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## Essay

# “What Has Always Been True”: The Washington Supreme Court Decides That Seizure Law Must Account for Racial Disparity in Policing

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In June, the Washington Supreme Court held that courts must consider an individual’s race as part of the totality of circumstances when determining whether that individual has been seized by a police officer.<sup>1</sup> Like the Fourth Amendment of the U.S. Constitution,<sup>2</sup> Washington’s parallel constitutional provision requires that the determination be objective—upon consideration of all the circumstances, was the individual free to leave, refuse a request, or otherwise terminate the police encounter.<sup>3</sup> Upon concluding that trial courts must consider the race and ethnicity in the totality of circumstances when deciding whether there was a seizure, the unanimous Washington Supreme Court “formally recognize[d] what has always been true: in interactions with law enforcement, race and ethnicity matter.”<sup>4</sup> Given

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1. *State v. Sum*, 511 P.3d 92, 97 (Wash. 2022).

2. Under federal law, a Fourth Amendment seizure occurs when, “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *Brendlin v. California*, 551 U.S. 249, 255 (2007) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

3. The Washington Supreme Court explicitly considered this question under state law, given it is “well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution.” *State v. Rankin*, 92 P.3d 202, 205 (Wash. 2004).

4. *Sum*, 511 P.3d at 97.

the dearth of guidance from the U.S. Supreme Court over conflicting interpretations of the “free to leave” test,<sup>5</sup> this decision is an important step towards recognizing the reality of racial bias in policing and its effects.

One morning in April of 2019, Mr. Palla Sum was sleeping in his parked car in Tacoma when a sheriff’s deputy noticed him, decided to run his license plate, and confirmed that the car was not stolen.<sup>6</sup> The officers decided to approach and knocked on his window, asking him questions and for his identification.<sup>7</sup> Mr. Sum gave the officer a false name, and when the officer went back to check for outstanding warrants, he drove away, crashing into a front lawn nearby.<sup>8</sup> Whether Mr. Sum was free to leave when he did was the key issue in his case.<sup>9</sup> He sought to suppress evidence of his false statements, saying that they were made only after the officer detained him by implying he was under investigation for car theft.<sup>10</sup> Mr. Sum argued that he was seized without reasonable suspicion *at the moment* the police officer knew that his car was not stolen but approached anyway.<sup>11</sup> A “reasonable person” for the purposes of seizure analysis, he explained, means one “familiar with patterns of policing in America and the risks a person of color takes in walking away from or disregarding police interaction.”<sup>12</sup> The Washington Supreme Court agreed, holding that an individual’s race is one of many relevant circumstances that *must be considered* when determining when they were seized. People of color have different experiences with law enforcement, as evidenced in data showing that police have long disproportionately arrested and used force against Black people and other racial minorities.<sup>13</sup>

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5. See *United States v. Mendenhall*, 446 U.S. 544, 558 (1980); Aliza Hochman Bloom, *Long Overdue: Confronting Race in the Fourth Amendment’s Free-to-Leave Analysis*, 65 HOWARD L. J. 1 (2021).

6. *Sum*, 511 P.3d at 98. Court records identify Mr. Sum as Asian Pacific Islander. State Response to Amici at 1, *State v. Sum*, 511 P.3d 92 (Wash. 2022) (No. 99730-6).

7. *Sum*, 511 P.3d at 98.

8. *Id.* at 98–99.

9. *Id.* at 97.

10. *Id.*

11. *Id.* at 99.

12. Brief for Petitioner at 1, *State v. Sum*, 511 P.3d 92 (Wash. 2022) (No. 99730-6).

13. See *e.g.*, *Commonwealth v. Long*, 485 Mass. 711 (Mass. 2020) (lowering the evidentiary standard for proving racial bias in police stops).

With this decision, Washington joins New Hampshire, whose highest court also recently held that “race is an appropriate circumstance to consider in conducting the totality of the circumstances seizure analysis.”<sup>14</sup> And in Massachusetts, the Supreme Judicial Court (SJC) acknowledges that the troubling past and present of policing inform how Black Americans and other racial minorities interpret police encounters.<sup>15</sup> As a result, neither flight from police nor other nervous or evasive behaviors contribute to the reasonable suspicion constitutionally required for a stop or search.<sup>16</sup> However, while intimating that race may inform the seizure inquiry under Massachusetts Article 14, the state corollary to the Fourth Amendment, the SJC declined to make that explicit constitutional holding.<sup>17</sup>

Meanwhile, *Sum* identifies the current conflict among the federal courts of appeal over this precise question.<sup>18</sup> The Ninth Circuit and the D.C. Circuit have expressly held that a defendant’s race can inform the seizure analysis, and the Seventh Circuit has endorsed the approach.<sup>19</sup> Upon addressing a consensual encounter that escalated into a seizure in *Dozier*, the D.C. Circuit explicitly considered the defendant’s race as a circumstance bearing on whether a reasonable person in his position would believe that he was free to leave.<sup>20</sup> The court explained: “As is known from well-publicized and documented examples, an African-American man facing armed policemen would reasonably be especially apprehensive” in defendant’s situation, having been “perceived with hyper vigilant police officers expecting to find criminal activity in a particular area.”<sup>21</sup>

On the other hand, the Tenth and Eleventh Circuits reject any consideration of race in the seizure analysis, arguing that doing so would transform an objective inquiry into a “subjective”

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14. *State v. Jones*, 235 A.3d 119, 126 (N.H. 2020).

15. *See Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016).

16. *Id.* at 343 (concluding that police had far too little information to support an individualized suspicion required for the investigatory stop); *Commonwealth v. Evelyn*, 152 N.E.3d 108, 114 (Mass. 2020) (affirming the holding of *Commonwealth v. Warren*).

17. *Evelyn*, 152 N.E.3d at 120–21.

18. *State v. Sum*, 642, 511 P.3d 92, 102–103 (Wash. 2022).

19. *United States v. Washington*, 490 F.3d 765, 773–74 (9th Cir. 2007); *Dozier v. United States*, 220 A.3d 933, 944 (D.C. 2019); *United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015) (citing *United States v. Mendenhall*, 446 U.S. 544, 558 (1980)).

20. *Dozier*, 220 A.3d at 944.

21. *Id.*

one, largely because there “is no uniform life experience for persons of color, and there are surely divergent attitudes toward law enforcement officers among members of the population.”<sup>22</sup>

More than forty years ago, the Supreme Court acknowledged that a Black woman’s race and gender were relevant to whether she “felt unusually threatened by officers” and thus whether her consent to a prolonged encounter with federal agents was voluntary.<sup>23</sup> Like seizure analysis, consent to a search considers “the totality of all the circumstances” in order to determine whether “duress or coercion” bore on the individual’s ability to terminate an encounter or deny a police request.<sup>24</sup> The Supreme Court has explained that the seizure and consent tests “turn on very similar facts,” and “the question of voluntariness pervades both . . . inquiries.”<sup>25</sup> And notably, race plays a role in the consent inquiry because of its *objective* import: given “Black Americans’ shared historic experience in police encounters, purported ‘consent’ is less likely to be truly voluntary when attributed to Black individuals . . . .”<sup>26</sup> It is for this reason that many lower courts have interpreted *Mendenhall* to suggest that race is likewise relevant to seizure analysis.<sup>27</sup> Yet despite the stark circuit conflict for the four decades since it has addressed the circumstances to be considered in the seizure determination, the Supreme Court declined to address this issue in December 2021.<sup>28</sup>

Without any direction from the U.S. Supreme Court, the Washington Supreme Court in *Sum* meaningfully added to the conversation in a few important ways.

First, *Sum* recognizes that the totality of circumstances used in the seizure analysis has always been expansive, and nothing in Washington’s constitution indicates it should artificially be limited to exclude race or ethnicity.<sup>29</sup> Similarly, the U.S.

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22. *United States v. Easley*, 911 F.3d 1074, 1082 (10th Cir. 2018); *see also* *United States v. Knights*, 989 F.3d 1281, 1288–89 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 709 (2021).

23. *United States v. Mendenhall*, 446 U.S. 544, 558 (1980).

24. *Id.* at 557.

25. *United States v. Drayton*, 536 U.S. 194, 196 (2002).

26. *Knights*, 989 F.3d at 1289–91 (Rosenbaum, J., concurring).

27. *See, e.g.*, *United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015); *State v. Ashbaugh*, 244 P.3d 360, 369 (Or. 2010).

28. *Knights*, 989 F.3d at 1288–89, *cert. denied*, 142 S. Ct. 709 (2021).

29. *State v. Sum*, 511 P.3d 92, 101 (Wash. 2022) (“Nothing in the text of the constitution indicates that the totality of the circumstances of an alleged seizure should be artificially limited to exclude race or ethnicity.”).

Supreme Court has reaffirmed that the correct approach to the Fourth Amendment seizure analysis is the “traditional contextual approach,” where the relative weight of each factor hinges on the particular circumstances of the encounter.<sup>30</sup> A trial court is directed to consider the effect of “all of the circumstances surrounding the incident” on a reasonable person’s belief in her freedom to leave,<sup>31</sup> and has rejected attempts by lower courts to fashion “bright-line” rules that rely on certain factors to the exclusion of others in determining whether a police encounter “is or is not necessarily a seizure.”<sup>32</sup>

Second, the Washington Supreme Court recognizes that police officers and judges competently consider race in other criminal procedure determinations.<sup>33</sup> Indeed, Washington has modified other criminal justice procedures to explicitly account for racial injustice. For example, the state has lowered a defendant’s burden of proving that members of her jury pool have been excluded based on their race,<sup>34</sup> rejecting the federal standard requiring proof of purposeful discrimination.<sup>35</sup> Similarly, federal courts already consider race in related Fourth and Fifth Amendment totality of the circumstance inquiries.<sup>36</sup> The Supreme Court has made clear that courts are competent to consider race

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30. *Michigan v. Chesternut*, 486 U.S. 567, 572–73 (1988); *see also* *Maryland v. Pringle*, 540 U.S. 366, 370 (2003).

31. *Brendlin v. California*, 551 U.S. 249, 255 (2007) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (internal quotation marks omitted)). *See, e.g.*, *Florida v. Bostick*, 501 U.S. 429, 435–37 (1991) (where the citizen “has no desire to leave,” the inquiry is whether “a reasonable person would feel free” to “terminate the encounter,” “taking into account *all of the circumstances*”) (emphasis added).

32. *Chesternut*, 486 U.S. at 567–73; *see Bostick*, 501 U.S. at 435–36 (rejecting rule that a seizure necessarily occurs when police randomly board a bus to question passengers). “Not once” has the Court “excluded from the custody analysis a circumstance that we 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 (2011).

33. *Sum*, 511 P.3d at 106–108.

34. *Id.* at 106 (citing *State v. Jefferson*, 429 P.3d 467, 475 (Wash. 2018)).

35. *Batson v. Kentucky*, 476 U.S. 79, 79–81 (1986).

36. *See Mendenhall*, 446 U.S. at 554 (holding that race is “not irrelevant” to the voluntariness of petitioner’s consent); *J.D.B.*, 564 U.S. at 279 (upon concluding that age is relevant to the custody analysis, explaining that police officers are “competent to evaluate the effect of relative age” and “[t]he same is true of judges”).

to ensure that defendants receive fair trials.<sup>37</sup> And courts employ tests that consider race, including tailored-reasonable-person and totality-of-the-circumstances tests, in a host of other contexts.<sup>38</sup>

The Washington Supreme Court acknowledges that certain groups have long experienced disproportionate violence in police encounters.<sup>39</sup> For example, while Black Americans account for 13.4 percent of the population,<sup>40</sup> they comprise 21 percent of all police-civilian encounters,<sup>41</sup> 38.6 percent of the federal prison population,<sup>42</sup> and over 26 percent of all people shot and killed by police.<sup>43</sup> In a study of recent civilian-police encounters, officers

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37. See *Rosales-Lopez v. United States*, 451 U.S. 182, 191–92 (1981) (holding trial judges are “required to ‘propound appropriate questions designed to identify racial prejudice’” during voir dire when a defendant accused of a violent crime requests the inquiry) (quoting *Ristaino v. Ross*, 424 U.S. 589, 597 n.9 (1976)); *Batson*, 476 U.S. at 99–100 (holding courts must consider race in assessing constitutionality of peremptory challenges).

38. See *J.D.B.*, 564 U.S. at 274 (“All American jurisdictions accept the idea that a person’s childhood is a relevant circumstance” in tort law’s objective reasonable person test) (internal quotation marks and alterations omitted); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004) (explaining that, in hostile-work-environment suit, “[b]y considering . . . discrimination from the perspective of a reasonable person of the plaintiff’s race, we recognize forms of discrimination that are real and hurtful, yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff”); *State v. Wanrow*, 559 P.2d 548, 558–59 (Wash. 1977) (applying reasonable-woman standard for self-defense instruction), *superseded by statute on other grounds* by *Lewis v. State, Dep’t of Licensing*, 105 P.3d 1029, 1030 (Wash. Ct. App. 2005), *as amended by Lewis v. Dep’t of Licensing*, 139 P.3d 1078 (Wash. 2006); *Andrews v. City of Phila.*, 895 F.2d 1469, 1482 (3d Cir. 1990) (applying reasonable-woman standard for sexual harassment cases), *superseded by statute* by *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206 (3d Cir. 2017); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2338–39 (2021) (considering race in the Voting Rights Act § 2 totality-of-circumstances analysis).

39. See *Terry v. Ohio*, 392 U.S. 1, 14–15 (1968) (recognizing “wholesale harassment” of Black individuals “by certain elements of the police community”).

40. *QuickFacts*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/quickfacts/fact/table/US/> [<https://perma.cc/WS3G-25XH>].

41. Erika Harrell & Elizabeth Davis, *Contacts Between Police and the Public, 2018 – Statistical Tables*, BUREAU JUST. STAT., 3 (Dec. 2020), <https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf> [<https://perma.cc/G65P-N8T5>].

42. *Inmate Race*, FED. BUREAU PRISONS (2021), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](https://www.bop.gov/about/statistics/statistics_inmate_race.jsp) [<https://perma.cc/TPF6-3PD2>].

43. Julie Tate, Jennifer Jenkins & Steven Rich., *Fatal Force*, WASH. POST (Apr. 20, 2021, updated July 20, 2021), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/2K7N>].

aimed or shot a gun at Black individuals at eight times the rate of white individuals, and threatened force or engaged in physical contact against Black individuals at four times the rate of white individuals.<sup>44</sup>

The impact of race on police encounters is well known and widely reported.<sup>45</sup> And Black Americans are obviously aware of this experience: generations of Black parents have taught their children to be deferential toward police for fear of how “an officer with a gun will react.”<sup>46</sup> Accordingly, people of color often tread more carefully around police, reasonably believing—based on “pervasive” and “persuasive” evidence—that “contact with the police can itself be dangerous.”<sup>47</sup>

Contrary to the misplaced concerns of some federal circuit courts,<sup>48</sup> no one suggests that the experience of Black Americans with police is uniform. Instead, judges across the country have begun to recognize reality: in a country where particularly Black Americans have long experienced disproportionate and well-publicized violence during police encounters, a young Black man is more likely to pause before attempting to ignore an officer’s question or leave the situation entirely.<sup>49</sup> To be sure, in the related criminal procedure determination of whether someone is

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-3N87] (showing that out of 5,760 people killed in encounters with police officers, 1,528 were Black).

44. Harrell & Davis, *supra* note 41, at 7 (stating that white individuals have guns pointed in at them in 0.1% of police encounters while Black individuals have guns pointed at them in 0.8% of police encounters and that white individuals are threatened with force in 0.5% of police encounters while Black individuals are threatened with force in 2% of police encounters).

45. Camille Lloyd, *For Black Americans, 41% of Police Encounters Not Positive*, GALLUP (July 30, 2020), <https://news.gallup.com/poll/316247/black-americans-police-encounters-not-positive.aspx> [<https://perma.cc/X7JE-CL9Q>].

46. *Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting).

47. *Illinois v. Wardlow*, 528 U.S. 119, 132 (2000) (Stevens, J., dissenting). For example, a recent national study found that Black Americans are five times more likely than white Americans to report that they “worry a lot” about harm from a police encounter. Amanda Grahama, Murat Haner, Melissa M. Sloan, Francis T. Cullen, Teresa C. Kulig & Cheryl Lero Jonson, *Race and Worry About Police Brutality: The Hidden Injuries of Minority Status in America*, 15 VICTIMS & OFFENDERS 549, 557 (2020).

48. See *United States v. Easley*, 911 F.3d 1074, 1082 (10th Cir. 2018); see also *United States v. Knights*, 989 F.3d 1281, 1288–89 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 709 (2021).

49. Collin M. Calvert, Sonya S. Brady & Rhonda Jones-Webb, *Perception of Violent Encounters Between Police and Young Black Men Across Stakeholder Groups*, 97 J. URBAN HEALTH 279, 280 (2020).

in “custody” for the purposes of requiring *Miranda* rights, the Supreme Court rejected the same concern, holding that “gradations among children” “cannot justify ignoring a child’s age altogether.”<sup>50</sup> Similarly, the fact that there is no uniform experience for persons of color with law enforcement does not justify ignoring race altogether in the determination of when someone has been seized.

Any rule that aims to account for objective realities—and the “whole” of a police encounter,<sup>51</sup>— cannot ignore the role that race often plays, alongside other factors, in amplifying the coercive nature of a confrontation. A reasonable person, in deciding whether he is “free to leave” a police encounter, may reasonably consider the distinct experiences of, for example, Black men with police—and the potential consequences of making the wrong choice.

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50. In *J.D.B. v. North Carolina*, 654 U.S. 261, 279 (2011), the Supreme Court explained that ignoring “objective circumstances that are a matter of degree” would only “make the inquiry more artificial.” See also Aliza Hochman Bloom, *Long Overdue: Confronting Race in the Fourth Amendment’s Free-to-Leave Analysis*, 65 HOWARD L.J. 1 (2021).

51. *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988).