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STATE OF WASHINGTON  
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SUPREME COURT No. 99730-6

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

PALLA SUM,

Petitioner.

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

The Honorable Frank E. Cuthbertson, Judge

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

Palla Sum, a person of color, was seized when a police officer, who had just woken Sum in a car, demanded information and made it clear Sum was the subject of criminal investigation for auto theft. Under preexisting Washington law, a reasonable person in Sum's position would not have felt free to ignore the officer. In addition, this Court should adopt a "reasonable person" standard for police seizures that truly considers all the circumstances. Such a "reasonable person" is familiar with patterns of policing in America and the risks a person of color takes in walking away from or disregarding police interaction. Because the officer lacked reasonable suspicion to seize Sum, suppression was warranted in this case.

B. ISSUES PRESENTED

1. Was Sum seized when a police officer, who had just woken Sum as he slept in his car, demanded information from Sum and made it clear Sum was the subject of criminal



investigation? In other words, would a reasonable person in Sum's position have felt free to ignore the officer?

2. Should this Court adopt, under the state constitution, a "reasonable person" standard for seizures reflecting a person who is aware of patterns of policing, the realities of police accountability, and the risks a person of color takes in refusing to comply with a police demand?

3. Did the officer lack reasonable suspicion to seize Sum, requiring suppression of Sum's statement?

C. STATEMENT OF THE CASE<sup>1</sup>

1. **Suppression hearing**

Sum was charged with three crimes. He moved to suppress evidence, arguing he was illegally seized by the police officer who approached his car and asked for identification under the guise of investigating vehicle theft even after determining the

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<sup>1</sup> This brief refers to verbatim reports as follows: 1RP – 6/20 and 7/23/19; 2RP – 8/6/19; 3RP – 8/7/19; 4RP – 8/8/19; 5RP – 8/16/19; and 6RP – 8/30/19.

car was not reported stolen. See CP 7-12 (motion to suppress); CP 13-22 (additional authority); 2RP 44-45 (argument).

Pierce County deputy Mark Rickerson testified at the suppression hearing. 2RP 9. The morning of April 9, 2019, he drove north on East L Street past East 71st Street in Tacoma. He glanced east toward a parking area located outside a fenced parking lot. 2RP 11-13. About five months earlier, another deputy had discovered a stolen car in that parking area and made an arrest. 2RP 13, 17. Also around that time, Rickerson spoke to a person who lived across the street. That person complained generally about non-residents parking there. 2RP 13, 40. The conversation occurred in a nearby Safeway parking lot. 2RP 13.

The day in question, Rickerson noticed a Honda parked just east of the fenced lot's gate. 2RP 16-17. The driver appeared to be asleep. 2RP 17-18. Rickerson drove past the Honda, made a U-turn at the dead end on 71st Street, and drove west toward the car. 2RP 18. Rickerson typed the Honda's Oregon license plate number into his vehicle's mobile data computer and

determined the car had *not* been reported stolen. 2RP 19-20, 41. Instead, there was a record the vehicle had been sold. 2RP 20-21. But Oregon records of this type do not identify the purchaser or the date of sale. 2RP 20-21, 41.

Rickerson parked east of the Honda and did not block it. 2RP 19, 27. He approached the car on foot and checked whether the last four digits of the car's visible Vehicle Identification Number (VIN) matched the VIN associated with the license plate. They matched. As Rickerson examined the VIN, he noticed another person, also asleep. 2RP 21-22.

Neither occupant woke to Rickerson's presence, so he knocked on the driver's window. 2RP 22-23. The driver, Sum, woke after a few seconds and rolled down the window. Rickerson asked what Sum was doing in the area. According to Rickerson, Sum said either that he was visiting a friend, or waiting for a friend, from across the street. Rickerson thought Sum could be referring to the home of the person he had talked to. 2RP 23.

Rickerson asked Sum if the car was his. Sum said no. 2RP 24-25. Rickerson asked who owned the car. Sum provided a first name but not a last name. Rickerson did not specifically recall the name provided. 2RP 25.

Rickerson then asked for Sum's identification. Sum asked why Rickerson was asking. 2RP 25. Rickerson responded to Sum that he was asking, "[b]ecause [you] couldn't tell me exactly who the vehicle belonged to and it was in an area where we've recovered stolen vehicles before." 2RP 26. Sum then provided an incorrect name and birthdate; the passenger provided his true name. 2RP 26-27.

Rickerson asked Sum and the passenger if they had been arrested before. Rickerson explained he wanted to verify their identities through booking photos. 2RP 27. Rickerson returned to his car to look up the names provided using a database that includes booking photos. 2RP 28.

Meanwhile, Rickerson heard the Honda's engine start. He thought little of it, assuming the driver only wanted to warm the

car. 2RP 28-29. A few seconds later, however, the car backed up at an angle, drove over the corner (including grass and sidewalk), and headed south on East L Street at a high rate of speed. 2RP 29. Disregarding a stop sign, the Honda turned west onto East 72nd Street, sliding into an improper lane. 2RP 29-30. Rickerson and another deputy sheriff caught up with the car after it skidded into a yard. 2RP 32.

**2. Refusal to suppress evidence**

The trial court made findings consistent with the above facts, except it incorrectly found (relating to Sum's explanation for being in the area) there was only one residence located across the street from the parking area. CP 86 (Finding of Fact 8). Photographic exhibits reveal several homes on the other side of the street. Pretrial Exs. 1, 2. From these findings, the court entered the following conclusions of law:

2. Deputy Rickerson's initial contact with [Sum], who was apparently unconscious in the driver's seat of a Honda Civic parked on East 71st Street, was not a seizure, but a reasonable check on health and safety because the public's interest in confirming

[Sum's] safety at the time outweighed [his] interest in freedom from police interference.

3. The fact that [Sum] then told Rickerson that the vehicle in which he was sitting did not belong to him, that he could not fully identify the owner of that vehicle, and, to a lesser extent, the fact that the location in which [Sum] had parked was a high-crime area from which stolen vehicles had been recovered, were specific and articulable facts which would lead one to believe that there was a substantial possibility that criminal conduct had occurred, and hence, justified a [stop under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)] of [Sum,] which rendered Rickerson's request for [Sum] and his passenger to identify themselves lawful and reasonable.

4. Because Rickerson did not retain [Sum's] physical identification to conduct his records check, [Sum] was not seized when Rickerson asked him to identify himself, and [Sum's] motion to suppress evidence obtained thereafter as the product of an unlawful seizure is therefore denied[.]

CP 88-89.

### 3. **Verdict and appeal**

A jury found Sum guilty of making a false or misleading statement to a public servant, the only crime at issue on appeal.

CP 23-24, 51-53. Sum appealed. CP 77. He argued he was illegally seized. But the Court of Appeals said the interaction was merely a social contact. State v. Sum, noted at 17 Wn. App.2d 1009, 2021 WL 1382608, \*3-4 (2021). That court did not evaluate whether the seizure was supported by reasonable suspicion.

This Court granted review. Sum now asks this Court to reverse the Court of Appeals and order the evidence suppressed.

D. ARGUMENT

**1. Sum was seized when Deputy Rickerson demanded information, having made it clear Sum was being investigated for vehicle theft.**

Sum was seized. Rickerson’s “request” for information is properly characterized as a demand because he made it clear the desired information related to an ongoing criminal investigation of Sum. Notification of criminal investigation is a significant factor in determining whether a person has been seized—or whether they may simply ignore a demand. In this case, it was dispositive, resulting in the conclusion that Sum was seized.

Article I, section 7 provides that “[n]o person shall be disturbed in [their] private affairs, or [their] home invaded, without authority of law.” This provision is different from the Fourth Amendment and provides greater protections. State v. Mayfield, 192 Wn.2d 871, 878, 434 P.3d 58 (2019). Article I, section 7 “is grounded in a broad right to privacy” and protects against governmental intrusion into private affairs. State v. Chacon Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).

Whether a police officer “seized” a person is a mixed question of law and fact. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). This Court review de novo the ultimate determination of whether contact constitutes a seizure. State v. Harrington, 167 Wn.2d 656, 662, 222 P.3d 92 (2009).

An accused person “bears the burden of proving a seizure occurred.” State v. Johnson, 8 Wn. App. 2d 728, 738, 440 P.3d 1032 (2019). But, if a seizure did occur, warrantless seizures are per se unconstitutional, and the State must demonstrate the



seizure fell into one of the narrow exceptions to that general rule. State v. Boisselle, 194 Wn.2d 1, 10, 448 P.3d 19 (2019).

An investigatory seizure, commonly referred to as a Terry stop, is one such exception under both State and federal jurisprudence. Terry, 392 U.S. 1. A police officer may, without a warrant, briefly detain an individual for questioning if they have reasonable and articulable suspicion the individual is or is about to be engaged in criminal activity. State v. Fuentes, 183 Wn.2d 149, 158, 352 P.3d 152 (2015).

Notification of criminal investigation is a significant factor in determining whether a reasonable person would believe they have been seized by police—or whether they may simply walk away without consequence. Here, it was the dispositive factor.

Police contact constitutes a seizure where “due to an officer’s use of physical force or display of authority, a reasonable person would not feel free to leave, terminate the encounter, refuse to answer the officer’s question, decline a request, or otherwise go about his business.” State v. Carriero, 8

Wn. App. 2d 641, 655, 439 P.3d 679 (2019) (reciting test from United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

The officer seizes the individual not only when the individual feels compelled to remain still but also when the individual “deems [themselves] obliged to respond to the officer’s requests.” Carriero, 8 Wn. App. 2d at 655. Put another way, under article I, section 7, a seizure occurs when an individual’s freedom of movement is restrained, and they would not believe they are (1) free to leave or (2) free to decline an officer’s request and end the encounter. Johnson, 8 Wn. App. 2d at 737.

This standard is objective. Harrington, 167 Wn.2d at 662. As such, “[t]he relevant question is whether a reasonable person in the individual’s position would feel [they were] being detained.” Id.

In considering what such a “reasonable person” would have perceived, the court considers the “totality of the circumstances,” including the coerciveness of the overall

environment. Johnson, 8 Wn. App. 2d at 741. Further, as noted in Harrington, in State v. Young, 135 Wn.2d 498, 957 P.2d 681 (1988), this Court “embraced a nonexclusive list of police actions”—and use of language—that may demonstrate a seizure has occurred. Harrington, 167 Wn.2d at 664. These include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” Young, 135 Wn.2d at 512 (quoting Mendenhall, 446 U.S. at 554-55).

As stated, an officer’s use of language, rather than show of force, may be sufficient. Harrington, 167 Wn.2d at 664; see also State v. Butler, 2 Wn. App. 2d 549, 561, 411 P.3d 393 (2018) (when police officer told Butler to stop leaving the scene, “[his] actions constituted ‘the use of language or tone of voice indicating that compliance . . . might be compelled.’”). On the other hand, activities such as engaging a person in conversation,

identifying themselves, or simply requesting identification have been said not to convert a “casual encounter” into a seizure. Carriero, 8 Wn. App. 2d. at 658. Even so, a seizure occurs when an officer “demands information from the person.” Id. at 655 (citing State v. O’Neill, 148 Wn.2d 564, 581, 62 P.3d 489 (2003)).

Other jurisdictions offer persuasive agreement with this principle.<sup>2</sup> “[T]he circumstances of [a police] encounter may indicate, even without physical restraint, a suspect is not free to leave.” Langston v. Commonwealth, 28 Va. App. 276, 282, 504 S.E. 2d 380, 383 (1998). “[I]t is possible to restrict a person’s liberty and freedom of movement by purely verbal means[.]” State v. Ashbaugh, 349 Or. 297, 317, 244 P.3d 360 (2010).

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<sup>2</sup> This Court may “may utilize well-reasoned, persuasive authority from federal courts and sister jurisdictions to resolve a question of first impression concerning the scope of article I, section 7.” State v. Pippin, 200 Wn. App. 826, 835, 403 P.3d 907 (2017).

The officer’s indication that the individual is suspected of a specific crime gives the words yet more force. A reasonable person approached by an armed sheriff’s deputy who is investigating that person for criminal activity feels that “compliance with the officer’s request might be compelled.” See Mendenhall, 446 U.S. at 554. The individual will feel there has been a demand for information—and that compliance with that demand is required. See McGee v. Commonwealth, 25 Va. App. 193, 200, 487 S.E.2d 259, 261 (1997) (when police officer informs an individual they have been specifically identified as a suspect in a particular crime under investigation, “that fact is significant . . . to determin[ing] whether a reasonable person would feel free to leave”); see also Wilson v. Superior Court, 34 Cal. 3d 777, 791, 195 Cal. Rptr. 671, 670 P.2d 325 (1983) (defendant was seized where he “could not help but understand that at that point he was the focus of the officer’s particularized suspicion”); State v. Morfin-Estrada, 251 Or. App. 158, 164-65,

283 P.3d 378 (2012) (defendant seized because officer “told defendant that he had seen defendant . . . cross against the light”).

Washington courts, like those courts, have also recognized that notification of criminal investigation is a critical factor in determining whether police have seized an individual. See Johnson, 8 Wn. App. 2d at 743 (“[I]nquiries into Johnson’s name, whether Johnson had a driver’s license, and whether Johnson would [present] his identification document . . . advanced the impression that a police investigation was ongoing and that Johnson was a suspect.”); cf. Armenta, 134 Wn.2d at 11 (“[A] police officer’s . . . asking for identification does not, alone, raise the encounter to an investigative detention [*particularly where the police officer requested the identification for some purpose other than investigating criminal activity.*” (Emphasis added.)). Indeed, notification that an individual has been singled out as a suspect “indicat[es] that compliance with the officer’s request might be compelled.” See Harrington, 167 Wn.2d at 664.

Here, a reasonable person in Sum's position would not have felt free to ignore Rickerson's inquiry. Rickerson didn't just casually, out of the blue, ask Sum to identify himself. Rickerson asked Sum for identification. When Sum asked why Rickerson was asking, Rickerson told Sum, "[b]ecause [Sum] couldn't tell me exactly who the vehicle belonged to and it was in an area where we've recovered stolen vehicles before." 2RP 25-26. A reasonable person in Sum's position would have understood at that point he was being investigated for a specific crime and would not have felt free to terminate the encounter without first answering Rickerson's questions.

Nevertheless, the trial court focused on the fact that Rickerson did not "retain" Sum's identification card. CP 89. Similarly, the State (and the Court of Appeals) have emphasized what Rickerson did *not* do in the interaction. E.g., Answer to Pet'n for Review at 18-19; Sum, 2021 WL 1382608 at \*4. But a "totality of the circumstances" seizure analysis is a cumulative

analysis, not a “divide-and-conquer” exercise. Johnson, 8 Wn. App. 2d at 745.

Sum acknowledges Washington courts have analyzed the circumstances in cases where identification was requested, but not retained, and found no seizure occurred. But what is significant about those cases is what is absent. The police officer, when requesting information, did not inform the individual they were then under investigation for a specific crime.

For example, in O’Neill, a police officer asked a vehicle occupant to roll down his window, then asked what he was doing in the lot. The occupant said the car had broken down. The police officer asked him to start the car, which would not start. The officer then asked for identification. At that point, the occupant said his driver’s license had been revoked. O’Neill, 148 Wn.2d at 172. This Court held there was no seizure; but, in contrast to this case, the occupant was not informed he was under investigation for a specific crime. See id.



In Mote, a police officer saw two people in sitting in a car in a residential neighborhood at night. The car's dome light was on. The police officer asked the occupants of the car for identification. But he did not tell them they were under investigation for a specific crime. Mote, 129 Wn. App. at 279-81.

And in Armenta, this Court specifically noted an initial request for identification was *not* related to investigation of criminal activity. Armenta, 134 Wn.2d at 11. This Court found, however, that Armenta and his companion were seized later in the encounter. Id. at 12.

Here, Rickerson's inquiry must be characterized, legally, as a "demand" because he informed Sum that Sum was suspected of committing a specific crime. A reasonable person in Sum's position would not have felt free to decline to answer and remove himself considering the pending criminal investigation. Sum was seized.

2. **The state constitution empowers this Court to improve the seizure test, which has failed to account for the realities of police-civilian interaction, particularly when a person of color is involved.**

Originally labeled the “reasonable man,” the objective reasonable person standard reflects the norms of dominant groups in society. The reasonable person is a fictitious character, likely an adult white male—if for no other reason than he has been penned over time by judges and lawmakers who are predominately white and male.

Kristin Henning, The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment, 67 AM. U. L. REV. 1513, 1520-21 (2018) (footnotes omitted).

Racism should not be viewed as an ideology or an orientation towards a certain group, but instead as a system: “[A]fter a society becomes racialized, racialization develops a life of its own . . . [and][a]lthough it interacts with class and gender . . . [race] becomes an organizing principle of social relations itself.” The persistent inequality experienced by . . . people of color in America is produced by this racial structure. The contemporary racial structure is distinct from the past in that it is covert, is embedded within the regular practices of institutions, does not rely on a racial vocabulary, and is invisible to most White people.

Race and the Criminal Justice System, Task Force 2.0, Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court, xii (2021). Fred T. Korematsu Center for Law and Equality. 116 (quoting Eduardo Bonilla-Silva, Rethinking Racism: Toward a Structural Interpretation, 62 AM. SOC. REV. 465, 467 & 475 (1997)).

Under the state constitution, whether a reasonable person would feel free to ignore a police demand must explicitly reflect a more realistic approach to the “reasonable person” than courts have typically taken. It is past time for race to be considered a prominent part of the totality of the circumstances. A reasonable person, aware of recent well-publicized events and patterns of policing in America, is aware of the risks a person of color takes by refusing contact with police.

“Washington courts have not set in stone a definition for so-called social contact. It occupies an amorphous area . . . , someplace between an officer’s saying ‘hello’ to a stranger on

the street and, at the other end of the spectrum, an investigative detention.” Harrington, 167 Wn.2d 664.

As argued, Sum prevails under the existing “reasonable person” standard because, when Rickerson asked Sum to identify himself, it was clear Sum was under investigation for a specific crime, and reasonable person would not have felt free to decline.

But, the applicable “reasonable person” standard—under what circumstances a “reasonable person” would feel free to decline an officer’s request and end the encounter—merits fresh scrutiny. This Court should adopt a standard acknowledging a person of color, like Sum, would think twice before eschewing such a demand.

When addressing article I, section 7’s broader protections in a new context, a party “must provide argument and relevant authorities supporting the specific outcome [sought] in light of ‘the constitutional text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing or not recognizing an

interest.” Mayfield, 192 Wn.2d 881 (quoting State v. Chenoweth, 160 Wn.2d 454, 463, 158 P.3d 595 (2007)).

Based on the first Mayfield inquiry, the text of the state constitution more broadly protects the right to go about one’s business free of government interference. See O’Neill, 148 Wn.2d at 584 (“[t]he state provision recognizes a person’s right to privacy with no express limitations . . . and [t]he right to be free from unreasonable governmental intrusion into one’s private affairs encompasses automobiles”).

The next question deals with the historical treatment of the right at issue, considering prior case law and/or relevant statutes. The primary difference between federal law and state law, in this specific context, was noted a quarter century ago in Young, 135 Wn.2d 498.

Seven years earlier, the Supreme Court had held there is no seizure unless the individual yields to the show of authority. California v. Hodari D., 499 U.S. 621, 626, 111 S. Ct. 1547, 113

L. Ed. 2d 690 (1991). If the individual runs, there has been no seizure. Id.

As this Court indicated, “Hodari D. introduced a subjective element into the definition of a Fourth Amendment seizure: the action of the subject, either to disregard the show of authority or to yield to it, determines the seizure question.” Young, 135 Wn.2d at 506. But this Court rejected such an analysis under our state constitution. “That Young actually did leave makes no difference; the test is objective.” Id. at 510-11.

Consistent with Young, to adopt an improved reasonable person standard under the more protective terms of the state constitution, a reviewing court need not evaluate whether an accused person *in fact* felt they were seized. Rather, this Court should recognize a reasonable person standard that allows a decisionmaker to consider present and historical patterns of policing as experienced by persons of color,<sup>3</sup> and how a person

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<sup>3</sup> Although police violence toward Black individuals is well documented, “[r]eal and perceived cultural difference add

of color would therefore react to interaction with a police officer under the circumstances.<sup>4</sup>

This is an objective standard that better accounts for the totality of the circumstances. Indeed, such a standard has been described as “a framework under which courts *actually* (and not merely *purport to*) analyze the seizure question from the perspective of a person in the defendant’s position, ‘taking into account all the circumstances surrounding the encounter.’” Devon W. Carbado, (E)racing the Fourth Amendment, 100

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specific dangers to police encounters for Asian Americans.” Devon W. Carbado, (E)racing the Fourth Amendment, 100 MICH. L. REV. 946, 1001 n. 229 (2002). At the time of the incident in this case, moreover, the killing of a Vietnamese American student by King County police was well publicized. See Hilary Hanson, Asian Student Holding a Pen Fatally Shot By Cops Night Before Graduation, HUFFPOST (June 30, 2017) (available at [https://www.huffpost.com/entry/tommy-le-police-killing-pen-graduation\\_n\\_59567959e4b0da2c73232689](https://www.huffpost.com/entry/tommy-le-police-killing-pen-graduation_n_59567959e4b0da2c73232689) (accessed Dec. 23, 2021)).

<sup>4</sup> Cf. Mendenhall, 446 U.S. at 558 (fact that Sylvia Mendenhall was “a female and a Negro” was “not irrelevant” to the question of whether she consented to accompany officers, or was seized).

MICH. L. REV. 946, 984 (2002) (quoting Mendenhall, 446 U.S. at 554) (emphasis added).<sup>5</sup>

In addition to “the historical treatment of the interest at stake,” this Court analyzes “current implications of recognizing or not recognizing an interest.” Mayfield, 192 Wn.2d at 881. This Court’s recent efforts to protect the right to a representative and fair jury provide a template for a more realistic reasonable person standard.

In State v. Jefferson, 192 Wn.2d 225, 429 P.3d 467 (2018), this Court, explaining a new rule for evaluating racial bias in the use of peremptory challenges, acknowledged just such a broadened standard was required. In evaluating a challenge to a prospective juror, courts must now consider “[w]hether ‘an

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<sup>5</sup> Cf. Carbado, 100 MICH. L. REV. at 996 (“To the extent that Latinas/os and non-Latinas/os are likely to . . . respond differently [immigration enforcement] authority, framing the seizure analysis without identity specificity is tantamount to framing it from a non-Latina/o perspective. In this sense, Justice Rehnquist’s analysis [in INS v. Delgado, 466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984)] . . . reflects an unstated racial preference for non-Latina/o identity.”).



objective observer could view race as a factor in the use of the peremptory challenge[.]” Id. at 249. “It is not a question of fact about whether a party intentionally used ‘purposeful discrimination,’ as [was] step three of the prior . . . test.” Id. Instead, “[i]t is an objective inquiry based on the average reasonable person—defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways.” Id. at 249-50.

The language in Jefferson derived from GR 37, which was adopted while the case was pending. This Court later extended this “reasonable person” to the context of juror misconduct. See State v. Berhe, 193 Wn.2d 647, 444 P.3d 1172 (2019).

GR 37(e) states that if a court determines that an “objective observer could view race or ethnicity as a factor in the use of a peremptory challenge,” the peremptory challenge “shall be denied.” “[A]n objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful

discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.” GR 37(f). As this Court stated in Berhe, “[w]e now hold that similar standards apply when it is alleged that implicit racial bias was a factor in the jury’s verdict. The ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict.” Berhe, 193 Wn.2d at 665.

Commentators and judges have long advocated for a similarly broadened concept of the reasonable person standard in the present context. This Court should, analogously, adopt a reasonable person standard for seizures under which courts consider, within the totality of circumstances, the risks a person of color takes (and has historically taken) by refusing even a request for interaction.<sup>6</sup>

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<sup>6</sup> Analogously, the United States Supreme Court has deemed “race” (or what seems like it) a permissible consideration in the

As one judge noted, certain people have long known they must tread more carefully around law enforcement than does the traditional jurisprudential “reasonable person” due to awareness that a misstep may cause the officer to misperceive a threat and escalate an encounter into a physical one. United States v. Knights, 989 F.3d 1281, 1296-97 (11th Cir. 2021) (Rosenbaum, J., concurring); see also Race and the Criminal Justice System, Task Force 2.0, supra, at 10-11 (discussing police accountability faced, and not faced, in local high-profile incidents involving persons of color).

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totality of the circumstances supporting a law enforcement agent’s reasonable suspicion. E.g., United States v. Brignoni-Ponce, 422 U.S. 873, 886-87, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975) (“likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor”). Like testimony of a police officer in favor of reasonable suspicion, specific testimony from an individual stopped by police would be a relevant component of the totality of the circumstances surrounding a seizure. Cf. United States v. Washington, 490 F.3d 765, 773-74 (9th Cir. 2007) (totality of circumstances supporting seizure included publicized shootings by Portland police officers of African Americans and a widely distributed pamphlet, with which Washington was familiar, instructing the public to comply with officers’ instructions).

Although persons of color have long been aware of the precariousness of refusing to interact, one professor has argued *any* “reasonable person” would be reluctant to decline police interaction. The legal framework protecting police, more than “the friendliness of the officer’s tone or whether the lights in the squad car were activated,” provides the “reasonable person” with a more accurate understanding of the (lack of) freedom to terminate the interaction. Lindsey Webb, Legal Consciousness as Race Consciousness: Expansion of the Fourth Amendment Seizure Analysis Through Objective Knowledge of Police Impunity, 48 SETON HALL L. REV. 403, 442 (2018); cf. United States v. Drayton, 536 U.S. 194, 212, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002) (Souter, J., dissenting) (“No reasonable passenger could have believed that [they were free to ignore the police], only an uncomprehending one.”). Although the professor advocates for broad applicability, fear of presenting as noncompliant will apply even more strongly in the case of a person of color.

In summary, article I, section 7 provides broader privacy protections than the Fourth Amendment. Recently, in an analogous context, this Court broadened the “reasonable person” to allow space for the knowledge and experiences of persons of color. This Court should similarly hold that the reasonable person is aware of patterns of policing in America and the risks a person of color takes in walking away from or disregarding police interaction. These factors can and should be considered when a court evaluates whether an individual, and particularly a person of color, has been seized.<sup>7</sup>

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<sup>7</sup> This test also promotes community safety because it deemphasizes force in seizures. See Scott E. Sundby, The Rugged Individual’s Guide to the Fourth Amendment: How the Court’s Idealized Citizen Shapes, Influences, and Excludes the Exercise of Constitutional Rights, 65 UCLA L. REV. 690, 737 (2018) (requiring individuals to “stand up” to police to exercise constitutional rights requires an individual to behave in a way that clashes with police teachings on how to control a situation to preserve officer safety); see also James A. Adams, Search and Seizure as Seen by Supreme Court Justices: Are They Serious or Is This Just Judicial Humor?, 12 ST. LOUIS U. PUB. L. REV. 413, 441 (1993) (people who know their rights and would otherwise exercise them are in a “Catch 22” because not complying “may

In the present case, Rickerson stood outside Sum's car window and informed Sum, a man of Asian descent sleeping in a car, that he was being investigated for auto theft. A reasonable person in Sum's position, aware of patterns of policing in America and in the community, would have perceived he was not free to decline the request.

**3. Rickerson seized Sum on a hunch.**

As demonstrated, Sum was seized. But Deputy Rickerson lacked reasonable suspicion. Rather, he acted on a hunch. This was insufficient to satisfy the constitution.

“The Supreme Court embraced the Terry rule to stop police from acting on mere hunches.” State v. Doughty, 170 Wn.2d 57, 63, 239 P.3d 573 (2010). To evaluate the reasonableness of an officer's suspicion, this Court examines the totality of the circumstances known to the officer including the officer's training and experience, the location of the stop, the

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cause police to escalate the intrusiveness of the encounter and place the citizen at risk of both physical harm and formal arrest”).

conduct of the person detained, the purpose of the stop, and the amount of physical intrusion on the suspect's liberty. State v. Weyand, 188 Wn.2d 804, 811-12, 399 P.3d 530 (2017). The circumstances at the stop must suggest a substantial possibility that the person has committed a specific crime or is about to do so. State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2006). “Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches[.]” Terry, 392 U.S. at 22.

A person's presence in a high-crime area (even late at night) does not, by itself, give rise to a reasonable suspicion to detain that person. E.g., Fuentes, 183 Wn.2d at 161; Doughty, 170 Wn.2d at 62.

This Court's decision in Weyand indicates Rickerson lacked a reasonable suspicion. There, during the wee hours of the morning, a police officer saw, near a home with drug history, a parked car that was not there 20 minutes earlier. Weyand, 188 Wn.2d at 807-08. The officer ran the license plate, and it

suggested no crime. Weyand and a friend left the home. As the men walked quickly toward the car, they looked up and down the street. Weyand got into the passenger seat. The driver looked around a second time before getting into the car. Id. at 807.

Based on these observations and the officer's knowledge of the drug history of the home, the officer conducted an investigative detention. Id. This Court held that the even late hour, the men's short stay at the house with "extensive drug history," and their glances up and down the street did not justify the seizure. Id. at 812.

Here, as demonstrated, Sum was seized when Rickerson appeared at the window and asked for identification while making it clear to Sum he was under investigation for stealing the Honda. But the seizure was based on a mere hunch. Further, it was not even designed to investigate the crime Rickerson identified. Rickerson said the area was known for stolen cars, though he was only able to provide a single example. But even before contacting Sum, Rickerson determined the Honda had not



been reported stolen and that the plates matched the VIN. 2RP 19-21.

Although Rickerson initially found Sum asleep in the car, 2RP 17-18, 21-22, the officer's testimony did not draw any association between that and criminal activity. Nor would it have been appropriate to do so. See State v. Harris, 9 Wn. App. 2d 625, 634, 444 P.3d 1252 (2019) (sleeping in a parked car should not be considered unusual; many people live in their cars, and many people nap in their cars).

After Rickerson woke Sum and started asking questions, Sum said he did not own the car but provided the first name of the owner. 2RP 25. Rickerson seemed to find a first name less reassuring than a full name. But Rickerson did not clarify whether (1) he had asked for a full name in the first instance or (2) whether his training and experience indicated that failure to provide a full name when asked suggests the presence of a stolen vehicle. Cf. Weyand, 188 Wn.2d at 811 (totality of

circumstances to be considered by reviewing court includes officer's relevant training and experience).

Relatedly, the Oregon sales report did not provide an owner's name, so Sum's identity would provide no more than an opportunity to fish for information—not on the car or its status—but on Sum. But even if Rickerson was suspicious of Sum generally, that is not enough. See Martinez, 135 Wn. App. at 182-83 (“The problem here is not with the officer's suspicion; the problem is with the absence of a particularized suspicion.”). Of course, Sum did not know this; he was told he needed to give his name because Rickerson was investigating vehicle theft.<sup>8</sup>

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<sup>8</sup> The trial court recounted Sum's statement he was visiting someone who lived across the street. CP 86 (Finding of Fact 7). Its findings indicate there was a single house across the street and the owner had complained. CP 86 (Finding of Fact 8). But the record does not support Finding 8—there are *several* houses. Pretrial Exs. 1, 2. In any event, the effect of this finding is opaque considering it is not mentioned in Conclusion of Law 3, where it might be expected to appear.

Rickerson seized Sum on a hunch. The remedy is suppression of Sum's statement, the fruit of the seizure. See State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980).

E. CONCLUSION

For the reasons stated, this Court should reverse the Court of Appeals and order suppression of the statement.

**I certify that this document was prepared using word processing software and contains 6,194 words excluding the parts exempted by RAP 18.17(c).**

DATED this 14<sup>th</sup> day of January, 2022.

Respectfully submitted,

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