A RACE CONSCIOUS OBJECTIVE REASONABLE PERSON STANDARD UNDER THE WASHINGTON STATE CONSTITUTION

STATE V. SUM, 511 P.3D 92 (WASH. 2022).

*Joelle Paull**

TABLE OF CONTENTS

I. INTRODUCTION 1098
II. STATEMENT OF THE CASE 1099
A. *Factual Background* 1099
B. *Procedural History* 1100
C. *Before the Washington Supreme Court* 1100
III. HISTORY AND BACKGROUND 1101
A. *Washington Supreme Court and Racial Justice* 1101
B. *Washington State and Racial Injustice by the Numbers* .. 1103
1. Stops 1104
2. Searches 1104
C. *Policing in the United States* 1105
IV. REASONING 1106
A. *The Washington State Constitution* 1107
B. *Burden of Proof When Considering Race and Ethnicity* ... 1109
C. *Application to the Alleged Seizure of Palla Sum and Other Similar Cases* 1110
V. ANALYSIS 1112
A. *Race and the Objective Reasonable Person Standard in the United States* 1112
B. *Washington State Constitution and the Totality of the Circumstances* 1113
VI. CONCLUSION 1115

* J.D. Candidate, May 2024, Rutgers Law School—Camden

I. INTRODUCTION

In the 2022 case *State v. Sum*,[1] the Washington Supreme Court held that when determining whether an interaction with the police is a warrantless seizure in violation of article I, section 7 of the Washington State Constitution,[2] courts must consider the experience of the person asserting their rights.[3] Under article I, section 7 of the Washington State Constitution, a person is seized "if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate the encounter due to law enforcement's display of authority or use of physical force."[4] In *State v. Sum*, the Washington Supreme Court further clarified that for "purposes of [Washington State's constitutional seizure] analysis, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against Black, Indigenous, and other People of Color (BIPOC) in Washington."[5]

The Washington State Supreme Court unanimously declared that the "objective observer" test must include an understanding of the history of policing in Washington and in the United States.[6] In doing so, the Washington Supreme Court has weighed into a decades-long debate over whether an objective reasonable person test in Fourth Amendment analysis, which fails to consider race, can produce a just outcome or whether it is a legal fiction that furthers systemic injustice.[7] This

1. 511 P.3d 92 (Wash. 2022).
2. WASH. CONST. art. I, § 7.
3. *Sum*, 511 P.3d at 97.
4. *Id.*; *see also* State v. Rankin, 92 P.3d 202, 205 (Wash. 2004) ("[W]hen considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority."); United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment 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.").
5. *Sum*, 511 P.3d at 97.
6. *See id.*
7. *See, e.g.*, Aliza Hochman Bloom, *Long Overdue: Confronting Race in the Fourth Amendment's Free to Leave Analysis*, 65 HOWARD L.J. 1, 3 (2021) (arguing that a Supreme Court rule allowing for a race-conscious reasonable person standard would "address a dangerous legal fiction—that race is irrelevant when determining whether a reasonable person feels free to ignore police presence"); Tracey Maclin, *Black and Blue Encounters—Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250 (1991) (suggesting that "[w]hen assessing the coercive nature of an encounter, the Court should consider the race of the person confronted by the police, and

Comment seeks to situate the *State v. Sum* decision within this debate and analyze how the Washington Supreme Court relied on the state constitution to transform the criminal legal system in Washington.

II. STATEMENT OF THE CASE

A. Factual Background

On April 19, 2019, Palla Sum[8] and a passenger were sleeping in Sum's parked car near a church parking lot.[9] Sum was not parked illegally.[10] Regardless, Deputy Rickerson pulled up in an unmarked police vehicle and approached the vehicle. (The record indicated that another deputy in Rickerson's unit had previously made an arrest in the same area upon finding the arrestee in a stolen car.)[11] Prior to exiting his vehicle, Rickerson ran a check on the car's plates. No report of a stolen vehicle came back, but the records did not indicate who owned the car.[12] Rickerson knocked on the driver's window, waking both passengers, and asked the pair what they were doing in the parked car.[13] Sum responded that they "were waiting for a friend."[14] Rickerson continued his questioning, asking Sum who owned the car.[15] Sum responded that he did not own the car and gave the name of the owner.[16] Rickerson then asked both Sum and the passenger for identification, explaining that they "were sitting in an area known for stolen vehicles and that [Sum] did not appear to know to whom the vehicle he was sitting in belonged."[17] Sum gave Rickerson a false name and date of birth.[18] While Rickerson went back to his car to run their info, Sum drove off.[19] The officer and

how that person's race might have influenced his attitude toward the encounter"); Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513 (2018) (addressing the intersection of race and youth in the reasonable person analysis); 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 (2018).

8. Palla Sum identified in court records as Asian/Pacific Islander. *Sum*, 511 P.3d at 98–99.
9. *Id.* at 98.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* (alteration in original) (quoting Suppl. Clerk's Papers at 86).
18. *Id.*
19. *Id.*

backup pursued Sum as he sped through a stop sign and several red lights.[20] The chase ended when Sum crashed, at which point the officer arrested him.[21] Post arrest, the police discovered that the car did belong to Sum and found a pistol inside.[22]

B. Procedural History

Sum was charged "with unlawful possession of a firearm in the first degree, attempting to elude a pursuing police vehicle, and making a false or misleading statement to a public servant."[23] He contended that he was unlawfully seized and filed a pretrial motion to suppress the false statement.[24] The motion was denied, and the jury convicted him on all charges.[25] The convictions were affirmed on appeal on the grounds that the officer's request for identification did not amount to a seizure.[26]

C. Before the Washington Supreme Court

The Washington Supreme Court granted a petition for review to address the question of whether race is relevant in the determination of "whether a warrantless search or seizure has taken place."[27] The Washington Supreme Court ultimately held that, in view of the totality of the circumstances, Sum had been seized under article I, section 7. The court reasoned that because an objective observer could conclude that Sum was not free to refuse the officer's request for ID and leave, any information the officer obtained after that moment should be evaluated under the state's exclusionary rule and exceptions. The court held that the false statement must be excluded[28] and reversed and remanded to the trial court.[29] In doing so, the court articulated a clear new rule:

20. *Id.*
21. *Id.*
22. *Id.* at 99.
23. *Id.*
24. *Id.* Sum moved to suppress all evidence obtained as a result of the stop, but the suppression of the false statement was the only issue on appeal. *See* State v. Sum, 17 Wash. App. 2d 1009, n.2 (Wash. Ct. App. 2021), *rev'd*, 511 P.3d 92 (Wash. 2022).
25. *Id.*
26. *Id.*
27. *Id.* at 99–100 (quoting the standard in State v. Rankin, 92 P.3d. 202, 205 (2004)) (The court in *Sum* was only charged with the first step of the *Rankin* seizure analysis — whether a warrantless search or seizure has taken place. The next step under *Rankin* is to determine "whether the action was justified by an exception to the warrant requirement.").
28. *Id.* at 109.
29. *Id.* at 110.

> Today, we formally recognize what has always been true: in interactions with law enforcement, race and ethnicity matter. Therefore, courts must consider the race and ethnicity of the allegedly seized person as part of the totality of the circumstances when deciding whether there was a seizure for purposes of article I, section 7.[30]

III. HISTORY AND BACKGROUND

A. *Washington Supreme Court and Racial Justice*

State v. Sum is just one of the recent Washington Supreme Court cases that seek to imbue Washington constitutional law with a "greater [sense of] racial justice."[31] The decision in *Sum* is best understood within the context of judicial decisions and actions of the past few years. On June 4th, 2020,[32] the nine justices of the Washington Supreme Court took the extraordinary step of publishing a letter to members of the Washington State judiciary and legal community "reaffirm[ing] [their] deepest level of commitment to achieving justice by ending racism."[33] In the letter, the nine justices wrote:

> [A]s individuals, we must recognize that systemic racial injustice against [B]lack Americans is not an omnipresent specter that will inevitably persist. It is the collective product of each of our individual actions—every action, every day. It is only by carefully reflecting on our actions, taking individual responsibility for them, and constantly striving for better that we can address the shameful legacy we inherit. We call on every member of our legal community to reflect on this moment and ask ourselves how we may work together to eradicate racism.[34]

30. *Id.* at 109–10.

31. *See* Letter from Chief Justice Debra L. Stephens et al., Justices of Washington State Supreme Court, to Members of the Judiciary and the Legal Community (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf

32. *Id.* at 1. The Washington Supreme Court published the letter days after the murder of George Floyd in Minneapolis in May of 2020. While the Justices are reacting to "recent events [that] have brought to the forefront of our collective consciousness a painful fact that is, for too many of our citizens, common knowledge," they take care to acknowledge that "[t]he devaluation and degradation of [B]lack lives is not a recent event. It is a persistent and systemic injustice that predates this nation's founding." *Id.*

33. *Id.* at 2.

34. *Id.*

As evidenced by *Sum*, the Washington Supreme Court endeavored to live up to the ideas espoused in the June 2020 letter.[35]

Sum is not the only case the court has taken to address injustice and racial discrimination in the state. The court in *Sum* imports the objective observer language directly from the 2018 update to the state's *Batson* rule.[36] In *Batson v. Kentucky*, the Supreme Court articulated a three-step framework courts must apply when determining whether a prosecutor's use of peremptory challenges violates the Equal Protection Clause.[37] First, the defendant must show that there was purposeful discrimination. Then, the burden shifts to the state to provide a neutral justification for the challenge, which the defendant may rebut as pretextual.[38] The Washington Batson rule, GR 37 Jury Selection, states that "an 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."[39] The rule requires courts to deny a peremptory challenge "[i]f the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge."[40] This means that in Washington, parties no longer have to prove intent or purposeful discrimination to successfully block a peremptory challenge.[41]

The Washington Supreme Court has looked to address racism in other areas of the criminal legal system. In 2020, the Court vacated the 1916 criminal conviction of Alec Towessnute, a member of the Yakama

35. *See* Alicia Bannon, *A Conversation with Washington Supreme Court Chief Justice Steven C. González*, STATE CT. REP. (Jan. 23, 2023), https://www.brennancenter.org/our-work/research-reports/conversation-washington-supreme-court-chief-justice-steven-c-gonzalez (listing, according to Chief Justice González, numerous decisions where the Court has strived to live up to the ideals expressed in the letter).

36. State v. Sum, 511 P.3d 92, 106 (Wash. 2022) ("In order to provide courts and parties with a clearer framework for conducting an article I, section 7 seizure analysis, we take guidance from GR 37. GR 37 was adopted to bring increased clarity, consistency, and justice to jury selection, an area of law where all three qualities have long proved elusive. Many of the same concerns arise in the context of warrantless seizures.").

37. 476 U.S. 79 (1986).

38. *See id.* at 96–98.

39. JURY SELECTION, WASH. R. GEN. 37.

40. *Id.*

41. Washington was notably an earlier adopter of *Batson* reform and served as the model for similar statutory reforms in states like California and New Jersey. *See Batson Reform: State by State*, BERKLEY L., https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/ (last visited Sept. 6, 2024); Thomas Ward Frampton & Brandon Charles Osowski, *The End of* Batson*?: Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1, 25–29 (2024).

Nation, for fishing in the Yakima River without a license.[42] Chief Justice Stephens began the opinion by citing the June 2020 letter to the judiciary—"[t]he injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all."[43] The following year, the court held that the state's strict liability drug possession statute, which imposed harsh penalties without requiring proof of knowledge of possession, was unconstitutional.[44] In doing so, it cited reports that the state's drug laws had a disproportionate impact on "young men of color."[45] In 2022, the court vacated the defendant's assault convictions because of the prosecutor's repeated appeals to "jurors' potential racial or ethnic bias, prejudice, or stereotypes" during jury selection.[46] In the June 2020 letter, the court wrote, "[w]e continue to see racialized policing and the overrepresentation of [B]lack Americans in every stage of our criminal and juvenile justice systems."[47] These examples illustrate that the court is looking to address injustice across the state legal system and that it will likely continue to consider race and other biases as it continues to develop constitutional law.

B. Washington State and Racial Injustice by the Numbers

The court is not making an assertion of discrimination in the abstract. It frequently relies on data submitted to the court in 2021 that

42. State v. Towessnute, 486 P.3d 111, 112 (Wash. 2020) ("Today, we . . . repudiate this case; its language; its conclusions; and its mischaracterization of the Yakama people, who continue the customs, traditions, and responsibilities that include the fishing and conservation of the salmon in the Yakima River."). For further discussion and examples of Indigenous nations' fights for land and resources as well as enforcement of treaty rights, see Michelle Nijhuis, *Fishers of the Yakama Nation*, NEW YORKER (Dec. 3, 2015), https://www.newyorker.com/tech/annals-of-technology/fishers-of-the-yakama-nation (providing a brief history of the legal battles for fishing rights in Washington); NICK ESTES, OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE 22–23 (2019) (providing an account of the Oceti Sakowin's relationship with the Missouri basin and ongoing fight to protect resources from the continued destruction by the United States); Robert T. Anderson, *Indigenous Rights to Water & Environmental Protection*, 53 HARV. C.R.-C.L. L. REV. 337, 339 (2018) (discussing the rights of Indigenous nations to environmental protection and stewardship of land, water, and resources); Jeffrey W. Stowers, Jr., *A Starving Culture: Alaskan Native Villages' Fight to Use Traditional Hunting and Fishing Grounds*, 40 AM. INDIAN L. REV. 41, 42–43 (2016).

43. *Towessnute*, 486 P.3d at 111 (quoting Letter from Chief Justice Debra L. Stephens et al., *supra* note 31, at 1).

44. State v. Blake, 481 P.3d 521, 528 (Wash. 2021).

45. *Id.* at 533.

46. State v. Zamora, 512 P.3d 512, 515 (Wash. 2022).

47. Letter from Chief Justice Debra L. Stephens et al., *supra* note 31, at 1.

details the systematic failures of the State's legal system.[48] Relevant for the court's discussion of 4th Amendment issues and the case of Palla Sum are data on stops, use of force, and killings by the police in the State. These are factors Washington courts will be required to consider when engaging in a search or seizure analysis under *Sum*. The data is somewhat limited and relies on local reporting data, which may be incomplete, but it does present clear examples of the disproportionate impact of policing on minority groups.

1. Stops

Among the close to 50,000 Terry Stops in Seattle from June 2015–2021, "Black persons are stopped at a rate that is 4.1 times that of non-Hispanic [w]hite persons and Indigenous people are stopped at a rate that is 5.8 times that of non-Hispanic [w]hite persons."[49] In Spokane:

> For traffic stops that were officer-initiated, for the period 2014–June 30, 2020, Black people were stopped at a rate 2.65 times that of non-Hispanic [w]hite people. Asians were more likely to be stopped at a rate 1.23 times that of non-Hispanic [w]hite people. Latinas/os and Indigenous people had rates of .51 and .95 that of non-Hispanic [w]hite people.[50]

2. Searches

Moving to those searched—the report cites a study conducted by the Seattle Police Department, which found that "Black persons, Hispanics, and Asian Americans were searched at rates greater than [their white counterparts]." [51] The study adds that these numbers exist despite findings that "[e]ven though minorities were searched more frequently than [w]hite persons, minorities were less likely to have weapons, with the greatest disparity in hit rates occurring for Indigenous people."[52] A similar study by the Washington State Patrol found that "Black, Latino, Indigenous people, and Native Hawaiian and other Pacific Islander

48. *See Sum*, 511 P.3d at 104. *See generally* Task Force 2.0, *Race & Washington's Criminal Justice System: 2021 Report to Washington Supreme Court,* 57 GONZ. L. REV. 117 (2021).

49. Task Force 2.0, *supra* note 48, at 148.

50. *Id.*

51. *Id.* (citing SEATTLE POLICE DEP'T, DISPARITY REVIEW, PART I: USING PROPENSITY SCORE MATCHING TO ANALYZE RACIAL DISPARITY IN POLICE DATA 27–29 (2019), https://crosscut.com/sites/default/files/files/19718539884.pdf).

52. *Id.* at 148–49.

drivers are searched at a higher rate than [w]hite motorists."[53] Data on the resulting arrests, unsurprisingly, show similar disparities.[54]

C. Policing in the United States

Collecting data on police encounters on the national level presents challenges and often an incomplete picture.[55] Researchers cite the lack of standardized data across a vast array of jurisdictions as a barrier to accurate reporting.[56] Notwithstanding, the limited available data reveals stark racial disparities. For instance, some recent findings show that Black drivers are more likely to be stopped than white drivers.[57] Relevant to an objective reasonable person standard, "[w]hite drivers pulled over by police (89%) were more likely than [B]lack drivers (83%) to think that the police behaved properly."[58] In the District of Columbia, a 2019 study showed that "while [B]lack people make up 46 percent of the city's population, they accounted for 70 percent of police stops, and 86 percent of stops that didn't involve traffic enforcement."[59] While data like this only shows a brief snapshot of the experience of police encounters in the United States, it is undeniable that people of color encounter the police more frequently, are subject to police violence more frequently, and that those encounters prove to be fatal more frequently. Black Americans "account for roughly 14 percent of the U.S. population and are killed by

53. *Id.* at 149 (citing WASH. STATE SUP. CT. GENDER AND JUST. COMM'N, 2021 GENDER JUSTICE STUDY 637 (2021), https://www.courts.wa.gov/?fa=home.sub&org=gjc&page=exploreStudy&layout-2&parent=study).

54. *Id.* at 150.

55. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 122 (2010). Alexander raises a common issue with many studies:

> Studies of racial profiling typically report the total number of people stopped and searched, disaggregated by race. These studies have led some policing experts to conclude that racial profiling is actually "worse" in white communities, because the racial disparities in stop and search rates are much greater there. What these studies do not reveal, however, is the frequency with which any given individual is likely to be stopped in specific, racially defined neighborhoods.

Id.

56. *See* Bianca Ortiz-Miskimen, *Race and Policing in America*, 2020–2021 DISCOVERY: RSCH. AT PRINCETON 16, 19, https://www.calameo.com/read/0008049750acc29ba7390.

57. LYNN LANGTON & MATTHEW DUROSE, BUREAU OF JUST. STAT., NCJ 242937, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 3 (2013), https://bjs.ojp.gov/content/pub/pdf/pbtss11.pdf ("Across age groups, the highest percentage of stopped drivers was among drivers ages 18 to 24 (18%). A higher percentage of [B]lack drivers (13%) than white (10%) and Hispanic (10%) drivers age 16 or older were pulled over in a traffic stop during their most recent contact with police.").

58. *Id.*

59. Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's the Proof*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/.

police at more than twice the rate of [w]hite Americans."[60] In 2022, 1,201 people were killed by the police—the highest in a decade.[61] Especially prescient for the issue presented in *State v. Sum*, "[m]ost killings began with police responding to suspected non-violent offenses or cases where no crime was reported."[62]

As the Washington Supreme Court makes clear, race and policing in the United States are intertwined. Policing today has its origins in slave patrols of the eighteenth and nineteenth centuries and colonial violence.[63] Police departments, as we know them, began to develop as Jim Crow laws were introduced across the South.[64] Where "policing had become a central tool of maintaining racial inequality throughout the South," policing in the North was concerned with controlling growing communities of color.[65] Policing today is the progeny of these histories, and the expansion of policing in the twentieth and twenty-first centuries has resulted in an increase in incarceration rates.[66] While racial bias pervades every stage of the criminal legal system, Michelle Alexander notes, "racial bias is most acute [in policing,] the point of entry to the system[,] for two reasons: discretion and authorization."[67] Police discretion, which has been sanctioned by courts, is partly what the Washington Supreme Court is reacting to in *Sum*. By situating the decision within the violent history of policing in Washington and in the United States and by relying on statistics, the court takes aim at the fiction that legal standards exist in a vacuum.

IV. REASONING

The Washington Supreme Court unanimously reversed the lower court's denial of Sum's motion to suppress and articulated a new

60. *1,176 People Have Been Shot and Killed by Police in the Past 12 Months*, WASH. POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (Aug. 30, 2024).

61. *2022 Police Violence Report*, MAPPING POLICE VIOLENCE, https://policeviolence report.org/2022/ (last visited Sept. 6, 2024).

62. *Id.*

63. *See The Origins of Modern Day Policing*, NAACP, https://naacp.org/find-resources/history-explained/origins-modern-day-policing (last visited Sept. 6, 2024); *see also* ALEX S. VITALE, THE END OF POLICING 42–48 (2017) (describing how the Texas Rangers, slave patrols, and U.S. foreign military regimes shaped policing in the United States).

64. VITALE, *supra* note 63, at 47–48.

65. *Id.*

66. *Id.* at 50 ("More police than ever before are engaged in more enforcement of more laws, resulting in astronomical levels of incarceration, economic exploitation, and abuse. This expansion mirrors the rise of mass incarceration.")

67. ALEXANDER, *supra* note 55, at 120–21.

constitutional rule that will impact the lives of thousands of Washingtonians.

A. The Washington State Constitution

To understand the court's reasoning in *State v. Sum*, it is important to examine the history of privacy rights and article I, section 7, which the court relied on. Article I, section 7 states "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[68] The text is noticeably pared back compared to the Fourth Amendment of the U.S. Constitution.[69] However, for the first half of the twentieth century, article I, section 7 was mostly read to track the Fourth Amendment.[70] In the 1980s, the court began to diverge in cases like *State v. Hehman* and *State v. Simpson*.[71] The Washington State Constitution, like any state constitution, may provide for greater protections than the United States Constitution.[72] The Washington Supreme Court in *State v. Gunwall* espoused six nonexclusive factors that state judges may look to when determining where to extend constitutional protections in the state.[73] Because it is "well settled that article I, section 7 of the

68. WASH. CONST. art. I, § 7.1

69. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). For analysis of the Washington constitutional convention and the explicit rejection of the language of the Fourth Amendment, see ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION 31 (G. Alan Tarr ed., 2d ed. 2013) and Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 SEATTLE U. L. REV. 431, 433–456 (2008).

70. UTTER & SPITZER, *supra* note 69, at 31.

71. *Id.*; *see also* State v. Hehman, 578 P.2d 527, 529 (Wash. 1978) (departing from U.S. Supreme Court precedent in *United States v. Robinson* and *Gustafson v. Florida* by holding a custodial arrest is unreasonable for a minor traffic offense); State v. Simpson, 622 P.2d 1199, 1205–06 (Wash. 1980) (noting "[t]he language of the search and seizure provision of our state constitution . . . differs significantly from the fourth amendment of the United States Constitution" before deciding to retain the automatic standing rule for challenging a search or seizure of contraband, despite the U.S. Supreme Court's rejection of automatic standing).

72. *See* State v. Sum, 511 P.3d 92, 99 n.2 (Wash. 2022); *see also* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 138 (2d ed. 2023).

73. State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986) (listing the following factors: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern"). For further discussion of this approach to constitutional interpretation, see WILLIAMS & FRIEDMAN, *supra* note 72, at 176 ("On the one hand, the criteria approach is laudable because it teaches and calls attention to the nature of state constitutional arguments. On

Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution,"[74] the court in *Sum* did not have to engage in analysis of the *Gunwall* factors.[75]

Despite not needing to conduct a *Gunwall* analysis, Washington Supreme Court precedent still requires a determination of:

> [W]hether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result. This involves an examination 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.[76]

In *Sum*, the court goes through this analysis to conclude that "race and ethnicity are relevant to the determination of whether a person was seized for purposes of article I, section 7."[77]

First, the court reasoned that nothing in the text requires limiting the analysis.[78] "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."[79] Next, the court notes that historically the court's treatment of people of color has been "deplorable."[80] But they opine that the second factor does not require "static" analysis.[81] To illustrate this point, the court relies on more recent decisions that have sought to change that history and that have considered race in their constitutional analysis.[82] Lastly, the court

---

the other hand, however, we have been critical of this approach for a number of reasons that we believe have demonstrated themselves in the past several decades.").

74. State v. Rankin, 92 P.3d 202, 204 (Wash. 2004) (quoting State v. Jones, 45 P.3d 1062, 1064 (Wash. 2002)).

75. *Sum*, 511 P.3d at 99 n.2.

76. State v. Mayfield, 434 P.3d 58, 65 (Wash. 2019) (internal quotation marks omitted) (quoting State v. Chenoweth, 158 P.3d 595, 600 (Wash. 2007)).

77. *Sum*, 511 P.3d at 101.

78. *Id.*

79. *Id.*

80. *Id.* (citing overturned decisions).

81. *Id.*

82. *Id.* at 102 (discussing the adoption of the new *Batson* rule; the abolition of the death penalty on the grounds that it was systematically administered in "an arbitrary and racially biased manner;" and notably for the court's analysis in *Sum*, the use of the GR 37 language in a recent decision "recognizing that 'racial bias is a common and pervasive evil that causes systemic harm to the administration of justice'" when reviewing jury verdicts) (first citing

considered "the current implications of recognizing (or failing to recognize) that race and ethnicity are relevant to the seizure analysis."[83] Relying on the recent decisions dealing with race and bias, the court concludes that "[i]t would be nonsensical to hold that a person's race and ethnicity, though clearly relevant to the important trial rights discussed above, are irrelevant to the question of how the person was brought into the criminal justice system in the first place."[84] The court limits its constitutional analysis under these three factors to determinations of whether a person has been seized under the meaning of article I, section 7.[85] The court clarifies that:

> As provided by our precedent, the article I, section 7 seizure inquiry is an objective test in which the allegedly seized person has the burden of showing that a seizure occurred. To properly apply this test, we now clarify that a person has been seized as a matter of independent state law if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate a police encounter due to law enforcement's display of authority or use of physical force. For purposes of this analysis, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against BIPOC in Washington.[86]

B. Burden of Proof When Considering Race and Ethnicity

Having concluded that race and ethnicity are relevant in the seizure analysis, the court has to address how race is relevant in this case and similar stops. The court is careful to say that the inclusion of race and ethnicity in the seizure analysis is not dependent on the other party producing statistical evidence.[87] For the court, imposing that burden on the defendant would only further the disparate impact the law imposes

JURY SELECTION, WASH. R. GEN. 37; then quoting State v. Gregory, 427 P.3d 621, 633 (Wash. 2018); then quoting State v. Berhe, 444 P.3d 1172, 1178 (Wash. 2019)).

83. *Id.*

84. *Id.*

85. *Id.* at 102–03 ("We express no opinion as to whether race and ethnicity might be relevant in determining whether a particular warrantless seizure was justified by reasonable suspicion or some other exception to the warrant requirement, as that issue is not before us.").

86. *Id.* at 108 (citation omitted).

87. *Id.* at 104.

on people of color.[88] Similarly, the race of the perpetrating officer is not necessarily relevant in evaluating the experience of the person being stopped. The court suggests that it may be relevant, but it is not determinative and not a part of the objective reasonable person test.[89] The court reasons that "a lack of statistics cannot totally negate the relevance of a person's race or ethnicity because statistical data are inherently limited by the manner and means in which they are collected."[90] Thus, under these circumstances, Palla Sum's race was relevant without requiring him to show that, historically, Asians and/or Pacific Islanders have been disproportionately impacted by biased or racist policing in the State.[91]

C. Application to the Alleged Seizure of Palla Sum and Other Similar Cases

Considering race as a factor in the case of Palla Sum, the court concluded that Sum was not free to refuse Rickerson's request for identification and was therefore unconstitutionally seized at that moment.[92] In the seizure analysis, the court reasoned that the most important fact was the officer's indication to Sum that he was suspected of car theft, which was the reason he asked him to produce identification.[93] Here, the court once again turns to the language of GR

88. *Id.* ("Thus, holding that a person's race and ethnicity are irrelevant unless the person produces statistics showing a pattern of targeted police discrimination or violence would reinforce the same systemic inequalities that prevent such statistics from being reliably compiled in the first instance. History has shown that when courts create crippling legal burdens to recognizing the constitutional rights of BIPOC, their lived experiences are unjustly disregarded and their rights go unprotected.") (internal quotation marks omitted).

89. *See id.* at 104–05. The court eschews any further analysis as to the relevance of the officer's race in a racist system. For further discussion of racial identity in policing and police misconduct or violence, see Clyde McGrady, *Tyre Nichols Beating Opens a Complex Conversation on Race and Policing*, N.Y. TIMES (Jan. 28, 2023), https://www.nytimes.com/2023/01/28/us/police-tyre-nichols-beating-race.html; Sean Nicholson-Crotty et al., *Will More Black Cops Matter? Officer Race and Police-Involved Homicides of Black Citizens*, 77 PUB. ADMIN. REV. 206, 206 (2017); VITALE, *supra* note 63, at 11–13; Brakkton Booker, *"Diversity Alone Won't Change Policing,"* POLITICO (Jan. 27, 2023, 5:32 PM), https://www.politico.com/newsletters/the-recast/2023/01/27/tyre-nichols-death-memphis-police-00080000.

90. *Sum*, 511 P.3d at 104. The court cites "statistical limitations [it views as] particularly relevant to Sum's case." The court notes that "[a]t times, 'Asian' is used by reporting agencies or groups as an umbrella designation that includes Native Hawaiians and other Pacific Islanders." *Id.* (alteration in original). "Therefore, while some aggregated data show that 'Asians' are less likely to be subjected to police force, 'individuals who are Native Hawaiians and Other Pacific Islanders are 3.3 times more likely.'" *Id.*

91. *See Sum*, 511 P.3d at 105.

92. *Id.* at 109.

93. *Id.*

37 for specific guidance on what facts may implicate the race or ethnicity of the person being stopped.[94] The jury selection rule points judges to a nonexclusive list of circumstances to consider when looking at the totality of the circumstances:

> (i) the number and types of [q]uestions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to [q]uestion the prospective juror about the alleged concern or the types of [q]uestions asked about it; (ii) whether the party exercising the peremptory challenge asked significantly more [q]uestions or different [q]uestions of the potential juror against whom the peremptory challenge was used in contrast to other jurors; (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party; (iv) whether a reason might be disproportionately associated with a race or ethnicity; and (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.[95]

For a seizure analysis, the number and types of questions an officer asks, whether an officer has a history of stopping and detaining members of minority groups, whether the reason the officer stops an individual is disproportionately associated with race or ethnicity, and potentially whether they have treated white individuals differently at similar stops may all be relevant using the jury selection rules as a guide.

In *Sum*, the court notes that the officer did not offer aid or inquire into Sum's or the passenger's well-being.[96] It is notable here that the officer had a single instance of prior theft in the area that he used to form his unwarranted suspicion that Sum's car was stolen when he asked Sum who the car belonged to.[97] While the court goes to great lengths to articulate the relevance of race when examining the totality of the circumstances in seizure cases, race ultimately plays a part in the outcome of this case. An objective observer who is aware that people of color are disproportionately stopped and searched in the state of Washington and in the United States, the court reasoned, could conclude that, given the facts, Sum was not free to leave.[98]

94. *Id.*
95. JURY SELECTION, WASH. R. GEN. 37 (g).
96. *Sum*, 511 P.3d at 108–09.
97. *Id.* at 98.
98. *See id.* at 109.

V. ANALYSIS

A. Race and the Objective Reasonable Person Standard in the United States

Both federal and state courts have been split on how to or whether to address the history of policing in the United States in Fourth Amendment analyses.[99] In *State v. Sum*, the Washington Supreme Court took up the call of Justice Sotomayor's dissent in *Utah v. Strieff*[100] and recognized that:

> [W]hile it is true that there is no uniform life experience or perspective shared by all people of color, heightened police scrutiny of the BIPOC community is certainly common enough to establish that race and ethnicity have at least some relevance to the question of whether a person was seized.[101]

Washington is one of a few states to include race as an element in the analysis. Recent decisions from other state supreme courts show a similar expansion of privacy rights to include consideration of race and/or experience.[102] In New Hampshire, the Supreme Court "observe[d] that

99. *See* Bloom, *supra* note 7, at 41–42 (arguing that the Supreme Court's denial of cert on the issue has created dangerous outcomes where race is rarely taken into account despite continued police violence and killings); Aliza Hochman Bloom, *"What Has Always Been True": The Washington Supreme Court Decides That Seizure Law Must Account for Racial Disparity in Policing*, 107 MINN. L. REV. HEADNOTES 1, 3–4 (2022) (summarizing the split in federal circuits). Several circuits have openly endorsed consideration of race or, at least, have not completely denounced the consideration. *See* 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). In contrast, the Eleventh and Tenth Circuits have excluded the consideration of race. *See* United States v. Easley, 911 F.3d 1074, 1082 (10th Cir. 2018); United States v. Knights, 989 F.3d 1281, 1288–89 (11th Cir. 2021)).

100. 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) ("[I]t is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, [B]lack and [B]rown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." (citations omitted)); *see also Sum*, 511 P.3d at 104 (liberally quoting Justice Sotomayor's dissent in *Utah v. Strieff*).

101. *Sum*, 511 P.3d at 105.

102. In *State v. Sum*, the court explicitly declined to follow South Carolina and "presume that race and ethnicity are irrelevant unless proved otherwise." *Sum*, 511 P.3d at 103. While not the law in South Carolina, the dissent in *State v. Spears* is illustrative of the ongoing debate over the adoption of a race-conscious standard. *See* 839 S.E.2d 450, 463 (S.C. 2020) (Beatty, C.J., dissenting) ("[A] true consideration of the totality of the circumstances cannot ignore how an individual's personal characteristics—and

race is an appropriate circumstance to consider in conducting the totality of the circumstances seizure analysis."[103] However, while New Hampshire includes race in its seizure analysis, the New Hampshire Supreme Court did not place the full weight of the state constitution behind the statement.[104] In Massachusetts, the Supreme Court in *Commonwealth. v. Warren*, held that:

> [W]here the suspect is a [B]lack male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department . . . report documenting a pattern of racial profiling of [B]lack males in the city of Boston.[105]

In *Warren*, the issue was not whether a seizure occurred, but whether the officer had the requisite reasonable suspicion to make the stop.[106] The Massachusetts Supreme Court references reports of disproportionate and discriminatory stops but again stops short of articulating a rule under the state constitution.[107] Washington State stands alone in its emphatic declaration that, under the state constitution, race "must [be considered] ... as part of the totality of the circumstances when deciding whether there was a seizure."[108]

B. Washington State Constitution and the Totality of the Circumstances

The clarity in the court's reasoning and constitutional analysis provides clear guidance to courts on how exactly race is relevant in the seizure analysis. It is notable that the court chose Palla Sum's case to expand the analysis under article I, section 7. Until Sum petitioned the court for review, he had not previously made an argument that race

---

accompanying experiences—impact whether he or she would feel free to terminate an encounter with law enforcement."). Beatty goes on to suggest that "[a]n objective eye would acknowledge the fact that African-Americans are being reasonable when they respond in accordance with their collective experiences gained over two hundred years." *Id.* at 467.

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

104. *See id.* (relying on state precedent that looked at the race of the arresting officer and Seventh Circuit precedent without mentioning the broader constitutional implications).

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

106. *Id.* at 343.

107. *Id.* at 342; *see also* Bloom, *supra* note 99, at 3 ("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.").

108. *Sum*, 511 P.3d at 110.

should be included in the calculus of whether he felt free to leave.[109] Nor is there evidence that the officer making the stop was aware of Sum's race prior to approaching the car window. As the court suggests, Sum's case rests on the interaction with the officer between Rickerson getting out of his car, knocking on the window, and the request for identification.[110] In fact, the prosecution argued that race didn't exist as an issue in the record and that therefore it was not relevant.[111] All of this indicates the level to which the court understood how race can inform all aspects of an interaction with the police. The court makes clear that Sum's race could have played a part in every moment of the interaction.

The court goes out of its way to say that including race as a factor in the analysis "does not undermine the objective nature of the seizure inquiry."[112] Opponents of the approach in *Sum* see the inclusion of race or the identity of the individual as transforming the objective test laid out in *United States v. Mendenhall*[113] into a subjective test.[114] By treating race as an objective factor, rather than requiring individual defendants to show how their experiences with police informed their behaviors, the court makes an important move. The United States Supreme Court in *J.D.B. v. North Carolina* held that courts can clearly "account for th[e] reality [that a child may feel coerced whereas an adult would feel free to leave] without doing any damage to the objective nature of the custody analysis."[115] In doing so, the Court distinguishes the age of a child (objective) from factors it views as "contingent [on the] psycholog[y] of the individual suspect."[116] As Aliza Bloom argues, "[u]nderstanding the effects of race does not require examining the psychology of individual suspects; rather, courts need only acknowledge the commonsense conclusions about behavior and perception that race broadly generates."[117] There is no guarantee that two children will react the same

109. *Id.* at 99.

110. *See id.* at 100.

111. State Response to Amici at 10, State v. Sum, 511 P.3d 92 (Wash. 2022) (No. SC997306), 2022 WL 1651514.

112. *Sum*, 511 P.3d at 102.

113. United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment 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.").

114. *Id.* at 102–03 (citing United States v. Easley, 911 F.3d 1074, 1082 (10th Cir. 2018)).

115. 564 U.S. 261, 272 (2011).

116. *Id.* at 275 (alterations in original) (internal quotation marks omitted) (quoting Yarborough v. Alvarado, 541 U.S. 652, 668 (2004)).

117. Aliza Hochman Bloom, *Objective Enough: Race Is Relevant to the Reasonable Person in Criminal Procedure*, 19 STAN. J. C.R. & C.L. 1, 41–42 (2023) (internal quotation marks omitted) (quoting *Alvarado*, 541 U.S. at 674 (Breyer, J., dissenting)).

in custody. Likewise, race is sufficiently objective.[118] In using this objective framework, the Washington Supreme Court can rely on the *Gunwall* factors and expand the objective totality of the circumstances rather than abandon it altogether.

Additionally, the Washington Supreme Court and others noted that the objective reasonable observer or person test as it stands in most of the United States already relies on multiple assumptions about the reasonable person. For instance, seizure analysis firmly rests on the presumption that a reasonable person has knowledge of relevant law.[119] Why should a reasonable person or juror who "knows the law" lack all understanding of the legal system and policing in the United States?

VI. CONCLUSION

In Washington, it was already established in the rules for peremptory challenges that "an objective observer in Washington 'is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in' many injustices against BIPOC, particularly in the criminal justice system."[120] This case is not an aberration in Washington's constitutional jurisprudence but rather part of a recognition that expanding state constitutional rights is one way of dealing with a system that was never meant to be and has never been just. The text of the Washington State Constitution does not preclude this interpretation—and the methods of constitutional interpretation developed over the course of the twentieth and twenty-first century allow for this exact type of inquiry and expansion of rights.

118. *Id.* at 42 ("[T]he fact that there is no uniform life experience for persons of color does not justify ignoring race altogether. *J.D.B.*'s reasoning confirms what is clear when deconstructing consent and seizure doctrines—individual characteristics, including age, race and gender, are, in the aggregate, objective enough to be relevant to deciding whether a 'reasonable person' facing particular circumstances would feel free to leave police presence.").

119. Webb, *supra* note 7, at 408.

120. *Sum*, 511 P.3d at 103 (quoting JURY SELECTION, WASH. R. GEN. 37(f)).