No. 919861

SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,

Plaintiff/Appellant/Petitioner,

v.

CODY RAY FLORES,

Defendant/Respondent

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# RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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## TABLE OF AUTHORITIES

**Cases**

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## I. INTRODUCTION

In this Answer to the State's Petition for Review, Respondent Cody Ray Flores asks the Court to accept review of the issues outlined in Section II below.

## II. ISSUES ON REVIEW:

1. Was the seizure of Cody Flores justified and reasonable, both in its scope and duration?
2. Should the seizure of Cody Flores be properly characterized as a *Terry* stop, when the only justification given by Officer Ouimette for making him walk backwards with his hands on his head is that Ouimette thought he was somehow involved in the reported crime?
3. Do the holdings of cases dealing with the rights of passengers during vehicle stops apply to situations involving pedestrians walking in a public place?
4. May the State raise the issues, for the first time in a Petition for Discretionary review, (a) that the court's findings of fact were inadequate and that the case should therefore be remanded for additional factual findings and (b) that suppression is not the proper remedy, when these issues were never raised with the trial court and never raised in the Appellant's brief filed with the Court of Appeals?

## III. STATEMENT OF THE CASE

### a. Substantive Facts

On November 2, 2013, a number of law enforcement officers were dispatched to the area of 1120 Alderwood Drive in Moses Lake, Washington, where they came into contact with Giovanni Powell and Cody Flores. RP 10. RP 31. These included Officer McCain, Officer Ouimette, Officer St. Peter, and Officer Cole of the Moses Lake Police Department. RP 10-11. Officer St. Onge was present as well, and arrived at about the same time as did Officer Ouimette. RP 24. The information provided by dispatch was that Giovanni Powell had pointed a gun at somebody's head; but no information was provided about the person who provided that information. RP 14. RP 66-67. RP 86. Dispatch reported that the person reporting the incident wanted to remain anonymous and that they had disconnected and that dispatch was unable to get them back on the line. RP 87.

The officers received the call at approximately 16:35. RP 78. Officer McCain initially estimated that he made contact with Powell and Flores approximately two minutes after receiving the call. RP 79. On cross-examination, McCain stated that it could have been as much as four to five minutes. RP 84.

The officers lacked information about how the reporting party knew that Powell had pointed a gun at someone; nor did they have any information that Cody Flores had been involved in criminal conduct of any kind. RP 15. There was no testimony as to the time when the alleged crime had taken place. *Id.* Officer McCain asked dispatch how they knew Powell had a gun, but

apparently never got an answer to that question. RP 32. RP 67. McCain was, however, advised that Powell had an outstanding warrant for his arrest. RP 67. Flores had been walking on the sidewalk with Mr. Powell when the two men were stopped. RP 17. Flores and Powell had been walking shoulder to shoulder. RP 38. The place where the two were seen walking was approximately four houses to the north of 1120 Alderwood. RP 44.

Officer McCain was the first officer to arrive at the location. RP 38. RP 72. Officer McCain was also the first to make contact with Powell and Flores. RP 33. He got out of his patrol vehicle and told Powell to stop, and Powell complied. RP 33. At the suppression hearing, McCain testified that he ordered "them" to stop. RP 70. He testified, "As I got out, I drew my weapon at low ready and ordered, ordered ***them*** to stop." RP 70 [Emphasis added]. He drew his gun immediately upon exiting his patrol vehicle. RP 40. RP 70. He called to the two men from across the intersection. RP 38. Flores also stopped, and McCain ordered both subjects to face away from him and to put their hands on their heads. RP 33. McCain testified at the CrR 3.5 hearing that he was not certain whether he specifically instructed Flores to stop, or what his exact words were. RP 39. But McCain testified at the CrR 3.6 hearings that he ordered them ***both*** to stop. RP 70. RP 71. But McCain also suggested that his comments were directed primarily at Powell rather than Flores. RP 71-72. McCain then ordered them both down to the knees with hands on their heads.

RP 34. RP 72. McCain had both Powell and Flores kneel down onto the sidewalk to put them both at a position of disadvantage. RP 72. The two men complied with McCain's commands. RP 33.

Prior to the arrival of the other officers, while Powell and Flores were on the sidewalk on their knees, they were approximately two feet away from each other and conversing with one another. RP 73. Officer McCain ordered Powell to start taking steps to his right, on his knees, in order to distance him from Mr. Flores. RP 73. Powell complied with those commands. RP 73. With both suspects now on their knees, and with their hands on their heads, and separated from one another, Officer McCain waited for the other officers to arrive. RP 73-74. By this time, Powell and Flores were separated from one another by a distance of five to seven feet. RP 77.

The next to arrive at the scene was Officer St. Peter. RP 40. Both Powell and Flores were already on their knees with their hands on their heads when the other officers arrived. RP 73. Once other officers arrived on the scene, McCain and another officer (presumably St. Peter) ordered Mr. Powell back to the officers' location by giving him verbal commands to start walking back toward the sound of the officers' voices while keeping his hands on his head. RP 34. RP 40. RP 75-76. Powell complied with these directives. RP 76. RP 77. Powell did not offer any resistance to McCain's orders. RP 77. Cody Flores also did nothing to obstruct the officers. RP 77-78. At that point in time,

Powell was detained and frisked for weapons, and dispatch advised that the warrant for his arrest was confirmed. RP 34. RP 76.

Officer McCain was familiar with Giovanni Powell from several prior dealings, and was familiar with his appearance. RP 43-44. RP 67-68. However, Officer McCain did not immediately recognize Cody Flores. RP 44. RP 70. RP 75.

The next to arrive were Officers Ouimette and Cole. RP 41. Officers Ouimette and Cole arrived from the south of Officer McCain's location while McCain was dealing with Powell. RP 76. Officer Ouimette testified that when he arrived, Officer McCain and Officer St. Peter were already on the scene. RP 87. When Officer Ouimette arrived, Giovani Powell was being called back to Officer McCain's and Officer St. Peter's location. RP 87. RP 91. Flores was waiting over on the corner with his hands up. RP 87.

Ouimette and Cole began focusing their attention on Mr. Flores. RP 76. Upon arrival, Officer Quimette drew his gun and held it at the low ready position. RP 15.[1] Prior to this, Officer Ouimette had not observed either of the two subjects holding a gun. RP 93. Mr. Flores was standing with his hands up in what is termed "a common position of disadvantage, and facing away from the officer. RP 18-19. Officer Ouimette was unable to recall whether Flores was still on his knees or standing, but testified that

[1] Later on, several other officers also arrived on scene. RP 42. The record reflects that ultimately, there were more than five police officers present at the scene and that all of them had their side arms drawn. The parties stipulated that all of the officers who responded had their guns drawn. RP 62.

he was already at a position of disadvantage, and facing away from the officers. RP 88-89.

Officer Ouimette then instructed Flores to walk backwards to the sound of his voice. RP 16. Officer Ouimette instructed Flores to keep his hands where Ouimette could see them and to walk backwards to the sound of his voice. RP 87-88. Flores was approximately forty to fifty feet away at the time Officer Ouimette addressed him. RP 19. Cody Flores complied with the officer's commands. RP 93. As Officer Ouimette was calling Flores back to him, Mr. Flores was able to see that the Officer's gun was drawn. RP 16. Officer Ouimette did not yet have any reason to believe that Flores had a gun. RP 17.

After Ouimette had ordered Flores to walk backwards toward the sound of his voice, and when Flores had gotten to a point approximately 20 feet from Ouimette, Flores tried to tell the officer that Powell had given him a the gun. RP 89. By that point in time, Flores had moved backward approximately ten to fifteen feet from his original location. RP 93. Ouimette instructed Flores to keep facing away from him, and that they would discuss it in a minute. RP 89. Ouimette then asked Flores where the firearm was at that time. *Id.* Flores responded that it was in his pants under his jacket. RP 90. Flores continued to walk backwards as he had been instructed to do. *Id.* Once he got a few feet away from Ouimette, Flores was instructed to go down to his knees, and officers approached him and secured him in handcuffs. *Id.* Officer

Ouimette then removed the gun from his waistband. *Id.* Flores was then detained in the back of a patrol vehicle. *Id.*

**b. Procedural History**

Cody Flores was charged with unlawful possession of a firearm in the first degree. A CrR 3.5 hearing was held on December 18, 2013, at which time many of the salient details regarding the stop came to light for the first time. RP 3-55. RP 61-62. The Defendant filed a motion to suppress evidence on December 19, 2013, arguing that all evidence against him was the product of an unlawful seizure and should be suppressed, citing *State v. Ladson*, 138 Wn.2d 243, 259 (1999).

On December 31, 2013, the State filed its response, conceding that both Powell and Flores were seized, and asserting that the seizure of Flores was necessary for the officers to control the scene, and likening the situation to one in which a motor vehicle carrying passengers is pulled over during a traffic stop. The State's response did not address the question of whether suppression was the proper remedy. *Id.*

On January 6, 2014, the defense filed its reply brief, challenging the analogy to a traffic stop and pointing out the complete lack of articulable suspicion necessary to justify a detention of the defendant.

A CrR 3.6 suppression hearing was held January 15, 2014. RP 56. At the hearing, the State attempted, but failed, to elicit testimony to the effect that Powell was known to law enforcement

to be "dangerous." For example, Officer McCain was asked whether he had ever seen pictures of Powell on Facebook. RP 68. McCain responded that he had seen pictures with Powell in them. *Id.* When asked whether Powell was brandishing firearms in those pictures, McCain answered, "I've seen pictures of him holding firearms or friends of his holding firearms." RP 68-69. McCain didn't use the word "brandishing" as the prosecutor had suggested; and he was not even certain that Powell was the person in the photographs who was holding any firearms.

McCain also testified that Powell is in a gang called the Base Block. RP 69.[2] But the witness provided no information about what type of gang the Base Block is; what its activities are; or the sorts of people who are members. *Id.* The prosecutor also asked Officer McCain if Mr. Powell was involved in a shooting in Spokane. *Id.* McCain responded that one of Powell's friends had been killed in Spokane and that Powell had been a material witness to the incident. *Id.* When asked what his knowledge was of the incident, McCain responded, "Just that he [Powell] was there" for a rap concert. *Id.* A fight broke out in a motel, and one of Powell's best friends was shot and killed. RP at 70.

McCain offered no testimony that Powell had ever behaved violently toward officers, that he ever resisted arrest, or assaulted anyone, or even that he had any criminal convictions of any kind.

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[2] "The base" refers to a neighborhood in Moses Lake formerly occupied by an Air Force base, and is mentioned in passing at RP 69.

The court also inquired as to the officers' knowledge of Flores. RP 80. The court asked Officer McCain whether he recognized Flores, and the witness responded that he didn't get a good enough look at his face to know who he was. RP 80. Flores did not have any tattoos or distinguishing marks that Officer McCain was able to observe. RP 80-81. Flores was not wearing any clothing that might be considered to be gang-affiliated. RP 81. When asked if the location was considered to be a "high crime area," Officer McCain testified only that there are some residents who live there that "associate with crime." RP 81. McCain also mentioned that there is a "known gang member" who lived right across the street from where the original incident was alleged to have occurred, but added that this individual was not a part of the situation under investigation. RP 82.

In its opening statement, the State conceded that the anonymous tip alone was insufficient to justify the stop. RP 60. The State's argument focused primarily on the question of whether Officer Ouimette was justified in seizing the Defendant. RP 56-60. RP 95-102. RP 113-120. The State did not address the issue of whether suppression was the appropriate remedy. *Id.*

On January 27, 2014, the trial court entered its decision granting the Defendant's motion to suppress evidence. The court also entered an order dismissing the charges without prejudice. The findings of fact and conclusions of law were drafted on pleading paper containing the State's imprint; presented for the court's

approval by the deputy prosecuting attorney; and approved as to form by the defense attorney. CP 59-61 The State did not object to the findings of fact that it had drafted and presented to the court, nor did the State argue on appeal that the case should be remanded for insufficiency of the trial court's factual findings.

## IV. ARGUMENT

### A. The trial court erred in findings of fact 2.1 and 2.2

The State continues to assert, "Officer Kyle McCain was at the Moses Lake Police Department when 911 received a call from a person who initially gave her name, then changed her mind and said she wished to be anonymous." Petition for Review at 2. This discrepancy was discussed fully in the Respondent's Brief at 16-22, and needs little further discussion here. Plainly stated, there was no testimony or other evidence in the record to support a finding that the caller was a female who initially gave her name, but then changed her mind and stated that she wished to remain anonymous. None of the officers who testified at the hearing knew anything at all about the 911 caller; and the State never introduced into evidence an actual recording of the 911 call.

### B. The State may not raise issues for the first time in its Petition for Review.

The Court does not generally consider issues raised for the first time in a petition for review. *Fisher v. Allstate Ins. Co.*, 136 Wash. 2d 240, 252, 961 P.2d 350, 356-57 (1998) citing *State v. Halstien,* 122 Wash.2d 109, 130, 857 P.2d 270 (1993). An issue not raised or

briefed in the Court of Appeals will not be considered by the Supreme Court of Washington. *State v. Laviollette*, 118 Wash.2d 670, 679, 826 P.2d 684 (1992).

The State raises two issues for the first time in its Petition for Review that were not raised or briefed in the court of Appeals: (1) whether the Superior Court's findings of fact were inadequate and whether the case should be remanded to the trial court for entry of additional findings; and (2) whether suppression of the evidence is the proper remedy.

As for the issue of findings, the State itself drafted and presented to the trial court all of the findings of fact which the State now claims are in need of supplementation. Furthermore, the State never asked for the remedy of remand for additional findings of fact when it initially appealed the court's ruling.

Similarly, the State now raises for the first time the issue as to whether suppression is the appropriate remedy. *See* Petition for Review at 17-18. The State never argued this position at the trial court nor at the Court of Appeals, and is therefore estopped from doing so now. Furthermore, all of the State's arguments against application of the exclusionary rule appear to be based on a theory that the officers acted in good faith, a concept that has been flatly

rejected in this state. *See e.g., State v. Winterstein*, 167 Wash. 2d 620, 634, 220 P.3d 1226, 1232 (2009) ("There is no requirement of good faith on the part of the police").

**C. The detention of Flores should be viewed as two parts.**

The Respondent has never conceded, and does not now concede, that his initial detention was proper, or that the cases involving the rights of passengers in automobiles are controlling. Nonetheless, it is necessary to analyze the seizure in question as a two-step process. The first part was initiated by Officer McCain when he first arrived at 1120 Alderwood Drive and espied Giovanni Powell ambling with Cody Flores along the sidewalk just to the north of the address. There he ordered Flores and Powell to stop and to get down on their knees with their hands on their heads. This part of the stop was probably not a *Terry* stop, as McCain never articulated any intention of detaining Flores specifically.

The second part was initiated by Officer Ouimette, after McCain already had the situation well in hand. Ouimette acted out of a belief that Flores had been involved in the alleged gun incident, but never articulated any specific reasons (a) for believing that Flores was so involved, other than his being in close proximity to Powell; or (b) for believing that Flores posed a threat to officer safety, other than his being in proximity to Powell; or (c) for why it was necessary to move Flores, thereby expanding the scope and duration of the stop, as a way of facilitating the arrest of Powell. RP 81. This ***second*** part of the detention (initiated by Officer

Ouimette) had nothing to do with the arrest of Powell and should properly be characterized as a *Terry* stop, because Ouimette's goal was to investigated Flores' possible involvement in the gun incident.

**D. The Court should find that Officer Ouimette's actions toward Flores amounted to a *Terry* stop.**

Whereas Flores argued below that his detention should be analyzed as an unjustified *Terry* stop that ripened into a warrantless arrest [Respondent's Brief at 27-45, 46-49], the Court of Appeals somewhat inconsistently held, in one portion of its Opinion, that the principles of *Terry* do not apply to this fact pattern while, in other parts of the opinion, applying those very same principles to the case at hand. *See, e.g.,* Slip Opinion at 8-9.

The determination of whether a *Terry* stop occurred should be viewed as a mixed question of law and fact. *See e.g., State v. Thorn*, 129 Wash. 2d 347, 351, 917 P.2d 108, 111 (1996) (pertaining to the issue of whether a seizure occurred). Ouimette's restriction of Flores' liberty should be viewed as a *Terry* stop because Officer Ouimette specifically testified that the reason he called Flores back to him at gunpoint, with his hands on his head, was because he thought that Flores was somehow involved in the reported gun incident. RP 88. It is therefore subject to the criteria of reasonableness set forth in *Terry* and *United States v. Botero–Ospina*, 71 F.3d 783, 786 (10th Cir.1995).

**E. The permissible scope of a *Terry* stop was exceeded.**

"The appropriate constitutional analysis for a stop precipitated by an informant is a review of the reasonableness of the suspicion under the totality of the circumstances." *State v. Z.U.E.*, 352 P.3d 796, 801 (2015). Officer Ouimette knew nothing about the person who called 911, what they saw, how recently they saw it, or even whether the information provided was based on firsthand information. He certainly had received no information that Flores has been a participant. Thus, any suspicion as to Cody Flores' involvement in a crime was not reasonable.

The permissible scope of any stop may, depending on the circumstances, be enlarged or prolonged as necessary in order to investigate unrelated suspicions that arise during the course of the stop. *State v. Smith*, 115 Wash.2d 775, 785, 801 P.2d 975 (1990); *State v. Guzman–Cuellar*, 47 Wash.App. 326, 332, 734 P.2d 966 (1987). The peace officer is permitted to "'maintain the status quo momentarily while obtaining more information.'" *State v. Williams*, 102 Wash.2d 733, 737, 689 P.2d 1065 (1984) (quoting *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)). But, to detain a suspect beyond what the initial stop demands, the officer must be able to articulate specific facts from which it could reasonably be suspected that the person was engaged in criminal activity. *State v. Santacruz*, 132 Wash. App. 615, 619, 133 P.3d 484, 486 (2006); *State v. Henry*, 80 Wash.App.

544, 550, 910 P.2d 1290 (1995); *State v. Tijerina*, 61 Wash.App. 626, 629, 811 P.2d 241 (1991).

In *State v. Cole*, 73 Wash. App. 844, 850, 871 P.2d 656, 659 (1994), a traffic infraction case, once the defendant was told to step out of the car, the infraction investigation was deemed to have escalated into a *Terry* stop. But a *Terry* stop was not warranted by the nature of the investigation (a safety belt violation) or the officer's suspicions (he apparently had none). *Id.* The pat-down search of Mr. Cole, moreover, would have been justified only if Trooper Slemp could have pointed to specific and articulable facts creating an objectively reasonable belief that the suspect was armed and presently dangerous. *Id., citing State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (*citing Terry v. Ohio*, 392 U.S. 1, 21–24, 88 S.Ct. 1868, 1879–81, 20 L.Ed.2d 889 (1968)). Trooper Slemp expressed no concern that Cole might be armed, nor did he express concern for his own personal safety. His only reason for detaining Mr. Cole was to confirm his identity; and that was not sufficient grounds for the detention. *Cole*, 73 Wn. App. at 850.

As the Court acknowledged in *Mendez,* where "the purpose of the officer's interaction with the passenger is investigatory," the officer must meet the higher *Terry* standard. *See State v. Horrace*, 144 Wash. 2d 386, 393, 28 P.3d 753, 757 (2001) *citing Mendez*, 137 Wash.2d at 220, 223, 970 P.2d 722.

What is striking in the case *sub judice*, is that the State never elicited from Officer Ouimette any rational explanation of why he found it necessary to expand both the scope and duration of the stop by moving Cody Flores from the position in which he found him upon arriving at the scene; i.e., kneeling on the ground, facing away from the officers, hands on head. No explanation was ever given for what Ouimette hoped to accomplish by forcing Flores to promenade backward to the sound of his voice. Officer Ouimette never testified that he was thought Flores posed a threat to officer safety. Instead, Officer Ouimette's explanation sounded more like he considered Flores to be a suspect in the crime that had been reported, in which case the purpose for his actions would logically have been to investigate Flores' possible involvement. The State bore the burden of showing that the nature, duration, and scope of the seizure were both necessary and reasonable, taking all relevant facts into account. Having failed in meeting that burden, the State would now like another opportunity to establish, in a re-hearing, what it failed to accomplish in the first instance.

The Court should hold, as a matter of law, that part two of the detention (involving Ouimette) was investigatory, and therefore, subject to the higher *Terry* standards of articulable suspicion.

**F. This case involves an issue of substantial public interest that should be determined by the Supreme Court, to wit, the question of whether cases involving the rights of passengers in automobiles during traffic stops necessarily govern situations involving pedestrians.**

The Court of Appeals held that the traffic stop cases are controlling, noting that nearly all of the cases involving similar detentions of innocent persons, encountered in the company of arrestees, involve car passengers in traffic stops. Slip Op. at 5 and 10. The State would like to take the analogy one step further by applying a single sentence in *Parker* [dicta] and having it apply to the case of pedestrians as well: "Thus, a vehicle stop and arrest in and of itself provides officers an objective basis to ensure their safety by 'controlling the scene,' including ordering passengers in or out of the vehicle as necessary." *State v. Parker*, 139 Wash. 2d 486, 502, 987 P.2d 73, 82 (1999) citing *State v. Mendez,* 137 Wash.2d 208, 220–21, 970 P.2d 722 (1999). The analogy is fundamentally flawed. Ordering a passenger to exit a vehicle in which the driver is arrested is <u>not</u> analogous to encountering an innocent pedestrian on a public street and ordering him at gunpoint to get down on his knees, facing away from the law enforcement officer, with his hands placed on his head, simply because he happens to be walking in close proximity to a person with an outstanding arrest warrant.

The State misconstrues this statement in *Parker*. The Court there is not making a blanket statement that police always have the unconditional right to order passengers out of a car, regardless of circumstances. The qualifying phrase, "as necessary," simply means that they may do so ***if there is a need.***

Furthermore, the State assumes that what is true in the case of an automobile stop is true, by analogy, in the case of the detention of an arrestee's companion, when the two are on foot in a public place, and not engaging in any suspicious or disruptive activities.

The Court should make clear that a traffic stop of a motorized vehicle is fundamentally different from the detention of two individuals walking side by side down the street, because (a) the vehicle stop automatically "entails the seizure of a passenger, even when the driver is the sole target of police investigation." *Brendlin v. California*, 551 U.S. 249, 254, 127 S. Ct. 2400, 2405, 168 L. Ed. 2d 132 (2007).

When an automobile transporting passengers comes to a stop, the passengers must, of necessity, stop (and become seized) along with the car and driver. This is not true in the case of two pedestrians walking side by side along a public sidewalk where the police are interested in arresting, on an outstanding warrant, only one of the two individuals. Whereas people who are passengers in a car don't normally walk away when the car is stopped, a person who is on foot enjoys relatively greater freedom to continue on his way, even though his companion is placed under arrest. Officer McCain could have arrested Powell without seizing Flores.

Respondent is aware of only one previous case that directly compares the rights of automobile passengers to the rights of pedestrians. *See Arizona v. Johnson*, 555 U.S. 323, 327, 129 S. Ct. 781, 784, 172 L. Ed. 2d 694 (2009) ("To justify a patdown of the

driver or a passenger during a traffic stop..." in any event "just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous").

Moreover, (b) automobiles are inherently dangerous while pedestrians are not: ***"Because traffic stops are inherently dangerous***, the police have a legitimate need to control the scene of such stops to ensure officer safety." *Mendez*, 137 Wash.2d at 219–20, 970 P.2d 722 [emphasis added]. This statement from *Mendez* implies that there are things ***peculiar to automobiles*** that present special dangers to women and men in uniform. We must therefore inquire what these characteristics are. Common sense dictates that the situation involving a stopped car is qualitatively different from that of encountering a pedestrian walking down the sidewalk. The automobile itself can become a deadly weapon, which may be used against the police and against innocent bystanders when driven. Additionally, a car is susceptible of having more hiding places than one's person. And when an officer stops a vehicle that is occupied by passengers, the officer cannot always see what is taking place below a certain line of vision. There are obstructions (sheet metal, bench seats, etc.) which can prevent the officer from observing potential threats to his or her safety. Thus *Parker* states, "***a vehicle stop and arrest*** in and of itself provides officers an objective basis to ensure their safety by 'controlling the scene,' including ordering passengers in or out of

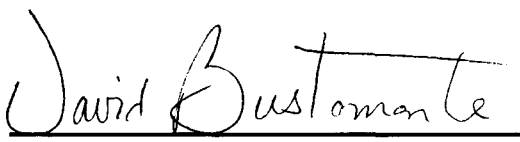
the vehicle as necessary." *State v. Parker*, 139 Wash. 2d 486, 502, 987 P.2d 73, 82 (1999). But for the very same reasons that a passenger in a vehicle may pose a danger to officer safety, justifying, in certain situations, ordering passengers out of the vehicle, there is simply no vehicle to order anyone out of in the situation of a pedestrian encountered in a public place. That heightened danger, inherent to automobiles, does not exist in the case of pedestrians. For these reasons, the traffic stop is emphatically not a good analogy to the case *sub judice.*

**CONCLUSION**

In conclusion, the Respondent urges the Court to accept review, and to affirm the Superior Court's order suppressing evidence, but on different grounds than those articulated by the Court of Appeals. The Court should find that ***the second part*** of Cody Flores' seizure by law enforcement officers was a *Terry* stop that was unwarranted in its duration, scope, and overall degree of coerciveness. The Court should hold that the cases involving the rights of passengers who are seized during traffic stops in which the driver is arrested do not apply to the case of pedestrians.

DATED this 25th day of August, 2015

RESPECTFULLY SUBMITTED,



DAVID BUSTAMANTE, WSBA #30668
Attorney for Respondent

# APPENDIX A

Declaration of Service

DECLARATION OF SERVICE

COMES NOW DAVID BUSTAMANTE, and declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on the 25th day of August, 2015, I caused the subjoined Answer to Petition for Review, in the matter of *State of Washington, Plaintiff/Appellant/Petitioner, v. Cody Ray Flores, Respondent*, Supreme Court Cause No. 919861, to be served on the Petitioner, State of Washington, by personally hand-delivering a true and correct copy to the offices of the Grant County Prosecuting Attorney's Office located at 35 C Street N.W., Ephrata, Washington 98823.

"I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct."

Signed at Ephrata, Washington, this 25th day of August, 2015.

David Bustamante

DAVID BUSTAMANTE
Declarant

DECLARATION OF SERVICE ON RESPONDENT

COMES NOW DAVID BUSTAMANTE, and declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on the 25th day of August, 2015, I caused the subjoined Answer to Petition for Review, in the matter of *State of Washington, Plaintiff/Appellant/Petitioner, v. Cody Ray Flores, Respondent*, Supreme Court Cause No. 919861, to be served on the Respondent, Cody Ray Flores, by personally hand-delivering a true and correct copy to the Respondent in person at the Grant County Jail, located at 35 C Street N.W., Ephrata, Washington 98823.

"I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct."

Signed at Ephrata, Washington, this 25th day of August, 2015.

David Bustamante

DAVID BUSTAMANTE
Declarant