicia of reliability based on the caller's anonymity and the brief nature of the call.

The Government argues that observing a traffic violation provided sufficient justification for Officer Hudson to detain the vehicle. Here, Officer Hudson observed the driver and passenger of the vehicle not wearing their seat belts, a violation of West Virginia law. Thus, Officer Hudson had sufficient justification for conducting the traffic stop. Second, the Government argues that the anonymous tip was reliable based on the caller's eyewitness knowledge and the contemporaneity between the observation and the report. Third, the Government contends that the police harbored reasonable suspicion that Defendant was armed and dangerous because: 1) the officers possessed knowledge from a reliable call that approximately seven minutes earlier Defendant was seen loading a handgun and concealing it in his pocket; 2) when asked if he was in possession of a

firearm, Defendant did not deny the allegation and gave a "weird look;" and 3) the case involved a location that officers believed to be a high crime area.

V. ANALYSIS

A. Lawfulness of the Traffic Stop

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Temporary detention of individuals during the stop of an automobile by the police . . . constitutes a 'seizure' " within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809 (1996); *see also Delaware v. Prouse*, 440 U.S. 648, 653 (1979). "Because a traffic stop is more analogous to an investigative detention than a custodial arrest, we treat a traffic stop, whether based on probable cause or reasonable suspicion, under the standard set forth in *Terry*." *United States v. Digiovanni*, 650 F.3d 498, 506 (4th Cir. 2011).

Under the *Terry* standard, the court analyzes "the propriety of a traffic stop on two fronts. First, we analyze whether the police officer's action was justified at its inception. Second, we analyze whether the police officer's subsequent actions were reasonably related in scope to the circumstances that justified the stop." *Digiovanni*, 650 F.3d at 506 (citing *United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992)). A traffic violation "provides sufficient justification for a police officer to detain the offending vehicle for as long as it takes to perform the traditional incidents of a routine traffic stop." *United States v. Branch*, 537 F.3d 328, 335 (4th Cir. 2008).

As part of a routine traffic stop, "the officer may request a driver's license and vehicle registration, run a computer check, and issue a citation, but that '[a]ny further detention for questioning is beyond the scope of the *Terry* stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime.' " *United States v. Brugal*, 209 F.3d 353, 358 (4th Cir. 2000) (citing Rusher, 966 F.2d at 876-77);*see also Digiovanni*, 650 F.3d at 507 (explaining that "[i]f a police officer seeks to prolong a traffic stop to allow for investigation into a matter outside the scope of the initial stop, he must possess reasonable suspicion or receive the driver's consent." Also during a routine traffic stop an officer may request the driver exit the vehicle. *See Pennsylvania v. Mimms*, 434 U.S. 106, 111, n. 6 (1977) (finding that "once a motor vehicle has been lawfully detained for a traffic violation, the police may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures."). In addition, "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop." *Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

"As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren*, 517 U.S. at 810. Any ulterior motive a police officer may have for making the traffic stop is irrelevant. *See Id.* at 813; *see also Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (finding that "in light of the admitted probable cause to stop Robinette for speeding, Deputy Newsome was objectively

justified in asking Robinette to get out of the car, subjective thoughts notwithstanding.").

In the present case, Officer Hudson testified that he stopped the vehicle on the basis of the seat belt violation. (Tr. 38). Pursuant to W.Va.Code § 17C-15-49(a), "[a] person may not operate a passenger vehicle on a public street or highway of this state unless the person . . . is restrained by a safety belt meeting applicable federal motor vehicle safety standards." Even though Officer Hudson gave another reason for the stop on cross examination, by affirming that he was "stopping them because they matched the description of the vehicle where the guy had the firearm," Officer Hudson did state that a traffic violation occurred. (Tr. 49). Despite any pretext the seat belt violation may have served in justifying the traffic stop, the evidence indicates that Officer Hudson observed a seat belt violation prior to pulling over the vehicle. (Tr. 37). Moreover, the parties do not appear to contest the fact that the driver was not wearing her seat belt at the time of the traffic stop. Accordingly, the Court finds that Officer Hudson had probable cause to believe a seat belt violation occurred, which justified the traffic stop.

B. Protective Search, or *Terry* Frisk, after the Traffic Stop

1. *Terry* Frisk Permissible When Reasonable Articulable Suspicion Exists that a Suspect is Armed and Dangerous

After a valid traffic stop has been made, the first *Terry* condition (i.e., a stop) has been established and the police may detain an automobile for the purposes

of inquiring into the traffic violation, as such the "police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity ." *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). "If a police officer seeks to prolong a traffic stop to allow for investigation into a matter outside the scope of the initial stop, he must possess reasonable suspicion or receive the driver's consent." *Digiovanni*, 650 F.3d at 507. Similarly, if after conducting the traffic stop the police develop a reasonable articulable suspicion that a person in the vehicle is armed and presently dangerous then the police may conduct a *Terry* frisk. *See Arizona v. Johnson*, 555 U.S. at 327 (explaining that "[t]o justify a patdown of the driver or a passenger during a traffic stop . . . just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Id.* "[I]f the officer has a reasonable fear for his own and others' safety based on an articulable suspicion that the suspect may be armed and presently dangerous, the officer may conduct a protective search of, *i.e.,* frisk, the outer layers of the suspect's clothing for weapons." *United States v. Holmes*, 376 F.3d 270, 275 (4th Cir. 2004) (citing *Terry,* 392 U.S. at 30-31) (internal quotation marks omitted).

However, the Fourth Circuit has held that a mere "generalized risk" to officer safety is not sufficient to justify a *Terry* frisk:

> *Terry* and *Long* require a specific, articulable suspicion of danger before police officers are entitled to conduct a 'pat-down.' Thus, where the intrusion is greater than an order to exit

> the car, the Court requires commensurately greater justification . . . [w]e conclude that we may not rely on a generalized risk to officer safety to justify a routine 'pat-down' of all passengers as a matter of course. Because a frisk or 'pat down' is substantially more intrusive than an order to exit a vehicle or to open its doors, we conclude that an officer must have justification for a frisk or a 'pat-down' beyond the mere justification for the traffic stop.

United States v. Sakyi, 160 F.3d 164, 168-69 (4th Cir. 1998) (citing *Holmes*, 376 F.3d at 276). "[I]n the absence of reasonable suspicion, an officer may not frisk a citizen merely because he feels uneasy about his safety." *United States v. Burton*, 228 F.3d 524, 529 (4th Cir. 2000). The officer must possess "a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that [a] suspect is dangerous and . . . may gain immediate control of weapons within the vehicle." *Holmes*, 376 F.3d at 276.

2. Reasonable Suspicion Standard under *Terry*

"The Government bears the burden of articulating facts sufficient to establish reasonable suspicion." *Burton*, 228 F.3d at 528. The reasonable suspicion standard "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Wardlow v. Illinois*, 528 U.S. 119, 123 (2000). However, the *Terry* reasonable suspicion

standard does require "a minimal level of objective justification" for the police action. *Id.* at 676. The Government "must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry,* 392 U.S. at 27). As the Fourth Circuit explained:

> [T]he Government must do more than simply label a behavior as "suspicious" to make it so. The Government must also be able to articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.

United States v. Foster, 634 F.3d 243, 248 (4th Cir. 2011). The Fourth Circuit has found that the Terry reasonable suspicion standard is "a commonsensical proposition," and that "[c]ourts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street." *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993). Moreover, "[t]he reasonable suspicion standard is an objective one, and the officer's subjective state of mind is not considered." *United States v. George*, 732 F.3d 296, 299 (4th Cir. 2013)*cert. denied,* 134 S.Ct. 1530 (U.S. 2014).

In addition, the specific facts justifying the search must be known to the officers before the protective search, or frisk, was conducted. "The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." *Florida v. J.L.*, 529 U.S. 266, 271 (2000). "That the

allegation about the gun turned out to be correct does not suggest that the officers prior to the frisks, had a reasonable basis for suspecting [the defendant] of engaging in unlawful conduct ." *Id.* "A reasonable belief that a person is armed and presently dangerous must form the predicate to a patdown of the person for weapons." *Ybarra v. Illinois*, 444 U.S. 85, 86 (1979).

Moreover, "reasonable suspicion is a particularized and objective basis for suspecting that the person to be frisked is armed and dangerous." *United States v. Powell*, 666 F.3d 180, 185-86 (4th Cir. 2011) (citing *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). In fact, "[t]he 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." *Terry,* 392 U.S. at 27. As such, "[i]n determining whether such reasonable suspicion exists, we examine the 'totality of the circumstances' to determine if the officer had a 'particularized and objective basis' for believing that the detained suspect might be armed and dangerous." *George*, 732 F.3d at 299 (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002)).

3. Examining the Totality of the Circumstances in Determining Whether an Officer had a "Particularized and Objective Basis" to Suspect that an Individual May be Armed and Dangerous

Various cases from the Fourth Circuit provide guidance on the consideration of factors in support of

reasonable suspicion that an individual is armed and presently dangerous.

In *George,* the police stopped a vehicle in a high-crime area at 3:30 a.m. after witnessing the vehicle chasing another vehicle and running a red light. *See George*, 732 F.3d at 297. After pulling over the vehicle for the traffic violation and observing suspicious conduct, the police officer asked the defendant to exit the vehicle and frisked him, discovering a firearm. *Id.* The district court denied the defendant's motion to suppress and he appealed. *Id.* at 299. In examining the totality of the circumstances, the Fourth Circuit found that the frisk of the defendant was "supported by objective and particularized facts sufficient to give rise to a reasonable suspicion that George was armed and dangerous." *Id.* at 300. The factors the Court pointed to include: 1) the stop occurred late at night (i.e., 3:30 a .m.) in a high crime area; 2) the circumstances of the stop suggested the occupants of the car "might well be dangerous" because the police officer observed the vehicle aggressively chasing a vehicle in front of it, which "indicated a hostility between the two vehicles" and then the vehicle slowed down and ended its pursuit once the officer began following the vehicle; 3) the vehicle was occupied by four males, increasing the risk; 4) George acted nervously when the officer approached the vehicle, he failed to put his hands on the headrest when ordered to do so and he did not make eye conduct with the officer; 5) the driver of the vehicle made misleading statements and gave an implausible explanation for his aggressive driving; 6) George's movements indicated he may have been carrying a weapon because his right hand

was on the seat next to his right leg and was concealed by his thigh and when ordered to put his hands on the headrest, George moved his left hand, but not his right; and 7) after the officer ordered George to exit the vehicle, he dropped his wallet and cell phone as he got out of the car and then bent over to pick them up, which the officer perceived as creating an opportunity to reach for a weapon or escape. *Id.* at 300-01. The Fourth Circuit found that these factors in their totality provided the "particularized and objective basis" for believing George to be armed and dangerous. *Id.* at 301.

In *Powell,* the police conducted a routine traffic stop for a burned-out headline. *United States v. Powell*, 666 F.3d 180, 182 (4th Cir. 2011). Two officers approached the car, one asked for the driver's license and registration, the other approached the passenger side of the car and made amicable conversation with the passenger, Powell. *Id.* at 183. The driver's license was suspended and after checking Powell's license, the officers learned that Powell had "priors" for armed robbery, which the officer's referred to as "caution data." *Id.* at 184. Neither Powell nor the other occupants of the car "appeared suspicious or presented any threat or problem to the officers." *Id.* However, based on the "caution data," the officers ordered Powell out of the vehicle and performed a patdown. *Id.* During the patdown Powell became nervous and attempted to unsuccessfully flee from the officers. *Id.* The officers then removed a backpack from the vehicle near where Powell had been sitting and discovered a handgun in the backpack. *Id.* Defendant appealed the denial of his motion to suppress arguing that the

police lacked reasonable suspicion that he was armed and dangerous. *Id.* at 185. The Government contended that "[o]fficers cannot be expected to blind themselves to obvious risks of danger when a person they encounter demonstrates a willingness to be untruthful, especially when there is information that the person has been involved previously in violence." *Id.* The Fourth Circuit first examined the overall context of the traffic strop and found that the interaction with Powell began as a routine traffic stop, there was no evidence the stop occurred in a high crime area, the four officers outnumbered the three occupants of the car, the occupants were amicable and cooperative with the officers, the occupants did not engage in threatening or evasive conduct, they did not "display any of the tell-tale signs typically associated with illegal and dangerous activity (*e.g.*, evidence of drug-dealing, gang affiliation, or possible concealed weapon)," and Powell was told he was free to leave, which indicates the police did not considered him to be armed and dangerous. *Id.* at 187. The Court found that "this context clearly provides no basis for the officers to reasonable suspect that Powell might have been armed and dangerous." *Id.* The Court then looked to the totality of the circumstances that were present as the patdown began, which included the caution data that the Powell had a prior criminal history of violent crimes and Powell's deliberate misrepresentation regarding his driver's license. *Id.* The Fourth Circuit found that the caution data, without more, does not justify a reasonable suspicion that Powell was armed and dangerous. *Id.* at 188. Similarly, the Court found that making false statements, without more, are insufficient to establish reasonable suspicion. *Id.* at

188-89. The Fourth Circuit concluded that "a reasonably prudent officer in these circumstances would not be warranted in suspicion that Powell was armed and dangerous on the night of the traffic stop. Accordingly, the patdown was not permissible under the Fourth Amendment." *Id.* at 189.

In *Neely,* the defendant was stopped for a headlights violation. *See United States v. Neely*, 564 F.3d 346, 348 (4th Cir. 2009). The driver provided the officer with his license and registration and gave consent to search the trunk of the vehicle. *Id.* However, when the defendant fumbled to find the button to unlock his trunk for about thirty seconds, the officer conducted a protective search of the vehicle. *Id.* The "protective search" of the interior of the vehicle revealed a firearm in the passenger area of the car. *Id.* at 348-49. The district court found that the officer had "articulable suspicion" to perform the vehicle search because the defendant was in a high crime area at 3:00 a.m. and "because of [the defendant] fumbling." *Id.* at 352. On appeal, Neely argued that the search was not a valid protective search because the officer did not possess a reasonable belief based on specific and articulable facts that he was armed and dangerous. *Id.* at 348-49. The Fourth Circuit reversed and held that "[f]umbling in a dark car in the middle of the night under the watchful eyes of two law enforcement officers for a trunk button does not, without more, create a reasonable suspicion that Neely was *dangerous* " even though the stop occurred in a high crime area late at night. *Id.*

The *Neely* court distinguished their facts from the *Holmes* case in which the court found the protective search to be warranted. *See United States v. Holmes*, 376 F.3d 270, 277 (4th Cir. 2004). In *Holmes,* the defendant was suspected to be a "member of a gang whose members had carried out numerous violent felonies while armed." *Id.* There, the Court found that the prior knowledge of the suspect's criminal history and knowledge of his involvement with a gang known to commit violent crimes involving weapons supported the officer's reasonable suspicion that the suspect was armed and dangerous. *Id.* at 278. Similarly, in *Elston,* the officers "possessed detailed information about the defendant due to a 911 call that identified the defendant as threatening to shoot someone in the near future." *United States v. Elston*, 479 F.3d 314, 318-19 (4th Cir.), *cert denied*, 550 U.S. 927 (2007). By contrast, in *Neely,* the officer "had no information that would lead him to believe that Neely either had committed violent crimes in his past or posed an immediate threat to the public." Neely, 564 F.3d at 352. The Court reasoned:

> Neely, unlike the defendants in *Holmes* and *Elston,* was not thought to be a member of a violent gang with an outstanding arrest warrant or an imminent violent threat based on a detailed 911 tip. There was no evidence or suggestion that Neely was armed. Moreover, Neely never hesitated or complained about following Tran's orders, never became belligerent, never threatened, intimidated, or in any way suggested that he intended harm. He was not overly nervous or

> evasive. These factors, combined with Officer Tran's testimony that Neely was free to leave at any time, render us unable to say that Neely's actions or past behavior allowed Officer Tran to reasonably believe Neely was dangerous. The simple discovery of a weapon cannot, of course, create reasonable suspicion after the fact. As such, we are unable to find that Tran's search of Neely's vehicle was justified under Holmes.

Id. at 352-53.

These cases demonstrate the need for specific articulable facts that demonstrate the police officer had a "particularized and objective basis" for believing an individual is armed and presently dangerous. Moreover, the Fourth Circuit has noted their "concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity." *Foster*, 634 F.3d at 248.

4. Totality of the Circumstances Surrounding the *Terry* Frisk of Defendant

Similar to the Fourth Circuit's analyses outlined above, the undersigned reviewed the overall context of the traffic stop to determine whether the totality of the circumstances demonstrate a "particularized and objective basis" for officers to suspect that Defendant was armed and dangerous as required to justify the *Terry* frisk for weapons.

First, the anonymous tip provided officers with information that a black male passenger in a bluish Toyota Camry in the parking lot of 7-Eleven near

Apple Tree Gardens was seen loading a firearm and concealing the firearm in his pocket. (Tr. 16). The caller further stated that the car was driven by a white female and that the car left the parking lot going south on North Mildred Street. (*Id.*).

Second, Trooper Walker,[2] Officer Tharp,[3] Officer Hudson[4] and Captain Roberts[5] each testified that the

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[2] Trooper D.R. Walker, who has worked with the West Virginia State Police for approximately a year and a half, testified that he has been called to Ranson "more times than I can count." (Tr. 4). He stated he was specifically called to the Apple Tree Garden apartments "quite a few times." (Tr. 5). His experience at the apartment complex has been "mostly drug activity and high crime rate, fights, things like that." (Tr. 5). He explained a recent drug seizure at the complex involved three search warrants that resulted in the confiscation of forty-nine (49) grams of crack and about three and a half grams of heroin, along with other small quantities. (Tr. 5). In regard to the connection of the 7-Eleven to the Apple Tree Garden apartments, the Trooper explained that "usually if someone is afraid to walk into Apple Tree to purchase narcotics, they will go to 7-Eleven" and a person will come from the apartment complex to the parking lot for the drug transaction. (Tr. 6). Trooper Walker testified his experience of this taking place occurred "quite a few times," which he quantified as more than twenty (20) but less than thirty (30). (Tr. 6-7). The Trooper stated he had not personally been associated with the seizure of any firearms in that area but he is aware of calls to the apartment complex for reports of firearms. (Tr. 7).

[3] Officer Tharp has served with the Ranson Police Department for about eight (8) years. (Tr. 19). She testified she had "a lot" of experience with crime at the Apple Tree Gardens, including a murder case in 2012, numerous drug cases, assisting in search warrants for drug cases and simple offenses such as loitering and drinking. (*Id.*). She classified Apple Tree Gardens as "the number one crime place" in Ranson. (*Id.*). Officer Tharp further affirmed that she had experience with crime "spilling over" into the 7-Eleven and explained "[w]hen I was doing drug

work and I dropped an informant off to buy drugs there, there were three other people waiting for drugs in that parking lot." (Tr. 20). Officer Tharp also stated that she received "numerous complaints from the management [of the 7-Eleven] saying that people are running – basically they will park in a car and someone will run from Apple Tree to the car, make a transaction, and run back." (*Id.*). She testified that she also had experience with firearms in the area a "few times." (*Id.*). She described one incident when she approached Apple Tree Gardens due to a complaint that an individual was dealing drugs and when she arrived, he ran from her and threw a weapon. (Tr. 20-21). There were the two instances that came to her mind quickly. (Tr. 21).

[4] Officer Hudson has served with the Ranson Police Department since December 2012. (Tr. 35). Officer Hudson testified that "Apple Tree Gardens is one of our highest crime rates that we have." (Tr. 43). He stated that he experienced "spillover crime" at the 7-Eleven with "riffraff coming from Apple Tree walking back and forth." (Id.). He stated that there were multiple shopliftings at the 7-Eleven. (Tr. 44). He personally had not been involved in gun seizures in that area. (*Id.*). Officer Hudson indicated a heightened level of alert for calls involving Apple Tree Gardens stating that "anytime you hear Apple Tree or 7-Eleven, your radar goes up a notch." (Tr. 54). He continued to explain "we get gun calls every now and then, sir. And then when you hear something from Apple Tree . . . you put yourself in that situation where you think it's definitely going to happen. It could be there." (*Id.*).

[5] Captain Roberts testified that he has worked in law enforcement in Jefferson County for twenty-eight (28) years. (Tr. 56). He currently works as the Captain of the Ranson City Police Department. (*Id.*). Captain Roberts stated that in Ranson, the Apple Tree complex has the most crime. (Tr. 57). Captain Roberts testified as to the "spillover of crime" from the Apple Tree Gardens to the 7-Eleven with problems such as "theft, drug deals, gunshots, you name it." (Id.). Captain Roberts affirmed that the drug dealing problem from Apple Tree Garden would spill over into the 7-Eleven parking lot because "[i]t is in walking distance, so, you know, sometimes people take it away from their residence." (Tr. 58).

city of Ranson and specifically Apple Tree Garden apartments are considered to be high crime areas based on the officers' knowledge and experience. Officers further testified that crime from Apple Tree Gardens often "spilled over" into the 7-Eleven parking lot as evidenced by shoplifting, thefts and drug trafficking activities in the parking lot. The traffic stop was conducted seven blocks south of this area. When considering the location of a stop or frisk in a "high crime area," the Fourth Circuit has held that "although standing alone this factor may not be the basis for reasonable suspicion to stop anyone in the area, it is a factor that may be considered along with others to determine whether police have a reasonable suspicion based on the totality of the circumstances." *United States v. Mayo*, 361 F.3d 802, 807 (4th Cir. 2004).

Third, as Defendant was exiting the car, Captain Roberts testified that when he asked whether Defendant was in possession of a firearm, Defendant gave a "weird look" or an "oh crap look," which the officer took to mean "I don't want to lie to you, but I'm not going to tell you anything." (Tr. 62).

The following factors tend to weigh against the Government's argument that reasonable suspicion justified the *Terry* frisk:

First, the information provided by the anonymous caller did not indicate Defendant was engaged in criminal activity, such as drug dealing, or engaged in threatening behavior, such as brandishing the weapon. (Tr. 24-27).

Second, upon stopping the vehicle, the driver complied with Officer Hudson's request and provided her license and registration. (Tr. 39). Defendant also attempted to comply with Officer Hudson's request to provide identification until he was stopped and ordered out of the vehicle. (*Id.*). Officer Hudson testified that Defendant was cooperative. (Tr. 53).

Third, at the time Officer Hudson ordered Defendant out of the car and Captain Roberts began the protective search, Defendant had not made any furtive gestures, movements or inconsistent statements to indicate that he was nervous, armed or intending to reach for a weapon. (Tr. 53).

Fourth, the stop occurred during daylight, at approximately 4:00 p.m., and only two occupants were in the vehicle, one female and one male. (Tr. 16, 40).

The strongest factor in support of the Government's argument that Defendant was armed and dangerous is the anonymous tip, which reported that a black male loaded and the concealed a firearm, in the parking lot of the 7-Eleven, which is in a high crime area of Ranson. Anonymous tips, alone, are not sufficient to demonstrate reasonable suspicion to conduct a *Terry* stop and frisk. *J.L.*, 529 U.S. at 272, 120 S.Ct. 1375 (finding that "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.' " *Id.* (citing *Alabama v. White*, 496 U.S. 325, 327 (1990); *Adams v. Williams*, 407 U.S. 143, 146-47 (1972)). However, there are

situations where an anonymous tip, when suitably corroborated, may provide "sufficient indicia of reliability" to support reasonable suspicion. *Alabama v. White*, 496 U.S. at 327; *see also Elston*, 479 F.3d at 318. Therefore, only after an anonymous tip exhibits indicia of reliability may the subsequently corroborated information justify the investigatory stop or protective search under *Terry*.

The Supreme Court in *Gates* adopted a " 'totality of the circumstances' approach to determining whether an informant's tip establishes probable cause." *Alabama v. White*, 496 U.S. at 328 (citing *Illinois v. Gates*, 462 U.S. 213 (1983)). "*Gates* made clear, however, that those factors that had been considered critical under *Aguilar* and Spinelli – an informant's 'veracity,' 'reliability,' and 'basis of knowledge' – remain 'highly relevant in determining the value of his report.' " *Id*. While *Gates* dealt with probable cause, the Court in *Alabama v. White* found "these factors are also relevant in the reasonable-suspicion context, although allowance must be made in applying them for the lesser showing required to meet that standard." 496 U.S. at 328-29. When "an informant's tip supplies part of the basis for reasonable suspicion, [the court] must ensure that the tip possesses sufficient indicia of reliability." *United States v. Perkins*, 363 F.3d 317, 323 (4th Cir. 2004).

The recent Supreme Court case of *Navarette v. California* addressed the reliability of an anonymous tip in supporting reasonable suspicion to conduct a *Terry* stop. 134 S.Ct. 1683, 1688 (U.S. Apr. 22, 2014). *Navarette* involved an investigative vehicle stop based on an anonymous tip by a 911 caller who

reported that a "vehicle had run her off the road." *Id.* at 1686. The caller provided the location of the vehicle as well as the direction it was headed and described the vehicle, including the color, make, model and license plate number. *Id.* Police officers located the vehicle and executed a traffic stop based on the tip. *Id.* The Supreme Court held that the stop complied with the Fourth Amendment because "the officer had reasonable suspicion that the driver was intoxicated" based on the anonymous tip. *Id.* In finding that the police had reasonable suspicion to conduct an investigative stop, the Court considered various factors demonstrating the tip bore adequate indicia of reliability. *Id.* at 1688. The Supreme Court found first, that eyewitness knowledge "lends significant support to the tip's reliability." *Id.* at 1689. Second, the 911 caller made a "contemporaneous report" which has "long been treated as especially reliable." *Id.* Specifically, "[p]olice confirmed the truck's location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call)." *Id.* Third, the Court credited the caller's use of the 911 emergency system, which allows for "identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." *Id.*

In the present case, the caller made a claim of eyewitness knowledge – he stated he personally observed a black male passenger in a bluish Toyota Camry loading a firearm and concealing the firearm in his pocket. This eyewitness knowledge supports the veracity of the tip. Second, the contemporaneity between the observation and the report was

substantial (*i.e.,* the vehicle was located within two or three minutes of the call and only about seven blocks from the location of the reported observation at the 7 -Eleven). This contemporaneity between the tip and Officer Hudson's location of the vehicle also supports the reliability of the tip. Third, the caller did not report the tip through the 911 emergency system, which detracts from the reliability of the tip.

However, a reliable tip can only justify reasonable suspicion for a *Terry* stop, if it creates a reasonable suspicion that "criminal activity may be afoot." For example, in *Brown,* the police received an anonymous telephone tip that "a short, black male with glasses was carrying a firearm outside the Roseman Court apartment complex." *United States v. Brown*, 401 F.3d 588, 590 (4th Cir. 2005) (internal citations omitted). The Court found that:

> [a]n anonymous telephone tip that alleges illegal possession of a firearm but that merely identifies a suspect and his location does not itself provide reasonable suspicion for a *Terry* stop. To justify a *Terry* stop, such a tip must contain sufficient 'indicia of reliability' to enable officers to evaluate the veracity of the tip before stopping whomever the tip identifies. For example, an anonymous telephone tip sufficient to justify a *Terry* stop might predict a suspect's future actions, which can then be corroborated by police surveillance of the suspect's movement. Once the predictions are corroborated, police may have reasonable suspicion to make a *Terry* stop.

Id. at 596. The Court further explained that "[w]hile the officers were able to corroborate immediately the identification and location components of the tip, at no point before Officer Lewis ordered Brown against the car did the officers observe any conduct by Brown that would cause them to suspect that he was carrying a firearm." *Id.* The Fourth Circuit held that "the anonymous tip alone did not provide reasonable suspicion to justifying seizing Brown . . . [b]ecause the officers had acquired no additional information that Brown was carrying a firearm." *Id.*

Similarly, in *J.L.,* the Supreme Court found that the anonymous tip that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun" was not sufficient to justify the police officer's stop and frisk of that person. *J.L.*, 529 U.S. at 270. Police arrived just six minutes after the call and saw three black males "hanging out" at the stop, one of whom was wearing a plaid shirt. *Id.* The officers did not see a firearm and J.L. did not make any "threatening" or "unusual movements." *Id.* The officers approached J.L., frisked him and seized a firearm from his pocket. *Id.* The Court held that the anonymous telephone tip did not provide reasonable suspicion to justify the stop and frisk. *Id.* at 272. The Court reasoned that "[t]he reasonable suspicion here at issue requires that a tip be *reliable in its assertion of illegality,* not just in its tendency to identify a determinate person." *Id.* (emphasis added).

The Court in *Navarette* similarly stated that "[e]ven a reliable tip will justify an investigative stop *only if* it creates reasonable suspicion that 'criminal activity may be afoot.' " *Id.* at 1690 (emphasis added). The Court pointed to the specificity and the content

of the 911 caller's information as providing "a significant indicator of drunk driving." *Id.* at 1691 (explaining that "the 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct."). In sum, the anonymous tip must allege some facts demonstrating an individual is engaged in criminal activity in order to justify a *Terry* stop. *See United States v. Cortez*, 449 U.S. 411, 417 (1981) (stating that "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.").

The Court notes that the above cited cases involve the veracity of a tip to support reasonable suspicion of criminal activity to justify a *Terry* stop. Based on the case law cited above, it is apparent that the tip in the present case, alone, is insufficient to support reasonable suspicion of criminal activity to allow for an investigative stop of Defendant's vehicle because the activity reported, carrying and concealing a firearm, is not a crime in West Virginia. However, at issue in the present case is whether the anonymous tip supported a reasonable suspicion that Defendant was armed and dangerous to justify the *Terry* frisk for weapons. Similar to the *Terry* stop analyses above, the anonymous tip must not only be reliable, but must also contain some facts demonstrating an "objective manifestation" that the person to be frisked is armed and dangerous.

The anonymous caller reported that he observed a black male loading and concealing a firearm. However, West Virginia is an open carry state and residents may conceal a loaded firearm with the issuance of a license. *See* W.Va.Code § 61-7-4. Therefore, merely possessing a concealed weapon does not necessarily indicate criminal activity or dangerousness. The Fourth Circuit clearly stated that "[b]eing a felon in possession of a firearm is not the default status." *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013). In *Black,* the Government argued that "it would be 'foolhardy' for the officers to 'go about their business while allowing a stranger in their midst to possess a firearm," to which the Fourth Circuit responded, "[w]e are not persuaded." *Id.* The Court reasoned that "where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention. Permitting such a justification would eviscerate Fourth Amendment protections for lawfully armed individuals in those states."[6] *Id.* (citing *United States v. King*, 990 F.2d 1552, 1559 (10th Cir. 1993)).

In this case, the content of the tip provided to the police, while reporting the individual was armed, does not contain any information demonstrating that

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[6] The Court recognizes that the Black case only involves whether possession of a firearm in an open-carry state is sufficient to support reasonable suspicion that a person is engaging in criminal activity. The undersigned is persuaded that the Court's reasoning – that merely exercising one's right to bear arms should not be grounds for police invasion of privacy – would similarly apply to the frisk of a person's body, not only the investigative detention.

the individual was engaging in any "objective or particularized" dangerous behavior. Officer Tharp testified that the information reported by the anonymous caller – that a person as in possession of and concealed a loaded firearm – was, in fact, not reporting a crime or any criminal activity. (Tr. 26-27). The anonymous tip provided no information indicating that the person observed in the parking lot was engaging in an illegal activity, making threats, brandishing the weapon or conducting himself in any manner that others would perceive as dangerous.[7] Similarly, the anonymous tip did not include information regarding the caller's familiarity with the man possessing the firearm indicating knowledge that he did not have a concealed carry permit or was not permitted to possess a firearm.

Moreover, Officer Hudson and Captain Roberts did not testify to any facts they observed after making the traffic stop that would corroborate the information provided by the anonymous caller that Defendant was in fact armed. Similarly, the officers testified to no objective and particularized facts demonstrating that Defendant was dangerous at the time of the traffic stop. The Government presented no

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[7] Captain Roberts testified that he conducted the frisk "because he was supposedly exposing a gun or brandishing a gun at the 7-Eleven store. If he is carrying a weapon, he has to have a permit if it is in a vehicle or concealed." (Tr. 65). However, the evidence presented to the Court regarding the anonymous tip is only that Defendant loaded and then concealed the firearm, not that he exposed or brandished the firearm. In addition, the caller never stated that the man observed loading and concealing the firearm was known to him as a felon or person who did not have a permit to conceal a weapon.

evidence indicating the officers' perceived any movements or received any statements demonstrating Defendant was nervous, uncooperative or dangerous. While Captain Roberts testified that Defendant gave a "weird look" indicating that "I don't want to lie to you, but I'm not going to tell you anything," this "look" even in combination with the tip still does not give rise to reasonable suspicion of dangerousness. While the "weird look" may indicate Defendant's unwillingness to cooperate at this stage of the stop, exercising his Fifth Amendment right to remain silent does not transform his silence into dangerousness. Moreover, the officer's subjective impression, without more, is insufficient to justify the search of Defendant's person.

The undersigned is sympathetic to the inherent dangers that police face when they approach vehicles with occupants they have reason to believe are armed. However, the Supreme Court recognized the inherent danger of firearms and the risk posed by armed criminals but explained that the lower standard of "reasonable suspicion" rather than "probable cause" to search for weapons accounted for this greater risk:

> Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry's* rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern.

J.L., 529 U.S. at 272 (citing *Terry,* 392 U.S., at 30). In this case, the Court flatly rejected the request to create a "firearm exception" that would allow police to conduct investigatory stops and frisks on the basis of a bare-boned anonymous tip. *Id.* The Court explained that "[s]uch an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms." *Id.*

While the officers testified regarding their concern for officer safety, the standard is not whether a generalized concern for officer safety existed but rather whether "objective and particularized" articulable facts raised a suspicion that Defendant was dangerous. *See Sakyi*, 160 F.3d at 168-69. The undersigned finds that the Government is unable to articulate any specific fact, other than Defendant's possession of a firearm in a high crime neighborhood, a legal activity in the state of West Virginia, which would justify the officer's suspicion that Defendant was dangerous. Accordingly, the totality of the circumstances in this case fail to demonstrate the officers possessed a "particularized and objective basis" to suspect that Defendant was armed and dangerous.

VI. CONCLUSION

The only factors in support of the protective search are the anonymous tip that Defendant was armed, he happened to be in a high crime area and he gave a "weird look." The Government presented no

objective and particularized articulable facts demonstrating a suspicion that Defendant was dangerous, beyond his location in or proximity to a high crime area or the subjective impressions of an officer. Under the Government's argument, every person legally carrying a gun would be at risk for an invasion of their privacy because the suspicion that they are armed would follow in every circumstance the suspicion that they are also dangerous. West Virginia's open carry law, which includes the right to conceal a firearm with a permit, is not suspended simply because an individual is residing or located in a high crime area. Officers could have questioned Defendant regarding the tip, his activities that day, asked for his name and ran a background check, or simply asked for consent to search. Instead, officers conducted a *Terry* frisk based solely on the anonymous tip that Defendant was in possession of a firearm, a legal activity in West Virginia, without any articulable facts demonstrating Defendant was presently dangerous.

VII. RECOMMENDATION

For the reasons stated herein, it is **RECOMMENDED** that Defendant's Motion to Suppress (ECF No. 21) be **GRANTED** and any and all evidence seized as a result of the illegal *Terry* frisk be **SUPPRESSED.**

Any party may, by Tuesday, August 12, 2014 at 5:00 p.m. EST, file with the Clerk of the Court any written objections to this Report and Recommendation. The party should clearly identify the portions of the Report and Recommendation to which the party is filing an objection and the basis for

such objection. The party shall also submit a copy of any objections to the Honorable Gina M. Groh, United States District Judge. Failure to timely file objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon this Report and Recommendation. 28 U.S.C. § 636(b)(1).

The Court directs the Clerk of the Court to provide a copy of this Report and Recommendation to all counsel of record, as provided in the Administrative Procedures for Electronic Case Filing in the United States District Court for the Northern District of West Virginia.

APPENDIX E

W. Va. Code § 61-7-3

§ 61-7-3. Carrying deadly weapon without license or other authorization; penalties

(a) Any person who carries a concealed deadly weapon, without a state license or other lawful authorization established under the provisions of this code, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars and may be imprisoned in the county jail for not more than twelve months for the first offense; but upon conviction of a second or subsequent offense, he or she shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than five years and fined not less than one thousand dollars nor more than five thousand dollars.

(b) It shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is a first offense or is a second or subsequent offense and, if it shall be a second or subsequent offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence before the trial court of such second or subsequent offense and shall not be permitted to use discretion in introducing evidence to prove the same on the trial.

APPENDIX F

W. Va. Code, § 61-7-4

§ 61-7-4. License to carry deadly weapons; how obtained

(a) Except as provided in subsection (h) of this section, any person desiring to obtain a state license to carry a concealed deadly weapon shall apply to the sheriff of his or her county for the license, and pay to the sheriff, at the time of application, a fee of $75, of which $15 of that amount shall be deposited in the Courthouse Facilities Improvement Fund created by section six, article twenty-six, chapter twenty-nine of this code. Concealed weapons permits may only be issued for pistols or revolvers. Each applicant shall file with the sheriff a complete application, as prepared by the Superintendent of the West Virginia State Police, in writing, duly verified, which sets forth only the following licensing requirements:

(1) The applicant's full name, date of birth, Social Security number, a description of the applicant's physical features, the applicant's place of birth, the applicant's country of citizenship and, if the applicant is not a United States citizen, any alien or admission number issued by the United States Bureau of Immigration and Customs enforcement, and any basis, if applicable, for an exception to the prohibitions of 18 U.S.C. § 922(g)(5)(B);

(2) That, on the date the application is made, the applicant is a bona fide resident of this state and of the county in which the application is made and has a valid driver's license or other

state-issued photo identification showing the residence;

(3) That the applicant is twenty-one years of age or older: *Provided,* That any individual who is less than twenty-one years of age and possesses a properly issued concealed weapons license as of the effective date of this article shall be licensed to maintain his or her concealed weapons license notwithstanding the provisions of this section requiring new applicants to be at least twenty-one years of age: *Provided, however,* That upon a showing of any applicant who is eighteen years of age or older that he or she is required to carry a concealed weapon as a condition for employment, and presents satisfactory proof to the sheriff thereof, then he or she shall be issued a license upon meeting all other conditions of this section. Upon discontinuance of employment that requires the concealed weapons license, if the individual issued the license is not yet twenty-one years of age, then the individual issued the license is no longer eligible and must return his or her license to the issuing sheriff;

(4) That the applicant is not addicted to alcohol, a controlled substance or a drug and is not an unlawful user thereof as evidenced by either of the following within the three years immediately prior to the application:

(A) Residential or court-ordered treatment for alcoholism or alcohol detoxification or drug treatment; or

(B) Two or more convictions for driving while under the influence or driving while impaired;

(5) That the applicant has not been convicted of a felony unless the conviction has been expunged or set aside or the applicant's civil rights have been restored or the applicant has been unconditionally pardoned for the offense;

(6) That the applicant has not been convicted of a misdemeanor crime of violence other than an offense set forth in subsection (7) of this section in the five years immediately preceding the application;

(7) That the applicant has not been convicted of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33), or a misdemeanor offense of assault or battery either under the provisions of section twenty-eight, article two of this chapter or the provisions of subsection (b) or (c), section nine, article two of this chapter in which the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense, or a misdemeanor offense with

similar essential elements in a jurisdiction other than this state;

(8) That the applicant is not under indictment for a felony offense or is not currently serving a sentence of confinement, parole, probation or other court-ordered supervision imposed by a court of any jurisdiction or is the subject of an emergency or temporary domestic violence protective order or is the subject of a final domestic violence protective order entered by a court of any jurisdiction;

(9) That the applicant has not been adjudicated to be mentally incompetent or involuntarily committed to a mental institution. If the applicant has been adjudicated mentally incompetent or involuntarily committed the applicant must provide a court order reflecting that the applicant is no longer under such disability and the applicant's right to possess or receive a firearm has been restored;

(10) That the applicant is not prohibited under the provisions of section seven of this article or federal law, including 18 U.S.C. § 922(q) or (n), from receiving, possessing or transporting a firearm;

(11) That the applicant has qualified under the minimum requirements set forth in subsection (d) of this section for handling and firing the weapon: *Provided,* That this requirement shall be waived in the case of a renewal applicant who has previously qualified; and

(12) That the applicant authorizes the sheriff of the county, or his or her designee, to conduct an investigation relative to the information contained in the application.

(b) For both initial and renewal applications, the sheriff shall conduct an investigation including a nationwide criminal background check consisting of inquiries of the National Instant Criminal Background Check System, the West Virginia criminal history record responses and the National Interstate Identification Index and shall review the information received in order to verify that the information required in subsection (a) of this section is true and correct. A license may not be issued unless the issuing sheriff has verified through the National Instant Criminal Background Check System that the information available to him or her does not indicate that receipt or possession of a firearm by the applicant would be in violation of the provisions of section seven of this article or federal law, including 18 U.S.C. § 922(g) or (n).

(c) Sixty dollars of the application fee and any fees for replacement of lost or stolen licenses received by the sheriff shall be deposited by the sheriff into a concealed weapons license administration fund. The fund shall be administered by the sheriff and shall take the form of an interest-bearing account with any interest earned to be compounded to the fund. Any funds deposited in this concealed weapon license administration fund are to be expended by the sheriff to pay the costs associated with issuing concealed weapons licenses. Any surplus in the fund on hand at the end of each fiscal year may be expended for other

law-enforcement purposes or operating needs of the sheriff's office, as the sheriff considers appropriate.

(d) All persons applying for a license must complete a training course in handling and firing a handgun. The successful completion of any of the following courses fulfills this training requirement:

(1) Any official National Rifle Association handgun safety or training course;

(2) Any handgun safety or training course or class available to the general public offered by an official law-enforcement organization, community college, junior college, college or private or public institution or organization or handgun training school utilizing instructors certified by the institution;

(3) Any handgun training or safety course or class conducted by a handgun instructor certified as such by the state or by the National Rifle Association;

(4) Any handgun training or safety course or class conducted by any branch of the United States Military, Reserve or National Guard or proof of other handgun qualification received while serving in any branch of the United States Military, Reserve or National Guard.

A photocopy of a certificate of completion of any of the courses or classes or an affidavit from the instructor, school, club, organization or group that conducted or taught the course or class attesting to the successful completion of the course or class by the applicant or a copy of any document which shows successful

completion of the course or class is evidence of qualification under this section.

(e) All concealed weapons license applications must be notarized by a notary public duly licensed under article four, chapter twenty-nine of this code. Falsification of any portion of the application constitutes false swearing and is punishable under the provisions of section two, article five, chapter sixty-one of this code.

(f) The sheriff shall issue a license unless he or she determines that the application is incomplete, that it contains statements that are materially false or incorrect or that applicant otherwise does not meet the requirements set forth in this section. The sheriff shall issue, reissue or deny the license within forty-five days after the application is filed if all required background checks authorized by this section are completed.

(g) Before any approved license is issued or is effective, the applicant shall pay to the sheriff a fee in the amount of $25 which the sheriff shall forward to the Superintendent of the West Virginia State Police within thirty days of receipt. The license is valid for five years throughout the state, unless sooner revoked.

(h) Each license shall contain the full name and address of the licensee and a space upon which the signature of the licensee shall be signed with pen and ink. The issuing sheriff shall sign and attach his or her seal to all license cards. The sheriff shall provide to each new licensee a duplicate license card, in size similar to other state identification cards and licenses, suitable for carrying in a wallet, and the

license card is considered a license for the purposes of this section.

(i) The Superintendent of the West Virginia State Police shall prepare uniform applications for licenses and license cards showing that the license has been granted and shall do any other act required to be done to protect the state and see to the enforcement of this section.

(j) If an application is denied, the specific reasons for the denial shall be stated by the sheriff denying the application. Any person denied a license may file, in the circuit court of the county in which the application was made, a petition seeking review of the denial. The petition shall be filed within thirty days of the denial. The court shall then determine whether the applicant is entitled to the issuance of a license under the criteria set forth in this section. The applicant may be represented by counsel, but in no case is the court required to appoint counsel for an applicant. The final order of the court shall include the court's findings of fact and conclusions of law. If the final order upholds the denial, the applicant may file an appeal in accordance with the Rules of Appellate Procedure of the Supreme Court of Appeals.

(k) If a license is lost or destroyed, the person to whom the license was issued may obtain a duplicate or substitute license for a fee of $5 by filing a notarized statement with the sheriff indicating that the license has been lost or destroyed.

(l) Whenever any person after applying for and receiving a concealed handgun license moves from the address named in the application to another

county within the state, the license remains valid for the remainder of the five years: *Provided,* That the licensee within twenty days thereafter notifies the sheriff in the new county of residence in writing of the old and new addresses.

(m) The sheriff shall, immediately after the license is granted as aforesaid, furnish the Superintendent of the West Virginia State Police a certified copy of the approved application. The sheriff shall furnish to the Superintendent of the West Virginia State Police at any time so requested a certified list of all licenses issued in the county. The Superintendent of the West Virginia State Police shall maintain a registry of all persons who have been issued concealed weapons licenses.

(n) Except when subject to an exception under section six, article seven of this chapter, all licensees shall carry with them a state-issued photo identification card with the concealed weapons license whenever the licensee is carrying a concealed weapon. Any licensee who, in violation of this subsection, fails to have in his or her possession a state-issued photo identification card and a current concealed weapons license while carrying a concealed weapon is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $50 or more than $200 for each offense.

(o) The sheriff shall deny any application or revoke any existing license upon determination that any of the licensing application requirements established in this section have been violated by the licensee.

(p) A person who is engaged in the receipt, review or in the issuance or revocation of a concealed weapon

license does not incur any civil liability as the result of the lawful performance of his or her duties under this article.

(q) Notwithstanding the provisions of subsection (a) of this section, with respect to application by a former law-enforcement officer honorably retired from agencies governed by article fourteen, chapter seven of this code; article fourteen, chapter eight of this code; article two, chapter fifteen of this code; and article seven, chapter twenty of this code, an honorably retired officer is exempt from payment of fees and costs as otherwise required by this section. All other application and background check requirements set forth in this shall be applicable to these applicants.

(r) Except as restricted or prohibited by the provisions of this article or as otherwise prohibited by law, the issuance of a concealed weapon permit issued in accordance with the provisions of this section authorizes the holder of the permit to carry a concealed pistol or revolver on the lands or waters of this state.