NO. 99730-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PALLA SUM,

Petitioner.

Pierce County Superior Court Cause No. 19-1-01329-1
Court of Appeals Cause No. 53924-1-II

SUPPLEMENTAL BRIEF OF RESPONDENT

MARY E. ROBNETT
Pierce County Prosecuting Attorney

BRITTA ANN HALVERSON
WSB # 44108 / OID #91121
ANNE EGELER, WSB # 20258
Deputy Prosecuting Attorneys
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-7400

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I. INTRODUCTION

Sum invites this Court to address an important public policy issue—the role of race in Washington's seizure analysis—without the necessary record to do so. It is Sum's burden to show a seizure occurred, yet he made no record below as to his race, the officer's race, or any relevant racial dynamics surrounding the encounter. Indeed, even Sum acknowledges that consideration of race is unnecessary for the determination of his case. This Court should decline to decide how race informs the seizure analysis under article I, section 7.

However, if this Court decides to reach the issue, despite the complete lack of factual support for the argument, then it should follow the approach taken by the Ninth Circuit and D.C. Court of Appeals and hold that race can be a factor considered under the totality of the circumstances test when the record shows that race was relevant to the encounter.

In Sum's case, the totality of the circumstances conclusively show that regardless of race, Sum was not seized

when a single officer approached his parked vehicle on foot, engaged him briefly in conversation, and asked for identification. This Court should affirm.

II. RESTATEMENT OF THE ISSUES

A. A reviewing court should not decide a constitutional issue unless absolutely necessary to the determination of the case. Should this Court decide whether race is an appropriate factor for consideration in the seizure analysis, where Sum agrees consideration of race is unnecessary in his case, no factual record regarding race was developed below, and no argument regarding race was raised in the trial court or Court of Appeals?

B. This Court has affirmatively stated that in applying the "reasonable person" standard, the totality of the circumstances test allows courts to objectively consider a range of factors, and the Ninth Circuit and D.C. Court of Appeals have recognized that race is a factor that may be objectively considered. If this Court decides to reach the issue, should it hold that race is a factor which courts may objectively consider under the totality of the circumstances test when there is evidence that race is relevant to the encounter?

C. If race is a factor that courts may consider, was it a relevant factor in Sum's case, where (1) the trial record is devoid of any indication of how Sum's race would objectively contribute to a belief that he was not free to leave, (2) Sum admits that consideration of his race is unnecessary, and (3) a reasonable person in Sum's situation, regardless of

race, would have felt free to leave or terminate the encounter with the deputy?

III. STATEMENT OF THE CASE

A. A Deputy Approached Sum's Car on Foot, in Daylight, Engaged Him in Conversation, and Asked for Identification.

Pierce County Sheriff's Deputy Mark Rickerson was on patrol in his unmarked vehicle at approximately 9:15 a.m. when he saw a Honda parked near a church. 2RP 9-13, 16-17.[1] The deputy was driving through that area because stolen vehicles had been recovered there previously. 2RP 12-13, 17. Months earlier, a concerned resident living across the street from the church contacted Deputy Rickerson about suspicious vehicles parked in the neighborhood. 2RP 13, 17. On this morning, someone appeared to be slumped over in the Honda's driver's seat. 2RP 17-18.

[1] The State references the verbatim reports of proceedings in the same manner as Sum. *See* Petition for Review (Pet.) at 1 n.1.

Deputy Rickerson parked 10-15 feet away so as not to block the Honda's ability to leave. 2RP 19, 28. At this point, the deputy "didn't know what was going on….[He] had no crime. [He] was just going to check on the vehicle…to see…why it was there" and "if the person needed medical aid." 2RP 19-20.

The deputy checked the Honda's registration and saw a report of sale from Oregon. 2RP 20-21. The deputy walked to the driver's window and saw two people inside the car. 2RP 21. Both appeared unconscious and did not seem to notice the deputy approach. 2RP 22. The deputy knocked on the driver's window to make sure they were okay and to see what they were doing there. 2RP 22. At no point did Deputy Rickerson draw his weapon. 2RP 23.

In the driver's seat, Palla Sum slowly woke, looked at the uniformed deputy, and partially rolled down his window. 2RP 21-23. When Deputy Rickerson asked what they were doing, Sum responded that they were waiting for a friend across the street. 2RP 23. Sum appeared to be referring to the residence that

had contacted Deputy Rickerson about suspicious vehicles parked in the neighborhood. 2RP 23.

Deputy Rickerson asked Sum if the car he was in belonged to him, and Sum replied "no." 2RP 25. When asked to whom it belonged, Sum responded with a first name and gave no other information. 2RP 25. Deputy Rickerson then asked if Sum and his passenger had any identification. 2RP 23, 25. Sum asked why the deputy wanted their identification, and the deputy explained that Sum could not tell him exactly who the Honda belonged to, and they were in an area where stolen vehicles had been recovered. 2RP 26. Sum replied with a false name and date of birth. 2RP 26-27.

Deputy Rickerson returned to his car and sat with the door open while he ran the false name through his computer. 2RP 27-28. He heard the Honda's engine start and saw it quickly back up and take off at a high rate of speed, over the grass and sidewalk. 2RP 28-29. Deputy Rickerson turned on his lights and siren and followed the Honda. 2RP 29-31. The Honda blew through a stop

sign, ran two red lights, and nearly collided with another car. 2RP 30-32. It then slid into a home's front yard as it attempted to negotiate a turn. 2RP 32. Sum jumped from the car and ran, but he tripped and the deputy was able to take him into custody. 2RP 32. Sum eventually provided his true name and date of birth. 2RP 33-35.

Deputy Rickerson observed a handgun inside the Honda, in front of the driver's seat. 2RP 37. The loaded gun was later recovered pursuant to a search warrant. 2RP 37-39. There were three rounds in the magazine and one in the chamber. 2RP 39.

B. Sum Moved to Suppress Evidence But Did Not Argue that Race Was a Factor.

The State charged Sum with first-degree unlawful possession of a firearm, attempting to elude a pursuing police vehicle, and making a false statement to a public servant. CP 23-24. Sum filed a motion to suppress evidence, arguing he was seized when the deputy asked for his identification. CP 7-12. He did not argue that race was a factor.

Deputy Rickerson was the only witness who testified at the suppression hearing. 2RP 9-44. No record was made regarding Sum's race, Deputy Rickerson's race, or how race was relevant to the encounter.

The trial court denied Sum's suppression motion, finding that because the deputy did not retain Sum's physical identification to conduct the records check, Sum was not seized. CP 89. At trial, the jury found Sum guilty of all charges. CP 51-53.

C. The Court of Appeals Applied the Totality of the Circumstances Test and Held Sum Was Not Seized.

Sum appealed only his conviction for making a false statement and challenged the superior court's order denying his motion to suppress evidence of that crime. The Court of Appeals held that under the totality of the circumstances test, Sum was not seized when he made the false statement. *State v. Sum*, No. 53924-1-II, 2021 WL 1382608 (Wash. Ct. App. April 13, 2021)

(unpublished). As at the trial court, Sum did not make any arguments in the Court of Appeals regarding race.

IV. ARGUMENT

Under the Fourth Amendment to the federal constitution, a seizure occurs only if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave" due to physical force or show of authority by police. *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988) (internal citations omitted); *see State v. O'Neill*, 148 Wn.2d 564, 574-75, 62 P.3d 489 (2003) (Washington's test under article I, section 7).[2] The Court of Appeals correctly evaluated the totality of the

[2] In *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998), this Court rejected the ruling in *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), that a seizure does not occur unless the person involved in fact yields to the show of authority. Otherwise, Washington's test under article I, section 7 largely mirrors that of the Fourth Amendment. *See O'Neill*, 148 Wn.2d at 574 (citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) and *Florida v. Bostick*, 501 U.S. 429, 436, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)).

circumstances in this case and held that a seizure did not occur. Race was not a factor considered, because it was not raised at the suppression hearing, the record was not developed regarding the race of Sum or the deputy, and Sum did not raise race at the Court of Appeals. The barren record in this case offers an extremely poor vehicle for deciding a question of statewide importance. The Court should decline to consider this issue for the first time on appeal to the state Supreme Court.

If the Court opts to address the newly raised issue, it should hold that when race is a relevant, objective factor, it may be considered within the context of the totality of the circumstances. *See United States v. Washington*, 490 F.3d 765, 770-774 (9th Cir. 2007). State and federal courts have repeatedly admonished that a threshold seizure inquiry will almost never turn on a single factor. *See, e.g., Florida v. Bostick*, 501 U.S. 429, 439-40, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991); *United States v. Smith*, 423 F.3d 25, 29-30 (1st Cir. 2005) ("[N]o single factor is dispositive in any case."); *State v. Young*, 135 Wn.2d 498, 514,

957 P.2d 681 (1998) (rejecting argument that shining of spotlight amounts to a *per se* violation of article I, section 7). For this reason, a new "reasonable person of color" standard should be rejected. Instead, the well-established, objective totality of the circumstances test is sufficiently flexible to allow courts to consider race and other demographic factors that objectively impact a reasonable person's belief that he or she is free to leave or otherwise terminate an encounter with police.

A. The Court Should Decline to Consider the Issue of Race Raised for the First Time in Sum's Petition for Review.

This case provides no context for deciding how, and to what extent, race may impact the objective seizure analysis under article I, section 7. Sum himself concedes that resolution of the issue is not necessary in his case. *See* Pet. at 15. "It is a long settled rule" that this Court will decide "only those questions that 'are *necessary* for a determination of the case presented for consideration, and will not render decisions in advance of such necessity[.]'" *Bird v. Best Plumbing Group*, 175 Wn.2d 756, 775,

287 P.3d 551 (2012) (emphasis added) (internal citations omitted); *see also State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981) ("A reviewing court should not pass on constitutional issues unless absolutely necessary to the determination of the case."). This alone is reason to decline to consider it.

Not only is consideration of race unnecessary, but the record below is also wholly insufficient to evaluate any impact of race within the total circumstances of Sum's case. Sum did not raise the issue of race in the trial court, nor did he develop the factual record with the necessary information to evaluate race as a potential factor. This case is an unsuitable vehicle for deciding whether race is an appropriate factor for consideration under article I, section 7, and the Court should decline to consider the issue.

B. If There Is Evidence That Race Is Relevant to the Encounter, It May Be Considered as a Factor in the Totality of the Circumstances Test.

If the Court decides to address the inclusion of race in the seizure analysis without any factual context, then it should do so

within the existing framework of the totality of the circumstances test. The totality of the circumstances test allows consideration of the objective characteristics of a suspect if they are relevant to the encounter. This has been the case for over 40 years, since the Supreme Court issued its decision in *Mendenhall* and stated that factors such as race and gender are neither irrelevant nor dispositive when viewing the total circumstances of a police-citizen encounter. *United States v. Mendenhall*, 446 U.S. 544, 558, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

Like the Fourth Amendment's reasonable person test, the test employed under article I, section 7 of the Washington Constitution is "purely objective" and "must be determined based upon the interaction between the person and the officer." *O'Neill*, 148 Wn.2d at 574-75. A person is seized only when, considering all of the circumstances, their freedom of movement is restrained and they would not feel free to leave or decline a request due to an officer's use of force or show of authority. *Id.* at 574; *Young*, 135 Wn.2d at 510. This Court has not addressed

whether objective demographic factors—including race, age, sex, or immigration status—may be considered. But it has not foreclosed consideration of any objective factor relevant to a given encounter.

Some federal courts, including the Ninth Circuit Court of Appeals, have specifically addressed race as part of the totality of the circumstances. For example, in *Washington*, the Ninth Circuit held that "under the totality of the circumstances," including the authoritative manner in which a white police officer searched a Black man, the arrival of a second white police officer, the second officer blocking the man's entrance back into his vehicle, the time of night, and "the publicized shootings by white Portland police officers of African-Americans," a reasonable person would not have felt free to disregard the officers and leave the scene. *Washington*, 490 F.3d at 767-68, 772-74.

The Ninth Circuit's decision was not based on speculation or generalities. Rather, the record included testimony regarding

"[r]ecent relations between police and the African–American community in Portland," including the publicized shootings. *Id.* at 768-69. In sharp contrast, no testimony or evidence regarding the impact of race or any other demographic factor was presented in Sum's case.

The D.C. Court of Appeals has also considered race as a relevant factor in the totality of the circumstances analysis. In *Dozier v. United States*, 220 A.3d 933, 941-43 (D.C. App. 2019), the court held that an African-American man was seized when two uniformed officers approached him when he was alone, at night, in a high crime area; the contact occurred "in a secluded alley partially blocked by a police cruiser with two additional officers standing by;" and the man was subjected to repeated, escalating requests that culminated in a request to conduct a pat-down search. The court concluded that "[i]n the isolated setting where the encounter took place, appellant, who is African-American, reasonably could have feared that unless he complied with the police requests, he would be vulnerable to police

violence[.]" *Id.* at 945. The court's consideration of race was based in part on recent Metropolitan Police Department statistics indicating that although only 46-percent of residents were African-American, 86-percent of non-vehicle stops in the District of Columbia involved African-Americans. *Id.* at 944-45 n.13. Sum offered no studies to suggest that his race was relevant to the setting in which his encounter with Deputy Rickerson took place.

In both *Washington* and *Dozier,* race alone was not decisive. It was one factor in the totality of the circumstances. *See Dozier*, 220 A.3d at 947 ("We emphasize that we consider the factors we have identified 'as a whole, under the totality of the circumstances, rather than in isolation.'") (internal citation omitted). This is consistent with the United States Supreme Court's recognition that although race and gender are "not irrelevant" factors, they are not alone "decisive." *Mendenhall*, 446 U.S. at 558. While the Court's observation concerned the voluntariness of consent, analysis of consent and seizure "turn on

very similar facts" and assess the total encounter. *See United States v. Drayton*, 536 U.S. 194, 206, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002) (explaining that because "the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts.").

State and federal courts throughout the country have recognized that the totality of the circumstances test offers flexibility to consider the entirety of the situation—including the police officers' actions, the setting, and any demographic characteristics relevant to the encounter. *See, e.g., United States v. Smith*, 794 F.3d 681, 684, 687-88 (7th Cir. 2015) ("[T]oday we echo the sentiments of the Court in *Mendenhall* that while Smith's race is 'not irrelevant' to the question of whether a seizure occurred, it is not dispositive either."); *State v. Jones,* 172 N.H. 774, 235 A.3d 119, 122 (2020) ("[R]ace is one circumstance that courts may consider in conducting the totality of the circumstances seizure analysis."); *State v. Johnson*, 8 Wn. App. 2d 728, 745 n.5, 440 P.3d 1032 (2019) (suggesting race

could be a factor in the total circumstances analysis when a suspect's race is known to the officer); *see also United States v. Moreno*, 742 F.2d 532, 536 (9th Cir. 1984) (considering defendant's alienage as a factor in the totality of the circumstances).

A contextual approach allows consideration of demographic factors in analogous situations as well. "Not once" has the United States Supreme Court "excluded from the custody analysis a circumstance that [it] determined was relevant and objective, simply to make the fault line between custodial and noncustodial 'brighter.'" *J.D.B. v. North Carolina*, 564 U.S. 261, 280, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (holding a child's age properly informs *Miranda*'s objective custody analysis if relevant and objectively apparent); *Commonwealth v. Evelyn*, 485 Mass. 691, 152 N.E.3d 108, 118 (2020) (applying *J.D.B.* to seizure analysis).

Despite this body of case law, some federal courts have held that consideration of race in determining whether a seizure

occurred is impermissibly subjective. *E.g.*, *United States v. Knights*, 989 F.3d 1281, 1288 (11th Cir. 2021), *cert. denied*, 2021 WL 5869416 (U.S. Sup. Ct. Dec. 13, 2021); *United States v. Easley*, 911 F.3d 1074, 1081-82 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1644 (2019).

While the Washington Supreme Court has not specifically addressed consideration of demographic factors in the totality of the circumstances test, consideration of relevant, objective demographic factors would be consistent with this Court's recognition of the flexible nature of the test.

C. Creating a "Reasonable Person of Color" Test Would Make Race a Singularly Decisive Factor in Violation of *Mendenhall* and Equal Protection Principles.

As an alternative to considering race as a factor under the totality of the circumstances test, Sum's petition suggests—with scant analysis—that this Court dispose of the reasonable person test and craft a new "reasonable person of color" test. Pet. at 15. That idea does not pass constitutional muster. A "reasonable person of color" standard would make race a singularly decisive

factor in violation of *Mendenhall* and raise equal protection concerns.

The Supreme Court in *Mendenhall* made clear that race is *not* a singularly decisive factor in the totality of the circumstances analysis. *Mendenhall*, 446 U.S. at 558. Rather, it is *a* factor that *may* be considered in light of "all of the circumstances surrounding the incident." *Id.* at 554. *See, e.g., Bostick*, 501 U.S. at 439-40 (holding the lower court erred in adopting a *per se* rule based on one factor and reaffirming the test considers all of the circumstances). This is because when considered in context, demographic characteristics may objectively inform a court's analysis of all other relevant factors, allowing the court to consider the full circumstances. *See Chesternut*, 486 U.S. at 573 (concluding that the reasonable person test "is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation."); *Washington*, 490 F.3d at 775-76 (holding that while some factors favored the government

and some favored Washington, when it considered race in the totality of the circumstances, it had "no confidence" that the search was voluntary).

A "reasonable person of color" test departs from the comprehensive approach employed by courts around the country and improperly focuses on a single factor—race—rather than the totality of all the circumstances. By elevating race above all other objective factors, a "reasonable person of color" test deprives courts of flexibility in assessing all of the circumstances of the citizen-police encounter at hand and forces consideration of race even when: race is not a relevant factor, or there is an insufficient record pertaining to race or any relevant racial circumstances.

A "reasonable person of color" standard also would implicate equal protection concerns by allowing a different outcome based solely on race. "[A]ny official action that treats a person differently on account of his race or ethnic origin is

inherently suspect" if it could result in different outcomes based on race alone. *See Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310, 133 S. Ct. 2411, 186 L. Ed. 2d 474 (2013) (internal citation omitted). Considering race as a singular factor would raise the same equal protection concerns that select federal circuits contend justifies complete exclusion of any consideration of race, even within the totality of the circumstances test. *See, e.g., Easley*, 911 F.3d at 1082 (noting "a seizure analysis that differentiates on the basis of race raises serious equal protection concerns if it could result in different treatment for those who are otherwise similarly situated"); *Knights*, 989 F.3d at 1289.

Consideration of objective demographic characteristics *within* the totality of the circumstances test allows courts to apply

the same flexible test to all and to acknowledge the reality of race and other demographic factors when relevant.[3]

D. The Totality of the Circumstances Test Confirms that Sum Was Not Seized.

The Court of Appeals properly applied the totality of the circumstances test to the facts of Sum's case and determined that no seizure occurred when Sum provided false identification information to police. Sum did not argue below that race was a factor in his case. He did not make a record of any racial considerations surrounding his encounter with Deputy Rickerson. In fact, he acknowledges that the question of his seizure can be decided irrespective of race. *See* Pet. at 15. Even if race were relevant, the totality of the circumstances show that

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[3] This same approach is endorsed by the National Association of Criminal Defense Lawyers (NACDL), which recently argued to the United States Supreme Court that "courts can, but need not, consider all objective circumstances," including race, in the totality of the circumstances analysis. *See* Brief of *Amicus Curiae* National Association of Criminal Defense Lawyers at 4, *Knights v. United States*, No. 21-198 (United States Supreme Court Sept. 10, 2021), https://www.supremecourt.gov/DocketPDF/21/21-198/192026/20210910124335975_Knights%20NACDL%20Amicus%20Final%20Version%209.10.21.pdf.

Sum was not seized when a single officer approached his parked vehicle on foot, in daylight, engaged him in conversation, and asked for his name. This Court should affirm.

1. As Sum agrees, consideration of race is unnecessary under the facts of his case.

The totality of the circumstances analysis considers only those factors relevant in a given encounter—including race. Thus, when the record indicates that the race of the defendant or officer was relevant to the encounter, it is viewed in conjunction with all other relevant factors. The Ninth Circuit considered race in conjunction with evidence regarding the location and use of force, where the record contained testimony regarding "[r]ecent relations between police and the African–American community in Portland." *Washington*, 490 F.3d at 767-68. Conversely, race is not considered if there is no evidence indicating its relevance. *See, e.g., State v. Spears*, 429 S.C. 422, 839 S.E.2d 450, 461 (2020) (declining to decide whether race is a factor to be

considered in the totality of the circumstances, where the trial record contained no argument or evidence on this point "other than the fact that Spears is a [B]lack male").

It is Sum's burden to show that a seizure occurred. *O'Neill*, 148 Wn.2d at 574. Yet the record is nearly silent as to Sum's race. It is silent as to Deputy Rickerson's race. It is silent as to any relevant racial circumstances surrounding the encounter. And the only indications of Sum's race are unrelated pleadings, such as the charging information and judgment and sentence, which list his race as "Asian/Pacific Island[er]." CP 4, 23, 65-66. This does not provide any indication of whether race played a role in Sum's interaction with the deputy.

The limited notation that Sum is "Asian/Pacific Island[er]" does not, standing alone, provide sufficient evidence that race was a relevant factor. Objective studies indicate that persons who identify as Asian/Pacific Islander generally face a lower risk of

use of force by police than their white peers.[4] Data pertaining specifically to Pierce County bears this out.[5] Citation to these studies is not meant to suggest that disparate treatment is never experienced by individuals who are Asian or Pacific Islander, or that their race is never relevant under the totality of the circumstances test.[6] To the contrary, the test provides courts flexibility to examine a myriad of objective factors, including

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[4] *See* Frank Edwards, Edward Esposito & Hedwig Lee, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, Proceedings of the National Academy of Sciences of the United States of America, (August 20, 2019), https://www.pnas.org/content/116/34/16793.

[5] Pierce County Criminal Justice Work Group, *Use of Force Analysis*, Pierce County Sheriff's Department, (November 8, 2021), http://www.piercecountywa.gov/useofforce.

[6] Other studies indicate that when Pacific Islanders are disaggregated from the broader "Asian" racial category, they often face a greater risk of police force than whites. Asian individuals still experience a lower risk of force. *See* Race and the Criminal Justice System, Task Force 2.0; *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court*, Fred T. Korematsu Center for Law and Equality, (2021), https://digitalcommons.law.seattleu.edu/korematsu_center/116. The record does not indicate whether Sum is Asian or Pacific Islander (or both).

race, when relevant. However, based on the record here, race was not a factor.

2. Viewing the totality of the circumstances, no seizure had occurred when Sum gave false identification information to Deputy Rickerson.

The Court of Appeals correctly determined that Sum was not seized during his initial encounter with Deputy Rickerson. A reasonable person in Sum's circumstances, regardless of his race, would have felt free to leave or "go about his business." *Chesternut*, 486 U.S. at 569.

"[N]ot every encounter between a police officer and a citizen is an intrusion requiring an objective justification." *Mendenhall*, 446 U.S. at 553. Recognizing this principle, this Court has repeatedly affirmed that an individual is not seized merely because a police officer engages him or her in conversation in a public place and asks for identification. *See, e.g., State v. Harrington*, 167 Wn.2d 656, 664-65, 222 P.3d 92 (2009); *O'Neill*, 148 Wn.2d at 577-78; *Young*, 135 Wn.2d at 511; *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997).

Critically, courts must look at the total circumstances of the encounter, rather than focusing on particular details in isolation, to determine if a reasonable person in the defendant's position would feel he was being detained. *See Chesternut*, 486 U.S. at 573; *O'Neill*, 148 Wn.2d at 581; *see also Mendenhall*, 446 U.S. at 554-55 (listing "[e]xamples of circumstances that might indicate a seizure").

Viewing the totality of the circumstances in this case, Sum was not seized when he provided false identification information to Deputy Rickerson. Sum's case closely mirrors *O'Neill*, where this Court held that the occupant of a parked vehicle was not seized when a police officer approached and asked him for identification. *O'Neill*, 148 Wn.2d at 570. In that case, the officer observed a car parked in front of a business that was closed and recently had been burglarized. *Id*. at 571-72. The officer pulled behind the car, activated his spotlight, and ran a computer check on the license plate. *Id.* at 572. He learned that the car had been

impounded within the previous two months. *Id.* The windows were fogged over and the car appeared to be occupied. *Id.*

The officer approached the driver's side of the car, shined his flashlight on the driver's face, and asked him to roll down the window. *Id.* The officer then asked O'Neill what he was doing there, and O'Neill responded that his car had broken down and would not start. *Id.* The officer asked O'Neill to try and start it. *Id.* O'Neill tried, but it would not start. *Id.* The officer then asked for identification. *Id.* O'Neill responded he had no identification and his license had been revoked, and he stated a false name. *Id*. The officer asked O'Neill to step out of the vehicle, and subsequent events led to O'Neill's arrest. *Id*. at 572-73. This Court held that under article I, section 7, O'Neill was not seized until he was asked to step out of the vehicle. *Id.* at 574. Before that point, the officer's "actions in their entirety, viewed objectively, d[id] not warrant the conclusion there was a show of authority amounting to a seizure." *Id*. at 581.

As in *O'Neill*, Sum was not seized when Deputy Rickerson approached his parked vehicle on foot, asked Sum what he was doing, and requested identification. This was a valid social contact. The deputy parked his vehicle so that it was not blocking Sum's vehicle. 2RP 18-19. Although the location was known as a "problem area," the deputy was alone, and the contact occurred during daylight hours. 2RP 11-12. There is no evidence the deputy activated his lights or siren. The deputy did not pull Sum over, but rather approached Sum's vehicle on foot after observing Sum slumped over in the driver's seat. 2RP 17-21. Sum partially rolled down his window to speak with the deputy. 2RP 23. *Compare O'Neill*, 148 Wn.2d at 579 (no seizure occurred where officer asked the defendant to roll down his window). Deputy Rickerson then briefly engaged Sum in conversation and asked him what he was doing in the area and to whom the vehicle belonged, just as the officer in *O'Neill* asked the defendant what he was doing. 2RP 23, 25. Finally, Deputy Rickerson asked Sum if he had identification, and Sum verbally

provided a false name and date of birth. 2RP 23, 25-27. There is no indication the deputy ever displayed his weapon, physically touched Sum, or used language or tone indicating mandatory compliance during this initial encounter. *See* 2RP 17-25. There was no show of authority amounting to a seizure.

Sum attempts to distinguish *O'Neill* by mischaracterizing Deputy Rickerson's request as a "demand" for information. According to the testimony from the suppression hearing, Deputy Rickerson "asked" Sum if he had identification on him. 2RP 23, 25. The trial court entered a finding that the deputy "inquired" if Sum had identification. CP 86 (Finding of Fact 11). The unchallenged finding is a verity on appeal. *O'Neill*, 148 Wn.2d at 571, 578. Deputy Rickerson requested Sum's identification, and no seizure occurs when an officer merely requests identification. *See O'Neill*, 148 Wn.2d at 577-78 (noting the superior court's findings of fact established "the officer issued no orders or commands, and made no demands").

Sum also emphasizes the deputy conveyed that Sum was the subject of a criminal investigation, thereby transforming the contact into a seizure. In effect, by focusing almost exclusively on this factor, Sum is advocating for a *per se* rule that an officer's articulated suspicions constitute a seizure. Such a rule conflicts with the principles of the totality of the circumstances test which considers the encounter as a whole. *See Bostick*, 501 U.S. at 439-40 (rejecting *per se* rule based on one factor and reaffirming the test considers all of the circumstances); *United States v. Glass*, 128 F.3d 1398, 1407 (10th Cir. 1997) (rejecting *per se* rule that a person is seized when an officer's conduct suggests the person is the particular focus of an investigation); *United States v. Holly*, 940 F.3d 995, 1000-01 (7th Cir. 2019) (holding defendant was not seized in light of the totality of the circumstances, even though officer asked if he had a gun); *State v. Thorn*, 129 Wn.2d 347, 350, 354, 917 P.2d 108 (1996) (rejecting trial court's implicit conclusion that officer's question "Where is the pipe?",

as a matter of law, created a coercive environment), *overruled on other grounds by O'Neill*, 148 Wn.2d at 571.

Any argument that Deputy Rickerson's articulated suspicions instead became the tipping point at which the circumstances transformed the encounter into a seizure should also be rejected. For there to be a tipping point, there would also need to be other factors suggestive of a coercive environment. *E.g., Harrington*, 167 Wn.2d at 666-70 (initial social contact escalated into seizure with arrival of second officer, request to remove hands from pockets, and request to frisk). Here, there are no such other factors. While the Court may certainly consider Deputy Rickerson's articulated suspicions as *a* factor in the totality of the circumstances, this factor alone does not transform the initial encounter into a seizure.

Sum was not seized until he sped off, over grass and the sidewalk, and Deputy Rickerson activated his lights in pursuit. 2RP 28-29. At that point, the deputy had reasonable suspicion to support a traffic stop. Before activating his lights in pursuit,

Deputy Rickerson had not used physical force or displayed any show of authority. *See O'Neill*, 148 Wn.2d at 577-81; *see also State v. Mote*, 129 Wn. App. 276, 279-81, 292, 120 P.3d 596 (2005) (holding no seizure occurred when officer, concerned about drug activity and vehicle prowls in area, approached vehicle parked in residential area late at night with its tail and dome lights activated and asked occupants "what they were up to" and for identification); *Washington*, 490 F.3d at 767-68, 770 (holding no seizure occurred when uniformed officer approached defendant's parked vehicle late at night on foot, shined flashlight into car, and asked what he was doing and if he "had anything on his person that he should not have").

Viewed objectively, the totality of Deputy Rickerson's actions did not create a show of authority sufficient to constitute a seizure. Citizens "expect the police to investigate when circumstances are suspicious, to interact with citizens to keep

informed about what is happening in a neighborhood, and to be available for citizens' questions, comments, and information citizens may offer." *O'Neill*, 148 Wn.2d at 576. Deputy Rickerson did what the citizens of this state expect police to do: he checked on the welfare of individuals who appeared to be unconscious, and he engaged one of those individuals—Sum—in conversation and asked for identification when circumstances appeared suspicious. There was no show of authority, and there was no seizure. Based on the totality of the circumstances, this Court should affirm.

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V. CONCLUSION

For the reasons set forth above, the State respectfully requests this Court affirm.

This document contains 5924 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 14th day of January, 2022

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ Britta Ann Halverson
Britta Ann Halverson
WSB # 44108 / OID #91121
Deputy Prosecuting Attorney
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
Telephone: (253) 798-2912
Britta.halverson@piercecountywa.gov

s/ Anne Egeler
Anne Egeler
WSB # 20258 / OID #91121
Deputy Prosecuting Attorney
Pierce County Prosecutor's Office
930 Tacoma Avenue So., Rm. 946
Tacoma, WA 98402
Telephone: (253) 798-7400
Anne.egeler@piercecountywa.gov

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

1-14-22	*s/Therese Kahn*
Date	Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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