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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

Z.U.E.,

Respondent.

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

The Honorable Kitty-Ann van Doorninck, Judge

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SUPPLEMENTAL BRIEF OF RESPONDENT Z.U.E.

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TABLE OF CONTENTS

	Page
A. <u>ISSUE</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	5
1. ZUE'S SEIZURE WAS UNLAWFUL BECAUSE THE CIRCUMSTANCES, INCLUDING THE TIPS FROM 911 CALLERS, DO NOT ESTABLISH AN INDIVIDUALIZED, REASONABLE SUSPICION THAT ZUE WAS INVOLVED IN CRIMINAL WRONGDOING.....	5
a. <u>Summary Of The Terry Exception To The Warrant Requirement</u> .....	6
b. <u>Article I, Section 7 Is More Stringent Than The Fourth Amendment In Assessing The Reliability Of An Informant's Tip.</u> .....	7
c. <u>The Seizure Of ZUE Was Illegal Under Article I, Section 7</u> .....	13
d. <u>The Seizure Of ZUE Was Illegal Under The Fourth Amendment</u> .....	20
e. <u>Even If The Tips Contained Sufficient Indicia Of Reliability That Criminal Activity Was Afoot, The Seizure Of ZUE Was Still Illegal Because The Tips Did Not Provide Individualized Suspicion That ZUE Was Or Was About To Be Engaged In Criminal Activity.</u> .....	20
D. <u>CONCLUSION</u> .....	23

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Campbell v. State of Wash. Dep't of Licensing,</u> 31 Wn. App. 833, 644 P.2d 1219 (1982).....	10
<u>State v. Athan,</u> 160 Wn.2d 354, 158 P.3d 27 (2007).....	8
<u>State v. Broadnax,</u> 98 Wn.2d 289, 654 P.2d 96 (1982).....	22
<u>State v. Crane,</u> 105 Wn. App. 301, 19 P.3d 1100, 1106 (2001).....	22
<u>State v. Doughty,</u> 170 Wn.2d 57, 239 P.3d 573 (2010).....	6, 7, 16
<u>State v. Gunwall,</u> 106 Wn.2d 54, 720 P.2d 808 (1986).....	7
<u>State v. Harrington,</u> 167 Wn.2d 656, 222 P.3d 92 (2009).....	7
<u>State v. Hart,</u> 66 Wn. App. 1, 830 P.2d 696 (1992).....	9, 18
<u>State v. Hopkins,</u> 128 Wn. App. 855, 117 P.2d 377 (2005).....	10, 13, 18
<u>State v. Jackson,</u> 102 Wn.2d 432, 688 P.2d 136 (1984).....	11, 12
<u>State v. Jones,</u> 85 Wn. App. 797, 934 P.2d 1224 (1997).....	9
<u>State v. Kennedy,</u> 107 Wn.2d 1, 726 P.2d 445 (1986).....	6

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

<u>State v. Lee,</u> 147 Wn. App. 912, 199 P.3d 445 (2008).....	10, 15, 16
<u>State v. Lesnick,</u> 84 Wn.2d 940, 530 P.2d 243 (1975).....	8, 18, 19
<u>State v. Marcum,</u> 149 Wn. App. 894, 205 P.3d 969 (2009).....	10
<u>State v. Patton,</u> 167 Wn.2d 379, 219 P.3d 651 (2009).....	7
<u>State v. Randall,</u> 73 Wn. App. 225, 868 P.2d 207 (1994).....	10
<u>State v. Richardson,</u> 64 Wn. App. 693, 825 P.2d 754 (1992).....	22
<u>State v. Ross,</u> 141 Wn.2d 304, 4 P.3d 130 (2000).....	6
<u>State v. Sieler,</u> 95 Wn.2d 43, 621 P.2d 1272 (1980) .....	8, 9, 11-13, 17, 19
<u>State v. Snapp,</u> 174 Wn.2d 177, 275 P.3d 289 (2012). .....	7
<u>State v. Thompson,</u> 93 Wn.2d 838, 613 P.2d 525 (1980).....	7, 22, 23
<u>State v. Vandover,</u> 63 Wn. App. 754, 822 P.2d 784 (1992).....	9, 16
<u>State v. Webb,</u> 147 Wn. App. 264, 195 P.3d 550 (2008).....	16

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

State v. Williams,  
102 Wn.2d 733, 689 P.2d 1065 (1984)..... 6

State v. Z.U.E.,  
178 Wn. App. 769, 315 P.3d 1158 (2014)..... 5, 8, 9, 16, 20

FEDERAL CASES

Adams v. Williams,  
407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)..... 11

Aguilar v. Texas,  
378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964)..... 9, 11

Alabama v. White,  
496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990) ..... 11

Brown v. Texas,  
443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979)..... 19, 23

Illinois v. Gates,  
462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) ..... 11, 12

Navarette v. California,  
\_\_\_ U.S. \_\_\_, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014)..... 14-16

Spinelli v. United States,  
393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969)..... 9, 11

Terry v. Ohio,  
392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)  
..... 6, 12, 14, 18, 20, 21, 23

United States v. Brown,  
448 F.3d 239 (3rd Cir. 2006) ..... 21

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

United States v. Cortez,  
449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)..... 21

RULES, STATUTES AND OTHER AUTHORITIES

3 Wayne R. LaFave, Search & Seizure (1978)..... 9

The Supreme Court, 1971 Term, 86 Harv. L. Rev. 50 (1972)..... 10

U.S. Const. amend. IV ..... 6, 7, 10, 14, 15, 20, 21

Wash. Const. art. I, § 7 ..... 6, 7, 11-13, 15, 20

Wayne R. LaFave, Search And Seizure: A Treatise On The Fourth  
Amendment (4th ed. 2004) ..... 10

A. ISSUE

Whether the tips from 911 callers were insufficiently reliable to provide police with a reasonable, individualized suspicion to seize ZUE without a warrant?

B. STATEMENT OF THE CASE

On the afternoon of October 2, 2011, Tacoma police dispatch received information from a 911 caller reporting an individual running with a gun in the Oakland Park area. RP 24, 26-27, 29, 31, 33, 75-76, 92. The caller gave his name (Arthur Reed), telephone number, and address. RP 75-76. He described the man as a shirtless black male, 18 to 19 years old, 5 feet 10 inches tall, 145 pounds, almost bald with short dark hair; and (2) he was holding a gun down by his side, ducking in and out of houses and cars, and at one point was seen holding the gun in a ready position. RP 31-33, 58, 95.

Officers Rose and Clark responded to Oakland Park, a known gang hangout and the site of multiple gang-related incidents in the previous year. RP 25-26, 33, 89, 91-92, 124, 130-32, 168-69, 184. Dispatch advised that multiple callers had reported more individuals were involved and that approximately eight of those individuals — including the shirtless man with a gun — were in a white car. RP 38-39, 59-60; CP 90. Dispatch subsequently advised that a caller reported the shirtless man with a gun

had gotten into a gray, not white, two-door car, and the car was headed toward Union on Center Street. RP 40, 61-62, 68, 81, 97, 140, 153; CP 90. These callers were not identified. RP 62-63, 68, 144.

Dispatch updated the officers again, stating a caller had observed a black female handing a gun to the shirtless, black male. RP 33-34, 75-76, 94-95, 114-15. This caller described the female as 17 years old, medium height, slim, wearing a black jacket, blue jeans and black shoes with blue trim. RP 34-35, 61, 74, 94-95, 98, 114-15. This caller gave her first name ("Dawn"), cell phone number, and location. RP 76; CP 95.

Officers saw two females walking about a half block away from the park; one matched the caller's description of the woman who handed off the gun. RP 33-35, 61, 71, 74, 80, 114-16, 225-26. Police continued to search for the man with the gun rather than make contact with the female. RP 35, 39-40. Officers then spoke with unnamed woman at an apartment building overlooking the park. RP 41-42, 96. The woman said there had been a large brawl in the park, several of the participants had their shirts off, and they left in four separate vehicles. RP 40-41, 65, 81, 96. She did not provide any information about the subjects or their vehicles or anyone with a gun. RP 65-66. Officers did not obtain her name or contact information. RP 42, 63.

As police continued to check the area, they again saw the two females, who now were in a parking lot at the intersection of Center and Union. RP 42-43, 74, 81, 84, 97-98, 114-16, 245. This location was about a quarter mile from the park, where dispatch had reported the gray car carrying the shirtless man with a gun was headed. RP 184-85, 234. The two women approached a compact, four-door Honda, which appeared gray. RP 152-53, 181, 198, 215-16. One of the women matched the description of the woman who handed off the gun. RP 42-43, 45, 70-71.

Police saw four people in the car. RP 173. Two males were in the front seat. RP 43-44, 226. ZUE was in the front passenger seat. RP 176, 216. The females got into the back seat. RP 227. Police did not see anyone in the car that was bald. RP 68. Officers believed they were investigating the crime of a minor in possession of a firearm and a gang-related assault with a deadly weapon. RP 74-75, 118-19. Officer Rose testified "we didn't know at the time that the males may or may not have been involved." RP 44. The primary reason for stopping the vehicle was because the female was getting into it. RP 66, 161, 225.

The officers approached the vehicle with firearms drawn. RP 45-46, 117-22, 215. The officers instructed the occupants of the vehicle to put their hands up, which they did. RP 46. Officer Clark saw the front seat occupants were not bald as he approached the car. RP 156. The

officers waited a few minutes for other officers to arrive and then directed the occupants to exit the vehicle one at a time. RP 46-47. The male driver and two female passengers exited the vehicle and were detained in handcuffs without incident. RP 47-48.

ZUE, in the front passenger seat of the car, was the last person to exit the vehicle. RP 48, 176, 216. He was wearing a red and white striped polo shirt, blue t-shirt, black jeans, and black and white sneakers. RP 58. He had an afro. RP 59. Officers Clark and Rose acknowledged ZUE was not the shirtless man reported to have a gun. RP 59, 147-48. Both males in the car had hair, and did not match the description of the almost bald, shirtless man. RP 58-59, 68, 147-48, 156.

ZUE complied with the police command to exit and walk backward toward the officer. RP 49. But ZUE did not comply quickly enough with an order to get down on his knees. RP 50. He glanced at the officer. RP 50. The officer grabbed ZUE's arm and took him down to the ground. RP 51, 366-67. Another officer tased ZUE. RP 55, 179. ZUE was handcuffed and arrested for obstruction. RP 55-56, 181. Police found a small amount of marijuana on him. RP 55-56, 181-82.

The State charged ZUE in juvenile court with unlawful possession of a controlled substance (marijuana) and obstructing a law enforcement officer. CP 85-87. ZUE moved to suppress any evidence obtained during

the stop as the fruit of an unlawful seizure. CP 9-52. The trial court denied ZUE's suppression motion. CP 101; RP 539. The court then found ZUE guilty of unlawful possession of a controlled substance (marijuana) but not guilty of obstructing a law enforcement officer.<sup>1</sup> CP 118. The Court of Appeals reversed the trial court's suppression ruling, holding police lacked reasonable suspicion to seize ZUE without a warrant. State v. Z.U.E., 178 Wn. App. 769, 774-75, 315 P.3d 1158 (2014).

C. ARGUMENT

1. ZUE'S SEIZURE WAS UNLAWFUL BECAUSE THE CIRCUMSTANCES, INCLUDING THE TIPS FROM 911 CALLERS, DO NOT ESTABLISH AN INDIVIDUALIZED, REASONABLE SUSPICION THAT ZUE WAS INVOLVED IN CRIMINAL WRONGDOING.

Tips from the 911 callers did not show the requisite indicia of reliability. The police therefore could not rely on them to justify the investigative seizure. Even if the tips were sufficiently reliable to show a reasonable suspicion that *others* had committed a crime, the tips do not establish a reasonable suspicion that *ZUE* committed a crime. One of the indispensable elements of a valid Terry seizure is an *individualized* suspicion of criminal activity. Mere proximity to others suspected of criminal activity will not justify even a short detention. Based on the

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<sup>1</sup> The court explained ZUE, who has Asperger's syndrome, was scared and confused and just did not move quickly enough to comply with officer commands. RP 560.

totality of circumstances known to police, including the tips, police did not have reasonable, individualized suspicion to believe ZUE was involved in criminal activity. His seizure was therefore improper.

a. Summary Of The Terry Exception to The Warrant Requirement.

As a general rule, a warrantless seizure is per se unlawful under both the Fourth Amendment and article I, section 7 unless it falls within one or more specific exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). These exceptions are jealously and carefully drawn. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). "The Terry stop — a brief investigatory seizure — is one such exception to the warrant requirement." State v. Doughty, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010) (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

"A Terry stop requires a well-founded suspicion that the defendant engaged in criminal conduct." Doughty, 170 Wn.2d at 62. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21. A reasonable, articulable suspicion means that there "is a substantial possibility that criminal conduct has occurred or is about to occur." State

v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). An individual's mere proximity to others independently suspected of criminal activity does not justify an investigative stop; the suspicion must be individualized. State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). "In reviewing the propriety of a Terry stop, a court evaluates the totality of the circumstances." State v. Snapp, 174 Wn.2d 177, 198, 275 P.3d 289 (2012). "The State must show by clear and convincing evidence that the Terry stop was justified." Doughty, 170 Wn.2d at 62.

b. Article I, Section 7 Is More Stringent Than The Fourth Amendment In Assessing The Reliability Of An Informant's Tip.

When a party claims both state and federal constitutional violations, this Court addresses the state constitutional claim first. State v. Patton, 167 Wn.2d 379, 385, 219 P.3d 651 (2009). Article I, section 7 provides greater protection than the Fourth Amendment because it focuses on the disturbance of private affairs rather than unreasonable searches and seizures. State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). Accordingly, a Gunwall<sup>2</sup> analysis is unnecessary for this Court to undertake an independent state constitutional analysis. Snapp, 174 Wn.2d at 194 n.9. "The only relevant question is whether article I, section 7

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<sup>2</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) (setting forth the factors for evaluating whether an issue merits independent state constitutional interpretation).

affords enhanced protection in the particular context." State v. Athan, 160 Wn.2d 354, 365, 158 P.3d 27 (2007).

The context here is the requisite standard for determining the reliability of an informant's tip in assessing whether reasonable suspicion supports a Terry stop. As recognized by the Court of Appeals, reports from citizen informants provided the sole basis for police suspicion that the young woman entering the gray car had committed the crime of a minor in possession of a firearm and that a man running with a gun had gotten into a gray car. Z.U.E., 178 Wn. App. at 780.

An informant's tip cannot provide the requisite "reasonable suspicion" for an investigatory detention unless it possesses sufficient "indicia of reliability." State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). In State v. Lesnick, the Court held the reliability of an informant's tip can be established if (1) the informant was reliable or (2) the officer's corroborative observation suggests either the presence of criminal activity or that the information was obtained in a reliable fashion. State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975).

Sieler subsequently clarified that even where an unknown but named telephone informant is deemed adequately reliable, "this reliability by itself generally does not justify an investigatory detention." Sieler, 95 Wn.2d at 48. "[T]he State generally should not be allowed to detain and

question an individual based on a reliable informant's tip which is merely a bare conclusion unsupported by a sufficient factual basis which is disclosed to the police prior to the detention." Id. "Some underlying factual justification for the informant's conclusion must be revealed so that an assessment of the probable accuracy of the informant's conclusion can be made." Id. The Court explained it "'makes no sense to require some 'indicia of reliability' that the informer is personally reliable but nothing at all concerning the source of his information." Id. (quoting 3 Wayne R. LaFare, Search & Seizure § 9.3 at 100 (1978)). The Court of Appeals recognized this requirement creates an analysis similar to the Aguilar-Spinelli<sup>3</sup> test. Z.U.E., 178 Wn. App. at 781.

Notwithstanding the Supreme Court's pronouncement in Sieler, there is a split in the Court of Appeals on whether both the reliability of the informant and a sufficient factual basis for the informant's knowledge must be established to show a tip's reliability or whether the basis of knowledge is merely one factor to consider under a totality of circumstances test.<sup>4</sup>

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<sup>3</sup> Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

<sup>4</sup> Compare State v. Vandover, 63 Wn. App. 754, 758-59, 822 P.2d 784 (1992) (investigatory detention resulting from an informant's tip is unconstitutional absent a showing that (1) the informant is reliable and the informant's information was obtained in a reliable manner); State v. Hart, 66 Wn. App. 1, 6-7, 830 P.2d 696 (1992) (same); State v. Jones, 85 Wn. App.

Division One has concluded a more lenient and nebulous test is appropriate for evaluating the reliability of an informant's tip in the investigatory detention context because the standard of reasonable suspicion for an investigatory detention is lower than the probable cause standard. Randall, 73 Wn. App. at 228-29; Lee, 147 Wn. App. at 920-22.

Division One fails to recognize the reasonable suspicion necessary for an investigatory detention "should be less than probable cause only in the sense that the officer may stop on less or different information than probable cause would require and not in the sense that he may act on information that is received in a manner less reliable than probable cause would require." 4 Wayne R. LaFave, *Search And Seizure: A Treatise On The Fourth Amendment* 575 (4th ed. 2004) (quoting The Supreme Court, 1971 Term, 86 Harv. L. Rev. 50, 177-78 (1972)). In either case, the information must be reliable to justify the intrusion on the citizen's privacy rights. This "extremely important distinction" has been "regrettably glossed over" by the U.S. Supreme Court in applying Fourth Amendment principles. LaFave,

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797, 799-800, 934 P.2d 1224 (1997) (same); State v. Hopkins, 128 Wn. App. 855, 862-63, 117 P.2d 377 (2005) (same); Campbell v. State of Wash. Dep't of Licensing, 31 Wn. App. 833, 835, 644 P.2d 1219 (1982) (same) with State v. Randall, 73 Wn. App. 225, 228, 868 P.2d 207 (1994) (adopting totality of circumstances test wherein basis of knowledge is one factor to be considered but is not necessary to establish reliability); State v. Lee, 147 Wn. App. 912, 199 P.3d 445 (2008) (same), review denied, 166 Wn.2d 1016, 210 P.3d 1019 (2009); State v. Marcum, 149 Wn. App. 894, 903-04, 205 P.3d 969 (2009) (same).

Search And Seizure, at 575 (citing Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)). But Sieler did not gloss over the distinction. Sieler followed Adams to an extent, but adopted Professor LaFave's criticism of that decision insofar as it did not require a showing of both the informant's reliability and the factual basis for the tip. Sieler, 95 Wn.2d at 48-49.

The U.S. Supreme Court in Illinois v. Gates subsequently abandoned the two-part test for evaluating whether an informant's tip provided probable cause to support a warrant in favor of a totality of circumstances test. Illinois v. Gates, 462 U.S. 213, 230, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The U.S. Supreme Court later approved the totality of circumstances test in the context of a Terry stop, following its reasoning in Gates. Alabama v. White, 496 U.S. 325, 328-29, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990).

But Washington declined to follow Gates. In Jackson, this Court adhered to the Aguilar-Spinelli test, holding an informant's tip does not provide probable cause to support a warrant under article 1, section 7 unless the affidavit establishes both (1) the credibility of the informant and (2) the basis of the information. State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 136 (1984). The Court explained: "A claim of first-hand observation should not compensate for the lack of any assurance that the informant is credible. A liar could allege first-hand knowledge in great

detail as easily as could a truthful speaker. Conversely, a strong showing of general trustworthiness should not compensate for the failure to explain how the informant came by his information. The qualities that demonstrate truthfulness have nothing to do with demonstrating the basis of knowledge on a particular occasion." Id. at 441. Jackson reasoned the totality test for assessing a tip's reliability was too nebulous, and that the two-pronged test was better *both* for protecting privacy and for providing guidance to law enforcement. Id. at 442.

This reasoning applies equally to the Terry context. Indeed, in rejecting the reasoning of Gates, the Jackson court relied on Sieler — a Terry stop case — in determining the requisite indicia of reliability for an informant's tip. Jackson, 102 Wn.2d at 439, 444-45. The totality of circumstances test in determining the reliability of an informant's tip provides no more guidance in the investigatory stop context than it does in the probable cause context. It remains just as nebulous. The citizen whose privacy article 1, section 7 is intended to preserve and the officer on the street both benefit from application of consistent constitutional rules that are easily understood. In evaluating the reliability of an informant's tip resulting in a suspect's detention, both the reliability of the informant and the factual basis of the informant's knowledge must be established before investigating

officers may lawfully seize a suspect under article I, section 7. Sieler, 95 Wn.2d at 48-49.

c. The Seizure Of ZUE Was Illegal Under Article I, Section 7.

Police lacked reasonable suspicion to seize the occupants of the gray car because the reliability of the 911 callers was not established. Even assuming officers that made the stop were aware that the first caller had identified himself by name and another by her first name,<sup>5</sup> a named, but otherwise unknown, citizen informant is not presumed to be reliable and a report from such an informant may not justify an investigative stop.

Sieler held "[t]he reliability of an anonymous telephone informant is not significantly different from the reliability of a named but unknown telephone informant. Such an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable." Sieler, 95 Wn.2d at 48. Hopkins held providing the name and cell phone number of a 911 caller unknown to officers is insufficient to establish reliability and cannot by itself justify an investigative stop. Hopkins, 128 Wn. App. at 863-64.

Here, two 911 callers provided basic information: the caller who reported seeing the bald man running with a gun provided his name,

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<sup>5</sup> See RP 78-79, where Officer Rose testified that he did not know who the callers were.

telephone number, and address and another caller who reported seeing the female hand the gun to the man provided her first name, cell phone number and location. RP 75-76; CP 95. The officers knew nothing else about them. Under Sieler, the Court of Appeals correctly held the absence of any information regarding the informants beyond basic identification precludes a finding of reliability.

The U.S. Supreme Court recently handed down a 5-4 decision holding a Terry stop complied with the Fourth Amendment because, under the totality of the circumstances of that case, the officer had reasonable suspicion that the truck's driver was intoxicated. Navarette v. California, \_\_\_U.S. \_\_\_, 134 S. Ct. 1683, 1686, 188 L. Ed. 2d 680 (2014). The majority found the combination of an anonymous 911 caller's firsthand personal observation of the truck running her off the road, the contemporaneous timing of the call akin to an excited utterance or present sense impression, and the caller's use of the 911 emergency system amounted to sufficient indicia of the tip's reliability. Navarette, 134 S. Ct. at 1688-90. While tips in 911 calls are not per se reliable, the majority emphasized the 911 emergency system allows police to trace and identify callers, verify important information about the caller, and record calls, which provides victims the opportunity to identify the false tipster's voice. Id. at 1689-90.

In dissent, Justice Scalia blasted the majority on this point: "assuming the Court is right about the ease of identifying 911 callers, it proves absolutely nothing in the present case unless the anonymous caller was aware of that fact. 'It is the tipster's belief in anonymity, not its reality, that will control his behavior.' There is no reason to believe that your average anonymous 911 tipster is aware that 911 callers are readily identifiable." Id. at 1694 (Scalia, J., dissenting) (internal citation omitted).

Because article I, section 7 provides greater protection than the Fourth Amendment, this Court should hold the dissent's reasoning in Navarette is better suited to the heightened protection of private affairs under the Washington Constitution. In ZUE's case, there is no indication in the record that any of the 911 callers were aware that they could be traced and that the calls were recorded.

But even if this Court wholly incorporates the reasoning of Navarette into article I, section 7, Navarette does not control the outcome here. Navarette, which the majority described as a "close case," was decided based on a tip having higher indicia of reliability than the tips in ZUE's case. Navarette, 134 S. Ct. at 1692. First, the caller in Navarette was actually a victim of the alleged crime (illegal or drunk driving). The 911 callers in ZUE's case were not crime victims. See Lee, 147 Wn. App. at 918–19 (status as crime victim enhances reliability). Second, the record

here does not establish the 911 callers made any report equivalent to an excited utterance. Third, as set forth below, the basis of their knowledge was not established, further setting ZUE's case apart from Navarette.

The record does not clearly show Reed, the first caller, stated the basis for his knowledge that a man was running with a gun.<sup>6</sup> CP 89. Officers may not presume that informants' tips are eyewitness accounts. It is the State's burden to produce and prove the facts showing an exception to the warrant requirement exists. Doughty, 170 Wn.2d at 62; State v. Webb, 147 Wn. App. 264, 270, 274, 195 P.3d 550 (2008). A caller may provide any number of details that could be based on someone else's hearsay or someone else's fabrication. The record must be clear enough to show the basis of knowledge. Z.U.E., 178 Wn. App. at 785-86 (citing Vandover, 63 Wn. App. at 755-56, 759-60).

The caller named "Dawn," meanwhile, "observed" the young woman hand a gun to a man. CP 90. An eyewitness's observation of events may provide a sufficient factual basis for a tip. Lee, 147 Wn. App. at 918-19. But the key portion of this informant's report was that she was 17 years old. Her age was significant because police suspected her of committing the crime of being a minor in possession of a firearm. If the

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<sup>6</sup> The 911 call taker summarizes the information to the dispatcher rather than forwarding the words of the caller verbatim. RP 17-19.

woman was not a minor, there was no basis for suspecting that her possession of a firearm was unlawful. RP 57. But the caller did not explain the factual basis for the estimate of the female's age. The estimate was a "bare conclusion unsupported by any factual foundation." Sieler, 95 Wn.2d at 49. As a result, the factual basis requirement was not satisfied for the officers' suspicion that the woman was involved in criminal activity. Even if the two 911 callers (Reed and Dawn) can be considered reliable, the record does not establish the basis of their knowledge to support their tips.

Further, another caller reported the male with the gun got into a gray car, described as a two door. RP 40, 61-62, 68, 81, 97, 140. That caller remained unidentified. RP 62-63, 68, 144. Nothing was known about him or her. The reliability of that caller was never established, and so police did not have enough information to reasonably believe the four door, gray car in which ZUE was in also contained the man with the gun.

"[T]he seriousness of the criminal activity reported by an informant can affect the reasonableness calculus which determines whether an investigatory detention is permissible." Sieler, 95 Wn.2d at 50. But here, police were investigating whether the female committed the crime of minor in possession of a firearm based on conduct that had already occurred before police conducted the stop. There was no ongoing

imminent threat based on specific, articulable facts. Any crime was over and done before police initiated the seizure.

The State argues the fact of multiple callers shows reliability. That was not a fact known to officers at the inception of the stop. Officers did not know how many callers there were. RP 78-79. Even setting that aside, only a single 911 caller reported seeing the man running around with a gun, while a different 911 caller reported seeing the female give the man a gun. RP 31-34, 94-95; CP 89-90. There was no cross corroboration for the report that the female gave the man the gun. Nor was there cross corroboration of the report that a man with a gun got into a gray vehicle. RP 40, 61-62; CP 90.

Independent police corroboration of the presence of criminal activity can supply the reasonable suspicion necessary to justify a Terry stop in the absence of reliable informant tips. Lesnick, 84 Wn.2d at 944. But confirming a subject's description or location or other innocuous facts does not satisfy the corroboration requirement. Id. at 943 (the fact that informant accurately described the defendant's vehicle is not sufficient corroboration for a stop); Hart, 66 Wn. App. at 9 (officer's observation of defendant confirming informant's description and defendant's location did not satisfy the corroboration requirement); Hopkins, 128 Wn. App. at 859, 865-66 (insufficient corroboration where officers observed a man who

resembled the informant's description at the described location, but did not observe a gun or any illegal, dangerous, or suspicious activity).

Here, officers did not make any corroborative observations suggesting the young woman had engaged in actual or potential criminal activity. When police saw her on two occasions, they did not see her engage in illegal or suspicious behavior. The first time she was walking along with another female. RP 33-35. The second time she was in the parking lot getting into the car. RP 42-43.

With regard to the man running with the gun, the officers never located anyone matching the informants' description of a shirtless, almost bald man. There was no testimony that ZUE or the other male occupant even slightly resembled the description of the shirtless bald man from the park. An anonymous caller reported the man was in a two door gray vehicle, not the four door gray vehicle occupied by ZUE. RP 40, 61-62, 68, 81, 97, 140, 153; CP 90. That caller's reliability was not established. Further, merely confirming a general vehicle description does not satisfy the corroboration requirement. Lesnick, 84 Wn.2d at 943.

One circumstance that can contribute to reasonable suspicion is the presence of the defendant in a high crime area. Sieler, 95 Wn.2d at 49; Brown v. Texas, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). But ZUE was not in the park known for gang violence. And considering the

lack of reliability and lack of independent police corroboration tying the shirtless man with the gun and the female who handed off the gun to the car ZUE was in, the crime area factor does not tip the balance in favor of justifying the stop. Under the totality of circumstances, police lacked reasonable suspicion to seize the occupants of the vehicle.

d. The Seizure Of ZUE Was Illegal Under The Fourth Amendment.

The Court of Appeals did not decide whether the informant's basis of knowledge is a requirement or merely a factor to be considered in the totality of the circumstances analysis because, under either approach, the circumstances here did not warrant an investigatory stop. Z.U.E., 178 Wn. App. at 782. Assuming article I, section 7 provides no greater protection in this regard, the stop was still illegal. For the reasons set forth in section C.1.c., supra, the tips do not contain the requisite indicia of reliability and there is insufficient police corroboration to justify the Terry stop under the totality of the circumstances standard.

e. Even If The Tips Contained Sufficient Indicia Of Reliability That Criminal Activity Was Afoot, The Seizure Of ZUE Was Still Illegal Because The Tips Did Not Provide Individualized Suspicion That ZUE Was Or Was About To Be Engaged In Criminal Activity.

While the totality of the circumstances as they reasonably appeared to police at the time of the stop must be considered, that is not the end of

the analysis. "The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process . . . must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." United States v. Cortez, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). "[This] demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." Id. at 418 (quoting Terry, 392 U.S. at 21 n. 18).

Here, the totality of circumstances, including the informant tips, did not establish an individualized reasonable suspicion that ZUE was engaged in criminal activity. He did not match the description of the suspects. Police knew this before they ordered him out of the car. Officer Clark saw the front seat occupants were not bald as he approached the car. RP 156. The question of whether ZUE matched a suspect description was the dispositive fact in determining whether police had a legal justification to seize him. See United States v. Brown, 448 F.3d 239, 247-248 (3rd Cir. 2006) (general description of robbery suspects failed the Fourth Amendment's "demand for specificity" — "reasonable suspicion cannot be met by a description that paints with this broad of a brush.").

ZUE happened to be in a car with someone suspected of earlier criminal activity. The officer's suspicion must be individualized to be

constitutionally sufficient. State v. Broadnax, 98 Wn.2d 289, 295-96, 654 P.2d 96 (1982); Thompson, 93 Wn.2d at 841; State v. Richardson, 64 Wn. App. 693, 697, 825 P.2d 754 (1992). Merely associating with a person or place suspected of criminal activity "does not strip away" individual constitutional protections. Broadnax, 98 Wn.2d at 296. An individual's proximity to others independently suspected of criminal activity does not justify an investigative stop of that individual. Thompson, 93 Wn.2d at 841; see also State v. Crane, 105 Wn. App. 301, 312, 19 P.3d 1100, 1106 (2001) ("Neither close proximity to others suspected of criminal activities nor presence in a high crime area, without more, will justify a seizure.")

The seizure of all the people in the car was not justified by officer safety concerns. Information known to officers shows the female gave the gun to the male. RP 66. Police had no specific information that she continued to be armed. RP 67. Police were investigating whether the female committed the crime of minor in possession of a firearm based on conduct that had already occurred before police conducted the stop. RP 74-75, 118-19. Further, the caller that reported the male with the gun got into a gray, two door car remained unidentified. RP 40, 61-63, 68, 81, 97, 140, 144, 153; CP 90. The reliability of that caller's tip was not established, and so police did not have enough information to reasonably believe the four door, gray car in which ZUE was in also contained the

man with the gun. Officers had no information that any of the occupants were armed. RP 67, 119, 227.

But even if the police could legally stop the car and order its occupants out at gunpoint based on officer safety concerns, the justification for seizing ZUE evaporated as soon as it became apparent that he did not match the male suspect they were looking for. Yet the police continued to seize him. That was illegal under the Terry standard. When the standard for showing individualized, reasonable suspicion is not strictly enforced by requiring specifically articulated facts to justify a seizure, the exception swallows the rule and "the risk of arbitrary and abusive police practices exceeds tolerable limits." Thompson, 93 Wn.2d at 843 (quoting Brown, 443 U.S. at 52). The Court of Appeals honored that dictate. ZUE asks this Court to do the same.

D. CONCLUSION

Z.U.E. requests that the Court of Appeals' decision be affirmed.

DATED this 31~~st~~ day of July 2014.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON	)	
	)	
Petitioner,	)	
	)	
vs.	)	NO. 89894-4
	)	
Z.U.E.,	)	
	)	
Appellants.	)	

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF JULY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF OF RESPONDENT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] Z.U.E  
C/O LINDA ESCALANTE  
6207 S. FERDINAND  
TACOMA, WA 98409

SIGNED IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF JULY, 2014.

X. Patrick Mayovsky

## OFFICE RECEPTIONIST, CLERK

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Attached for filing today is supplemental brief of respondent and a motion for leave to file supplemental brief for the case referenced below.

State v. Z.U.E.

No. 89894-4

Motion for for Leave to File Supplemental Brief

Supplemental Brief of Respondent

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